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

WHEN: Tuesday, July 14, 2009
9:00 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
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800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

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

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

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 246

RIN 0584–AD73

[FNS–2007–0009]

Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Implementation of Nondiscretionary WIC Certification and General Administrative Provisions

AGENCY: Food and Nutrition Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: This is an affirmation by the Department of a final rule, without change, of an interim rule that amended the regulations for the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) by implementing most of the nondiscretionary provisions of the Child Nutrition and WIC Reauthorization Act of 2004 that address participant certification and general program administration in the WIC Program. The rule implements the exclusions from income eligibility determinations set forth in the National Defense Authorization Act for Fiscal Year (FY) 2006 and in the National Flood Insurance Act of 1968, as amended, and clarifies an inconsistency related to fair hearings and notices of adverse actions that was inadvertently omitted in the publication of the Final WIC Miscellaneous Rule. Finally, this rulemaking includes technical amendments to correct the address and telephone numbers to which complaints alleging discrimination in the WIC Program should be directed, and to correct the address of the Western Regional Office of the Food and Nutrition Service (FNS). The interim rule was necessary to implement the non-discretionary provisions of this law.

DATES: Effective on July 7, 2009, the Department is adopting as a final rule the interim rule published at 73 FR 11305 on March 3, 2008.

FOR FURTHER INFORMATION CONTACT: Debra R. Whitford, Chief, Policy and Program Development Branch, Supplemental Food Programs Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Room 528, Alexandria, VA 22302, (703) 305–2746, or *Debbie.Whitford@fns.usda.gov*.

SUPPLEMENTARY INFORMATION:

Background

On, March 3, 2008, the Department published an interim rule implementing most of the nondiscretionary provisions of the Child Nutrition and WIC Reauthorization Act of 2004, in addition to provisions from the National Defense and Authorization Act of 2004 and the National Flood Insurance Act of 1968. The revisions address participant certification and general program administration in the WIC Program. While most of the provisions in the interim rule were implemented exactly as written in the law, the Department believed the provision related to State-paid EBT costs might be somewhat confusing to State agencies. Comments were invited on that provision in an effort to explain its implementation more fully.

The comment period ended on June 2, 2008. Only one comment letter was submitted during the comment period. The regulatory provisions addressed in that letter pertained only to the nondiscretionary provisions set forth in the interim rule. Because the nondiscretionary provisions have been implemented as set forth in the law, they are retained as written in this final rule.

For reasons given in the interim rule, the Department is adopting the interim rule as a final rule without change.

This action also affirms information contained in the interim rule concerning Executive Order 12866, the Regulatory Flexibility Act, Executive Order 12988, and the Paperwork Reduction Act. Further, for this action, the Office of Management and Budget has waived its review under Executive Order 12866.

List of Subjects in 7 CFR Part 246

Food assistance programs, Food donations, Grant programs—Social programs, Indians, Infants and children, Maternal and child health, Nondiscrimination, Nutrition education, Public assistance programs, WIC, Women.

PART 246—SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS AND CHILDREN

■ Accordingly, the Department is adopting as a final rule, without change, the interim rule that amended 7 CFR part 246 and was published at 73 FR 11305 on March 3, 2008.

Dated: June 29, 2009.

Julia Paradis,

Administrator, Food and Nutrition Service.

[FR Doc. E9–15968 Filed 7–6–09; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Part 457

RIN 0563–AC09

Common Crop Insurance Regulations; Grape Crop Insurance Provisions and Table Grape Crop Insurance Provisions

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) finalizes amendments to the Common Crop Insurance Regulations, Grape Crop Insurance Provisions and Table Grape Crop Insurance Provisions. The intended effect of this action is to provide policy changes and clarify existing policy provisions to better meet the needs of insured producers, and to reduce vulnerability to fraud, waste, or abuse.

DATES: *Effective Date:* This rule is effective August 6, 2009.

FOR FURTHER INFORMATION CONTACT: Elizabeth Lopez, Risk Management Specialist, Product Management, Product Administration and Standards Division, Risk Management Agency, United States Department of Agriculture, Beacon Facility, Stop 0812,

Room 421, P.O. Box 419205, Kansas City, MO 64141–6205, telephone (816) 926–7730.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is non-significant for the purpose of Executive Order 12866 and, therefore, it has not been reviewed by OMB.

Paperwork Reduction Act of 1995

Pursuant to the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the collections of information in this rule have been approved by OMB under control number 0563–0053 through March 31, 2012.

E-Government Act Compliance

FCIC is committed to complying with the E-Government Act of 2002, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. This rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, and Tribal governments or the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Executive Order 13132

It has been determined under section 1(a) of Executive Order 13132, Federalism, that this rule does not have sufficient implications to warrant consultation with the States. The provisions contained in this rule will not have a substantial direct effect on States, or on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

Regulatory Flexibility Act

FCIC certifies that this regulation will not have a significant economic impact on a substantial number of small entities. Program requirements for the Federal crop insurance program are the same for all producers regardless of the size of their farming operation. For instance, all producers are required to submit an application and acreage report to establish their insurance guarantees and compute premium amounts, and all producers are required to submit a notice of loss and production information to determine the amount of an indemnity payment in the event of an insured cause of crop loss. Whether a producer has 10 acres or 1,000 acres, there is no difference in the kind of information collected. To ensure crop insurance is available to small entities, the Federal Crop Insurance Act authorizes FCIC to waive collection of administrative fees from limited resource farmers. FCIC believes this waiver helps to ensure that small entities are given the same opportunities as large entities to manage their risks through the use of crop insurance. A Regulatory Flexibility Analysis has not been prepared since this regulation does not have an impact on small entities, and therefore, this regulation is exempt from the provisions of the Regulatory Flexibility Act (5 U.S.C. 605).

Federal Assistance Program

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

Executive Order 12372

This program is not subject to the provisions of Executive Order 12372, which require intergovernmental consultation with State and local officials. *See* the Notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115, June 24, 1983.

Executive Order 12988

This rule has been reviewed in accordance with Executive Order 12988 on civil justice reform. The provisions of this rule will not have a retroactive effect. The provisions of this rule will preempt State and local laws to the extent such State and local laws are inconsistent herewith. With respect to any direct action taken by FCIC or to require the insurance provider to take specific action under the terms of the crop insurance policy, the administrative appeal provisions published at 7 CFR part 11 must be exhausted before any action against FCIC for judicial review may be brought.

Environmental Evaluation

This action is not expected to have a significant economic impact on the quality of the human environment, health, or safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

Background

On February 29, 2008, FCIC published a notice of proposed rulemaking in the **Federal Register** at 73 FR 11054–11060 to revise 7 CFR 457.138 Grape crop insurance provisions and 7 CFR 457.149 Table grape crop insurance provisions. Following publication of the proposed rule, the public was afforded 60 days to submit written comments and opinions.

A total of 29 comments were received from 8 commenters. The commenters were reinsured companies, trade associations and an insurance service organization. The comments received and FCIC's responses are as follows:

Grape Crop Provisions

Some of the comments received pertained to both the Grape Crop Provisions and Table Grape Crop Provisions. In those cases, the responses will be provided under the Grape Crop Provisions with a note indicating when the Table Grape Crop Provisions are also impacted.

Comment: A few commenters expressed concern regarding insurable grape and table grape varieties in Arizona and California and the possible impact of changing the term ''varietal group'' to ''type'' throughout the policy. In California, there is a type for ''Other Varieties''. This type is for all varieties not listed individually in the Special Provisions. The provisions allow the insured the option to insure one or more varieties under this type. The varieties insured under this type qualify for a separate basic unit. All varieties under this type must have the same coverage level and price election percentage, but would qualify for one single administrative fee as type, ''Other Varieties'', are not recognized as a separate crop in regards to administrative fees. The commenters further stated that in light of the increasing number of varieties being insured under this type, a separate administrative fee should be charged for ''Other Varieties''. In addition, changing ''variety'' to ''type'' could impact varieties currently being insured under this type. Any change in terminology needs to take into consideration the impacts involved in insuring different varieties under type 095 in California.

Response: Provisions that allow insurance to be selected by variety have been retained for Arizona and California. Producers will still be able to select insurance coverage levels by variety except for those varieties that fall under type 095 (other varieties). All varieties listed under type 095 must have the same price election and coverage level percentage. For example,

if a producer selects to insure three varieties under type 095, and selected 80 percent of the maximum price election and 75 percent of the coverage level for the first variety under type 095, the remaining two varieties under type 095 must have the same price election and coverage level percentage as the first. RMA reviewed the California 2007 crop year to determine the number of policies that included multiple varieties under type 095 and found approximately 53 grape policies with multiple varieties under type 095. This is only 1 percent of the total grape policies (4,439). Because such a small percentage of policies are impacted and there is only an average of 15 acres of each variety under type 095 in each policy, RMA determined it is not cost effective to make all the computer system changes necessary to charge a separate administrative fee for each grape variety that falls under type 095. In addition, a definition of ''variety'' has been included in both the Crop Provisions to clarify the term.

Comment: A few commenters stated that in states other than Arizona and California, it is common for different varieties/types of grapes to be grouped into different varietal groups, which are now being eliminated and being referred to as different types. Since there are many different new varieties/types that are always being developed, the commenter would like to recommend that the Special Provisions be clear and specific in defining the different types so that it is easy to determine the proper category for these new varieties.

Response: The Special Provisions will be clear and specific in defining the types. The Special Provisions will clearly indicate that for California and Arizona a ''type'' will consist of a variety, with the exception of type 095 (other varieties). For all other states, a ''type'' will consist of one or more varieties identified as a type on the Special Provisions, (*i.e.*, type 083 may include the Merlot variety and all other varieties not specifically named on the Special Provisions).

Comment: A few commenters questioned whether the replacement of ''varietal group'' with ''type'' was one of terminology or whether there other differences as well. There are no references to what a ''type'' will consist of within a given state or region. The new term ''type'' is used to identify the varieties grouped together in the actuarial documents for all states except Arizona and California for rating and optional unit purposes. The commenters ask if it is similar to the current varietal group in these states/regions. The terminology for Arizona and California throughout the Crop Provisions is ''variety'' or ''grape variety'', however, section 1(g) if the Proposed Rule Background on page 11055 states that ''* * * (each variety in California constitutes a type) * * *'' and the 2008 actuarial documents for California use the term ''type''. The commenters ask if it would be possible to use the term ''type'' for all states rather than having to distinguish between ''variety'' (Arizona and California) and ''type'' (all other states) throughout. This also would help avoid confusion with the use ''variety'' instead of ''type'' along with ''practice'' in the actuarial documents. If Arizona and California continue to use ''variety'' instead of ''type'', presumably the terminology in the actuarial documents for Arizona and California will be changed from ''types'' to ''varieties'', while terminology in other states will be changed from ''varietal group'' to ''type''.

Response: The actuarial document will still use the term ''type''. Type is defined in the Crop Provisions as, ''A category of grapes (one or more varieties) identified as a type in the Special Provisions''. In California and Arizona each variety is a separate type except for type 095 as explained above. In these two states the term ''variety'' must still be used to allow producers to select the varieties they wish to insure within type 095. For all other states covered under the Grape Crop Provisions, the term ''type'' is simply a replacement for the term ''varietal group''. The Table Grape Crop Provisions will now also include the term ''type''.

Comment: A few commenters asked that FCIC consider including a definition of ''variety'' to clarify the difference between ''types'' and ''varieties''. Otherwise, the reference to ''each variety'' in section 2(a)(1) [for Arizona and California] could lead to confusion as to whether or not it is the same as ''type'' as defined.

Response: FCIC has included in both Grape Crop Provisions and Table Grape Crop Provisions a definition of ''variety.''

Comment: A few comments were received regarding unit division. In the states of Arizona and California, basic units are divided into additional basic units by each variety insured. The commenters state that since section 7 states the insured crop will be any insurable variety that the producer elects to insure in these states, section 2(a)(1) may not be necessary. If each variety is insured as a separate crop, it is already a separate basic unit even before establishing any basic units for different share arrangements. However, it may be helpful to include some reference in section 2 to the different basic unit qualifications in Arizona and California. The following is suggested language, ''Basic units are established for each variety that you choose to insure, and also defined in section 1 of the Basic Provisions.''

Response: Unit structure and insurability are two different things and should be treated separately. Therefore, while section 2(a)(1) may not be strictly necessary, it is provided to clarify that while each variety is treated as a separate crop to allow producers to elect which variety they want to insure, all insured varieties are still covered under one grape policy with separate basic units provided. No change has been made.

Comment: A few commenters stated there is no mention of acreage insured under organic farming practices in provisions dealing with unit division. Clarification is needed to determine whether optional units are allowed for organic practices.

Response: In Arizona and California, optional units may be established if each optional unit is located on non-contiguous land. In addition, optional units may be provided for acreage grown and insured under an organic farming practice. In all other states, optional units may be established in accordance with section 34 of the Basic Provisions, which includes optional units for organic acreage, and as provided for in the Grape Crop Provisions. Both the Grape Crop Provisions and the Table Grape Crop Provisions have been clarified accordingly.

Comment: A few comments were received regarding the phrase in section 2(b)(2) ''* * * when separate types are specified in the Special Provisions''. The commenters ask if ''separate type'' is different from a ''type'' and does it need to be defined in section 1.

Response: ''Separate type'' does not to be defined. In this case, ''separate'' is given its common meaning, which means that optional units can be established by each different (or individual) type listed in the Special Provisions.

Comment: A few comments were received regarding clarification of sections 3(a) and (b). In Arizona and California, addition of the phrase ''* * * you elect to insure'' in 3(a) would clarify that each variety is considered a separate crop, and it may not be necessary to mention ''in the county'', though it is for 3(b), which is further clarified as having the same level and price percentage for all grapes in the county, regardless of variety.

Response: The phrase ''you elect to insure'' should be added in section 3(a). The language regarding ''in the county'' should be consistent in both 3(a) and (b) and therefore, will be added to section 3. These same changes have also been made in the Table Grape Crop Provisions to maintain consistency between the policies.

Comment: A few commenters expressed concern with the removal of the language currently in section 3(c) that would allow insureds in all states (not just Arizona and California) to select different price election percentages by type, though this was not identified as a change in the Proposed Rule.

Response: The proposed provision in section 3(b) allows insureds in all states to choose a different price election percentage for each type. This proposal was described in the Proposed Rule on page 11055. In addition, FCIC has also removed section 3(c) (in the current policy), which required the same percentage relationship to the maximum price offered for each varietal group, so that different price election percentage could be selected by type.

Comment: A few commenters questioned the removal of section 3(c), stating it would result in a significant change, allowing grape insureds in all states (not just Arizona and California) to choose different price election percentages by type. They further stated this would be problematic in the other states since different types are not treated as separate crops, but are potentially separate optional units that could end up being combined if the optional unit requirements are not met. Also, new types could be added on the acreage report (because all grapes in the county must be insured), when it is after the sales closing date deadline to select a price percentage. If this is the intent, the language needs clarification. The commenters also stated they do not agree with the intended effect of the revised provision. They suggested that the policyholder continue to be allowed to choose a single price election percentage and coverage level on a county basis and all insurable types in the county would be insured on this basis.

Response: It should not be a problem if there are different coverage levels and price election percentages for separate types provided the application contains the selected coverage levels and price election percentages. Further, clarification has been added to section 3(b) of the Grape Crop Provisions and Table Grape Crop Provisions regarding percentage relationship to the maximum price election. Additionally, FCIC has added a new section 3(c) to both Grape Crop Provisions and Table Grape Crop Provisions (and redesignated the following sections) to account for cases where a new type is added after the application is received. This provision states that if the producer acquires a share in any grape acreage after the application is submitted, provided such acreage is insurable under the terms of the policy and the producer did not include the grape type on the application, the insurance provider will assign a coverage level and price election percentage. The assigned coverage level will be the lowest coverage level selected for any other grape type along with the corresponding price election percentage.

Comment: A few of the commenters expressed concerns regarding the possible use of a contract price. This is already allowed by the Special Provisions in California, but would be new in the Crop Provisions, which would allow for the possibility for this to be extended to other states as well. Care must be taken to make sure that all necessary information is included in the Crop Provisions, while not over-complicating it.

Response: Provisions regarding the use of a contract price when allowed by Special Provisions will include information on how to determine the contract price if more than one contract exists, and a maximum price which the contract price cannot exceed.

Comment: A few comments were submitted regarding the use of a price election based on a contract price if allowed by the Special Provisions. The commenters asked that FCIC consider the ramifications of contract prices coexisting with non-contract prices. In addition, the commenters asked that FCIC consider including a definition under section 1 so that other references to ''price election'' would include the possibility of a contract price basis. ''Price election'' should be defined, and some type of limit should be placed on the price election for grapes under contract. The commenter asked what would the price election be (for a grape type in the county in states other than Arizona and California) if there is a contract price on some grapes types but not others or if there are multiple contract prices within a unit. It is quite possible that one variety is insured under contract while another is not. In such cases, there is a need to specify what price election is used. Clarification is needed to specify that the price election will be based on the contact price but the actual price election will be limited to the terms stated in the Special Provisions. Additionally, determination of an indemnity in section 12 needs to be clearly illustrated in such situations.

Response: It is not necessary to redefine ''price election'' in section 1 because the provision in redesignated section 3(d) indicates a contract price election may be used instead of the published price election. It is not necessary to add an example in section 12 because the provisions already address situations in which multiple price elections are applicable. The provisions regarding use of a contract price, when allowed by Special Provisions, will include information regarding calculation of a weighted average price if more than one price election exists, and a maximum price which the contract price cannot exceed. All of the necessary information will be included in the Special Provisions statement.

Comment: A few commenters noted the reference to adjusting the approved yield in redesignated section 3(d) is not relevant without adding the reason for which production will be reduced. The preamble of the Proposed Rule states that this was added as some contracts require the use of cultural practices to produce fewer tons of grapes. The commenters recommend revising the last sentence of 3(d) to clarify that the reduction to the approved yield will be based on redesignated 3(f): ''* * * In the event any contract requires the use of a cultural practice that will reduce the amount of production from any insured acreage, your approved yield will be adjusted in accordance with section 3(f).''

Response: FCIC has added the reason the yield will be reduced. Redesignated section 3(d) will also reference redesignated section 3(g) because these sections state yields will be reduced to reflect changes in practices or other circumstances.

Comment: A few commenters stated that proposed section 3(f) (redesignated 3(g)), repeats what was stated in proposed sections 3(e)(1) and (4) (redesignated 3(f)(1) and (4)), and that it may ease in reading if those sections were referenced instead of duplicating.

Response: The provisions are duplicative and FCIC has revised the provisions in the Grapes Crop Provisions and Table Grape Crop Provisions accordingly.

Comment: A few commenters suggested a revision to the last sentence in section 3(f) (redesignated section 3(g)), to include: ''* * * If you fail to notify us of any circumstance that may reduce your yields from previous levels, we will reduce your guarantee or assess uninsured cause of loss against your

claim at any time we become aware of the circumstance.'' Growers have a responsibility to report to the insurance provider damage, removal of vines, etc. If they report it timely, the insurance provider can adjust the guarantee and premium. There should be a penalty if they do not report this information timely and it is discovered by the adjuster at claim time. Currently there is no penalty, so there is little incentive to report the information timely.

Response: Assessing an uninsured cause of loss against the claim was not in the proposed rule, the public was not provided an opportunity to comment on the recommended change, and therefore, the recommendation cannot be incorporated in the final rule. No change has been made.

Comment: A few commenters questioned the proposed language used in section 3(g) (redesignated section 3(h)). The commenters were not sure if any other Crop Provisions use the phrase ''the ratio of your price election to the maximum price election we offer'' rather than the phrasing that has been dropped from the current Grape Crop Provisions section 3(c) that states ''the same percentage relationship to the maximum price offered by us''. The commenters also questioned the reference to ''the maximum price election we offer'' since ''we'' refers to the insurance provider while the price elections are determined and offered by RMA [though it can be understood that the insurance provider is offering the coverage, including the price election, to the insured]. In addition, the commenters requested clarification on what is meant by ''* * * if a cause of loss * * * is evident prior to the time that you request the increase.'' A cause of loss that occurred the previous crop year would be ''prior to the time that you request the increase.'' The commenter asked FCIC consider rewriting the provision similar to the following: ''Your request to increase the coverage level or price election percentage will not be accepted if a cause of loss that could or would reduce the yield of the insured crop is evident when your request is made.''

Response: FCIC has changed language in redesignated 3(h). The phrase ''the ratio of your price election to the maximum price election we offer'' has been deleted. The provision will now include the recommended language. This same change has been made in the Table Grape Crop Provisions.

Comment: A few commenters questioned the language under section 6. They commented that the phrase, ''In all other states, by each grape type you insure,'' sounds as though insureds in the other states can choose to insure some but not all types as in California, which is not the case. The commenters recommended ending section (b) after the word ''type'' or to consider whether this requires a distinction between states. Perhaps section 6 could read simply: ''* * * you must report your acreage by grape type or variety, as applicable.''

Response: Section 6(b) needs to be clarified so FCIC changed the provisions to state reporting is required ''by each grape type''. The Table Grape Crop Provisions have also been revised so the provisions will be consistent.

Comment: A few comments were received regarding Settlement of Claim and the quality adjustment for mature marketable grapes. Due to the increasing amount of wine grape acreage in production, wineries have increased the sugar percent thresholds in their contracts. This has allowed buyers to be very selective in the grapes they will purchase. The effect of this on grape crop insurance is in determining market prices and the values for the quality adjustment procedure in 12(e). For example, if the market price of the wine grapes in the area is based primarily on sugar content that the producer's wine grape production does not normally meet, the commenters asks how is the market price and value to be determined. In many cases, there is no means of determining if the damage caused a drop in the sugar percentage. If the sugar content were higher, the value of the grape would be greater and the producer may not even feel compelled to file a claim. In years where production is low, the buyers do not place such emphasis on the sugar content and this is a non-issue. This fluctuation in market demand causes many issues in determining values and adjusting for quality for wine grapes, though it may also be an issue for juice grapes.

The commenters recommend that a standard minimum sugar percentage be included in the determination of the market price and value. Doing so sets a limit to the amount of quality adjustment that can be made when market prices and values are based on sugar content, and if market prices are not based on sugar content, the quality adjustment is not affected. Crop insurance should pay for damaged production but caution is needed when determining values based on marketability and market demand. Failure to add a limit can result in quality adjustments that are not related to the insured cause of damage. The Grape Crop Provisions must include language to control the potential for abuse. The commenters suggested revising the section to include the following: ''Grapes produced for the production of wine or juice will only be eligible for quality adjustment due to an insured cause of loss that results in the grapes having a sugar level below 17 percent. Grapes with an insurable damage that fail to meet or exceed 17 percent sugar will be adjusted for quality based on the market value for a sugar content of not less than 17 percent for undamaged grapes.''

Response: Quality adjustment is applicable only if the reduction in value is due to an insurable cause of loss, such as adverse weather. If low brix levels or other damage are due to an insurable cause of loss, the grapes may be eligible for quality adjustment provided that they qualify under section 12(e) of the Grape Provisions. According to AMS standards, brix level is an indication of maturity in some table and juice grapes, however, there are no such published standards for wine grapes. Therefore, FCIC does not have information necessary to establish standard brix levels for the various wine grape varieties and growing areas. No change has been made.

Comment: A few commenters stated that language in the preamble regarding quality adjustment (page 11056) did not match language in the proposed Crop Provisions section 12(e)(2)(i). The preamble stated, ''* * * FCIC is proposing that the value per ton of the damaged grapes will be divided by the value per ton for undamaged grapes. The value of undamaged grapes will not exceed the maximum price election for such grapes. This will ensure that the undamaged grapes are not over-valued.'' The Crop Provisions state, ''Dividing the value per ton of the damaged grapes by the value per ton for undamaged grapes (the value of undamaged grapes will be the lesser of the average market price or the maximum price election for such grapes) * * *''

Response: The language in the preamble was not consistent with the policy provision. The preamble was incorrect and it should have referred to the lesser of the average market price or the maximum price election for such grapes. This ensures the grapes are not overinsured.

Comment: A commenter stated that while in favor of the proposed changes, the following provisions should also be added: (1) Grape crop insurance should be available in all Texas counties covered by an American Viticulture Area; (2) crop insurance by variety should also be provided in Texas.

Response: Grape insurance is currently available in several Texas

counties, and coverage in counties without the grape insurance program can be requested by written agreement. If the commenter has specific counties where they would like grape insurance, the commenter may make a request to RMA's Oklahoma City Regional Office. If there are sufficient acres and producers in a requested county, and other expansion criteria are met, the Regional Office can recommend implementation of a program for the requested county. Since providing 'insurance by variety'' in Texas was not proposed and the public was not provided opportunity to comment on the recommended change, the recommendation cannot be incorporated in the final rule. Insurance by type is available in Texas as it is in all states other than California and Arizona. No other change has been made.

Comment: A commenter stated that several vitis vinifera varieties (Riesling, Chardonnay, and Cabernet Franc for example) have a long history in New York and warrant having separate premium rates for these varieties. At current time, these varieties need a written agreement annually, which is cumbersome for the growers as well as the insurer.

Response: The vinifera varieties in New York are insured by written agreement to take into consideration the location, block by block, susceptibility to frost, and each producers yield history by variety. Due to the climatic conditions in the region, premium rates are individually set by use of the written agreement.

Comment: A commenter inquired about new plantings in New York being insurable at an earlier age than is currently available since they are such a long term investment. Recent ''disaster'' payments have had provisions to pay partial payments on 3 and 4 year old plantings based on a percentage of the county average yield for the particular variety. It would seem that some sort of plan like this could help relieve some of the financial burden of having several thousand dollars per acre invested in a new planting, with no eligibility for insurance for the first 6 years.

Response: When establishing a new vineyard, a significant risk is production loss due to freeze. New vines run a higher risk of production loss due to freeze than older established vines. Insuring production on younger vines would require additional rating analysis to determine if it would be cost prohibitive to provide such coverage. In addition, further procedures would be involved to determine appropriate production guarantees for such young vines. FCIC can consider the recommended changes in the future and is willing to work with any interested parties to determine if insurance can be provided for production from younger vines. However, no insurance is currently available for damage to vines.

Table Grape Crop Provisions

Several comments received were the same as those received for the Grape Crop Provisions; since the provisions are substantially similar, those comments were addressed in the Grape Crop Provisions and noted for Table Grape Provisions as applicable. Therefore, they will not be repeated in the comments below.

Comment: A few comments were received regarding the definition of ''Lug''. The commenters stated that as written in the Proposed Rule, the added phrase ''* * * or as otherwise specified in the Special Provisions'' would allow the 21-lb lug to be changed only in ''all other California districts'' but not to Coachella County, California, or any other states (with a 20-lb lug). If it is intended to allow the Special Provisions to revise the number of pounds in a lug in any state/county, the definition needs to be rearranged, perhaps something like: (a) 20 pounds; (b) 21 pounds; or (c) as otherwise specified.

Response: FCIC will revise the definition to read: Lug—(a) Twenty (20) pounds of table grapes in the Coachella Valley, California district, and all other states, (b) Twenty-one (21) pounds in all other California districts, or (c) as otherwise specified in the Special Provisions.

Comment: A few commenters questioned section 3(b) stating that this subsection is being added to allow for possible expansion of the Table Grape program beyond Arizona and California. It matches the equivalent subsection of the proposed Grape Crop Provisions but also needs to include the additional information that was dropped in the Proposed Rule for Grapes so it does not allow insureds to choose different levels/price percentages for different types.

Response: The proposed change was intended to also allow insureds in all states to select a coverage level and price election percentage by type. FCIC proposed the changes in coverage level and price election percentages to allow the producer greater flexibility in managing their production and risk. No change has been made.

Comment; A few commenters noted that while there is general consistency in many of the provisions of the Grape Crop Provisions and Table Grape Crop Provisions, section 7(f) is written differently from the equivalent section 7(e) of the Grape Crop Provisions. Among the differences:

- The phrase ''* * * unless otherwise provided in the Special Provisions,'' is not being added for Table Grapes. The commenter asks whether this possible flexibility is not needed as much for Table Grapes, especially since some flexibility is being added to the definition of ''lug.''
- The last sentence states that the insurance provider ''* * * may agree in writing to insure acreage that has not produced this amount'' [dropping the reference in the current crop provisions to ''inspect'' as well as ''agree''], while the Grape Crop Provisions ends with ''* * * inspect and allow insurance on such acreage.'' The commenter asks whether there is a valid reason Grapes still would require an inspection but Table Grapes would not.

Response: FCIC has made the changes to be consistent with language contained in the Grape Crop Provisions.

Comment: A few comments were received regarding the proposed changes in the calendar date for the end of insurance period. The commenters stated that:

- The proposed language no longer includes the date when ''* * * the grapes are normally harvested * * *''. This revision broadens coverage and potentially increases exposure. The commenter recommends retaining the reference to the date when the grapes are normally harvested.
- By comparison, note that the actual calendar dates are spelled out in the Grape Crop Provisions, instead of just referring to the Special Provisions for Table Grapes (which currently are insured only in Arizona and California). Consider if those dates could be in the Table Grape Crop Provisions as well.

Response: The phrase when the grapes are normally harvested is not specific with respect to the time insurance ends. Therefore, this language was removed. However, the date that appears on the Special Provisions is clear and defines the end of insurance.

At this time, FCIC is not considering including the end of insurance dates for table grapes to be in the Crop Provisions because the dates vary by variety and geographic area and the Special Provisions are generally used for information that varies by county. Also as new states enter the program; it is beneficial to include this date on the Special Provisions so regulations do not have to be revised to add new counties or types of grapes.

Comment: A comment was received regarding section 9(b)(1). The commenter indicated the sentence,

''* * * Acreage acquired after the acreage reporting date will not be insured'', is not contained in the Table Grape Crop Provisions, as it is in the Grape Crop Provisions and questioned if this implies that acreage acquired after the acreage reporting date can be insured based upon an acceptable inspection. If so, the commenter recommend adding a statement to allow insurance providers the opportunity to inspect and insure (or deny) acreage added after the acreage reporting date if they wish to do so. This would be similar to what is currently allowed for acreage that is not reported in section 6(f) of the Basic Provisions.

Response: It is intended these provisions be the same for grapes and table grapes. Therefore, the provisions indicating insurance will not be provided for acreage obtained after the acreage reporting date have been added to the Table Grape Crop Provisions.

Comment: Commenters asked why the phrase, ''* * * and you previously gave notice in accordance with section 14 of the Basic Provisions * * *'' in section 11(b) is in the Grape Crop Provisions but not in the equivalent section of the Table Grape Crop Provisions. Consider either removing it from the Grape Crop Provisions or adding it for Table Grapes.

Response: The intent of both provisions is to require a notice in addition to a notice given previously. The provisions should be the same. Therefore, the phrase indicating, ''notice was previously given'', has been added to section 11(c) of the Table Grape Crop Provisions.

Comment: A few comments were received regarding section 12(c)(1)(iii) referring to ''Unharvested production that meets, or would meet if properly handled, the state quality standards or the appropriate USDA grade standards (if no state standard is applicable).'' ''USDA Grade Standard'' has been added to the definitions in section 1, but there is no definition of the ''state quality standards'' that take precedence over the USDA standards according to this. Recommend one of the following actions:

- Adding a definition of ''state quality standards'' to the Crop Provisions or Special Provisions;
- Removing the reference in 12(c)(1)(iii) to avoid the possibility of arbitrary determinations; or
- Revising 12(c)(1)(iii) to read something like ''* * * the state quality standards, if specified in the Special Provisions or the appropriate USDA grade standard (if no state standard is applicable) * * *''

Response: FCIC has revised the provisions to clarify the state quality standards as specified in the Special Provisions will be used or the appropriate USDA grade standard will be used if no state standard is specified.

List of Subjects in 7 CFR Part 457

Crop insurance, Grapes, Reporting and recordkeeping requirements.

Final Rule

■ Accordingly, as set forth in the preamble, the Federal Crop Insurance Corporation amends 7 CFR part 457 effective for the 2010 and succeeding crop years for the Grape Crop Insurance Provisions and Table Grape Crop Insurance Provisions.

PART 457—COMMON CROP INSURANCE REGULATIONS

■ 1. The authority citation for 7 CFR part 457 continues to read as follows:

Authority: 7 U.S.C. 1506(1), 1506(o).

■ 2. Amend § 457.138 as follows:
■ a. In the introductory text, remove ''2000'' and add ''2010'' in its place and remove the phrase ''FCIC Policies'';
■ b. Remove the paragraph immediately preceding section 1;
■ c. Amend section 1 by revising the definitions of ''harvest'' and ''set out'', adding definitions of ''type'' and ''variety'', and removing the definition of ''varietal group'';
■ d. Revise sections 2 through 8;
■ e. Amend section 9 by revising paragraph (a) and the introductory text in paragraph (b);
■ f. Amend section 10 by revising the introductory text in paragraph (a);
■ g. Amend section 11 by revising the introductory text; and
■ h. Amend section 12 by revising paragraphs (b)(2) and (4), and (c)(2) and (e)(2)(i).

The added and revised text reads as follows:

§ 457.138 Grape crop insurance provisions.

* * * * *

1. Definitions.

* * * * *

Harvest. Removing the mature grapes from the vines either by hand or machine.

* * * * *

Set out. Physically planting the grape plants in the vineyard.

* * * * *

Type. A category of grapes (one or more varieties) identified as a type in the Special Provisions.

Variety. A kind of grape that is distinguished from any other by unique characteristics such as, but not limited to, size, color, skin thickness, acidity, flavors and aromas. In Arizona and California each variety is identified as a separate type in the Special Provisions except for type 095 (other varieties). Type 095 is used to designate varieties not listed as a separate type.

2. Unit Division.

(a) In Arizona and California only:

(1) A basic unit as defined in section 1 of the Basic Provisions will be divided into additional basic units by each variety that you insure; and

(2) Provisions in the Basic Provisions that provide for optional units by section, section equivalent, or FSA farm serial number and by irrigated and non-irrigated practices are not applicable. Unless otherwise allowed by written agreement, optional units may only be established if each optional unit is located on non-contiguous land or grown and insured under an organic farming practice.

(b) In all states except Arizona and California, in addition to, or instead of, establishing optional units by section, section equivalent, or FSA farm serial number and by irrigated and non-irrigated acreage and for acreage grown and insured under an organic farming practice as provided in the unit division provisions contained in the Basic Provisions, a separate optional unit may be established if each optional unit:

(1) Is located on non-contiguous land; or

(2) Consists of a separate type when separate types are specified in the Special Provisions.

3. Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities.

In addition to the requirements of section 3 of the Basic Provisions:

(a) In Arizona and California, you may select only one coverage level and price election for each grape variety you elect to insure in the county.

(b) In all states except Arizona and California, you may select only one coverage level and price election for each grape type in the county as specified in the Special Provisions. The coverage level you choose for each grape type is not required to have the same percentage relationship. The price election you choose for each type is not required to have the same percentage relationship to the maximum price election offered by us for each type. For example, if you choose 75 percent coverage level and 100 percent of the maximum price election for one type, you may choose 65 percent coverage level and 75 percent of the maximum price election for another type. If you elect the Catastrophic Risk Protection (CAT) level of insurance for any grape type, the CAT level of coverage will be

applicable to all insured grape acreage in the county.

(c) In all states except Arizona and California, if you acquire a share in any grape acreage after you submit your application, such acreage is insurable under the terms of the policy and you did not include the grape type on your application, we will assign the following:

(1) A coverage level equal to the lowest coverage level you selected for any other grape type: and

(2) A price election percentage equal to the type with the lowest coverage level you selected, if you elected additional coverage; or 55 percent of the maximum price election, if you elected CAT.

(d) In addition to the definition of ''price election'' contained in section 1 of the Basic Provisions, a price election based on the price contained in your grape contract is allowed if provided by the Special Provisions. In the event any contract requires the use of a cultural practice that will reduce the amount of production from any insured acreage, your approved yield will be adjusted in accordance with section 3(f) and (g) to reflect the reduced production potential.

(e) In Arizona and California only, if the Special Provisions do not provide a price election for a specific variety you wish to insure, you may apply for a written agreement to establish a price election. Your application for the written agreement must include:

(1) The number of tons sold for at least the two most recent crop years; and

(2) The price received for all production of the grape variety in the years for which production records are provided.

(f) You must report by the production reporting date designated in section 3 of the Basic Provisions, by type or variety, if applicable:

(1) Any damage, removal of bearing vines, change in practices or any other circumstance that may reduce the expected yield below the yield upon which the insurance guarantee is based, and the number of affected acres;

(2) The number of bearing vines on insurable and uninsurable acreage;

(3) The age of the vines and the planting pattern; and

(4) For the first year of insurance for acreage interplanted with another perennial crop, and any time the planting pattern of such acreage is changed:

(i) The age of the interplanted crop, and the grape type or variety, if applicable;

(ii) The planting pattern; and

(iii) Any other information that we request in order to establish your approved yield.

(g) We will reduce the yield used to establish your production guarantee, based on our estimate of the effect on yield potential of any of the items listed in section 3(f)(1) through (4). If you fail to notify us of any circumstance that may reduce your yields from previous levels, we will reduce your production guarantee at any time we become aware of the circumstance.

(h) Your request to increase the coverage level or price election percentage will not be accepted if a cause of loss that could or would reduce the yield of the insured crop is evident when your request is made.

4. Contract Changes.

In accordance with section 4 of the Basic Provisions, the contract change date is October 31 preceding the cancellation date for Arizona and California and August 31 preceding the cancellation date for all other states.

5. Cancellation and Termination Dates.

In accordance with section 2 of the Basic Provisions, the cancellation and termination dates are January 31 in Arizona and California, and November 20 for all other states.

6. Report of Acreage.

In addition to the requirements of section 6 of the Basic Provisions, you must report your acreage:

(a) In Arizona and California, by each grape variety you insure; or

(b) In all other states, by each grape type.

7. Insured Crop.

In accordance with section 8 of the Basic Provisions, the crop insured will be any insurable variety that you elect to insure in Arizona and California, or in all other states all insurable types, in the county for which a premium rate is provided by the actuarial documents:

(a) In which you have a share;

(b) That are grown for wine, juice, raisins, or canning (if such grapes are put to another use (*i.e.* table grapes), the production to count will be in accordance with section 12(c)(2(ii));

(c) That are grown in a vineyard that, if inspected, is considered acceptable by us;

(d) That, after being set out or grafted, have reached the number of growing seasons designated by the Special Provisions; and

(e) That have produced an average of at least two tons of grapes per acre (or as otherwise provided in the Special Provisions) in at least one of the three crop years immediately preceding the insured crop year, unless we inspect and allow insurance on acreage that has not produced this amount.

8. Insurable Acreage.

In lieu of the provisions in section 9 of the Basic Provisions that prohibit insurance attaching to a crop planted with another crop, grapes interplanted with another perennial crop are insurable unless we inspect the acreage and determine that it does not meet the requirements contained in your policy.

9. Insurance Period.

(a) In accordance with the provisions of section 11 of the Basic Provisions:

(1) For the year of application, coverage begins on February 1 in Arizona and California, and November 21 in all other states. Notwithstanding the previous sentence, if your application is received by us after January 12 but prior to February 1 in Arizona or California, or after November 1 but prior to November 21 in all other states, insurance will attach on the 20th day after your properly completed application is received in our local office, unless we inspect the acreage during the 20-day period and determine that it does not meet insurability requirements. You must provide any information that we require for the crop or to determine the condition of the vineyard.

(2) For each subsequent crop year that the policy remains continuously in force, coverage begins on the day immediately following the end of the insurance period for the prior crop year. Policy cancellation that results solely from transferring to a different insurance provider for a subsequent crop year will not be considered a break in continuous coverage.

(3) If in accordance with the terms of the policy, your grape policy is cancelled or terminated for any crop year after insurance attached for that crop year, but on or before the cancellation and termination dates, whichever is later, insurance will not be considered to have attached for that crop year and no premium, administrative fee, or indemnity will be due for such crop year.

(4) The calendar date for the end of the insurance period for each crop year is as follows, unless otherwise specified in the Special Provisions:

(i) October 10 in Mississippi and Texas;

(ii) November 10 in Arizona, California, Idaho, Oregon and Washington; and

(iii) November 20 in all other states.

(b) In addition to the provisions of section 11 of the Basic Provisions:

* * * * *

10. Causes of Loss.

(a) In accordance with the provisions of section 12 of the Basic Provisions,

insurance is provided only against the following causes of loss that occur during the insurance period:

* * * * *

11. Duties in the Event of Damage or Loss.

In addition to the requirements of section 14 of the Basic Provisions, the following will apply:

* * * * *

12. Settlement of Claim.

* * * * *

(b) * * *

(2) Multiplying each result in section 12(b)(1) by the respective price election you selected for each type or variety;

* * * * *

(4) Multiplying the total production to count of each type or variety, if applicable, (see section 12 (c) through (e)) by the respective price election you selected;

* * * * *

(c) * * *

(2) All harvested production from the insurable acreage:

(i) Grape production that is harvested and dried for raisins will be converted to a fresh weight basis by multiplying the number of tons of raisin production by 4.5.

(ii) Grapes grown for wine, juice, raisins or canning and put to another use, will be counted as production to count on a tonnage basis. No quality adjustment other than that specifically provided for in your policy is available.

* * * * *

(e) * * *

(2) * * *

(i) Dividing the value per ton of the damaged grapes by the value per ton for undamaged grapes (the value of undamaged grapes will be the lesser of the average market price or the maximum price election for such grapes); and

* * * * *

■ 3. Amend § 457.149 as follows:

■ a. In the introductory text, remove ''2001'' and add ''2010'' in its place and remove the phrase ''FCIC Policies'';

■ b. Remove the paragraph immediately preceding section 1;

■ c. Amend section 1 by revising the definitions of ''harvest'', ''lug'', and ''set out'', adding definitions of ''type'' ''USDA grade standard'' and ''variety'', and removing the definition of ''cluster thinning and removal'';

■ d. Revise sections 2 through 10;

■ e. Amend section 11 by revising the introductory text and paragraph (c); and

■ f. Amend section 12 by revising paragraphs (b)(2) and (4) and (c)(1)(iii).

The added and revised text reads as follows:

§ 457.149 Table grape crop insurance provisions.

* * * * *

1. Definitions.

* * * * *

Harvest. Removing the mature grapes from the vines either by hand or machine.

* * * * *

Lug.

(1) Twenty (20) pounds of table grapes in the Coachella Valley, California district, and all other States.

(2) Twenty-one (21) pounds in all other California districts.

(3) Or as otherwise specified in the Special Provisions.

Set out. Physically planting the grape plants in the vineyard.

* * * * *

Type. A category of grapes (one or more varieties) identified as a type in the Special Provisions.

USDA grade standard. (1) United States standard used to determine the minimum quality grade will be:

(i) The United States Standards for Grades of Table Grapes (European or Vinifera Type);

(ii) The United States Standards for Grades of American (Eastern Type Bunch Grapes; and

(iii) The United States Standards for Grades of Muscadine (Vitis rotundifolia) Grapes. The quantity and number of samples required will be determined in accordance with procedure issued by FCIC or as provided on the Special Provisions of Insurance.

Variety. A kind of grape that is distinguished from any other by unique characteristics such as, but not limited to, size, color, skin thickness, acidity, flavors and aromas. In Arizona and California each variety is identified as a separate type in the Special Provisions except for type 095 (other varieties). Type 095 is used to designate varieties not listed as a separate type.

2. Unit Division.

(a) In Arizona and California only:

(1) A basic unit as defined in section 1 of the Basic Provisions will be divided into additional basic units by each table grape variety that you insure; and

(2) Provisions in the Basic Provisions that provide for optional units by section, section equivalent, or FSA farm serial number and by irrigated and non-irrigated practices are not applicable. Unless otherwise allowed by written agreement, optional units may only be established if each optional unit is located on non-contiguous land or grown and insured under an organic farming practice.

(b) In all states except Arizona and California, in addition to, or instead of, establishing optional units by section, section equivalent, or FSA farm serial number and by irrigated and non-irrigated acreage and for acreage grown and insured under an organic farming practice as provided in the unit division provisions contained in the Basic Provisions, a separate optional unit may be established if each optional unit:

(1) Is located on non-contiguous land; or

(2) Consists of a separate type when separate types are specified in the Special Provisions.

3. Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities.

In addition to the requirements of section 3 of the Basic Provisions:

(a) In Arizona and California, you may select only one coverage level and price election for each table grape variety you elect to insure in the county.

(b) In all states except Arizona and California, you may select only one coverage level and price election for each table grape type in the county as specified in the Special Provisions. The coverage level you choose for each table grape type is not required to have same percentage relationship. The price election you choose for each type is not required to have the same percentage relationship to the maximum price election offered by us for each type. For example, if you choose 75 percent coverage level and 100 percent of the maximum price election for one type, you may choose 65 percent coverage level and 75 percent of the maximum price election for another type. If you elect the Catastrophic Risk Protection (CAT) level of insurance for any grape type, the CAT level of coverage will be applicable to all insured grape acreage in the county.

(c) In all states except Arizona and California, if you acquire a share in any grape acreage after you submit your application, such acreage is insurable under the terms of the policy and you did not include the grape type on your application, we will assign the following:

(1) A coverage level equal to the lowest coverage level you selected for any other grape type: and

(2) A price election percentage equal to the type with the lowest coverage level you selected, if you elected additional coverage; or 55 percent of the maximum price election, if you elected CAT.

(d) You must report by the production reporting date designated in section 3 of the Basic Provisions, by type or variety if applicable:

(1) Any damage, removal of bearing vines, change in practices or any other

circumstance that may reduce the expected yield below the yield upon which the insurance guarantee is based, and the number of affected acres;

(2) The number of bearing vines on insurable and uninsurable acreage;

(3) The age of the vines and the planting pattern; and

(4) For the first year of insurance for acreage interplanted with another perennial crop, and any time the planting pattern of such acreage is changed:

(i) The age of the interplanted crop, and the table grape type or variety, if applicable;

(ii) The planting pattern; and

(iii) Any other information that we request in order to establish your approved yield.

(e) We will reduce the yield used to establish your production guarantee, based on our estimate of the effect on yield potential of any of the items listed in section 3(d)(1) through (4). If you fail to notify us of any circumstance that may reduce your yields from previous levels, we will reduce your production guarantee at any time we become aware of the circumstance.

(f) Your request to increase the coverage level or price election percentage will not be accepted if a cause of loss that could or would reduce the yield of the insured crop is evident when your request is made.

4. Contract Changes.

In accordance with section 4 of the Basic Provisions, the contract change date is October 31 preceding the cancellation date for Arizona and California and August 31 preceding the cancellation date for all other states.

5. Cancellation and Termination Dates.

In accordance with section 2 of the Basic Provisions, the cancellation and termination dates are January 31 in Arizona and California, and November 20 for all other states.

6. Report of Acreage.

In addition to the requirements of section 6 of the Basic Provisions, you must report your acreage:

(a) In Arizona and California, by each table grape variety you insure; or

(b) In all other states, by each table grape type.

7. Insured Crop.

In accordance with section 8 of the Basic Provisions, the crop insured will be any insurable variety of table grapes that you elect to insure in Arizona and California, or in all other states all insurable types, in the county for which a premium rate is provided by the actuarial documents:

(a) In which you have a share;

(b) That are grown for harvest as table grapes;

(c) That are adapted to the area;

(d) That are grown in a vineyard that, if inspected, is considered acceptable by us;

(e) That, after being set out or grafted, have reached the number of growing seasons designated by the Special Provisions; or

(f) That have produced an average of at least 150 lugs of table grapes per acre (or as otherwise provided in the Special Provisions) in at least one of the three crop years immediately preceding the insured crop year, unless we inspect and allow insurance on acreage that has not produced this amount.

8. Insurable Acreage.

In lieu of the provisions in section 9 of the Basic Provisions that prohibit insurance attaching to a crop planted with another crop, table grapes interplanted with another perennial crop are insurable unless we inspect the acreage and determine that it does not meet the requirements contained in your policy.

9. Insurance Period.

(a) In accordance with the provisions of section 11 of the Basic Provisions

(1) For the year of application, coverage begins on February 1 in Arizona and California, and November 21 in all other states. Notwithstanding the previous sentence, if your application is received by us after January 12 but prior to February 1 in Arizona or California, or after November 1 but prior to November 21 in all other states, insurance will attach on the 20th day after your properly completed application is received in our local office, unless we inspect the acreage during the 20-day period and determine that it does not meet insurability requirements. You must provide any information that we require for the crop or to determine the condition of the vineyard.

(2) For each subsequent crop year that the policy remains continuously in force, coverage begins on the day immediately following the end of the insurance period for the prior crop year. Policy cancellation that results solely from transferring to a different insurance provider for a subsequent crop year will not be considered a break in continuous coverage.

(3) If in accordance with the terms of the policy, your table grape policy is cancelled or terminated for any crop year after insurance attached for that crop year, but on or before the cancellation and termination dates, whichever is later, insurance will not be considered to have attached for that crop year and no premium, administrative fee, or indemnity will be due for such crop year.

(4) The calendar date for the end of insurance period for each crop year is the date specified in the Special Provisions.

(b) In addition to the provisions of section 11 of the Basic Provisions:

(1) If you acquire an insurable share in any insurable acreage after coverage begins, but on or before the acreage reporting date for the crop year, and after an inspection we consider the acreage acceptable; insurance will be considered to have attached to such acreage on the calendar date for the beginning of the insurance period. Acreage acquired after the acreage reporting date will not be insured.

(2) If you relinquish your insurable share on any insurable acreage of table grapes on or before the acreage reporting date for the crop year, insurance will not be considered to have attached to, and no premium will be due or indemnity paid for such acreage for that crop year unless:

(i) A transfer of coverage and right to an indemnity, or a similar form approved by us, is completed by all affected parties;

(ii) We are notified by you or the transferee in writing of such transfer on or before the acreage reporting date; and

(iii) The transferee is eligible for crop insurance.

10. Causes of Loss.

(a) In accordance with the provisions of section 12 of the Basic Provisions, insurance is provided only against the following causes of loss that occur during the insurance period:

(1) Adverse weather conditions;

(2) Fire, unless weeds and other forms of undergrowth have not been controlled or pruning debris has not been removed from the vineyard;

(3) Insects, except as excluded in 10(b)(1), but not damage due to insufficient or improper application of pest control measures;

(4) Plant disease, but not damage due to insufficient or improper application of disease control measures;

(5) Wildlife;

(6) Earthquake;

(7) Volcanic eruption; or

(8) Failure of irrigation water supply, if caused by an insured peril that occurs during the insurance period.

(b) In addition to the causes of loss excluded in section 12 of the Basic Provisions, we will not insure against damage or loss of production due to:

(1) Phylloxera, regardless of cause; or

(2) Inability to market the table grapes for any reason other than the actual physical damage from an insurable cause specified in this section. For example, we will not pay you an indemnity if you are unable to market

due to quarantine, boycott, or refusal of any person to accept production.

11. Duties in the Event of Damage or Loss.

In addition to the requirements of section 14 of the Basic Provisions, the following will apply:

* * * * *

(c) If the crop has been damaged during the growing season and you previously gave notice in accordance with section 14 of the Basic Provisions, you must also provide notice at least 15 days prior to the beginning of harvest if you intend to claim an indemnity as a result of the damage previously reported. You must not destroy the damaged crop until the earlier of 15 days from the date you gave notice of loss, or our written consent to do so. If you fail to meet requirements of this section all such production will be considered undamaged and included as production to count.

* * * * *

12. Settlement of Claim.

* * * * *

(b) * * *

(2) Multiplying each result in section 12(b)(1) by the respective price election you selected for each type or variety;

* * * * *

(4) Multiplying the total production to count of each type or variety, if applicable, (see section 12(c)) by the respective price election you selected;

* * * * *

(c) * * *

(1) * * *

(iii) Unharvested production that meets, or would meet if properly handled, the state quality standards, if specified in the Special Provisions, or the appropriate USDA grade standard (if no state standard is specified); and

* * * * *

Signed in Washington, DC, on June 24, 2009.

William J. Murphy,

Acting Manager, Federal Crop Insurance Corporation.

[FR Doc. E9–15498 Filed 7–6–09; 8:45 am]

BILLING CODE 3410–08–P

DEPARTMENT OF ENERGY

10 CFR Part 431

[Docket No. EERE–2008–BT–TP–0008]

RIN 1904–AB71

Energy Conservation Program: Test Procedures for Small Electric Motors

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

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) is prescribing test procedures for measuring the energy efficiency of single-phase and polyphase small electric motors. The final rule incorporates by reference industry test procedures already in use when measuring the energy efficiency of these types of motors. Additionally, the final rule clarifies definitions applying to small electric motors and identifies issues that will be further addressed later in a related supplemental notice.

DATES: This rule is effective August 6, 2009. The incorporation by reference of certain publications listed in this rule was approved by the Director of the Federal Register on August 6, 2009.

ADDRESSES: You may review copies of all materials related to this rulemaking at the U.S. Department of Energy, Resource Room of the Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please call Ms. Brenda Edwards at the above telephone number for additional information regarding visiting the Resource Room. Please note that the DOE's Freedom of Information Reading Room no longer houses rulemaking materials.

FOR FURTHER INFORMATION CONTACT: Mr. James Raba, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–8654. E-mail: *Jim.Raba@ee.doe.gov.* In the Office of the General Counsel, contact Mr. Michael Kido, U.S. Department of Energy, Office of the General Counsel, GC–72, 1000 Independence Avenue, SW., Washington, DC 20585. Telephone: (202) 586–9507. E-mail: *Michael.Kido@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: Today's final rule incorporates by reference, into subpart X of Title 10, Code of Federal Regulations, part 431 (10 CFR part 431),[1] the following industry standards from the Canadian Standards Association and the Institute of Electrical and Electronics Engineers:

- CAN/CSA–C747–94 (Reaffirmed 2005), (''CAN/CSA–C747''), Energy Efficiency Test Methods for Single- and Three-Phase Small Motors.
- IEEE Std 114–2001™ (Revision of IEEE Std 114–1982™), (''IEEE Std 114''), ''IEEE Standard Test Procedure for Single-Phase Induction Motors,'' approved December 6, 2001.
- IEEE Std 112™–2004 (Revision of IEEE Std 112–1996), (''IEEE Std 112''), ''IEEE Standard Test Procedure for Polyphase Induction Motors and Generators,'' approved February 9, 2004.

Copies of CAN/CSA–C747 can be obtained from the Canadian Standards Association, Sales Department, 5060 Spectrum Way, Suite 100, Mississauga, Ontario, L4W 5N6, Canada, 1–800–463–6727, or *http://www.shopcsa.ca/onlinestore/welcome.asp.*

Copies of IEEE Std 112 and 114 can be obtained from the Institute of Electrical and Electronics Engineers, Inc., 445 Hoes Lane, P.O. Box 1331, Piscataway, NJ 08855–1331, 1–800–678–IEEE (4333), or *http://www.ieee.org/web/publications/home/index.html.*

You can also view copies of these standards at the U.S. Department of Energy, Resource Room of the Building Technologies Program, 950 L'Enfant Plaza, SW., 6th Floor, Washington, DC 20024, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

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[1] The December 22, 2008, notice of proposed rulemaking that addressed test procedures for measuring the energy efficiency of small electric motors proposed in section III.A of the preamble a new ''Subpart T—Small Electric Motors,'' under 10 CFR part 431. 73 FR 78220, 78237. Subsequent to that notice, DOE became aware that ''Subpart T'' had been used in an earlier rulemaking for certification, compliance, and enforcement requirements for consumer products and commercial equipment. 71 FR 42178, 42214 (July 25, 2006). Consequently, today's final rule reformats ''Subpart T'' to read ''Subpart X'' and renumbers the ''431.340'' series to read ''431.440.'' Notwithstanding, certain passages, comments, and references that follow make reference to ''Subpart T'' because that language was used in the NOPR. This is addressed further in section III.E of the preamble that follows.

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I. Introduction

A. Authority

Part A–1 of Title III of the Energy Policy and Conservation Act, as amended, (EPCA) provides for an energy conservation program for certain commercial and industrial equipment.[2] (42 U.S.C. 6311–6317) In particular, section 346(b)(1) of EPCA directs the Secretary of Energy to prescribe testing requirements and energy conservation standards for those small electric motors for which the Secretary determines that standards would be technologically feasible and economically justified, and would result in significant energy savings. (42 U.S.C. 6317(b)(1))

B. Background

On July 10, 2006, the Department of Energy (DOE) published in the **Federal Register** a positive determination that energy conservation standards for certain single-phase and polyphase small electric motors appear technologically feasible, economically justified and would result in significant energy savings.[3] 71 FR 38799. Further, DOE stated in its determination notice that it will initiate the development of test procedures for certain small electric motors. 71 FR 38807. DOE then published proposed test procedures and requested comment on those procedures. 73 FR 78220 (December 22, 2008). Today's final rule prescribes test procedures for measuring the energy efficiency of certain small electric motors with ratings of ¼ to 3 horsepower (hp), which are built in a two-digit National Electrical Manufacturers Association (NEMA) frame number series. Although both could have the same horsepower ratings, small electric motors, which are covered in today's final rule, differ from electric motors, which are built in a three-digit NEMA frame number series and have other differentiating features and performance characteristics. This test procedure is also applicable to NEMA-equivalent International Electrotechnical Commission (IEC) standard motors (metric motors), which are equivalent to small electric motors, as defined in EPCA (*see* section III.A.1 in today's final rule). *See* 42 U.S.C. 6311(13)(G).

In the notice of proposed rulemaking (NOPR), DOE proposed to (1) establish test procedures to measure the energy efficiency for small electric motors and (2) amend the test procedures for electric motors (*i.e.* 1–200 hp) by revising and expanding their current scope and to extend coverage of those procedures to include electric motors with ratings between 201 and 500 hp. 73 FR 78220. These proposed changes would amend the regulations currently found at 10 CFR part 431. DOE identified several issues in the NOPR on which it sought public comment. For small electric motors, DOE specifically sought comments on three issues: (1) The proposed test procedure for small electric motors, based on the Institute of Electrical and Electronics Engineers (IEEE) Std 114–2001, ''Test Procedure for Single-Phase Induction Motors,'' and IEEE Std 112–2004, ''Test Procedure for Polyphase Induction Motors and Generators;'' (2) the proposal to allow manufacturers to use Canadian Standards Association (CAN/CSA) C747–94, ''Energy Efficiency Test Methods for Single- and Three-Phase Small Motors,'' as an alternative to IEEE Std 114 and 112; and (3) the proposal to use an alternative efficiency determination method (AEDM) as a means for calculating the total power loss and average full load efficiency of a small electric motor.[4] With respect to this last item, DOE discussed proposed requirements for a manufacturer to substantiate: (i) The accuracy and reliability of its AEDM, (ii) a statistically valid number of basic models and units to be tested, and (iii) the accuracy of the predictive capabilities of the AEDM relative to actual testing.

On January 29, 2009, DOE held a public meeting to receive comments, data, and information on its NOPR. On March 9, 2009, the NOPR comment period closed. In addition to the oral comments presented at the public meeting and recorded in the official transcript, DOE received three additional written comments. In view of the comments received, DOE subsequently decided to separate the two major rulemaking activities originally contained in the NOPR—one to address the test procedure for small electric motors, and the other to address the revision and expansion of the test procedure for electric motors found in subpart B of 10 CFR part 431.[5] The issues relevant to the small electric motors test procedure are addressed in today's final rule. Issues affecting electric motors will be addressed in a separate supplemental notice of proposed rulemaking (SNOPR), which DOE will publish at a later date.

II. Summary of the Final Rule

Today's final rule establishes new test procedures for measuring the energy efficiency of certain general purpose, single-phase and polyphase small electric motors built in a two-digit NEMA frame series. The test procedures incorporate by reference IEEE Std 112 (Test Method A and Test Method B), IEEE Std 114, and CAN/CSA C747 for single-phase small electric motors.

Also, today's final rule does the following: (1) Codifies the statutory definition for the term ''small electric motor;'' (2) clarifies the definition of the term ''basic model'' and the relationship of the term to certain equipment classes and compliance certification reporting requirements; and (3) codifies the ability of manufacturers to use an AEDM to reduce testing burden while maintaining accuracy and ensuring compliance with potential future energy conservation standards. Finally, today's notice also discusses matters of

[2] For editorial reasons, Parts B (consumer products) and C (commercial equipment) of Title III of EPCA were redesignated as Parts A and A–1, respectively, in the United States Code.

[3] A small electric motor is a machine that converts electric power (either single-phase or polyphase alternating current) into rotational mechanical power. Single-phase electric power varies all the voltages of the supply in unison, while a polyphase (three-phase) system has three alternating currents offset from one another by one-third of their period, or 120 degrees. *See* 73 FR 78221.

[4] The IEEE Standards addressed in this notice are generally listed chronologically by their last date of revision and adoption rather than their sequential number.

[5] DOE is addressing the small motors test procedure issues in today's notice to ensure its compliance with the Consent Decree deadline established by Federal District Court for the Southern District of New York on November 6, 2006 in the consolidated cases of *New York* v. *Bodman,* Case No. 05 Civ. 7807 (JES), and *Natural Resources Defense Council* v. *Bodman,* Case No. 05 Civ. 7808 (JES). Unlike the test procedures for small electric motors, the test procedure rulemaking for electric motors (i.e. 1–200 hp) is not part of the Consent Decree schedule.

laboratory accreditation, compliance certification, and enforcement for small electric motors.

III. Discussion

Small electric motors covered in today's final rule are general purpose rotating machines that use either single-phase or polyphase electricity, and provide sufficient torque to drive equipment such as blowers, fans, conveyors, and pumps. Today's final rule does not cover small electric motors that are components of a covered product under section 322(a) of EPCA. (42 U.S.C. 6317(b)(3)) For example, a small electric motor that is a component of a covered consumer appliance, such as a refrigerator, is not covered in today's final rule. The following discussion provides some background for today's final rule.

On July 10, 2006, DOE published in the **Federal Register** a positive determination with respect to testing requirements and energy conservation standards for small electric motors. DOE preliminarily determined that standards for small electric motors would be ''technologically feasible and economically justified, and would result in significant energy savings.'' 71 FR 38807. Thereafter, DOE began to develop a test procedure for small electric motors and an analysis of potential energy conservation standards levels. As part of this analysis, DOE prepared a framework document that described the standards rulemaking process and provided details regarding the procedural and analytical approaches DOE anticipated using to evaluate energy conservation standards for small electric motors. *See* generally, Energy Conservation Standards Rulemaking Framework Document for Small Electric Motors, at pp. 9–33 (July 30, 2007) (available at *http://www1.eere.energy.gov/buildings/appliance_standards/commercial/pdfs/small_motors_framework_073007.pdf*).

On August 10, 2007, DOE published a **Federal Register** notice that initiated a rulemaking addressing energy conservation standards for small electric motors and announced both the availability of the framework document and a public meeting to discuss and receive comments, data, and information about issues DOE would address in the energy conservation standards rulemaking. 72 FR 44990. NEMA responded to the notice by pointing out that its members use IEEE Std 112 for measuring the efficiency of polyphase small electric motors and IEEE Std 114 for measuring the efficiency of single-phase small electric motors. (NEMA, No. 2 at p. 2)[6] DOE examined these industry standards as well as CAN/CSA–C747, and concluded that these test procedures provide the necessary methodology and technical requirements to accurately determine the energy efficiency of the small electric motors covered in its rulemaking.

On December 22, 2008, DOE published a NOPR that, in part, proposed to create new Subpart T, ''Small Electric Motors,'' (now Subpart X) in 10 CFR part 431, to set forth definitions and prescribe test procedures for small electric motors. 73 FR 78220. In particular, the NOPR invited interested parties to submit comments, data, and information on the proposed test methods for small electric motors (IEEE Std 112 and IEEE Std 114) and whether CAN/CSA C747 could be used as an alternative test method to the IEEE standards for the same equipment. DOE held a public meeting on January 29, 2009, to address, in part, its proposed test procedures for small electric motors and solicit comments from interested parties. In addition to oral comments recorded in the transcript from the public meeting, DOE received three sets of written comments, all of which are addressed in today's rulemaking.

A. Definition of Small Electric Motor

In the NOPR, DOE proposed to codify the statutory definition of ''small electric motor'' into ''Subpart T—Small Electric Motors'' of 10 CFR part 431. 73 FR 78223. Section 340(13)(G) of EPCA, as amended by the Energy Independence and Security Act of 2007 (EISA 2007) (42 U.S.C. 6311(13)(G)), defines the term ''small electric motor'' as ''a NEMA general purpose alternating-current single-speed induction motor, built in a two-digit frame number series in accordance with NEMA Standards Publication MG1–1987.'' In today's final rule, DOE is codifying this definition under 10 CFR 431.442 of a new Subpart X for small electric motors.

Interested parties raised two general issues that are addressed in this section: (1) Whether DOE considers NEMA-equivalent IEC standard motors (metric motors) to be covered under 10 CFR part 431; and (2) whether in paragraph MG1–1.05 of NEMA Standards Publication MG1–1987 the classification of insulation system prescribed for small motors is a potential means to circumvent the applicable compliance requirements in 10 CFR part 431.

1. International Electrotechnical Commission Motors

As discussed above, EPCA defines ''small electric motor'' on the basis of NEMA Standards Publication MG1–1987, ''Motors and Generators.'' Section 340(13)(G) of EPCA, 42 U.S.C. 6311(13)(G). The elements that comprise the EPCA definition of ''small electric motor'' are based on the construction and rating system in paragraph MG1–1.05 of NEMA MG1–1987, which use U.S. customary units of measurement, rather than metric units. Today's codified definition describes general-purpose small electric motors in terms that are used in common parlance for the U.S. market.

By contrast, general-purpose small electric motors manufactured outside the U.S. and Canada generally are defined and described in terms of IEC Standards. For example, IEC 60034-series, ''Rotating Electrical Machines,'' sets forth terminology and performance criteria that are different from those in the EPCA definition of small electric motor. Further, ''IEC motors'' are rated under IEC 60034–1, ''Rating and Performance,'' which uses metric units of measurement and a construction and rating system different from NEMA MG1–1987. For example, where NEMA standards rate the output power of small electric motors in terms of horsepower, IEC standards rate the input power of (equivalent) small electric motors in terms of kilowatts.

Baldor Electric Company (Baldor), Northwest Energy Efficiency Alliance (NEEA), and NEMA commented that IEC motors of equivalent ratings should be considered covered equipment. Baldor asserted that IEC motors should be covered because it is possible for foreign IEC motors to be brought into the United States and used in the same applications as EPCA-defined small electric motors. (Baldor, Public Meeting Transcript, No. 8 at p. 75). NEEA[7] noted that the test procedures and any energy conservation standards for small electric

[6] A notation in the form ''NEMA, No. 2 at p. 2'' refers to (1) a statement that was submitted by the National Electrical Manufacturers Association and is recorded in the docket ''Energy Conservation Program: Test Procedures for Electric Motors,'' Docket Number EERE–2008–BT–TP–0008, as comment number 2; and (2) a passage that appears on page 2 of that document. Likewise, a notation in the form ''Baldor, Public Meeting Transcript, No. 8 at p. 75'' refers to (1) a statement by Baldor Electric Company and is recorded in the docket as comment number 8; and (2) a passage that appears on page 75 of the transcript, ''Public Meeting on Test Procedures for Small Electric Motors and Electric Motors,'' dated January 29, 2009.

[7] This comment was made by Adjuvant Consulting, which represented both the Northwest Energy Efficiency Alliance (NEEA) and the Northwest Power and Conservation Council. For referencing purposes, throughout this notice, comments from these groups will be cited as NEEA.

motors should apply to the equivalent IEC motors. (NEEA, Public Meeting Transcript, No. 8 at pp. 81–82). NEEA also submitted a written comment stating its shared concerns with manufacturers about DOE's ability to enforce efficiency standards in cases involving covered products arriving from overseas as components of OEM equipment, including compatibility with IEC-based testing and rating. NEEA urges DOE to work with manufacturers and other interested parties to develop a plan that does not place an asymmetric burden on U.S. manufacturers in providing for reasonable enforcement of the standards. (NEEA, No. 10 at p. 6) NEMA commented that when DOE codified the provisions for electric motors into subpart B of 10 CFR part 431 pursuant to the Energy Policy Act of 1992 (EPACT 1992), DOE recognized that IEC motors equivalent to (and used as substitutes for) NEMA ''electric motors'' should be considered covered products. Consistent with that interpretation, NEMA requested that DOE include equivalent IEC motors in the definition of ''small electric motor.'' (NEMA, No. 12 at p. 2) Interested parties did not submit comments opposing this approach.

DOE agrees that IEC-equivalent small electric motors should be covered equipment. DOE understands that while the statutory definition of ''small electric motor'' does not explicitly address IEC motors, Congress directed DOE to consider small electric motors built in accordance with NEMA MG1–1987. NEMA MG1 specifies a broad array of requirements which also generally apply to IEC motors, and do not affect the purpose or design characteristics of these devices. Three reasons support the view that IEC motors identical or equivalent to NEMA motors are covered:

(1) Both motors perform the same functions. IEC-equivalent small electric motors generally can perform the identical functions of EPCA-defined small electric motors. IEC small electric motors are designed and rated according to criteria in IEC 60034–1, whereas EPCA defines small electric motor in terms of design and rating criteria set forth in NEMA MG1. The differences in criteria concern primarily nomenclature, units of measurement, standard motor configurations, and design details, but have little bearing on motor function. Comparable motors of either type can provide virtually equivalent power to operate the same piece of machinery or equipment. Thus, in most general purpose applications, such IEC motors can be used interchangeably with EPCA-defined small electric motors.

(2) Any broad exclusion of IEC-equivalent motors from test procedures or any future energy efficiency requirements would conflict with the energy conservation goal of EPCA and create a regulatory gap that would permit the use of non-compliant small motors, which Congress likely did not intend. Furthermore, any efficiency standards prescribed for small electric motors would be readily applicable to both standard and nonstandard equivalent IEC motors.

(3) Placing energy efficiency requirements on EPCA-defined small electric motors while permitting equivalent IEC motors to remain unregulated would effectively give preferential treatment to those companies who manufacture IEC motors. Such a situation would likely lead to a reduction in the production of NEMA motors while encouraging the increased production of IEC motors, which would be unregulated.

DOE notes that it made similar findings in the past to justify the coverage of equivalent IEC motors. In a prior rulemaking notice addressing 1–200 horsepower electric motors, ''Energy Efficiency Program for Certain Commercial and Industrial Equipment: Test Procedures, Labeling, and Certification Requirements for Electric Motors,'' 61 FR 60440, 60442–43 (November 27, 1996), DOE stated the following:

> The Department interprets the Act as requiring that IEC motors satisfy the same energy efficiency requirements that the statute applies to identical or equivalent to NEMA motors. Thus, under the regulation proposed today, the definition of ''electric motor'' includes IEC motors that have physical and performance characteristics which are either identical or equivalent to the characteristics of NEMA motors that fit within the statutory definition. In the Department's view, there can be no question that EPCA's requirements cover any motor whose physical and performance characteristics fit within the statutory definition of ''electric motor.'' This is true regardless of the measuring units used to describe the motor's performance or characteristics, or of the criteria pursuant to which it was designed.
>
> The Department also understands that comparable IEC and NEMA motors typically are closely equivalent but not identical, and that the characteristics of many IEC motors closely match EPCA's definition of ''electric motor'' but deviate from it in minor respects. It also appears that, for most general purpose applications, such IEC motors can be used interchangeably with the NEMA motors. In addition, as discussed below, the efficiency standards prescribed for standard horsepower motors are readily applicable to both standard and nonstandard kilowatt motors. The Department believes that a broad exclusion of IEC motors from energy efficiency requirements would conflict with the energy conservation goal of the Act, was not intended by Congress, and would be irrational. Furthermore, the Department agrees with the views of commenters that placing energy efficiency requirements on NEMA motors but not on equivalent IEC motors could have the effect of giving preferential treatment to the IEC motors. Thus, the Department construes the EPCA definition of electric motor to include motors that have characteristics equivalent to those set forth in that definition. 61 FR 60443.

As a result, the definition of the term ''electric motor'' was codified under 10 CFR 431.2 to include reference both to NEMA MG1 and IEC-equivalent design, duty rating, dimensions, and performance characteristics. 64 FR 54114 (October 5, 1999). In addition, each element of the codified definition made reference to the applicable provisions in NEMA and IEC standards, which were then incorporated by reference under 10 CFR 431.22. *See* 64 FR 54142.

For all the above reasons and finding no evidence or receiving any comment to the contrary, DOE concludes that IEC-equivalent motors are subject to the same test procedures and any potential energy efficiency standards that apply to EPCA-defined small electric motors. Further, IEEE Std 112, IEEE Std 114, and CAN/CSA–C747, as applicable to small electric motors, are also applicable to those IEC motors that have physical and performance characteristics that are identical or equivalent to those characteristics of the EPCA-defined small electric motors. In DOE's view, EPCA's requirements cover any motor whose physical and performance characteristics fit within the statutory definition of ''small electric motor,'' regardless of the nomenclature, design descriptors, or units expressed that characterize performance. Today's final rule applies the statutory definition in a manner consistent with EPCA and includes motors that have characteristics equivalent to those set forth in that definition. Accordingly, the complete definition codified in today's final rule reads: ''Small electric motor means a NEMA general purpose alternating current single-speed induction motor, built in a two-digit frame number series in accordance with NEMA Standards Publication MG1–1987, including IEC metric equivalent motors.''

2. Insulation System Class

Section 340(13)(G) of EPCA defines the term ''small electric motor'' as a ''NEMA general purpose alternating

current single-speed induction motor, built in a two-digit frame number series in accordance with NEMA Standards Publication MG1–1987.'' (42 U.S.C. 6311(13)(G)) Where EPCA refers to NEMA MG1–1987, paragraph MG1–1.0 within that document defines the term ''general purpose'' motor as one that incorporates, in part, a Class A[8] insulation system with temperature rise as specified in MG1–12.43 for small motors. Advanced Energy asserted that there could be a problem with limiting the definition of general purpose small electric motors to one with Class A insulation. (Advanced Energy, No. 11 at pp. 3–4) Advanced Energy argued that insulation systems used in small electric motors have improved since this definition of general purpose was first standardized in NEMA MG1–1987. Further, as new insulation technologies have improved and material costs have decreased, it has become increasingly common for manufacturers to use insulation temperature classes higher than Class A. Thus, if DOE limits coverage to small electric motors with Class A insulation, a manufacturer could potentially choose between the cost of compliance or moving to a higher insulation class to avoid regulation.

DOE understands the risk that migration from one insulation class to another might be used as a means of circumventing an energy conservation standard. Similarly, DOE is concerned that if IEC motors are not covered, it could open a regulatory gap in coverage. Moreover, DOE is equally concerned that any relatively inexpensive or minor redesign of an existing line of small electric motors (which could include altering the type of insulation used in these products) would enable a manufacturer to circumvent the statutory framework established by Congress.

As part of its technical analysis for the upcoming standards rulemaking for small electric motors, on December 30, 2008, DOE published a notice announcing the availability of a preliminary technical support document. 73 FR 79723. DOE examined both the EPCA definition of ''small electric motor'' and the current use of ''general purpose'' in paragraph 1.6.1 of MG1–2006, Revision 1, and found that the insulation-class coverage of what is considered ''general purpose'' has in fact expanded beyond Class A. In light of this observation, one potential solution would be to apply the term ''general purpose'' to more than one insulation class by modifying the current requirement to cover products equipped with a ''Class A or higher rated insulation system.'' DOE plans to more fully address this issue as part of its energy conservation standards rulemaking for small electric motors.

3. Definition of Basic Model

It is common for a manufacturer to make numerous models of a product covered under EPCA and for each model to be subject to testing to determine compliance with an energy conservation standard. To reduce any undue burden of testing, DOE provides for manufacturers to group together product models having essentially identical energy consumption characteristics into a single family of models, collectively called a ''basic model.'' This concept is well established both for residential appliances and commercial and industrial equipment covered under EPCA. For example, refrigerators are often manufactured according to the same elementary or basic blueprint design and any particular model could incorporate modifications that include type of finish, shelf or drawer arrangement, or some other feature that does not significantly affect the energy efficiency or performance of that appliance. Requiring manufacturers to test the energy efficiency of each model with a different cosmetic feature—*e.g.,* red with four shelves, or bisque with two shelves and two drawers—would create significant and redundant testing burdens for models that share the same energy efficiency performance.

The term ''basic model'' for electric motors is defined in relevant part as: ''all units of a given type of electric motor (or class thereof) manufactured by a single manufacturer and which have the same rating, have electrical characteristics that are essentially identical, and do not have any differing physical or functional characteristics which affect energy consumption or efficiency.'' 10 CFR 431.12. Except for changes to reflect the type of product at issue, this basic model definition also appears in 10 CFR part 431 for products as diverse as commercial refrigerators, freezers, and refrigerator-freezers (Subpart C of 10 CFR part 431), distribution transformers (Subpart K of 10 CFR part 431), illuminated exit signs (Subpart L of 10 CFR part 431), and refrigerated bottled or canned beverage vending machines (Subpart Q of 10 CFR part 431). For covered products and equipment, the characteristics differentiating basic models will vary with the specific designs, features and attributes of the products or equipment. Each manufacturer can then test a sufficient, representative sample of units of each basic model it manufactures, and derive an efficiency rating for each basic model that would apply to all models subsumed by that basic model.

DOE proposed a basic model definition for small electric motors that incorporated these concepts. 73 FR 78223 and 78237–38. The proposed definition read:

> Basic model means, with respect to a small electric motor, all units of a given type of small electric motor (or class thereof) manufactured by a single manufacturer, and which have the same rating, have electrical characteristics that are essentially identical, and do not have any differing physical or functional characteristics which affect energy consumption or efficiency. For the purpose of this definition, ''rating'' means a combination of the small electric motor's group (*i.e.,* capacitor-start, capacitor-run; capacitor-start, induction-run; or polyphase), horsepower rating (or standard kilowatt equivalent), and number of poles with respect to which section 431.346 prescribes nominal full load efficiency standards.[9]

NEMA commented that the only electrical characteristic that may be important among basic models is the stator winding configuration. It noted that it is possible to use different winding configurations, *e.g.,* lap winding or concentric winding, to produce the same performance, including efficiency, for a small electric motor. (NEMA, No. 12 at p. 2) Further, NEMA offered an example of this type of change by explaining that a small electric motor incorporating an internal fan for air movement may have the same efficiency as one which uses blades on the rotor end rings for moving air through the motor. In view of the winding configuration and cooling fan examples, NEMA did not believe the design difference is important with respect to the concept of a ''basic model'' when the efficiency remains the same. (NEMA, No. 12 at p. 2) Finally, NEMA recommended that DOE define ''basic model'' as ''all units of a given type of small electric motor (or class thereof) manufactured by a single manufacturer, and which have the same rating and nominal efficiency.'' (NEMA, No. 12 at p. 2)

In its written comments, NEEA asserted that ''basic model'' is one of the most important terms to clearly define for a rulemaking. NEEA summarized the

[8] Insulation systems are rated by standard NEMA classifications according to maximum allowable operating temperatures, which are: Class A—105 °C (221 °F); Class B—130 °C (266 °F); Class F—155 °C (311 °F); and Class H—180 °C (356 °F).

[9] As indicated earlier, the sections affecting small electric motors will be in a new Subpart X. Accordingly, the reference to section 431.346 in this definition is updated in today's final regulatory text to reflect that fact and read as section 431.446.

industry's view that the basic model regime used for covered (1–200 horsepower) electric motors [as defined in 10 CFR 431.12] be applied to small electric motors, provided that the basic model ''boxes'' for each motor are carefully specified. NEEA added that such ''boxes'' would be synonymous with DOE's equipment classes (*i.e.,* a unique combination of the motor's horsepower, number of poles, and whether the design is a capacitor-start, induction run (CSIR), capacitor-start, capacitor run (CSCR), or polyphase motor).[10] (NEEA, No. 10 at p. 3)

Emerson commented that its design engineers routinely make changes to their electric motors but maintain the same efficiency level. Emerson continued by noting that some manufacturers use more copper and less core steel, while other manufacturers use less copper and more steel. A manufacturer may also make modifications to meet other performance requirements requested by customers, including efficiency, torque, power factor, and inertia. In all, Emerson noted that 15 or 20 different criteria that manufacturers must meet to have a marketable product. Emerson noted that it is able to maintain specific efficiency levels by using AEDM programs that are correlated with actual testing methods. Emerson speculated that the definition of ''basic model'' for small electric motors [under the new 10 CFR 431.342] will follow the same or similar definition found in 10 CFR 431.12 for 1–200 horsepower electric motors, which potentially will result in fewer basic models of small electric motors than the current 113 basic models of electric motors [in 10 CFR 431.25]. (Emerson, Public Meeting Transcript, No. 8 at pp. 51–52)

DOE notes that there are well-established differences in its regulatory program between equipment classes,[11] basic models, and compliance certification reporting. From the comments submitted, it appears that interested parties did not fully understand these differences. The following discussion clarifies these three important concepts as they apply to small electric motors.

The concept of a basic model was created to help reduce repetitive testing burdens on manufacturers while ensuring that energy efficiency standards are maintained. Equipment classes for small electric motors are represented by the number of boxes contained in the three matrices (*i.e.,* CSIR, CSCR, and polyphase small electric motors) of horsepower ratings and number of poles contained in the chart that organizes these items. In its Preliminary Technical Support Document, the engineering analysis addressed 72 potential equipment classes for small electric motors.[12] *See http://www1.eere.energy.gov/buildings/appliance_standards/commercial/small_electric_motors_nopr_tsd.html.* The equipment classes are the smallest subgroups of small electric motors where DOE would establish discrete efficiency levels—*i.e.,* there would be one efficiency value or equation for each equipment class.

Basic models represent all units of a given type of small electric motor (or class thereof) manufactured by a single manufacturer, having the same rating[13] and electrical characteristics that are essentially identical, and which do not have any differing physical or functional characteristics that affect energy consumption or efficiency. In essence, basic models are unique blueprints for each electrical motor design generated by a manufacturer, even if a particular catalog model incorporates minor design changes as described by Emerson. Minor design changes can occur every day due to customer needs, material costs, and the intrinsic nature of the manufacturing and testing processes. These basic models may have the same numerical efficiency percentages, but they are not the same basic model if they are incorporating design changes that affect their rated nominal full load efficiency (*e.g.,* a stator loss increase offset by a rotor loss decrease).

For 1 through 200 hp electric motors, one manufacturer can have thousands of basic models in any one equipment class. The regulations require each covered electric motor to have a ''nominal full load efficiency of *not less than''* (emphasis added) the prescribed efficiency level. *See* 10 CFR 431.25(a) (listing electric motor efficiency standards), 431.36(b)(1)(i) (requiring certification of efficiency requirements), and 431.36(e) (requiring certification for each basic model). Thus, the regulations allow a manufacturer to conservatively rate their products within a certain efficiency range according to the definition of ''nominal full load efficiency,'' pursuant to 10 CFR 431.12. In other words, the regulations do not prohibit manufacturers from combining a number of basic models into a single basic model and then reporting the combined set at the lowest nominal full load efficiency within that aggregated basic model.

Individual manufacturer burdens are further reduced by simplifying the reporting requirements manufacturers need to meet. For 1–200 hp electric motors, under 10 CFR 431.36(b)(2), a manufacturer must report the nominal full load efficiency of the ''least efficient basic model within that rating.'' The same holds true under 10 CFR 431.36(e) where a new Compliance Certification must be submitted for a new basic model only if the new basic model has a lower nominal full load efficiency than otherwise previously certified. Therefore, while a manufacturer may be preparing thousands of designs for a given equipment class, the manufacturer would only report to DOE (for compliance purposes) the nominal full load efficiency of the least-efficient basic model within any given equipment class. DOE then compares the reported efficiency against the required nominal full load efficiency level to verify that all basic models within a given equipment class by that manufacturer are in compliance. In a future rulemaking, DOE intends to consider similar burden-reducing provisions for small electric motors (the product covered in today's final rule), should DOE establish energy conservation standards for small electric motors.

As discussed earlier in this section, NEMA proposed a new definition for the term ''basic model.'' (NEMA, No. 12 at p. 2) DOE cannot accept NEMA's proposed definition because it is not consistent with the long established and widely accepted basic model concept throughout both 10 CFR parts 430 and

[10] A CSIR motor is a single-phase motor with a main winding arranged for direct connection to a source of power and an auxiliary winding connected in series with a capacitor. The motor has a capacitor phase, which is in the circuit only during the starting period. A CSCR motor is a single-phase motor which has different values of effective capacitance for the starting and running conditions. A polyphase motor is an electric motor that uses the phase changes of the electrical supply to induce a rotational magnetic field and thereby supply torque to the rotor. (*See* Chapter 2: Analytical Framework, Comments from Interested Parties, and DOE Responses, at p. 2–7 (December 30, 2008) (available at *http://www1.eere.energy.gov/buildings/appliance_standards/commercial/pdfs/ch_2_small_motors_nopr_tsd.pdf*).

[11] For covered products in 10 CFR part 431, DOE uses the phrase ''equipment classes'' and for covered products in 10 CFR part 430, DOE uses the phrase ''product classes.'' They signify exactly the same concept, but use slightly different language meant to reflect the use of the word ''product'' for residential appliances in 10 CFR part 430 and the word ''equipment'' for commercial and industrial units in 10 CFR part 431.

[12] *See: http://www1.eere.energy.gov/buildings/appliance_standards/commercial/small_electric_motors_nopr_pub_mtg.html.*

[13] For the purpose of this definition, ''rating'' means a combination of the horsepower (or standard kilowatt hour equivalent), number of poles, and motor type (*i.e.,* capacitor-start, capacitor-run; a capacitor-start, induction-run; or a polyphase small electric motor).

431. DOE understands that NEMA's proposed definition would allow a single basic model to include many different designs of small electric motors that have significantly different utility or performance-related features that affect their efficiency, but which have the same numerical nominal efficiency value. In other words, these motors could have different operating voltages, winding configurations, or other design changes that would make them separate and distinct basic models in view of DOE's national regulatory program. Thus, DOE believes that NEMA's proposed definition is inconsistent with the ''basic model'' concept as it has long been applied and understood across a range of covered consumer products and commercial equipment.

DOE continues to believe that any definition of basic model must require that all the included models have virtually identical energy consumption characteristics and be within the same equipment class. Such an approach is necessary to assure that the efficiency rating derived for a particular basic model accurately represents the efficiency of all of the small electric motors encompassed therein. Therefore, DOE is defining ''basic model'' for small electric motors by including a requirement that any small electric motors falling into a basic model grouping ''not have any differentiating electrical, physical or functional features that affect energy consumption.'' A few examples of electrical, physical, and functional features that may affect energy consumption for small electric motors include, among others, changing: The operating voltage, the electrical steel, the stack height, the wire in the windings, the insulation rating, and the air gap between the stator and rotor.

DOE recognizes that manufacturers will have many basic models that fit under today's definition of basic model for each small electric motor equipment class, *i.e.,* each combination of the group (*i.e.,* capacitor-start, capacitor-run; capacitor-start, induction-run; or polyphase), horsepower rating (or standard kilowatt equivalent), and number of poles. The basic model concept ensures that no design manufactured and distributed in commerce would be below the minimum regulatory standard. However, DOE is unaware of any practicable way to aggregate models with different energy consumption characteristics, for purposes of testing, which would produce an accurate efficiency rating for each model included in an aggregated group of models.

To address undue testing burdens on an individual manufacturer, as discussed later in this notice, DOE is adopting in today's final rule a provision that permits the use of an AEDM, which, once substantiated by a manufacturer, will allow that manufacturer to rate the efficiency of many small electric motors based on calculations and software modeling instead of physical testing. In addition, DOE intends to propose in a future rulemaking the compliance certification provisions for small electric motors, which would likely be based on the established and recognized reporting requirements for (1–200 hp) electric motors at 10 CFR 431.36. These provisions require manufacturers to report only the least efficient rated basic model within an equipment class. Taken together, DOE believes these two provisions will greatly reduce testing and reporting burden on manufacturers of small electric motors while adhering to the existing requirements that apply to both manufacturers of electric motors and other commercial and industrial equipment covered under 10 CFR part 431.

Therefore, in view of all the above, today's final rule defines a basic model for small electric motors as all units of a given type of small electric motor (or class thereof) manufactured by a single manufacturer, having the same rating and electrical characteristics that are essentially identical, and which do not have any differing physical or functional characteristics that affect energy consumption or efficiency. For the purpose of this definition, ''rating'' means a combination of the horsepower (or standard kilowatt hour equivalent), number of poles, and whether the motor is a capacitor-start, capacitor-run; capacitor-start, induction-run; or polyphase small electric motor, with respect to which 10 CFR 431.446 prescribes nominal full load efficiency standards.

B. Test Procedures for the Measurement of Energy Efficiency

DOE proposed that the test procedure for measuring the energy efficiency of a small electric motor be based on one of the following methods: IEEE Std 114, IEEE Std 112, or CAN/CSA–C747–94. (73 FR 78223 and 78238) DOE understands that the scope of small electric motors includes single-phase and polyphase designs that cover fractional and integral horsepower ratings that can be tested according to somewhat different but equivalent methodologies, using the same measurements and producing virtually the same results. The application of these methods and commenter responses to them are further discussed below.

1. Single-Phase Small Electric Motor Test Method

For single-phase small electric motors, DOE proposed to incorporate the test method in IEEE Std 114, which measures and compares output power and input power. In addition, DOE proposed CAN/CSA–C747 as an alternative test method, believing that it would provide equivalent rigor and render virtually equivalent results.

Advanced Energy and NEEA agreed both with the use of IEEE Std 114 and CAN/CSA–C747 as an alternative method. Advanced Energy commented that IEEE Std 114 and the CAN/CSA–C747 are both input-output methods with minor differences and recommended that these test methods be used for single-phase small electric motors. (Advanced Energy, No. 11 at pp. 1–3) NEEA also agreed with DOE's proposal to use IEEE Std 114 and CAN/CSA–C747 as an alternative test method. (NEEA, No. 10 at p. 1) DOE did not receive any comments objecting to the adoption of either test method. Therefore, in today's final rule, DOE is incorporating by reference IEEE Std 114 and the CAN/CSA–C747 as test methods for single-phase small electric motors.

2. Polyphase Small Electric Motor Test Method

For polyphase small electric motors, DOE proposed the use of IEEE Std 112, without specifying the use of one of the particular test methods available in that test procedure, such as Method A or Method B. DOE also proposed that manufacturers be allowed to use CAN/CSA–C747 as an alternative test method on the basis that it would provide equivalent rigor and render equivalent results with IEEE Std 112, while offering manufacturers some flexibility on testing methods used.

In general, interested parties were receptive to DOE's proposal, but requested that DOE specify which test method to use. During the public meeting, a consensus developed that CAN/CSA–C747 is consistent with the IEEE Std 112 Test Method A, but that a different CAN/CSA test method should be used if DOE adopts IEEE Std 112 Test Method B.

Concerning which IEEE Std 112 test method DOE should adopt, Advanced Energy stated that there are several methods in IEEE Std 112 but highlighted Test Methods A and B. (IEEE Std 112 Test Method B has

already been incorporated by reference for 1–200 hp electric motors in 10 CFR 431.15(b)(2).) Advanced Energy described IEEE Std 112 Test Method B as the ''loss segregation method.'' This method determines efficiency by calculating the constituent losses of the motor, including stray load losses, through its measurements and methodology. (Advanced Energy, No. 11 at pp. 1–2) However, Advanced Energy asserted that IEEE Std 112 Test Method B cannot be adopted for all small electric motors because: (1) IEEE Std 112 recommends Test Method A for motors rated less than 1 kilowatt (kW), which covers most of the small electric motors under consideration; and (2) there is an inherently significant difference between the input-output calculation method (IEEE Std 112 Test Method A, consistent with CAN/CSA–C747) and the loss-segregation method (IEEE Std 112 Test Method B, consistent with CAN/CSA–C390 Test Method 1 [14]). Advanced Energy stated that if a polyphase small electric motor were tested according to IEEE Std 112 Test Method B and CAN/CSA–C747, the difference in the efficiency results would be significant; whereas if the same test was done between IEEE Std 112 Test Method A and CAN/CSA–C747, the results would be similar. (Advanced Energy, No. 11 at pp. 1–2)

Advanced Energy summarized its comments as follows: (1) The test procedure for polyphase small electric motors should be IEEE Std 112 Test Method A and the test procedure for single-phase small electric motors should be IEEE Std 114; (2) the CAN/CSA–C747 and IEEE Std 114 test methods are essentially direct input-output methodologies that produce equivalent test results; (3) use of IEEE Std 112 Test Method B for polyphase small electric motors compared to CAN/CSA–C747 would produce significant variations in measured efficiency for the same motor; and (4) CAN/CSA–C747 may be used as an alternative test method alongside IEEE Std 112 Test Method A and IEEE Std 114. (Advanced Energy, No. 11 at p. 3)

NEMA echoed many of the same points raised by Advanced Energy. According to NEMA, IEEE Std 112 lists 11 different procedures for testing polyphase motors. NEMA commented that DOE should identify a specific test procedure to be used for determining the efficiency of small electric motors. (NEMA, No. 12 at pp. 3–4) It noted that IEEE Std 112 Test Method A is the method commonly used by the motor industry for testing small electric motors. While the NOPR proposed the use of ''IEEE Standard 112,'' it did not identify a particular test method that accounts for motor size, such as a (T-frame) ''electric motor'' or a (two-digit frame) ''small electric motor.'' (73 FR 78238) Further, IEEE Std 112 recommends that Test Method A be limited to motors rated less than 1 kW (1.34 hp). Test Method B is recommended for motors rated 1–300 kW and is the test method prescribed in appendix B to subpart B for ''electric motors.'' Test Method A in IEEE Std 112 for polyphase motors is essentially the same as the test methods in IEEE Std 114 for single-phase motors and in CAN/CSA–C747 both for three-phase small motors (up to 0.746 kW at 1800 revolutions per minute (rpm)) and single-phase small motors (up to 7.5 kW). NEMA noted that Test Method B in IEEE Std 112 is essentially equivalent to Test Method 1 in CAN/CSA–C390 for polyphase motors rated 0.746 kW or greater at 1800 rpm. The specific ratings for the application of the CAN/CSA standards are based on a kW rating at 1800 RPM. For other speeds it is assumed that the corresponding rating is based on constant torque, such that the kW rating at some other speed ''S'' would be equal to kW@1800 * S/1800. To cover the required test procedures adequately, NEMA encouraged DOE to add an appendix B to the proposed subpart T (now Subpart X) of 10 CFR part 431, similar to appendix B to subpart B of 10 CFR part 431. Also, NEMA recommended that DOE adopt the use of the various IEEE and CAN/CSA test procedures along with their respective hp/kW ranges, as indicated above. (NEMA, No. 12 at pp. 3–4)

During the public meeting, Baldor added that, for polyphase small electric motors, DOE should adopt both IEEE Std 112 Test Method A and Test Method B. Baldor noted that IEEE Std 112 Test Method A is similar to the test method DOE is adopting for single-phase small electric motors (IEEE Std 114). (Baldor, Public Meeting Transcript, No. 8 at p. 32) DOE did not receive any comments objecting to this approach.

DOE considered all these comments on the testing methodologies for polyphase small electric motors and, consistent with the majority of interested parties, including NEMA, is adopting both IEEE Std 112 Test Method A and Test Method B in today's final rule. DOE is apportioning the covered motors to these two different test methods according to the guidance provided in IEEE Std 112.[15]

DOE had proposed adopting IEEE Std 112 in its entirety, but today's final rule modifies that proposal by delineating the scope of coverage for the test procedure consistent with the recommendation in IEEE Std 112. However, since DOE intends to establish its regulatory standard on the basis of standard horsepower ratings, DOE will not be assigning motors to be tested with IEEE Std 112 Test Method A or Test Method B according to a kilowatt rating. Instead, DOE is basing the applicable test method on horsepower ratings. Since IEEE Std 112 Test Method A is applicable to polyphase small electric motors *below* 1 kilowatt (1.34 horsepower), DOE is applying this method to small electrical motors rated *at or below* 1 horsepower. A demarcation based on horsepower rather than kilowatts makes this division more practicable since manufacturer literature indicates that small electric motors marketed for the U.S. are generally grouped by horsepower ratings, with 1 hp being the first common horsepower rating below 1 kilowatt (1.34 horsepower). Similarly, IEEE Std Test Method B will be applicable to polyphase small electric motors rated greater than 1 horsepower.

Furthermore, in today's final rule, while DOE is adopting CAN/CSA–C747 for single-phase small electric motors, DOE is not adopting any alternative test methods promulgated today for polyphase small electric motors based on CAN/CSA–C747 or CAN/CSA–C390 Test Method 1 because there may be an inconsistency in the measured efficiency associated with units tested under IEEE Std 112 Test Method B and CAN/CSA–C747. Instead, DOE plans to raise this issue in a SNOPR and propose adopting: (1) CAN/CSA–C747 as an alternative to IEEE Std Test Method A for polyphase small electric motors rated less than or equal to one horsepower (0.746 kilowatt) and (2) CAN/CSA–C390, ''Energy Efficiency Test Methods for Three-Phase Induction Motors'' (Test Method 1) as an alternative to IEEE Std Test Method B for polyphase small electric motors that have a rating greater than one horsepower (0.746 kilowatt).

[14] CAN/CSA–C390 Test Method 1 is the Canadian test method that is considered to be equivalent to IEEE 112 Std Test Method B. In the existing test procedure for electric motors in Appendix B to Subpart B of 10 CFR part 431, manufacturers determine efficiency and losses according to either IEEE 112 Std Test Method B or CAN/CSA–C390 Test Method 1.

[15] Section 6.2.1 on page 34 of IEEE Std 112 states ''[t]he input-output method (Efficiency Test Method A) should be limited to machines with ratings less than 1 kW.''

C. Alternative Efficiency Determination Method

1. Statistical Basis for an Alternative Efficiency Determination Method

DOE proposed that the efficiency of a small electric motor must be determined either through actual testing or by using an AEDM, provided that its reliability and accuracy are substantiated by testing five basic models that are based on a sample of five production units selected at random and tested. 73 FR 78238–39.

In view of the above, NEEA commented that while it supported the use of an AEDM methodology, it expressed concern that DOE's proposal to substantiate the AEDM for small electric motors by testing a minimum of five motors, each from a minimum of five basic models, may not produce a statistically defensible model. (NEEA, No. 10 at p. 2) NEEA also questioned whether AEDMs were sufficiently rigorous to predict total power loss within ten percent of the mean total power loss, compared to actual testing. NEEA asserted that total power loss will likely range from 10 to 30 percent, depending on the basic model and the standards that are set. Consequently, the magnitude of AEDM error will approach the difference between two prescribed standard efficiency levels, thereby making it more difficult to justify the standard levels. NEEA requested more discussion about whether a given AEDM's accuracy properly accounts for (1) variability in manufacturing and product performance and (2) limitations in the calculations used to represent the design, construction, and operating conditions of the motors being tested. (NEEA, No. 10 at p. 2)

DOE understands NEEA's concerns about the adequacy of using an AEDM for small electric motors and whether it is sufficient to determine which level of efficiency is supported by testing samples selected from the total population. NEEA's concern appears to be with overlapping nominal efficiency distributions and the probability that the sample tested may indicate an incorrect nominal efficiency for the basic model. DOE understands that two populations of motors could intersect each other, given the variations inherent in the manufacturing process and efficiency testing. This situation is a result of basing calculations on efficiency, when the criteria for selecting discrete values of nominal efficiency for marking small electric motors would be based on step changes in the total losses. Also, the difference in losses between efficiency levels that may appear would be slight, primarily due to mathematical rounding when calculating the efficiency values. Nevertheless, DOE believes that the probability of overlapping efficiency levels is small because the AEDM is substantiated through the modeling and construction of actual small electric motors. As a result, in DOE's view, the use of proposed AEDM is reasonable for compliance certification because it balances the manufacturer's and consumer's risks that the minimum permissible value of average efficiency for the sample falls between the nominal efficiency value to be declared by the manufacturer and the next lower value of nominal efficiency.

Moreover, the proposed AEDM follows the widely accepted precedent for (1–200 hp) electric motors, at 10 CFR 431.17, which is based on National Institute of Standards and Technology (NIST) Internal Report 6092, January 1998, ''Analysis of Proposals for Compliance and Enforcement Testing Under the New Part 431; Title 10, Code of Federal Regulations.'' That report analyzed a variety of criteria and sampling plans for establishing compliance with standards prescribed by EPCA. DOE concluded that the findings of this study, which indicated that the sampling plan for electric motors was statistically sound and sufficiently rigorous to ensure compliance with a regulatory standard, were also appropriate and applicable to the testing of small electric motors. Furthermore, under the new 10 CFR 431.445(b)(3) adopted today, as with 10 CFR 431.17(a)(3), the accuracy and reliability of any AEDM must be substantiated through statistically valid sampling and testing in accordance with established industry standards. Therefore, DOE believes the proposed AEDM requirements are sufficiently rigorous for compliance, without being unduly burdensome to a manufacturer.

2. Sample Size for Substantiating an Alternative Efficiency Determination Method

DOE proposed a statistical sampling regimen for selecting representative basic models out of a population of small electric motors for testing, to validate an AEDM. (73 FR 78239) NEMA pointed out that according to the proposed section 431.345(b)(1)(i)(C), ''the [five] basic models should be of different frame number series without duplication.'' In contrast, the two-digit NEMA frame number series consists only of three values: 42, 48, and 56. While the proposed 10 CFR 431.345(b)(1)(ii) in the NOPR provided instructions for when section 431.345(b)(1)(i)(C) cannot be satisfied, NEMA believed it preferable to recognize this testing requirement at the outset. NEMA suggested that the provision at 10 CFR 431.345(b)(1)(i)(C) be changed to read ''At least one basic model should be selected from each of the frame number series for the designs of small electric motors for which the AEDM is to be used.'' (NEMA, No. 12 at p. 4)

DOE understands that modifying the proposed sampling regimen is necessary to reflect the frame number series available for sampling small electric motors given the relative paucity of two-digit frame number series identified in Table 4–2 in NEMA Standards Publication MG1–2006 (Table 11–1 in NEMA Standards Publication MG1–1987), which has only three frame numbers in the two-digit series. DOE also understands that any sampling plan should represent the total population and, in this case, reflect the importance of substantiating an AEDM by selecting at least one basic model from each frame number series. Consequently, DOE is adopting NEMA's proposed language for section 431.445(b)(1)(i)(C).

3. Omission of Alternative Efficiency Determination Method Substantiation

The NOPR proposed a new section 431.345(b)(2), which would have provided details regarding the manner in which to select units for testing within a basic model. However, NEMA pointed out that the proposed section 431.345(b)(2) did not specify what manufacturers should do with the results of the tests of those five units in determining whether the basic model complies with any efficiency standards that DOE may set in the future. NEMA recommended that DOE establish a clear set of rules to follow as part of the test procedure to determine whether the basic model is in compliance based on the tests of the five units. (NEMA, No. 12 at p. 5)

NEMA also commented that if DOE intended to follow the existing requirements in section 431.17(b)(2) for electric motors, it may need to ascertain whether the same requirements apply to small electric motors, because this section is based on the NEMA nominal and corresponding minimum efficiency values for electric motors from NEMA MG1–12.58.2 (2006). Since the NOPR only proposed to define the term ''average full-load efficiency,'' DOE would need to define the term ''nominal full-load efficiency'' in order to adopt the same requirements for small electric motors that currently apply to electric motors under section 431.17(b)(2). NEMA also pointed out that the electric motors covered under NEMA MG1–

12.58.2 (2006) are tested according to IEEE Std 112 Test Method B and not Test Method A. NEMA offered to assist DOE in developing the proper analysis of the results of the tests of the five units of a basic model, to determine if the basic model complies with any efficiency standard that DOE might establish. (NEMA, No. 12 at p. 5)

DOE appreciates NEMA's comments, but notes that nominal full-load efficiency values need only be defined if and when DOE adopts energy conservation standards for small electric motors. The test procedure is only intended to measure the losses of a particular motor in a sample of motors, which it does. Measured losses can then be used to determine the full-load efficiency for the one motor and, thereafter, to calculate the average of the full-load efficiencies of the several motors in the sample. DOE believes it will become necessary to establish nominal full-load efficiency values in the future, values that would be selected from a table similar to Table 12–10 for 1 to 200 hp electric motors, in MG1–2006. Recognizing that this table is based on efficiency measurements using IEEE Std 112 Test Method B, DOE invites NEMA and other interested parties to provide additional input, data, and information about what a table of nominal full-load efficiencies for small electric motors, tested according to IEEE Std 112 Test Method A and IEEE Std 114, might look like. DOE intends to address the matter of nominal full-load efficiency levels as part of its energy conservation standards rulemaking for small electric motors.

D. Testing Laboratory Accreditation

EPCA provides different requirements for determining the energy efficiency of (two-digit NEMA frame) small electric motors and (three-digit NEMA frame) electric motors. Specifically, section 345(c) of EPCA directs the Secretary of Energy to require manufacturers of ''electric motors'' to ''certify, through an independent testing or certification program nationally recognized in the United States, that [any electric motor subject to EPCA efficiency standards] meets the applicable standard.'' [16] (42 U.S.C. 6316(c)) Section 342(b) of EPCA establishes the applicable energy efficiency standards for electric motors. (42 U.S.C. 6313(b)) EPCA, however, does not include compliance certification requirements for small electric motors. Because small electric motors are covered under section 346(b) of EPCA (42 U.S.C. 6317(b)), the certification requirements that apply to electric motors do not apply to small electric motors.

DOE proposed in the NOPR to allow a manufacturer to self-certify the efficiency test results for its small electric motors (*i.e.,* not require ''independent testing''), which DOE believes is consistent with the compliance certification requirements for other commercial products such as high-intensity discharge lamps and distribution transformers covered under section 346 of EPCA. Nevertheless, DOE is considering proposing at a later date compliance certification requirements for small electric motors equivalent to those in place for electric motors (*i.e.,* requiring manufacturers to test small electric motors through an independent testing or certification program nationally recognized in the United States).

NEMA observed that small electric motors sold in the U.S. are also sold in Canada, and that Canadian regulatory entities are considering following DOE's lead in any efficiency standard developed for small electric motors. (NEMA, No. 12 at p. 4) NEMA noted that the only means to certify compliance for electric motors in Canada is through the CAN/CSA Energy Efficiency Verification Program. Further, given the likelihood that the Canadian government will require small electric motors to be certified through the same CAN/CSA Energy Efficiency Verification Program, NEMA requested that DOE recognize independent third party efficiency certification programs for small electric motors. However, NEMA was clear that it was not encouraging DOE to mandate the use of independent third party certification programs or accreditation programs for testing facilities. Rather, it stressed that DOE recognition of such programs would encourage voluntary use of certification through third parties, such as NIST/NVLAP. In addition, NEMA recommended that DOE allow sufficient time for the approval of such programs and manufacturer participation in such programs because no accreditation programs for testing in accordance with IEEE Std 112 Method A, IEEE Std 114, or CAN/CSA–C747 currently exist.

NEEA expressed its support for a nationally recognized certification program or accredited laboratory, according to the requirements established in 10 CFR 431.17(a)(5). Further, it recommended that DOE apply the same requirements to the small electric motors covered in this rulemaking. (NEEA, No. 10 at p. 2)

In view of the above comments, DOE intends to address these matters as part of a SNOPR for electric motor test procedures, and will invite comments as to whether independent third party compliance certification or laboratory accredited programs for small electric motors should (1) be established and (2) be made mandatory or voluntary.

E. Certification and Enforcement

NEMA expressed concern that the proposed subpart T (now Subpart X) of 10 CFR part 431 did not include a means for identifying the test procedure to follow when certifying the efficiency of a small electric motor. (NEMA, No. 12 at p. 5) Also, NEMA questioned how DOE would enforce any potential energy efficiency standards for small electric motors, particularly for those small electric motors incorporated into equipment that is imported into the United States. NEMA asked how DOE intends to make enforcement applicable to small electric motors in 10 CFR part 431. (NEMA, No. 12 at p. 6)

DOE notes that it published in the **Federal Register** a NOPR that, in part, included provisions under a new Subpart T—Certification and Enforcement to ensure compliance with EPCA's energy conservation standards, which, with minor modifications could apply to small electric motors. 71 FR 42178, 42214 (July 25, 2006). In that NOPR, DOE proposed a new section 431.370 that described the purpose and scope of a proposed subpart T of 10 CFR part 431. Subpart T would set forth the procedures to be followed for manufacturer compliance certifications of all covered equipment except electric motors (which are not small electric motors). Subpart T would also set forth details regarding the determination of whether a basic model of covered equipment, other than electric motors and distribution transformers, complies with the applicable energy or water conservation standard set forth in 10 CFR part 431.

Although Subpart T—Certification and Enforcement as proposed in the July 2006 NOPR would not apply to 1–200 horsepower electric motors, it would apply to small electric motors, should DOE promulgate energy conservation standards for this equipment. However, because the July 26, 2006, NOPR remains an active and on-going rulemaking at DOE and, to avoid confusion, DOE chose not to propose certification and enforcement

[16] Further, 10 CFR 431.17(a)(5) provides for a manufacturer to establish compliance either through (1) a certification program that DOE has classified as nationally recognized, such as CAN/CSA or Underwriters Laboratories, Inc., or (2) testing in any laboratory that is accredited by the National Institute of Standards and Technology/National Voluntary Laboratory Accreditation Program (NIST/NVLAP).

requirements in its December 2008 NOPR. 73 FR 78220.

F. Other Issues Raised

In response to the December 2008 NOPR, interested parties drawing comparisons between provisions for electric motors in 10 CFR part 431 and the proposed test procedure for small electric motors submitted questions concerning issues and requirements that were not included in the NOPR. These issues are addressed below.

1. Definition of ''Nominal Full-Load Efficiency''

NEMA noted that for electric motors covered under Subpart B of 10 CFR part 431, the term ''nominal full-load efficiency'' is the metric for determining compliance with the applicable energy efficiency standards in 10 CFR 431.25. The term ''nominal full-load efficiency'' is defined under 10 CFR 431.12 and, in part, elements of the definition refer to NEMA MG1–1993 Table 12–8, which provides a column of nominal efficiency values and a column of corresponding minimum efficiency values. NEMA expressed concern that the NOPR did not specify which nominal full load efficiency values DOE plans to use when determining small electric motor compliance. NEMA offered to assist DOE in this regard. (NEMA, No. 12 at p. 3)

DOE appreciates NEMA's offer and recognizes that there are different full-load efficiency values defined in 10 CFR 431.12: average full-load efficiency [17] and nominal full-load efficiency.[18] Also, DOE recognizes that the efficiency values presented in NEMA MG1–1993 Table 12–8 were created using IEEE Std 112 Test Method B, and may not apply to all small electric motors, most of which will be measured for efficiency using IEEE Std 114 and IEEE Std 112 Test Method A.

DOE is concerned about the actual measured energy efficiency and AEDM-modeled energy efficiency, making the output of the measured or modeled efficiency value the most relevant factor when comparing energy efficiency standards. As a result, DOE plans to define nominal full-load efficiency for small electric motors under a separate rulemaking.

2. Materials Incorporated by Reference

In its December 2008 NOPR, DOE proposed test procedures for small electric motors by incorporating by reference IEEE Std 112, ''Test Procedure for Polyphase Induction Motors and Generators,'' IEEE Std 114, ''Test Procedure for Single-Phase Motors,'' and CAN/CSA–C747, ''Energy Efficiency for Single- and Three-Phase Small Motors.'' In addition, DOE proposed to update the citations of industry standards that are incorporated by reference under 10 CFR 431.15, which included NEMA Standards Publication MG1, ''Motors and Generators;'' IEEE Std 112, ''Test Procedure for Polyphase Induction Motors and Generators;'' and CAN/CSA–C390, ''Energy Efficiency Test Methods for Three-Phase Induction Motors.'' 73 FR 78221.

NEMA expressed concern that DOE proposed for incorporation by reference into new 10 CFR 431.343 for small electric motors, only certain test methods in IEEE Std 112 and 114, and, separately, CAN/CSA C747 and C390. This was in contrast to DOE's inclusion of construction and performance standards for ''electric motors'' in 10 CFR 431.15. In NEMA's view, this omission was particularly troubling because DOE overlooked incorporating by reference certain IEC standards into the new proposed Subpart T (now Subpart X) of 10 CFR part 431. NEMA requested that DOE include the appropriate NEMA and IEC standards in the list of materials incorporated by reference and identify the source for those materials. (NEMA, No. 12 at p. 3)

DOE did not incorporate by reference construction and performance standards for small electric motors in the NOPR because of statutory limitations. Outside of clarifying the EPCA definition of ''small electric motor,'' 42 U.S.C. 6311(13)(G), DOE's mandate for establishing test procedures and energy conservation standards for small electric motors does not extend to prescribing construction or performance standards. Where 10 CFR 431.15 prescribes certain provisions in NEMA Standards Publication MG1 and IEC 60050–411, 60072–1, and 60034–12, which, collectively, include dimensions, mounting, frames, and performance characteristics, DOE made such provisions to clarify the scope of coverage of electric motors. 64 FR 54114 (October 5, 1999) (final rule covering test procedures, labeling, and certification requirements for electric motors). At the time of that rulemaking, DOE added a policy statement as appendix A to Subpart A of 10 CFR part 431 (presently appendix A to Subpart B of 10 CFR part 431) to provide additional guidance as to which types of motors are ''electric motors.'' Notwithstanding the provisions under 10 CFR 431.15, other products covered in 10 CFR part 431 do not address construction and performance standards or similar requirements. DOE addresses scope of coverage matters in section III.A of today's rule, and clarifies what it considers IEC-equivalent small motors that could be used as substitutes for covered small electric motors. Therefore, DOE makes no changes in today's final rule that would otherwise pertain to construction and performance standards for small electric motors. As explained above, DOE considers IEC-equivalent motors, which can be used as substitutes for small electric motors, to be covered.

3. Labeling Requirements

The December 2008 NOPR did not provide requirements for labeling energy efficiency or compliance certification for small electric motors. NEMA argued that DOE omitted provisions for labeling energy efficiency and compliance certification information for small electric motors in the newly proposed Subpart T (now Subpart X) of 10 CFR part 431. NEMA recommended that DOE include such provisions, similar to those in 10 CFR 431.30 [10 CFR 431.31] for ''electric motors.'' Further, NEMA suggested that DOE permit a manufacturer, both of electric motors and small electric motors, to use the same compliance certification number on both its electric motors and small electric motors. (NEMA, No. 12 at p. 5)

The NOPR did not provide labeling requirements for small electric motors because DOE has not yet established whether energy conservation standards will be adopted for small electric motors. Once DOE establishes these standards, it will prescribe labeling requirements consistent with the statute. (42 U.S.C. 6317).

4. Preemption of State Standards and Labeling

Sections 431.26 and 431.32 of 10 CFR part 431 cover electric motors and provide for preemption of State regulations, both for energy conservation standards and disclosure of electric motor information with respect to energy consumption. The NOPR does not address preemption of State regulation.

[17] Average full-load efficiency is defined as ''the arithmetic mean of the full-load efficiencies of a population of electric motors of duplicate design, where the full-load efficiency of each motor in the population is the ratio (expressed as a percentage) of the motor's useful power output to its total power input when the motor is operated at its full rated load, rated voltage, and rated frequency.'' 10 CFR 431.12.

[18] Nominal full-load efficiency is defined as ''a representative value of efficiency selected from Column A of Table 12–8, NEMA Standards Publication MG1–1993, (incorporated by reference, *see* 10 CFR 431.15), that is not greater than the average full-load efficiency of a population of motors of the same design.'' 10 CFR 431.12.

NEMA noted that the NOPR did not include a specific preemption provision for small electric motors in new Subpart T (now Subpart X) of 10 CFR part 431, and recommended that DOE include such a provision for preemption much like the one that currently applies to electric motors in 10 CFR 431.26. (NEMA, No. 12 at p. 5)

As a preliminary matter, DOE notes that Congress specifically provided for the preemption of electric motors. *See* 42 U.S.C. 6316(a). However, a similar provision was not included for small electric motors. However, small electric motors standards would be covered under general preemption principles. Energy conservation standards that are established under, or promulgated pursuant to, EPCA are national standards. In general, these standards preempt State and local regulations when those regulations conflict with the national standards unless otherwise provided by law. With respect to the energy conservation standards, States may petition DOE for a waiver from these standards. By statute, a State must demonstrate that unusual and compelling State or local energy interests exist that would justify the granting of such a waiver. Accordingly, DOE does not believe that the inclusion of a specific preemption provision is required.

5. Petitions and Waivers

Subpart V—General Provisions of 10 CFR part 431 prescribes requirements for the submissions of petitions for waiver and interim waivers for any basic model of electric motor covered under 10 CFR 431.16. The NOPR did not address petitions for waiver, and applications for interim waiver, of test procedures for small electric motors.

NEMA questioned whether DOE intends to make applicable to small electric motors the relevant parts of ''Subpart L, General Provisions'' [19] for electric motors, or create a new subpart. (NEMA, No. 12 at p. 6)

DOE intends to address this issue specifically in a separate rulemaking.[20]

[19] Although NEMA says ''Subpart L, General Provisions'' from the context of their comment, it is clear it meant ''Subpart V, General Provisions.'' Subpart L was redesignated Subpart V on October 18, 2005. 70 FR 60417.

[20] DOE notes that Section 323(e) of EPCA (42 U.S.C. 6293(e)), which requires DOE to consider the impacts of a test procedure amendment to the applicable energy efficiency or energy use of a covered product, does not apply in this instance because DOE is promulgating a new test procedure for small electric motors and no energy conservation standards are currently in effect.

IV. Procedural Requirements

A. Executive Order 12866

Today's regulatory action is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993). Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless DOE certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site, *http://www.gc.doe.gov.*

DOE reviewed today's final rule under the provisions of the Regulatory Flexibility Act and the policies and procedures published on February 19, 2003. DOE tentatively certified in the December 22, 2008 NOPR that the proposed rule would not have a significant impact on a substantial number of small entities. 73 FR 78232. In the NOPR, DOE made this tentative certification for small electric motors based on the fact that: (1) DOE is not imposing any additional testing requirements or higher accuracy tolerances beyond what is already contained in the industry standards documents incorporated by reference for this equipment (*i.e.,* IEEE Std 114, IEEE Std 112 and CSA C747); (2) DOE is adopting testing requirements that the industry already follows, avoiding any significant increase in testing or compliance costs; and (3) DOE is consistent with current industry test procedures and methodologies, thereby eliminating confusion and any undue burden from determining the efficiency of an electric motor according to two separate test procedures for potentially the same result.

DOE did not receive any comments addressing small business impacts for manufacturers of small electric motors. Thus, DOE reaffirms and certifies that this rule will have no significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. In today's final rule, DOE adopts new test procedures and associated documentation retention and reporting requirements for small electric motors. However, unless and until DOE requires manufacturers of small electric motors to comply with energy conservation standards, a manufacturer would not be required to comply with these record-keeping provisions because of the absence of certification/compliance requirements applicable to the test procedures. Therefore, today's final rule would not impose any new reporting requirements requiring approval by OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

D. National Environmental Policy Act

In this rule, DOE adopts new test procedures that are used to measure and determine the energy efficiency of small electric motors. This rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969, (NEPA) 42 U.S.C. 4321 *et seq.,* and DOE's implementing regulations at 10 CFR part 1021. DOE has determined that this rule is covered under the Categorical Exclusion found in DOE's National Environmental Policy Act regulations at paragraph A.6 of Appendix A to Subpart D, 10 CFR part 1021, which applies to rulemakings that are strictly procedural. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 10, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. DOE examined this final rule and determined that it would not have a substantial direct effect on the States, on the

relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, Executive Order 13132 requires no further action.

F. Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. Regarding the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires, among other things, that Executive agencies make every reasonable effort to ensure that the regulation (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this rule meets the relevant standards of Executive Order 12988.

G. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4; UMRA) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and Tribal governments. Subsection 101(5) of title I of that law defines a Federal intergovernmental mandate to include any regulation that would impose upon State, local, or Tribal governments an enforceable duty, except a condition of Federal assistance or a duty arising from participating in a voluntary Federal program. Title II of UMRA requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. For proposed regulatory actions likely to result in a rule that may cause expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish estimates of the resulting costs, benefits, and other effects on the national economy. Section 204 of UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate.'' On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA (62 FR 12820) (also available at *http://www.gc.doe.gov.* Today's final rule would establish new test procedures that would be used in measuring the energy efficiency of small electric motors. Today's rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure by State, local, and Tribal governments, or by the private sector, of $100 million or more in any year. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

H. Treasury and General Government Appropriations Act, 1999

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

I. Executive Order 12630

Pursuant to Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 15, 1988), DOE has determined that this rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (Pub. L. 106–554, codified at 44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's notice under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's regulatory action is not a significant regulatory action under Executive Order 12866 or any successor order; would not have a significant adverse effect on the supply, distribution, or use of energy; and has not been designated by the Administrator of OIRA as a significant energy action. Therefore, this rule is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

L. Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91), DOE must comply with all laws applicable to the former Federal Energy Administration, including section 32 of the Federal Energy Administration Act of 1974 (Pub. L. 93–275), as amended by the Federal Energy Administration Authorization Act of 1977 (Pub. L. 95–70). (15 U.S.C. 788) Section 32 provides that where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. Section

32(c) also requires DOE to consult with the Department of Justice and the Federal Trade Commission (FTC) concerning the impact of commercial or industry standards on competition.

Certain of the amendments and revisions in this final rule incorporate testing methods contained in the following commercial standards: (1) IEEE Std 114, ''IEEE Standard Test Procedure for Single-Phase Induction Motors''; (2) IEEE Std 112, ''IEEE Standard Test Procedure for Polyphase Induction Motors and Generators''; and CAN/CSA C747, ''Energy Efficiency Test Methods for Single- and Three-Phase Small Motors.'' As stated in the December 22, 2008 NOPR, DOE has evaluated these standards and is unable to conclude whether they fully comply with the requirements of section 32(b) of the Federal Energy Administration Act (*i.e.,* that they were developed in a manner that fully provides for public participation, comment, and review). 73 FR 48054, 48079. DOE has consulted with the Attorney General and the Chairman of the FTC concerning the impact on competition of requiring manufacturers to use the test methods contained in these standards, and neither recommended against incorporation by reference of these standards.

M. Congressional Notification

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

V. Approval of the Office of the Secretary

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

List of Subjects in 10 CFR Part 431

Administrative practice and procedure, Commercial and industrial equipment, Confidential business information, Energy conservation, Incorporation by reference, Reporting and recordkeeping requirements.

Issued in Washington, DC, on June 29, 2009.

Steven G. Chalk,

Principal Deputy Assistant Secretary, Energy Efficiency and Renewable Energy.

■ For the reasons stated in the preamble, part 431 of chapter II of title 10, Code of Federal Regulations, is amended as set forth below:

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

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

Authority: 42 U.S.C. 6291–6317.

■ 2. Add a new subpart X to part 431 to read as follows:

Subpart X—Small Electric Motors

Sec.
431.441 Purpose and scope.
431.442 Definitions.

Test Procedures

431.443 Materials incorporated by reference.
431.444 Test procedures for the measurement of energy efficiency.
431.445 Determination of small electric motor energy efficiency.

Energy Conservation Standards

431.446 Small electric motors energy conservation standards and their effective dates.

§ 431.441 Purpose and scope.

This subpart contains definitions, test procedures, and energy conservation requirements for small electric motors, pursuant to Part A–1 of Title III of the Energy Policy and Conservation Act, as amended, 42 U.S.C. 6311–6317.

§ 431.442 Definitions.

The following definitions are applicable to this subpart:

Alternative efficiency determination method, or AEDM, means, with respect to a small electric motor, a method of calculating the total power loss and average full-load efficiency.

Average full-load efficiency means the arithmetic mean of the full-load efficiencies of a population of small electric motors of duplicate design, where the full-load efficiency of each motor in the population is the ratio (expressed as a percentage) of the motor's useful power output to its total power input when the motor is operated at its full rated load, rated voltage, and rated frequency.

Basic model means, with respect to a small electric motor, all units of a given type of small electric motor (or class thereof) manufactured by a single manufacturer, and which have the same rating, have electrical characteristics that are essentially identical, and do not have any differing physical or functional characteristics that affect energy consumption or efficiency. For the purpose of this definition, ''rating'' means a combination of the small electric motor's group (*i.e.,* capacitor-start, capacitor-run; capacitor-start, induction-run; or polyphase), horsepower rating (or standard kilowatt equivalent), and number of poles with respect to which § 431.446 prescribes nominal full load efficiency standards.

CAN/CSA means Canadian Standards Association.

DOE or *the Department* means the U.S. Department of Energy.

EPCA means the Energy Policy and Conservation Act, as amended, 42 U.S.C. 6291–6317.

IEC means International Electrotechnical Commission.

IEEE means Institute of Electrical and Electronics Engineers, Inc.

NEMA means National Electrical Manufacturers Association.

Small electric motor means a NEMA general purpose alternating current single-speed induction motor, built in a two-digit frame number series in accordance with NEMA Standards Publication MG1–1987, including IEC metric equivalent motors.

Test Procedures

§ 431.443 Materials incorporated by reference.

(a) *General.* The Department incorporates by reference the following standards into Subpart X of part 431. The Director of the Federal Register has approved the material listed in paragraph (b) of this section for incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Any subsequent amendment to a standard by the standard-setting organization will not affect the DOE test procedures unless and until the DOE amends its test procedures. DOE incorporates the material as it exists on the date of the approval and a notice of any change in the material will be published in the **Federal Register.** All approved material is available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* Also, this material is available for inspection at U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, Sixth Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024, (202) 586–2945, or go to *http://www1.eere.energy.gov/buildings/appliance_standards/.* Standards can be obtained from the sources below.

(b) *CAN/CSA.* Canadian Standards Association, Sales Department, 5060 Spectrum Way, Suite 100, Mississauga,

Ontario, L4W 5N6, Canada, 1–800–463–6727, or go to *http://www.shopcsa.ca/onlinestore/welcome.asp.*

(1) CAN/CSA–C747–94 (''CAN/CSA–C747'') (Reaffirmed 2005), *Energy Efficiency Test Methods for Single- and Three-Phase Small Motors,* IBR approved for § 431.444.

(2) [Reserved]

(c) *IEEE.* Institute of Electrical and Electronics Engineers, Inc., 445 Hoes Lane, P.O. Box 1331, Piscataway, NJ 08855–1331, 1–800–678–IEEE (4333), or go to *http://www.ieee.org/web/publications/home/index.html.*

(1) IEEE Std 112™–2004 (Revision of IEEE Std 112–1996) (''IEEE Std 112''), *IEEE Standard Test Procedure for Polyphase Induction Motors and Generators,* approved February 9, 2004, IBR approved for § 431.444.

(2) IEEE Std 114–2001™ (Revision of IEEE Std 114–1982) (''IEEE Std 114''), *IEEE Standard Test Procedure for Single-Phase Induction Motors,* approved December 6, 2001, IBR approved for § 431.444.

§ 431.444 Test procedures for the measurement of energy efficiency.

(a) *Scope.* Pursuant to section 346(b)(1) of EPCA, this section provides the test procedures for measuring, pursuant to EPCA, the efficiency of small electric motors pursuant to EPCA. (42 U.S.C. 6317(b)(1)) For purposes of this Part 431 and EPCA, the test procedures for measuring the efficiency of small electric motors shall be the test procedures specified in § 431.444(b).

(b) *Testing and Calculations.* Determine the energy efficiency and losses by using one of the following test methods:

(1) Single-phase small electric motors: either IEEE Std 114, (incorporated by reference, *see* § 431.443), or CAN/CSA C747, (incorporated by reference, *see* § 431.443);

(2) Polyphase small electric motors less than or equal to 1 horsepower (0.746 kW): IEEE Std 112 (incorporated by reference, *see* § 431.443), Test Method A; or

(3) Polyphase small electric motors greater than 1 horsepower (0.746 kW): IEEE Std 112 (incorporated by reference, *see* § 431.443), Test Method B.

§ 431.445 Determination of small electric motor efficiency.

(a) *Scope.* When a party determines the energy efficiency of a small electric motor to comply with an obligation imposed on it by or pursuant to Part A–1 of Title III of EPCA, 42 U.S.C. 6311–6317, this section applies.

(b) *Provisions applicable to all small electric motors*—(1) *General requirements.* The average full-load efficiency of each basic model of small electric motor must be determined either by testing in accordance with § 431.444 of this subpart, or by application of an alternative efficiency determination method (AEDM) that meets the requirements of paragraphs (a)(2) and (3) of this section, provided, however, that an AEDM may be used to determine the average full-load efficiency of one or more of a manufacturer's basic models only if the average full-load efficiency of at least five of its other basic models is determined through testing.

(2) *Alternative efficiency determination method.* An AEDM applied to a basic model must be:

(i) Derived from a mathematical model that represents the mechanical and electrical characteristics of that basic model, and

(ii) Based on engineering or statistical analysis, computer simulation or modeling, or other analytic evaluation of performance data.

(3) *Substantiation of an alternative efficiency determination method.* Before an AEDM is used, its accuracy and reliability must be substantiated as follows:

(i) The AEDM must be applied to at least five basic models that have been tested in accordance with § 431.444; and

(ii) The predicted total power loss for each such basic model, calculated by applying the AEDM, must be within plus or minus 10 percent of the mean total power loss determined from the testing of that basic model.

(4) *Subsequent verification of an AEDM.* (i) Each manufacturer that has used an AEDM under this section shall have available for inspection by the Department of Energy records showing the method or methods used; the mathematical model, the engineering or statistical analysis, computer simulation or modeling, and other analytic evaluation of performance data on which the AEDM is based; complete test data, product information, and related information that the manufacturer has generated or acquired pursuant to paragraph (a)(3) of this section; and the calculations used to determine the efficiency and total power losses of each basic model to which the AEDM was applied.

(ii) If requested by the Department, the manufacturer shall conduct simulations to predict the performance of particular basic models of small electric motors specified by the Department, analyses of previous simulations conducted by the manufacturer, sample testing of basic models selected by the Department, or a combination of the foregoing.

(c) *Additional testing requirements*—(1) *Selection of basic models for testing if an AEDM is to be applied.*

(i) A manufacturer must select basic models for testing in accordance with the criteria that follow:

(A) Two of the basic models must be among the five basic models with the highest unit volumes of production by the manufacturer in the prior year, or during the prior 12-month period before the effective date of the energy efficiency standard, whichever is later, and in identifying these five basic models, any small electric motor that does not comply with § 431.446 shall be excluded from consideration;

(B) The basic models should be of different horsepower ratings without duplication;

(C) At least one basic model should be selected from each of the frame number series for the designs of small electric motors for which the AEDM is to be used; and

(D) Each basic model should have the lowest nominal full-load efficiency among the basic models with the same rating (''rating'' as used here has the same meaning as it has in the definition of ''basic model'').

(ii) If it is impossible for a manufacturer to select basic models for testing in accordance with all of these criteria, the criteria shall be given priority in the order in which they are listed. Within the limits imposed by the criteria, basic models shall be selected randomly.

(2) [RESERVED]

Energy Conservation Standards

§ 431.446 Small electric motors energy conservation standards and their effective dates.

[Reserved]

[FR Doc. E9–15795 Filed 7–6–09; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2009–0042; Airspace Docket No. 09–ANM–1]

Modification of Class E Airspace; Montrose, CO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action will modify Class E airspace at Montrose Regional Airport,

Montrose, CO. Additional controlled airspace is necessary to accommodate aircraft using the Instrument Landing System (ILS) Localizer/Distance Measuring Equipment (LOC/DME) Standard Instrument Approach Procedure (SIAP) at Montrose Regional Airport, Montrose, CO. This will improve the safety of Instrument Flight Rules (IFR) aircraft executing the ILS LOC/DME SIAP at Montrose Regional Airport, Montrose, CO.

DATES: *Effective Date:* 0901 UTC, October 22, 2009. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Eldon Taylor, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue, SW., Renton, WA 98057; telephone (425) 203–4537.

SUPPLEMENTARY INFORMATION:

History

On April 13, 2009, the FAA published in the **Federal Register** a notice of proposed rulemaking to establish additional controlled airspace at Montrose, CO (74 FR 16812). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9S signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR part 71.1. The Class E airspace designations listed in this document will be published subsequently in that Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by amending the Class E airspace at Montrose, CO. Additional controlled airspace extending upward from 700 feet above the surface is necessary to accommodate IFR aircraft executing ILS LOC/DME approach procedures at Montrose Regional Airport, Montrose, CO.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. The FAAs authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106 discusses the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes additional controlled airspace at Montrose Regional Airport, Montrose, CO.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9S, Airspace Designations and Reporting Points, signed October 3, 2008, and effective October 31, 2008 is amended as follows:

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

* * * * *

ANM CO, E5 Montrose, CO [Modify]

Montrose Regional Airport, CO
(Lat. 38°30′35″ N., long. 107°53′39″ W.)
Montrose VOR/DME
(Lat. 38°30′23″ N., long. 107°53′57″ W.)

That airspace extending upward from 700 feet above the surface within a 7.2-mile radius of the Montrose Regional Airport and within 4.3 miles northeast and 8.3 miles southwest of the Montrose VOR/DME 313° and 133° radials extending from 7.2 miles southeast to 21.4 miles northwest of the VOR/DME, and within 4 miles each side of the Montrose VOR/DME 360° radial extending to 13.6 miles north of the VOR/DME; and that airspace extending upward from 1,200 feet above the surface within an area bounded by a point beginning at lat. 38°40′00″ N., long. 108°46′00″ W.; to lat. 38°25′00″ N., long. 108°42′30″ W.; to lat. 37°58′00″ N., long. 108°10′00″ W.; to lat. 38°09′00″ N., long. 107°35′00″ W.; to lat. 38°43′00″ N., long. 107°39′30″ W.; to lat. 38°51′30″ N., long. 107°41′00″ W.; to lat. 39°01′00″ N., long. 107°47′00″ W.; to lat. 39°01′00″ N., long. 108°09′00″ W.; thence to the point of beginning.

* * * * *

Issued in Seattle, Washington, on June 26, 2009.

H. Steve Karnes,

Acting Manager, Operations Support Group, Western Service Center.

[FR Doc. E9–15876 Filed 7–6–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2009–0253; Airspace Docket No. 09–ANM–2]

Modification of Class E Airspace; Twin Falls, ID

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action will modify Class E airspace at Twin Falls, ID. Additional controlled airspace is necessary to accommodate aircraft using a new VHF Omni-Directional Radio Range (VOR) Standard Instrument Approach Procedure (SIAP) at Twin Falls Joslin Field—Magic Valley Regional, Twin Falls, ID. This will improve the safety of Instrument Flight Rules (IFR) aircraft executing the new VOR SIAP at Twin Falls Joslin Field—Magic Valley Regional, Twin Falls, ID.

DATES: *Effective Date:* 0901 UTC, October 22, 2009. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Eldon Taylor, Federal Aviation Administration, Operations Support

Group, Western Service Center, 1601 Lind Avenue SW., Renton, WA, 98057; telephone (425) 203–4537.

SUPPLEMENTARY INFORMATION:

History

On April 15, 2009, the FAA published in the **Federal Register** a notice of proposed rulemaking to establish additional controlled airspace at Twin Falls, ID (74 FR 17441). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9S signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR part 71.1. The Class E airspace designations listed in this document will be published subsequently in that Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by amending the Class E airspace at Twin Falls, ID. Additional controlled airspace is necessary to accommodate IFR aircraft executing a new VOR approach procedure at Twin Falls Joslin Field—Magic Valley Regional, Twin Falls, ID.

The FAA has determined this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, discusses the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes additional controlled airspace at Twin Falls Joslin Field—Magic Valley Regional, Twin Falls, ID.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9S, Airspace Designations and Reporting Points, signed October 3, 2008, and effective October 31, 2008 is amended as follows:

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

* * * * *

ANM ID E5 Twin Falls, ID [Modified]

Twin Falls Joslin Field—Magic Valley Regional, ID
(Lat. 42°28′55″ N., long. 114°29′16″ W.)
Twin Falls VORTAC
(Lat. 42°28′47″ N., long. 114°29′22″ W.)

That airspace extending upward from 700 feet above the surface within 10.5 miles north and 4.3 miles south of the Twin Falls VORTAC 086° radial extending 26.1 miles east, and within 4.3 miles each side of the VORTAC 156° radial extending from the VORTAC to 8.3 miles southeast of the VORTAC, and within 10.3 miles north and 7.3 miles south of the VORTAC 281° radial extending 20 miles west; that airspace extending upward from 1,200 feet above the surface bounded on the northeast by a line beginning at the intersection of long. 114°01′03″ W. and V–500, extending south along long. 114°01′03″ W., to V–269, southwest along V–269 to the 18.3-mile radius of the Twin Falls VORTAC, thence clockwise via the 18.3-mile radius to V–484, northwest along V–484 to the 14.4-mile radius of the Twin Falls VORTAC, thence clockwise along the 14.4-mile radius to V–293, southwest along V–293 to the intersection of V–293 and long. 115°00′00″ W., thence north along long. 115°00′00″ W. to a point 7.9 miles southwest of V–253, thence northwest and parallel to V–253 for 25.9 miles, thence to the intersection of V–4, V–253, and V–330, east along V–330 to V–293, north along V–293 to V–500, then to the point of beginning; excluding that airspace within Federal airways.

* * * * *

Issued in Seattle, Washington, on June 26, 2009.

H. Steve Karnes,

Acting Manager, Operations Support Group, Western Service Center.

[FR Doc. E9–15873 Filed 7–6–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2009–0526]

RIN 1625–AA00

Safety Zones; Fireworks Displays in Boothbay Harbor, South Gardiner, and Woolwich, ME

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing five temporary safety zones for the ''Windjammer Days Fireworks'', the ''Boothbay Harbor Fourth of July Fireworks'', the ''Heritage Days Fireworks'', the ''Westerlund's Landing Party Fireworks'', and the ''Town of Woolwich 250th Celebration'' in the towns of Boothbay Harbor, South Gardiner, and Woolwich, Maine. These temporary safety zones are necessary to provide for the safety of life on the navigable waters by prohibiting spectators, vessels, and other users of the waterway from entering an area surrounding the fireworks launch site due to the hazards associated with fireworks displays.

DATES: This rule is effective from 8 p.m. on June 24, 2009 until 10 p.m. on August 3, 2009.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2009–0526 and are available online by going to *http://www.regulations.gov,* selecting the Advanced Docket Search option on the right side of the screen, inserting USCG–2009–0526 in the Docket ID box, pressing Enter, and then clicking on the item in the Docket ID column. They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m.

and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail BMC Randy Bucklin, Coast Guard Sector Northern New England, Waterways Management Division; telephone 207–741–5440, e-mail *Randy.Bucklin@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because a notice and comment period would be impracticable due to the time constraints resulting from the immediacy of the upcoming events. The Coast Guard did not receive notification of the exact location or proposed dates for the fireworks events in sufficient time to issue a NPRM for this rulemaking. Further, the expeditious implementation of this rule is in the public interest because it will help ensure the safety of those involved in displaying the fireworks, the spectators, and users of the waterway during the fireworks events. Finally, a delay or cancellation of the fireworks events in order to accommodate a notice and comment period is contrary to the public's interest in this event occurring as scheduled.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. As noted above, the Coast Guard finds that it is both impractical and contrary to public interest to delay the effective date of this rule for 30 days after publication. Immediate action is needed in order to ensure the safety of the fireworks display crew, spectators and users of the waterway. The public will likely have close to 30 days notice after publication in the **Federal Register** for the two events scheduled in August, specifically the Westerlund's Landing Party Fireworks and the Town of Woolwich 250th Celebration Fireworks.

Background and Purpose

The ''Windjammer Days Fireworks'', the ''Boothbay Harbor Fourth of July Fireworks'', the ''Heritage Days Fireworks'', the ''Westerlund's Landing Party Fireworks'', and the ''Town of Woolwich 250th Celebration'' are annual marine fireworks events held in the months of June, July, and August, in the towns of Boothbay Harbor, South Gardiner, and Woolwich Maine.

These regulations will establish fixed safety zones around the perimeter of the affected portions of Boothbay Harbor, Woolwich, and South Gardiner waterways. These safety zones are designed to protect spectators and vessels from the hazards associated with fireworks displays, and to protect the sponsors from the dangers of nearby vessel traffic by preventing entry into the zone during the enforcement time unless prior authorization is received by the Coast Guard Captain of the Port Northern New England. Hazards include the explosive and flammable nature of the fireworks and the risks to persons and property that could come in contact with burning material as well as the associated high noise level to those in close proximity to the explosions.

Discussion of Rule

This rule creates the following temporary safety zones: ''Windjammer Days Fireworks'': All navigable waters of Boothbay Harbor within a 500 yard radius of the fireworks launch site in the vicinity of Clam Rock in approximate location latitude 43°50′38″ N, longitude 069°37′57″ W. This safety zone will be enforced from 8 p.m. to 10 p.m. on June 24, 2009 with a rain date of July 4, 2009; ''Boothbay Harbor Fourth of July Fireworks'': All navigable waters of Boothbay Harbor within a 500 yard radius of the fireworks launch site within the vicinity of Clam Rock in approximate location latitude 43°50′38″ N, longitude 069°37′57″ W. This safety zone will be enforced from 8 p.m. to 10 p.m. on July 5, 2009 with a rain date of July 6, 2009;

''Heritage Days Fireworks'': All navigable waters of the Kennebec River within a 500 yard radius of the fireworks launch site in the vicinity of Reed and Reed Boat Yard, Woolwich, Maine in approximate location latitude 43°54′56″ N, longitude 069°48′16″ W. This safety zone will be enforced from 8 p.m. to 10:30 p.m. on August 1, 2009 with a rain date of August 2, 2009;

''Westerlund's Landing Party Fireworks'': All navigable waters of the Kennebec River within a 500 yard radius of the fireworks launch site in the vicinity of Nehumkeag Island, South Gardiner, Maine in approximate position latitude 44°10′19.56″ N, longitude 069°45′24.68″ W. This safety zone will be enforced from 9 p.m. to 10 p.m. on August 2, 2009 with a rain date of August 3, 2009;

''Town of Woolwich 250th Celebration'': All navigable waters of the Kennebec River within 500 yards of the fireworks launch site in the vicinity of Reed and Reed Dockyard, Woolwich, Maine in approximate location latitude 43°54′59.06″ N, longitude 069°48′16.23″ W. This safety zone will be enforced from 9 p.m. to 10 p.m. on August 2, 2009 with a rain date of August 3, 2009.

During the times when the safety zones are in effect, vessel traffic will be restricted within the affected locations. Entry into these zones by any person or vessel will be prohibited unless specifically authorized by the Captain of the Port Northern New England, or his designated representatives.

The Coast Guard has determined that the safety zones will not have a significant impact on commercial vessel traffic due to the temporary nature of the zones' time and scope. The zones have been limited to the areas surrounding the events and they will be enforced only during the times of the fireworks displays. Public notifications will be made via marine information broadcasts during the effective period of these safety zones.

Regulatory Analyses

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

Regulatory Planning and Review

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

The Coast Guard determined that this rule is not a significant regulatory action for the following reasons: The safety zones will be of limited duration, cover only a small portion of the navigable waterways and the events are designed to avoid, to the extent practicable, deep draft, fishing, and recreational boating traffic routes. In addition, vessels may be authorized to transit the zone with permission of the Captain of the Port Northern New England; and maritime

advisories will be broadcast during the duration of the enforcement periods.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit or anchor in the designated safety zones during the enforcement periods stated above.

The safety zones will not have a significant economic impact on a substantial number of small entities for the following reasons: The safety zones are of limited size and of short duration and vessels that can safely do so may navigate in all other portions of the waterways except for the area designated as a safety zone. Additionally, before the enforcement periods, the Coast Guard will issue maritime advisories via marine broadcasts and advisories.

Assistance for Small Entities

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

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

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

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

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

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

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

Technical Standards

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

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

Environment

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add temporary § 165.T01–0526 to read as follows:

§ 165.T01–0526 Temporary Safety Zones for Fireworks Displays in Boothbay Harbor, South Gardiner, and Woolwich ME

(a) Locations. The following areas are temporary safety zones:

(1) For the ''Windjammer Days Fireworks'': all navigable waters of Boothbay Harbor within a 500 yard radius of the fireworks launch site in the vicinity of Clam Rock in approximate location latitude 43°50′38″ N, longitude 069°37′57″ W.

(2) For the ''Boothbay Harbor Fourth of July Fireworks'': all navigable waters of Boothbay Harbor within a 500 yard radius of the fireworks launch site in the vicinity of Clam Rock in approximate location latitude 43°50′38″ N, longitude 069°37′57″ W.

(3) For the ''Heritage Days Fireworks'': all navigable waters of the Kennebec River within a 500 yard radius of the fireworks launch site in the vicinity of Reed and Reed Boat Yard, Woolwich, Maine enclosed by an area starting at latitude 43°54′56″ N, longitude 069°48′16″ W.

(4) For the ''Westerlund's Landing Party Fireworks'': all navigable waters of the Kennebec River within a 500 yard radius of the fireworks launch site in the vicinity of Nehumkeag Island, South Gardiner, Maine enclosed by an area starting at latitude 44°10′19.56″ N, longitude 069°45′24.68″ W.

(5) For the ''Town of Woolwich 250th Celebration'': all navigable waters of the Kennebec River within a 500 yard radius of the fireworks launch site in the vicinity of Reed and Reed Dockyard, Woolwich, Maine enclosed by an area starting at latitude 43°54′59″ N, longitude 069°48′16″ W.

(b) Enforcement Period. The temporary safety zones will be enforced during the following dates and times:

(1) For the ''Windjammer Days Fireworks'': June 24, 2009 (Rain Date: July 4, 2009), between 8 p.m. to 10 p.m.

(2) For the ''Boothbay Harbor Fourth of July Fireworks'': July 4, 2009 (Rain Date: July 5, 2009), between 8 p.m. to 10 p.m.

(3) For the ''Heritage Days Fireworks'': July 5, 2009 (Rain Date: July 6, 2009), between 8 p.m. to 10 p.m.

(4) For the ''Westerlund's Landing Party Fireworks'': August 1, 2009 (Rain Date: August 2, 2009), between 8 p.m. to 10:30 p.m.

(5) For the ''Town of Woolwich 250th Celebration'' August 2, 2009 (Rain Date: August 3, 2009), between 9 p.m. to 10 p.m.

(c) Regulations.

(1) During the enforcement period, entry into, transiting, remaining within or anchoring in these safety zones is prohibited unless authorized by the Captain of the Port Northern New England or his designated representatives.

(2) These safety zones are closed to all vessel traffic, except as may be permitted by the Captain of the Port Northern New England or his designated representatives.

(3) The ''designated representative'' is any Coast Guard commissioned, warrant, or petty officer who has been designated by the Captain of the Port Northern New England to act on his behalf. The designated representative will be aboard either a Coast Guard or Coast Guard Auxiliary vessel.

(4) Vessel operators desiring to enter or operate within the safety zones shall contact the Captain of the Port Northern New England or his designated representative via VHF Channel 16 to obtain permission to do so.

(5) Vessel operators given permission to enter or operate in the safety zones must comply with all directions given to them by the Captain of the Port Northern New England or his designated representatives.

Dated: June 23, 2009.

B.J. Downey Jr.,

Commander, U.S. Coast Guard, Acting Captain of the Port, Sector Northern New England.

[FR Doc. E9–15874 Filed 7–6–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2009–0522]

RIN 1625–AA00

Safety Zone; San Clemente Island Northwest Harbor August and September Training; Northwest Harbor, San Clemente Island, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a safety zone on the navigable waters of the Northwest Harbor of San Clemente Island in support of the Naval Underwater Detonation. This safety zone is necessary to ensure non-authorized personnel and vessels remain safe by keeping clear of the hazardous area during the training activity. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port (COTP) or his designated representative.

DATES: This rule is effective from August 1, 2009 through September 30, 2009.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2009–0522 and are available online by going to *http://www.regulations.gov,* selecting the Advanced Docket Search option on the right side of the screen, inserting USCG–2009–0522 in the Docket ID box, pressing Enter, and then clicking on the item in the Docket ID column. They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail Petty Officer Kristen Beer, Waterways Management, U.S. Coast Guard Sector San Diego, Coast Guard; telephone 619–278–7262, e-mail *Kristen.A.Beer@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because immediate action is necessary to ensure the safety of commercial and recreational vessels in the vicinity of any underwater detonation on the dates and times this rule will be in effect and delay would be contrary to the public interest.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delay in the effective date would be contrary to the public interest, since immediate action is needed to ensure the public's safety.

Background and Purpose

The Officer in Charge (OIC) of the Southern California Offshore Range will be conducting intermittent training involving the detonation of military grade explosives underwater throughout August and September 2009. This safety zone is necessary to ensure non-authorized personnel and vessels remain safe by keeping clear of the hazardous area during the training activity.

Discussion of Rule

The Coast Guard is establishing a safety zone that will be enforced from August 1, 2009 through September 30, 2009. The limits of the safety zone will be the navigable waters of the Northwest Harbor of San Clemente Island bounded by the following coordinates: 33°02′06″ N, 118°35′36″ W; 33°02′00″ N, 118°34′36″ W; thence along San Clemente Island shoreline to 33°02′06″ N, 118°35′36″ W. This safety zone is necessary to ensure non-authorized personnel and vessels remain safe by keeping clear of the hazardous area during the training activities. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative.

Regulatory Analyses

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

Regulatory Planning and Review

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

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation is unnecessary. This determination is based on the size and location of the safety zone. Commercial and recreational vessels will not be allowed to transit through the designated safety zone during the specified times while training is being conducted.

Small Entities

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

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

This rule will affect the following entities, some of which may be small entities: The owners or operators of commercial and recreational vessels intending to transit or anchor in a portion of the Northwest Harbor of San Clemente Island from August 1, 2009 through September 30, 2009.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons. Although the safety zone will apply to the entire width of the harbor, commercial and recreational vessels will be allowed to pass through the zone with the permission of the U.S. Navy or Coast Guard Sector San Diego. Before the effective period, the Coast Guard will issue a broadcast notice to mariners (BNM) alerts and publish local notice to mariners (LNM).

Assistance for Small Entities

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

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

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

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

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

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

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

Technical Standards

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

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

Environment

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295; 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add a new temporary § 165.T11–210 to read as follows:

§ 165.T11–210 Safety Zone; San Clemente Island Northwest Harbor August and September Training; Northwest Harbor, San Clemente Island, CA.

(a) *Location.* The limits of the safety zone will include the navigable waters of the Northwest Harbor of San Clemente Island bounded by the following coordinates: 33°02′06″ N, 118°35′36″ W; 33°02′00″ N, 118°34′36″ W; thence along the coast of San Clemente Island to 33°02′06″ N, 118°35′36″ W.

(b) *Enforcement Period.* This section will be enforced from August 1, 2009 through September 30, 2009 during naval training exercises. If the training is concluded prior to the scheduled termination time, the COTP will cease enforcement of this safety zone and will announce that fact via Broadcast Notice to Mariners.

(c) *Definitions.* The following definitions apply to this section: (1) *Designated representative* means any Commissioned, Warrant, or Petty Officers of the Coast Guard, Coast Guard Auxiliary, or local, state, and federal law enforcement vessels who have been authorized to act on behalf of the COTP.

(2) *Non-authorized personnel and vessels,* means any civilian boats, fishermen, divers, and swimmers.

(d) *Regulations.* (1) Entry into, transit through or anchoring within this safety zone is prohibited unless authorized by the COTP San Diego or his designated representative.

(2) Non-authorized personnel and vessels requesting permission to transit through the safety zone may request authorization to do so from the COTP San Diego or his designated representative. They may be contacted on VHF–FM Channel 16, or at telephone number (619) 278–7033.

(3) Naval units involved in the exercise are allowed in the confines of the established safety zone.

(4) All persons and vessels shall comply with the instructions of the Coast Guard COTP or his designated representative.

(5) Upon being hailed by the U.S. Coast Guard or other official personnel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.

(6) The Coast Guard may be assisted by other federal, state, or local agencies and the U.S. Navy.

Dated: June 22, 2009.

D.L. LeBlanc,

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

[FR Doc. E9–15885 Filed 7–6–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2009–0399]

RIN 1625–AA00

Safety Zone, Kinnickinnic River Sediment Removal Project, Milwaukee, WI

AGENCY: Coast Guard, DHS.

ACTION: Temporary interim rule with request for comments.

SUMMARY: The Coast Guard is establishing a temporary safety zone on

the Kinnickinnic River in Milwaukee, WI. This temporary interim rule places navigational and operational restrictions on all vessels transiting the navigable waters located between the West Becher Street Bridge and the South Kinnickinnic Avenue Bridge located in Milwaukee, WI.

DATES: This temporary interim rule is effective from June 12, 2009 until December 31, 2009. Comments and related material must reach the Docket Management Facility on or before August 6, 2009.

ADDRESSES: You may submit comments identified by docket number USCG–2009–0399 using any one of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov.

Fax: 202–493–2251.

Mail: Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

Hand delivery: Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these methods. For instructions on submitting comments, see the ''Public Participation and Request for Comments''.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary interim rule, call BM2 Adam Kraft, Waterways Management Division, Coast Guard Sector Lake Michigan, telephone 414–747–7154. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2009–0399), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online, or by fax, mail or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an e-mail address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov*, select the Advanced Docket Search option on the right side of the screen, insert ''USCG–2009–0399'' in the Docket ID box, press Enter, and then click on the balloon shape in the Actions column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change this rule based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, select the Advanced Docket Search option on the right side of the screen, insert USCG–2009–0399 in the Docket ID box, press Enter, and then click on the item in the Docket ID column. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008 issue of the **Federal Register** (73 FR 3316).

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one to the Docket Management Facility at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Regulatory Information

The Coast Guard is issuing this temporary interim rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because of the importance of removing harmful polychlorinated biphenyls from this area of water. Also, this project has been opened to the community for comment via numerous public meetings, local news, and comment cards that were given to the local marinas. No feedback was received. Likewise, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register** because of the safety risk to commercial and recreational boaters who could possibly transit this area. The following discussion and the Background and Purpose section below provides additional support of the Coast Guard's determination that good causes exists for not publishing a NPRM and for making this rule effective less than 30 days after publication.

The Kinnickinnic Sediment Removal Project is a 22 million dollar dredging project that's main purpose is to remove harmful polychlorinated biphenyls from the sediment in this area of water. This is an Environmental Protection Agency (EPA) sponsored project which has joined with the Army Corp of Engineers for coordination and completion. This project has been in the planning stages since 2002 and has incorporated many local stakeholders into their meetings, including: Southwind Marine, Milwaukee Marine, Canadian Pacific Railroad, Ryba Marine, United States Coast Guard and the Gillen Company to ensure all issues that could arise from a project of this magnitude are addressed. They also have involved the public through the use of the local news, public comment forums, informational handouts, and public open houses. They have received no negative feedback from any of this public outreach. The area that is affected by this project does not affect

any commercial traffic and rarely encounters any type of recreational traffic. The area of river where this project is occurring only affects one winter storage marina and the owner of that marina has been involved in all aspects of this planning.

Background and Purpose

U.S. Environmental Protection Agency Great Lakes National Program Office and state partner Wisconsin Department of Natural Resources are heading up the dredging of contaminated sediment from Milwaukee's Kinnickinnic River. The $22 million project is being funded under the Great Lakes Legacy Act (GLLA). The Act provides federal money that along with local matching dollars are used to clean up polluted sediment (mud) along the U.S. shores of the Great Lakes. The Kinnickinnic River project calls for the removal of about 170,000 cubic yards of sediment contaminated with PCBs and PAHs (polychlorinated biphenyls and polyaromatic hydrocarbons).

Discussion of Rule

The proposed safety zone will encompass all waters of the Kinnickinnic River between the West Becher Street Bridge located at 43°00′37″ N 087°54′51″ W and the South Kinnickinnic Avenue Bridge located at 43°00′29″ 087°54′30″. (NAD 83). Vessels will be permitted to transit the zone with the permission of the Captain of the Port Lake Michigan or his on-scene representative. Periods during which transit of the zone will be permitted will be communicated to the public daily via Broadcast Notice to Mariners. These Broadcasts can be heard daily via VHF Channel 16.

All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the on-scene representative. Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port Sector Lake Michigan or his on-scene representative. The Captain of the Port or his on-scene representative may be contacted via VHF Channel 16.

Regulatory Analyses

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

Regulatory Planning and Review

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

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation is unnecessary. This determination is based on the following: (1) Commercial vessel traffic is non-existent in this area and recreational traffic is very minimal; (2) the public is very well informed about this project via local news, public comment forums, and public open houses; (3) all local marinas have been involved in every aspect of the seven years of planning that have lead up to this project; and (4) the safety zone almost always will have daily four hour openings for traffic to pass through if needed.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule would affect the following entities, some of which might be small: The owners and operators of vessels intending to transit or anchor in a portion of the Kinnickinnic River, Milwaukee, WI between 7 a.m. on June 12, 2009 and 11:59 p.m. (local) on December 31, 2009.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: (1) Commercial vessel traffic is non-existent in this area and recreational traffic is very minimal; (2) the public is very well informed about this project via local news, public comment forums, and public open houses; (3) all local marinas have been involved in every aspect of the seven years of planning that have lead up to this project; and (4) the safety zone almost always will have daily four hour openings for traffic to pass through if needed. The Coast Guard will give notice to the public, using all appropriate means to inform them when the safety zone is enforced and when openings are authorized.

Assistance for Small Entities

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

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and

Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

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

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that this action is one of the category of actions which do not individually or cumulatively have significant effect on the human environment. Therefore, this rule is categorically excluded, under section 2.B.2 Figure 2–1, paragraph (34)(g), of the Instruction and neither an environmental assessment nor an environmental impact statement is required. This rule involves the establishing, disestablishing, or changing of a safety zone. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add temporary § 165.T09–0399 to read as follows:

§ 165.T09–0399 Safety Zone, Kinnickinnic River Sediment Removal Project, Milwaukee, WI.

(a) *Location.* All waters of the Kinnickinnic River between the West Becher Street Bridge located at 43°00′37″ N, 087°54′51″ W and the South Kinnickinnic Avenue Bridge located at 43°00′29″ N, 087°54′30″ W (NAD 83).

(b) *Enforcement period.* This regulation is enforced from 7 a.m. local on June 12, 2009 until 11:59 p.m. on December 31, 2009. The Captain of the Port, Sector Lake Michigan may terminate this zone at any time.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port Sector Lake Michigan, or his on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port Sector Lake Michigan or his on-scene representative.

(3) The ''on-scene representative'' of the Captain of the Port is any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain of the Port to act on his behalf. The on-scene representative of the Captain of the Port will be aboard either a Coast Guard or Coast Guard Auxiliary vessel.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port Sector Lake Michigan or his on-scene representative to obtain permission to do so. The Captain of the Port or his on-scene representative may be contacted via VHF Channel 16. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port Sector Lake Michigan or his on-scene representative.

Dated: June 12, 2009.

B.C. Jones,

Captain, U.S. Coast Guard, Captain of the Port Sector Lake Michigan.

[FR Doc. E9–15953 Filed 7–6–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2009–0469]

Security and Safety Zone Regulations, Large Passenger Vessel Protection, Portland, OR Captain of the Port Zone

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the security and safety zone in 33 CFR 165.1318 for large passenger vessels operating in the Portland, Oregon Captain of the Port Zone during the dates and times listed in **DATES**. This action is necessary to ensure the

security and safety of the large passenger vessels, including their crew and passengers, as well as the maritime public. During the enforcement period, no person or vessel may enter or remain in the security and safety zone without permission of the Captain of the Port, Portland, Oregon.

DATES: The regulations in 33 CFR 165.1318 will be enforced during the following dates and times for the vessels noted:

(1) LPV Carnival Splendor: From 7 a.m. June 9, 2009, through 12 a.m. (midnight) June 10, 2009.

(2) LPV Carnival Splendor: From 7 a.m. June 16, 2009, through 12 a.m. (midnight) June 17, 2009.

(3) LPV The World: From 7 a.m. June 19, 2009, through 12 a.m. (midnight) June 20, 2009.

(4) LPV Norwegian Pearl: From 7 a.m. September 22, 2009, through 12 a.m. (midnight) September 23, 2009.

(5) LPV Norwegian Star: From 7 a.m. September 22, 2009, through 12 a.m. (midnight) September 23, 2009.

(6) LPV Serenade of the Seas: From 7 a.m. September 29, 2009, through 12 a.m. (midnight) September 30, 2009.

(7) LPV Veendam: From 5:30 a.m. September 29, 2009, through 12 a.m. (midnight) September 30, 2009.

(8) LPV Millennium: From 7 a.m. October 3, 2009, through 12 a.m. (midnight) October 4, 2009.

(9) LPV Mercury: From 7 a.m. October 16, 2009, through 12 a.m. (midnight) October 17, 2009.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or e-mail MST1 Jaime Sayers, U.S. Coast Guard Sector Portland, Waterways Management Branch; telephone 503–240–9319, e-mail *Jaime.A.Sayers@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the security and safety zone regulation in 33 CFR 165.1318 for large passenger vessels operating in the Portland, Oregon Captain of the Port Zone during the dates and times listed in **DATES**.

Under the provisions of 33 CFR 165.1318 and 33 CFR 165 Subparts C and D, no person or vessel may enter or remain in the security and safety zone without permission of the Captain of the Port, Portland, Oregon. Persons or vessels wishing to enter the safety and security zone may request permission to do so from the on scene Captain of the Port representative via VHF Channel 16 or 13. The Coast Guard may be assisted by other Federal, State, or local enforcement agencies in enforcing this regulation.

This notice is issued under authority of 33 CFR 165.1318 and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register**, the Coast Guard will provide the maritime community with notification of the enforcement periods via a Local Notice to Mariners.

Dated: June 22, 2009.

F.G. Myer,

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

[FR Doc. E9–15951 Filed 7–6–09; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–2009–0146; FRL–8926–1]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct Final Notice of Deletion of the Wilson Farm Superfund Site (Site) from the National Priorities List.

SUMMARY: EPA, Region 2, is publishing a direct final notice of deletion of the Site, located in Plumsted Township, Ocean County, New Jersey, from the National Priorities List (NPL). The NPL, promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is an appendix of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). This direct final Notice of Deletion is being published by EPA with the concurrence of the State of New Jersey, through the Department of Environmental Protection (NJDEP). EPA and NJDEP have determined that all appropriate remedial actions under CERCLA, including operation and maintenance, have been implemented.

DATES: This direct final deletion will be effective September 8, 2009 unless EPA receives significant adverse comments by August 6, 2009. If significant adverse comments are received, EPA will publish a timely withdrawal of this direct final deletion in the **Federal Register**, informing the public that the deletion will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID no. EPA–HQ–SFUND–2009–0146, by one of the following methods:

Web Site: http://www.regulations.gov. Follow the on-line instructions for submitting comments.

E-mail: zeolla.michael@epa.gov.

Fax: To the attention of Michael Zeolla at (212) 637–4393.

Mail: To the attention of Michael Zeolla, Remedial Project Manager, Emergency and Remedial Response Division, U.S. Environmental Protection Agency, Region 2, 290 Broadway, 19th Floor, New York, New York 10007–1866.

Hand Delivery: Superfund Records Center, 290 Broadway, 18th Floor, New York, NY 10007–1866 (*telephone:* 212–637–4308). Such deliveries are only accepted during the Docket's normal hours of operation (Monday to Friday from 9 a.m. to 5 p.m.). Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID no. EPA–HQ–SFUND–2009–0146; EPA' policy is that all comments received will be included in the Docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider CBI or otherwise protected through *http://www.regulations.gov* or via e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comments. If you send comments to EPA via e-mail, your e-mail address will be included as part of the comment that is placed in the Docket and made available on the Web Site. If you submit electronic comments, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM that you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comments. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the Docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in the hard copy. Publicly available docket materials can be available either electronically in *http://www.regulations.gov* or in hard copy at:

U.S. Environmental Protection Agency, Region 2, Superfund Records Center, 290 Broadway, 18th Floor, New York, NY 10007–1866, *Phone:* (212) 637–4308, *Hours:* Monday to Friday from 9 a.m. to 5 p.m., and

New Jersey Department of Environmental Protection, 401 East State Street, Trenton, New Jersey 08625–0410, *Phone:* 609–777–3373.

FOR FURTHER INFORMATION CONTACT: Michael Zeolla, Remedial Project Manager, Emergency and Remedial Response Division, U.S. Environmental Protection Agency, Region 2, 290 Broadway, 19th Floor, New York, New York 10007–1866, telephone at (212) 637–4376; fax at (212) 637–4393; or e-mail at: *zeolla.michael@epa.gov.*

SUPPLEMENTARY INFORMATION:

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I. Introduction
II. NPL Deletion Criteria
III. Deletion Procedures
IV. Basis for Intended Site Deletion
V. Deletion Action

I. Introduction

EPA Region 2 is publishing this direct final notice of deletion of the Wilson Farm Superfund Site (Site) from the National Priorities List (NPL). The NPL constitutes Appendix B of 40 CFR part 300, which is the Oil and Hazardous Substances Pollution Contingency Plan (NCP), which EPA promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980, as amended. EPA maintains the NPL as the list of sites that appear to present a significant risk to public health, welfare, or the environment. Sites on the NPL may be the subject of remedial actions financed by the Hazardous Substance Superfund (Fund). As described in 300.425(e)(3) of the NCP, a site deleted from the NPL remains eligible for remedial actions if conditions at the site warrant such action.

Because EPA considers this action to be noncontroversial and routine, this action will be effective September 8, 2009 unless EPA receives significant adverse comments by August 6, 2009. Along with this direct final Notice of Deletion, EPA is co-publishing the Notice of Intent to Delete in the ''Proposed Rule'' section of today's **Federal Register**. If adverse comments are received within the 30-day public comment period on this deletion action, EPA will publish a timely withdrawal of this direct final notice of deletion before the effective date of the deletion and the deletion will not take effect. EPA will, as appropriate, prepare a response to comments and continue with the deletion process on the basis of the Notice of Intent to Delete and the comments already received. There will be no additional opportunity to comment.

Section II of this document explains the criteria for deleting sites from the NPL. Section III discusses procedures that EPA is using for this action. Section IV discusses the Site and demonstrates how it meets the deletion criteria. Section V discusses EPA's action to delete the Site from the NPL unless significant adverse comments are received during the public comment period.

II. NPL Deletion Criteria

The NCP establishes the criteria that EPA uses to delete sites from the NPL. In accordance with 40 CFR 300.425(e), sites may be deleted from the NPL where no further response is appropriate. In making such a determination pursuant to 40 CFR 300.425(e), EPA will consider, in consultation with the state, whether any of the following criteria have been met:

i. Responsible parties or other parties have implemented all appropriate response actions required;

ii. All appropriate Fund-financed responses under CERCLA have been implemented, and no further action by responsible parties is appropriate; or

iii. The remedial investigation has shown that the release poses no significant threat to public health or the environment and, therefore, implementing remedial measures is not appropriate.

III. Deletion Procedures

The following procedures apply to deletion of this Site.

(1) EPA consulted with the State of New Jersey prior to developing this direct final Notice of Deletion and the Notice of Intent to Delete co-published today in the ''Proposed Rules'' section of the **Federal Register**.

(2) EPA has provided the State of New Jersey thirty (30) working days for review of this notice and the parallel Notice of Intent to Delete prior to their publication today, and the State of New Jersey, through the NJDEP, has concurred on the deletion of the Site from the NPL.

(3) Concurrently with the publication of this direct final Notice of Deletion, a notice of the availability of the parallel Notice of Intent to Delete is being published in a major local newspaper, the Ocean County Observer. The newspaper notice announces the 30-day public comment period concerning the Notice of Intent to Delete the Site from the NPL.

(4) EPA placed copies of documents supporting the proposed deletion in the deletion docket and made these items available for public inspection and copying at the Site information repositories identified above.

(5) If adverse comments are received within the 30-day public comment period on this deletion action, EPA will publish a timely notice of withdrawal of this direct final Notice of Deletion before its effective date and will prepare a response to comments. If appropriate, EPA may then continue with the deletion process based on the Notice of Intent to Delete and the comments already received.

Deletion of a site from the NPL does not itself create, alter, or revoke any individual's rights or obligations. Deletion of a site from the NPL does not in any way alter EPA's right to take enforcement actions, as appropriate. The NPL is designed primarily for informational purposes and to assist EPA management. Section 300.425(e)(3) of the NCP states that the deletion of a site from the NPL does not preclude eligibility for future response actions, should future conditions warrant such actions.

IV. Basis for Site Deletion

The following summary provides the Agency's rationale for the proposal to delete this Site from the NPL.

Site Background and History

The Site consists of 10 acres within a 218-acre property and is located one-quarter mile southwest from the intersection of State Highway Route 528 (New Egypt-Lakewood Road) and Hawkin Road (State Highway Route 640) in Plumsted Township, Ocean County, New Jersey. The Site is situated in a predominantly rural area with some residential homes to the south. The 10-acre site, bordered on the north side by cultivated land which is part of the Wilson Farm property, is wooded and unoccupied. A dirt road runs through the center of the Site, which allows access into the property from Hawkin Road. The Site has a number of unimproved roadways in and around it and is used mainly for hunting. Colliers Mills Wildlife Management Area is east of the Site and consists of forested undeveloped property that runs north and south along Hawkin Road. Borden Run Creek runs west and south of the site and flows into Colliers Mills Lake. At the northern edge of the Site towards New Egypt/Lakewood Road is an active farm field and beyond that a small residential neighborhood. The Site is

located within the boundaries of a national reserve known as the ''Pinelands.'' The Pinelands reserve is separated into ''Management Areas.''

The Wilson Farm property was one of seven sites used to dispose of liquid and drummed chemical waste from the Thiokol Corporation facility during the 1960's and early 1970's. The property on which the Site is located is privately owned and has been posted with ''No Trespassing Signs.''

The Site was inspected by the Ocean County Health Department and New Jersey Department of Environmental Protection (NJDEP) in February 1980, which led to the implementation of an Immediate Removal Action in September 1980. Approximately 620 cubic yards of mixed chemical waste material and soils were removed from the Site. Prior to the Immediate Removal Action, NJDEP had installed and sampled six groundwater monitoring wells in July 1980. Groundwater from these monitoring wells was found to contain chemical contamination.

In December 1982, the NJDEP scored the Site utilizing the Hazard Ranking System. Based on this ranking, the Site was added to the NPL on September 21, 1984 (FRL–2646–2).

In 1986, the NJDEP established a Well Restriction Area (WRA) on the Site and surrounding properties in order to protect any new drinking water wells which might be installed near the Site. The WRA required that all new wells within approximately a 2,000-foot radius of the Site be installed to a depth of at least 150 feet. The purpose of this action was to ensure that new wells were not impacted by contamination in the shallow aquifer.

Remedial Investigation and Feasibility Study (RI/FS)

In July 1986, the NJDEP directed Morton Thiokol Inc. (Thiokol merged with Morton Norwich Corporation) to make payments to the NJDEP for the cost of conducting a Remedial Investigation and Feasibility Study (RI/FS) at the Site. On December 3, 1987, the NJDEP and Morton Thiokol Inc. (MTI) entered into an Administrative Consent Order (ACO) in which MTI agreed to comply with this Directive (Directive No. 1).

In January 1987, Acres International Corporation (Acres) was contracted by the NJDEP to perform the RI/FS. After initial site investigations were performed, NJDEP determined that further remedial studies were necessary. In January 1990, the NJDEP directed Morton International Incorporated (MII) and the Thiokol Corporation (after Directive No. 1 was issued, MTI split into MII and Thiokol) to pay for the additional studies. MII complied and the RI/FS was completed by Acres in March 1992.

The RI/FS identified that approximately six to twelve cubic yards of industrial waste, including a black rubbery tar-like substance and miscellaneous laboratory glassware, to a depth of six inches, still remained at the Site. No buried waste was encountered. The RI/FS found that this waste did not present a risk to human health or the environment.

On August 23, 1991, the NJDEP and MII entered into a second ACO for the removal of the remaining contaminated surface waste materials at the Site. MII prepared and submitted an Interim Removal Action Plan to the NJDEP and EPA in October 1991. The final removal activities were agreed to between NJDEP and MII in May 1992.

The surficial waste removal activities were conducted at the Site between June and July 1992. Approximately 645 cubic yards of waste/soil material was removed and transported for treatment and disposal to a federally permitted hazardous waste landfill. A comparison of the post-excavation soil sample analytical results to the NJDEP proposed cleanup goals for residential surface soils confirmed the effectiveness of the removal work. In October 1993, MII restored all areas disturbed by the removal activities through back-filling and grading soils and re-vegetating. A final surficial waste removal report was submitted by MII in February 1994.

After completing the Interim Removal Action, EPA conducted a baseline risk assessment to evaluate the potential risks to human health and the environment for residual contaminants in the soil, groundwater, surface water and sediments. EPA issued the final Risk Assessment Report on May 3, 1993.

Selected Remedy

Based on this Risk Assessment Report, EPA concurred on a ''No Further Action'' Record of Decision (ROD) which was issued by NJDEP on August 2, 1993. The selected remedy included implementing a groundwater, surface water and sediment monitoring program for five years to ensure that any residual contamination remained below levels of concern and confirmed the no action determination. Visual inspection of the Site during monitoring was also conducted to ensure that no further waste materials were present. Lastly, the ROD called for continuation of the WRA for a minimum of five years to ensure the protection of area drinking water supplies.

Response Action

Pursuant to the remedy selected in the ROD, MII and the NJDEP entered into a Memorandum of Agreement (MOA) on August 25, 1994, to perform post-remediation monitoring activities. A Post-Remediation Monitoring Work Plan was submitted by MII in October 1994. A final post-remediation monitoring work plan was approved in January 1995.

The five years of monitoring, as outlined in the ROD, began in May 1995 with the first quarterly sampling event and continued until September 1999. The monitoring consisted of collecting samples at ten monitoring wells and three surface water and sediment locations on a quarterly basis in the first year and on an annual basis in 1996, 1997, 1998 and 1999. During each sample event, the Site was inspected for any evidence of remaining surface waste material that would then be removed.

After five years of monitoring, site contaminants remained below Federal Maximum Contaminant Levels (MCLs). Since the Site is located in New Jersey's Pinelands Protection Area, the aquifer is classified by the NJDEP as Class I–PL under its Groundwater Quality Criteria Standards (GWQS). Class I–PL standards are defined as the higher of the Practical Quantitative Levels (PQLs) or background levels. NJDEP requires groundwater sample results to indicate concentrations are below the PQL. The GWQS establish anti-degradation policies that are designed to protect the existing and designated uses of the State of New Jersey ground waters and are not considered health-based Federal MCLs.

A review of the post-remediation monitoring results revealed that lead in MW–5S, and chloroform in MW–8S were present above the PQLs for all sampling events. Lead concentrations were detected above the PQL of 10 ppb (5 ppb is now the current standard) in MW–5S and ranged from 14.5 ppb (2nd sample event) to 94.9 ppb (6th sample event). Chloroform concentrations were detected above the PQL of 1 ppb and ranged from 1.2 ppb (7th sample event) to 6.2 ppb (2nd sample event). Due to these groundwater concentrations above the PQL, NJDEP recommended that Rohm and Haas (which acquired MII) conduct additional investigative activities including soil and groundwater sampling around MW–5S and MW–8S for lead and chloroform, respectively.

A Supplemental Groundwater Investigation (SGI) was conducted by ENSR (on behalf of the Rohm and Hass Company which acquired MII) in October 2004. The SGI consisted of

collecting sixteen subsurface soil samples around MW–5S and MW–8S, four groundwater samples from temporary wells MW–5S–5, MW–5S–6, MW–8S–2 and MW–8S–4, and four surface water and sediments samples in Borden Run Creek. The results of sampling found non-detect levels of Site contaminants in the surface water, sediments and soils. In a March 18, 2005 letter, NJDEP concluded that no further monitoring of the Site surface water, sediments or soils was required but recommended that a Classification Exemption Area (CEA) be proposed for the Site groundwater. The SGI results are summarized as follows:

(1) Subsurface soil samples collected from the area around MW–5S (for lead) and MW–8S (for chloroform) did not have lead or chloroform detected above the New Jersey Residential Direct Contact, Non-Residential Direct Contact or the Impact to Groundwater Soil Cleanup Criteria. The data also found field screening results showing no detectable concentrations of lead and chloroform are present in soils. NJDEP concluded that the subsurface soil data for the area around MW–5S and MW–8S indicate that the soils are not impacted and a no further action for the soils is appropriate;

(2) Groundwater samples collected from MW–5S–5 and MW–5S–6 (for total and dissolved lead analysis), and MW–8S–2 and MW–8S–4 (for chloroform analysis) found no detectable levels of lead above the method detection limit or chloroform above the GWQS of 6 ppb, and neither above the Federal MCLs. Chloroform did, however, exceed the PQL criteria of 1 ppb at three locations (MW–8S–2, MW–8S–4, and MW–8S–4D);

(3) Surface water samples collected found that chloroform, toluene, lead and zinc did not exceed the NJDEP Surface Water Quality Standards (SWQS) or EPA National Ambient Water Quality Criteria (NAWQC). However, zinc concentrations were found slightly above the background levels; and

(4) Sediment sample-analyses did not detect chloroform or toluene above the analytical detection limits. However, the detection limits were above the NJDEP Guidance for Sediment Quality Evaluations (SQE) and EPA Region 5 Ecological Screening Levels (ESLs). NJDEP believes that neither toluene nor chloroform is problematic in sediments. Lead and zinc concentrations did not exceed the SQE and ESLs but were detected above the background level at the two most down gradient sediment locations.

NJDEP's review of the current and historical surface water and sediment data concluded that additional sampling is not necessary and no further action for this area of concern is appropriate.

In December 2005 and November 2006, ENSR re-sampled MW–5S and MW–8S. The analytical results indicated that lead and chloroform concentrations continued to be above the Class I–PL groundwater standards (or PQL). Because of the historical concentrations of lead in MW–5S and chloroform in MW–8S exceeding the PQL, NJDEP requested that Rohm and Haas propose a CEA at the Site.

Institutional Controls

At the time of the ROD, a WRA was in place and recognized by the ROD as a temporary measure along with continued monitoring for five years. NJDEP indicates that the WRA is still in place. Since the groundwater currently meets federal and state standards for public consumption, it does not appear that the WRA provides any specific purpose at the Site.

Although not required by the 1993 ROD remedy, the NJDEP required the institution of a CEA at the Site due to limited groundwater contaminant levels continuing to exceed PQLs. The CEA was submitted in October 2006. As part of the CEA requirements, Rohm and Hass proposed several actions to reduce the length of time the CEA would remain in effect. Those actions included installing a replacement well that would evaluate the possibility that the elevated lead concentrations were an artifact of some unexpected problem at MW–5S and performing a one-day high vacuum groundwater extraction in order to remove chloroform impacted groundwater and soil vapors from MW–8S.

ENSR replaced MW–5S with MW–5R and performed the high vacuum groundwater extraction at MW–8S on May 7, 2007. MW–5S was decommissioned. Following these field activities, ENSR collected groundwater samples from MW–5R and MW–8S on June 6 and September 5, 2007. The results indicate that lead concentrations in MW–5R were no longer detected but the chloroform concentrations in MW–8S continue to exceed the PQL but not the MCL. Based on these results, the NJDEP issued a no further action for lead at MW–5R on April 13, 2008, and requested that the CEA be revised for chloroform at MW–8S. Rohm and Haas will continue to monitor MW–8S until chloroform is not detected at concentrations above the PQL for two consecutive quarterly sampling events.

NJDEP has accepted the Rohm and Hass proposal of no further action with a CEA for chloroform at MW–8S, without the need of a WRA designation. Rohm and Haas submitted the final revised CEA proposal in January 2009. Once approved by the NJDEP, the CEA will continue until chloroform is below the PQL for two consecutive quarterly sampling events. The NJDEP will issue a no further action for chloroform at MW–8S when two consecutive quarterly sampling events results in chloroform detection below the PQL concentration.

Since contaminant levels in all media are below risk based levels, no institutional controls are required at this Site under CERCLA.

Cleanup Goals

Post-excavation sampling conducted as part of the removal actions verifies that the Site soils were below the NJDEP cleanup standards for residential properties. Groundwater CERCLA cleanup standards were Federal Maximum Contaminant Level (MCL) and Maximum Contaminant Level Goal (MCLG).

Operations and Maintenance

No operation and maintenance was required for the Site property, where mixed surface waste and contaminated soils were removed for off-site disposal, and post-excavation sampling confirmed that remediation goals were achieved. Post-remediation groundwater monitoring was conducted for five years and all contaminants are below MCLs.

Five-Year Review

There were two five-year reviews of the selected remedy for this Site. The first review was issued on May 12, 2000. A second five-year review was signed on June 3, 2005. The June 2005 Five-Year Review Report found that the no further action remedy protects human health and the environment at this Site. It indicates that no future five-year reviews will be necessary if the Site is found to be suitable for unlimited use without restriction and that finding is part of the deletion process or is contained within an appropriate EPA decision document. The deletion process has determined that the Site is suitable for unlimited use without restriction. Therefore, no future five-year reviews will be conducted at this Site.

Community Involvement

Public participation activities for this Site have been satisfied as required in CERCLA sections 113(k) and 117, 42 U.S.C. 9613(k) and 9617. Throughout the removal and remedial process, EPA and the NJDEP have kept the public informed of the activities being conducted at the Site by way of public

meetings, progress fact sheets, and the announcement through local newspaper advertisement on the availability of documents such as the RI/FS, Risk Assessment, ROD, Proposed Plan and Five-Year Reviews. Notices associated with these community relations activities were also mailed out to the area residents and other concerned parties on the mailing list for the Site.

Determination That the Site Meets the Criteria for Deletion From the NCP

The NCP specifies that EPA may delete a site from the NPL if ''all appropriate Fund-financed response under CERCLA has been implemented, and no further response action by responsible parties is appropriate.'' 40 CFR 300.425(e)(1)(ii). EPA, with the concurrence from the State of New Jersey, through NJDEP, believes that this criterion for deletion has been met and the Site is available for use without restriction. Consequently, EPA is deleting this Site from the NPL. Documents supporting this action are available in the Site files.

V. Deletion Action

EPA, with the concurrence of the State of New Jersey, has determined that all appropriate Fund-financed responses under CERCLA have been implemented, and no further action by responsible parties is appropriate. Therefore, EPA is deleting the Site from the NPL.

Because EPA considers this action to be noncontroversial and routine, EPA is deleting the Site without prior publication. This action will be effective September 8, 2009 unless EPA receives adverse comments by August 6, 2009. If adverse comments are received within the 30-day public comment period of this action, EPA will publish a timely withdrawal of this Direct Final Deletion before the effective date of the deletion and the deletion will not take effect. EPA will, if appropriate, prepare a response to comments and continue with the deletion process on the basis of the Notice of Intent to Delete and the comments received. In such a case, there will be no additional opportunity to comment.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: June 25, 2009.

George Pavlou,

Acting Regional Administrator, Region 2.

■ For the reasons set out in the preamble Part 300 Title 40 of Chapter I of the Code of Federal Regulations is amended as follows:

PART 300—[AMENDED]

■ 1. The authority citation for Part 300 continues to read as follows:

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

Appendix B—[Amended]

■ 2. Table 1 of Appendix B to part 300 is amended by removing ''Wilson Farm, Plumsted Township, NJ.''

[FR Doc. E9–15801 Filed 7–6–09; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Part 8

[USCG–2008–1014]

RIN 1625–AB31

International Air Pollution Prevention (IAPP) Certificates

AGENCY: Coast Guard, DHS.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: On May 8, 2009, the Coast Guard published a direct final rule that notified the public of the Coast Guard's intent to amend its vessel inspection regulations to add the International Air Pollution Prevention (IAPP) certificate to the list of certificates a recognized classification society may be authorized to issue on behalf of the United States. We have not received an adverse comment, or notice of intent to submit an adverse comment, on this rule. Therefore, the rule will go into effect as scheduled.

DATES: The effective date of the direct final rule published at 74 FR 21554, is confirmed as August 6, 2009.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call Mr. Wayne Lundy, Systems Engineering Division, Coast Guard, telephone 202–372–1379.

SUPPLEMENTARY INFORMATION: On May 8, 2009, we published a direct final rule entitled ''International Air Pollution Prevention (IAPP) Certificates'' in the **Federal Register** at 74 FR 21554. We promulgated this rule because the United States deposited an instrument of ratification with the International Maritime Organization for Annex VI of the International Convention for the Prevention of Pollution by Ships, 1973 as modified by the Protocol of 1978 (MARPOL 73/78). As a result, Annex VI entered into force for the United States on January 8, 2009. The rule offers a more efficient means for U.S. vessels to obtain an IAPP certificate.

We published the rule as a direct final rule under 33 CFR 1.05–55 because we considered this rule to be noncontroversial and did not expect an adverse comment regarding this rulemaking. In the direct final rule we stated that if no adverse comment, or notice of intent to submit an adverse comment is received by June 22, 2009, the rule would become effective on August 6, 2009.

We have not received adverse comments, or notices of intent to submit adverse comments, on this rulemaking. Therefore, this notice confirms that the direct final rule will become effective as scheduled, on August 6, 2009.

Dated: June 29, 2009.

Howard L. Hime,

Acting Director of Commercial Regulations and Standards, U.S. Coast Guard.

[FR Doc. E9–15875 Filed 7–6–09; 8:45 am]

BILLING CODE 4910–15–P

Proposed Rules

Federal Register
Vol. 74, No. 128
Tuesday, July 7, 2009

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 THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 944

[SATS No. UT–046–FOR; Docket ID No. OSM–2009–0005]

Utah Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule, opening of public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We are announcing the receipt of a proposed amendment to the Utah regulatory program (hereinafter, the ''Utah program'') under the Surface Mining Control and Reclamation Act of 1977 (''SMCRA'' or ''the Act''). Utah proposes to delete repeal dates for statutory provisions pertaining to permit eligibility and revegetation requirements on lands eligible for remining. Utah intends to revise its program to remain consistent with the Federal Program under SMCRA.

This document gives the times and locations that the Utah program and the proposed amendment to that program are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4 p.m. [m.d.t.], August 6, 2009. If requested, we will hold a public hearing on the amendment on August 3, 2009. We will accept requests to speak until 4 p.m. [m.d.t.] on July 22, 2009.

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

Federal eRulemaking Portal: http://www.regulations.gov. The proposed rule has been assigned Docket ID: OSM–2009–0005. If you would like to submit comments through the Federal eRulemaking Portal, go to *http://www.regulations.gov* and do the following. Click on the ''Advanced Docket Search'' button on the right side of the screen. Type in the Docket ID ''OSM–2009–0005'' and click the ''Submit'' button at the bottom of the page. The next screen will display the Docket Search results. If you click on ''OSM–2009–0005'' you can view the proposed rule and submit a comment. You can also view supporting material and any comments submitted by others.

Hand Delivery/Courier: James F. Fulton, Chief, Denver Field Division, Office of Surface Mining Reclamation and Enforcement, 1999 Broadway, Suite 3320, Denver, CO 80202.

U.S. Postal Service: James F. Fulton, Chief, Denver Field Division, Office of Surface Mining Reclamation and Enforcement, P.O. Box 46667, Denver, CO 80201–46667.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Comment Procedures'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: In addition to obtaining copies of documents at *http://www.regulations.gov,* information may also be obtained at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSM's Denver Office.

James F. Fulton, Chief, Denver Field Division, Office of Surface Mining Reclamation and Enforcement, 1999 Broadway, Suite 3320, Denver, CO 80202, (303) 293–5015, *jfulton@osmre.gov*.

John Baza, Director, Utah Division of Oil, Gas and Mining, 1594 West North Temple, Suite 1210, Salt Lake City, UT 84116, 801–538–5334, *johnbaza@utah.gov*.

FOR FURTHER INFORMATION CONTACT: James F. Fulton, Chief, Denver Field Division, Office of Surface Mining Reclamation and Enforcement, 1999 Broadway, Suite 3320, Denver, CO 80202, (303) 293–5015, *jfulton@osmre.gov*.

SUPPLEMENTARY INFORMATION:

I. Background on the Utah Program
II. Description of the Proposed Amendment
III. Public Comment Procedures
IV. Procedural Determinations

I. Background on the Utah Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Utah program on January 21, 1981. You can find background information on the Utah program, including the Secretary's findings, the disposition of comments, and the conditions of approval of the Utah program in the January 21, 1981, **Federal Register** (46 FR 5899). You can also find later actions concerning Utah's program and program amendments at 30 CFR 944.15 and 944.30.

II. Description of the Proposed Amendment

By letter dated May 19, 2009, Utah sent us a proposed amendment to its program (SATS # UT–046–FOR; Docket ID No. OSM–2009–0005) under SMCRA (30 U.S.C. 1201 *et seq.*). Utah sent the amendment at its own initiative. The full text of the program amendment is available for you to read at the locations listed above under **ADDRESSES**.

Specifically, Utah proposes to delete Utah Code Annotated (UCA) 40–10–11(5)(c) and UCA 40–10–17(6). These subsections contain repeal dates for UCA 40–10–11(5) and UCA 40–10–17(2)(t)(ii). By deleting these repeal dates, the Division would retain provisions that are slated to expire. These provisions pertain to permit eligibility and revegetation requirements on lands eligible for remining.

OSM deleted corresponding repeal dates in the December 20, 2006 changes to SMCRA (H.R. 6111, Tax Relief and Health Care Act of 2006). Through the deletion in SMCRA Sec. 510(e), OSM retained the authority of 510(e) and 515(b)(20)(B), which were also slated to expire.

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the Utah program.

Electronic or Written Comments

Send your written or electronic comments to OSM at the address given above. If you submit written comments, they should be specific, confined to issues pertinent to the proposed regulations, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on the final regulations will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent Tribal or Federal laws or regulations, technical literature, or other relevant publications.

We cannot ensure that comments received after the close of the comment period (*see* **DATES**) or sent to an address other than those listed above (*see* **ADDRESSES**) will be included in the docket for this rulemaking and considered.

Public Availability of Comments: Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available in the electronic docket for this rulemaking at *http://www.regulations.gov.* While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4 p.m., m.d.t. on July 22, 2009. If you are disabled and need reasonable accommodation to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold the hearing. If only one person expresses an interest, a public meeting rather than a hearing may be held, with the results included in the docket for this rulemaking.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at a public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak, and others present in the audience who wish to speak, have been heard.

IV. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA. Section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally recognized Indian Tribes and have determined that the rule does not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes. The rule does not involve or affect Indian Tribes in any way.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities

under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), of the Small Business Regulatory Enforcement Fairness Act.

This rule:

a. Does not have an annual effect on the economy of $100 million.

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.

This determination is based upon the fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded Mandate on State, local, or Tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 944

Intergovernmental relations, Surface mining, Underground mining.

Dated: May 29, 2009.

Allen D. Klein,

Regional Director, Western Region.

[FR Doc. E9–15971 Filed 7–6–09; 8:45 am]

BILLING CODE P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[EPA–HQ–OAR–2005–0161; FRL–8927–3]

RIN 2060–A081

Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of comment period.

SUMMARY: The U.S. Environmental Protection Agency (''EPA'') is announcing an extension of the public comment period for the proposed rule ''Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program'' (the proposed rule is hereinafter referred to as ''RFS2''). EPA published a notice of proposed rulemaking, which included a request for comment, in the **Federal Register** on May 26, 2009. The public comment period was to end on July 27, 2009—60 days after publication in the **Federal Register**. The purpose of this document is to extend the comment period an additional 60 days until September 25, 2009. This extension of the comment period is provided to allow the public additional time to provide comment on the proposed rule.

DATES: The comment period for the proposed rule published May 26, 2009 (74 FR 24904) is extended. Written comments must be received on or before September 25, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2005–0161, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov.*
- *Mail:* Air and Radiation Docket and Information Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St., NW., Washington, DC 20503.
- *Hand Delivery:* EPA Docket Center, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2005–0161. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* For additional instructions on submitting comments, please refer to the notice of proposed rulemaking (Section XI, Public Participation, of the **SUPPLEMENTARY INFORMATION** section of the proposed rulemaking document).

How Can I Access the Docket?

All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA West,

Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

How Can I Get Copies of This Document, the Proposed Rule, and Other Related Information?

The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2005–0161. The EPA has also developed a Web site for the proposed RFS2 rule, including the notice of proposed rulemaking, at: *http://www.epa.gov/otaq/renewablefuels/index.htm.* Please refer to the notice of proposed rulemaking for detailed information on accessing information related to the proposal.

FOR FURTHER INFORMATION CONTACT: Julia MacAllister, Office of Transportation and Air Quality, Assessment and Standards Division, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; *telephone number:* (734) 214–4131; *Fax number:* (734) 214–4816; *E-mail address: macallister.julia@epa.gov,* or Assessment and Standards Division Hotline; telephone number (734) 214–4636; *E-mail address: asdinfo@epa.gov.*

SUPPLEMENTARY INFORMATION: *Background:* In a separate notice of proposed rulemaking, EPA proposed a regulation to implement changes to the Renewable Fuel Standard program as mandated by the Clean Air Act (as amended by Sections 201, 202, and 210 of the Energy Independence and Security Act of 2007). The revised statutory requirements specify the volumes of cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel that must be used in transportation fuel each year, with the volumes increasing over time. The rule proposed regulations designed to ensure that refiners, blenders, and importers of gasoline and diesel would use enough renewable fuel each year so that the four volume requirements of the Energy Independence and Security Act would be met with renewable fuels that also meet the required lifecycle greenhouse gas emissions performance standards. The RFS2 proposed rule describes the standards that would apply to these parties, the lifecycle greenhouse gas modeling, and the renewable fuels that would qualify for compliance. The proposed regulations also make a number of changes to the current Renewable Fuel Standard program while retaining many elements of the compliance and trading system already in place.

Extension of Comment Period: EPA received requests for an extension of the RFS2 public comment period from various parties ranging from 60 to 120 days. EPA also received a request to not extend the comment period, and to continue with the schedule as proposed. After considering all of these comments, EPA has determined that an extension of the comment period would provide the public adequate time to provide meaningful comment on the proposed rule. However, this need must be balanced against our desire to finalize and implement the new standards in a timely manner. EPA believes that an additional 60 days is an appropriate amount of time to balance these needs. Accordingly, the public comment period for the RFS2 proposed rulemaking is extended until September 25, 2009. EPA does not anticipate any further extension of the comment period at this time.

Dated: June 30, 2009.

Gina McCarthy,

Assistant Administrator, Office of Air and Radiation.

[FR Doc. E9–15947 Filed 7–6–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–2009–0146; FRL–8925–9]

National Oil and Hazardous Substance Pollution Contingency Plan; National Priorities List

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of intent to delete the Wilson Farm Superfund Site (Site) from the National Priorities List.

SUMMARY: EPA, Region 2 is issuing a notice of intent to delete the Site located in Plumsted Township, Ocean County, New Jersey from the National Priorities List (NPL) and requests public comments on this proposed action. The NPL, promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is an appendix of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The EPA and the State of New Jersey, through the New Jersey Department of Environmental Protection, have determined that all appropriate response actions under CERCLA, including operation and maintenance, have been implemented.

DATES: Comments concerning this Site must be received by August 6, 2009.

ADDRESSES: Submit your comments, identified by Docket ID no. EPA–HQ–SFUND–2009–0146, by one of the following methods:

- *http://www.regulations.gov* Follow on-line instructions for submitting comments.
- *E-mail: zeolla.michael@epa.gov* Michael Zeolla, Remedial Project Manager.
- *Fax:* (212) 637–4393.
- *Mail:* Michael Zeolla, Remedial Project Manager, Emergency and Remedial Response Division, U.S. Environmental Protection Agency, Region 2, 290 Broadway, 19th Floor, New York, NY 10007–1866
- *Hand delivery:* Superfund Records Center, 290 Broadway, 18th Floor, New York, NY 10007–1866 (*telephone:* 212–637–4308). Such deliveries are only accepted during the Docket's normal hours of operation (Monday thru Friday from 9 a.m. to 5 p.m.). Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–SFUND–2009–146. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in the hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at:

U.S. Environmental Protection Agency, Region 2, Superfund Records Center, 290 Broadway, Room 1828, New York, New York 10007–1866, *Phone:* 212–637–4308; *Hours:* Monday through Friday from 9 a.m. to 5 p.m., and New Jersey Department of Environmental Protection, 401 East State Street, Trenton, New Jersey 08625–0402, *Phone:* 609–777–3373.

FOR FURTHER INFORMATION CONTACT: Michael Zeolla, Remedial Project Manager, by mail at Emergency and Remedial Response Division, U.S. Environmental Protection Agency, Region 2, 290 Broadway, 19th Floor, New York, NY 10007–1866; telephone at 212–637–4376; fax at 212–637–4393; or e-mail at *zeolla.michael@epa.gov.*

SUPPLEMENTARY INFORMATION: In the ''Rules and Regulations'' Section of today's **Federal Register**, we are publishing a direct final notice of deletion of the Wilson Farm Superfund Site without prior notice of intent to delete because we view this as a noncontroversial revision and anticipate no adverse comment. We have explained our reasons for this deletion in the preamble to the direct final deletion. If we receive no adverse comment(s) on this notice of intent to delete or the direct final notice of deletion, we will not take further action on this notice of intent to delete. If we receive adverse comment(s), we will withdraw the direct final notice of deletion and it will not take effect. We will, as appropriate, address all public comments in a subsequent final deletion notice based on this notice of intent to delete. We will not institute a second comment period on this notice of intent to delete. Any parties interested in commenting must do so at this time.

For additional information, see the direct final notice of deletion which is located in the Rules section of this **Federal Register**.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, water supply.

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

Dated: May 29, 2009.

George Pavlou,

Acting Regional Administrator, Region 2.

[FR Doc. E9–15802 Filed 7–6–09; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Chapter I

[DA 09–1307]

Possible Revision or Elimination of Rules

AGENCY: Federal Communications Commission.

ACTION: Review of regulations; comments requested.

SUMMARY: This document invites members of the public to comment on the Federal Communication Commission's (FCC's or Commission's) rules to be reviewed pursuant to section 610 of the Regulatory Flexibility Act of 1980, as amended (RFA). The purpose of the review is to determine whether Commission rules whose ten-year anniversary dates are in the year 2008, as contained in the Appendix, should be continued without change, amended, or rescinded in order to minimize any significant impact the rules may have on a substantial number of small entities. Upon receipt of comments from the public, the Commission will evaluate those comments and consider whether action should be taken to rescind or amend the relevant rule(s).

DATES: Comments may be filed on or before September 8, 2009.

ADDRESSES: Submit comments to Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Sharon K. Stewart, Special Assistant to the Director, Office of Communications Business Opportunities (OCBO), Federal Communications Commission, (202) 418–0990. People with disabilities may contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by *e-mail: FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

SUPPLEMENTARY INFORMATION: Each year the Commission will publish a list of ten-year old rules for review and comment by interested parties pursuant to the requirements of section 610 of the RFA.

Public Notice

FCC Seeks Comment Regarding Possible Revision or Elimination of Rules Under The Regulatory Flexibility Act, 5 U.S.C. 610.

CB Docket No. 09–102.

Released: June 24, 2009

1. Pursuant to the Regulatory Flexibility Act (RFA), *see* 5 U.S.C. section 610, the FCC hereby publishes a plan for the review of rules adopted by the agency in calendar year 1998 which have, or might have, a significant economic impact on a substantial number of small entities. The purpose of the review is to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of section 610 of the RFA, to minimize any significant economic impact of such rules upon a substantial number of small entities.

2. This document lists the FCC regulations to be reviewed during the next twelve months. In succeeding years, as here, the Commission will publish a list for the review of regulations promulgated ten years preceding the year of review.

3. In reviewing each rule in a manner consistent with the requirements of section 610 the FCC will consider the following factors:

(a) The continued need for the rule;

(b) The nature of complaints or comments received concerning the rule from the public;

(c) The complexity of the rule;

(d) The extent to which the rule overlaps, duplicates, or conflicts with other federal rules and, to the extent feasible, with State and local governmental rules; and

(e) The length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

4. Appropriate information has been provided for each rule, including a brief description of the rule and the need for, and legal basis of, the rule. The public is invited to comment on the rules chosen for review by the FCC according to the requirements of section 610 of the RFA. All relevant and timely comments

will be considered by the FCC before final action is taken in this proceeding.

Comments may be filed using the Commission's Electronic Comment Filing System (''ECFS'') or by filing paper copies. Comments filed through the ECFS may be sent as an electronic file via the Internet to *http://www.fcc.gov/cgb/ecfs/*. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number.

Parties may also submit an electronic comment by Internet e-mail. To obtain filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov*, and should include the following words in the body of the message: ''get form.'' A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002.

The filing hours at this location are 8 a.m. to 7 p.m.

All hand deliveries must be held together with rubber bands or fasteners.

- Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554.
- All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

Comments in this proceeding will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. They may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–488–5300 or 800–378–3160, facsimile 202–488–5563, or via e-mail at *fcc@bcniweb.com*. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

For additional information on the requirements of the RFA, the public may contact Eric Malinen, Attorney Advisor, Office of Communications Business Opportunities, 202–418–0990 or visit *http://www.fcc.gov/ocbo*.

Federal Communications Commission.

Carolyn Fleming Williams, Esq.,

Director, Office of Communications Business Opportunities.

Appendix

List of rules for review pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 610, for the ten-year period beginning in the year 1998 and ending in the year 2008. All listed rules are in Title 47 of the Code of Federal Regulations.

Part 1—Practice and Procedure

Subpart F—Wireless Radio Services Applications and Proceedings

Brief Description: Part 1 contains rules pertaining to Commission practices and procedures. Subpart F sets forth the rules governing the authorization and licensing of Wireless Radio Services.

Need: These rules are needed to set forth the general application process and licensing rules for the Wireless Radio Services, including requirements concerning specific forms, electronic filing, application content, ownership information, waivers, and public notice.

Legal Basis: 47 U.S.C. 154, 161, 303 and 332.

Section Number and Title:

1.901 Basis and purpose.
1.902 Scope.
1.903 Authorization required.
1.907 Definitions.
1.911 Station files.
1.913 Application and notification forms; electronic and manual filing.
1.915 General application requirements.
1.917 Who may sign applications.
1.919 Ownership information.
1.923 Content of applications.
1.924 Quiet zones.
1.925 Waivers.
1.926 Application processing; initial procedures.
1.927 Amendment of applications.
1.929 Classification of filings as major or minor.
1.931 Application for special temporary authority.
1.933 Public notices.
1.934 Defective applications and dismissal.
1.935 Agreements to dismiss applications, amendments or pleadings.
1.937 Repetitious or conflicting applications.
1.939 Petitions to deny.
1.945 License grants.
1.946 Construction and coverage requirements.
1.947 Modification of licenses.
1.948 Assignment of authorization or transfer of control, notification of consummation.
1.949 Application for renewal of license.
1.951 Duty to respond to official communications.
1.955 Termination of authorizations.
1.956 Settlement conferences.
1.957 Procedure with respect to amateur radio operator license.
1.981 Reports, annual and semiannual.

Subpart Q—Competitive Bidding Proceedings

Brief Description: The Part 1 rules state the general rules of practice and procedure before the Federal Communications Commission. Subpart Q sets forth the provisions implementing Section 309(j) of the Communications Act of 1934, as amended, authorizing the Commission to employ competitive bidding procedures to resolve mutually exclusive applications for certain initial licenses.

Need: These rules are needed to implement the Commission's competitive bidding authority under Section 309(j) of the Communications Act of 1934, as amended.

Legal Basis: 47 U.S.C. 154, 303, and 309(j).

Section Number and Title:

1.2102 Eligibility of applications for competitive bidding.
1.2103 Competitive bidding design options.
1.2105 Bidding application and certification procedures; prohibition of collusion.
1.2107 Submission of down payment and filing of long-form applications.
1.2111 Assignment or transfer of control; unjust enrichment.

Part 2—Frequency Allocations and Radio Treaty Matters; General Rules and Regulations

Subpart I—Marketing of Radiofrequency Devices

Brief Description: The rules in part 2, subpart I, define radiofrequency devices and specify the requirements for marketing of such devices.

Need: These rules provide exemption for certain transmitters and amplifiers as required by the Act or are under close control of the licensed user. The rules allow marketing and operation of Radio frequency devices under specific conditions prior to approval of the radio frequency device. The rules are needed to allow manufacturers to evaluate, test

and demonstrate the device for product suitability.

Legal Basis: 47 U.S.C. 154, 302a, 303, and 336.

Section Number and Title:

2.803 Marketing of radio frequency devices prior to equipment authorization.

Subpart J—Equipment Authorization Procedures

Brief Description: These rules specify conditions associated with grant of equipment authorization under the Commission's rules.

Need: The rules provide procedures and conditions under which grants can be dismissed, limited and revoked. The rules also specify measurement procedures to be applied generally for radio frequency devices. The rules are needed to ensure devices are properly authorized and are operating in accordance with FCC rules to prevent interference.

Legal Basis: 47 U.S.C. 154, 302a, 303, and 336.

Section Number and Title:

2.901 Basis and purpose.
2.924 Marketing of electrically identical equipment having multiple trade names and models or type numbers under the same FCC identifier.
2.931 Responsibility of the grantee.
2.933 Change in identification of equipment.
2.938 Retention of records.
2.943 Submission of equipment for testing.
2.946 Penalty for failure to provide test samples and data.
2.1041 Measurement procedure.
2.1046 Measurements required: RF power output.
2.1407 Measurements required: Modulation characteristics.
2.1049 Measurements required: Occupied bandwidth.
2.1051 Measurements required: Spurious emissions at antenna terminals.
2.1053 Measurements required: Field strength of spurious radiation.
2.1057 Frequency spectrum to be investigated.

Part 11—Emergency Alert System (EAS)

Subpart D—Emergency Operations

Subpart E—Tests

Brief Description: These rules state certain technical and operational procedures for Emergency Alert System (EAS) Participants.

Need: The identified rules, which govern EAS tests as well as how an EAS Participant should respond to the receipt of an Emergency Action Notification, are necessary to ensure the proper functioning of the Emergency Alert System. The EAS may be used to provide the heads of state and local governments, or their designated representatives, with a means to communicate emergency information with the public.

Legal Basis: Sections 1, 4(i) and (o), 303(r), 624(g) and 706 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i) and (o), 303(r), 544(g) and 606.

Section Number and Title:

11.54(b) EAS operation during a National Level emergency. [Subpart D]
11.61 Tests of EAS procedures. [Subpart E]

Part 13—Commercial Radio Operators

Brief Description: The Part 13 rules prescribe the manner and conditions under which commercial radio operators are licensed by the Commission.

Need: These rules provide conditional temporary operating authority during which a person who has passed the necessary examination(s) can operate while an application is pending before the Commission.

Legal Basis: 47 U.S.C. 154 and 303, and applicable treaties and agreements to which the United States is a party.

Section Number and Title:

13.9(e) Eligibility and application for new license or endorsement.
13.13(d) Application for a renewed or modified license.

Note: Currently effective 13.9(e) was adopted in 1998 as 13.9(d).

Part 15—Radio Frequency Devices

Subpart A—General

Brief Description: These rules specify the regulations under which certain radio frequency equipment may be operated without an individual license.

Need: These rules provide technical specifications, administrative requirements and other conditions relating to the marketing and operations of Part 15 devices.

Legal Basis: 47 U.S.C. 154, 302a, 303, 304, 307, 336, and 544a.

Section Number and Title:

15.17 Susceptibility to interference.
15.25 Kits.
15.33 Frequency range of radiated measurements.

Subpart C—Intentional Radiators

Brief Description: These rules specify the regulations under which certain radio frequency equipment may be operated without an individual license.

Need: These rules provide technical specifications, administrative requirements and other conditions relating to the marketing and operations of Part 15 devices.

Legal Basis: 47 U.S.C. 154, 302a, 303, 304, 307, 336, and 544a.

Section Number and Title:

15.253 Operation within the bands 46.7–46.9 GHz and 76.0–77.0 GHz.

Part 18—Industrial, Scientific, and Medical Equipment

Subpart B—Applications and Authorizations

Brief Description: These rules specify the technical standards and other requirements for certain equipment or appliances that generate and use local radiofrequency energy for industrial, scientific, medical purposes, excluding telecommunications applications, to be marketed and operated within the United States.

Need: These rules are needed to regulate industrial, scientific and medical (ISM) equipment that emits electromagnetic energy on frequencies within the radiofrequency spectrum in order to prevent harmful interference to authorized radio communications services.

Legal Basis: 47 U.S.C. 4, 301, 302, 303, 304, 307.

Section Number and Title:

18.203 Equipment authorization.
18.207 Technical report.
18.209 Identification of authorized equipment.
18.211 Multiple listing of equipment.
18.212 Compliance information.

Part 20—Commercial Mobile Radio Services

Brief Description: These rules set forth the requirements and conditions applicable to commercial mobile radio service providers as they pertain to the transmission of wireless 911 calls to Public Safety Answering Points (PSAP).

Need: The identified rules require the provision of automatic numbering information and automatic location information and are intended to ensure that PSAPs receive adequate information in order to respond to 911 emergencies.

Legal Basis: Sections 4, 251–2, 303, and 332, 48 Stat. 1066, 1062, as amended; 47 U.S.C. 154, 251–4, 303, and 332.

Section Number and Title:

20.3 Definitions.
20.18 911 Service. [Excluding 47 CFR 20.18(h).]

Part 22—Public Mobile Services

Subpart H—Cellular Radiotelephone Service

Brief Description: The Part 22 rules state the conditions under which radio stations may be licensed and used in the Paging and Rural, Air-Ground, Cellular and Offshore Radiotelephone Services. Subpart H sets forth rules governing the licensing and operation of cellular radiotelephone systems.

Need: This rule informs the public about the notification and filing requirements when a licensee makes minor modifications that result in a change to the station's cellular geographical service area (CGSA) or involve a contract service area boundary (SAB) extension.

Legal Basis: 47 U.S.C. 154, 310, 302, 303, 309 and 332.

Section Number and Title:

22.953(c) Content and form of applications.

Part 24—Personal Communications Services

Subpart I—Interim Application, Licensing and Processing Rules for Broadband PCS

Brief Description: The Part 24 rules set forth the conditions under which portions of the radio spectrum are made available and licensed for personal communications services (PCS). Subpart I sets forth rules governing the submission of applications for broadband PCS licenses.

Need: These rules establish restrictions on assignments and transfers of control of licenses for frequency blocks C and F.

Legal Basis: 47 U.S.C. 154, 301, 303, 308, 309 and 332.

Section Number and Title:

24.839(a)(1) and (2) Transfer of control or assignment of license.

Part 52—Numbering

Subpart C—Number Portability

Brief Description: Section 52.33 permits incumbent local exchange carriers to file tariffs with the Commission establishing a monthly number-portability charge, a number-portability query-service charge, and a number-portability query/administration charge, to recover carrier-specific costs directly related to providing long-term number portability. The rule also allows all interconnected VoIP providers and telecommunications carriers that are not incumbent local exchange carriers to recover such costs in any manner consistent with state and federal law and regulation.

Need: In implementing the statutory requirements for number portability and the promotion of local exchange competition, this rule permits telecommunications carriers to recover costs of providing long-term number portability in a competitively neutral manner, as required by section 251(e).

Legal Basis: 47 U.S.C. 251(b)(2), 251(d)(1), and 251(e)(2).

Section Number and Title:

52.33(a)(1)–(2), (b) Recovery of carrier-specific costs directly related to providing long-term number portability.

Subpart D—Toll Free Numbers

Brief Description: This rule provides that toll free numbers shall be made available to subscribers on a first-come, first-served basis, unless otherwise directed by the Commission.

Need: The toll free number rules enable the Commission to ensure the efficient, fair, and orderly allocation of toll free numbers, as it is required to do under section 251(e) of the Communications Act, as amended. The Commission has determined that a first-come, first-served reservation process ensures an orderly allocation of toll free numbers, avoids the need to resolve competing claims among subscribers to assignment of particular numbers, and avoids problems of accelerated number depletion and subscriber disputes about reservation priority.

Legal Basis: 47 U.S.C. 154(i), 154(j), 251(e).

Section Number and Title:

52.111 Toll free number assignment.

Part 54—Universal Service

Subpart A—General Information

Brief Description: These rules provide general information regarding the Universal Service Fund, including various terms and definitions that are referenced throughout section 54 of the Commission's rules.

Need: In implementing statutory requirements for the Universal Service Fund, these rules provide necessary information regarding terms that may have different definitions outside the universal service context.

Legal Basis: 47 U.S.C. 254.

Section Number and Title:

54.5 Terms and definitions.

Subpart B—Services Designated for Support

Brief Description: These rules specify the supported services for rural, insular and high-cost areas. These rules also specify the requirement to offer all designated services, as well as provide additional time for telecommunications carriers to complete network upgrades.

Need: These rules ensure that rural, insular and high-cost areas receive support for the specified designated telecommunications services.

Legal Basis: 47 U.S.C. 254.

Section Number and Title:

54.101 Supported services for rural, insular and high-cost areas.

Subpart C—Carriers Eligible for Universal Service Support

Brief Description: These rules specify the requirements for the designation of eligible telecommunications carriers. Congress has established that only those entities designated as eligible telecommunications carriers may receive support under the Universal Service support mechanism. These rules include the requirements regarding the relinquishment of designation as an eligible telecommunications carrier.

Need: These rules ensure that the designation process for eligible telecommunications carriers meets the statutory requirements for the Universal Service support mechanism.

Legal Basis: 47 U.S.C. 214(e)(2), 214(e)(4), 214(e)(6), 254(e).

Section Number and Title:

54.201 Definition of eligible telecommunications carriers, generally.

Subpart D—Universal Service Support for High-Cost Areas

Brief Description: These rules specify the requirements for the high-cost support mechanism. These rules provide requirements for how high-cost support will be calculated and distributed to eligible telecommunications providers.

Need: In implementing statutory requirements for the high-cost program of the universal service support mechanism, these rules ensure that rates in rural, insular and high-cost areas, are ''reasonably comparable'' to rates charged for similar services in urban areas.

Legal Basis: 47 U.S.C. 254(b).

Section Number and Title:

54.301 Local switching support.
54.303 Long term support.
54.307 Support to a competitive eligible telecommunications carrier.

Subpart E—Universal Service Support for Low-Income Consumers

Brief Description: These rules specify the requirements for the Lifeline and Linkup Program of the universal service support mechanism. The rules establish the requirements for eligible consumers and eligible telecommunications carriers. The rules also establish certification and verification requirements, as well as recordkeeping and auditing requirements.

Need: In implementing statutory requirements for the Lifeline and Linkup Program of the universal service support mechanism, these rules ensure that quality telecommunications services are available to low-income consumers at reasonable and affordable rates.

Legal Basis: 47 U.S.C. 254(b).

Section Number and Title:

54.400 Terms and definitions.
54.401 Lifeline defined.
54.403 Lifeline support amount.

Subpart F—Universal Service Support for Schools and Libraries

Brief Description: These rules specify the requirements for participation in the Schools and Libraries Program of the universal service support mechanism. The rules describe requirements regarding eligible entities, and the services eligible for discounted support. The rules also establish procedures for the application process, competitive bidding process, and the distribution of support. Finally, these rules establish recordkeeping and auditing requirements.

Need: In implementing statutory requirements for the Schools and Libraries support mechanism, these rules ensure that eligible schools, libraries, and consortia that include eligible schools and libraries receive discounts for eligible telecommunications services, Internet access, and internal connections.

Legal Basis: 47 U.S.C. 254(h)(1)(B).

Section Number and Title:

54.502 Supported telecommunications services.
54.503 Other supported special services.
54.504 Requests for services.
54.505 Discounts.
54.506 Internal connections.
54.507 Cap.
54.509 Adjustments to the discount matrix.
54.511 Ordering services.
54.515 Distributing support.
54.516 Auditing.
54.517 Services provided by non-telecommunications carriers.
54.518 Support for wide area networks.
54.519 State telecommunications networks.

Subpart G—Universal Service Support for Health Care Providers

Brief Description: These rules specify the requirements for participation in the Rural Health Care Program of the universal service support mechanism. The rules establish the requirements for eligible health care providers, and the services eligible for discounted support. The rules also establish procedures for the application process, competitive bidding process, and the distribution of support. Finally, these rules establish recordkeeping and auditing requirements.

Need: In implementing statutory requirements for the Rural Health Care support mechanism, these rules ensure that discounts are available to eligible rural health care providers for telecommunications services and monthly Internet access service charges.

Legal Basis: 47 U.S.C. 254(h)(2)(A).

Section Number and Title:

54.603 Competitive bid requirements.
54.604 Existing contracts.
54.605 Determining the urban rate.
54.609 Calculating support.
54.619 Audits and recordkeeping.
54.623 Cap.
54.625 Support for services beyond the maximum supported distance for rural health care providers.

Subpart H—Administration

Brief Description: These rules specify the requirements regarding the Universal Service Administrative Company, as the permanent Administrator for the universal service support mechanism. These rules establish the Administrator's functions and responsibilities, as well as the composition of the Administrator's Board of Directors and Committees. These rules also establish requirements regarding contributions and contributor reporting requirements.

Need: In implementing statutory requirements for the universal service support mechanism, these rules provide the framework and requirements for the administration of the program.

Legal Basis: 47 U.S.C. 254.

Section Number and Title:

54.701 Administrator of universal service support mechanisms.
54.702 Administrator's functions and responsibilities.
54.703 The Administrator's Board of Directors.
54.704 The Administrator's Chief Executive Officer.
54.705 Committees of the Administrator's Board of Directors.
54.706 Contributions.
54.708 De minimis exemption.
54.709 Computations of required contributions to universal service support mechanisms.
54.711 Contributor reporting requirements.
54.715 Administrative expenses of the Administrator.

Subpart I—Review of Decisions Issued by the Administrator

Brief Description: These rules specify the requirements regarding review of decisions issued by the Universal Service Administrative Company. These rules establish the filing requirements, review process, and the treatment of disbursements during the pending review process.

Need: In implementing statutory requirements for the universal service support mechanism, these rules provide the framework and requirements for the review of decisions issued by the Administrator.

Legal Basis: 47 U.S.C. 254.

Section Number and Title:

54.719 Parties permitted to seek review of Administrator decisions.
54.720 Filing deadlines.
54.721 General filing requirements.
54.722 Review by the Wireline Competition Bureau or the Commission.
54.723 Standard of review.
54.724 Time periods for Commission approval of Administrator decisions.
54.725 Universal service disbursements during pendency of a request for review and Administrator decision.

Part 61—Tariffs

Subpart E—General Rules for Dominant Carriers

Brief Description: The Part 61 rules are designed to implement the provisions of sections 201, 202, 203, and 204 of the Communications Act of 1934, as amended, and help ensure that rates are just, reasonable, and not unjustly or unreasonably discriminatory. The rules govern the filing, form, content, public notice periods, and accompanying support materials for tariffs. Section 61.52(c) requires incumbent local exchange carriers to file tariffs and associated documents electronically.

Need: This rule makes the filing of tariffs and associated documents easier and less expensive for carriers, and expedites the availability of tariffs and associated documents for public inspection.

Legal Basis: 47 U.S.C. 151, 154(i), 154(j), 201–205, and 403.

Section Number and Title:

61.52(c) Form, size, type, legibility, etc.

Brief Description: The Part 61 rules are designed to implement the provisions of sections 201, 202, 203, and 204 of the Communications Act of 1934, as amended, and help ensure that rates are just, reasonable, and not unjustly or unreasonably discriminatory. The rules govern the filing, form, content, public notice periods, and accompanying support materials for tariffs. Section 61.58 establishes notice requirements for filed tariffs. Section 61.58(e) provides notice requirements for tariffs filed by non-price cap carriers.

Need: Section 61.58(e) was adopted to provide adequate opportunity for review of tariffs filed by non-price cap carriers. The periods were shortened to reduce carriers' regulatory burden without restricting the Commission's ability to perform its statutory duty.

Legal Basis: 47 U.S.C. 151, 154(i), 154(j), 201–205, and 403.

Section Number and Title:

61.58(e) Notice requirements.

Part 64—Miscellaneous Rules Relating to Common Carriers

Subpart G—Furnishing of Enhanced Services and Customer-Premises Equipment by Communications Common Carriers; Telephone Operator Services

Brief Description: This rule specifies that providers of operator services must

disclose to the consumer, at no charge and before connecting any interstate non-access code operator service call, how to obtain the total cost of the call before providing further oral advice to the consumer on how to proceed to make the call.

Need: These provisions address the problem of widespread consumer dissatisfaction with the high rates charged by many operator services providers for calls from public phones and other aggregator locations such as hotels, hospitals, and educational institutions. The rules were designed to ensure that consumers receive sufficient information about the rates they will pay for operator services at public phones and other aggregator locations, thereby fostering a more competitive operator service provider marketplace.

Legal Basis: 47 U.S.C. 151, 154, 160, 201–205, 215, 218, 226, 254.

Section Number and Title:

64.703(a)(4) Consumer information.

Brief Description: These rules exempt Commercial Mobile Radio Service (CMRS) aggregators (entities that make telephones available to the public or to transient users of the entity's premises for interstate calls using a provider of CMRS operator services) and providers of CMRS operator services from the general rules (a) prohibiting aggregators from blocking consumers from calling 800 and 950 access code numbers to access the consumer's choice of operator services providers; and (b) restricting charges related to the provision of operator services (e.g., prohibiting operator service providers from billing for unanswered telephone calls).

Need: The Commission has determined that the equal access and unblocking regulations established in this section are generally unnecessary to protect consumers of CMRS, and would increase the cost of CMRS service without producing any identifiable benefits.

Legal Basis: 47 U.S.C. 154, 201, 218, 226(e).

Section Number and Title:

64.704(e) Call blocking prohibition/exemption for CMRS aggregators and CMRS operator services providers.
64.705(c) Restrictions on charges related to the provision of operator services/exemption for CMRS aggregators and CMRS operator services providers.

Brief Description: These rules define a ''CMRS aggregator'' as ''an aggregator that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises for interstate telephone calls using a provider of CMRS operator services;'' ''CMRS operator services'' as operator services provided by means of a commercial mobile radio service; and ''Provider of CMRS operator services'' as a provider of operator services that provides CMRS operator services.

Need: These rules define and provide necessary information regarding specific types of service providers that are exempt from certain portions of the rules in this subpart and that may have different definitions outside of this context.

Legal Basis: 47 U.S.C. 154, 201, 202, 218, 226, 332.

Section Number and Title:

64.708(d) Definitions: CMRS aggregator.
64.708(e) Definitions: CMRS operator services.
64.708(k) Definitions: Provider of CMRS operator services.

Brief Description: Section 64.709 provides for the filing of operator service informational tariffs, and requires that such tariffs must include specific rates expressed in dollars and cents, as well as applicable per-call aggregator surcharges or other per-call fees, if any, that are collected from consumers.

Need: This provision seeks to make operator service provider informational tariffs more useful to consumers, allowing them to make rational purchasing decisions, and impose market-based discipline on operator service providers.

Legal Basis: 47 U.S.C. 226(h)(1)(A).

Section Number and Title:

64.709 Informational tariffs.

Brief Description: This rule establishes certain requirements for operator services providers serving prison inmates, such as required disclosures concerning call rates and total costs, and requiring service providers to allow prisoners to terminate a call at no charge before the call is connected.

Need: This provision furthers the Commission's statutory obligation to ''ensur[e] that consumers have the opportunity to make informed choices'' in using operator services to place interstate telephone calls. The Commission adopted price disclosure rules for providers of inmate operator services that are similar to those applicable to operator service providers in order to ''eliminate some of the abusive practices that have led to complaints'' and to protect recipients of collect calls from inmates from being charged excessive rates by a monopoly provider.

Legal Basis: 47 U.S.C. 47 U.S.C. 151, 154, 160, 201–205, 215, 218, 226, 254.

Section Number and Title:

64.710 Operator services for prison inmate phones.

Subpart U—Customer Proprietary Network Information

Brief Description: These rules provide general information, including various terms and definitions referenced throughout subpart U, regarding the proper use of customer proprietary network information (CPNI), and the duty of telecommunications carriers to protect the confidentiality of CPNI.

Need: Congress recognized that the new competitive market forces and technology ushered in by the 1996 Act had the potential to threaten consumer privacy interests, and therefore enacted section 222 to prevent consumer privacy protections from being inadvertently swept away along with the prior limits on competition. The CPNI regulations in section 222 are largely consumer protection provisions that establish restrictions on carrier use and disclosure of personal customer information. The statutory design expressly recognizes the duty of all carriers to protect customer information and embodies the principle that customers must be able to control information they view as sensitive and personal from use, disclosure, and access by carriers.

Legal Basis: 47 U.S.C. 154, 222, 254(k).

Section Number and Title:

64.2001 Basis and purpose.
64.2003 Definitions.

Brief Description: This rule describes the circumstances under which telecommunications carriers may, and may not, use, disclose or permit access to CPNI without prior customer approval.

Need: These rules further Congress' goals of fostering competition in telecommunications markets and ensuring the privacy of customer information.

Legal Basis: 47 U.S.C. 154, 201, 218, 222, 254(k).

Section Number and Title:

64.2005 Use of customer proprietary network information without customer approval.

Brief Description: This rule establishes the methods telecommunications carriers may use to obtain valid prior customer approval for the use of CPNI; requires carriers to maintain the customer's approval or disapproval in effect until the customer revokes or limits it; and requires carriers to maintain records of customer approval for at least one year.

Need: These rules further Congress' goals of fostering competition in

telecommunications markets and ensuring the privacy of customer information.

Legal Basis: 47 U.S.C. 154, 201, 218, 222, 254(k).

Section Number and Title:

64.2007 Approval required for use of customer proprietary network information.

Brief Description: This rule requires carriers to provide notice to customers of their right to restrict the use of, disclosure of, and access to the customer's CPNI, establishes the methods for providing and the required content of such notice, and requires carriers to maintain records of this notification for at least one year.

Need: These rules further Congress' goals of fostering competition in telecommunications markets and ensuring the privacy of customer information.

Legal Basis: 47 U.S.C. 154, 201, 218, 222, 254(k).

Section Number and Title:

64.2008 Notice required for use of customer proprietary network information.

Brief Description: This rule establishes safeguards that carriers must implement to ensure compliance with the Commission's CPNI regulations, including specific record keeping, personnel training, and disciplinary, compliance and certification processes.

Need: These rules further Congress' goals of fostering competition in telecommunications markets and ensuring the privacy of customer information.

Legal Basis: 47 U.S.C. 154, 201, 218, 222, 254(k).

Section Number and Title:

64.2009 Safeguards required for use of customer proprietary network information.

Part 69—Access Charges

Subpart C—Computation of Charges for Price Cap Local Exchange Carriers

Brief Description: The Part 69 rules are designed to implement the provisions of sections 201 and 202 of the Communications Act of 1934, as amended, and to protect consumers by helping to prevent the exercise of market power by incumbent local exchange carriers. Section 69.153 allows price cap LECs to assess a per-line charge on multi-line business subscribers' presubscribed interexchange carriers. This charge is designed to reflect the non-traffic sensitive nature of local loop costs. Section 69.153(e) establishes the maximum monthly presubscribed interexchange carrier charge (PICC) price cap LECs may assess for Centrex lines, adopting a ratio of up to nine Centrex lines for one private branch exchange (PBX) trunk.

Need: Section 69.153(e) provides similar regulatory treatment with regard to PICC between the functionally equivalent Centrex and PBX trunk services.

Legal Basis: 47 U.S.C. 154, 201, 202, 203, 205, 218, 220, 254, 403.

Section Number and Title:

69.153 Presubscribed interexchange carrier charge (PICC).

Part 73—Broadcast Radio Services

Subpart E—Television Broadcast Stations

Brief Description: These rules specify showings that must be made in applications filed by TV broadcast stations who wish to use electrical beam tilt.

Need: In implementing statutory requirements for the transition to digital broadcasting, these rules set forth technical showings that applicants must provide when applying to use electrical beam tilt to increase the power of an UHF DTV station. These showings are necessary for Commission staff evaluation of competing applications for DTV stations.

Legal Basis: 47 U.S.C. 154, 303, 334, 336.

Section Number and Title:

73.625(c)(5) DTV coverage of principal community and antenna system.

Subpart H—Rules Applicable to All Broadcast Stations

Brief Description: The Part 73 rules state the general rules applicable to all broadcast services. Subpart H sets forth the rules common to all AM, FM, TV and Class A TV broadcast services, commercial and noncommercial. This rule applies the prohibition of collusion to all broadcast services subject to competitive bidding.

Need: These rules are needed to implement the Commission's competitive bidding authority for broadcast services under Section 309(j) of the Communications Act of 1934, as amended, and to confirm that the Commission's rules prohibiting collusion applies to all broadcast services subject to competitive bidding. This section conforms the auction rules and procedures for broadcast construction permits with the Commission's Part 1 auction rules.

Legal Basis: 47 U.S.C. 154, 303, 309(j), 334 and 336.

Section Number and Title:

73.3525(1) Agreements for removing application conflicts.

Brief Description: This rule applies subsections (c) and (d) of Section 73.3597 to mutually exclusive noncommercial applications filed after the release of *1998 Biennial Regulatory Review, Streamlining of Mass Media Applications, Rules, and Processes,* MM Docket 98–43, 13 FCC Rcd 23056 (Nov. 25, 1998).

Need: This section clarifies which applications are subject to subsections (c) and (d) of this rule.

Legal Basis: 47 U.S.C. 154, 301, 303, 307, 308, and 309.

Section Number and Title:

73.3597(c)(1)(iii) Procedures on transfer and assignment applications.

Brief Description: This rule eliminates the requirement that sales agreements and contracts be filed with the Commission within thirty days of execution, where the reporting entity has already filed the sales contract with an assignment or transfer application.

Need: This section reduces the filing burdens on licensees.

Legal Basis: 47 U.S.C. 154, 301, 303, 307, 308, and 309.

Section Number and Title:

73.3613(b)(7) Filing of contracts.

Subpart I—Procedures for Competitive Bidding and for Applications for Noncommercial Educational Broadcast Stations on Non-Reserved Channels

Brief Description: The Part 73 rules state the general rules for broadcast services. Subpart I sets forth the procedures for competitive bidding and applications for non-commercial educational broadcast stations on non-reserved channels. The rules below implement amended Section 309(j) of the Communications Act, which requires the Commission to use auctions to select from among all mutually exclusive applications broadcast construction permits.

Need: These rules amend the disparate application procedures for the various broadcast services to establish a uniform window filing approach. These rules also conform the procedures for auctioning mutually exclusive applications for broadcast construction permits to the Commission's Part 1 auction rules.

Legal Basis: 47 U.S.C. 154, 301, 303, 309 (j), 334, and 336.

Section Number and Title:

73.5000 Services subject to competitive bidding.

73.5002 Application and certification procedures; return of mutually exclusive applications not subject to competitive bidding procedures; prohibition of collusion.

73.5003 Submission of full payments.

73.5005 Filing of long-form applications.
73.5006 Filing of petitions to deny against long-form applications.
73.5007 Designated entity provisions.
73.5008 Definitions applicable for designated entity provisions.
73.5009 Assignment of transfer of control.

Part 74—Experimental Radio, Auxiliary, Special Broadcast and Other Program Distributional Services

Subpart L—FM Broadcast Translator Stations and FM Broadcast Booster Stations

Brief Description: These rules set forth technical standards for FM translator and booster stations along the United States borders.

Need: These rules are necessary to prevent interference with Canadian and Mexican broadcast stations.

Legal Basis: 47 U.S.C. 154, 303, 307, and 554.

Section Number and Title:

74.1235(d)(1), (2) and (3) Power limitations and antenna systems.

Part 79—Closed Captioning and Video Description of Video Programming

Brief Description: In 1996, Congress added section 713 to the Communications Act of 1934, as amended (the Act), requiring the Commission to adopt rules for the closed captioning of video programming. Among other things, these rules establish implementation schedules, provide for who is responsible for compliance and how compliance is determined, and set forth categorical, self-implementing exemptions from the rules. In 1998, the Commission added another self-implementing exemption to those it adopted the previous year. This one, found at 79.1(d)(13), covers instructional programming that is locally produced by public television stations for use in grades K–12 and post secondary schools. Regarding how compliance is determined, the Commission also added a provision to the rules that recognizes that there may be times when the captioning requirements can be problematic due to a variety of factors. As such, 79.1(e)(10) states that the Commission will consider showings that any lack of captioning was de minimis and reasonable under the circumstances.

Need: Closed captioning is the visual display of the audio portion of video programming. These rules implement section 713 of the Act, through which Congress required that video programming be closed captioned in order to ensure access by persons with hearing disabilities to video programming. The 1998 rule changes allow for certain educational programming to be exempt from the closed captioning rules, because such programming is not intended for widespread distribution, and it is subject anyway to other Federal requirements that ensure that adequate efforts will be taken to make it accessible on a case by case basis. The rule changes also provide guidance as to how the Commission will address complaints regarding lack of closed captioning where the lack of captioning arguably was de minimis and reasonable under the circumstances.

Legal Basis: 47 U.S.C. 613

Section Number and Title:

79.1(d)(13), (e)(10) Closed captioning of video programming.

Part 80—Stations in the Maritime Services

Subpart B—Applications and Licenses

Brief Description: The Part 80 rules set forth the conditions under which portions of the radio spectrum are made available and licensed for stations in the maritime services. Subpart B sets forth the procedures and requirements for the filing of applications for license to operate radio facilities in the maritime services.

Need: These rules establish an exemption for certain vessels from annual inspection and requirements for partitioning licenses and disaggregating spectrum.

Legal Basis: 47 U.S.C. 154, 303, 307, 309, and 332.

Section Number and Title:

80.59(d)(2) Compulsory ship inspections.
80.60 Partitioned licenses and disaggregated spectrum.

Subpart C—Operating Requirements and Procedures

Brief Description: The Part 80 rules set forth the conditions under which portions of the radio spectrum are made available and licensed for stations in the maritime services. Subpart C sets forth the technical, operational, and administrative requirements for use of the spectrum and equipment for stations in the maritime services.

Need: This rule permits certain VHF public coast licensees and certain automated maritime telecommunications system (AMTS) coast licensees to transfer or assign their channel(s) or channel block(s) to another entity.

Legal Basis: 47 U.S.C. 154, 303, 307, 309, and 332.

Section Number and Title:

80.70(c) Special conditions relative to coast station VHF facilities.

Subpart H—Frequencies

Brief Description: The Part 80 rules set forth the conditions under which portions of the radio spectrum are made available and licensed for stations in the maritime services. Subpart H describes the carrier frequencies and general uses of radiotelegraphy for distress, urgency, safety, call and reply; working; digital selective calling; narrow-band direct-printing; and facsimile for stations within the maritime services.

Need: These rules list and establish requirements for the radiotelephony working frequencies assignable to Marine VHF 156–162 MHz band public coast stations for public correspondence communications with ship stations and units on land.

Legal Basis: 47 U.S.C. 154, 303, 307, 309, and 332.

Section Number and Title:

80.371(c)(1)(i), (ii), (iii), (2), (3), and (4) Public correspondence frequencies.

Subpart Y—Competitive Bidding Procedures

Brief Description: The Part 80 rules set forth the conditions under which portions of the radio spectrum are made available and licensed for stations in the maritime services. Subpart Y sets forth the rules governing the use of competitive bidding to resolve mutually exclusive VHF Public Coast Service Area (VPCSA) and automated maritime telecommunications system (AMTS) applications for initial licenses.

Need: These rules are needed to implement the Commission's competitive bidding authority under 47 U.S.C. 309(j). The provisions in 80.1252 are necessary to administer the Commission's designated entity program under which small businesses meeting certain eligibility criteria may receive bidding credits on their winning bids.

Legal Basis: 47 U.S.C. 154, 303, 307, 309, and 332.

Section Number and Title:

80.1251 Maritime communications [services] subject to competitive bidding.
80.1252 Designated entities.

Part 90—Private Land Mobile Radio Services

Subpart J—Non-Voice and Other Specialized Operations

Brief Description: The Part 90 rules state the conditions under which radio communications systems may be licensed and used in the Public Safety, Industrial/Business Radio Pool, and Radiolocation Radio Services. Subpart J sets forth requirements and standards for licensing and operation of non-voice and other specialized radio uses,

including secondary signaling, telemetry, radioteleprinter, radiofacsimile, automatic vehicle monitoring, radio call box, relay, vehicular repeater, and control station operations.

Need: This rule permits the use of 40.66–40.70 MHz and 216–220 MHz frequency bands for the tracking of, and the telemetry of scientific data from ocean buoys and animal wildlife.

Legal Basis: 47 U.S.C. 154, 303, and 332.

Section Number and Title:

90.248 Wildlife and ocean buoy tracking.

Subpart M—Intelligent Transportation Systems Radio Service

Brief Description: The Part 90 rules state the conditions under which radio communications systems may be licensed and used in the Public Safety Pool, Industrial/Business Radio Pool, and Radiolocation Radio Services. Subpart M governs Intelligent Transportation Systems radio services, which include the Location and Monitoring Service (LMS) and Dedicated Short Range Communications Service (DSRCS).

Need: The rule, permits LMS licensees to partition licenses and disaggregate spectrum, and is intended to allow auction winners of LMS spectrum to customize their LMS systems to suit their business plans and helps remove entry barriers for small businesses. *Legal Basis:* 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7).

Section Number and Title:

90.365 Partitioned licenses and disaggregated spectrum.

Subpart R—Regulations Governing the Licensing and Use of Frequencies in the 764–776 and 794–806 MHz Bands

Brief Description: The Part 90 rules state the conditions under which radio communications systems may be licensed and used in the Public Safety Pool, Industrial/Business Radio Pool, and Radiolocation Radio Services. Subpart R sets forth the regulations governing the licensing and operations of all systems operating in the 763–775 MHz and 793–805 MHz frequency bands.

Need: The identified rules govern eligibility as well as operational, planning and licensing requirements and standards for stations licensed in the 763–775 MHz and 793–805 MHz bands.

Legal Basis: 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7).

Section Number and Title:

90.521 Scope.
90.523 Eligibility.
90.527 Regional plan requirements.
90.531 Band plan.
90.533 Transmitting sites near the U.S./Canada or U.S./Mexico border.
90.535 Modulation and spectrum usage efficiency requirements.
90.537 Trunking requirement.
90.539 Frequency stability.
90.541 Transmitting power limits.
90.543 Emission limitations.
90.545 TV/DTV interference protection criteria.
90.549 Transmitter certification.
90.551 Construction requirements.

Subpart T—Regulations Governing Licensing and Use of Frequencies in the 220–222 MHz Band

Brief Description: The Part 90 rules state the conditions under which radio communications systems may be licensed and used in the Public Safety, Industrial/Business Radio Pool, and Radiolocation Radio Services. Subpart T sets forth the administrative, operational, and technical rules governing licensing and use of frequencies in the 220–222 MHz Band, including eligibility, frequency and channel availability, permissible operations, frequency selection and assignment, and construction requirements.

Need: These rules calculate Phase I licensee service areas based on predicted service contours; inform Phase I licensees when they may add, remove, or modify a transmitter site within their existing service area without prior notification to the Commission; when they may exchange multiple licenses for a single authorization and when adding, removing or modifying a site requires coordination of those actions to avoid and resolve issues of harmful interference.

Legal Basis: 47 U.S.C. 154, 303, and 332.

Section Number and Title:

90.723(g) and (h) Selection and assignment of frequencies.
90.745 Phase I licensee service areas.

Subpart X—Competitive Bidding Procedures for Location and Monitoring Service

Brief Description: The part 90 rules state the conditions under which radio communications systems may be licensed and used in the Public Safety, Industrial/Business Radio Pool, and Radiolocation Radio Services. Subpart X sets forth the rules governing the use of competitive bidding to resolve mutually exclusive multilateration Location and Monitoring Service applications for initial licenses.

Need: These rules are needed to implement the Commission's competitive bidding authority under 47 U.S.C. 309(j). The provisions in 90.1103 are necessary to administer the Commission's designated entity program under which small businesses meeting certain eligibility criteria may receive bidding credits on their winning bids.

Legal Basis: 47 U.S.C. 154, 161, 303, 309, and 332.

Section Number and Title:

90.1101 Location and monitoring service subject to competitive bidding.
90.1103 Designated entities.

Part 95—Personal Radio Services

Subpart A—General Mobile Radio Service (GMRS)

Brief Description: The Part 95 rules govern the Personal Radio Services, including the General Mobile Radio Service, Family Radio Service, Radio Control Radio Service, Citizens Band Radio Service, 218–219 MHz Service, Low Power Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, and Multi-Use Radio Service. Subpart A applies to the General Mobile Radio Service.

Need: The rule informs station operators which communications are prohibited, including messages for hire, false or deceptive messages, and messages in connection with any illegal activity.

Legal Basis: 47 U.S.C. 154 and 303.

Section Number and Title:

95.183 Prohibited communications.

Part 97—Amateur Radio Service

Subpart A—General Provisions

Brief Description: The Part 97 rules set forth the conditions under which portions of the radio spectrum are made available and licensed for amateur radio service. Subpart A contains administrative, technical, and operational requirements for use of the spectrum and equipment in the amateur radio service.

Need: This rule provides guidance on the issuance of International Amateur Radio Permits (IARP).

Legal Basis: 47 U.S.C. 154 and 303.

Section Number and Title:

97.5(e) Station license required.

Subpart D—Technical Standards

Brief Description: The Part 97 rules set forth the conditions under which portions of the radio spectrum are made available and licensed for amateur radio service. Subpart D outlines technical standards for the frequency bands available to amateur stations.

Need: The rule suspends amateur station transmitting in the 76–77 GHz segment of the 4 mm band.

Legal Basis: 47 U.S.C. 154 and 303.
Section Number and Title:

97.303(r) Frequency sharing requirements.

Part 101—Fixed Microwave Services

Subpart A—General

Brief Description: The Part 101 rules prescribe the manner in which portions of the radio spectrum may be made available for private operational, common carrier, Local Television Transmission Service (LTTS), 24 GHz Service, Local Multipoint Distribution Service (LMDS), 39 GHz, Multiple Address Service (MAS), Multichannel Video Distribution and Data Service (MVDDS) and 70–80–90 GHz fixed, microwave operations that require transmitting facilities on land or in specified offshore coastal areas within the continental shelf. Subpart A sets forth the scope of and authority for the remaining rules in Part 101, as well as setting forth definitions of certain terms used in the remaining rules.

Need: The identified rule is necessary to refer to the rules of practice and procedure in Part 1 of the rules that are applicable to services regulated under Part 101 of the rules.

Legal Basis: 47 U.S.C. 154 and 303.
Section Number and Title:

101.1(a) Scope and authority.

Subpart B—Applications and Licenses

Brief Description: The Part 101 rules prescribe the manner in which portions of the radio spectrum may be made available for private operational, common carrier, Local Television Transmission Service (LTTS), 24 GHz Service, Local Multipoint Distribution Service (LMDS), 39 GHz, Multiple Address Service (MAS), Multichannel Video Distribution and Data Service (MVDDS) and 70–80–90 GHz fixed, microwave operations that require transmitting facilities on land or in specified offshore coastal areas within the continental shelf. Subpart B sets forth the rules governing applications and licenses in those fixed microwave services subject to Part 101.

Need: The identified rules are necessary to establish service areas and performance requirements for the 38.6–40.0 GHz band, allow partitioning and disaggregation in that band, define the general filing requirements for licensees in the private operational, common carrier, LTTS, 24 GHz, LMDS, MAS, MVDDS and 70–80–90 GHz Services and to provide specific procedures for the licensing, operation, and modification of facilities in those services.

Legal Basis: 47 U.S.C. 154 and 303.
Section Number and Title:

101.17 Performance requirements for the 38.6–40.0 GHz frequency band.
101.31(e)(1)(viii) Temporary and conditional authorizations.
101.56 Partitioned service areas (PSAs) and disaggregated spectrum.
101.64 Service areas.

Subpart C—Technical Standards

Brief Description: The Part 101 rules prescribe the manner in which portions of the radio spectrum may be made available for private operational, common carrier, Local Television Transmission Service (LTTS), 24 GHz Service and Local Multipoint Distribution Service (LMDS), 39 GHz, Multiple Address Service (MAS), Multichannel Video Distribution and Data Service (MVDDS) and 70–80–90 GHz fixed, microwave operations that require transmitting facilities on land or in specified offshore coastal areas within the continental shelf. Subpart C sets forth the technical requirements for such services.

Need: The identified rules are necessary to assign frequencies for systems in the 38.6–40 GHz band on an Economic Area service area basis and to clarify that non-LMDS operations in the 31,000–31,300 MHz band licensed after March 11, 1997 are secondary to Local Multipoint Distribution Service operations and are unprotected with respect to each other.

Legal Basis: 47 U.S.C. 154 and 303.
Section Number and Title:

101.103(b)(3) Frequency coordination procedures.
101.147(v)(2) Frequency assignments.

Subpart N—Competitive Bidding Procedures for the 38.6–40.0 GHz Band

Brief Description: The part 101 rules prescribe the manner in which portions of the radio spectrum may be made available for private operational, common carrier, Local Television Transmission Service (LTTS), 24 GHz Service and Local Multipoint Distribution Service (LMDS), 39 GHz, Multiple Address Service (MAS), Multichannel Video Distribution and Data Service (MVDDS) and 70–80–90 GHz fixed, microwave operations that require transmitting facilities on land or in specified offshore coastal areas within the continental shelf. Subpart N sets forth the rules governing the use of competitive bidding to resolve mutually exclusive applications for initial licenses in the 38.6–40.0 GHz Band.

Need: These rules are needed to implement the Commission's competitive bidding authority under 47 U.S.C. 309(j). The provisions in 47 CFR 101.1208 and 101.1209 are necessary to administer the Commission's designated entity program under which small businesses meeting certain eligibility criteria may receive bidding credits on their winning bids.

Legal Basis: 47 U.S.C. 154, 303, and 309.
Section Number and Title:

101.1201 38.6–40.0 GHz subject to competitive bidding.
101.1208 Bidding credits for small businesses.
101.1209 Definitions.

[FR Doc. E9–15928 Filed 7–6–09; 8:45 am]
BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 09–1362; MB Docket No. 09–98; RM–11536]

Radio Broadcasting Services; Leupp, AZ

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document sets forth a proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's rules, 47 CFR Section 73.202(b). The Commission requests comment on a petition filed by Cochise Broadcasting LLC, licensee of FM Station KZXK, Doney Park, Arizona. Petitioner proposes the substitution of FM Channel 293C2 for vacant Channel 255C2 at Leupp, Arizona. The purpose of the requested channel substitution at Custer is to allow FM Station KZXK to go from being a short-spaced station authorized pursuant to Section 73.215 of the Commission's rules and using a directional antenna to a fully-spaced station using an omnidirectional antenna. Channel 293C2 can be allotted at Leupp in compliance with the Commission's minimum distance separation requirements without site restriction at 35–17–02 North Latitude and 110–57–52 West Longitude. *See* **SUPPLEMENTARY INFORMATION** *infra.*

DATES: Comments must be filed on or before August 10, 2009, and reply comments on or before August 25, 2009.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve petitioner's counsel as follows: Susan A. Marshall, Esq., Ann Goodwin Crump, Esq., Fletcher, Heald & Hildreth, P.L.C., 1300 N. 17th Street—Eleventh Floor, Arlington, Virginia 22209.

FOR FURTHER INFORMATION CONTACT: Deborah A. Dupont, Media Bureau (202) 418–7072.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Notice of Proposed Rule Making*, MB Docket No. 09–98, adopted June 17, 2009, and released June 19, 2009. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY–A257), 445 12th Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, (800) 378–3160, or via the company's Web site, *http://www.bcpiweb.com*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

The Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Arizona, is amended by removing Channel 255C2 and by adding Channel 293C2 at Leupp.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. E9–15929 Filed 7–6–09; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register

Vol. 74, No. 128

Tuesday, July 7, 2009

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Medicine Bow-Routt National Forests and Thunder Basin National Grassland; Wyoming; Thunder Basin National Grassland Land and Resource Management Plan Amendment for Prairie Dog Management

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement, correction.

SUMMARY: The Forest Service proposes to: (1) Develop a project-level and site-specific implementation strategy to manage black-tailed prairie dogs (Cynomys ludovicianus) using the full suite of management tools to maintain viable populations to support blackfooted ferret reintroduction and populations of other associated species while reducing unwanted colonization of adjoining lands along national grassland boundaries and (2) to amend the Thunder Basin National Grassland Land and Resource Management Plan (LRMP) as needed to support the site-specific implementation plan and to modify the boundary of the black-footed ferret reintroduction area. The ferret area modification is proposed to provide a more logical boundary, based on topographical and biological barriers for prairie dog colonies, and to include lands recently acquired through land exchange.

A Notice of Intent (NOI) to prepare an environmental impact statement (EIS) for this project was published March 13, 2007 (72 FR 11323–11324). More than six months have elapsed since the projected FEIS date in the original NOI. This revised NOI is being issued to update the projected date of availability of the FEIS.

DATES: The Notice of Availability of the draft environmental impact statement was published in the **Federal Register** on February 8, 2008 (73 FR 7555–7556). The final environmental impact statement is expected in July, 2009. No further formal public comment opportunities will be offered on this project.

FOR FURTHER INFORMATION CONTACT: Cristi Painter, Wildlife Biologist or Misty Hays, Deputy District Ranger, Douglas Ranger District, 2250 East Richards St, Douglas, WY 82633 (307 358–4690.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: Since the 1960s, the Forest Service has been challenged to balance our duty to conserve prairie dog habitat and manage the impacts from prairie dogs on public lands and neighboring private lands. Prairie dog management on the Thunder Basin National Grassland fluctuated throughout the 1960's, 1970's and 1980s from periods of active use of rodenticide, management to maintain prairie dog populations and no rodenticide use. However, with the petition for listing the prairie dog in 1998, rodenticide use was prohibited by Forest Service policy from 1999 until 2004 when the US Fish and Wildlife Service issued its decision to remove the prairie dog from its candidate list. In 2001 the LRMP was completed with the 2002 Record of Decision (ROD). The LRMP continued to limit use of prairie dog rodenticide to situations involving public health and safety risks and damage to facilities. In 2002, as the Thunder Basin National Grassland LRMP was being completed a plague epizootic impacted prairie dog colonies on the Thunder Basin National Grassland in April and May 2002 reducing populations from an estimated 21,000 acres of inventoried active colonies in 2001 to about 3,300 acres of inventoried active colonies in 2002. Since 2002, active colonies have been recovering from the plague event from 29–69% annually. In 2004, as part of the appeal decisions on the LRMP, USDA Deputy Under Secretary, David Tenny, issued instructions directing the Thunder Basin National Grassland to ensure that local land managers work together with State and county officials and local landowners to aggressively implement the spirit and intent of the good neighbor policy.

Purpose and Need for Action

To meet Grassland-wide Goals and Objectives (Goal 1.b, Objective 1), the desired conditions prescribed under the MA 3.63 direction, the National Black Footed Ferret Recovery Plan, and the LRMP appeal direction, the purpose of the proposed action is to establish the public support and maintain the biological environment needed to facilitate the reintroduction of black-footed ferrets on the Thunder Basin National Grassland (TBNG).

To achieve this purpose, the Forest Service has identified the need to:

- Proactively manage prairie dog populations on the TBNG in an environmentally, biologically, and socially acceptable manner that provides for the long-term conservation of black-tailed prairie dogs and other species associated with prairie dog colonies.
- Manage prairie dog populations, colonies and complexes on the TBNG in adequate acreages and distributions to provide habitat conditions that support future reintroductions of black-footed ferrets.
- Address the potential for prairie dog movement from the TBNG to adjoining private and State lands and local landowner concerns about possible losses of agricultural production, costs of controlling prairie dogs, effects on land values, and risks to human and animal health and safety that may occur if prairie dogs colonize adjacent non-federal lands as a result of this movement.
- Conserve prairie dogs on the TBNG for the wide variety of wildlife species that are dependent on the habitat provided by prairie dog colonies.
- Gain local landowner and State of Wyoming support for a prairie dog management on the TBNG that provides for the biological needs of the black-footed ferret and minimizes potential adverse impacts to adjacent non-federal landowners.

Proposed Action

The Forest Service proposes to develop a project-level and site-specific implementation strategy to manage prairie dogs using the full suite of management tools to maintain viable populations to support black-footed ferret reintroduction and populations of

other associated species while reducing unwanted colonization of prairie dogs on adjoining lands along National Grassland boundaries. The Forest Service also proposes to amend the LRMP as needed to support the site-specific implementation plan and to modify the boundary of the black-footed ferret reintroduction area. The ferret reintroduction area modification is proposed in order to provide a more logical boundary based on topographical and biological barriers for prairie dog colonies and to include lands recently acquired through land exchange. All standards and guidelines as currently prescribed in the LRMP for Black Footed Ferret Reintroduction Habitat will apply to the modified area. Methods for implementing the proposed actions include a suite of non-lethal and lethal management tools such as: rodenticide, limited shooting, landownership adjustment, third-party solutions, financial incentives, conservation agreements, conservation easements, live-trapping, reduced livestock grazing to create visual barriers, and physical barriers.

Responsible Official

Mary H. Peterson, Forest Supervisor, Medicine Bow-Routt National Forests and Thunder Basin National Grassland, 2468 Jackson Street, Laramie, Wyoming 82070 is the official responsible for making the decision on this action. She will document her decision and rationale in a Record of Decision.

Nature of Decision To Be Made

The Responsible Official will consider the results of the analysis and its findings and then document the final decision in a Record of Decision (ROD). The decision will include a determination whether or not to amend the LRMP to support the prairie dog management strategy and adjust the boundaries of the Black Footed Ferret Reintroduction Management Area.

Scoping Process

Concurrent with this NCI, letters requesting comments will be sent to interested parties. Anyone who provides comments to the DEIS or expresses interest during the comment period will have eligibility.

Preliminary Issues

The Forest Service has identified the following preliminary issues: (1) Potential impacts to the Black-Footed Ferret, an Endangered species; (2) Potential impacts to the black-tailed prairie dog, a Forest Service Region 2 Sensitive Species and other associated sensitive species; (3) Potential impacts to adjacent private lands; (4) Potential impacts to livestock grazing permits on National Grassland.

Comment Requested

Comments and input regarding the proposal were requested from the public, other groups and agencies via direct mailing on May 9, 2007. The Draft EIS was issued for a 45-day public comment in December 19, 2007 and the comment period was extended for an additional 45 days from February 4, 2008 until March 24, 2008. No further formal public comment will be accepted on this project.

Dated: June 22, 2009.

Misty A. Hays,

Deputy District Ranger.

[FR Doc. E9–15842 Filed 7–6–09; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Sanders County Resource Advisory Committee Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92–463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106–393) the Lolo and Kootenai National Forests' Sanders County Resource Advisory Committee will meet on July 16 at 7 p.m. in Thompson Falls, Montana for a business meeting. The meeting is open to the public.

DATES: July 16, 2009.

ADDRESSES: The meeting will he held at the Thompson Falls Courthouse, 1111 Main Street, Thompson Falls, MT 59873.

FOR FURTHER INFORMATION CONTACT: Randy Hojem, Designated Federal Official (DFO), District Ranger, Plains Ranger District, Lolo National Forest at (406) 826–3821.

SUPPLEMENTARY INFORMATION: Agenda topics include recommendations on new RAC project proposals, reviewing progress on current projects, and receiving public comment, If the meeting location is changed, notice will be posted in the local newspapers, including the Clark Fork Valley Press, and Sanders County Ledger.

Dated: June 24, 2009.

Randy Hojem,

DFO, Plains Ranger District, Lolo National Forest.

[FR Doc. E9–15844 Filed 7–6–09; 8:45 am]

BILLING CODE M

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

National Advisory Council on Maternal, Infant and Fetal Nutrition; Notice of Meeting

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, this notice announces a meeting of the National Advisory Council on Maternal, Infant and Fetal Nutrition.

DATES: July 21–23, 2009, 9 a.m.–5:30 p.m.

ADDRESSES: The meeting will be held at the Food and Nutrition Service, 3101 Park Center Drive, Room 830 (July 21), Room 204 A & B (July 22–23), Alexandria, VA 22302.

FOR FURTHER INFORMATION CONTACT: Carla McTigue, Supplemental Food Programs Division, Food and Nutrition Service, Department of Agriculture, (703) 305–2086.

SUPPLEMENTARY INFORMATION: The Council will continue its study of the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), and the Commodity Supplemental Food Program (CSFP). The agenda will include updates and discussion of implementation of the WIC food package, WIC cost containment, CSFP Farm Bill provisions, participation trends, and current research studies. Meetings of the Council are open to the public. Members of the public may participate, as time permits. Members of the public may file written statements before or after the meeting with Carla McTigue, Supplemental Food Programs Division, 3101 Park Center Drive, Room 522, Alexandria, Virginia 22302. If members of the public need special accommodations, please notify Mr. Dennis Murray by July 7, 2009, at (703) 305–2704, or e-mail at *dennis.murray@fns.usda.gov*.

Dated: July 1, 2009.

Julia Paradis,

Administrator.

[FR Doc. E9–15970 Filed 7–6–09; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Coastal Ocean Program Grants Proposal Application Package

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before September 8, 2009.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Laurie Golden, 301–713–3338 ext 151 or *laurie.golden@noaa.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Oceanic and Atmospheric Administration's Coastal Ocean Program (COP) provides direct financial assistance through grants and cooperative agreements for research supporting the management of coastal ecosystems. In addition to standard government application requirements, applicants for financial assistance are required to submit a project summary form. Recipients are required to file annual progress reports and a project final report using COP formats. All of these requirements are needed for better evaluation of proposals and monitoring of awards.

II. Method of Collection

Respondents have a choice of either electronic or paper forms.

III. Data

OMB Control Number: 0648–0384.
Form Number: None.
Type of Review: Regular submission.
Affected Public: Not-for-profit institutions; business or other for-profit organizations; State, Local or Tribal Government.
Estimated Number of Respondents: 300.
Estimated Time per Response: 30 minutes for a project summary; 5 hours for an annual report; and 10 hours for a final report.
Estimated Total Annual Burden Hours: 900.
Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: July 1, 2009.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E9–16001 Filed 7–6–09; 8:45 am]

BILLING CODE 3510–JS–P

DEPARTMENT OF COMMERCE

U.S. Census Bureau

Proposed Information Collection; Comment Request; Current Population Survey (CPS), Annual Social and Economic Supplement (ASEC)

AGENCY: U.S. Census Bureau.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: To ensure consideration, written comments must be submitted on or before September 8, 2009.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Michelle Wiland, U.S. Census Bureau, DSD/CPS HQ–7H108E, Washington, DC 20233–8400, (301) 763–3806.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau plans to request clearance for the collection of data concerning the Annual Social and Economic Supplement (ASEC) to be conducted in conjunction with the February, March, and April Current Population Survey (CPS). The Census Bureau has conducted this supplement annually for over 50 years. The Census Bureau, the Bureau of Labor Statistics, and the Department of Health and Human Services sponsor this supplement.

In the ASEC, we collect information on work experience, personal income, noncash benefits, health insurance coverage, and migration. The work experience items in the ASEC provide a unique measure of the dynamic nature of the labor force as viewed over a one-year period. These items produce statistics that show movements in and out of the labor force by measuring the number of periods of unemployment experienced by people, the number of different employers worked for during the year, the principal reasons for unemployment, and part-/full-time attachment to the labor force. We can make indirect measurements of discouraged workers and others with a casual attachment to the labor market.

The income data from the ASEC are used by social planners, economists, government officials, and market researchers to gauge the economic well-being of the country as a whole and selected population groups of interest. Government planners and researchers use these data to monitor and evaluate the effectiveness of various assistance programs. Market researchers use these data to identify and isolate potential customers. Social planners use these data to forecast economic conditions and to identify special groups that seem to be especially sensitive to economic

fluctuations. Economists use ASEC data to determine the effects of various economic forces, such as inflation, recession, recovery, and so on, and their differential effects on various population groups.

A prime statistic of interest is the classification of people in poverty and how this measurement has changed over time for various groups. Researchers evaluate ASEC income data not only to determine poverty levels but also to determine whether government programs are reaching eligible households.

New questions are proposed for the ASEC, beginning in 2010. The questions are related to: (1) Medical expenditures; (2) presence and cost of a mortgage on property; (3) child support payments; and (4) amount of child care assistance received. These questions will enable analysts and policymakers to obtain better estimates of family and household income, and to gauge poverty status more precisely. To offset respondent burden, some questions will be removed from the ASEC. Those removed include questions on transportation assistance, child care services, and questions on receipt of government assistance related to welfare reform.

Congressional passage of the State Children's Health Insurance Program (SCHIP), or Title XXI, led to a mandate from Congress, in 1999, that the sample size for the CPS, and specifically the ASEC, be increased to a level whereby more reliable estimates can be derived for the number of individuals participating in this program at the state level. By administering the ASEC in February, March, and April, rather than only in March as in the past, we have been able to achieve this goal. The total number of respondents has not been upwardly affected by this change.

II. Method of Collection

The ASEC information will be collected by both personal visit and telephone interviews in conjunction with the regular February, March and April CPS interviewing. All interviews are conducted using computer-assisted interviewing.

III. Data

OMB Control Number: 0607–0354.

Form Number: There are no forms. We conduct all interviewing on computers.

Type of Review: Regular submission.

Affected Public: Individuals or households.

Estimated Number of Respondents: 78,000.

Estimated Time per Response: 25 minutes.

Estimated Total Annual Burden Hours: 32,500.

Estimated Total Annual Cost: There are no costs to the respondents other than their time to answer the CPS questions.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13, United States Code, Section 182; and Title 29, United States Code, Sections 1–9.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: July 2, 2009.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E9–16039 Filed 7–6–09; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–357–812]

Honey from Argentina: Final Results of Antidumping Duty Administrative Review and Determination to Revoke Order in Part

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On December 30, 2008, the Department of Commerce (the Department) published its preliminary results of the 2006–2007 administrative review of the antidumping duty order on honey from Argentina. This administrative review covers three firms which were selected as mandatory respondents, Asociacion de Cooperativas Argentinas (ACA), Patagonik S.A. (Patagonik), and Seylinco, S.A. (Seylinco), and one firm which was not selected as a mandatory respondent, Compania Inversora Platense S.A. (CIPSA). Based on our revised cost of production analysis, the final results margin for Patagonik has changed from the preliminary results. In addition, we are revoking the order with respect to Seylinco.

EFFECTIVE DATE: July 7, 2009.

FOR FURTHER INFORMATION CONTACT: Maryanne Burke for Seylinco, David Cordell for Patagonik, Deborah Scott for ACA and CIPSA, or Robert James, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–5604, (202) 482–0408, (202) 482–2657 or (202) 482–0649, respectively.

SUPPLEMENTARY INFORMATION:

Background

On December 30, 2008, the Department published in the **Federal Register** the preliminary results of the administrative review of the antidumping duty order on honey from Argentina for the period December 1, 2006 to November 30, 2007. *See Honey from Argentina: Preliminary Results of Antidumping Duty Administrative Review and Intent to Revoke Order in Part*, 73 FR 79802 (December 30, 2008) (*Preliminary Results*).

On December 31, 2008, Patagonik filed a response to the section D supplemental questionnaire the Department had issued on November 19, 2008. On February 3, 2009, the Department issued Patagonik a second supplemental questionnaire for section D, to which Patagonik responded on March 2, 2009.

On February 9, 2009, Patagonik submitted what it termed a minor correction to its section B response. Specifically, Patagonik argued that due to a clerical error on one invoice, the color of the honey supplied to the customer differed from the color of the honey specified on the invoice. Patagonik argued this information was not new but rather was typical of a minor correction that would have been identified had the Department verified Patagonik's responses. Patagonik urged the Department to use this information because it was the most accurate information available. Petitioners (the American Honey Producers Association and Sioux Honey Association) objected to Patagonik's submission in a letter dated February 17, 2009. On February 18, 2009, and March 9, 2009, the Department issued supplemental questionnaires to Patagonik regarding its February 9, 2009, submission. Patagonik

filed responses to these supplemental questionnaires on March 4, 2009, and March 23, 2009, respectively.

In response to the Department's invitation to comment on the *Preliminary Results*, petitioners, ACA, CIPSA, Patagonik, and Seylinco filed case briefs on April 8, 2009. Petitioners, Patagonik, and Seylinco submitted rebuttal briefs on April 20, 2009. In addition, Seylinco filed comments on petitioners' rebuttal brief on April 21, 2009.

Period of Review

The period of review (POR) is December 1, 2006 to November 30, 2007.

Scope of the Order

The merchandise covered by the order is honey from Argentina. The products covered are natural honey, artificial honey containing more than 50 percent natural honey by weight, preparations of natural honey containing more than 50 percent natural honey by weight, and flavored honey. The subject merchandise includes all grades and colors of honey whether in liquid, creamed, comb, cut comb, or chunk form, and whether packaged for retail or in bulk form. The merchandise is currently classifiable under subheadings 0409.00.00, 1702.90.90, and 2106.90.99 of the *Harmonized Tariff Schedule of the United States* (HTSUS). Although the HTSUS subheadings are provided for convenience and Customs purposes, the Department's written description of the merchandise under this order is dispositive.

Determination to Revoke Order, in Part

The Department may revoke, in whole or in part, an antidumping duty order upon completion of a review under section 751 of the Tariff Act of 1930, as amended (the Act). While Congress has not specified the procedures that the Department must follow in revoking an order, the Department has developed a procedure for revocation that is described in 19 CFR 351.222. This regulation requires, *inter alia*, that a company requesting revocation must submit the following: (1) a certification that the company has sold the subject merchandise at not less than normal value (NV) in the current review period and that the company will not sell subject merchandise at less than NV in the future; (2) a certification that the company sold commercial quantities of the subject merchandise to the United States in each of the three years forming the basis of the request; and (3) an agreement to immediate reinstatement of the order if the Department concludes that the company, subsequent to the revocation, sold subject merchandise at less than NV. *See* 19 CFR 351.222(e)(1). Upon receipt of such a request, the Department will consider: (1) whether the company in question has sold subject merchandise at not less than normal value (NV) for a period of at least three consecutive years; (2) whether the company has agreed in writing to its immediate reinstatement in the order, as long as any exporter or producer is subject to the order, if the Department concludes that the company, subsequent to the revocation, sold the subject merchandise at less than NV; and (3) whether the continued application of the antidumping duty order is otherwise necessary to offset dumping. *See* 19 CFR 351.222(b)(2).

On December 31, 2007, pursuant to section 751(d) of the Act and 19 CFR 351.222(b)(2), Seylinco requested revocation of the antidumping duty order with respect to its sales of subject merchandise. Seylinco's request was accompanied by certification that it: (1) sold the subject merchandise at not less than NV during the current POR and will not sell the merchandise at less than NV in the future; (2) sold subject merchandise to the United States in commercial quantities for a period of at least three consecutive years; and (3) agreed to immediate reinstatement of the antidumping duty order, as long as any exporter or producer is subject to the order, if the Department concludes that, subsequent to the revocation, Seylinco sold the subject merchandise at less than NV.

In the *Preliminary Results*, we determined that Seylinco's request meets all of the criteria under 19 CFR 351.222(e)(1) and that revocation is warranted pursuant to 19 CFR 351.222(b)(2). *See Preliminary Results*, 73 FR at 79804–05 and Memorandum to Gary Taverman, ''Request by Seylinco, S.A. for Revocation in the Antidumping Duty Administrative Review of Honey from Argentina,'' dated December 19, 2008. We have not altered our findings for these final results. Therefore, we find that Seylinco qualifies for revocation of the antidumping duty order on honey from Argentina under 19 CFR 351.222(b)(2) and, accordingly, we are revoking the order with respect to subject merchandise exported by Seylinco.[1] For further discussion, *see* the accompanying Issues and Decision Memorandum at Comment 1.

[1] Only exports by Seylinco in which Seylinco is the first party with knowledge of the U.S. destination of the merchandise are covered by this revocation.

Effective Date of Revocation

The revocation of Seylinco applies to all entries of subject merchandise that are exported by Seylinco, and are entered, or withdrawn from warehouse, for consumption on or after December 1, 2007. The Department will order the suspension of liquidation ended for all such entries and will instruct U.S. Customs and Border Protection (CBP) to release any cash deposits or bonds. The Department also will instruct CBP to refund with interest any cash deposits on entries made on or after December 1, 2007.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the Issues and Decision Memorandum. A list of issues addressed in the Issues and Decision Memorandum is appended to this notice. The Issues and Decision Memorandum is on file in the Central Records Unit (CRU), Room 1117 of the main Commerce Building and can be accessed directly on the web at http://ia.ita.doc.gov/frn/index.html.

Changes Since the Preliminary Results

Based on the information Patagonik submitted in response to the Department's supplemental section D questionnaires, we have made adjustments to the beekeepers' and middleman's costs. We relied on the cost data submitted by the two beekeeper respondents and the middleman in their cost questionnaire responses, except as follows.

1. Because the middleman was unable to provide financial statements or corporate tax returns for 2007, we used the middleman's verified cost data from the 2004–2005 new shipper review of honey from Argentina. *See* Memorandum to the File, ''Administrative Review of Honey from Argentina,'' dated March 30, 2009, where the Department placed Attachment A of the 2004–2005 Honey from Argentina New Shipper Review memorandum, ''Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results – Patagonik S.A. Beekeeper Respondents.'' *See also Honey from Argentina: Preliminary Results of New Shipper Review*, 71 FR 67850 (November 24, 2006); unchanged in *Honey from Argentina: Final Results of New Shipper Review*, 72 FR 19177 (April 17, 2007).
2. We calculated land rental cost for Beekeeper 1 based on the market value of honey as payment–in-kind

for land use.

3. We adjusted Beekeeper 2's rent costs to reflect the market value for bartered honey.

For additional details, see Memorandum to Neal M. Halper, Director of Office of Accounting, ''Cost of Production and Constructed Value Calculation Adjustments for the Final Results - Patagonik S.A.'s - Beekeeper Respondents / Collector of Honey,'' dated June 29, 2009. We note the changes identified above have an effect on the final margin, and in fact we find sales below cost.

We also reclassified Patagonik's reported third country warranty expense as post–sale price adjustments granted by Patagonik in order to maintain good customer relations. *See* the accompanying Issues and Decision Memorandum at Comment 4 and the Analysis Memorandum for the Final Results of the Antidumping Duty Review of Honey from Argentina (A–357–812) for Patagonik S.A. (Patagonik).

Final Results of Review

We determine that the following dumping margins exist for the period December 1, 2006 through November 30, 2007.

Exporter	Weighted Average Margin (percentage)
ACA	0.00
CIPSA	0.77[2]
Patagonik S.A.	0.77
Seylinco	0.00

[2] This rate is based on the average of the margins calculated in this review, other than those which were zero, *de minimis*, or based on total facts available.

Assessment

The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we have calculated duty assessment rates which will be applied to all ACA, CIPSA,[3] Patagonik, and Seylinco entries made during the POR. The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of these final results of review.

The Department clarified its automatic assessment regulation on May 6, 2003 (68 FR 23954). This clarification will apply to entries of subject merchandise during the POR produced by companies included in these final results of review for which the reviewed companies did not know their merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all–others rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

[3] The assessment rate for CIPSA will be the same as the cash deposit rate assigned to that company.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of these final results, consistent with section 751(a)(1) of the Act: (1) for the companies covered by this review, the cash deposit rate will be the rate listed above except for Seylinco, which is revoked from the order; (2) if the exporter is not a firm covered in this review, but was covered in a previous review or the original less than fair value (LTFV) investigation, the cash deposit rate will continue to be the company–specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original LTFV investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review conducted by the Department, the cash deposit rate will continue to be 30.24 percent, which is the all–others rate established in the LTFV investigation. *See Notice of Antidumping Duty Order; Honey From Argentina*, 66 FR 63672 (December 10, 2001). These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

Notification to Interested Parties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation, which is subject to sanction.

We are issuing and publishing this determination and notice in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act.

Dated: June 29, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

Appendix – List of Comments in the Issues and Decision Memorandum

Comment 1: Revocation of the Order with Respect to Seylinco, S.A. (Seylinco)
Comment 2: Patagonik S.A.'s (Patagonik's) Proposed Change to Reported Honey Color
Comment 3: Use of Facts Available for Patagonik
Comment 4: Treatment of Patagonik's U.K Warranty Expense
Comment 5: Treatment of Asociación de Cooperativas Argentinas' (ACA's) Testing Expenses
Comment 6: Appropriate Margin to Assign to Compañía Inversora Platense S.A. (CIPSA)

[FR Doc. E9–15965 Filed 7–6–09; 8:45 am]
BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XL07

Fisheries in the Western Pacific; Certification Requirements for Electronic Logbook Applications

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

ACTION: Notice; certification requirements for electronic logbook applications.

SUMMARY: This notice describes the certification process and requirements for vendors wishing to supply western

Pacific fishing vessel owners and operators with electronic logbook applications (e-log applications).

ADDRESSES: You may request copies of the NOAA Fishery Information System (FIS) Electronic Logbook Certification Guidelines (Certification Guidelines), and submit requests for certification of e-log applications to: Electronic Reporting System Manager, Pacific Islands Fisheries Science Center (PIFSC), NMFS, 2570 Dole Street, Honolulu, HI 96822–2396, tel 808–983–5326; fax 808–983–2902.

FOR FURTHER INFORMATION CONTACT: Kurt Kawamoto, PIFSC, tel. 808–983–5326.

SUPPLEMENTARY INFORMATION: This notice is also accessible at *www.gpoaccess.gov/fr*.

Background

NMFS encourages the use of e-log applications as an alternative to paper logbooks and data reports. This recognizes that many fishermen use electronic navigation and communications equipment aboard their vessels, as well as computers for recording and maintaining catch and effort information, business records, and other information in a coordinated system that facilitates more efficient fishing operations. Accordingly, many fishermen wish to file Federal catch and effort reports in electronic format. This approach makes data submission easier for fishermen and reduces data entry and processing time for NMFS staff.

Further, NMFS notes that if reports were to be submitted in connection with other at-sea communication means, electronic reports could be near real-time, which could facilitate monitoring and compliance efforts in circumstances that demand at-sea reporting. NMFS also must ensure that electronic data reports are in a standardized format that is compatible with the data management system for historical fishery records and for hard-copy processing. Otherwise, the benefits of electronic submissions are reduced.

Based on recommendations from the Western Pacific Fishery Management Council, NMFS published a final rule that modified the reporting and recordkeeping requirements for western Pacific fisheries, offering fishermen the option of submitting either paper or electronic logbook records (72 FR 19123, April 17, 2007). The objectives of allowing electronic reporting include reducing the amount of time spent by fishermen to complete and file paper reports, improving the accuracy of reports, and reducing the time spent by NMFS personnel to process the logbook data. That final rule did not establish the technical requirements for electronic logbook programs.

To implement electronic reporting, PIFSC will specify an ''open'' program whereby fishery participants may select from a variety of e-log applications that have been certified as eligible to participate in the electronic logbook program. An e-log application includes the following functions: gathering and storing logbook data (data entry), generating (exporting) electronic logbooks, and viewing logbook data on the application database and the electronic logbook. The aim of the certification process is to encourage the use of electronic logbooks for the reporting of catch and effort data by promoting standard data exchange procedures, formats, and application validation tests. The certification process provides vendors with technical guidelines for minimally-prescribed performance elements and criteria to meet data management requirements. The goal of certification is to ensure that PIFSC-certified e-log applications will ensure, to the extent practicable, that submitted electronic logbooks are complete and accurate and that the electronic submission will be successfully integrated into the NMFS data system in a secure manner.

Fishermen must comply with Federal fishery reporting requirements, and are held accountable for data accuracy. Certification is necessary to provide a benchmark of performance standards and criteria for vendors to develop e-log applicatins that meet NMFS requirements. Certification enables vendor competition and potentially more product choices for fishermen. This is preferable to specifying a single supplier or e-log application. Certification does not guarantee that a product is free of defects; it means only that a product has passed validation tests aimed at complete, accurate, and successful reporting of logbook data. Certification does not protect the vendor from any product liability claims made by customers. The use of a certified e-log application does not exempt fisherman from any western Pacific recordkeeping requirements.

General Certification Process

Based on a request for a vendor certification, PIFSC will evaluate the submitted e-log application and issue a statement to accept or deny the vendor's request. The vendor must demonstrate that the submitted e-log application meets the standards set forth in this notice and in the Certification Guidelines for timely, accurate, and complete data submission in the proper format and structure for the fisheries reports required by Federal regulations. Upon successful demonstration of compliance with the standards and the Certification Guidelines, PIFSC will issue a vendor certification for the e-log application. PIFSC will initially certify e-log applications only for Hawaii-based pelagic longline fisheries; other certifications may follow.

NMFS certification will not result in government endorsement or procurement of any related electronic hardware or software for use in NMFS data systems. PIFSC will request a fact sheet from the vendor to provide information to the fishing industry about the e-log application that was certified, the costs of the application, and possibly other value-added services that the vendor or application may provide. This will allow fishermen to make purchase decisions that are compatible with the data reporting and logbook requirements of Federal regulations and their personal needs.

Initiation

PIFSC will initiate the vendor certification process upon written request from the vendor (or distributor or reseller acting within the constraints of its agreement with the vendor), subject to the demonstration of compliance with this notice and the availability of test hardware and software. Consideration will be given to a vendor that has already successfully completed a comparable certification process in another U.S. fishery recordkeeping program. PIFSC will also consider certifying a vendor that resells, packages, or integrates e-log applications from a company that has been certified in a similar program for another U.S. fishery.

A vendor requesting certification shall describe in detail the manner in which the proposed e-log application would meet the specifications outlined in this notice and in the Certification Guidelines. The vendor must supply PIFSC, at no cost, with at least one set of the hardware and software components for which certification is desired so that the proposed application can be tested and evaluated. PIFSC intends to complete the testing and certification process within 90 days. The vendor must provide documentation, including such fact sheets, operator manuals, user handbooks, or other materials that would be provided to fishermen purchasing the application. PIFSC will review the submission against the standards and Certification Guidelines, will perform trials using test fishery data, and may conduct field trials aboard fishing vessels. These tests may

involve demonstrating every aspect of the e-log application, including troubleshooting procedures. In addition to the vendor providing everything the hardware and software needed to test and certify an e-log application, PIFSC must also receive any updates to the product(s) at no cost.

Certification Criteria

The ultimate goal of certification is to provide complete, accurate, and successful reporting of electronic logbook data. All data elements required for an electronic logbook must be supported. And, data values must be correctly transferred from the e-log application to electronic logbook in the correct file format and structure. Complete and accurate reporting means that all logbook information recorded by fishermen is reported in the electronic logbook, and that the information is stored and reported exactly as entered. Successful reporting means that each element of an electronic logbook submitted to PIFSC can be loaded into the NMFS data system automatically.

The criteria for certification are as follows:

1. *Creation of electronic logbook document or files.* The e-log application must be capable of creating electronic logbook documents on demand in the agreed file format using standard file naming conventions. The document file contents may vary by fishery, but initially must contain the contents of the NMFS Western Pacific Daily Longline Fishing Log, as follows:

- Fishery: Hawaii Pelagic Longline
- Electronic Logbook Document Contents: One trip including all sets, catch and effort records, protected species interaction records, and e-log application information

2. *Inspection tool for use by authorized personnel.* The vendor must provide a companion e-log application ''viewer program'' and documentation for use by PIFSC and other authorized personnel to inspect e-log application data. The viewer program must run on Windows XP, and must provide read-only access to all elements of the electronic logbook database and electronic logbook files. The viewer program must not have the capability to alter the logbook data. The documentation must include installation instructions and user instructions for PIFSC and other authorized personnel.

3. *Electronic Logbook Test Support Requirements.* For test purposes, the e-log application must allow data entry of all electronic logbook data elements. (See Appendix 3 of the Certification Guidelines for specific data elements that must be enterable.)

4. *Common Information Requirements.* The information requirements common to all e-log applications for all fisheries are contained in Appendix 2 of the Certification Guidelines: Common Information Requirements. It covers the following requirements:

- PIR Standard Codes: Reference codes for common information requirements. Example--Port code HNL for Honolulu, HI.
- Date/Time: Date and time formatting requirements.
- Calendar Date: Calendar date formatting requirements.
- Geographic Location: Geographic (latitude/longitude) formatting requirements.
- Source Keys: Requirements for reporting keys or identifiers used in the e-log application itself. Some source keys are required or recommended to allow cross-referencing between NMFS logbook records and the fisherman's e-log application.
- Unknown values: Requirements for recording unknown (null) values.
- Electronic Logbook file names and extensions: File-naming conventions for electronic logbook files.

5. *Fishery Specific Electronic Logbook Requirements.* The e-log application must support the creation of the electronic logbook in a file format agreed upon by PIFSC and the vendor. The preferred file format for electronic logbook submission is XML. If PIFSC approves one or more electronic signature methods for use with electronic logbooks, the e-log application must also support at least one approved electronic signature method. Fishery specific information and file layout specifications are available in the Appendices to the Certification Guidelines, including the following:

- Fishery: Hawaii Pelagic Longline
- Reference: 50 CFR part 665, Subpart C, Western Pacific Pelagics
- Specifications: PIR-LB–1.1–1, Appendix 3

Requests for Certification

Requestors must submit a request for certification to PIFSC. Requestors should contact PIFSC for current application requirements which may include the items listed in sections 1 through 5 below:

1. Identifiers
a. Trade name of the service;
b. Company name;
c. Company headquarters address and phone number;
d. Principal company employee point of contact for this submission;
e. Principal business of the company;
f. Parent and subsidiary companies, if applicable;
g. Name(s) and location(s) of principal facilities; and
h. Name and address of Hawaii point of contact, if applicable.

2. E-log application components and supporting documents
a. Hardware requirements;
b. Software requirements;
c. Application description and documentation;
d. Handbooks, user manuals, and other supporting documents;
e. Sample electronic logbook document(s) produced by the e-log application, and instructions to guide testing staff to substantially reproduce the document(s);
f. Troubleshooting procedures; and
g. e-log application and viewer (Windows XP).
h. Requested certification(s)

3. Technical specifications of the e-log application
a. E-log application version numbers;
b. Data entry format (compatibility with paper logbook format);
c. Data formatting requirements; and
d. Electronic logbook data storage and submission media.

4. Customer service
a. Local point of contact information (name, phone number, email address, etc.);
b. Data security procedures and assurances;
c. Fishermen's privacy and confidentiality procedures and assurances;
d. Technical assistance procedures and contacts; and
e. Updates of PIR Standard Codes into the e-log application by fishermen.

5. Litigation support and vendor agreements
a. Vendor contact for litigation support;
b. Vendor technical expert on e-log application ;
c. Past experience in court documentation/appearances on e-log applications;
d. Non-disclosure agreement; and
e. Agreement to the certification guideline terms including an agreement to provide litigation support.

Litigation Support

Logbook information and other data reports may be used for law enforcement purposes, and all technical aspects of a vendor's submission are subject to being admitted as evidence in court, as needed. The reliability of all technologies utilized in the e-log application may be analyzed in court for, among other things, testing

procedures, error rates, peer review, and general industry acceptance. Further, the vendor may be required to provide technical and expert support for litigation to support the application's capabilities and to establish cases against violators. If the vendor's application has previously been subject to such scrutiny in a court of law, the vendor should describe the evidence and any court finding on the reliability of the application.

Additionally, to maintain the integrity of the e-log application for fisheries management, the vendor will be required to sign a non-disclosure agreement limiting the release of certain information that might compromise either the confidentiality of fishermen's personally identifying information or proprietary fishing data. The vendor shall include a statement confirming its agreement with these conditions. The scope of litigation support may include, but is not limited to, technical capabilities of the e-log application, e-log application support and training content, alterations to the e-log application, and data content and history.

A vendor may voluntarily retire a certification to terminate its obligation to provide litigation support for the product; such action must be in writing to PIFSC. The vendor's obligation to provide litigation support will end 180 calendar days after such notification is received. If a certification is retired, the e-log application is no longer available for use in the fishery.

Change Control

Once an e-log application is certified, it is the responsibility of the vendor to notify PIFSC of any change in its submission, such as a change affecting hardware or software components, performance characteristics, or customer support services or contacts. PIFSC reserves the right to reconsider and revoke the certification if, as a result of the change, the vendor's application is deemed to no longer satisfy PIFSC reporting and recordkeeping requirements. The vendor must report to the PIFSC e-log technical panel (as described in the Certification Guidelines) any changes to the certified product, along with updated copies of the new configuration prior to deploying the changes to customers. If the change affects the e-log application components used to meet the requirements, PIFSC may require re-evaluation and possible recertification. The technical panel will notify the vendor within 30 days with a recertification statement which will say whether a recertification is required and if so, why and when the recertification would be completed. The vendor may report planned changes to the certified e-log application to PIFSC and request an advisory recertification statement within 30 days. The vendor is permitted to provide quick code upgrades for customers to handle critical defects; however, the vendor must report the code change to PIFSC prior to deploying the change to a customer.

Advertising Prohibition

Once a product is certified, the vendor may state that the product is ''certified for electronic logbook submission for the Hawaii pelagic longline fishery.'' However, the vendor must not use in the vendor's name or the product name, or claim endorsement of the e-log application by, any of the following: NOAA, NMFS, PIFSC, or PIRO.

Expiration of Certification

The certification expiration date for a product is determined by changes to PIFSC reporting requirements and reporting activity by product users. Additionally, PIFSC may set an expiration date for a certification based on other requirements. PIFSC will notify the vendor at least 120 days prior to expiration. PIFSC will set an expiration date for a certification if the product has not been used to submit an electronic logbook for three years.

Revocation of Certification

PISFC may revoke certification of a product if any of the following occurs:

1. PIFSC repeatedly receives inaccurate or incorrectly formatted electronic logbooks and the error is traced to a defect in the e-log application;

2. The vendor modifies a certified e-log application without reporting the modification to PIFSC; or

3. The vendor violates advertising prohibitions.

If a certification is revoked, the e-log application is no longer available for use in the fishery.

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

Dated: June 30, 2009.

Alan D. Risenhoover,

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

[FR Doc. E9–15958 Filed 7–6–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 20–2009 and 22–2009]

Foreign-Trade Zones 29 and 203 Applications for Subzone Authority Dow Corning Corporation and REC Silicon; Notice of Public Hearing and Extension of Comment Period

A public hearing will be held on the applications for subzone authority at the Dow Corning Corporation (Dow Corning) facilities in Carrollton, Elizabethtown and Shepherdsville, Kentucky (74 FR 21621–21622, 5/8/09) and at the REC Silicon facility in Moses Lake, Washington (74 FR 25488–25489, 5/28/09). The Commerce examiner will hold the public hearing on September 1, 2009 at 1 p.m., at the Department of Commerce, Room 4830, 1401 Constitution Ave., NW., Washington, DC 20230. Interested parties should indicate their intent to participate in the hearing and provide a summary of their remarks no later than August 28, 2009.

The comment period for the cases referenced above is being extended to September 16, 2009, to allow interested parties additional time in which to comment. Rebuttal comments may be submitted during the subsequent 15-day period, until October 1, 2009. Submissions (original and one electronic copy) shall be addressed to the Board's Executive Secretary at: Foreign-Trade Zones Board, U.S. Department of Commerce, Room 2111, 1401 Constitution Ave., NW., Washington, DC 20230.

For further information, contact Elizabeth Whiteman at *Elizabeth_Whiteman@ita.doc.gov* or (202) 482–0473.

Dated: June 30, 2009.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E9–15966 Filed 7–6–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

NATIONAL SCIENCE FOUNDATION

[Docket No. 0906261096–91096–01]

RIN 0648–ZC08

Comparative Analysis of Marine Ecosystem Organization (CAMEO)

AGENCIES: Fisheries Headquarters Program Office (FHQ), National Marine Fisheries Service (NMFS), National

Oceanic and Atmospheric Administration (NOAA), Commerce; National Science Foundation (NSF).

ACTION: Notice of funding availability.

SUMMARY: This announcement solicits proposals for the Comparative Analysis of Marine Ecosystem Organization (CAMEO) Program which is implemented as a partnership between the NOAA National Marine Fisheries Service and National Science Foundation Division of Ocean Sciences. The purpose of CAMEO is to strengthen the scientific basis for an ecosystem approach to the stewardship of our ocean and coastal living marine resources. The program will support fundamental research to understand complex dynamics controlling ecosystem structure, productivity, behavior, resilience, and population connectivity, as well as effects of climate variability and anthropogenic pressures on living marine resources and critical habitats. CAMEO encourages the development of multiple approaches, such as ecosystem models and comparative analyses of managed and unmanaged areas (e.g., marine protected areas) that can ultimately form a basis for forecasting and decision support. Further information is available on the CAMEO web site (*http://cameo.noaa.gov*).

DATES: Full proposals must be received and validated by Grants.gov, postmarked, or provided to a delivery service on or before 11:59 p.m. ET, October 5, 2009. Please note: Validation or rejection of your application by Grants.gov may take up to 2 business days after submission. Please consider this process in developing your submission timeline. Applications received after the deadline will be rejected/returned to the sender without further consideration. Use of U.S. mail or another delivery service must be documented with a receipt. No facsimile or electronic mail applications will be accepted.

ADDRESSES: Electronic application packages are strongly encouraged and are available at: *http://www.grants.gov/*. If the applicant's only mode of submitting a proposal is via paper application, or if the applicant has difficulty accessing Grants.gov or downloading the required forms, they should contact: Lora Clarke, CAMEO, NOAA Fisheries, 1315 East–West Highway, Room 14505, Silver Spring, MD, 20910 or by phone at (301) 713–2239, or via internet at *Lora.Clarke@noaa.gov*.

FOR FURTHER INFORMATION CONTACT: Michael Ford, CAMEO Program Manager, NOAA/NMFS, (301) 713–2239, *Michael.Ford@noaa.gov*; Lora Clarke, Associate Program Manager, NOAA/NMFS, (301) 713–2239, *Lora.Clarke@noaa.gov*; Cynthia Suchman, Associate Program Director, Biological Oceanography, OCE/GEO/NSF, (703) 292–8582, *csuchman@nsf.gov*; David Garrison, Program Director, Biological Oceanography, OCE/GEO/NSF, (703) 292–8582, *dgarriso@nsf.gov*.

SUPPLEMENTARY INFORMATION: CAMEO will be implemented as an interagency partnership between NOAA–NMFS and NSF. The interests of these agencies overlap in funding basic scientific research that will lead to discovery and a deeper understanding of the factors controlling ecosystem dynamics, with the potential to create tools for effective living marine resource management. The first competition for the program was held in 2008, with several initial projects selected for FY2009 funding. This announcement provides guidance to researchers wishing to apply for CAMEO support in FY2010. We expect that CAMEO proposals will continue to focus on comparisons of environments where there is a rich base of environmental and biological data, where there are clear and compelling management issues, and where further research is likely to result in a deeper understanding of ecosystem processes that ultimately can lead to management tools or solutions. Projects with a strong probability of producing results that can be widely applied are likely to be most compelling. A substantial challenge is to develop research that integrates across spatial and temporal scales — from conducting local, short–term investigations to evaluating regional, decadal processes. The over–arching goal is to produce information applicable to stocks of managed resources and ecosystems that will support management decisions. Because of their link to management, CAMEO projects must emphasize population and community processes affecting upper trophic levels and/or multi–species interactions. Proposals should not be submitted that focus on areas (such as microbial dynamics, biogeochemical cycling, and ocean acidification) that overlap existing programs within NSF and NMFS. Questions about whether proposals are appropriate for the CAMEO program should be directed to the NOAA or NSF technical contacts. As appropriate to each proposal, applicants should employ one or more of the approaches below, providing sufficient detail for critical evaluation of methodology and connection to CAMEO objectives.

1. Synthesis of existing time series and/or ongoing observation programs

Projects may draw on a wide range of existing data and observations, including historical data sets and ongoing programs. If this approach is chosen, it is expected that the project will primarily focus on the synthesis of information rather than the development or support of new observational capabilities. Any new field studies must be well justified and integrated with existing data.

2. Modeling

Modeling is likely to be an approach common to many CAMEO proposals. These efforts may range from the development of conceptual models for emergent properties such as connectivity or resilience to more specific numerical models used for ecosystem comparisons or predictions. Among the many possible modeling approaches, different models (or sets of assumptions) may be compared for the same ecosystem, or the same (or similar) models may be applied to compare different ecosystems.

3. Experimental approach

Carefully planned experiments can shed light on the mechanisms driving large–scale patterns and processes. Moreover, experiments can provide information to parameterize models, e.g., environmental tolerances and reproductive, growth, survival, and trophic transfer rates. In CAMEO, comparative experimental approaches may include traditional field, mesocosm, or laboratory experiments as well as non–traditional opportunities provided by experimental adaptive management (conducted at large spatial scales with the potential to illuminate mechanisms structuring ecosystems).

4. Human dimensions

Human activities have compounded climate–related and other environmental changes affecting marine ecosystems. In turn, human systems need to respond and adapt to changes in the availability of marine living resources and other goods and services resulting from ecosystem processes. In CAMEO, collaborations between natural and social scientists may undertake interdisciplinary comparative research on ecosystems, living resources and human interactions.

5. Taking multiple and integrative approaches

In some cases, the aim of CAMEO — to develop links between fundamental research on marine ecosystems and issues of living resources management — may be addressed effectively through integration of the above approaches.

Therefore, research strategies combining approaches may provide an important contribution to the CAMEO Program.

Program Priorities:

This funding opportunity will implement CAMEO research by supporting the development of research tools and strategic approaches. The following types of proposals are encouraged:

1. Development of strategies and methodologies for comparative analyses that can be applied consistently across spatial and temporal scales and ecosystems, and that facilitate the design of decision support tools for marine populations, ecosystems and habitats.

2. Development of models that address key scientific questions by comparing ecosystems and ecosystem processes. Models that are geographically and temporally portable, and that incorporate assessment of modeling skill, are particularly encouraged.

3. Retrospective studies that analyze, re–analyze or synthesize existing information (historic, time–series, ongoing program, etc.) using a comparative approach.

4. Studies that integrate the human dimension within ecosystem dynamics. The CAMEO program seeks to promote interdisciplinary research using comparative approaches to link marine ecosystem research with the social and behavioral sciences in new and vital ways.

ELECTRONIC ACCESS:

The full text of the full funding opportunity announcement for this program can be accessed via the Grants.gov web site at *http://www.grants.gov*. The announcement will also be available by contacting the program officials identified under **FOR FURTHER INFORMATION CONTACT**. Applicants must comply with all requirements contained in the full funding opportunity announcement.

STATUTORY AUTHORITY:

Authority for CAMEO is provided by the following: 33 U.S.C. 1442 for the National Marine Fisheries Service and 42 U.S.C. 1861–75 for the National Science Foundation.

CFDA:

11.472, Unallied Science Program

FUNDING AVAILABILITY:

It is anticipated that up to $6 million will be available to support 2–3 year projects in response to this announcement

ELIGIBILITY:

Eligible applicants are U.S. institutions of higher education, other non–profits, state, local, Indian Tribal Governments, and Federal agencies that possess the statutory authority to receive financial assistance. International collaborations are encouraged, but international partners are not eligible to receive funding, including travel funds. Collaborative partnerships between academic or private researchers and NOAA scientists are highly encouraged. Federal employees are not eligible to apply for salary.

COST SHARING REQUIREMENTS:

None is required. Applicants may seek supplementary funding from other agencies or foundations (non–profits, state, local etc). Applicants are encouraged to discuss funding opportunities with these entities prior to submitting proposal applications to NOAA/NSF and should list any supplementary funding in their applications.

EVALUATION AND SELECTION PROCEDURES:

The general evaluation criteria and selection factors that apply to full applications to this funding opportunity are summarized below. Further information about the evaluation criteria and selection factors can be found in the full funding opportunity announcement.

EVALUATION CRITERIA FOR PROJECTS:

The general evaluation criteria that apply to full applications to this funding opportunity are summarized below. For the purposes of this competition, NOAA will adopt the NSF evaluation criteria. NSF merit review criteria are listed below. Following each criterion are potential considerations that the reviewer may employ in the evaluation. These are suggestions and not all will apply to any given proposal. Each reviewer will be asked to address only those that are relevant to the proposal and for which he/she is qualified to make judgments. Principal Investigators (PIs) should be aware that a component of Criterion 2 will be how well the project meets CAMEO program goals.

Criterion 1 (50%): What is the intellectual merit of the proposed activity? How important is the proposed activity to advancing knowledge and understanding within its own field or across different fields? How well qualified is the proposer (individual or team) to conduct the project? (If appropriate, the reviewer will comment on the quality of prior work.) To what extent does the proposed activity suggest and explore creative, original, or potentially transformative concepts? How well conceived and organized is the proposed activity? Is there sufficient access to resources?

Criterion 2 (50%): What are the broader impacts of the proposed activity? How well does the activity advance discovery and understanding while promoting teaching, training, and learning? How well does the proposed activity broaden the participation of underrepresented groups (e.g., gender, ethnicity, disability, geographic, etc.)? To what extent will it enhance the infrastructure for research and education, such as facilities, instrumentation, networks, and partnerships? Will the results be disseminated broadly to enhance scientific and technological understanding? What may be the benefits of the proposed activity to society? Each proposal that requests funding to support postdoctoral researchers must include a description of the mentoring activities that will be provided for such individuals. Mentoring activities provided to postdoctoral researchers supported on the project, as described in a one–page supplementary document, will be evaluated under the Broader Impacts criterion. PIs should address the following elements in their proposal to provide reviewers with the information necessary to respond fully to the above–described merit review criteria. NSF and NOAA staff will give these elements careful consideration in making funding decisions.

Integration of Research and Education: One of the principal strategies in support of NSF's goals is to foster integration of research and education through the programs, projects and activities it supports at academic and research institutions. These institutions provide abundant opportunities where individuals may concurrently assume responsibilities as researchers, educators, and students, and where all can engage in joint efforts that infuse education with the excitement of discovery and enrich research through the diversity of learning perspectives.

Integrating Diversity into NSF Programs, Projects, and Activities: Broadening opportunities and enabling the participation of all citizens — women and men, underrepresented minorities, and persons with disabilities — are essential to the health and vitality of science and engineering. NSF is committed to this principle of diversity and deems it central to the programs,

projects, and activities it considers and supports.

REVIEW AND SELECTION PROCESS:

Proposals will be evaluated individually in accordance with the assigned weights of the above evaluation criteria by independent peer mail review and/or by independent peer panel review. Both Federal and non–Federal experts in the field may be used in this process. The peer mail reviewers have expertise in the subjects addressed by the proposals. Each mail reviewer will see only certain individual proposals within his or her area of expertise, and will score them individually on the following scale: Excellent (1), Very Good (2), Good (3), Fair (4), Poor (5). Those proposals receiving an average mail review score of ''Fair'' or ''Poor'' will not be given further consideration, in which case proposers will be notified of non selection. The peer panel will comprise 8 to 12 individuals, with each individual having expertise in a separate area, so that the panel, as a whole, covers a range of scientific expertise. The panel will have access to all mail reviews of proposals, and will use the mail reviews in discussion and evaluation of the entire slate of proposals. All proposals will be evaluated and scored individually. The peer panel shall rate the proposals using the evaluation criteria and scores provided above. Scores from each peer panelist shall be averaged for each application and presented to the program officers. No consensus advice will be given by the independent peer mail review or the review panel. The program officers will neither vote or score proposals as part of the independent peer panel nor participate in discussion of the merits of the proposal. Those proposals receiving an average panel score of ''Fair'' or ''Poor'' will not be given further consideration, and proposers will be notified of non selection. For the proposals rated by the panel as either ''Excellent,'' ''Very Good,'' or ''Good'', the program officers will (a) select the proposals to be recommended for funding according to the averaged ratings, and/or by applying the project selection factors listed below; (b) determine the total duration of funding for each proposal; and (c) determine the amount of funds available for each proposal subject to the availability of fiscal year funds. Awards may not necessarily be made in rank order. In addition, proposals rated by the panel as either ''Excellent,'' ''Very Good,'' or ''Good'' that are not funded in the current fiscal period, may be considered for funding in another fiscal period without having to repeat the competitive, review process. Proposals recommended for funding by the Program Officers are then forwarded to the NMFS selecting official and/or NSF Ocean Sciences Division Director for the final funding recommendations. Final recommendations are based upon the reviewer/program officer recommendations, project funding priorities and availability of funds. Final decisions for all recommended proposals will be made within the Grants Divisions at NOAA and NSF. At the conclusion of the review process, the NOAA Program Officer and the NSF Biological Oceanography Program Officer will notify lead proposers for those projects recommended for support, and negotiate revisions in the proposed work and budget. All proposals selected for funding by NSF will be required to be resubmitted to NSF's FastLane system. Final awards will be issued by the agency responsible for a specific project after receipt and processing of any specific materials required by the agency. Investigators may be asked to modify objectives, work plans or budgets, and provide supplemental information required by the agency prior to the award. When a decision has been made (whether an award or declination), verbatim anonymous copies of reviews and summaries of review panel deliberations, if any, will be made available to the proposer. Declined applications will be held by NOAA for 3 years in accordance with the current retention requirements, and then destroyed.

SELECTION FACTORS FOR PROJECTS:

The Selecting Official shall award in the rank order unless the proposal is justified to be selected out of rank order based on one or more of the following factors: 1. Availability of funding 2. Balance and distribution of funds (by research area, project type, type of institutions, type of partners, geographical location) 3. Duplication of other projects funded or considered for funding by NOAA/NSF. 4. FY2010 Program Priorities (listed above under Program Priorities, and in Section I.B. of the FFO) 5. Applicant's prior award performance. 6. Partnerships with/Participation of targeted groups. 7. Adequacy of information necessary to make a National Environmental Policy Act (NEPA) determination and draft necessary documentation before recommendations for funding are made.

INTERGOVERNMENTAL REVIEW:

Applications under this program are not subject to Executive Order 12372, Intergovernmental Review of Federal Programs.

LIMITATION OF LIABILITY:

In no event will NOAA, the Department of Commerce, or NSF be responsible for proposal preparation costs if these programs fail to receive funding or are cancelled because of other agency priorities. Publication of this announcement does not oblige NOAA or NSF to award any specific project or to obligate any available funds.

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA):

NOAA must analyze the potential environmental impacts, as required by the National Environmental Policy Act (NEPA), for applicant projects or proposals which are seeking NOAA federal funding opportunities. Detailed information on NOAA compliance with NEPA can be found at the following NOAA NEPA website: *http://www.nepa.noaa.gov/*, including our NOAA Administrative Order 216–6 for NEPA, *http://www.nepa.noaa.gov/NAO216_6_TOC.pdf*, and the Council on Environmental Quality implementation regulations, *http://ceq.eh.doe.gov/nepa/regs/ceq/toc_ceq.htm*. Consequently, as part of an applicant's package, and under their description of their program activities, applicants are required to provide detailed information on the activities to be conducted, locations, sites, species and habitat to be affected, possible construction activities, and any environmental concerns that may exist (e.g., the use and disposal of hazardous or toxic chemicals, introduction of non–indigenous species, impacts to endangered and threatened species, aquaculture projects, and impacts to coral reef systems). In addition to providing specific information that will serve as the basis for any required impact analyses, applicants may also be requested to assist NOAA in drafting of an environmental assessment, if NOAA determines an assessment is required. Applicants will also be required to cooperate with NOAA in identifying feasible measures to reduce or avoid any identified adverse environmental impacts of their proposal. The failure to do so shall be grounds for not selecting an application. In some cases if additional information is required after an application is selected, funds can be withheld by the Grants Officer under a special award condition requiring the

recipient to submit additional environmental compliance information sufficient to enable NOAA to make an assessment on any impacts that a project may have on the environment.

THE DEPARTMENT OF COMMERCE PRE–AWARD NOTIFICATION REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS:

The Department of Commerce Pre–Award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of February 11, 2008 (73 FR 7696), are applicable to this solicitation.

PAPERWORK REDUCTION ACT:

This document contains collection–of–information requirements subject to the Paperwork Reduction Act (PRA). The use of Standard Forms 424, 424A, 424B, and SF–LLL and CD–346 has been approved by the Office of Management and Budget (OMB) under the respective control numbers 0348–0043, 0348–0044, 0348–0040, 0348–0046, and 0605–0001. Notwithstanding any other provision of law, no person is required to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number.

EXECUTIVE ORDER 12866:

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

EXECUTIVE ORDER 13132 (FEDERALISM):

It has been determined that this notice does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

ADMINISTRATIVE PROCEDURE ACT/ REGULATORY FLEXIBILITY ACT:

Prior notice and an opportunity for public comment are not required by the Administrative Procedure Act or any other law for rules concerning public property, loans, grants, benefits, and contracts (5 U.S.C. 553(a)(2)). Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements for the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis has not been prepared.

Dated: June 29, 2009.

Steven A. Murawski, Ph.D.

NOAA Fisheries, Chief Scientific Advisor, Director of Scientific Programs.

Dated: June 30, 2009.

Phillip R. Taylor

Section Head, Ocean Section, Division of Ocean Sciences, National Science Foundation.

[FR Doc. E9–15960 Filed 7–6–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

[Docket No. PTO–P–2009–0027]

Grant of Interim Extension of the Term of U.S. Patent No. 4,977,138; ISTODAX™

AGENCY: United States Patent and Trademark Office.

ACTION: Notice of Interim Patent Term Extension.

SUMMARY: The United States Patent and Trademark Office has issued an order granting interim extension under 35 U.S.C. 156(d)(5) for a one-year interim extension of the term of U.S. Patent No. 4,977,138.

FOR FURTHER INFORMATION CONTACT: Mary C. Till by telephone at (571) 272–7755; by mail marked to her attention and addressed to the Commissioner for Patents, Mail Stop Hatch-Waxman PTE, P.O. Box 1450, Alexandria, VA 22313–1450; by fax marked to her attention at (571) 273–7755, or by e-mail to *Mary.Till@uspto.gov.*

SUPPLEMENTARY INFORMATION: Section 156 of Title 35, United States Code, generally provides that the term of a patent may be extended for a period of up to five years if the patent claims a product, or a method of making or using a product, that has been subject to certain defined regulatory review, and that the patent may be extended for interim periods of up to a year if the regulatory review is anticipated to extend beyond the expiration date of the patent.

On June 12, 2009, Gloucester Pharmaceuticals, Inc., a licensee of Astellas Pharma Inc., the patent owner, timely filed an application under 35 U.S.C. 156(d)(5) for an interim extension of the term of U.S. Patent No. 4,977,138. The patent claims the human drug product ISTODAX™ (romidepsin). The application indicates that a New Drug Application (NDA No. 22–393) for the human drug product ISTODAX™ (romidepsin) has been filed and is currently undergoing regulatory review before the Food and Drug Administration for permission to market or use the product commercially.

Review of the application indicates that except for permission to market or use the product commercially, the subject patent would be eligible for an extension of the patent term under 35 U.S.C. 156, and that the patent should be extended for an additional one year as required by 35 U.S.C. 156(d)(5)(B). Because it is apparent that the regulatory review period will continue beyond the original expiration date of the patent (July 6, 2009), an interim extension of the patent term under 35 U.S.C. 156(d)(5) is appropriate.

An interim extension under 35 U.S.C. 156(d)(5) of the term of U.S. Patent No. 4,977,138 is granted for a period of one year from the original expiration date of the patent, i.e., until July 6, 2010.

June 30, 2009.

John J. Doll,

Acting Under Secretary of Commerce for Intellectual Property and Acting Director of the United States Patent and Trademark Office.

[FR Doc. E9–15863 Filed 7–6–09; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XQ12

Marine Mammals; File No. 540–1811

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

ACTION: Notice; Issuance of permit amendment.

SUMMARY: Notice is hereby given that Mr. John Calambokidis, Cascadia Research Collective, Waterstreet Building, 218 1/2 West Fourth Avenue, Olympia, WA 89501, has been issued an amendment to scientific research Permit No. 540–1811.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment (See **SUPPLEMENTARY INFORMATION**).

FOR FURTHER INFORMATION CONTACT: Jennifer Skidmore or Carrie Hubard, (301)713–2289.

SUPPLEMENTARY INFORMATION: On May 7, 2008, notice was published in the **Federal Register** (73 FR 25668) that a request for a scientific research permit amendment to take cetacean species had been submitted by the above-named

individual. The requested permit amendment has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

Permit No. 540–1811, issued to John Calambokidis, authorizes aerial and vessel surveys, photo-identification, behavioral observations, tagging (using suction-cup attached tags), biopsy, video and acoustic recording, and incidental harassment of all species of odontocetes and baleen whales in the North Pacific Ocean. The permit has been amended to authorize dart tagging of the following species of marine mammals: blue (*Balaenoptera musculus*), fin (*B. physalus*), sei (*B. borealis*), gray (*Eschrichtius robustus*), sperm (*Physeter macrocephalus*), Bryde's (*B. edeni*), humpback (*Megaptera novaeangliae*) and minke (*B. acutorostrata*) whales, Mesoplodon beaked whales (*Mesoplodon* spp), Cuvier's (*Ziphius cavirostris*) and Baird's (*Berardius bairdii*) beaked whales, and bottlenose (*Tursiops truncatus*) and Risso's (*Grampus griseus*) dolphins. For each species, 20 animals have been authorized to be taken via dart tags, with the exception of sei whales, where only 5 takes were requested and granted. Additionally, an increase in biopsy sampling and suction-cup tagging has been authorized for several cetacean species (fin, sperm, and short-finned pilot whales (*Globicephala macrorhynchus*) and Baird's, Cuvier's, and *Mesoplodon* beaked whales). No additional Level B harassment was requested. Dart tagging will occur concurrently with already permitted activities (i.e., vessel surveys, photo-identification, suction-cup tagging etc), primarily in the waters off California, though some species may be tagged opportunistically elsewhere where activities are authorized (i.e., U.S. and international waters of the Pacific including Alaska, Washington, Oregon, and other U.S. territories). The amended permit is valid until April 14, 2011.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an environmental assessment (EA) was prepared analyzing the effects of the permitted activities on the human environment. Based on the analyses in the EA, NMFS determined that issuance of the permit amendment would not significantly impact the quality of the human environment and that preparation of an environmental impact statement was not required. That determination is documented in a Finding of No Significant Impact (FONSI), signed on June 29, 2009.

Issuance of this amended permit, as required by the ESA, was based on a finding that such permit: (1) was applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Documents may be reviewed in the following locations:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521;

Northwest Region, NMFS, 7600 Sand Point Way NE, BIN C15700, Bldg. 1, Seattle, WA 98115–0700; phone (206)526–6150; fax (206)526–6426;

Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668; phone (907)586–7221; fax (907)586–7249;

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562)980–4001; fax (562)980–4018; and

Pacific Islands Region, NMFS, 1601 Kapiolani Blvd., Rm 1110, Honolulu, HI 96814–4700; phone (808)973–2935; fax (808)973–2941.

Dated: June 30, 2009.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E9–15957 Filed 7–6–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XP98

Marine Mammals; File No. 14483

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

ACTION: Notice; issuance of permit.

SUMMARY: Notice is hereby given that Ocean World, 304 US Highway 101 South, Crescent City, California 95531 [Mary Wilson, Responsible Party] has been issued a permit to import three California sea lions (*Zalophus californianus*) for public display.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376; and

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562)980–4001; fax (562)980–4018.

FOR FURTHER INFORMATION CONTACT: Jennifer Skidmore or Kristy Beard, (301)713–2289.

SUPPLEMENTARY INFORMATION: On April 21, 2009, notice was published in the **Federal Register** (74 FR 18200) that a request for a public display permit to import three female California sea lions from Zoo Tiergarten Nuremberg in Nuremberg, Germany to Ocean World, Crescent City, California, had been submitted by the above-named organization. The requested permit has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Dated: June 30, 2009.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E9–15959 Filed 7–6–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Science Advisory Board (SAB)

AGENCY: Office of Oceanic and Atmospheric Research (OAR), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice of Open Meeting.

SUMMARY: The Science Advisory Board (SAB) was established by a Decision Memorandum dated September 25, 1997, and is the only Federal Advisory Committee with responsibility to advise the Under Secretary of Commerce for Oceans and Atmosphere on strategies for research, education, and application

of science to operations and information services. SAB activities and advice provide necessary input to ensure that National Oceanic and Atmospheric Administration (NOAA) science programs are of the highest quality and provide optimal support to resource management.

Time and Date: The meeting will be held Wednesday, July 22, 2009 from 10:15 a.m. to 3:30 p.m. and Thursday, July 23, 2009, from 8 a.m. to 3:30 p.m. These times and the agenda topics described below are subject to change. Please refer to the web page *http://www.sab.noaa.gov/Meetings/meetings.html* for the most up-to-date meeting agenda.

Place: The meeting will be held both days at the Aquarium of the Pacific, 100 Aquarium Way, Long Beach, California 90802. Please check the SAB Web site *http://www.sab.noaa.gov* for confirmation of the venue and for directions.

Status: The meeting will be open to public participation with a 30-minute public comment period on July 22 at 3 p.m. (check Web site to confirm time). The SAB expects that public statements presented at its meetings will not be repetitive of previously submitted verbal or written statements. In general, each individual or group making a verbal presentation will be limited to a total time of five (5) minutes. Written comments should be received in the SAB Executive Director's Office by July 16, 2009 to provide sufficient time for SAB review. Written comments received by the SAB Executive Director after July 16, 2009, will be distributed to the SAB, but may not be reviewed prior to the meeting date. Seats will be available on a first-come, first-served basis.

Matters to be Considered: The meeting will include the following topics: (1) NOAA Next Generation Strategic Plan for SAB comments; (2) National Weather Service Strategic Plan; (3) Marine Transportation in the U.S.; (4) NOAA's Marine Transportation Programs, Commerce and Transportation Goal; (5) Panel Discussion on NOAA's Transportation Services; and (6) Updates from the Ocean Exploration, Oceans and Health, and Ecosystem Sciences and Management Working Groups.

FOR FURTHER INFORMATION CONTACT: Dr. Cynthia Decker, Executive Director, Science Advisory Board, NOAA, Rm. 11230, 1315 East-West Highway, Silver Spring, Maryland 20910. (*Phone:* 301–734–1156, *Fax:* 301–713–1459, *E-mail: Cynthia.Decker@noaa.gov*); or visit the NOAA SAB Web site at *http://www.sab.noaa.gov.*

Dated: June 29, 2009.

Mark E. Brown,

Chief Financial Officer, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.

[FR Doc. E9–15851 Filed 7–6–09; 8:45 am]

BILLING CODE 3510–KD–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–868]

Folding Metal Tables and Chairs from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''the Department'') is conducting an administrative review of the antidumping duty order on folding metal tables and chairs (''FMTCs'') from the People's Republic of China (''PRC'') covering the period June 1, 2007, through May 31, 2008, and one respondent. We have preliminarily determined that New–Tec Integration (Xiamen) Co., Ltd. (''New–Tec''), did not make sales in the United States at prices below normal value (''NV'') during the period of review (''POR''). If these preliminary results are adopted in our final results of this review, we will instruct U.S. Customs and Border Protection (''CBP'') to liquidate entries of merchandise exported by New–Tec, during the POR without regard to antidumping duties.

We invite interested parties to comment on these preliminary results. We intend to issue the final results no later than 120 days from the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''the Act'').

EFFECTIVE DATE: July 7, 2009.

FOR FURTHER INFORMATION CONTACT: Giselle Cubillos or Charles Riggle, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–1778 and (202)482–0650, respectively.

SUPPLEMENTARY INFORMATION:

Background

On June 27, 2002, the Department published the antidumping duty order on FMTCs from the PRC. *See Antidumping Duty Order: Folding Metal Tables and Chairs From the People's Republic of China*, 67 FR 43277 (June 27, 2002). On June 9, 2008, the Department published a notice of opportunity to request an administrative review of this order. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 73 FR 32557 (June 9, 2008). In accordance with 19 CFR 351.213(b), interested parties made the following requests for review: (1) on June 23, 2008, Meco Corporation (''Meco''), a domestic producer of the like product, requested that the Department conduct administrative reviews of Feili Group (Fujian) Co., Ltd., Feili (Fujian) Co., Ltd., Feili Furniture Development Limited Quanzhou City, and Feili Furniture Development Co., Ltd. (collectively ''Feili''), New–Tec Integration (Xiamen) Co. Ltd. (''New–Tec''), and Dongguan Shichang Metals Factory Co., Ltd. (''Shichang''), which are all producers/exporters of subject merchandise; (2) on June 26, 2008, Cosco Home & Office Products (''Cosco''), a U.S. importer of subject merchandise, requested that the Department conduct administrative reviews of Feili and New–Tec; and, (3) on June 30, 2008, Feili and New–Tec requested that the Department conduct an administrative review of their respective sales. Feili, in addition, requested that the Department defer the initiation of the review for one year in accordance with 19 CFR 351.213(c).

On July 30, 2008, the Department published the initiation of the administrative review of the antidumping duty order on FMTCs from the PRC and granted Feili's request for deferral of the 2007–2008 review.[1] No parties objected to the deferral of Feili's 2007–2008 review.

On August 11, 2008, Meco withdrew its request that the Department conduct an administrative review of Shichang. On September 26, 2008, the Department published the notice of partial rescission of antidumping administrative review rescinding the administrative review of FMTCs with respect to Shichang.[2]

The Department issued an antidumping duty questionnaire to New–Tec on September 9, 2008. On October 7, 2008, New–Tec submitted a Section A questionnaire response (''AQR''), and on October 30, 2008,

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[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part, and Deferral of Administrative Review*, 73 FR 44220 (July 30, 2008).

[2] *See Folding Metal Tables and Chairs from the People's Republic of China: Notice of Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 55813 (September 26, 2008).

New–Tec submitted Section C and D questionnaire responses (''CQR'' and ''DQR,'' respectively). On December 11, 2008, the Department requested the Office of Policy to provide a list of surrogate countries for this review. *See* Memorandum to Carole Showers, Executive Director, Office of Policy, ''Certain Folding Metal Tables and Chairs from the People's Republic of China: Request for Surrogate Country Selection'' (December 11, 2008). On December 22, 2008, the Office of Policy issued its list of surrogate countries. *See* Memorandum from Carole Showers, Executive Director, Office of Policy, ''Request for a List of Surrogate Countries for an Administrative Review of the Antidumping Duty Order on Certain Folding Metal Tables and Chairs (''FMTC'') from the People's Republic of China (PRC)'' (December 22, 2008) (''Surrogate Country Memorandum'').

On December 22, 2008, the Department requested interested parties to submit surrogate value information and to provide surrogate country selection comments. On December 24, 2008, the Department issued a supplemental questionnaire to New–Tec. On January 21, 2009, Meco provided comments on publicly available information to value the factors of production (''FOP''). None of the interested parties provided comments on the selection of a surrogate country. On January 21, 2009, New–Tec submitted publicly available information to value the financial ratios and submitted its supplemental questionnaire response. On February 3, 2009, the Department issued a supplemental questionnaire to New–Tec. On February 25, 2009, New–Tec submitted a supplemental questionnaire response. On March 4, 2009, the Department published a notice in the **Federal Register** extending the time limit for the preliminary results of review until no later than May 1, 2009.[3] On March 20, 2009, the Department issued a supplemental questionnaire to New–Tec. On March 30, 2009, Meco submitted comments on the supplemental questionnaire response filed by New–Tec on February 24, 2009. On April 3, 2009, New–Tec submitted a supplemental questionnaire response. On April 23, 2009, the Department issued a supplemental questionnaire to New–Tec.

On May 7, 2009 the Department published a notice in the **Federal Register** extending the time limit further for the preliminary results of review until June 30, 2009.[4] On May 18, 2009, New–Tec submitted a supplemental questionnaire response. On May 29, 2009, Meco provided comments on publicly available information to value additional FOPs. On June 3, 2009, Meco submitted comments on the May 18, 2009, supplemental questionnaire response filed by New–Tec. On June 5, 2009, the Department issued a supplemental questionnaire to New–Tec. On June 9, 2009, New–Tec submitted a supplemental questionnaire response.

In accordance with 19 CFR 351.301(c)(3)(ii), for the final results in an antidumping administrative review, interested parties may submit publicly available information to value FOPs within 20 days after the date of publication of these preliminary results of review.

Period of Review

The POR is June 1, 2007, through May 31, 2008.

Scope of Order

The products covered by this order consist of assembled and unassembled folding tables and folding chairs made primarily or exclusively from steel or other metal, as described below:

1) Assembled and unassembled folding tables made primarily or exclusively from steel or other metal (folding metal tables). Folding metal tables include square, round, rectangular, and any other shapes with legs affixed with rivets, welds, or any other type of fastener, and which are made most commonly, but not exclusively, with a hardboard top covered with vinyl or fabric. Folding metal tables have legs that mechanically fold independently of one another, and not as a set. The subject merchandise is commonly, but not exclusively, packed singly, in multiple packs of the same item, or in five piece sets consisting of four chairs and one table. Specifically excluded from the scope of the order regarding folding metal tables are the following:

Lawn furniture;
Trays commonly referred to as ''TV trays;''
Side tables;
Child–sized tables;
Portable counter sets consisting of rectangular tables 36'' high and matching stools; and,
Banquet tables.

A banquet table is a rectangular table with a plastic or laminated wood table top approximately 28'' to 36'' wide by 48'' to 96'' long and with a set of folding legs at each end of the table. One set of legs is composed of two individual legs that are affixed together by one or more cross–braces using welds or fastening hardware. In contrast, folding metal tables have legs that mechanically fold independently of one another, and not as a set.

2) Assembled and unassembled folding chairs made primarily or exclusively from steel or other metal (folding metal chairs). Folding metal chairs include chairs with one or more cross–braces, regardless of shape or size, affixed to the front and/or rear legs with rivets, welds or any other type of fastener. Folding metal chairs include: those that are made solely of steel or other metal; those that have a back pad, a seat pad, or both a back pad and a seat pad; and those that have seats or backs made of plastic or other materials. The subject merchandise is commonly, but not exclusively, packed singly, in multiple packs of the same item, or in five piece sets consisting of four chairs and one table. Specifically excluded from the scope of the order regarding folding metal chairs are the following:

Folding metal chairs with a wooden back or seat, or both;
Lawn furniture;
Stools;
Chairs with arms; and
Child–sized chairs.

The subject merchandise is currently classifiable under subheadings 9401.71.0010, 9401.71.0030, 9401.79.0045, 9401.79.0050, 9403.20.015, 9403.20.0030, 9403.70.8010, 9403.70.8020, and 9403.70.8030 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Although the HTSUS subheadings are provided for convenience and customs purposes, the Department's written description of the merchandise is dispositive.

Based on a request by RPA International Pty., Ltd. and RPS, LLC (collectively, ''RPA''), the Department ruled on January 13, 2003, that RPA's poly–fold metal folding chairs are within the scope of the order because they are identical in all material respects to the merchandise described in the petition, the initial investigation, and the determinations of the Secretary.

On May 5, 2003, in response to a request by Staples, the Office Superstore Inc. (''Staples''), the Department issued a scope ruling that the chair component of Staples' ''Complete Office–To-Go,'' a folding chair with a tubular steel frame and a seat and back of plastic, with

[3] *See Folding Metal Tables and Chairs from the People's Republic of China: Notice of Extension of Time Limit for the Preliminary Results of the Antidumping Duty Administrative Review*, 74 FR 9385 (March 4, 2009).

[4] *See Folding Metal Tables and Chairs from the People's Republic of China: Notice of Extension of Time Limit for the Preliminary Results of the Antidumping Duty Administrative Review*, 74 FR 21332 (May 7, 2009).

measurements of: height: 32.5 inches; width: 18.5 inches; and depth: 21.5 inches, is covered by the scope of the order because it is identical in all material respects to the scope description in the order, but that the table component, with measurements of: width (table top): 43 inches; depth (table top): 27.375 inches; and height: 34.875 inches, has legs that fold as a unit and meets the requirements for an exemption from the scope of the order.

On September 7, 2004, the Department found that table styles 4600 and 4606 produced by Lifetime Plastic Products Ltd. are within the scope of the order because these products have all of the components that constitute a folding metal table as described in the scope.

On July 13, 2005, the Department issued a scope ruling determining that ''butterfly'' chairs are not within the scope of the antidumping duty order because they do not meet the physical description of merchandise covered by the scope of the order as they do not have cross braces affixed to the front and/or rear legs, and the seat and back is one piece of cloth that is not affixed to the frame with screws, rivets, welds, or any other type of fastener.

On July 13, 2005, the Department issued a scope ruling determining that folding metal chairs imported by Korhani of America Inc. are within the scope of the antidumping duty order because the imported chair has a wooden seat, which is padded with foam and covered with fabric or polyvinyl chloride, attached to the tubular steel seat frame with screws, and has cross braces affixed to its legs.

On May 1, 2006, the Department issued a scope ruling determining that ''moon chairs'' are not included within the scope of the antidumping duty order because moon chairs have different physical characteristics, different uses, and are advertised differently than chairs covered by the scope of the order.

On October 4, 2007, the Department issued a scope ruling determining that International E–Z Up Inc.'s (''E–Z Up'') Instant Work Bench is not included within the scope of the antidumping duty order because its legs and weight do not match the description of the folding metal tables in the scope of the order.

On April 18, 2008, the Department issued a scope ruling determining that the VIKA Twofold 2–in–1 Workbench/Scaffold (''Twofold Workbench/Scaffold'') imported by Ignite USA, LLC from the PRC is not included within the scope of the antidumping duty order because its rotating leg mechanism differs from the folding metal tables subject to the order, and its weight is twice as much as the expected maximum weight for folding metal tables within the scope of the order.

On May 6, 2009, the Department issued a final determination of circumvention, determining that imports from the PRC of folding metal tables with legs connected by cross bars, so that the legs fold in sets, and otherwise meeting the description of in scope merchandise, are circumventing the order and are properly considered to be within the class or kind of merchandise subject to the order on FMTCs from the PRC.

On May 22, 2009, the Department issued a scope ruling determining that folding metal chairs that have legs that are not connected with cross–bars are within the scope of the antidumping duty order on folding metal tables and chairs from the PRC.

Non–Market Economy Country Status

No party contested the Department's treatment of the PRC as a non–market economy (''NME'') country, and the Department has treated the PRC as an NME country in all past antidumping duty investigations and administrative reviews and continues to do so in this case. *See, e.g., Certain Cased Pencils from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 72 FR 27074, 27075 (May 14, 2007) (''*Pencils*''). No interested party in this case has argued that we should do otherwise. Designation as an NME country remains in effect until it is revoked by the Department. *See* section 771(18)(C)(i) of the Act.

Surrogate Country

Section 773(c)(1) of the Act directs the Department to base NV on the NME producer's FOPs, valued in a surrogate market–economy country or countries considered to be appropriate by the Department. In accordance with section 773(c)(4) of the Act, in valuing the FOPs, the Department shall use, to the extent possible, the prices or costs of the FOPs in one or more market–economy countries that are: (1) at a level of economic development comparable to that of the NME country; and (2) significant producers of comparable merchandise. The sources of the surrogate factor values are discussed under the ''Normal Value'' section below. *See* Memorandum to The File, ''Preliminary Results of the 2007–2008 Administrative Review of Folding Metal Tables and Chairs from the People's Republic of China: Surrogate Value Memorandum'' (June 30, 2009) (''Surrogate Value Memorandum'').

The Department determined that Columbia, India, Indonesia, Peru, the Philippines and Thailand are countries comparable to the PRC in terms of economic development. See Surrogate Country Memorandum. Once we have identified the countries that are economically comparable to the PRC, we select an appropriate surrogate country by determining whether an economically comparable country is a significant producer of comparable merchandise and whether the data for valuing FOPs are both available and reliable.

The Department has determined that India is the appropriate surrogate country for use in this review. The Department based its decision on the following facts: (1) India is at a level of economic development comparable to that of the PRC; (2) India is a significant producer of comparable merchandise; and (3) India provides the best opportunity to use quality, publicly available data to value the FOPs. On the record of this review, we have usable surrogate financial data from India, and no party has submitted surrogate financial data from any other potential surrogate country. Additionally, the data submitted by Meco and New–Tec for our consideration as potential surrogate values are sourced from India.

Therefore, because India best represents the experience of producers of comparable merchandise operating in a surrogate country, we have selected India as the surrogate country and, accordingly, have calculated NV using Indian prices to value the respondent's FOPs, when available and appropriate. *See* Surrogate Value Memorandum. We have obtained and relied upon publicly available information wherever possible.

Separate Rates

In proceedings involving NME countries, the Department has a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assessed a single antidumping duty rate. *See, e.g., Pencils*, 72 FR at 27075. It is the Department's policy to assign all exporters of merchandise subject to review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate. Id. Exporters can demonstrate this independence through the absence of both de jure and de facto government control over export activities. The Department analyzes each entity exporting the subject merchandise under a test arising from the *Notice of Final Determination of*

Sales at Less Than Fair Value: Sparklers from the People's Republic of China, 56 FR 20588, at Comment 1 (May 6, 1991) (''*Sparklers*''), as further developed in *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585, 22587 (May 2, 1994) (''*Silicon Carbide*''). However, if the Department determines that a company is wholly foreign–owned or located in a market economy, then a separate–rate analysis is not necessary to determine whether it is independent from government control.

A. Absence of *De Jure* Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) other formal measures by the government decentralizing control of companies. *See Sparklers*, 56 FR at 20589.

New–Tec has placed documents on the record to demonstrate the absence of *de jure* control including its list of shareholders, business license, and the Company Law of the PRC (''Company Law''). Other than limiting New–Tec to activities referenced in the business license, we found no restrictive stipulations associated with the license. In addition, in previous cases the Department has analyzed the Company Law and found that it establishes an absence of *de jure* control, lacking record evidence to the contrary.[5] We have no information in this segment of the proceeding that would cause us to reconsider this determination. Therefore, based on the foregoing, we have preliminarily found an absence of *de jure* control for New–Tec.

B. Absence of *De Facto* Control

Typically the Department considers four factors in evaluating whether each respondent is subject to *de facto* government control of its export functions: (1) whether the export prices are set by or are subject to the approval of a government agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.[6] The Department has determined that an analysis of *de facto* control is critical in determining whether respondents are, in fact, subject to a degree of government control that would preclude the Department from assigning separate rates.

With regard to *de facto* control, New–Tec reported that: (1) it independently set prices for sales to the United States through negotiations with customers and these prices are not subject to review by any government organization; (2) it did not coordinate with other exporters or producers to set the price or to determine to which market the companies will sell subject merchandise; (3) the PRC Chamber of Commerce did not coordinate the export activities of New–Tec; (4) its general manager has the authority to contractually bind it to sell subject merchandise; (5) its board of directors appoints its general manager; (6) there is no restriction on its use of export revenues; (7) its shareholders ultimately determine the disposition of respective profits, and New–Tec has not had a loss in the last two years; and (8) none of New–Tec's board members or managers is a government official. Furthermore, our analysis of New–Tec's questionnaire responses reveals no information indicating government control of its export activities. Therefore, based on the information on the record, we preliminarily determine that there is an absence of *de facto* government control with respect to New–Tec's export functions and that New–Tec has met the criteria for the application of a separate rate.

The evidence placed on the record of this review by New–Tec demonstrates an absence of de jure and de facto government control with respect to its exports of subject merchandise, in accordance with the criteria identified in Sparklers, 56 FR at 20589; and Silicon Carbide, 59 FR at 22587. Accordingly, we have preliminarily granted a separate rate to New–Tec.

Date of Sale

19 CFR 351.401(i) states that:

> In identifying the date of sale of the subject merchandise or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

See also Allied Tube and Conduit Corp. v. United States, 132 F. Supp. 2d 1087, 1090–1092 (CIT 2001) (upholding the Department's rebuttable presumption that invoice date is the appropriate date of sale). After examining the questionnaire responses and the sales documentation placed on the record by New–Tec, we preliminarily determine that invoice date is the most appropriate date of sale for New–Tec. Nothing on the record rebuts the presumption that invoice date should be the date of sale.

Normal Value Comparisons

To determine whether sales of FMTCs to the United States by New–Tec were made at less than NV, we compared export price (''EP'') to NV, as described in the ''Export Price,'' and ''Normal Value'' sections of this notice, pursuant to section 771(35) of the Act.

Export Price

Because New–Tec sold subject merchandise to unaffiliated purchasers in the United States prior to importation into the United States or to unaffiliated resellers outside the United States with knowledge that the merchandise was destined for the United States, and use of a constructed export price methodology is not otherwise indicated, we have used EP in accordance with section 772(a) of the Act.

We calculated EP based on the free–on-board or delivered price to unaffiliated purchasers for New–Tec. From this price, we deducted amounts for foreign inland freight, international movement expenses, air freight, brokerage and handling, and billing adjustments, as applicable, pursuant to section 772(c)(2)(A) of the Act.[7]

The Department valued brokerage and handling using a simple average of the brokerage and handling costs that were reported in public submissions that were filed in three antidumping duty cases. Specifically, we averaged the public brokerage and handling expenses reported by Navneet Publications (India) Ltd. in the 2007–2008 administrative

[5] *See, e.g., Certain Non-Frozen Apple Juice Concentrate from the People's Republic of China: Final Results, Partial Rescission and Termination of a Partial Deferral of the 2002-2003 Administrative Review*, 69 FR 65148, 65150 (November 10, 2004).

[6] *See Silicon Carbide*, 59 FR at 22586-87; *see also Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From the People's Republic of China*, 60 FR 22544, 22545 (May 8, 1995).

[7] *See* Memorandum to The File, ''Analysis for the Preliminary Results of the 2007-2008 Administrative Review of Folding Metal Tables and Chairs from the People's Republic of China: New-Tec Integration (Xiamen) Co. Ltd. (''New-Tec'')'' (June 30, 2009) (''New-Tec Preliminary Analysis Memorandum'').

review of certain lined paper products from India, Essar Steel Limited in the 2006–2007 antidumping duty administrative review of hot–rolled carbon steel flat products from India, and Himalya International Ltd. in the 2005–2006 administrative review of certain preserved mushrooms from India. The Department adjusted the average brokerage and handling rate for inflation. *See* Surrogate Value Memorandum.

To value truck freight, we used the freight rates published by www.infobanc.com, ''The Great Indian Bazaar, Gateway to Overseas Markets.'' The logistics section of the website contains inland freight truck rates between many large Indian cities. The truck freight rates are for the period August 2008 through September 2008. Since these dates are not contemporaneous with the POR, we deflated the rates using Indian WPI. See Surrogate Value Memorandum.

Zero–Priced Transactions

In the final results of the 2003–2004, 2004–2005, 2005–2006 and the 2006–2007 administrative reviews of FMTCs, we included New–Tec's and/or other respondents' zero–priced transactions in the margin calculation because the record demonstrated that respondents' provided many pieces of the same product, indicating that these ''samples'' did not primarily serve for evaluation or testing of the merchandise. Additionally, respondents provided ''samples'' to the same customers to whom it was selling the same products in commercial quantities.[8] As a result, we concluded that these transactions were not what we consider to be samples because respondents were not providing product to entice its U.S. customers to buy the product.

The U.S. Court of Appeals for the Federal Circuit (''Federal Circuit'') has not required the Department to exclude zero–priced or *de minimis* sales from its analysis but, rather, has defined a sale as requiring ''both a transfer of ownership to an unrelated party and consideration.''[9] The Court of International Trade (''CIT'') in *NSK Ltd. v. United States* stated that it saw ''little reason in supplying and re–supplying and yet re–supplying the same product to the same customer in order to solicit sales if the supplies are made in reasonably short periods of time,'' and that ''it would be even less logical to supply a sample to a client that has made a recent bulk purchase of the very item being sampled by the client.''[10] Furthermore, the Courts have consistently ruled that the burden rests with a respondent to demonstrate that it received no consideration in return for its provision of purported samples.[11] Moreover, even where the Department does not ask a respondent for specific information to demonstrate that a transaction is a sample, the respondent has the burden of presenting the information in the first place to demonstrate that its transactions qualify for exclusion.[12]

An analysis of New–Tec's Section C computer sales listing reveals that it provided zero–priced merchandise to the same customer to whom it sold the same products in commercial quantities. Consequently, based on the facts cited above, the guidance of past court decisions, and our previous decisions, for the preliminary results of this review, we have not excluded these zero–priced transactions from the margin calculation for New–Tec.

Normal Value

Section 773(c)(1) of the Act provides that, in the case of an NME, the Department shall determine NV using an FOP methodology if the merchandise is exported from an NME and the information does not permit the calculation of NV using home–market prices, third–country prices, or constructed value under section 773(a) of the Act.

The Department bases NV on FOPs because the presence of government controls on various aspects of these economies renders price comparisons and the calculation of production costs invalid under our normal methodologies. Therefore, we calculated NV based on FOPs in accordance with sections 773(c)(3) and (4) of the Act and 19 CFR 351.408(c). The FOPs include: (1) hours of labor required; (2) quantities of raw materials employed; (3) amounts of energy and other utilities consumed; and (4) representative capital costs. In accordance with 19 CFR 351.408(c)(1), the Department normally uses publicly available information to value the FOPs. However, when a producer sources a meaningful amount of an input from a market–economy country and pays for it in market–economy currency, the Department may value the factor using the actual price paid for the input.[13] Further, the Department disregards prices it has reason to suspect may be dumped or subsidized.[14]

We have reason to believe or suspect that prices of inputs from Indonesia, South Korea, and Thailand may have been subsidized. We have found in other proceedings that these countries maintain broadly available, non–industry-specific export subsidies and, therefore, it is reasonable to infer that all exports to all markets from these countries may be subsidized.[15] The legislative history explains that we need not conduct a formal investigation to ensure that such prices are not subsidized.[16] Rather, Congress indicated that the Department should base its decision on information that is available to it at the time it makes its determination. Therefore, we have not used prices from these countries in calculating the Indian import–based surrogate values. In instances where respondents source a market economy input solely from suppliers located in these countries, we used Indian import–based surrogate values to value the input. In addition, we excluded Indian

[8] *See Folding Metal Tables and Chairs from the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 71 FR 2905 (January 18, 2006), and accompanying Issues and Decision Memorandum at Comment 4; *Folding Metal Tables and Chairs from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 71 FR 71509 (December 11, 2006), and accompanying Issues and Decision Memorandum at Comment 4; and *Folding Metal Tables and Chairs from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 72 FR 71355 (December 17, 2007), and accompanying Issues and Decision Memorandum at Comments 10 and 11.

[9] *See NSK Ltd. v. United States*, 115 F.3d 965, 975 (Fed. Cir. 1997).

[10] *See NSK Ltd .v. United States*, 217 F. Supp. 2d 1291, 1311-1312 (CIT 2002)., 217 F. Supp. 2d 1291, 1311-1312 (CIT 2002).

[11] *See, e.g., Zenith Electronics Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993) (explaining that the burden of evidentiary production belongs ''to the party in possession of the necessary information''). *See also Tianjin Machinery Import & Export Corp. v. United States*, 806 F. Supp. 1008, 1015 (CIT 1992) (''The burden of creating an adequate record lies with respondents and not with {the Department}.'') (citation omitted).

[12] *See NTN Bearing Corp. of America. v. United States*, 997 F.2d 1453, 1458 (Fed. Cir. 1993).

[13] *See* 19 CFR 351.408(c)(1); *see also Lasko Metal Products v. United States*, 43 F.3d 1442, 1445-1446 (Fed. Cir. 1994) (affirming the Department's use of market-based prices to value certain FOPs).

[14] *See, e.g., China National Machinery Import & Export Corp. v. United States*, 293 F. Supp. 2d 1334, 1339 (CIT 2003) (aff'd, 104 Fed. Appx. 183 (Fed. Cir. 2004)), and *see Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27366 (May 19, 1997).

[15] *See, e.g., Frontseating Service Valves from the People's Republic of China; Preliminary Determination of Sales at Less Than Fair Value, Preliminary Negative Determination of Critical Circumstances, and Postponement of Final Determination*, 73 FR 62952 (October 22, 2008) (unchanged in *Frontseating Service Valves from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 74 FR 10886 (March 13, 2009); and *China National Machinery Import & Export Corporation v. United States*, 293 F. Supp. 2d 1334 (CIT 2003), affirmed 104 Fed. Appx. 183 (Fed. Cir. 2004).

[16] *See Omnibus Trade and Competitiveness Act of 1988, Conference Report to Accompanying H.R. 3, H.R. Rep.* 100-576 at 590-91 (1988).

import data from NME countries and unidentified countries from our surrogate value calculations.[17]

Factor Valuations

In accordance with section 773(c) of the Act, we calculated NV based on the FOPs reported by New–Tec for the POR. To calculate NV, we multiplied the reported per–unit factor quantities by publicly available Indian surrogate values (except as noted below). In selecting the surrogate values, we considered the quality, specificity, and contemporaneity of the data. As appropriate, we adjusted input prices by including freight costs to render them delivered prices. Specifically, we added to Indian import surrogate values a surrogate freight cost using the shorter of the reported distance from the domestic supplier to the factory or the distance from the nearest seaport to the factory where appropriate (*i.e.*, where the sales terms for the market–economy inputs were not delivered to the factory). This adjustment is in accordance with the decision of the Federal Circuit in *Sigma Corp. v. United States*, 117 F. 3d 1401, 1408 (Fed. Cir. 1997). For a detailed description of all surrogate values used for New–Tec, *see* the Surrogate Value Memorandum.

Except as noted below, we valued raw material inputs using the weighted–average unit import values derived from the Monthly Statistics of the Foreign Trade of India, as published by the Directorate General of Commercial Intelligence and Statistics of the Ministry of Commerce and Industry, Government of India in the World Trade Atlas (''WTA''), available at http://www.gtis.com/wta.htm. The WTA data are reported in rupees and are contemporaneous with the POR. Where we could not obtain publicly available information contemporaneous with the POR with which to value FOPs, we adjusted the surrogate values using, where appropriate, the Indian Wholesale Price Index as published in the *International Financial Statistics* of the International Monetary Fund. We used the U.S. Consumer Price Index as published in the Bureau of Labor Statistics, to adjust the air freight and air fuel surcharge values as published in AFMS Transportation Management Group. *See* Surrogate Value Memorandum.

We further adjusted material input values to account for freight costs incurred between the supplier and respondent. We used the freight rates published by www.infobanc.com, ''The Great Indian Bazaar, Gateway to Overseas Markets.'' The logistics section of the website contains inland freight truck rates between many large Indian cities. The truck freight rates are for the period August 2008 through May 2009. Since these dates are not contemporaneous with the POR, we deflated the rates using Indian WPI. *See* Surrogate Value Memorandum.

New–Tec made raw materials purchases from market–economy suppliers. Therefore, in accordance with our practice outlined in *Antidumping Methodologies: Market Economy Inputs*,[18] where at least 33 percent of an input was sourced from market–economy suppliers and purchased in a market–economy currency, the Department will use actual weighted–average purchase prices to value these inputs.[19] Where the quantity of the input purchased from market–economy suppliers during the period was below 33 percent of its total volume of purchases of the input during the period, the Department will weight–average the weighted average market–economy purchase price with an appropriate surrogate value. *See Antidumping Methodologies: Market Economy Inputs*. For a complete description of the factor values we used, *see* Surrogate Value Memorandum and New–Tec Preliminary Analysis Memorandum.

To value liquid petroleum gas, we used per–kilogram values obtained from Bharat Petroleum, published June 4, 2009. We made adjustments to account for inflation and freight costs incurred between the supplier and New–Tec. *See* Surrogate Value Memorandum.

To value electricity, we used price data for small, medium, and large industries, as published by the Central Electricity Authority of the Government of India in its publication entitled ''Electricity Tariff & Duty and Average Rates of Electricity Supply in India,'' dated July 2006. These electricity rates represent actual country–wide, publicly–available information on tax–exclusive electricity rates charged to industries in India. *See* Surrogate Value Memorandum.

To value water, we used the revised Maharashtra Industrial Development Corporation (''MIDC'') water rates available at http://www.midcindia.com/water–supply, which we deflated using Indian WPI. See Surrogate Value Memorandum.

For direct labor, indirect labor and packing labor, consistent with 19 CFR 351.408(c)(3), we used the PRC regression–based wage rate as reported on Import Administration's web site.[20] Because this regression–based wage rate does not separate the labor rates into different skill levels or types of labor, we have applied the same wage rate to all skill levels and types of labor reported by each respondent. *See* Surrogate Value Memorandum.

For factory overhead, selling, general, and administrative expenses (''SG&A''), and profit values, both New–Tec and Meco submitted identical financial statements to those that were submitted and considered by the Department for use as surrogate financial statements in the preceding administrative review; none of which is contemporaneous with the current POR.[21] The Department examined these financial statements in the preceding administrative review and found that Maximaa Systems Limited (''Maximaa'') produced a greater proportion of comparable merchandise than the other companies (Infiniti Modules PVT Ltd., Godrej & Boyce Manufacturing Company Limited, and Tube Investments of India, Ltd.), and therefore best met the Department's criteria for surrogate financial ratios. Because parties have submitted for the instant review the same surrogate financial statements as those from the prior review, and the record indicates that Maximaa produced a greater proportion of comparable merchandise than other surrogate companies whose financial statements were placed on the record, we find that Maximaa continues to be the best available information with which to determine factory overhead as a percentage of the total raw materials, labor and energy (''ML&E'') costs; SG&A as a percentage of ML&E plus overhead (*i.e.*, cost of manufacture); and the profit rate as a percentage of the cost of manufacture plus SG&A. *See* Surrogate Value Memorandum for a full discussion of the calculation of these ratios.

For packing materials, we used the per–kilogram values obtained from the

[17] For a detailed description of all surrogate values used for each respondent, *see* Surrogate Value Memorandum.

[18] *See Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 FR 61716, 61717-19 (October 19, 2006) (''Antidumping Methodologies: Market Economy Inputs'').

[19] For a detailed description of all actual values used for market-economy inputs, *see* New-Tec Preliminary Analysis Memorandum dated concurrently with this notice.

[20] *See* Expected Wages of Selected NME Countries (May 14, 2008) (available at http://ia.ita.doc.gov/wages). The source of these wage rate data on Import Administration's web site is the *Yearbook of Labour Statistics 2005*, ILO, (Geneva: 2005), Chapter 5B: Wages in Manufacturing. The years of the reported wage rates range from 2004 to 2005.

[21] *See* New-Tec's January 21, 2009, Surrogate Value Comments at Exhibit 1, and Meco's January 21, 2009, Surrogate Value Comments at Exhibit 7.

WTA and made adjustments to account for freight costs incurred between the PRC supplier and New–Tec's plants. *See* Surrogate Value Memorandum.

Currency Conversion

We made currency conversions into U.S. dollars, in accordance with section 773A(a) of the Act, based on the exchange rates in effect on the dates of the U.S. sales, as certified by the Federal Reserve Bank.

Preliminary Results of Review

We preliminarily determine that the following weighted–average dumping margin exists:

Manufacturer/Exporter	Margin (Percent)
New–Tec	0.18*

* de minimis

Disclosure

We will disclose the calculations used in our analysis to parties to this proceeding within five days of the publication date of this notice. *See* 19 CFR 351.224(b). Interested parties are invited to comment on the preliminary results and may submit case briefs and/or written comments within 30 days of the date of publication of this notice. See 19 CFR 351.309(c). Interested parties may file rebuttal briefs and rebuttals to written comments, limited to issues raised in such briefs or comments, no later than five days after the date on which the case briefs are due. *See* 19 CFR 351.309(d). The Department requests that parties submitting written comments provide an executive summary and a table of authorities as well as an additional copy of those comments electronically.

Any interested party may request a hearing within 30 days of publication of this notice. *See* 19 CFR 351.310(c). If a request for a hearing is made, parties will be notified of the time and date for the hearing to be held at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230. *See* 19 CFR 351.310(d). The Department will issue the final results of this administrative review, which will include the results of its analysis of issues raised in any such comments, within 120 days of publication of these preliminary results, pursuant to section 751(a)(3)(A) of the Act.

Deadline for Submission of Publicly Available Surrogate Value Information

In accordance with 19 CFR 351.301(c)(3), the deadline for submission of publicly available information to value FOPs under 19 CFR 351.408(c) is 20 days after the date of publication of the preliminary results. In accordance with 19 CFR 351.301(c)(1), if an interested party submits factual information less than ten days before, on, or after (if the Department has extended the deadline), the applicable deadline for submission of such factual information, an interested party has ten days to submit factual information to rebut, clarify, or correct the factual information no later than ten days after such factual information is served on the interested party. However, the Department generally will not accept in the rebuttal submission additional, alternative surrogate value information not previously on the record, if the deadline for submission of surrogate value information has passed.[22] Furthermore, the Department generally will not accept business proprietary information in either the surrogate value submissions or the rebuttals thereto, as the regulation regarding the submission of surrogate values allows only for the submission of publicly available information.

Assessment Rates

Upon issuance of the final results, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review. The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review. In accordance with 19 CFR 351.212(b)(1), we calculated exporter/importer (or customer)-specific assessment rates for the merchandise subject to this review.

Where the respondent reports reliable entered values, we calculate importer (or customer)-specific *ad valorem* rates by aggregating the dumping margins calculated for all U.S. sales to each importer (or customer) and dividing this amount by the total entered value of the sales to each importer (or customer). *See* 19 CFR 351.212(b)(1). Where an importer (or customer)-specific *ad valorem* rate is greater than *de minimis*, we will apply the assessment rate to the entered value of the importers'/customers' entries during the POR. *See* 19 CFR 351.212(b)(1). Where we do not have entered values for all U.S. sales, we calculate a per–unit assessment rate by aggregating the antidumping duties due for all U.S. sales to each importer (or customer) and dividing this amount by the total quantity sold to that importer (or customer).

To determine whether the duty assessment rates are *de minimis*, in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we calculated importer (or customer)-specific *ad valorem* ratios based on the estimated entered value. Where an importer (or customer)-specific *ad valorem* rate is zero or *de minimis*, we will instruct CBP to liquidate appropriate entries without regard to antidumping duties. *See* 19 CFR 351.106(c)(2).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) for New–Tec, the cash deposit rate will be the company–specific rate established in the final results of review (except, if the rate is zero or *de minimis*, no cash deposit will be required); (2) for previously investigated or reviewed PRC and non–PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter–specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC–wide rate of 70.71 percent; and (4) for all non–PRC exporters of subject merchandise that have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporters that supplied that non–PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This determination is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

[22] *See, e.g., Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission, in Part,* 72 FR 58809 (October 17, 2007), and accompanying Issues and Decision Memorandum at Comment 2.

Dated: June 30, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E9–15963 Filed 7–6–09; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–905]

Certain Polyester Staple Fiber from the People's Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review and Extension of Time Limit for the Final Results

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''Department'') is conducting the first administrative review of the antidumping duty order on certain polyester staple fiber (''PSF'') from the People's Republic of China (''PRC'') for the period of review (''POR'') December 26, 2006, through May 31, 2008. The Department has preliminarily determined that sales have been made below normal value (''NV'') by the respondents. If these preliminary results are adopted in our final results of this review, the Department will instruct U.S. Customs and Border Protection (''CBP'') to assess antidumping duties on all appropriate entries of subject merchandise during the POR.

Interested parties are invited to comment on these preliminary results. The Department intends to issue the final results no later than 180 days from the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''Act''). See ''Extension of the Time Limits for the Final Results'' below.

EFFECTIVE DATE: July 7, 2009.

FOR FURTHER INFORMATION CONTACT: Emeka Chukwudebe or Alexis Polovina AD/CVD Operations, Office 9, Import Administration, International Trade Administration, Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482 0219 or (202) 482 3927 respectively.

SUPPLEMENTARY INFORMATION:

Background

On June 1, 2007, the Department published in the **Federal Register** an antidumping duty order on certain polyester staple fiber from the PRC. *See Notice of Antidumping Duty Order: Certain Polyester Staple Fiber from the People's Republic of China*, 72 FR 30545 (June 1, 2007) (''Order''). On July 30, 2008, the Department published a notice of initiation of an administrative review of certain PSF from the PRC covering the period December 26, 2006, through May 31, 2008 for 27 companies.[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part, and Deferral of Administrative Review*, 73 FR 44220 (July 30, 2008) (''Initiation Notice''). On February 19, 2009, the Department published a notice extending the time period for issuing the preliminary results by 120 days to June 30, 2009. *See Certain Polyester Staple Fiber from the People's Republic of China: Extension of Time Limits for Preliminary Results of the Antidumping Duty Administrative Review*, 74 FR 7660 (February 19, 2009).

Respondent Selection

Section 777A(c)(1) of the Act directs the Department to calculate individual dumping margins for each known exporter or producer of the subject merchandise. However, section 777A(c)(2) of the Act gives the Department discretion to limit its examination to a reasonable number of exporters or producers if it is not practicable to examine all exporters or producers involved in the review.

On August 5, 2008, the Department released CBP data for entries of the subject merchandise during the POR under administrative protective order (''APO'') to all interested parties having an APO as of five days of publication of the Initiation Notice, inviting comments regarding the CBP data and respondent selection. The Department received comments and rebuttal comments between August 14, 2008, and August 22, 2008.

On October 1, 2008, the Department sent out a quantity and value (''Q&V'') questionnaire to all 27 companies for which a review was requested because a significant amount of the volume in the CBP data was unclear. In the CBP data, the identity of the largest exporter could not be publicly identified by any party, including the Department. Moreover, it was unclear if companies with the same CBP module suffix could be grouped together or whether the CBP module suffix was properly used by those companies which were assigned the CBP module suffix in the investigation. In addition, parties requested numerous adjustments to the CBP data, including but not limited to grouping of companies, and corrections to company names. The Department received Q&V responses between October 16, 2008, and October 20, 2008, from 19 of the 27 companies who received the questionnaire.

On November 7, 2008, the Department issued its respondent selection memorandum after assessing its resources and determining that it could reasonably examine two exporters subject to this review. Pursuant to section 777A(c)(2)(B) of the Act, the Department selected Ningbo Dafa Chemical Fiber Co., Ltd. (''Ningbo Dafa'') and Cixi Santai Chemical Fiber Co. (''Santai'') as mandatory respondents.[2] The Department sent antidumping duty questionnaires to Ningbo Dafa and Santai on November 14, 2008.

Ningbo Dafa submitted the Section A Questionnaire Response on December 5, 2008, the Section C Questionnaire Response on December 30, 2008, and the Section D Questionnaire Response on January 9, 2009. Santai submitted the Section A Questionnaire Response on December 12, 2008, and the Sections C and D Questionnaire Responses on January 9, 2009.

Petitioners submitted deficiency comments regarding respondents' questionnaire responses between December 2008 and May 2009. The Department issued supplemental questionnaires to Ningbo Dafa and Santai between March 2009 and May 2009 to which both companies responded.

[1] Those companies are: Far Eastern Industries, Ltd., (Shanghai) and Far Eastern Polychem Industries;Ningbo Dafa Chemical Fiber Co., Ltd.; Cixi Sansheng Chemical Fiber Co., Ltd.; Cixi Santai Chemical Fiber Co., Ltd.; Cixi Waysun Chemical Fiber Co., Ltd.; Hangzhou Best Chemical Fibre Co., Ltd.; Hangzhou Hanbang Chemical Fibre Co., Ltd.; Hangzhou Huachuang Co., Ltd.; Hangzhou Sanxin Paper Co., Ltd.; Hangzhou Taifu Textile Fiber Co., Ltd.; Jiaxang Fuda Chemical Fibre Factory; Nantong Loulai Chemical Fiber Co., Ltd.;Nanyang Textile Co., Ltd.; Suzhou PolyFiber Co., Ltd.; Xiamen Xianglu Chemical Fiber Co.; Zhaoqing Tifo New Fiber Co., Ltd.; Zhejiang Anshun Pettechs Fibre Co., Ltd.; Zhejiang Waysun Chemical Fiber Co., Ltd.; Dragon Max Trading Development; Xiake Color Spinning Co., Ltd.; Jiangyin Hailun Chemical Fiber Co., Ltd.; Hyosung Singapore PTE Ltd.; Jiangyin Changlong Chemical Fiber Co., Ltd.; Ma Ha Company, Ltd.; Jiangyin Huahong Chemical Fiber Co., Ltd.; Jiangyin Mighty Chemical Fiber Co., Ltd.; and Huvis Sichuan.

[2] *See* Memorandum to James Dole, Director, AD/CVD Operations, Office 9, from Alexis Polovina, International Trade Compliance Analyst, AD/CVD Operations, Office 9; First Antidumping Duty Administrative Review of Certain Polyester Staple Fiber from the PRC: Selection of Respondents for Individual Review, dated November 7, 2008 (''*Respondent Selection Memo*'').

Surrogate Country and Surrogate Value Data

On February 13, 2009, the Department sent interested parties a letter inviting comments on surrogate country selection and surrogate value data.[3] No parties provided comments with respect to selection of a surrogate country. On April 27, 2009, the Department received information to value factors of production (''FOP'') from Ningbo Dafa, Santai, and Petitioners. On May 11, 2009, Ningbo Dafa and Santai filed rebuttal comments. On May 14, 2009, Ningbo Dafa provided additional surrogate value information and comments. On May 19, 2009, Petitioners filed additional rebuttal comments. All the surrogate values placed on the record were obtained from sources in India.

Scope of the Order

The merchandise subject to this order is synthetic staple fibers, not carded, combed or otherwise processed for spinning, of polyesters measuring 3.3 decitex (3 denier, inclusive) or more in diameter. This merchandise is cut to lengths varying from one inch (25 mm) to five inches (127 mm). The subject merchandise may be coated, usually with a silicon or other finish, or not coated. PSF is generally used as stuffing in sleeping bags, mattresses, ski jackets, comforters, cushions, pillows, and furniture.

The following products are excluded from the scope: (1) PSF of less than 3.3 decitex (less than 3 denier) currently classifiable in the Harmonized Tariff Schedule of the United States (''HTSUS'') at subheading 5503.20.0025 and known to the industry as PSF for spinning and generally used in woven and knit applications to produce textile and apparel products; (2) PSF of 10 to 18 denier that are cut to lengths of 6 to 8 inches and that are generally used in the manufacture of carpeting; and (3) low–melt PSF defined as a bi–component fiber with an outer, non–polyester sheath that melts at a significantly lower temperature than its inner polyester core (classified at HTSUS 5503.20.0015).

Certain PSF is classifiable under the HTSUS subheadings 5503.20.0045 and 5503.20.0065. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under the orders is dispositive.

Non–Market Economy (''NME'') Country Status

In every case conducted by the Department involving the PRC, the PRC has been treated as an NME country. In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. *See*, *e.g.*, *Brake Rotors from the People's Republic of China: Final Results and Partial Rescission of the 2004/2005 Administrative Review and Notice of Rescission of 2004/2005 New Shipper Review*, 71 FR 66304 (November 14, 2006). None of the parties to this proceeding have contested such treatment. Accordingly, the Department calculated NV in accordance with section 773(c) of the Act, which applies to NME countries.

Surrogate Country

When the Department investigates imports from an NME country and available information does not permit the Department to determine NV pursuant to section 773(a) of the Act, then, pursuant to section 773(c)(4) of the Act, the Department bases NV on an NME producer's FOPs, to the extent possible, in one or more market–economy countries that (1) are at a level of economic development comparable to that of the NME country, and (2) are significant producers of comparable merchandise. The Department determined India, Philippines, Indonesia, Colombia, Thailand, and Peru are countries comparable to the PRC in terms of economic development.[4]

Based on publicly available information placed on the record (*e.g.*, production data), the Department determines India to be a reliable source for surrogate values because India is at a comparable level of economic development pursuant to section 773(c)(4) of the Act, is a significant producer of subject merchandise, and has publicly available and reliable data. Accordingly, the Department has selected India as the surrogate country for purposes of valuing the FOPs because it meets the Department's criteria for surrogate country selection.

Separate Rates

In 2005, the Department notified parties of a new application and certification process by which exporters and producers may obtain separate rate status in an NME review. The process requires exporters and producers to submit a separate rate status certification and/or application. *See also Policy Bulletin 05.1: Separate–Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non–Market Economy Countries*, (April 5, 2005) (''*Policy Bulletin 05.1*''), available at: http://ia.ita.doc.gov. However, the standard for eligibility for a separate rate, which is whether a firm can demonstrate an absence of both *de jure* and *de facto* government control over its export activities, has not changed.

A designation of a country as an NME remains in effect until it is revoked by the Department. *See* section 771(18)(c)(i) of the Act. In proceedings involving NME countries, it is the Department's practice to begin with a rebuttable presumption that all companies within the country are subject to government control and thus should be assessed a single antidumping duty rate. *See*, *e.g.*, *Policy Bulletin 05.1*; *see also Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products from the People's Republic of China*, 71 FR 53079, 53082 (September 8, 2006); *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 FR 29303, 29307 (May 22, 2006) (''*Diamond Sawblades*''). It is the Department's policy to assign all exporters of merchandise subject to investigation in an NME country this single rate unless an exporter can affirmatively demonstrate that it is sufficiently independent so as to be entitled to a separate rate. *See*, *e.g.*, *Diamond Sawblades*, 71 FR at 29307. Exporters can demonstrate this independence through the absence of both *de jure* and *de facto* government control over export activities. *Id*. The Department analyzes each entity exporting the subject merchandise under a test arising from the *Notice of Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588, 20589 (May 6, 1991) (''*Sparklers*''), as further developed in *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585, 22586–87 (May 2, 1994) (''*Silicon Carbide*''). However, if the Department determines that a company is wholly foreign–owned or located in a market economy, then a separate rate analysis is not necessary to determine whether it is independent from government control. *See*, *e.g.*, *Final*

[3] *See* the Department's Letter to All Interested Parties; Antidumping Investigation of Certain Polyester Staple Fiber (''PSF'') from the People's Republic of China (''PRC''): Surrogate Country List, dated February 13, 2009 (''*Surrogate Country List*'').

[4] *See Surrogate Country List.*

Results of Antidumping Duty Administrative Review: Petroleum Wax Candles from the People's Republic of China, 72 FR 52355, 52356 (September 13, 2007).

In addition to the two mandatory respondents, Ningbo Dafa and Santai, the Department received separate rate applications or certifications from the following 15 companies (''Separate–Rate Applicants''): Far Eastern Industries, Ltd., (Shanghai) and Far Eastern Polychem Industries; Cixi Sansheng Chemical Fiber Co., Ltd.; Cixi Waysun Chemical Fiber Co. Ltd., Hangzhou Best Chemical Fibre Co., Ltd.; Hangzhou Hanbang Chemical Fibre Co., Ltd.; Hangzhou Huachuang Co., Ltd.; Hangzhou Sanxin Paper Co., Ltd.; Hangzhou Taifu Textile Fiber Co., Ltd.; Jiaxang Fuda Chemical Fibre Factory; Nantong Loulai Chemical Fiber Co., Ltd.; Nanyang Textile Co., Ltd.; Xiamen Xianglu Chemical Fiber Co.; Zhaoqing Tifo New Fiber Co., Ltd.; Zhejiang Anshun Pettechs Fibre Co., Ltd.; and Zhejiang Waysun Chemical Fiber Co., Ltd. However, the following 10 companies did not submit either a separate–rate application or certification: Dragon Max Trading Development; Xiake Color Spinning Co., Ltd.; Jiangyin Hailun Chemical Fiber Co., Ltd.; Hyosung Singapore PTE Ltd.; Jiangyin Changlong Chemical Fiber Co., Ltd.; Ma Ha Company, Ltd.; Jiangyin Huahong Chemical Fiber Co., Ltd.; Jiangyin Mighty Chemical Fiber Co., Ltd.; Huvis Sichuan; and Suzhou PolyFiber Co., Ltd. Therefore, because these companies did not demonstrate their eligibility for separate rate status, they have now been included as part of the PRC–wide entity.

a. Absence of De Jure Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) any other formal measures by the government decentralizing control of companies. *See Sparklers*, 56 FR at 20589. The evidence provided by Ningbo Dafa, Santai, and the Separate–Rate Applicants supports a preliminary finding of *de jure* absence of government control based on the following: (1) an absence of restrictive stipulations associated with the individual exporter's business and export licenses; (2) there are applicable legislative enactments decentralizing control of the companies; and (3) there are formal measures by the government decentralizing control of companies. *See, e.g.*, Ningbo Dafa's Separate Rate Certification, dated September 4, 2008, at pages 3–4; and Santai's Section A Questionnaire Response, dated December 12, 2008, at pages 2–9.

b. Absence of De Facto Control

Typically the Department considers four factors in evaluating whether each respondent is subject to *de facto* government control of its export functions: (1) whether the export prices are set by or are subject to the approval of a government agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses. *See Silicon Carbide*, 59 FR at 22586–87; *see also Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From the People's Republic of China*, 60 FR 22544, 22545 (May 8, 1995). The Department has determined that an analysis of *de facto* control is critical in determining whether respondents are, in fact, subject to a degree of government control which would preclude the Department from assigning separate rates. The evidence provided by Ningbo Dafa, Santai, and the Separate–Rate Applicants supports a preliminary finding of *de facto* absence of government control based on the following: (1) the companies set their own export prices independent of the government and without the approval of a government authority; (2) the companies have authority to negotiate and sign contracts and other agreements; (3) the companies have autonomy from the government in making decisions regarding the selection of management; and (4) there is no restriction on any of the companies' use of export revenue. *See, e.g.*, Ningbo Dafa's Separate Rate Certification, dated December 12, 2008, at pages 5–6 and Santai's Section A Questionnaire Response, dated September 5, 2008, at pages 2–9. Therefore, the Department preliminarily finds that Ningbo Dafa and Santai have established that they qualify for a separate rate under the criteria established by *Silicon Carbide* and *Sparklers*.

Separate Rate Calculation

As stated previously, this administrative review covers 27 exporters. Of those, the Department selected two exporters, Ningbo Dafa and Santai, as mandatory respondents in this review. As stated above, 10 companies are part of the PRC–Wide entity and thus are not entitled to a separate rate.[5] The remaining 15 companies submitted timely information as requested by the Department and thus, the Department has preliminarily determined to treat these companies as cooperative Separate–Rate Applicants.

The statute and the Department's regulations do not address the establishment of a rate to be applied to individual companies not selected for examination where the Department limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally we have looked to section 735(c)(5) of the Act, which provides instructions for calculating the all–others rate in an investigation, for guidance when calculating the rate for respondents we did not examine in an administrative review. Section 735(c)(5)(A) of the Act instructs that we are not to calculate an all–others rate using any zero or *de minimis* margins or any margins based entirely on facts available. Accordingly, the Department's practice in this regard, in reviews involving limited respondent selection based on exporters accounting for the largest volumes of trade, has been to average the rates for the selected companies, excluding zero and de minimis rates and rates based entirely on facts available. *See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 52273, 52275 (September 9, 2008) and accompanying Issues and Decision Memorandum at Comment 6 (''*Shrimp from Vietnam*''). Section 735(c)(5)(B) of the Act also provides that, where all margins are zero, *de minimis*, or based entirely on facts available, we may use ''any reasonable method'' for assigning the rate to non–selected respondents, including ''averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.''

The Department has available in administrative reviews information that would not be available in an investigation, namely rates from prior

[5] Those companies are: Dragon Max Trading Development; Xiake Color Spinning Co., Ltd.; Jiangyin Hailun Chemical Fiber Co., Ltd.; Hyosung Singapore PTE Ltd.; Jiangyin Changlong Chemical Fiber Co., Ltd.; Ma Ha Company, Ltd.; Jiangyin Huahong Chemical Fiber Co., Ltd.; Jiangyin Mighty Chemical Fiber Co., Ltd.; Huvis Sichuan; and Suzhou PolyFiber Co., Ltd.

administrative and new shipper reviews. Accordingly, since the determination in the investigation in this proceeding, the Department has determined that in cases where we have found dumping margins in previous segments of a proceeding, a reasonable method for determining the rate for non–selected companies is to use the most recent rate calculated for the non–selected company in question, unless we calculated in a more recent review a rate for any company that was not zero, *de minimis* or based entirely on facts available. *See Shrimp from Vietnam* at Comment 6; *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of Review in Part*, 73 FR 52823, 52824 (September 11, 2008) and accompanying Issues and Decision Memorandum at Comment 16; *see also Certain Fish Fillets from the Socialist Republic of Vietnam: Notice of Preliminary Results of the New Shipper Review and Fourth Antidumping Duty Administrative Review and Partial Rescission of the Fourth Administrative Review*, 73 FR 52015 (September 8, 2008) (changed in final results as final calculated rate for mandatory respondent was above *de minimis*, which remained unchanged in the amended final results).[6]

In this case, all the Separate–Rate Applicants received a separate rate in the original investigation. Therefore, for the preliminary results, we are assigning all the Separate–Rate Applicants a separate rate of 4.44%, which is the separate rate from the original investigation. Entities receiving this rate are identified by name in the ''Preliminary Results of Review'' section of this notice.

Date of Sale

Ningbo Dafa and Santai reported the invoice date as the date of sale because they claim that, for their U.S. sales of subject merchandise made during the POR, the material terms of sale were established on the invoice date. The Department preliminarily determines that the invoice date is the most appropriate date to use as Ningbo Dafa's and Santai's date of sale is in accordance with 19 CFR 351.401(i) and the Department's long–standing practice of determining the date of sale.[7]

Fair Value Comparisons

To determine whether sales of certain PSF to the United States by Ningbo Dafa and Santai were made at less than fair value, the Department compared the export price (''EP'') to NV, as described in the ''U.S. Price,'' and ''Normal Value'' sections below.

U.S. Price

Export Price

In accordance with section 772(a) of the Act, the Department calculated the EP for a portion of sales to the United States for Ningbo Dafa and Santai because the first sale to an unaffiliated party was made before the date of importation and the use of constructed EP (''CEP'') was not otherwise warranted. The Department calculated EP based on the price to unaffiliated purchasers in the United States. In accordance with section 772(c) of the Act, as appropriate, the Department deducted from the starting price to unaffiliated purchasers foreign inland freight and brokerage and handling. Each of these services was either provided by an NME vendor or paid for using an NME currency. Thus, the Department based the deduction of these movement charges on surrogate values.

Normal Value

Section 773(c)(1) of the Act provides that the Department shall determine the NV using a factors–of-production methodology if the merchandise is exported from an NME and the information does not permit the calculation of NV using home–market prices, third–country prices, or constructed value under section 773(a) of the Act. The Department bases NV on the FOPs because the presence of government controls on various aspects of non–market economies renders price comparisons and the calculation of production costs invalid under the Department's normal methodologies.

Factor Valuations

In accordance with 19 CFR 351.408(c)(1), the Department will normally use publicly available information to value the FOPs, but when a producer sources an input from a market economy country and pays for it in a market economy currency, the Department may value the factor using the actual price paid for the input. During the POR, both Ningbo Dafa and Santai reported that they purchased certain inputs from a market economy supplier and paid for the inputs in a market economy currency. *See* Ningbo Dafa Section D Questionnaire Response, dated January 9, 2009, at pages D–5–6 and Exhibit 3; and Santai's Section D Questionnaire Response, dated January 9, 2009, at page 5 and Exhibit D–1–B. The Department has a rebuttable presumption that market economy input prices are the best available information for valuing an input when the total volume of the input purchased from all market economy sources during the period of investigation or review exceeds 33 percent of the total volume of the input purchased from all sources during the period. *See Antidumping Methodologies: Market Economy Inputs, Expected Non–Market Economy Wages, Duty Drawback; and Request for Comments*, 71 FR 61716, 61717–18 (October 19, 2006) (''*Antidumping Methodologies*''). In these cases, unless case–specific facts provide adequate grounds to rebut the Department's presumption, the Department will use the weighted average market economy purchase price to value the input. Alternatively, when the volume of an NME firm's purchases of an input from market economy suppliers during the period is below 33 percent of its total volume of purchases of the input during the period, but where these purchases are otherwise valid and there is no reason to disregard the prices, the Department will weight–average the market economy purchase price with an appropriate surrogate value according to their respective shares of the total volume of purchases, unless case–specific facts provide adequate grounds to rebut the presumption. *See Antidumping Methodologies*. When a firm has made market economy input purchases that may have been dumped or subsidized, are not bona fide, or are otherwise not acceptable for use in a dumping calculation, the Department will exclude them from the numerator of the ratio to ensure a fair determination of whether valid market economy purchases meet the 33–percent threshold. *See Antidumping Methodologies*.

The Department used Indian import data from the World Trade Atlas (''WTA Indian import data'') published by Global Trade Information Services, Inc., which is sourced from the Directorate General of Commercial Intelligence & Statistics, Indian Ministry of Commerce,

[6] *See Notice of Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 74 FR 11349 (March 17, 2009) and accompanying Issues and Decision Memorandum at Comment 6; *Notice of Amended Final Results of the Fourth Antidumping Duty Administrative Review: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 74 FR 17816 (April 17, 2009).

[7] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand*, 69 FR 76918 (December 23, 2004) and accompanying Issues and Decision Memorandum at Comment 10.

to determine the surrogate values for raw material, steam coal, by–products, and packing material inputs. The Department has disregarded statistics from NMEs, countries with generally available export subsidies, and undetermined countries, in calculating the average value. For a detailed description of all surrogate values used for Ningbo Dafa and Santai, *see* Memorandum to the File through Alex Villanueva, Program Manager, Office 9 from Alexis Polovina, Case Analyst: Antidumping Duty Administrative Review of Certain Polyester Staple Fiber from the People's Republic of China (''PRC''): Surrogate Values for the Preliminary Results (''Prelim Surrogate Value Memo'') dated June 30, 2009.

In accordance with section 773(c) of the Act, for subject merchandise produced by Ningbo Dafa and Santai, the Department calculated NV based on the FOPs reported by Ningbo Dafa and Santai for the POR. The Department used the WTA Indian import data and other publicly available Indian sources in order to calculate surrogate values for Ningbo Dafa and Santai's FOPs. To calculate NV, the Department multiplied the reported per–unit factor quantities by publicly available Indian surrogate values. The Department's practice when selecting the best available information for valuing FOPs is to select, to the extent practicable, surrogate values which are product–specific, representative of a broad market average, publicly available, contemporaneous with the POR and exclusive of taxes and duties. *See*, *e.g.*, *Electrolytic Manganese Dioxide From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 48195 (August 18, 2008) and accompanying Issues and Decision Memorandum at Comment 2.

As appropriate, the Department adjusted input prices by including freight costs to render them delivered prices. Specifically, the Department added to Indian import surrogate values a surrogate freight cost using the shorter of the reported distance from the domestic supplier to the factory or the distance from the nearest seaport to the factory. This adjustment is in accordance with the decision of the *Federal Circuit in Sigma Corp. v. United States*, 117 F. 3d 1401, 1408 (Fed. Cir. 1997). *See* Prelim Surrogate Value Memo.

In those instances where the Department could not obtain publicly available information contemporaneous to the POR with which to value factors, the Department adjusted the surrogate values using, where appropriate, the Indian Wholesale Price Index (''WPI'') as published in the International Financial Statistics of the International Monetary Fund, a printout of which is attached to the Prelim Surrogate Value Memo at Attachment 2. Where necessary, the Department adjusted surrogate values for inflation and exchange rates, taxes, and the Department converted all applicable items to a per–kilogram basis.

The Department valued electricity using price data for small, medium, and large industries, as published by the Central Electricity Authority of the Government of India (''CEA'') in its publication titled ''Electricity Tariff & Duty and Average Rates of Electricity Supply in India,'' dated July 2006. These electricity rates represent actual country–wide, publicly available information on tax–exclusive electricity rates charged to industries in India. Since the rates are not contemporaneous with the POR, the Department inflated the values using the WPI. Parties have suggested that the Department rely on the 2005 International Energy Agency (''IEA'') data. However, the Department preliminarily finds that we cannot rely on those data because the 2005 IEA data are less contemporaneous than the July 2006 CEA data. Therefore, we preliminarily determine to value electricity using the CEA price data. *See* Prelim Surrogate Value Memo.

Because water is essential to the production process of the subject merchandise, the Department is considering water to be a direct material input, and not as overhead, and valued water with a surrogate value according to our practice. *See Final Determination of Sales at Less Than Fair Value and Critical Circumstances: Certain Malleable Iron Pipe Fittings From the People's Republic of China*, 68 FR 61395 (October 28, 2003) and accompanying Issue and Decision Memorandum at Comment 11. The Department valued water using data from the Maharashtra Industrial Development Corporation (www.midcindia.org) as it includes a wide range of industrial water tariffs. To value water, we used the revised Maharashtra Industrial Development Corporation (''MIDC'') water rates available at http://www.midcindia.com/water–supply, which we deflated using Indian WPI. *See* Prelim Surrogate Value Memo.

For direct, indirect, and packing labor, consistent with 19 CFR 351.408(c)(3), the Department used the PRC regression–based wage rate as reported on Import Administration's home page, Import Library, Expected Wages of Selected NME Countries, revised in May 2008; see http://ia.ita.doc.gov/wages/index.html; *Corrected 2007 Calculation of Expected Non–Market Economy Wages*, 73 FR 27795 (May 14, 2008). The source of these wage–rate data listed on Import Administration's web site is the Yearbook of Labour Statistics 2005, ILO (Geneva: 2007), Chapter 5B: Wages in Manufacturing. Because this regression–based wage rate does not separate the labor rates into different skill levels or types of labor, the Department has applied the same wage rate to all skill levels and types of labor reported by the respondents. *See* Prelim Surrogate Value Memo.

The Department valued truck freight expenses using a per–unit average rate calculated from data on the infobanc Web site: http://www.infobanc.com/logistics/logtruck.htm. The logistics section of this website contains inland freight truck rates between many large Indian cities. Since this value is not contemporaneous with the POR, the Department deflated the rate using WPI. See Prelim Surrogate Value Memo.

To value brokerage and handling, the Department calculated a simple average of the brokerage and handling costs that were reported in public submissions that were filed in three antidumping duty cases. Specifically, the Department averaged the public brokerage and handling expenses reported by Navneet Publications (India) Ltd. in the 2007–2008 antidumping duty administrative review of certain lined paper products from India, Essar Steel Limited in the 2006–2007 antidumping duty administrative review of hot–rolled carbon steel flat products from India, and Himalaya International Ltd. in the 2005–2006 antidumping duty administrative review of certain preserved mushrooms from India. The Department inflated the brokerage and handling rate using the appropriate WPI inflator. *See* Prelim Surrogate Value Memo.

To value factory overhead, selling, general, and administrative (''SG&A'') expenses, and profit, the Department used the audited financial statements of Ganesh Polytex Limited.

We are preliminarily granting a by–product offset to Ningbo Dafa for waste paper and waste bottle hood. We are also preliminarily granting a by–product offset to Ningbo Dafa for waste fiber based on its production of waste fiber, as opposed to its POR reintroduction of waste fiber. Ningbo Dafa stated that when waste fiber is produced it enters an inventory–in account and a value is assigned to that inventory in their books. Moreover, Ningbo claims that all of the waste fiber produced during the POR has been or will be reintroduced. In other words, there is no indication

that any of the waste fiber produced is not ultimately reintroduced into the processing stage. Under such a circumstance, the practice of using the ''lower of'' the quantity of by–product produced or reintroduced in each POR may lead to a biased result over multiple review periods. The Department notes that granting the by–product offset based on total by–product production during the POR is a departure from past NME practice, in which by–product offsets were based on its total POR reintroduction of the by–product produced during the POR. *See*, *e.g.*, *Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 FR 37116 (June 23, 2003) and accompanying Issues and Decisions Memorandum at Comment 12. However, this change brings our NME practice into line with normal accounting principles, which recognizes and records the economic value of a by–product when it is produced. We are hereby notifying parties of this change in practice for NME cases and we invite interested parties to provide comments in their case briefs.

We are also preliminarily granting a by–product offset to Santai for polypropylene (''PP'') waste and polyethylene terephthalate (''PET'') waste.

Currency Conversion

Where necessary, the Department made currency conversions into U.S. dollars, in accordance with section 773A(a) of the Act, based on the exchange rates in effect on the dates of the U.S. sales, as certified by the Federal Reserve Bank.

Preliminary Results of Review

The Department preliminarily determines that the following weighted–average dumping margins exist:

CERTAIN POLYESTER STAPLE FIBER FROM THE PEOPLE'S REPUBLIC OF CHINA

Manufacturer/Exporter	Weighted Average Margin (Percent)
Ningbo Dafa Chemical Fiber Co., Ltd.	0.00
Cixi Santai Chemical Fiber Co.	0.06 (*de minimis*)
Far Eastern Polychem Industries	4.44
Cixi Sansheng Chemical Fiber Co., Ltd.	4.44
Cixi Waysun Chemical Fiber Co. Ltd.	4.44
Hangzhou Best Chemical Fibre Co., Ltd.	4.44
Hangzhou Hanbang Chemical Fibre Co., Ltd.	4.44
Hangzhou Huachuang Co., Ltd.	4.44
Hangzhou Sanxin Paper Co., Ltd.	4.44
Hangzhou Taifu Textile Fiber Co., Ltd.	4.44
Jiaxang Fuda Chemical Fibre Factory	4.44
Nantong Loulai Chemical Fiber Co., Ltd.	4.44
Nanyang Textile Co., Ltd.	4.44
Xiamen Xianglu Chemical Fiber Co.	4.44
Zhaoqing Tifo New Fiber Co., Ltd.	4.44
Zhejiang Anshun Pettechs Fibre Co., Ltd.	4.44
Zhejiang Waysun Chemical Fiber Co., Ltd.	4.44
PRC–Wide Rate	44.30

Disclosure and Public Hearing

The Department will disclose to parties the calculations performed in connection with these preliminary results within five days of the date of publication of this notice. *See* 19 CFR 351.224(b). Because, as discussed above, the Department intends to seek additional information, the Department will establish the briefing schedule at a later time, and will notify parties of the schedule in accordance with 19 CFR 351.309. Parties who submit case briefs or rebuttal briefs in this proceeding are requested to submit with each argument: 1) a statement of the issue; 2) a brief summary of the argument; and 3) a table of authorities. *See* 19 CFR 351.309(c) and (d).

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, Room 1117, within 30 days of the date of publication of this notice. Requests should contain: 1) the party's name, address and telephone number; 2) the number of participants; and 3) a list of issues to be discussed. *Id*. Issues raised in the hearing will be limited to those raised in the respective case briefs. The Department will issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

Extension of the Time Limit for the Final Results

Section 751(a)(3)(A) of the Act requires that the Department issue the final results of an administrative review within 120 days after the date on which the preliminary results are published. If it is not practicable to complete the review within that time period, section 751(a)(3)(A) of the Act allows the Department to extend the deadline for the final results to a maximum of 180 days after the date on which the preliminary results are published.

In this proceeding, the Department requires additional time to complete the final results of this administrative review to issue additional supplemental questionnaires, conduct verifications of several producers in addition to the exporters, generate the reports of the verification findings, and properly consider the issues raised in case briefs from interested parties. Thus, it is not practicable to complete this administrative review within the original time limit. Consequently, the Department is extending the time limit for completion of the final results of this review by 60 days, in accordance with section 751(a)(3)(A) of the Act. The final results are now due no later 180 days after the publication date of these preliminary results.

Assessment Rates

Upon issuance of the final results, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by these reviews. The Department intends to issue assessment instructions to CBP 15

days after the publication date of the final results of this review excluding any reported sales that entered during the gap period. In accordance with 19 CFR 351.212(b)(1), we calculated exporter/importer (or customer)-specific assessment rates for the merchandise subject to this review. Where the respondent has reported reliable entered values, we calculated importer (or customer)-specific ad valorem rates by aggregating the dumping margins calculated for all U.S. sales to each importer (or customer) and dividing this amount by the total entered value of the sales to each importer (or customer). *See* 19 CFR 351.212(b)(1). Where an importer (or customer)-specific ad valorem rate is greater than *de minimis*, we will apply the assessment rate to the entered value of the importers'/customers' entries during the POR. *See* 19 CFR 351.212(b)(1).

Where we do not have entered values for all U.S. sales, we calculated a per–unit assessment rate by aggregating the antidumping duties due for all U.S. sales to each importer (or customer) and dividing this amount by the total quantity sold to that importer (or customer). *See* 19 CFR 351.212(b)(1). To determine whether the duty assessment rates are *de minimis*, in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we calculated importer (or customer)-specific ad valorem ratios based on the estimated entered value. Where an importer (or customer)-specific ad valorem rate is zero or *de minimis*, we will instruct CBP to liquidate appropriate entries without regard to antidumping duties. *See* 19 CFR 351.106(c)(2).

For the companies receiving a separate rate that were not selected for individual review, the assessment rate will be based on the rate from the investigation or, if appropriate, a simple average of the cash deposit rates calculated for the companies selected for individual review pursuant to section 735(c)(5)(B) of the Act.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) for the exporters listed above, the cash deposit rate will be established in the final results of this review (except, if the rate is zero or *de minimis*, i.e., less than 0.5 percent, no cash deposit will be required for that company); (2) for previously investigated or reviewed PRC and non–PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter–specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC–wide rate of 44.3 percent; and (4) for all non–PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporters that supplied that non–PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This determination is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221(b)(4).

Dated: June 30, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E9–15964 Filed 7–6–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

[Docket No. 0906231085–91085–01]

Relocation of Federal Systems in the 1710–1755 MHz Frequency Band: Review of the Initial Implementation of the Commercial Spectrum Enhancement Act

AGENCY: National Telecommunications and Information Administration.

ACTION: Notice of Inquiry.

SUMMARY: The U.S. Department of Commerce's National Telecommunications and Information Administration (NTIA) seeks comment on the initial implementation of the Commercial Spectrum Enhancement Act (CSEA).[1] The CSEA, which was enacted in 2004, created an innovative funding mechanism allowing Federal agencies to recover the costs of relocating their radio systems from the proceeds of the auction of the radio spectrum vacated. The first auction under the CSEA, that of the 1710–1755 MHz band, concluded in 2006, providing new opportunities for Advanced Wireless Services (AWS–1). Over two years into the relocation of Federal systems from this band, NTIA requests information on what implementation steps should be retained as best practices, what lessons have been learned, and what, if any, improvements should be made in future relocations under the CSEA.

DATE: Comments are requested on or before August 21, 2009, 2009.

ADDRESSES: Parties may mail written comments to Gary Patrick, Spectrum Engineering and Analysis Division, Office of Spectrum Management, National Telecommunications and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue, N.W., Room 6725, Washington, DC 20230, with copies to Gina Harrison, Esq., Office of Spectrum Management, National Telecommunications and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue, N.W., Room 4099, Washington, DC 20230. Alternatively, comments may be submitted in Microsoft Word format electronically to csealessonslearned@ntia.doc.gov. Comments will be posted on NTIA's website at http://www.ntia.doc.gov and regulations.gov.

FOR FURTHER INFORMATION CONTACT: Gary Patrick, National Telecommunications and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue, N.W., Room 6725, Washington, DC 20230 or Gina Harrison, Esq., National Telecommunications and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue, N.W., Room 4099, Washington, DC 20230; telephone (202) 482–9132 or (202) 482–2695; or email: gpatrick@ntia.doc.gov or rharrison@ntia.doc.gov.

SUPPLEMENTARY INFORMATION:

Overview

NTIA decided to reallocate the 1710–1755 MHz band to commercial use in

[1] Title II, Pub. Law No. 108–494, 118 Stat. 3986, 47 U.S.C. §§ 309 (j) (3), 921, 923, 928 and note (annual report requirement).

1995.[2] However, the decision could not be implemented until 2004, when enactment of the CSEA provided a streamlined means to pay for the relocation of Federal systems. The CSEA created the Spectrum Relocation Fund (SRF).[3] The SRF uses the proceeds from the commercial auction of relinquished spectrum to reimburse Federal agencies required to vacate the spectrum.

The CSEA and the SRF it created help solve a recurrent spectrum management dilemma, the problem of clearing incumbents from a portion of the spectrum. Such transition issues can stymie efforts to bring new, improved uses of spectrum into service.[4] By enhancing the efficiency of the Federal relocation process, the CSEA provides three concurrent benefits. Commercial firms and consumers benefit from expediting the process for freeing additional radio frequencies for new or expanded services. Federal agencies benefit from the funds the SRF provides for state-of-the-art systems they will use in new spectrum locations. Finally, the CSEA assists in the Federal budget process by providing that unused spectrum auction receipts revert to the Treasury's general fund.

On September 18, 2006, the Federal Communications Commission (FCC) concluded the first auction conducted under the CSEA, the AWS–1 auction, including 1710–1755 MHz. The auction of the Federal spectrum raised $6.85 billion out of $13.7 billion in net winning bids from Federal and non-Federal auctioned spectrum combined. Opening the band to commercial use will spur new wireless services.

In March 2007, the Office of Management and Budget (OMB), in consultation with NTIA and based on Federal agency estimates of relocation costs, transferred slightly over $1 billion from the SRF to 12 Federal agencies to relocate their systems out of the 1710–1755 MHz band.[5] This first implementation of the CSEA has been ongoing for over two years. NTIA takes this opportunity to solicit public comment on how the CSEA has functioned so far.

This Notice of Inquiry (NOI) first invites interested parties to comment on the overall performance of the Federal relocation process. The NOI then divides the issues among those arising before and after the auction. Issues regarding the adequacy and transparency of data, sufficiency of communications, guidance with respect to the relocation process, and NTIA's role, arise both ''Pre-Auction'' and ''Post-Auction.'' The Post-Auction section addresses a number of additional issues, including ''early entry'' of licensees prior to a Federal agency's scheduled date to vacate the band. In some cases, ''Pre-Auction'' events may have had ''Post-Auction'' effects. In other cases, ''Post-Auction'' circumstances may shed light on the value of pre-auction information and on the level of bidding. Thus, NTIA asks commenters to analyze CSEA implementation from both cause-and-effect and ''feedback'' perspectives.

Chronology

The CSEA requires the FCC to notify NTIA at least 18 months in advance of an auction of eligible frequency bands.[6] In December 2004, the FCC notified NTIA that the auction of the 1710–1755 MHz band would begin as early as June 2006.[7]

Under the CSEA, at least six months prior to the auction, NTIA, on behalf of the Federal agencies and after review by OMB, must provide the FCC and Congress the estimated costs and time lines for relocating Federal agencies from affected spectrum.[8] NTIA complied with these requirements in December 2005.[9]

In April 2006, prior to the auction, NTIA and the FCC published a Joint Public Notice providing guidance to assist AWS–1 licensees and Federal incumbents in the post-auction coordination process. One of the purposes of that Joint Public Notice was to permit licensees access to the band in advance of estimated relocation dates, subject to the completion of successful coordination with the incumbents.[10] The FCC concluded the auction on September 18, 2006.[11]

On February 16, 2007, OMB reported the cost and time estimates of relocating incumbent systems in the 1710–1755 MHz band to Congress. The CSEA provides that unless disapproved within 30 days, SRF funds shall be available immediately.[12] OMB consequently transferred funds from the SRF to individual agencies, and calculated the start time for relocation activities as the date the funds transferred to the agency's account.[13]

The CSEA sets no firm date by which incumbent Federal agencies must vacate spectrum. Pursuant to the CSEA, however, Federal agencies in the 1710–1755 MHz band estimated relocation times from one to six years.[14] The CSEA provides that eight years after deposit of auction proceeds into the SRF, any remaining proceeds revert to the general fund of the Treasury.[15]

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[2] NTIA, Spectrum Reallocation Final Report: Response to Title IV-Omnibus Budget Reconciliation Act of 1993 (Feb. 1995), *available at* http://www.ntia.doc.gov/openness/contents.html.

[3] CSEA, § 204, 118 Stat. 3994, 47 U.S.C. § 928.

[4] ''800 MHz Transition May Drag on Until 2012, Some Say,'' TR Daily (Feb. 17, 2009); *Order, Improving Public Safety Communications in the 800 MHz Band*, WT Docket No. 02–55, FCC 08–253 (rel. Oct. 30, 2008), *available at* 2008 Lexis 7625; *Order, Improving Public Safety Communications in the 800 MHz Band*, WT Docket No. 02–55, FCC 09–35 (Apr. 20, 2009), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC–09–35A1.doc.

[5] There are 1,990 frequency assignments associated with the Federal systems to be relocated from the 1710–1755 MHz band. The 12 relocating agencies are Department of Agriculture (USDA), Department of Defense, Department of Energy, Federal Aviation Administration, Department of Homeland Security, Department of Housing and Urban Development, Department of the Interior, Department of Justice, National Aeronautics and Space Administration, Department of the Treasury, Tennessee Valley Authority, and United States Postal Service. As of December 2008, Federal agencies had spent $174,126,082 from the SRF. NTIA, *1710–1755 MHz Band Relocation: Second Annual Progress Report* (Mar. 2009) (*''Second Annual Relocation Report''*), *available at* http://www.ntia.doc.gov/reports/Final2ndAnnualRelocation Report20090416.pdf.

[6] CSEA, § 202, 118 Stat. 3992, 47 U.S.C. § 923 (g) (4) (A).

[7] Letter from Michael K. Powell, Chairman, Federal Communications Commission to the Honorable Michael D. Gallagher, Assistant Secretary for Communications and Information, and Administrator, National Telecommunications and Information Administration (Dec. 29, 2004).

[8] CSEA, § 202, 118 Stat. 2992–93, 47 U.S.C. § 923 (g) (4) (A) (5).

[9] Public Notice, ''Commerce Releases Costs to Open Up Spectrum for Advanced Wireless Broadband Services,'' *available at* http://www.ntia.doc.gov/ntiahome/press/2005/relo_12282005.htm. *See generally* ''1710–1755 MHz Introduction,'' *available at* http://www.ntia.doc.gov/osmhome/reports/specrelo/index.htm (updated list of affected Federal frequency assignments and other data). For a related discussion, *see infra* Section 2.a.

[10] *Federal Communications Commission and NTIA — Coordination Procedures in the 1710–1755 MHz Band*, 21 FCC Rcd 4730 (Apr. 20, 2006) (''Joint Public Notice''). Access to a band by licensees prior to relocation of incumbents is sometimes referred to as ''early entry.''

[11] ''Auction 66, Advanced Wireless Services (AWS–1),'' *available at* http://wireless.fcc.gov/auctions/default.htm?job=auction_factsheet&id=66.

[12] CSEA, § 204, 118 Stat. 3995, 47 U.S.C. § 928(d) (2).

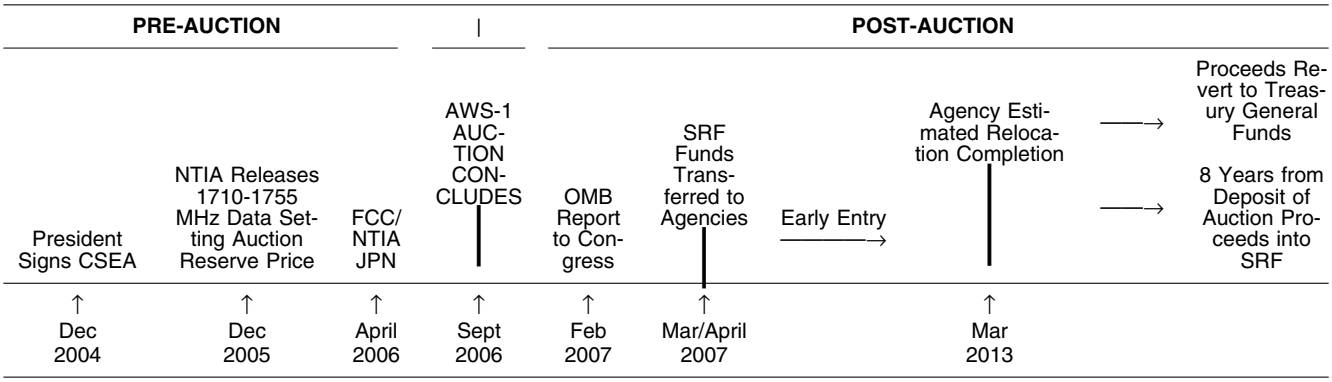
[13] The CSEA provides that amounts transferred from the SRF to a Federal agency be credited to the appropriations ''account'' of the agency. *Id.* § 928 (e) (C).

[14] ''Report to Congress by the Office of Management and Budget on Agency Plans for Spectrum Relocation Funds Pursuant to the Commercial Spectrum Enhancement Act'' (Feb. 16, 2007) *available at* http://www.ntia.doc.gov/reports/2007/OMBSpectrumRelocationCongressional Notification_final.pdf.

[15] CSEA, § 204 (d) (3), 118 Stat. 3995, 47 U.S.C. § 928 (d) (3). NTIA may terminate a frequency authorization if it finds that an agency has unreasonably failed to comply with OMB-approved time lines. CSEA, §§ 202, 203(b), 118 Stat. 3993–94, 47 U.S.C. §§ 923 (g) (6), 309(j) (15) (D). *See generally* Manual of Regulations and Procedures for Federal Radio Frequency Management (''NTIA Manual''), Chapter O, Relocation of Federal Government Radio Systems in Accordance with the Commercial Spectrum Enhancement Act, *available at* http://www.ntia.doc.gov/osmhome/redbook/O.pdf.

The time line below describes the principal stages in the 1710–1755 MHz band relocation.

TIME LINE — PRINCIPAL STAGES IN THE 1710–1755 MHz BAND RELOCATION



REQUEST FOR COMMENT:

NTIA requests comment on the questions below to assist in identifying lessons to be learned and other issues and suggestions related to the implementation of the CSEA. These questions are not a limitation on comments that may be submitted. When references are made to studies, research, and other empirical data that are not widely published, commenters are asked to provide copies of the referenced material with the submitted comments.

1. Overall Performance

As of December 31, 2008, Federal agencies had relocated approximately 933 or 47 percent of the 1,990 Federal frequency assignments in the 1710–1755 MHz band.[16] Also, as of December 31, 2008, licensees registered expenses with private sector clearinghouses for relocating a total of approximately 765 or approximately 15 percent of the approximately 5,000 non-Federal radio frequency links in the 2110–2155 MHz band, which was paired for auction with the 1710–1755 MHz band.[17] Non-Federal relocation typically occurs on a link-by-link basis at the initiation of the AWS–1 licensee, when attempts to ''engineer around'' an incumbent microwave licensee fail. Apart from moves made in response to requests for early entry, Federal agencies relocate on a system-wide basis under established time frames and SRF funding. NTIA asks parties to provide their perspectives on the overall Federal relocation effort. NTIA also seeks comment on how the nature and speed of the Federal relocation process compares with relocation of private sector incumbents in the 2110–2155 MHz band.

2. Pre-Auction Issues

a. Adequacy of Data

The CSEA requires NTIA, at least six months prior to an auction, ''[t]o the extent practicable and consistent with national security considerations'' to provide the FCC with relocation cost and time estimates ''by the geographic location of the Federal entities' facilities or systems and the frequency bands used by such facilities or systems.''[18] The cost data are used to set the reserve price for the auction.[19]

NTIA compiled cost and time estimates developed by the agencies in compliance with this requirement, along with a list of affected Federal assignments and other information. NTIA submitted these to the FCC and to Congress in December 2005.[20] NTIA also published these data on its website and updated these published data before and after the auction. NTIA continues to update the data periodically.[21]

In addition, prior to the auction, in April 2006, NTIA and the FCC published a Joint Public Notice. The Joint Public Notice detailed the early entry coordination process between AWS–1 licensees and Federal incumbents.[22] The early entry process has raised a number of concerns from both Federal agencies and AWS–1 licensees.[23] Was the Joint Public Notice useful to AWS–1 auction bidders and, later, to licensees? How might future such Notices be improved?

NTIA seeks comment on whether the information provided prior to the auction, both with respect to the Federal systems' relocation plans and the process for early entry, was adequate.[24] Commenters should specify the type of additional information, if any, that would have been helpful. What technical and operational information, if any, would have better described the nature of systems to be relocated? Would additional technical details, a glossary of spectrum management terms, references to the NTIA Manual, or a description of the geographic area authorized for each Federal system, have better apprised potential bidders of the various types of operations in the

[16] NTIA, *1710–1755 MHz Relocation and Schedule Summary*, *available at* http://www.ntia.doc.gov/osmhome/reports/specrelo/pdf_20081209/1710_1755_Relo_Costs_2008_12.pdf. One fixed microwave link and one land mobile link each comprise two Federal assignments. Fixed transportable and aeronautical mobile links each constitute a single assignment.

[17] Report of the CTIA Spectrum Clearinghouse, LLC (Jan. 30, 2009); Semi-Annual Report of the PCIA — The Wireless Infrastructure Association on the Status of the PCIA AWS Clearinghouse (Jan. 30, 2009), both reports *available at* http://www.fcc.gov/cgb/ecfs/ (search Docket 02–353).

[18] CSEA, § 202, 118 Stat. 3992–93, 47 U.S.C. § 923 (g) (4) (A), (C).

[19] CSEA, § 203 (b), 118 Stat. 3994, 47 U.S.C. § 309 (j) (15) (B). ''A 'reserve price' is defined as an absolute minimum price below which an auctioneer will not sell an object being auctioned.'' Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, ¶ 140 (1997), *recon. denied*, 15 FCC Rcd 15293 (2000).

[20] *See supra* note 9.

[21] *Id.*

[22] Joint Public Notice, *supra* note 10.

[23] *See generally* Commerce Spectrum Management Advisory Committee (''CSMAC''): ''Recommendations for Improving the Process for Identifying Spectrum for Future Reallocation or Sharing,'' at 12–15, 19 (Aug. 22, 2008) (''CSMAC Reallocation Report'') *available at* http://www.ntia.doc.gov/advisory/spectrum/meeting_files/081508_csmac_WG3_Report_Revised_(clean_final).pdf.

[24] Issues regarding the adequacy of information provided for purposes of coordinating early entry and permitting service initiation are discussed *infra*, Section 3.

band?[25] Should Federal agencies be required to highlight particular circumstances about which licensees might not otherwise know, such as the fact that replacement equipment is under development and is not commercially available, or the existence of nationwide, airborne, or classified systems?

Under existing procedures, OMB reviews agency cost and time estimates in consultation with NTIA before they are submitted to Congress.[26] Would future relocations benefit from more detailed information regarding agency transition plans in addition to what is currently incorporated in CSEA?

Federal agencies have estimated time lines for vacating the spectrum to which they are expected to adhere. Are details regarding agency transition plans relevant primarily to an assessment of the possibility of early entry? If so, to what extent would the disclosure of such details prior to the auction affect auction bidding?

b. Transparency

i. Effect on bidding

Security requirements necessitated the classification of some information regarding affected Federal systems. That information was therefore withheld prior to the auction.[27] Other data in NTIA files related to many other Federal systems that have been treated previously as ''Freedom of Information Act (FOIA) Exempt.''[28] However, to support the implementation of the CSEA, NTIA released these data prior to the auction.[29]

To what extent (if any) did a lack of access to ''classified'' information prior to the auction affect bidders' ability to participate in the auction? Is there a way to ensure that commercial entities understand whether sharing with classified systems will be possible before Federal systems are fully moved? Can agencies, while avoiding prohibited disclosure of classified information, still objectively describe the risks that relocation time lines will not be met or that early entry coordination will not be possible? Must commercial entities have such an understanding in order to bid in the auction? Was the release of FOIA-exempt information prior to the auction helpful?

ii. Qualitative assessment

Would bidders benefit from a qualitative assessment by NTIA of the ease or difficulty of early entry? What would such an assessment entail? What factors would need to be analyzed? What would make early entry ''easy'' or ''difficult''? How would such an assessment affect auction bidders' due diligence obligations?[30]

iii. Post-auction techniques

After the AWS–1 auction, Federal agencies formulated Non-Disclosure Agreements (NDAs) and web-based capabilities for information dissemination. These steps provided additional information to a limited set of winning bidders/licensees in support of the early entry coordination process.[31] These tools were not available prior to the auction. In some cases, they included information previously treated as FOIA exempt. No classified material was provided via these additional mechanisms. NTIA seeks comment on whether, subject to the appropriate restrictions, disclosure of such unclassified FOIA-exempt information could or should be made available prior to the auction.[32] Could any additional post-auction techniques to provide additional information be used in advance of the auction? Parties commenting on this question should detail the types of practices and methods, including legal instruments and information technology-based mechanisms that would be helpful here. To what extent do pre-auction competitive and anti-collusion concerns hinder the use of such techniques?

c. Communications

i. Information exchange

Prior to the AWS–1 auction, NTIA scheduled meetings with affected Federal agencies, and initially consulted with wireless associations regarding relocation efforts. Should NTIA expand its pre-auction procedures in the future to encompass regular information exchanges among potential bidders or wireless associations and affected agencies? How can NTIA ensure that it reaches small and minority-owned businesses that may benefit from purchasing auctioned spectrum? Would future relocation efforts benefit from outreach to wireless associations prior to the auction? Would such an effort help centralize, prioritize, and expedite requests for early entry from forthcoming auction winners?[33] Parties commenting on this question should specify the type of information that should be exchanged, the appropriate parties and groups to be included, and the venue and frequency for such exchanges.

ii. Standardization

For AWS–1, some agencies developed templates and forms expanding the licensee data required in the Joint Public Notice and related FCC rules.[34] Were these templates useful without being overly burdensome? What aspects of these forms should be retained? Are there ways in which they can be improved? Should they remain ad hoc in nature or be standardized across all agencies? Can such standardized forms be developed prior to future auctions, to eliminate any lag in the early entry coordination process?

The 1710–1755 MHz band incumbents are largely fixed microwave operations. The Joint Public Notice and FCC rules require the interference analysis methodology and criteria specified in Telecommunications Industry Association (TIA) Telecommunications Systems (TSB) Bulletin 10–F.[35] That analysis applies to sharing between fixed systems and between fixed and mobile systems. It was used to assess potential interference

[25] Some AWS–1 licensees attempting early entry apparently were unprepared for the challenges involved in relocating incumbent video surveillance systems that use large bandwidths and are authorized for nationwide operation. These characteristics significantly complicate coordination.

[26] For more explanation on this process, *see* the ''Chronology'' section above.

[27] *See generally* Executive Order No. 12,958, *as amended* by Executive Order No. 13,292 (2003); 68 F.R. 15,315 (Mar. 28, 2003) (procedures for classifying, safeguarding and declassifying information) (''Classification Order'').

[28] 5 U.S.C. § 552.

[29] *See generally* ''1710–1755 MHz Data — Prior to May 22, 2006,'' *available at* http://www.ntia.doc.gov/osmhome/reports/specrelo/pdf_Prior%20to%2020060614/data_2005.htm.

[30] Under the FCC due diligence obligations applicable to the AWS–1 auction, potential bidders are solely responsible for investigating the factors that may bear on the value of the licenses. Applicants in the AWS–1 auction were cautioned that operations had to be protected or relocated and that such limitations could restrict the ability to use certain portions of the spectrum or to provide service in certain geographic areas. Public Notice, ''Auction of Advanced Wireless Services Scheduled for June 29, 2006,'' AU Docket No. 06–30, FCC 06–47 (Apr. 12, 2006), ¶¶ 37–47, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC–06–47A1.pdf, *modified on other grounds*, Public Notice, ''Auction of Advanced Wireless Services Licenses Rescheduled for August 9, 2006,'' AU Docket No. 06–30, FCC 06–71 (May 19, 2006).

[31] An NDA allowed an agency, prior to complete relocation, to share additional technical material on its operations as well as further information on sensitive operations, subject to certain conditions. *See infra* Section 3.a.v.B.

[32] *See generally* ''Memorandum for the Heads of Executive Departments and Agencies: Freedom of Information Act'' (Jan. 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/.

[33] Issues related to the possible value of expanded communications with licensees after the auction in connection with early entry issues are discussed further *infra* Section 3.a.vi.

[34] *See infra* Section 3.a.vi.B.

[35] *See* Joint Public Notice, *supra* note 10. *See also* 47 C.F.R. § 27.1134(b). The Joint Public Notice noted that the parties could agree to an alternative method where this standard did not apply.

arising from licensee operations prior to the scheduled relocation date. Did this analysis prove useful, and should it be used in future, similar auctions? If not, what would help?

NTIA also seeks comment on how to address coordination between licensees and incumbents in future relocations where established sharing methodology or criteria does not exist. Would over-the-air testing prior to the auction and prior to a determination of winning bidders and their specific technical plans provide useful information?[36] What role, if any, should NTIA play in any such testing?

iii. Guidance

Successful spectrum relocation under the CSEA necessitates that diverse Federal and non-Federal entities harmonize procedures and terminology. Is there a need for NTIA, the FCC, and OMB to provide clarifying guidance to both licensees and agencies before the auction beyond what has been provided in OMB Circular A–11 and OMB Memorandum M–09–01, as well as through informal channels such as interagency meetings?[37] Would such guidance ensure that all affected parties understand terminology and processes?

Should NTIA, alone or in collaboration with other oversight agencies, sponsor training for agency headquarters and field personnel? Should NTIA prepare or collaborate with wireless industry associations to provide training for relevant commercial entities? Such pre-auction training might also clarify terminology, interpretation, and procedure. Would such training improve the auction and early-entry processes? Interested parties are asked to comment on appropriate sponsors and topics for such training, and whether it should be mandatory.

d. Starting the Clock

Under the CSEA, the auction of Federal frequencies must raise at least 110 percent of the estimated relocation costs of affected agencies, or the auction will be canceled.[38] Until that threshold is reached, Federal agencies cannot be sure that their expenses will be reimbursed. Thus, an agency undertaking initial tasks in advance of an auction does so at the risk of not being recompensed. Such tasks may include project management, technical studies, training, development of software tools, or the hiring of additional personnel. Can Federal agencies draw from private-sector experience and methodology to ensure that their estimated costs and time lines are as accurate as possible, and that they are prepared to tackle relocation in a timely manner? If so, what should be done?

e. NTIA's Role

NTIA regulates the Federal government's use of radio stations and associated radio frequency spectrum.[39] The CSEA confers oversight powers on NTIA, in consultation with OMB, with respect to relocation efforts.[40] Prior to the AWS–1 auction, NTIA compiled estimated relocation costs and time lines, as the CSEA requires, and consulted with Federal agencies and the industry. NTIA published these data on its website and continues to update this material periodically.[41] Parties are asked to comment on NTIA's role in the pre-auction phase of CSEA implementation. Is there additional or different information NTIA should provide? In retrospect, was the information accurate? What could be done to make the information more accurate or useful? Are post-auction updates useful to licensees? To others?

3. Post-Auction Issues

a. Early Entry

i. Background

The CSEA permits the grant of an FCC license to auction winners on reallocated spectrum even if agencies continue to operate in the band, provided there is no harmful interference to agency operations.[42] Under the CSEA, ''eligible costs'' subject to SRF reimbursement may include ''one-time costs of any modification of equipment'' reasonably necessary to accommodate early entry.[43] They also include costs associated with ''accelerated replacement'' if necessary for ''timely relocation of systems to a new frequency assignment.''[44]

As permitted under the CSEA, several AWS–1 licensees sought to begin operations before the estimated relocation dates established by the agencies.[45] Licensees particularly focused on major metropolitan areas. Licensees expressed frustration at the delays they encountered in coordinating with Federal agencies.[46] On the other hand, it is NTIA's understanding that Federal agencies found themselves overwhelmed by industry requests and pressure to allow early entry. Has early entry by licensees beginning to implement their systems proven important in the successful implementation of the CSEA?

The Joint Public Notice provided a structured process for early entry coordination. Parties are asked to comment on whether this created a reasonable expectation of successful coordination. For Federal agencies, the CSEA requires that they meet their estimated relocation dates and coordinate in good faith for early entry prior to their scheduled moves. The agencies do not believe that the CSEA requires that they vacate the band prior to their estimated relocation dates at the licensee's request, nor that the law guarantees successful early entry coordination.[47] In some cases, licensees negotiated with Federal agencies in order to expedite band clearance. However, existing Federal operations sometimes precluded early entry by the licensees.[48] Were Federal agencies reasonably diligent in their early relocation efforts? How could they be more so? Did an expectation of successful coordination form part of the basis for AWS–1 auction bids? Should bidders expect to bear all the risks associated with early entry? What options should be available to facilitate early entry?

ii. FCC Process for Non-Federal Incumbents

The FCC transitional rules applicable to non-Federal incumbents differ from the CSEA procedures described above. Under the FCC rules, AWS–1 licensees trigger the start of non-Federal incumbent relocation efforts in the form

[36] *See infra* Section 3.a.vi.B for a related discussion from a post-auction perspective.

[37] Executive Office of the President, Office of Management and Budget, Circular No. A–11, Preparation, Submission, and Execution of the Budget, (June 2008 rev.), *available at* http://www.whitehouse.gov/omb/circulars/a11/current_year/a_11_2008.pdf; Executive Office of the President, Office of Management and Budget, Memorandum for Heads of Executive Departments and Agencies, M–09–01, *available at* http://www.whitehouse.gov/omb/assets/omb/memoranda/fy2009/m09–01.pdf. *See infra* Section 3.b for a related discussion from the post-auction perspective.

[38] CSEA, § 203 (b) 118 Stat. 3994, 47 U.S.C. § 309 (j) (15) (B).

[39] NTIA Manual, *supra* note 15, § 1.1.

[40] *See supra* note 15.

[41] *See generally* ''1710–1755 MHz Introduction,'' *available at* http://www.ntia.doc.gov/osmhome/reports/specrelo/index.htm. *See also* Section 2.a, *supra*.

[42] CSEA, § 203 (b) (C), 118 Stat. 3994, 47 U.S.C.§ 309 (j) (15) (c). The Joint Public Notice established coordination procedures for early entry. *See* ''Chronology,'' Section 2.a, and note 10, *supra*.

[43] CSEA, § 202, 118 Stat. 3992, 47 U.S.C. § 923 (g) (3) (D).

[44] CSEA, § 202, 118 Stat. 3992, 47 U.S.C. § 923 (g) (3) (E).

[45] Agencies estimated relocation times from one to six years. *See* ''Chronology,'' *supra*.

[46] CSMAC Reallocation Report, *supra* note 23, at 18–21.

[47] *See generally id.*, at 19.

[48] *See generally id.*, at 18–21.

of mandatory negotiations.[49] Private clearinghouses allow AWS–1 licensees to share commonly incurred reimbursement costs.[50] An AWS–1 licensee may pay a premium to expedite a non-Federal incumbent's move. If the payment, however, exceeds the clearinghouse ''cost-sharing cap,'' other AWS–1 licensees also benefitting from the relocation would only have to make payments on a pro-rata basis up to the cap. We seek comment on how the Federal and non-Federal approaches to compensating incumbents for relocation expenses compare.[51]

iii. Incentives

A. *Market-based incentives*

NTIA seeks comment on whether any of the market-based incentives operative in the non-Federal clearance process could be applied to expedite Federal agency relocation. The CSEA allows recovery of some costs associated with interim changes accommodating early entry prior to scheduled Federal relocation. These include one-time costs of equipment modification necessary for early entry and costs associated with accelerated replacement of systems and equipment.[52] Are these provisions sufficient?

B. *Benchmarks and other non-economic approaches*

The CSEA requires agencies to estimate relocation times. Were relocation estimates for AWS–1 generally accurate? How might they be improved in the future? NTIA seeks comment on whether standards, expressed or implied, for assessing the reasonableness of these times, can be drawn from the statute. How, as a practical matter, might NTIA and OMB ensure that relocation time estimates provide that agencies vacate the spectrum as expeditiously as possible?

The Commerce Spectrum Management Advisory Committee (CSMAC) recommended the adoption of ''benchmarks'' or interim clearance requirements by which gradually increasing percentages of a Federal system would be vacated at certain specified dates.[53] Should NTIA establish mandatory ''benchmarks'' or other non-market-based incentives for Federal agencies to use in vacating the spectrum? Would benchmarks of this nature help move relocation forward or provide meaningful certainty to bidders? What other benchmarks might be useful? Would benchmarks contradict the CSEA procedures allowing agencies to estimate their own relocation times, subject to OMB and NTIA review? Should any such benchmarks be service-specific, taking account of the relative ease or difficulty of relocating different types of operations? Parties advocating for benchmarks should indicate how an entrant would use them, point to analogous FCC or other precedent, and explain how benchmarks have been used in the past. In particular, NTIA seeks input on how benchmarks could be enforced in a meaningful way.

iv. Adequacy of Data

The Joint Public Notice detailed the coordination process for licensees to use in early entry. This process, if successful, permits AWS–1 licensees to access the 1710–1755 MHz band prior to the estimated agency relocation dates. The Joint Public Notice referenced additional material available on NTIA's website providing geographic location, frequency bands, and other information.[54] NTIA seeks comment on the adequacy of this information for purposes of coordinating early entry and permitting licensees to begin deployment.[55] What information might be added? What aspects of the coordination process established in the Joint Public Notice succeeded and which might be improved?

Parties are asked to detail any supplementary information that would facilitate sharing of the spectrum prior to the agency's scheduled relocation time. Once winning bidders are determined, should commercial entities be required to exchange information regarding their operational plans as part of the coordination process? Such information might enable Federal agencies to reduce the additional agency data needed to facilitate early entry. Parties are asked to comment on this tentative view, and on any competitive or proprietary issues it may raise. What licensee information, if any, should be shared, and if so, at what point and by what mechanisms?

v. Transparency

A. *Post-auction considerations*

After a successful auction, the number of commercial entities potentially interested in classified or otherwise restricted data on incumbent Federal operations narrows to a group of successful bidders with specific deployment plans and operational needs. The Federal agencies developed distinct techniques for releasing additional information to this smaller group. NTIA seeks comment on the validity of this general distinction between pre-auction and post-auction releasability of data. Does this distinction generally allow Federal agencies to provide more data after the auction? Did these post-auction techniques succeed, and how might they be improved? Should there be a standardized process for releasing otherwise restricted data after licenses are awarded?

B. *Non-disclosure agreements*

The Joint Public Notice provided that AWS–1 licensees could enter into Non-Disclosure Agreements (NDAs) with Federal agencies after the auction.[56] An NDA allowed an agency, prior to complete relocation, to share additional technical material on its operations as well as further information on otherwise sensitive data. NTIA seeks comment on whether this process should be retained. Can it be improved? If so, how?

C. *Other mechanisms*

NTIA seeks comment on other possible mechanisms for exchanging information on classified or otherwise restricted data. In lieu of NDAs, some agencies developed web-based capabilities to facilitate coordination with licensees.[57] This allowed an assessment of potential interference to Federal systems without revealing restricted material. Were these techniques successful? Such web-based capabilities require licensees to provide detailed, accurate data regarding their operational plans. Provision of this data may permit an agency to assess accurately and quickly the potential for interference to their operations, and to

[49] This period is two years for fixed microwave incumbents and three years for Broadband Radio Service (BRS) licensees. 47 C.F.R. § 101.69; 47 C.F.R. § 1250. Fixed microwave services operate in the 2110–2150 MHz band. BRS operates at 2150–2155 MHz. Parties are free to negotiate voluntarily at any time. If the parties fail to agree within the mandatory period, the AWS licensee may initiate involuntary relocation procedures. The microwave relocation rules sunset 10 years, and the BRS rules 15 years, after the first AWS–1 license is issued. At this point, an AWS–1 licensee starting up service within interference range may require an incumbent to cease operation. 47 C.F.R. § 101.79(a)(1); 47 C.F.R. § 27.1253.

[50] AWS–1 licensees benefitting from another licensee's relocation of an incumbent share in those expenses, pro-rata, subject to a ''cap.'' The FCC established maximum amounts or ''caps'' on what the clearinghouse could pay. ''FAQs — AWS Licensees,'' *available at* http://ww.ctiaspectrumclearinghouse.org/ctia/aws-lic.jsp.

[51] *See also* Section 1, *supra*.

[52] *See* Section 3.a.1, *supra*.

[53] CSMAC Reallocation Report, *supra* note 23 at 24–25.

[54] Joint Public Notice, *supra* note 10.

[55] For a discussion of how adequacy of this information might affect bidding, *see supra* Section 2.a.

[56] Joint Public Notice, *supra* note 10, at 4.

[57] The CSMAC has recommended the use of automated procedures or other secure online capabilities for facilitating the sharing of classified information. *See* CSMAC Reallocation Report, *supra* note 23, at 21–22.

notify the licensee accordingly. Does this additional data demand raise competitive and proprietary concerns for licensees? If so, how can such concerns be lessened?

Parties addressing the disclosure of classified or otherwise sensitive information should reference relevant Federal rules and statutes.[58] Commenters are encouraged to cite specific examples of mechanisms that have either worked or failed.

vi. Communications

Both Federal agencies and licensees cite poor communications as a fundamental cause of early entry issues. It is NTIA's understanding that Federal agencies noted intense pressure, floods of requests, and inaccurate data from licensees. Licensees, in turn, remark about bureaucratic delays, lack of assigned agency staff, and divergent agency practices.[59] In general, how could communications related to early entry activities be improved?

A. *Information exchange*

NTIA has held monthly meetings among affected Federal agencies since the AWS–1 auction. Should NTIA expand these to include regular information exchanges among both licensees and agencies to address problems and assess progress? How would such meetings affect licensees' competitive concerns? Parties are asked to comment on what the frequency and scope of such meetings would be.

Agencies claim that they were inundated with simultaneous early entry requests.[60] Would it help to require a date certain notification to agencies of license award, company, and contact information and the need for coordination? Should licensees be required to prioritize when submitting large numbers of such requests at the same time?

Some agencies maintain that inadequate data from licensees for coordination purposes hindered early deployment. To what extent did this inadequacy proceed from competitive or proprietary concerns which hampered full information exchange? What types of data — for example, contact information, implementation schedules, network characteristics, technical parameters, duty cycles — would be of assistance? How can agencies correctly understand licensee early entry aims, while at the same time protect competitive sensitivities? What types of information or procedures might help?

B. *Standardization and centralization*

Parties are asked to comment on the value of automation in improving transparency of communications.[61] Web-based capabilities and other Information Technology-based mechanisms may provide a way to streamline the coordination process. Should Federal agencies be encouraged to adopt these? Should OMB, the FCC, and NTIA create a centralized Federal website to provide uniform guidance on process, eligible costs, coordination, and other CSEA implementation matters?

The methodology and interference criteria specified in TIA TSB 10–F provided a standard approach for assessing potential interference to Federal fixed microwave systems.[62] Some agencies also developed templates and forms for licensee interactions, following agency-specific testing and determination of particular interference parameters. Such uniformity can help avoid time-consuming case-by-case analyses. Is there a way to standardize interference parameters across agencies for the same incumbent service? What if a widely accepted standard, such as the TIA TSB 10–F, is not available for the service at issue?

Would it be useful to permit testing as a means of verifying the results of interference analyses in ''real world'' conditions? If so, when should such testing be permitted?

b. Guidance

Licensees have noted the lack of agency personnel dedicated to relocation matters, with the result that agency interactions may prove dilatory or unproductive.[63] Section 2.c.iii above addresses the need for pre-auction training and guidance. Is there a need for ongoing and standardized guidance as the relocation process progresses post-auction? What sort of guidance would prove useful in answering specific or novel implementation questions regarding early entry and related matters as they occur?

c. NTIA's Role

Where necessary, NTIA facilitated coordination efforts between AWS–1 licensees and Federal incumbents, and left the ultimate decision-making to the parties themselves. On the non-Federal side, AWS–1 licensees are required to negotiate directly with individual incumbents. Please comment regarding the adequacy of NTIA's efforts to support coordination. The CSMAC has suggested that relocation activities, including licensee interface, be centralized in NTIA.[64] Do circumstances differ for direct licensee-Federal incumbent interaction such that NTIA should increase its leadership role?

Throughout the 1710–1755 MHz relocation process, NTIA has served multiple roles. Often, NTIA acts as a liaison for licensees seeking additional information or accelerated clearance from agencies. NTIA also coordinates with OMB and the FCC regarding appropriate policies and procedures. NTIA provides guidance to the Federal agencies based on its own expertise, and the advice of OMB and the FCC. In light of NTIA's institutional expertise, the CSMAC recommended that NTIA assume a greater leadership role in this process.[65] NTIA seeks comment on its role as a liaison between AWS–1 licensees and Federal agencies in early entry matters. What additional responsibilities or roles should NTIA assume in this process? What are the potential benefits or pitfalls of such additional responsibility(ies)? With respect to offering guidance on relocation policies and procedures, are there ways in which NTIA might improve its efforts?[66]

d. Other Funding and Administrative Issues

i. Long-term lease costs

Federal spectrum management policies encourage Federal agencies to use commercial services whenever feasible.[67] One Federal agency replaced existing fixed microwave systems having an estimated 12-year life with commercial telephony leases entailing recurring monthly charges. However, in the 1710–1755 MHz relocation, payment of costs is limited to one-time relocation costs.[68] Does this limitation hinder or delay the entry of commercial services in the band?[69]

ii. Spectrum-efficient technologies

The CSEA is based on payment of costs to relocate Federal systems to new

[58] *See, e.g.*, Classification Order, *supra* note 27; 5 U.S.C. § 552.

[59] *See generally* CSMAC Reallocation Report, *supra* note 23 at 18–21.

[60] *See generally id.*, at 13, 19.

[61] *See also supra* Section 3.a.v.C.

[62] *See supra* Section 2.c.ii.

[63] CSMAC Reallocation Report, *supra* note 23, at 13.

[64] *Id.*, at 23.

[65] *Id.*

[66] *See supra* Section 3.b.

[67] NTIA Manual, *supra* note 15, § 2.3.3.

[68] The SRF may pay ''relocation'' costs. These include costs necessary to achieve ''comparable capability'' regardless if that entails a new frequency assignment or use of an alternative technology. CSEA, §§ 204 (c), 202, 118 Stat. 3994, 3992, 47 U.S.C. §§ 928, 923 (g) (3).

[69] One alternative might be to use the eight-year CSEA ''sunset'' date. *See* ''Chronology,'' *supra*.

spectrum. In the case of the 1710–1755 MHz band, this involved moving Federal systems completely out of the allocated band. It is possible, however, that technological advances or more spectrum-efficient techniques, if implemented across all Federal agencies or entire services, may permit increased consolidation or sharing among Federal agencies. This, in turn, could result in release of additional spectrum that could be auctioned for commercial services. Under this approach the Federal users might still remain in the band. Could this approach result in the potential for increased opportunities to accommodate new commercial services? Are there other approaches to accommodating new commercial services in bands used by the Federal government?

e. Urban versus Rural Relocation

Federal policies favor nationwide availability of advanced services.[70] Advanced wireless industry efforts to transition agencies thus far, however, appear to have concentrated on populated areas. To date, agencies in remote areas for the most part have been able to accommodate buildouts through the coordination process.[71] In the future, should Federal/non-Federal sharing in remote regions substitute for outright reallocation? How would continued Federal use hinder commercial deployment in remote areas?

Dated: June 30, 2009.

Anna M. Gomez,

Deputy Assistant Secretary for Communications and Information.

[FR Doc. E9–15870 Filed 7–6–09; 8:45 am]

BILLING CODE 3510–60–S

[70] *See generally* White House, Technology, ''Drive Economic Growth and Solve National Problems by Deploying a 21st Century Infrastructure,'' *available at* www.whitehouse.gov/issues/technology; Press Release, NTIA, ''Vilsack, Copps and Wade Kick Off American Recovery and Reinvestment Act's Broadband Initiative'' (Mar. 10, 2009) *available at* http://www.ntia.doc.gov/press/2009/BTOP_RFI_090310.pdf.

[71] *See generally Second Annual Relocation Report, supra* note 5, at A–1 and n. 2 (USDA extensions of relocation time lines in remote areas did not impact commercial deployment).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 3633–037]

Alternative Energy Associates Limited Partnership; KC Brighton LLC; Notice of Application for Transfer of License, and Soliciting Comments, Motions To Intervene, and Protests

June 26, 2009.

On June 8, 2009, Alternative Energy Associates Limited Partnership (Transferor) and KC Brighton LLC (Transferee) filed a joint application for transfer of license of the Brighton Dam Project. The Project is located on the Patuxent River in Howard and Montgomery Counties, Maryland.

Applicants seek Commission approval to transfer the license for Brighton Dam Project from Alternative Energy Associates Limited Partnership to KC Brighton LLC.

Applicant Contact: For Transferor, Alternative Energy Associates Limited Partnership, Barbara Exter, Alternative Energy Associates Limited Partnership, 123 Piano Drive, Newark, DE 19713–1984, telephone (302) 293–9544.

For Transferee, KC Brighton LLC, Kelly W. Sackheim, KC Brighton LLC, 5096 Cocoa Palm Way, Fair Oaks, CA 95628–519, telephone (916) 267–5937.

FERC Contact: Patricia W. Gillis, (202) 502–8735.

Deadline for filing comments, protests, and motions to intervene: 30 days from the issuance of this notice. Comments and motions to intervene may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–3633–037) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–15892 Filed 7–6–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP09–433–000; PF09–4–000]

Fayetteville Express Pipeline LLC; Notice of Application

June 26, 2009.

Take notice that on June 15, 2009, Fayetteville Express Pipeline LLC (Fayetteville Express), 500 Dallas Street, Suite 1000, Houston, Texas 77002, filed an application in Docket No. CP09–433–000 pursuant to section 7(c) of the Natural Gas Act (NGA), and parts 157 and 284 of the Commission's regulations requesting: (1) Authorization to construct and operate a new approximately 185-mile, 42-inch natural gas pipeline located in Arkansas and Mississippi capable of transporting up to 2,000,000 Dth/day; (2) a blanket certificate authorizing Fayetteville Express to engage in certain self-implementing routine activities under part 157, subpart F, of the Commission's regulations; and (3) a blanket certificate authorizing Fayetteville Express to transport natural gas, on an open access and self-implementing basis, under part 284, subpart G of the Commission's regulations. Additionally, Fayetteville Express seeks approval of its proposed recourse rates, and *pro forma* tariff, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

Any questions regarding the applications should be directed to Ronald Brown, Vice President, Fayetteville Express Pipeline LLC, 500 Dallas Street, Suite 1000, Houston, Texas 77002; *telephone:* (713) 369–9290 or *e-mail: ronald_brown@kindermorgan.com.*

The filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site 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, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

On November 25, 2008, the Commission staff granted Fayetteville Express' request to utilize the Pre-Filing Process and assigned Docket No. PF09–4 to staff activities involved with the Fayetteville Express project. Now as of the filing of the June 15, 2009 application, the Pre-Filing Process for this project has ended. From this time forward, this proceeding will be conducted in Docket No. CP09–433–000, as noted in the caption of this Notice.

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 in the proceeding with the Commission and must mail a copy to the applicant and to every other party. 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 commentors 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 commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors 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.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the eFiling link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the eLibrary link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: July 17, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–15894 Filed 7–6–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

June 29, 2009.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER97–3923–003.
Applicants: Infinite Energy, Inc.
Description: Order No 697 Compliance filing and request for Category I, Status of Infinite Energy, Inc.
Filed Date: 06/26/2009.
Accession Number: 20090629–0108.
Comment Date: 5 p.m. Eastern Time on Friday, July 17, 2009.

Docket Numbers: ER00–586–008.
Applicants: Madison Gas and Electric Company.
Description: Madison Gas and Electric Company submits for filing its triennial market power update in support of its continued authority to sell electric capacity, energy and ancillary services *etc.*
Filed Date: 06/25/2009.
Accession Number: 20090626–0093.
Comment Date: 5 p.m. Eastern Time on Monday, August 24, 2009.

Docket Numbers: ER00–3251–020; ER99–754–019.
Applicants: Exelon Generation Company, LLC, AmerGen Energy Company, LLC.
Description: Exelon Generation Co, LLC *et al.* submits an updated market power analysis.
Filed Date: 06/26/2009.
Accession Number: 20090629–0048.
Comment Date: 5 p.m. Eastern Time on Friday, July 17, 2009.

Docket Numbers: ER03–720–013; ER94–389–033.
Applicants: New Covert Generating Company, LLC, Tenaska Power Services Co.
Description: Updated Market Power Analysis of Tenaska Power Services Co., *et al.*
Filed Date: 06/26/2009.
Accession Number: 20090626–5136.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 25, 2009.

Docket Numbers: ER03–762–013; ER09–533–002.
Applicants: Alliant Energy Corporate Services, Inc.; Alliant Energy Neenah, LLC.
Description: Notice of change in status regarding market-based rates authority of Alliant Energy Corporate Services, Inc.
Filed Date: 06/29/2009.
Accession Number: 20090629–5077.
Comment Date: 5 p.m. Eastern Time on Monday, July 20, 2009.

Docket Numbers: ER04–944–007; ER00–2129–003; ER99–1801–012.
Applicants: Orion Power Midwest, L.P., RRI Energy Wholesale Generation, LLC, RRI Energy Solutions East, LLC.
Description: Triennial Report of RRI Central MBR Entities.
Filed Date: 06/26/2009.
Accession Number: 20090626–5193.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 25, 2009.

Docket Numbers: ER06–882–002.
Applicants: Bayside Power L.P.
Description: Bayside Power, LP submits its Order 697 Compliance Filing and Application for Category 1 status.
Filed Date: 06/24/2009.
Accession Number: 20090625–0104.
Comment Date: 5 p.m. Eastern Time on Wednesday, July 15, 2009.

Docket Numbers: ER08–1252–003.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc

submits Superseding Original Sheet 530.83 *et al.* to FERC Electric Tariff, Third Revised Volume 1.

Filed Date: 06/26/2009.

Accession Number: 20090629–0109.

Comment Date: 5 p.m. Eastern Time on Friday, July 17, 2009.

Docket Numbers: ER09–629–002; ER00–1895–013; ER01–3109–013; ER99–4160–018.

Applicants: Dynegy Midwest Generation, Inc., Dynegy Power Marketing, Inc., Dynegy Marketing and Trade, LLC, Renaissance Power, LLC.

Description: Updated Market Power Analysis of Dynegy Marketing and Trade, LLC, *et al.*

Filed Date: 06/26/2009.

Accession Number: 20090626–5205.

Comment Date: 5 p.m. Eastern Time on Tuesday, August 25, 2009.

Docket Numbers: ER09–910–001; OA09–25–001; TS09–3–001.

Applicants: Cogen Technologies Linden Venture, LLP.

Description: Cogen Technologies Linden Venture, LLP submits Substitute Original Sheet 8 *et al.* Rate Schedule FERC No 1.

Filed Date: 06/25/2009.

Accession Number: 20090626–0096.

Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Docket Numbers: ER09–1019–001.

Applicants: Arizona Public Service Company.

Description: Arizona Public Service Company submits Service Agreement 300 to FERC Electric Tariff, Fourteenth Revised Volume 2.

Filed Date: 06/25/2009.

Accession Number: 20090626–0097.

Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Docket Numbers: ER09–1102–001.

Applicants: Midwest Independent Transmission System.

Description: Midwest Independent Transmission System Operator, Inc. submits Substitute First Revised Service Agreement 1355 *et al.* to FERC Electric Tariff, Fourth Revised Volume 1.

Filed Date: 06/26/2009.

Accession Number: 20090626–0109.

Comment Date: 5 p.m. Eastern Time on Friday, July 17, 2009.

Docket Numbers: ER09–1202–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc submits an executed Large Generator Interconnection Agreement *etc.*

Filed Date: 05/27/2009.

Accession Number: 20090528–0155.

Comment Date: 5 p.m. Eastern Time on Monday, July 06, 2009.

Docket Numbers: ER09–1207–002.

Applicants: P.H. Glatfelter Company.

Description: PH Glatfelter Company submits Second Substitute Original Sheet 1 *et al.* to FERC Electric Tariff, Original Volume 1 to be effective 7/29/09.

Filed Date: 06/25/2009.

Accession Number: 20090626–0092.

Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Docket Numbers: ER09–1286–001.

Applicants: Elizabethtown Energy, LLC.

Description: Elizabethtown Energy, LLC submits First Revised Sheet 1 *et al.* to FERC Electric Tariff, Original Volume 1.

Filed Date: 06/25/2009.

Accession Number: 20090626–0094.

Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Docket Numbers: ER09–1287–001.

Applicants: Lumberton Energy, LLC.

Description: Lumberton Energy, LLC submits First Revised Sheet 1 *et al.* to FERC Electric Tariff, Original Volume 1.

Filed Date: 06/25/2009.

Accession Number: 20090626–0095.

Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Docket Numbers: ER09–1339–001.

Applicants: Grand Ridge Energy II LLC.

Description: Grand Ridge Energy II LLC submits Substitute Original Sheet 3 *et al.* to FERC Electric Tariff, Original Volume 1 to be effective 8/25/09.

Filed Date: 06/26/2009.

Accession Number: 20090629–0104.

Comment Date: 5 p.m. Eastern Time on Friday, July 17, 2009.

Docket Numbers: ER09–1340–001.

Applicants: Grand Ridge Energy III LLC.

Description: Grand Ridge Energy III, LLC submits Substitute Original Sheet 3 *et al.* to FERC Electric Tariff, Original Volume 1, to be effective 8/25/09.

Filed Date: 06/26/2009.

Accession Number: 20090629–0105.

Comment Date: 5 p.m. Eastern Time on Friday, July 17, 2009.

Docket Numbers: ER09–1341–001.

Applicants: Grand Ridge Energy IV LLC.

Description: Grand Ridge Energy IV, LLC submits Substitute Original Sheet 3 *et al.* to FERC Electric Tariff, Original Volume 1 to be effective 8/25/09.

Filed Date: 06/26/2009.

Accession Number: 20090629–0106.

Comment Date: 5 p.m. Eastern Time on Friday, July 17, 2009.

Docket Numbers: ER09–1342–001.

Applicants: Grand Ridge Energy V LLC.

Description: Grand Ridge Energy V, LLC submits Substitute Original Sheet 3 *et al.* to FERC Electric Tariff, Original Volume 1 to be effective 8/25/09.

Filed Date: 06/26/2009.

Accession Number: 20090629–0107.

Comment Date: 5 p.m. Eastern Time on Friday, July 17, 2009.

Docket Numbers: ER09–1348–000.

Applicants: Puget Sound Energy, Inc.

Description: Puget Sound Energy, Inc submits an unexecuted Standard Large Generator Interconnection Agreement, dated 6/24/09 between PSE, as Transmission Provider, and Vanatage Wind Energy LLC as Interconnection Customer.

Filed Date: 06/24/2009.

Accession Number: 20090624–0044.

Comment Date: 5 p.m. Eastern Time on Wednesday, July 15, 2009.

Docket Numbers: ER09–1349–000.

Applicants: WestConnect.

Description: WestConnect submits section 205 filing to clarify timeframes for reserving and scheduling regional transmission service *etc.*

Filed Date: 06/24/2009.

Accession Number: 20090625–0101.

Comment Date: 5 p.m. Eastern Time on Wednesday, July 15, 2009.

Docket Numbers: ER09–1350–000.

Applicants: PJM Interconnection LLC.

Description: PJM Interconnection, LLC submits executed interim interconnection service agreement and an executed interconnection construction service agreement entered into among PJM, Monmouth Energy, Inc, *et al.*

Filed Date: 06/25/2009.

Accession Number: 20090625–0108.

Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Docket Numbers: ER09–1351–000.

Applicants: EPLP Energy Services (US) LLC.

Description: EPLP Energy Services, LLC submits Original Sheet 1 *et al.* to FERC Electric Tariff, Original Volume 1 to be effective 8/25/09.

Filed Date: 06/26/2009.

Accession Number: 20090629–0002.

Comment Date: 5 p.m. Eastern Time on Friday, July 17, 2009.

Docket Numbers: ER09–1352–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc submits Second Revised Sheet 125 *et al.* to FERC Electric Tariff, Fifth Revised Volume 1.

Filed Date: 06/25/2009.

Accession Number: 20090626–0091.

Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Docket Numbers: ER09–1353–000.

Applicants: Virginia Electric and Power Company.

Description: Dominion Virginia Power submits a revised service agreement cover sheet that cancels Service Agreement 1314 in conformance with Order 614.

Filed Date: 06/25/2009.

Accession Number: 20090626–0090.

Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Docket Numbers: ER09–1354–000.

Applicants: PJM Interconnection LLC.

Description: PJM Interconnection, LLC submits an executed interconnection service agreement among PJM *et al.* and notices of cancellation for three ISAs being superseded.

Filed Date: 06/25/2009.

Accession Number: 20090626–0089.

Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Docket Numbers: ER09–1355–000.

Applicants: PJM Interconnection LLC.

Description: PJM Interconnection, LLC submits an executed interconnection service agreement among PJM *et al.* and notices of cancellation for three ISAs being superseded.

Filed Date: 06/25/2009.

Accession Number: 20090626–0088.

Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Docket Numbers: ER09–1356–000; OA09–30–000; TS09–6–000.

Applicants: Grand Ridge Energy LLC.

Description: Grand Ridge Energy, LLC *et al.* submits Original Sheet 1 to Rate Schedule FERC No 1.

Filed Date: 06/25/2009.

Accession Number: 20090626–0087.

Comment Date: 5 p.m. Eastern Time on Thursday, July 09, 2009.

Docket Numbers: ER09–1357–000.

Applicants: Altair Energy Trading, Inc.

Description: Altair Energy Trading, Inc submits petition for acceptance of initial tariff, waivers and blanket authority.

Filed Date: 06/26/2009.

Accession Number: 20090626–0112.

Comment Date: 5 p.m. Eastern Time on Friday, July 17, 2009.

Docket Numbers: ER09–1358–000.

Applicants: Duke Energy Ohio, Inc.

Description: Duke Energy Ohio, Inc submits First Revised Sheet 1 to First Revised Rate Schedule 48 to be effective 8/25/09.

Filed Date: 06/26/2009.

Accession Number: 20090629–0001.

Comment Date: 5 p.m. Eastern Time on Friday, July 17, 2009.

Docket Numbers: ER09–1359–000.

Applicants: PECO Energy Company.

Description: PECO Energy Company submits Original Service Agreement 2196 *et al.* to FERC Electric Tariff, Sixth Revised Volume 1 to be effective 7/27/09.

Filed Date: 06/26/2009.

Accession Number: 20090629–0003.

Comment Date: 5 p.m. Eastern Time on Friday, July 17, 2009.

Docket Numbers: ER09–1360–000.

Applicants: PECO Energy Company.

Description: PECO Energy Company submits notice of Cancellation of Rate Schedule FPC No 47, to be effective 7/26/09.

Filed Date: 06/26/2009.

Accession Number: 20090629–0004.

Comment Date: 5 p.m. Eastern Time on Friday, July 17, 2009.

Docket Numbers: ER09–1361–000.

Applicants: California Independent System Operator Corporation.

Description: California Independent System Operator Corp submits a Participating Load Pilot Agreement.

Filed Date: 06/26/2009.

Accession Number: 20090629–0110.

Comment Date: 5 p.m. Eastern Time on Friday, July 17, 2009.

Docket Numbers: ER09–1362–000.

Applicants: California Independent System Operator Corporation.

Description: The California Independent System Operator Corporation submits Service Agreement 1358 to FERC Electric Tariff, Fourth Replacement Volume 11 with San Diego Gas & Electric Company.

Filed Date: 06/26/2009.

Accession Number: 20090629–0111.

Comment Date: 5 p.m. Eastern Time on Friday, July 17, 2009.

Docket Numbers: ER09–1363–000.

Applicants: California Independent System Operator Corporation

Description: The California Independent System Operator Corporation submits Service Agreement 1357 to FERC Electric Tariff, Fourth Replacement Volume II.

Filed Date: 06/26/2009.

Accession Number: 20090629–0112.

Comment Date: 5 p.m. Eastern Time on Friday, July 17, 2009.

Take notice that the Commission received the following open access transmission tariff filings:

Docket Numbers: OA07–53–005.

Applicants: Progress Energy, Inc.

Description: Revised Annual Penalty Revenues Refund Report of Carolina Power & Light Company and Florida Power Corporation.

Filed Date: 06/25/2009.

Accession Number: 20090625–5184.

Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–15938 Filed 7–6–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 2

June 22, 2009.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP08–295–003.
Applicants: Columbia Gas Transmission, LLC.
Description: Columbia Gas Transmission, LLC submits First Revised Sheet 137 and 138 to FERC Gas Tariff, Third Revised Volume 1, to be effective 7/20/09.
Filed Date: 06/19/2009.
Accession Number: 20090622–0036.
Comment Date: 5 p.m. Eastern Time on Wednesday, July 01, 2009.

Docket Numbers: RP96–200–216.
Applicants: CenterPoint Energy Gas Transmission Co.
Description: Center Point Energy Gas Transmission Company submits negotiated rate agreements with Gavilon, LLC.
Filed Date: 06/19/2009.
Accession Number: 20090622–0085.
Comment Date: 5 p.m. Eastern Time on Wednesday, July 01, 2009.

Docket Numbers: RP96–312–195.
Applicants: Tennessee Gas Pipeline Company.
Description: Tennessee Gas Pipeline Company submits clarification of negotiated rate filing with Louis Dreyfus Energy Services LP under Rate Schedule PAL, to be effective June 1, 2009.
Filed Date: 06/19/2009.
Accession Number: 20090622–0087.
Comment Date: 5 p.m. Eastern Time on Wednesday, July 01, 2009.

Docket Numbers: RP96–312–196.
Applicants: Tennessee Gas Pipeline Company.
Description: Tennessee Gas Pipeline Company submits amended negotiated rate filing under Rate Schedule PAL, to be effective 6/1/09.
Filed Date: 06/19/2009.
Accession Number: 20090622–0086.
Comment Date: 5 p.m. Eastern Time on Wednesday, July 01, 2009.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing 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. Such protests must be filed on or before 5 p.m. Eastern time on the specified comment date. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,
Deputy Secretary.
[FR Doc. E9–15868 Filed 7–6–09; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 1

June 22, 2009.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP09–770–000.
Applicants: Western Gas Interstate Company.
Description: Western Gas Interstate Company submits Fifth Revised Sheet 247 to FERC Gas Tariff to be effective 8/1/09.
Filed Date: 06/18/2009.
Accession Number: 20090619–0133.
Comment Date: 5 p.m. Eastern Time on Tuesday, June 30, 2009.

Docket Numbers: RP09–771–000.
Applicants: East Tennessee Natural Gas, LLC.
Description: East Tennessee Natural Gas, LLC submits Fourth Revised Sheet No 301 et al. to FERC Gas Tariff, Third Revised Volume No. 1, to be effective 7/1/09.
Filed Date: 06/19/2009.
Accession Number: 20090622–0084.
Comment Date: 5 p.m. Eastern Time on Wednesday, July 01, 2009.

Docket Numbers: RP09–772–000.
Applicants: MoGas Pipeline LLC.
Description: MoGas Pipeline LLC submits First Revised Sheet No. 84 et al. to its FERC Gas Tariff, First Revised Volume No. 1 pursuant to order 587–T, to be effective 8/1/09.
Filed Date: 06/19/2009.
Accession Number: 20090622–0083.
Comment Date: 5 p.m. Eastern Time on Wednesday, July 01, 2009.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or

call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–15867 Filed 7–6–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

June 25, 2009.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP09–773–000.
Applicants: Dauphin Island Gathering Partners.
Description: Dauphin Island Gathering Partners 2009 Cash Out Refund Report.
Filed Date: 06/22/2009.
Accession Number: 20090622–5064.
Comment Date: 5 p.m. Eastern Time on Monday, July 06, 2009.

Docket Numbers: RP09–774–000.
Applicants: Kern River Gas Transmission Company.
Description: Kern River Gas Transmission Company submits Sixth Revised Sheet No 490 *et al.* to its FERC Gas Tariff, Second Revised Volume No 1.
Filed Date: 06/22/2009.
Accession Number: 20090623–0103.
Comment Date: 5 p.m. Eastern Time on Monday, July 06, 2009.

Docket Numbers: RP09–775–000.
Applicants: Dominion Transmission, Inc.
Description: Dominion Transmission, Inc submits Seventeenth Revised Sheet 1300 *et al.* to its FERC Gas Tariff, Third Revised Volume 1, to be effective 7/23/09.
Filed Date: 06/23/2009.
Accession Number: 20090624–0001.
Comment Date: 5 p.m. Eastern Time on Monday, July 06, 2009.

Docket Numbers: RP09–776–000.
Applicants: Northern Natural Gas Company.
Description: Northern Natural Gas Company submits petitions for a limited waiver of tariff provisions.
Filed Date: 06/23/2009.
Accession Number: 20090624–0036.
Comment Date: 5 p.m. Eastern Time on Monday, July 06, 2009.

Docket Numbers: RP09–777–000.
Applicants: Dauphin Island Gathering Partners.
Description: Dauphin Island Gathering Partners submits First Revised Sheet No 11 *et al.* to FERC Gas Tariff, First Revised Volume No 1, to be effective July 1, 2009.
Filed Date: 06/24/2009.
Accession Number: 20090624–0020.
Comment Date: 5 p.m. Eastern Time on Monday, July 06, 2009.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

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Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–15866 Filed 7–6–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

June 23, 2009.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG09–49–000.
Applicants: Blackstone Wind Farm, LLC.
Description: Supplement to Notice of Self-Certification of Exempt Wholesale Generator Status of Blackstone Wind Farm, LLC.
Filed Date: 06/19/2009.
Accession Number: 20090619–5063.
Comment Date: 5 p.m. Eastern Time on Friday, July 10, 2009.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER01–1403–010; ER01–2968–011; ER01–845–009; ER04–366–008; ER05–1122–007; ER06–1443–006; ER08–107–004.
Applicants: FirstEnergy Operating Companies, Pennsylvania Power Company, Jersey Central Power & Light Co., FirstEnergy Solutions Corp., FirstEnergy Generation Corporation, FirstEnergy Nuclear Generation Corporation, FirstEnergy Generation Mansfield Unit 1.
Description: Supplement of FirstEnergy Service Company to Triennial Market Power Update Analysis of FirstEnergy Operating Companies, *et al.*
Filed Date: 06/17/2009.
Accession Number: 20090617–5175.
Comment Date: 5 p.m. Eastern Time on Wednesday, July 08, 2009.

Docket Numbers: ER03–533–004; ER03–762–012.
Applicants: Alliant Energy Corporate Services, Inc., Alliant Energy Neenah, LLC.
Description: Alliant Energy Corporate Services, Inc et al submits revised application and market power study to replace those submitted to the Commission on 1/5/08 & 5/14/09.
Filed Date: 06/19/2009.
Accession Number: 20090622–0167.
Comment Date: 5 p.m. Eastern Time on Friday, July 10, 2009.

Docket Numbers: ER08–283–003.
Applicants: New York Independent System Operator, Inc.
Description: New York Independent System Operator, Inc submits response to request for additional information set forth in FERC 5/29/09 deficiency letter.
Filed Date: 06/19/2009.

Accession Number: 20090622–0165.
Comment Date: 5 p.m. Eastern Time on Friday, July 10, 2009.

Docket Numbers: ER08–314–002.
Applicants: Bicent (California) Malburg, LLC.
Description: Bicent (California) Malburg, LLC submits FERC Electric Tariff, Original Volume No 1, Substitute First Revised Sheet No 1 and Sub First Revised Sheet No 2.
Filed Date: 06/19/2009.
Accession Number: 20090622–0164.
Comment Date: 5 p.m. Eastern Time on Friday, July 10, 2009.

Docket Numbers: ER08–580–002.
Applicants: Ontario Power Generation Energy Trading, Inc.
Description: Updated Market Power Study for Central (MISO) Region of Ontario Power Generation Energy Trading, Inc.
Filed Date: 06/23/2009.
Accession Number: 20090623–5053.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 14, 2009.

Docket Numbers: ER08–1410–003.
Applicants: PacifiCorp.
Description: PacifiCorp submits a compliance filing *et al.*
Filed Date: 06/22/2009.
Accession Number: 20090623–0082.
Comment Date: 5 p.m. Eastern Time on Monday, July 13, 2009.

Docket Numbers: ER09–241–002.
Applicants: California Independent System Operator Corporation.
Description: The California Independent System Operator Corporation submits Substitute First Revised Sheet 538B *et al.* to FERC Electric Tariff, Fourth Replacement Volume 1.
Filed Date: 06/22/2009.
Accession Number: 20090623–0078.
Comment Date: 5 p.m. Eastern Time on Monday, July 13, 2009.

Docket Numbers: ER09–865–001; ER09–866–001; ER00–814–007.
Applicants: Allegheny Energy Supply Company, LLC.
Description: Allegheny Energy Supply Company, LLC submits First Revised Sheet 2 *et al.* to FERC Electric Tariff, Second Revised Volume 1, effective 6/1/09.
Filed Date: 06/22/2009.
Accession Number: 20090623–0079.
Comment Date: 5 p.m. Eastern Time on Monday, July 13, 2009.

Docket Numbers: ER09–1146–001.
Applicants: Lafarge Midwest, Inc.
Description: Lafarge Midwest, Inc submits supplemental information to its application for market based rates, request for blanket authorization, *et al.*
Filed Date: 06/15/2009.
Accession Number: 20090617–0003.
Comment Date: 5 p.m. Eastern Time on Monday, July 06, 2009.

Docket Numbers: ER09–1207–001.
Applicants: P.H. Glatfelter Company.
Description: PH Glatfelter Company submits Substitute Original Sheet 1 *et al.* to FERC Electric Tariff, Original Volume 1, to be effective 7/29/09.
Filed Date: 06/22/2009.
Accession Number: 20090623–0077.
Comment Date: 5 p.m. Eastern Time on Monday, July 13, 2009.

Docket Numbers: ER09–1314–000.
Applicants: NorthWestern Corporation.
Description: NorthWestern Corporation submits an amendment to its Montana Open Access Transmission Tariff to add a new Schedule 10, Regulation and Frequency Response Service for Intermittent Renewable Generator Exports.
Filed Date: 06/16/2009.
Accession Number: 20090618–0114.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 07, 2009.

Docket Numbers: ER09–1320–000.
Applicants: Blackstone Wind Farm, LLC.
Description: Blackstone Wind Farm, LLC submits petition for order accepting market-based rate tariff for filing and granting waivers and blanket approvals.
Filed Date: 06/19/2009.
Accession Number: 20090622–0194.
Comment Date: 5 p.m. Eastern Time on Friday, July 10, 2009.

Docket Numbers: ER09–1321–000.
Applicants: Blue Canyon Windpower V, LLC.
Description: Blue Canyon Windpower V, LLC submits petition for order accepting market-based rate tariff for filing and granting waivers and blanket approvals.
Filed Date: 06/19/2009.
Accession Number: 20090622–0195.
Comment Date: 5 p.m. Eastern Time on Friday, July 10, 2009.

Docket Numbers: ER09–1322–000.
Applicants: Meadow Lake Wind Farm, LLC.
Description: Meadow Lake Wind Farm, LLC submits petition for order accepting market-based rate tariff for filing and granting waivers and blanket approvals.
Filed Date: 06/22/2009.
Accession Number: 20090622–0196.
Comment Date: 5 p.m. Eastern Time on Monday, July 13, 2009.

Docket Numbers: ER09–1323–000.
Applicants: Lost Lakes Wind Farm, LLC.
Description: Lost Lakes Wind Farm, LLC submits petition for order accepting market-based rate tariff for filing and granting waivers and blanket approvals.
Filed Date: 06/22/2009.
Accession Number: 20090622–0197.
Comment Date: 5 p.m. Eastern Time on Monday, July 13, 2009.

Docket Numbers: ER09–1329–000.
Applicants: NaturEner Power Watch, LLC.
Description: NaturEner Power Watch, LLC submits executed Amended and Restated Coordinated Operating Agreement.
Filed Date: 06/19/2009.
Accession Number: 20090622–0030.
Comment Date: 5 p.m. Eastern Time on Friday, July 10, 2009.

Docket Numbers: ER09–1330–000.
Applicants: PJM Interconnection, LLC.
Description: PJM Interconnection, LLC submits an executed interconnection service agreement entered into among PJM, *et al.*
Filed Date: 06/19/2009.
Accession Number: 20090622–0029.
Comment Date: 5 p.m. Eastern Time on Friday, July 10, 2009.

Docket Numbers: ER09–1335–000.
Applicants: Idaho Power Company.
Description: Idaho Power Company submits revisions to the Agreement for Interconnection and Transmission Services with Utah Power & Light Company.
Filed Date: 06/19/2009.
Accession Number: 20090622–0125.
Comment Date: 5 p.m. Eastern Time on Friday, July 10, 2009.

Docket Numbers: ER09–1336–000.
Applicants: Pacific Gas and Electric Company.
Description: Pacific Gas and Electric Company submits an unexecuted Large Generator Interconnection Agreement for the interconnection of PG&E's replacement generation facilities at the Humboldt Bay Re-Powering Project.
Filed Date: 06/22/2009.
Accession Number: 20090622–0186.
Comment Date: 5 p.m. Eastern Time on Monday, July 13, 2009.

Docket Numbers: ER09–1337–000.
Applicants: Southern California Edison Company.
Description: Southern California Edison Company submits Third Revised Sheet 7 *et al.* to FERC Electric Tariff, First Revised Volume 5.
Filed Date: 06/22/2009.
Accession Number: 20090623–0081.
Comment Date: 5 p.m. Eastern Time on Monday, July 13, 2009.

Docket Numbers: ER09–1338–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc submits First Revised Sheet 1039 et

al. to FERC Electric Tariff, Fifth Revised Volume 1 to its Open Access Transmission Tariff, to be effective 8/21/09.

Filed Date: 06/22/2009.

Accession Number: 20090623–0080.

Comment Date: 5 p.m. Eastern Time on Monday, July 13, 2009.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–15865 Filed 7–6–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

June 24, 2009.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER09–1044–001.
Applicants: Northwestern Wisconsin Electric Company.
Description: Northwestern Wisconsin Electric Company submits Original Sheet No 1 to Eighth Revised FERC Rate Schedule No 2 *et al.*
Filed Date: 06/23/2009.
Accession Number: 20090624–0005.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 14, 2009.

Docket Numbers: ER09–1309–000.
Applicants: PacifiCorp.
Description: PacifiCorp submits revisions to its FERC Electric Tariff, Seventh Revised Volume No 11.
Filed Date: 06/16/2009.
Accession Number: 20090617–0166.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 07, 2009.

Docket Numbers: ER09–1310–000.
Applicants: PacifiCorp.
Description: PacifiCorp submits updated Exhibit 1 to the Amended and Restated Facilities Rental and Wheeling Agreement between PacifiCorp and Moon Lake Electric Association.
Filed Date: 06/16/2009.
Accession Number: 20090617–0168.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 07, 2009.

Docket Numbers: ER09–1311–000.
Applicants: Entergy Arkansas, Inc.
Description: Entergy Arkansas, Inc submits Notice of Termination of Service Agreement No 38 etc.
Filed Date: 06/16/2009.
Accession Number: 20090617–0167.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 07, 2009.

Docket Numbers: ER09–1312–000.
Applicants: Riverside Energy Center, LLC.
Description: Riverside Energy Center, LLC submits revised Rate Schedule FERC No 2.
Filed Date: 06/16/2009.
Accession Number: 20090617–0169.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 07, 2009.

Docket Numbers: ER09–1313–000.
Applicants: RockGen Energy LLC.
Description: RockGen Energy, LLC submits revised Rate Schedule FERC No 3.
Filed Date: 06/16/2009.
Accession Number: 20090617–0170.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 07, 2009.

Docket Numbers: ER09–1343–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc submits revised pages to its Open Access Transmission Tariff to implement rate changes for Westar Energy, Inc and Oklahoma Gas & Electric, which are transmission owners and pricing zones etc.
Filed Date: 06/23/2009.
Accession Number: 20090624–0004.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 14, 2009.

Docket Numbers: ER09–1344–000.
Applicants: NextEra Energy Power Marketing, LLC.
Description: Motion of NextEra Energy Power Marketing, LLC. Requesting Limited Waiver of Forward Capacity Auction Qualification Rules.
Filed Date: 06/23/2009.
Accession Number: 20090624–0006.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 07, 2009.

Docket Numbers: ER09–1345–000.
Applicants: Southern California Edison Company.
Description: Southern California Edison Company submits for filing changes under Volume 6—Service Agreement *et al.* to Rate Schedule FERC No 466 *et al.*
Filed Date: 06/23/2009.
Accession Number: 20090624–0002.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 14, 2009.

Docket Numbers: ER09–1346–000.
Applicants: PJM Interconnection, LLC.
Description: PJM Interconnection, LLC requests limited one-time waivers of certain provisions of the Reliability Assurance Agreement among Load-Serving Entities in the PJM Region *etc.*
Filed Date: 06/23/2009.
Accession Number: 20090624–0009.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 14, 2009.

Docket Numbers: ER09–1347–000.
Applicants: Mirant Energy Trading, LLC.
Description: Motion for Limited Waiver and Request for Shortened Comment Period and Expedited Treatment of Mirant Energy Trading, LLC.
Filed Date: 06/23/2009.
Accession Number: 20090623–5122.

Comment Date: 5 p.m. Eastern Time on Tuesday, July 07, 2009.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern Time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

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Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–15864 Filed 7–6–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

June 25, 2009.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC09–85–000.
Applicants: Grand Ridge Energy LLC, Grand Ridge Energy II LLC, Grand Ridge Energy III LLC, Grand Ridge Energy IV LLC.
Description: Grand Ridge Energy LLC, et al. Application for Authorization Under Section 203 of the Federal Power Act and Request for Waivers and Expedited Action.
Filed Date: 06/25/2009.
Accession Number: 20090625–5070.
Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG09–59–000.
Applicants: Horse Hollow Generation Tie, LLC.
Description: Notice of Self Certification of Exempt Wholesale Generator Status of Horse Hollow Generation Tie, LLC.
Filed Date: 06/24/2009.
Accession Number: 20090624–5130.
Comment Date: 5 p.m. Eastern Time on Wednesday, July 15, 2009.

Docket Numbers: EG09–60–000.
Applicants: Grand Ridge Energy LLC.
Description: Notice of Self Certification of Exempt Wholesale Generator Status of Grand Ridge Energy LLC.
Filed Date: 06/25/2009.
Accession Number: 20090625–5103.
Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Docket Numbers: EG09–61–000.
Applicants: Grand Ridge Energy II LLC.
Description: Notice of Self Certification of Exempt Wholesale Generator Status of Grand Ridge Energy II LLC.
Filed Date: 06/25/2009.
Accession Number: 20090625–5104.
Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Docket Numbers: EG09–62–000.
Applicants: Grand Ridge Energy III LLC.
Description: Notice of Self Certification of Exempt Wholesale Generator Status of Grand Ridge Energy III LLC.
Filed Date: 06/25/2009.
Accession Number: 20090625–5105.
Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Docket Numbers: EG09–63–000.
Applicants: Grand Ridge Energy IV LLC.
Description: Notice of Self Certification of Exempt Wholesale Generator Status of Grand Ridge Energy IV LLC.
Filed Date: 06/25/2009.
Accession Number: 20090625–5106.
Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Docket Numbers: EG09–64–000.
Applicants: Grand Ridge Energy V LLC.
Description: Notice of Self Certification of Exempt Wholesale Generator Status of Grand Ridge Energy V LLC.
Filed Date: 06/25/2009.
Accession Number: 20090625–5107.
Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Docket Numbers: EG09–65–000.
Applicants: Rugby Wind LLC.
Description: Self Certification Notice for Exempt Wholesale Generator Status of Rugby Wind LLC.
Filed Date: 06/25/2009.
Accession Number: 20090625–5108.
Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Docket Numbers: EG09–66–000.
Applicants: Streator-Cayuga Ridge Wind Power, LLC.
Description: Self Certification Notice of Exempt Wholesale Generator Status of Streator-Cayuga Ridge Wind Power LLC.
Filed Date: 06/25/2009.
Accession Number: 20090625–5109.
Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES09–38–000.
Applicants: Montana Alberta Tie Ltd.
Description: Application of Montana Alberta Tie Ltd. for Authorization to Assume Obligations and Liabilities under Section 204 of the Federal Power Act.
Filed Date: 06/25/2009.
Accession Number: 20090625–5072.
Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern

time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC 20426.

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Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–15940 Filed 7–6–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice Of Filings #1

June 26, 2009.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER06–733–006.

Applicants: Midland Cogeneration Venture Limited Partnership.

Description: Midland Cogeneration Venture Limited Partnership submits an updated market power analysis and notice of change in status.

Filed Date: 06/25/2009.

Accession Number: 20090625–5125.

Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Docket Numbers: ER09–1335–000.

Applicants: Idaho Power Company.

Description: Idaho Power Company submits revisions to the agreement for interconnection and transmission services between Idaho Power Company and Utah Power & Light Company.

Filed Date: 06/19/2009.

Accession Number: 20090622–0124.

Comment Date: 5 p.m. Eastern Time on Friday, July 10, 2009.

Docket Numbers: ER09–1339–000.

Applicants: Grand Ridge Energy II LLC.

Description: Application for market-based rate authorization, request for related waivers and request for blanket approval under 18 CFR part 34 of all future issuances of securities.

Filed Date: 06/25/2009.

Accession Number: 20090626–0054.

Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Docket Numbers: ER09–1340–000.

Applicants: Grand Ridge Energy III LLC.

Description: Grand Ridge Energy III LLC submits application of GR III for authorization to make market-based wholesale sales of energy, capacity and ancillary services under GR III's FERC Electric Tariff 1 etc.

Filed Date: 06/25/2009.

Accession Number: 20090626–0052.

Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Docket Numbers: ER09–1341–000.

Applicants: Grand Ridge Energy IV LLC.

Description: Application for market-based rate authorization, request for related waivers and request for blanket approval under 18 CFR Part 34 of all future issuances of securities.

Filed Date: 06/25/2009.

Accession Number: 20090626–0053.

Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Docket Numbers: ER09–1342–000.

Applicants: Grand Ridge Energy V LLC.

Description: Application for market-based rate authorization, request for related waivers and request for blanket approval under 18 CFR part 34 of all future issuances of securities.

Filed Date: 06/25/2009.

Accession Number: 20090626–0051.

Comment Date: 5 p.m. Eastern Time on Thursday, July 16, 2009.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

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Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–15939 Filed 7–6–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP09–57–000]

Transcontinental Gas Pipe Line Company, LLC; Notice of Availability of the Environmental Assessment for the Proposed 85 North Expansion Project

June 26, 2009.

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 Transcontinental Gas Pipe Line Company, LLC (Transco) in the above-referenced docket.

The EA was prepared to satisfy the requirements of the National Environmental Policy Act of 1969 (NEPA). The FERC 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 85 North Expansion Project. Transco proposes to construct three new 42-inch diameter natural gas pipeline loops with a combined total length of approximately 22.06 miles adjacent to its existing pipeline system in Alabama, South Carolina, and North Carolina. Transco also proposes to construct one new compressor station and modify eight existing compressor stations in Mississippi, Alabama, Georgia, South Carolina, and North Carolina. The facilities that would be constructed are as follows:

- Modify Compressor Station 80 in Jones County, Mississippi, and Compressor Station 90 in Marengo County, Alabama;
- Add additional compression at Compressor Station 100 in Chilton County, Alabama;
- Construct new Compressor Station 135 in Anderson County, South Carolina;
- Modify Compressor Station 110 in Randolph County, Alabama; Compressor Station 115 in Coweta County, Georgia; Compressor Station 125 in Walton County, Georgia; Compressor Station 150 in Iredell County, North Carolina; and Compressor Station 155 in Davidson County, North Carolina;
- Install Coosa Loop, an approximately 4.40 mile segment of 42-inch diameter natural gas pipeline, in Coosa County, Alabama;
- Install Cowpens Loop, an approximately 9.39 mile segment of 42-inch diameter natural gas pipeline, in Spartanburg and Cherokee Counties, South Carolina; and
- Install Iredell Loop, an approximately 8.27 mile segment of 42-inch diameter natural gas pipeline, in Iredell and Rowan Counties, North Carolina.

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 libraries in the project area; Native America groups; 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.

You can make a difference by providing us with your specific comments or concerns about the 85 North Expansion Project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send your comments so that they will be received in Washington, DC on or before July 31, 2009.

For your convenience, there are three methods in which you can use to submit your comments to the Commission. In all instances please reference the project docket number CP09–57–000 with your submission. The Commission encourages electronic filing of comments and has dedicated eFiling expert staff available to assist you at 202–502–8258 or *efiling@ferc.gov*.

(1) You may file your comments electronically by using the *Quick Comment* feature, which is located on the Commission's internet Web site at *http://www.ferc.gov* under the link to *Documents and Filings.* A Quick Comment is an easy method for interested persons to submit text-only comments on a project;

(2) You may file your comments electronically by using the *eFiling* feature, which is located on the Commission's Internet Web site at *http://www.ferc.gov* under the link to *Documents and Filings. eFiling* involves preparing your submission in the same manner as you would if filing on paper, and then saving the file on your computer's hard drive. You will attach that file as your submission. New eFiling users must first create an account by clicking ''*Sign up*'' or ''*eRegister*.'' You will be asked to select the type of filing you are making. A comment on a particular project is considered a ''Comment on a Filing;'' or

(3) You may file your comments via mail to the Commission by sending an original and two copies of your letter to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Room 1A, Washington, DC 20426.

Label one copy of the comments for the attention of the Gas Branch 3, PJ–11.3.

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).[1] 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, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which

[1] Interventions may also be filed electronically via the Internet in lieu of paper. See the previous discussion on filing comments electronically.

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 the eSubscription link on the FERC Internet Web site (*http://www.ferc.gov/esubscribenow.htm).*

Kimberly D. Bose,

Secretary.

[FR Doc. E9–15895 Filed 7–6–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP09–428–000]

Blue Sky Gas Storage, LLC; Notice of Intent To Prepare an Environmental Assessment for the Proposed Blue Sky Gas Storage Project and Request for Comments on Environmental Issues

June 26, 2009.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Blue Sky Gas Storage Project involving the construction and operation of facilities by Blue Sky Gas Storage, LLC (Blue Sky) in Logan County, Colorado. The Blue Sky Gas Storage Project involves the conversion of a depleted natural gas storage reservoir to a natural gas storage facility. This EA will be used by the Commission in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process we will use to gather input from the public and interested agencies on the project. Your input will help determine which issues need to be evaluated in the EA. Please note that the scoping period will close on July 27, 2009.

This notice is being sent to the Commission's current environmental mailing list for this project, which includes affected landowners; Federal, State, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American tribes; parties to this proceeding; and local libraries and newspapers. State and local government representatives are asked to notify their constituents of this proposed project and to encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, you may be contacted by a pipeline company representative about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The company would seek to negotiate a mutually acceptable agreement. However, if the project is approved by the Commission, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings in accordance with State law.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' was attached to the project notice Blue Sky provided to landowners. This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. It is available for viewing on the FERC Web site (*http://www.ferc.gov*).

Summary of the Proposed Project

Blue Sky proposes to convert a depleted underground natural gas production reservoir to a natural gas storage facility located approximately 16 miles north of the town of Sterling, in Logan County, Colorado. Blue Sky also proposes to construct 5.3 miles of 16-inch-diameter header pipeline extending north from the storage facility to interconnect with Rockies Express Pipeline, LLC, and Trailblazer Pipeline, LLC's interstate pipeline systems. In addition, Blue Sky proposes to construct 9.8 miles of 16-inch-diameter header pipeline extending southwest to interconnect with Kinder Morgan Interstate Gas Transmission, LLC's interstate pipeline system. Blue Sky would construct one metering station at each of the two proposed interconnections. The Blue Sky Storage Project would have a working gas storage capacity of approximately 4.4 billion cubic feet and be capable of delivering gas at a rate of approximately 100 million cubic feet per day (MMcf/d).

Activities at the storage facility would include:

- Drilling 10 new natural gas storage wells;
- Converting one existing well to a water disposal well;
- Converting two abandoned wells to observation wells;
- Re-entering 18 abandoned exploration and production wells to confirm proper plugging and abandonment; and
- One 2,370 horsepower compressor station.

High West Energy would construct and operate a non-jurisdictional electrical distribution line upgrade and extension. To service the Blue Sky facilities, a one mile new section of new electrical distribution line would be built eastward of the existing electrical distribution line across County Road 33 into the Blue Sky facility.

Maps showing the location of the proposed project are included as appendix 1.[1]

Land Requirements for Construction

The proposed storage facility would occupy a subsurface area of about 2,757 acres. Construction of the proposed facilities would temporarily disturb a total of 263.7 acres of land for the aboveground facilities and the pipeline. Following construction, about 36.1 acres would be maintained for permanent operation of the project's facilities; the remaining acreage would be restored and allowed to revert to former uses.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us to discover and address concerns the public may have about proposals. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission staff requests public comments on the scope of the issues to address in the EA. All comments received will be considered during the preparation of the EA.

In the EA, we[2] will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- Geology and soils;
- Land use;

[1] The appendix referenced in this notice is not being printed in the **Federal Register.** Copies of the appendix are available on the Commission's website at the ''eLibrary'' link or from the Commission's Public Reference Room, 888 First Street NE., Washington, DC 20426, or by calling (202) 502–8371. For instructions on connecting to eLibrary, refer to the ''Additional Information'' section of this notice. Copies of the appendix were sent to all those receiving this notice in the mail. Requests for detailed maps of the proposed facilities should be made directly to Blue Sky.

[2] ''We,'' ''us,'' and ''our'' refer to the environmental staff of the FERC's Office of Energy Projects.

- Water resources, fisheries and wetlands;
- Cultural resources;
- Vegetation and wildlife;
- Air quality and noise;
- Threatened and endangered species; and
- Public safety.

We will also evaluate possible alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on various resource areas.

Our independent analysis of the issues will be in the EA. Depending on the comments received during the scoping process, the EA may be published and mailed to those on our environmental mailing list (see discussion on how to remain on our environmental mailing list on page 5). A comment period will be allotted for the review if the EA is published. We will consider all comments on the EA before we make our recommendations to the Commission. To ensure your comments are considered, please carefully follow the instructions in the public participation section below.

With this notice, we are asking agencies with jurisdiction and/or special expertise with respect to environmental issues to formally cooperate with us in the preparation of the EA. These agencies may choose to participate once they have evaluated the proposal relative to their responsibilities. Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

Currently Identified Environmental Issues

We have already identified issues we think deserve attention based on a preliminary review of the proposed facilities and the environmental information provided by Blue Sky. This includes potential cumulative impacts associated with another storage project in the same general area of Logan County that has been proposed by East Cheyenne Gas Storage, LLC (docket number PF09–12).

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send in your comments so that they will be received in Washington, DC on or before July 27, 2009.

For your convenience, there are three methods which you can use to submit your comments to the Commission. The Commission encourages electronic filing of comments and has dedicated eFiling expert staff available to assist you at 202–502–8258 or *eFiling@ferc.gov*.

(1) You may file your comments electronically by using the *Quick Comment* feature, which is located at *http://www.ferc.gov* under the link called ''*Documents and Filings''*. A Quick Comment is an easy method for interested persons to submit text-only comments on a project;

(2) You may file your comments electronically by using the *eFiling* feature, that is listed under the ''*Documents and Filings''* link. eFiling involves preparing your submission in the same manner as you would if filing on paper, and then saving the file on your computer's hard drive. You will attach that file as your submission. New eFiling users must first create an account by clicking on ''*Sign up''* or ''*eRegister.''* You will be asked to select the type of filing you are making. A comment on a particular project is considered a ''Comment on a Filing;'' or

(3) You may file your comments with the Commission via mail by sending an original and two copies of your letter to:

Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Room 1A, Washington, DC 20426.

In all instances please reference the project docket number (CP09–428–000) with your submission. Label one copy of the comments for the attention of Gas Branch 1, PJ–11.1.

Environmental Mailing List

An effort is being made to send this notice to all individuals, organizations, and government entities interested in and/or potentially affected by the project. This includes all landowners who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of the aboveground facilities (as defined in the Commission's regulations).

If you do not want to send comments at this time but still want to remain on the environmental mailing list, please return the Information Request (appendix 2). If you do not return the Information Request, you will be taken off the mailing list.

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an ''intervenor,'' which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in a Commission proceeding by filing a request to intervene. Instructions for becoming an intervenor are included in the User's Guide under the ''e-Filing'' link on the Commission's Web site.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC or on the Internet at *http://www.ferc.gov* using the ''eLibrary'' link. Click on the eLibrary link, then on ''General Search'' and enter the docket number excluding the last three digits (*i.e.,* CP09–428) in the Docket Number field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. Go to *http://www.ferc.gov/esubscribenow.htm.*

Finally, any public meetings or site visits will be posted on the Commission's calendar located at *http://www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–15893 Filed 7–6–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP09–418–000]

Perryville Gas Storage LLC; Notice of Intent To Prepare an Environmental Assessment for the Proposed Crowville Salt Dome Storage Project and Request for Comments on Environmental Issues, and Notice of Public Scoping Meeting and Site Visit

June 26, 2009.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Crowville Salt Dome Storage Project (Project) involving construction and operation of facilities by Perryville Gas Storage LLC (Perryville) in Franklin and Richland Parishes, Louisiana. This EA will be used by the Commission in its decisionmaking process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process we will use to gather input from the public and interested agencies on the project. Your input will help the Commission staff determine what issues need to be evaluated in the EA. Please note that the scoping period will close on July 27, 2009.

Comments may be submitted in written form or verbally. Further details on how to submit written comments are provided in the public participation section of this notice. In lieu of sending written comments, we invite you to attend the public scoping meeting we have scheduled as follows: FERC Public Scoping Meeting, Crowville Salt Dome Storage Project, Tuesday, July 14, 2009, 7 p.m., Crockett Point Baptist Church, 139 Crockett Point Church Road, Winnsboro, Louisiana 71295.

Interested groups and individuals are encouraged to attend the meeting and to present comments on the environmental issues they believe should be addressed in the EA. A transcript of the meeting will be generated so that your comments will be accurately recorded.

In addition, on July 14, 2009, the FERC staff will conduct a public site visit to view the proposed facility locations and pipeline route. Examination will be by automobile and on foot. Representatives of Perryville will be accompanying the FERC staff. All interested parties may attend. Those planning to attend must provide their own transportation and should meet at the Crockett Point Baptist Church at 1 p.m., at the address listed above. For additional information, you may contact the Commission's Office of External Affairs at 1–866–208–FERC (3372).

This notice is being sent to affected landowners; Federal, State, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; parties to this proceeding; and local libraries and newspapers. State and local government representatives are asked to notify their constituents of this proposed project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, you may be contacted by a pipeline company representative about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The company would seek to negotiate a mutually acceptable agreement. However, if the project is approved by the Commission, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings in accordance with State law.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' was attached to the project notice Perryville provided to landowners. This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. It is also available for viewing on the FERC Web site (*http://www.ferc.gov*).

Summary of the Proposed Project

Perryville requests authorization to construct, own and operate a new natural gas storage facility in the Crowville Salt Dome, as well as related facilities in Franklin and Richland Parishes, Louisiana. Upon completion of the proposed facilities, the Project would provide a total of 15 billion cubic feet (Bcf) of natural gas storage working capacity in two salt caverns, with a maximum injection rate of up to 226 million cubic feet per day (MMcf/d) and a maximum withdrawal rate of 600 MMcf/d.

According to Perryville, its project would provide necessary gas infrastructure, add new competitive storage facilities to the U.S. natural gas market, and support further development of domestic gas production in the Gulf Coast and Mid-Continent regions.

The Crowville Gas Storage Project would consist of the following facilities:

- Two 7.5 billion cubic feet (Bcf) working gas capacity natural gas storage caverns connected to 1000 feet of utility corridor for an 8-inch-diameter freshwater pipeline, an 8-inch-diameter brine pipeline, a 14-inch-diameter natural gas pipeline, and a permanent access road;
- 2.6 miles of 24-inch-diameter pipeline to deliver to CenterPoint Energy Gas Transmission Company and 11.8 miles of 36-inch-diameter pipeline to deliver to Columbia Gulf Transmission;
- One 9,500 horsepower compressor station facility and multi-purpose buildings;
- Leaching facilities with 0.8 mile of 20-inch-diameter brine pipeline and 14-inch-diameter freshwater pipeline connecting to three brine settling ponds;
- Two 20-inch-diameter brine disposal pipelines (2.3 miles and 0.9 mile) connecting to five brine disposal well pads; and
- About ten access roads, a wareyard, and four freshwater supply wells.

The general location of the project facilities is shown in appendix 1.[1]

Land Requirements for Construction

Construction of the Natural Gas Handling Facilities would disturb about 39 acres, including land for the two storage caverns, the compressor station, a 100-foot-wide utility corridor, leaching plant, and 4 freshwater supply wells. The leaching facilities would disturb an additional 30 acres of land for the brine disposal ponds and brine and water pipelines. Construction of the brine disposal wells would disturb a total of 12.7 acres (2.54 acres for each of 5 wells), while operation of the brine disposal wells would be limited to a total of 1.4 acres (0.28 acre per well).

The first pipeline corridor would consist of 2.6 miles of a 150-foot-wide corridor (for two pipelines), while the second corridor would disturb an additional 9.2 miles of 125-foot-wide corridor. The total acreage for construction of the pipelines would be about 188 acres. Following construction, about 88.5 acres would be maintained for 75- and 60-foot-wide permanent pipeline rights-of-way; the remaining acreage would be restored and allowed to revert to former uses. About 10 miles of the proposed pipeline route parallels

[1] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies of appendices were sent to all those receiving this notice in the mail and are available at *http://www.ferc.gov* using the link called ''eLibrary'' or from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

an existing Columbia Gulf natural gas pipeline right-of-way.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us to discover and address concerns the public may have about proposals. This process is referred to as ''scoping''. The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. All comments received will be considered during the preparation of the EA.

In the EA we [2] will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- Geology and soils;
- Land use;
- Water resources, fisheries, and wetlands;
- Cultural resources;
- Vegetation and wildlife;
- Air quality and noise;
- Endangered and threatened species;
- Hazardous waste; and
- Public safety.

We will also evaluate possible alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

Our independent analysis of the issues will be presented in the EA. Depending on the comments received during the scoping process, the EA may be published and mailed to those on our environmental mailing list (*see* discussion of how to remain on our mailing list on page 6). A comment period will be allotted for review if the EA is published. We will consider all comments on the EA before we make our recommendations to the Commission. To ensure your comments are considered, please carefully follow the instructions in the Public Participation section below.

With this notice, we are asking agencies with jurisdiction and/or special expertise with respect to environmental issues to formally cooperate with us in the preparation of the EA. These agencies may choose to participate once they have evaluated the proposal relative to their responsibilities. Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your written comments are timely and properly recorded, please send in your comments so that they will be received in Washington, DC on or before July 27, 2009.

For your convenience, there are three methods which you can use to submit your written comments to the Commission. The Commission encourages electronic filing of comments and has expert eFiling staff available to assist you at 202–502–8258 or *efiling@ferc.gov.*

(1) You may file your comments electronically by using the Quick Comment feature, which is located at *http://www.ferc.gov* under the link called ''Documents and Filings''. A Quick Comment is an easy method for interested persons to submit text-only comments on a project;

(2) You may file your comments electronically by using the ''eFiling'' feature that is listed under the ''Documents and Filings'' link. eFiling involves preparing your submission in the same manner as you would if filing on paper, and then saving the file on your computer's hard drive. You will attach that file to your submission. New eFiling users must first create an account by clicking on the links called ''Sign up'' or ''eRegister''. You will be asked to select the type of filing you are making. A comment on a particular project is considered a ''Comment on a Filing''; or

(3) You may file your comments with the Commission via mail by sending an original and two copies of your letter to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Room 1A, Washington, DC 20426.

In all instances, please reference the project docket number CP09–418–000 with your submission. Label one copy of the comments for the attention of Gas Branch 2, PJ–11.2.

Environmental Mailing List

An effort is being made to send this notice to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project. This includes all landowners who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities (as defined in the Commission's regulations).

If you do not want to send comments at this time but still want to remain on our mailing list, please return the Information Request (appendix 2). If you do not return the Information Request, you will be taken off the mailing list.

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an ''intervenor,'' which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are included in the User's Guide under the ''e-filing'' link on the Commission's Web site.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC or on the Internet at *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, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, contact (202)502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. Go to *http://www.ferc.gov/esubscribenow.htm.*

[2] ''We'', ''us'', and ''our'' refer to the environmental staff of the Commission's Office of Energy Projects.

Finally, public meetings or site visits will be posted on the Commission's calendar located at *http://www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–15898 Filed 7–6–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. NP09–26–000]

North American Electric Reliability Corporation; Notice of Filing Regarding Notice of Penalty and Request for Decision on Jurisdiction Issue

June 26, 2009.

Take notice that on June 24, 2009, the North American Electric Reliability Corporation (NERC) submitted a Notice of Penalty regarding U.S. Army Corps of Engineers (Corps) Tulsa District in the Texas Regional Entity region. NERC's filing includes a discussion of the applicability of mandatory Reliability Standards to the Corps Tulsa District. NERC states that the Corps Tulsa District has challenged NERC's jurisdiction under section 215 of the Federal Power Act (FPA). Therefore, NERC requests that the Commission issue a decision on the jurisdictional issue regarding the applicability mandatory Reliability Standards under section 215 of the FPA to the Corps and other Federal agencies. Accordingly, public comment is sought regarding the applicability of mandatory Reliability Standards under section 215 of the FPA to the Corps and other Federal agencies.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on July 24, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–15896 Filed 7–6–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13442–000]

McGinnis, Inc.; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

June 26, 2009.

On April 29, 2009, McGinnis, Inc. filed an application, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Robert C. Byrd Hydrokinetic Project No. 13442, to be located on the Ohio River, in Mason County, West Virginia, and Gallia County, Ohio.

The proposed Robert C. Byrd Project would be located just downstream of the Robert C. Byrd Lock and Dam in an area of the Ohio River approximately 9,500-feet-long and 1,100-feet-wide and would consist of: (1) A single barge suspending up to 10 axial flow turbine generators into the river with a total installed capacity of 350 kilowatts; (2) a new 300 to 8,000-foot-long, 13.5-kV transmission line; and (3) appurtenant facilities. The project would have an estimated average annual generation of 1,533 megawatt-hours.

Applicant Contact: Mr. Bruce D. McGinnis, Sr., P.O. Box 534, 502 Second Street Ext., South Point, Ohio 45680, (740) 377–4391.

FERC Contact: Tom Dean, (202) 502–6041.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''eFiling'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13442) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–15897 Filed 7–6–09; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2008–0281; FRL–8927–1]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NESHAP for Publicly Owned Treatment Works (Renewal), EPA ICR Number 1891.05, OMB Control Number 2060–0428

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before August 6, 2009.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2008–0281, to (1) EPA online using *http://www.regulations.gov* (our preferred method), or by e-mail to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 28221T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Learia Williams, Compliance Assessment and Media Programs Division, Office of Compliance, Mail Code 2223A, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564–4113; fax number: (202) 564–0050; e-mail address: *williams.learia@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On May 30, 2008 (73 *FR* 31088), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2008–0281, which is available for public viewing online at *http://www.regulations.gov* and in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1752.

Use EPA's electronic docket and comment system at *http://www.regulations.gov*, to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper will be made available for public viewing at *http://www.regulations.gov*, as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov*.

Title: NESHAP for Publicly Owned Treatment Works (Renewal).

ICR Numbers: EPA ICR Number 1891.05, OMB Control Number 2060–0428.

ICR Status: This ICR is schedule to expire on August 31, 2009. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. 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. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The National Emission Standards for Hazardous Air Pollutants (NESHAP) for Publicly Owned Treatment Works were proposed on December 1, 1998 and promulgated on October 26, 1999. These regulations apply to owners or operators of waste treatment processes and operations in the publicly owned treatment works (POTW) source category.

All new sources must be in compliance with subpart VVV upon startup or the promulgation date, whichever is later. Owners and operators of affected sources are subject to the requirements of 40 CFR part 63, subpart A, the General Provisions, unless the regulation specifies otherwise. New sources constructed or reconstructed after the effected date of the standard are required to submit an application for approval of construction or reconstruction.

Generally, respondents are required to submit one-time reports of: (1) Start of construction of new facilities, and (2) anticipated and actual startup dates for new facilities. The subpart also requires new affected sources to submit a notification of compliance status.

Emission and control requirements for ''existing'' industrial POTWs are specified by the appropriate NESHAP for the industrial user. In addition, there are no control requirements for ''existing'' non-industrial POTW treatment plants. Therefore, there are no subpart VVV recordkeeping or reporting requirements for ''existing'' sources covered by this ICR.

Any owner or operator subject to the provisions of this subpart must maintain a file of these measurements, and retain the file for at least five years following the collection of such measurements, maintenance reports, and records. All reports are sent to the delegated State or local authority. In the event that there is no such delegated authority, the reports are sent directly to the EPA regional office.

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. The OMB Control Numbers for EPA regulations listed in 40 CFR part 9 and 48 CFR chapter 15 are identified on the form and/or instrument, if applicable.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average one hour per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose and provide information to or for a Federal agency. This includes the time needed to review instructions, develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information. All existing ways will have to adjust to comply with any previously applicable instructions and requirements that have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Publicly owned treatment works.

Estimated Number of Respondents: 6.

Frequency of Response: On occasion, initially, semiannually and annually.

Estimated Total Annual Hour Burden: 14.

Estimated Total Annual Cost: $1,114.06 in labor costs exclusively. There are neither capital/startup nor operation and maintenance costs.

Changes in the Estimates: There is no change in the total estimated burden currently identified in the OMB inventory of Approved ICR Burdens. This is due to two considerations: (1)

The regulations have not changed over the past three years and are not anticipated to change over the next three years; and (2) the current growth rate for the industry is very low, negative or nonexistent, so there is no significant change in the overall burden.

Dated: June 30, 2009.

John Moses,

Director, Collection Strategies Division.

[FR Doc. E9–16008 Filed 7–6–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8927–4]

Science Advisory Board Staff Office Notification of an Upcoming Meeting of the Science Advisory Board Environmental Engineering Committee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA or Agency) Science Advisory Board (SAB) Staff Office announces a public face-to-face meeting of the SAB Environmental Engineering Committee (EEC). The EEC augmented with additional members will conduct a consultation on EPA's Aging Drinking Water and Wastewater Infrastructure Research Initiative.

DATES: The meeting dates are Tuesday, July 21, 2009 from 8:30 a.m. to 5 p.m. (Eastern Daylight Time) and Wednesday, July 22, 2009 from 8 a.m. to 12 noon (Eastern Daylight Time).

ADDRESSES: The Committee meeting will be held at the Kingsgate Marriott Conference Hotel at the University of Cincinnati, 151 Goodman Drive, Cincinnati, Ohio, 45219.

FOR FURTHER INFORMATION CONTACT: Members of the public who wish to obtain additional information regarding this meeting may contact Mr. Edward Hanlon, Designated Federal Officer (DFO), EPA Science Advisory Board (1400F), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC, 20460; telephone/voice mail: (202) 343–9946; fax (202) 233–0643; or via e-mail at *hanlon.edward@epa.gov.* General information about the EPA SAB as well as any updates concerning the meeting announced in this notice, may be found on the SAB Web site at *http://www.epa.gov/sab.* Any inquiry regarding EPA's Aging Drinking Water and Wastewater Infrastructure Research Initiative should be directed to Dr. Thomas Speth, EPA Office of Research and Development (ORD), at *speth.thomas@epa.gov* or (513) 569–7208.

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act, 5 U.S.C., App. 2 (FACA), notice is hereby given that the SAB Environmental Engineering Committee augmented with additional experts will hold a public meeting to discuss comments on EPA's Aging Drinking Water and Wastewater Infrastructure Research Initiative. The SAB was established pursuant to 42 U.S.C. 4365 to provide independent scientific and technical advice to the Administrator on the technical basis for Agency positions and regulations. The SAB is a Federal Advisory Committee chartered under FACA. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

Background: As discussed in the Federal Register Notice dated March 31, 2009 (74 FR 14553–14555) announcing this advisory activity, EPA's ORD initiated a research program in 2007 to improve and evaluate innovative technologies and techniques for reducing the cost and improving the effectiveness of operations, maintenance, and replacement of aging and failing systems for drinking water and wastewater treatment and conveyance. The outputs from this research program are intended to assist EPA's program and regional offices to implement Clean Water Act and Safe Drinking Water Act requirements; to help states and tribes meet their programmatic requirements; and to assist utilities to more effectively implement comprehensive management of drinking water and wastewater treatment and conveyance systems, provide reliable service to their customers, and meet their statutory requirements. In response to a request from EPA's ORD, the augmented EEC will hold a public meeting to provide comments on the suitability and appropriateness of completed, existing and upcoming research projects; whether additional projects are needed; and the overall scope of the initiative. Additional information about this consultative activity including a meeting agenda will be posted on the SAB Web site prior to the meeting at *http://www.epa.gov/sab.*

Availability of Meeting Materials: The agenda and other meeting materials will be available on the SAB Web site at *http://www.epa.gov/sab* in advance of the meeting.

Procedures for Providing Public Input: Interested members of the public may submit relevant written or oral information for the SAB EEC to consider during the advisory process. *Oral Statements:* In general, individuals or groups requesting an oral presentation at a public face-to-face meeting will be limited to five minutes per speaker, with no more than a total of one hour for all speakers. Each person making an oral statement should consider providing written comments as well as their oral statement so that the points presented orally can be expanded upon in writing. Interested parties should contact Edward Hanlon, DFO, in writing (preferably via e-mail) at the contact information noted above, by July 14, 2009 to be placed on the list of public speakers for the meeting. *Written Statements:* Written statements should be received in the SAB Staff Office by July 14, 2009 so that the information may be made available to the Committee members for their consideration. Written statements should be supplied to the DFO in the following formats: one hard copy with original signature, and one electronic copy via e-mail (acceptable file format: Adobe Acrobat PDF, WordPerfect, MS Word, MS PowerPoint, or Rich Text files in IBM–PC/Windows 98/2000/XP format). Submitters are requested to provide versions of each document submitted with and without signatures, because the SAB Staff Office does not publish documents with signatures on its Web sites.

Accessibility: For information on access or services for individuals with disabilities, please contact Edward Hanlon at the phone number or e-mail address noted above, preferably at least ten days prior to the public face-to-face meeting to give EPA as much time as possible to process your request.

Dated: June 29, 2009.

Anthony F. Maciorowski,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. E9–16005 Filed 7–6–09; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

June 23, 2009.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the

following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501–3520. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before September 8, 2009. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via internet at *Nicholas_A._Fraser@omb.eop.gov* and to *Judith-B.Herman@fcc.gov,* Federal Communications Commission, or an e-mail to *PRA@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information, contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION: *OMB Control Number:* 3060–1031.

Title: Commission's Initiative to Implement Enhanced 911 (E911) Emergency Services.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit; not-for-profit institutions; Federal Government; and State, local or tribal government.

Number of Respondents: 858 respondents; 1,992 responses.

Estimated Time per Response: 2–4 hours per requirement.

Frequency of Response: On occasion reporting requirement, recordkeeping requirement and third party disclosure requirement.

Obligation to Respond: Voluntary. Statutory authority for this information collection is contained in 47 U.S.C. sections 154, 160, 201, 251–254, 303 and 332 unless otherwise noted.

Total Annual Burden: 10,168 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Needs and Uses: The Commission will submit this information collection to the Office of Management and Budget (OMB) after this 60 day comment period in order to obtain the full three year clearance from them. The Commission is requesting an extension (no change in the reporting, recordkeeping and/or third party certification and notification requirements) of this information collection. There is a change in the estimated respondents/responses and the annual burden hours. The Commission is reporting 834 additional responses. Therefore, the total annual burden hour estimate has increased by 3,592 total annual burden hours. This change is due to a recalculation of all the estimates for each requirement in the Supporting Statement. Pursuant to the Commission's E911 rules, a wireless carrier must provide E911 service to a particular Public Safety Answering Point (PSAP) within six months if that PSAP makes a request for the service and is capable of receiving and utilizing the information provided. In the City of Richardson Order, the Commission adopted rules clarifying what constitutes a valid PSAP request so as to trigger a wireless carrier's obligation to provide service to a PSAP within six months.

In November 2002, the Commission released the City of Richardson Order on Reconsideration, modifying its E911 rules to provide additional clarification on the issue of PSAP readiness. The Commission's actions were intended to facilitate the E911 implementation process by encouraging parties to communicate with each other early in the implementation process, and to maintain a constructive, on going dialog throughout the implementation process.

The Order contained three information collection requirements subject to the Paperwork Reduction Act for which the Commission seeks continued OMB approval:

(a) The Commission established a procedure whereby wireless carriers that have completed all necessary steps toward E911 implementation that are not dependent on PSAP readiness may have their compliance obligation temporarily tolled, if the PSAP is not ready to receive the information at the end of the six-month period, and the carrier files a certification to that effect with the Commission.

(b) As part of the certification and notification process (third party disclosure requirements), a carrier must notify the PSAP of its intent to file a certification with the Commission that the PSAP is not ready to receive and use the information. The PSAP is permitted to send a response to the carriers' notification to affirm that it is not ready to receive E911 information or to challenge the carrier's characterization of its state of readiness. Carriers are required to include any response they receive from the PSAP to their certification filing to the Commission.

(c) The Commission clarified that nothing in its rules prevented wireless carriers and PSAPs from mutually agreeing to an E911 deployment schedule at variance with the schedule contained in the Commission's rules. Carriers and PSAPs may choose to participate in the certification and private negotiation process. The Commission does not require participation.

The Commission will use the certification filings from wireless carriers to determine each carrier's compliance with its E911 obligations. The Commission will review carrier certifications to ensure that carriers have sufficiently explained the basis for their conclusion that a particular PSAP will not be ready and have identified all of the specific steps the PSAP has taken to provide the requested service. The Commission retains the discretion to investigate a carrier's certification and take enforcement action if appropriate.

The requirement that carriers notify affected PSAPs in writing of their challenge, including a copy of the certification, will afford PSAPs an opportunity to review proposed certifications and present their respective views about their readiness to receive and use E911 information to the carrier and the Commission. The Commission will review the PSAP responses to determine whether there are any PSAP objections to particular certification filings. The clarification regarding mutually agreed upon alternative implementation schedules necessarily entails a third-party contact information burden. However, the affected entities will receive the benefit of being able to adopt an E911 implementation schedule best suited to the specific circumstances.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E9–15930 Filed 7–6–09; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

June 30, 2009.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act (PRA) of 1995, Public Law No. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. Pursuant to the PRA, no person shall be subject to any penalty for failing to comply with a collection of information that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written PRA comments should be submitted on or before September 8, 2009. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Interested parties may submit all PRA comments by e-mail or U.S. mail. To submit your comments by e-mail, send them to *PRA@fcc.gov.* To submit your comments by U.S. mail, mark them to the attention of Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, send an e-mail to *PRA@fcc.gov* or contact Cathy Williams at 202–418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Numbers: 3060–1086.

Title: Section 74.786, Digital Channel Assignments; Section 74.787, Digital Licensing; Section 74.790, Permissible Service of Digital TV Translator and LPTV Stations; Section 74.794, Digital Emissions, and Section 74.796, Modification of Digital Transmission Systems and Analog Transmission Systems for Digital Operation.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for profit entities; Not for profit institutions; State, local or Tribal government.

Number of Respondents/Responses: 8,533 respondents; 34,790 responses.

Estimated Hours per Response: 0.50–4 hours.

Frequency of Response: Recordkeeping requirement; One-time reporting requirement; Third party disclosure requirement.

Total Annual Burden: 55,542 hours.

Total Annual Cost: $95,767,200.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Section 301 of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Privacy Act Assessment: No impact(s).

Needs and Uses: On May 8, 2009, the Commission adopted the Report and Order, In the Matter of Amendments of Parts 73 and 74 of the Commission's Rules to Establish Rules for Replacement Digital Low Power Television Translator Stations; MB Docket No. 08–253, FCC 09–36 (released May 8, 2009).

In this Report and Order, the Commission created a new ''replacement'' digital television translator service to permit full-service television stations to continue to provide service to viewers within their analog coverage areas who have lost service as a result of those stations' digital transition. Replacement digital translators can be licensed solely on digital television channels 2 through 51 and with secondary frequency status. Unlike other television translator licenses, the replacement digital television translator license will be associated with the full-service station's main license and will have the same four letter call sign as its associated main station. As a result, a replacement digital television translator license may not be separately assigned or transferred and will be renewed or assigned along with the full-service station's main license. Almost all other rules associated with television translator stations are applied to replacement digital television translators.

Moreover, the Report and Order adopts an information collection requirement contained in 47 CFR 74.787(a)(5)(i). 47 CFR 74.787(a)(5)(i) states that an application for a replacement digital television translator may be filed by a full-service television station that can demonstrate that a portion of its analog service area will not be served by its full, post-transition digital facilities. The service area of the replacement digital television translators shall be limited to only a demonstrated loss area. However, an applicant for a replacement digital television translator may propose a de minimis expansion of its full-service pre-transition analog service area upon demonstrating that it is necessary to replace its post-transition analog loss area.

Congress has mandated that after June 12, 2009, full-power television broadcast stations must transmit only in digital signals, and may no longer transmit analog signals. Therefore, this collection of information will allow full-power DTV stations to use replacement digital television translators to meet their statutory responsibilities and begin operations on their final, post-transition (digital) channels by their construction deadlines. Replacement digital television translators will provide DTV broadcasters with an important tool for providing optimum signal coverage to their pre-transition analog viewers. For some broadcasters, replacement digital television translators may offer the only option for continuing to provide over-the-air service to pre-transition analog viewers.

The DTV information collection requirement contained in the Report and Order and 47 CFR 74.787(a)(5)(i) must stay in effect after June 12, 2009, the date of the Congressionally mandated full-power digital transition, and for the full OMB three-year approval period. Full-power broadcast stations may require additional adjustments in their facilities, including the new construction of replacement digital translators, as their transition to digital mode is optimized, and they come to better comprehend their new digital service contours. The extent of these adjustments, including the new construction of replacement digital translators, is not fully known at this time because of the new nature of the full-power digital television service.

The following information collection requirements are also contained in this information collection:

47 CFR 74.786(d) requires that digital LPTV and TV translator stations assigned to these channels as a companion digital channel demonstrate

that a suitable in-core channel is not available. The demonstration will require that the licensee conduct a study to verify that an in-core channel is not available.

47 CFR 74.786(d) further requires that digital LPTV and TV translator stations proposing use of channels 52–59 notify all potentially affected 700 MHz wireless licensees of their proposed operation not less than 30 days prior to the submission of their application. These applicants must notify wireless licensees of the 700 MHz bands comprising the same TV channel and the adjacent channel within who licensed geographic boundaries the digital LPTV or TV translator station is proposed to be located, and they must also notify licensees of co-channel and adjacent channel spectrum whose service boundaries lie within 75 miles and 50 miles respectively of their proposed station location.

47 CFR 74.786(e) allows assignment of UHF channels 60 to 69 to digital LPTV or TV translator stations for use as a digital conversion channel provided that stations proposing use of these channels notify all potentially affected 700 MHz wireless licensees of their proposed operation not later than 30 days prior to the submission of their application.

47 CFR 74.786(e) further provides that digital LPTV and TV translator stations proposing use of UHF channel 63, 64, 68, and 69 (public safety frequencies) as a digital conversion channel must secure a coordinated spectrum use agreement with the pertinent 700 MHz public safety regional planning committee and state administrator prior to the submission of their application.

47 CFR 74.786(e) Digital LPTV and TV translator stations proposing use of channels 62, 65, and 67 must notify the pertinent regional planning committee and state administrator of their proposed operation not later than 30 days prior to submission of their application.

47 CFR Section 74.787(a)(2)(iii) provides that mutually exclusive LPTV and TV translator applicants for companion digital stations will be afforded an opportunity to submit in writing to the Commission, settlements and engineering solutions to resolve their situation.

47 CFR 74.787(a)(3) provides that mutually exclusive applicants applying for construction permits for new digital stations and for major changes to existing stations in the LPTV service will similarly be allowed to submit in writing to the Commission, settlements and engineering solutions to rectify the problem.

47 CFR 74.787(a)(4) provides that mutually exclusive displacement relief applicants filing applications for digital LPTV and TV translator stations may be resolved by submitting settlements and engineering solutions in writing to the Commission.

47 CFR 74.790(f) permits digital TV translator stations to originate emergency warnings over the air deemed necessary to protect and safeguard life and property, and to originate local public service announcements (PSAs) or messages seeking or acknowledging financial support necessary for its continued operation. These announcements or messages shall not exceed 30 seconds each, and be broadcast no more than once per hour.

47 CFR 74.790(e) requires that a digital TV translator station shall not retransmit the programs and signal of any TV broadcast or DTV broadcast station(s) without prior written consent of such station(s). A digital TV translator operator electing to multiplex signals must negotiate arrangements and obtain written consent of involved DTV station licensee(s).

47 CFR 74.790(g) requires a digital LPTV station who transmits the programming of a TV broadcast or DTV broadcast station received prior written consent of the station whose signal is being transmitted.

47 CFR 74.794 mandates that digital LPTV and TV translator stations operating on TV channels 22–24, 32–36, 38, and 65–69 with a digital transmitter not specifically FCC-certificated for the channel purchase and utilize a low pass filter or equivalent device rated by its manufacturer to have an attenuation of at least 85 dB in the GPS band. The licensees must retain with their station license a description of the low pass filter or equivalent device with the manufacturer's rating or a report of measurements by a qualified individual.

47 CFR 74.796(b)(5) requires digital LPTV or TV translator station licensees that modify their existing transmitter by use of a manufacturer-provided modification kit would need to purchase the kit and must notify the Commission upon completion of the transmitter modifications. In addition, digital LPTV or TV translator station licensees that modify their existing transmitter and do not use a manufacturer-provided modification kit, but instead perform custom modification (those not related to installation of manufacturer-supplied and FCC-certified equipment) must notify the Commission upon completion of the transmitter modifications and shall certify compliance with all applicable transmission system requirements.

47 CFR 74.796(b)(6) provides that operators who modify their existing transmitter by use of a manufacturer-provided modification kit must maintain with the station's records for a period of not less than two years, and will make available to the Commission upon request, a description of the nature of the modifications, installation and test instructions, and other material provided by the manufacturer, the results of performance-tests and measurements on the modified transmitter, and copies of related correspondence with the Commission. In addition, digital LPTV and TV translator operators who custom modify their transmitter must maintain with the station's records for a period of not less than two years, and will make available to the Commission upon request, a description of the modifications performed and performance tests, the results of performance-tests and measurements on the modified transmitter, and copies of related correspondence with the Commission.

Protection of Analog LPTV. In situations where protection of an existing analog LPTV or translator station without a frequency offset prevents acceptance of a proposed new or modified LPTV, TV translator, or Class A station, the Commission requires that the existing non-offset station install at its expense offset equipment and notify the Commission that it has done so, or, alternatively, negotiate an interference agreement with the new station and notify the Commission of that agreement.

Resolving Channel Conflict. The Commission requires that wireless licensees operating on channels 52–59 and 60–69 notify (by certified mail, return receipt requested) a digital LPTV or TV translator licensee operating on the same channel of first adjacent channel of its intention to initiate or change wireless operations and the likelihood of interference from the LPTV or translator station within its licensed geographic service area. This notification should describe the facilities, associated service area, and operation of the wireless licensee with sufficient detail to permit an evaluation of the likelihood of interference.

Marlene H. Dortch,

Secretary, Federal Communications Commission.

[FR Doc. E9–15934 Filed 7–6–09; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted to OMB for Review and Approval, Comments Requested

June 30, 2009.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before August 6, 2009. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via Internet at *Nicholas_A._Fraser@omb.eop.gov* or via fax at (202) 395–5167 and to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC or via Internet at *Cathy.Williams @fcc.gov* or *PRA@fcc.gov.* To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB control number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.''

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0113.

Type of Review: Revision of a currently approved collection.

Title: Broadcast EEO Program Report, FCC Form 396.

Form Number: FCC Form 396.

Respondents: Business or other for-profit entities; Not-for-profit institutions.

Number of Respondents and Responses: 2,000 respondents and 2,000 responses.

Estimated Time per Response: 1.5 hours.

Frequency of Response: At time of renewal reporting requirement.

Obligation to Respond: Required to obtain benefits. The statutory authority for this collection of information is contained in Sections 154(i) and 303 of the Communications Act of 1934, as amended.

Confidentiality: No need for confidentiality required.

Total Annual Burden: 3,000 hours.

Total Annual Cost: $200,000.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: The Broadcast Equal Employment Opportunity (EEO) Program Report, FCC Form 396, is a device that is used to evaluate a broadcaster's EEO program to ensure that satisfactory efforts are being made to comply with FCC's EEO requirements. FCC Form 396 is required to be filed at the time of renewal of license by all AM, FM, TV, Low Power TV and International stations.

The Commission is revising this collection to remove the information collection requirements associated with OMB control number 3060–0120 (FCC Form 396–A) from the collection. Collection 3060–0120 was previously consolidated into information collection 3060–0113. The collections (3060–0113 and 3060–0120) are really different in nature and should not be consolidated. Therefore, we are requesting that they remain as two separate collections.

OMB Control Number: 3060–0120.

Type of Review: Reinstatement of a previously approved collection.

Title: Broadcast EEO Program Report, FCC Form 396–A.

Form Number: FCC Form 396–A.

Respondents: Business or other for-profit entities; Not-for-profit institutions.

Number of Respondents: 5,000.

Estimated Time per Response: 1 hour.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Required to obtain benefits. The statutory authority for this collection of information is contained in Sections 154(i) and 303 of the Communications Act of 1934, as amended.

Confidentiality: No need for confidentiality required.

Total Annual Burden: 5,000 hours.

Total Annual Cost: None.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: The Broadcast Equal Employment Opportunity (EEO) Model Program Report, FCC Form 396–A, is filed in conjunction with applicants seeking authority to construct a new broadcast station, to obtain assignment of construction permit or license and/or seeking authority to acquire control of an entity holding construction permit or license. This program is designed to assist the applicant in establishing an effective EEO program for its station. The Commission is requesting reinstatement of OMB control number 3060–0120 by OMB. The collection was previously consolidated into information collection 3060–0113. The collections (3060–0113 and 3060–0120) are really different in nature and should not be consolidated. Therefore, we are requesting that they remain as two separate collections.

OMB Control Number: 3060–0647.

Title: Annual Survey of Cable Industry Prices (''Price Survey'').

Form Number: FCC Form 333.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; State, local or Tribal Government.

Number of Respondents and Responses: 758 respondents and 758 responses.

Estimated Time per Response: 10 hours.

Frequency of Response: Annual reporting requirement.

Total Annual Burden: 7,580 hours.

Total Annual Cost: None.

Obligation to Respond: Mandatory. The statutory authority for this information collection is contained in Sections 4(i) and 623(k) of the

Communications Act of 1934, as amended. Nature and Extent of Confidentiality: If individual respondents to this survey wish to request confidential treatment of any data provided in connection with this survey, they can do so upon written request, in accordance with Sections 0.457 and 0.459 of the Commission's rules. To receive confidential treatment of their data, respondents need only describe the specific information they wish to protect and provide an explanation of why such confidential treatment is appropriate.

Privacy Impact Assessment: No impact(s).

Needs and Uses: Section 623(k) of the Cable Television Consumer Protection and Competition Act of 1992 requires the Commission to publish annually a statistical report on average rates for basic cable service, cable programming service, and equipment. The report must compare the prices charged by cable operators subject to ''effective competition'' and those not subject to effective competition. The data needed to prepare this report is collected using the annual cable industry Price Survey.

Marlene H. Dortch,

Secretary, Federal Communications Commission.

[FR Doc. E9–15936 Filed 7–6–09; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL ELECTION COMMISSION

[Notice 2009–11]

Advisory Opinion Procedure

AGENCY: Federal Election Commission.

ACTION: Notice of New Advisory Opinion Procedures and Explanation of Existing Procedures.

SUMMARY: The Commission is establishing a program to allow persons requesting an advisory opinion, or their counsel, a limited opportunity to appear before the Commission. The purpose of their appearances is to answer questions from the Commission at the open meeting during consideration of the requestor's draft advisory opinion.

DATES: *Effective Date:* July 7, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Robert M. Knop, Assistant General Counsel, or Mr. Neven F. Stipanovic, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Federal Election Commission is implementing a program allowing persons requesting advisory opinions, or their counsel, to answer questions at the open meeting during consideration of an advisory opinion draft.

I. Background

On January 14 and 15, 2009, the Commission held a public hearing on possible changes to a number of its policies, practices, and procedures, including possible changes to the advisory opinion process. Information about the hearing is available on the Commission Web site at *http://www.fec.gov/law/policy/enforcement/publichearing011409.shtml.* The Commission received several public comments regarding the advisory opinion process. One issue generating significant attention was whether advisory opinion requestors, or their counsel, should be allowed to appear before the Commission during the advisory opinion process. After reviewing the public comments, the Commission has decided to allow requestors, or their counsel, to appear at the open meeting during consideration of an advisory opinion draft. The specific procedures are explained below.

A. Existing Advisory Opinion Procedures

Any person may request an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended (the ''Act''), or Commission regulations, to a specific transaction or activity by the person.[1] *See* 2 U.S.C. 437f; 11 CFR part 112. Requestors or their counsel (''Requestors'') must submit their request in writing. 11 CFR 112.1. The Commission, in turn, must issue an advisory opinion within 60 days of receiving a complete advisory opinion request. 2 U.S.C. 437f(a)(1). The 60-day deadline is reduced to 20 days when a Federal candidate or a candidate's authorized committee submits a complete request within 60 days of a Federal election. 2 U.S.C. 437f(a)(2). At times, the Commission expedites certain highly significant, time-sensitive requests and issues these advisory opinions within 30 days. *See infra* Section I(E). Advisory opinions are issued if approved by at least four Commissioners.

Members of the public have two distinct opportunities to participate in the advisory opinion process. First, they may submit written comments on the advisory opinion request, which is released to the public and posted on the Commission's Web site as soon as it becomes complete. 11 CFR 112.2; 112.3. Second, they may submit written comments on a draft advisory opinion, which typically is provided to the Requestor and made available to the public prior to the Commission meeting at which the advisory opinion will be considered.

B. Proposed Revisions to the Advisory Opinion Process

At the public hearing held on January 14 and 15, 2009, those commenters who addressed the advisory opinion process generally agreed that the Requestor should be allowed to appear before the Commission when the Commission considers the advisory opinion draft. The main concern with the existing advisory opinion process was the Requestor's inability to respond to Commissioners' questions during the open meeting. The commenters noted that when they represented Requestors, they sometimes found it frustrating to sit in the audience during the open meeting when the Commission was considering their request, with no opportunity to respond when Commissioners raised questions. To address this concern, the Commission is implementing a new procedure that would allow Requestors to appear before the Commission to answer questions at the open meeting when the Commission considers the Requestor's draft advisory opinion.

The Commission believes that this procedure will promote transparency and fairness, while ensuring that advisory opinions continue to be issued in an efficient and timely manner. It would permit the Requestors to answer directly Commissioners' questions. These appearances may clear up ambiguous or conflicting statements in the Requestors' written submissions or allow the Commission to obtain additional information where the Requestor's previous discussions with Office of General Counsel (''OGC'') attorneys did not provide an answer. Allowing Requestors to appear would help ensure that the Commission fully considers all significant aspects of the proposed transaction or activity before voting on the advisory opinion. Appearances by Requestors may also help some Requestors to understand better the basis for the Commission's decision.

Some commenters suggested that the Commission should hold formal oral hearings on advisory opinion requests, similar to the probable cause hearings the Commission holds in enforcement matters, before it considers and votes on draft advisory opinions. *See* Procedural

[1] The Act defines ''person'' as an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons. 2 U.S.C. 431(11).

Rules for Probable Cause Hearings, 72 FR 64919 (Nov. 19, 2007). The Commission believes that a broader opportunity for an oral presentation is not needed and would prove unworkable within the short statutory deadlines for issuing advisory opinions. These 60- and 20-day statutory deadlines preclude more extensive oral hearings at an earlier point in the process. The Commission would have to devote significant resources to arranging and preparing for oral presentations, thereby reducing the already limited time available for drafting and considering opinions responding to advisory opinion requests. While extensions may be arranged if necessary, as the Commission has done in the past, allowing extensions on a regular basis could undermine the statutory directive to issue advisory opinions within 60 or 20 days. Furthermore, because Requestors already have multiple opportunities to participate in the advisory opinion process, an additional oral hearing would not significantly benefit them or the advisory opinion process.

One commenter at the public hearing suggested that third-party commenters in the advisory opinion process should be allowed to appear before the Commission; other commenters disagreed. The Act specifically provides that the Commission shall issue an advisory opinion ''with respect to a specific transaction or activity by the person'' who submitted the request. 2 U.S.C. 437f(a)(1). Accordingly, under the new program, third-party commenters would not be allowed to make oral presentations. Requestors would be permitted to appear only for the limited purpose of addressing questions raised by the Commission. Commenters already have an opportunity to submit written comments on the request, as well as on the draft advisory opinion. Moreover, arranging an oral hearing within the 60- or 20-day statutory deadlines for all interested parties who wish to testify would be inefficient and impractical.

Another issue raised at the public hearing was whether the Commission should transcribe oral presentations if it allowed Requestors to appear. The Commission currently does not transcribe open meetings, and the Commission does not intend to change this practice when Requestors or their counsel make an appearance, for two reasons. First, the transcripts would be an expense to the Commission while offering little added benefit to the Requestor. Second, the Commission already has podcasts of its open meetings available on the Commission Web site.

C. Notice of Intent To Appear Before the Commission

Requestors wishing to appear before the Commission to answer questions regarding their advisory opinion request shall have the opportunity to do so. Requestors must submit a written notice to the Commission in advance indicating that they will be available to respond to questions at the open meeting at which the advisory opinion request is to be considered. The notice must be received by the Office of the Commission Secretary (''OCS'') by e-mail, hand delivery, or fax no later than 48 hours prior to the scheduled open meeting. Requestors are responsible for ensuring that OCS timely receives the notice. In the event any advisory opinion draft response is not made available to the public and to the Requestor within one week (3 days for requests under the 20-day expedited procedure) prior to the Commission open meeting at which the advisory opinion request is to be considered, the Requestor shall have an automatic right to appear before the Commission, and no advance notice shall be required. *See infra* Section I(E).

The opportunity to appear before the Commission does not guarantee that Requestor will be able to address the Commission if no Commissioners have any questions of the Requestor. These appearances are voluntary, and no adverse inferences will be drawn if Requestors do not appear.

D. Open Meeting Procedures

Requestors who appear before the Commission shall take a seat at the witness table during consideration of their advisory opinion and respond to any questions Commissioners may have. Requestors who are unable to appear physically at an open meeting may participate remotely, subject to the Commission's technical capabilities. To ensure availability, Requestors wishing to participate remotely are advised to notify the OCS when they submit their notice of intent to appear.

Requestors' appearance is limited to answering Commissioners' questions; it is not an opportunity for Requestors to make extended oral presentations. The Commissioners, the General Counsel, and the Staff Director may ask Requestors questions appropriate or relevant to answering the advisory opinion request at hand. Commissioners also may ask the General Counsel and the Staff Director questions pertaining to the request. Any factual representations made at the open meeting will be considered definitive in the formulation of a final advisory opinion.

E. Improving Transparency and Timeliness of Advisory Opinion Procedures and Opportunity for Comment

In an effort to streamline the advisory opinion request process and to improve transparency and meaningful opportunity for public comment and Commission consideration of such comments, the Commission informally has implemented several procedures and proposes additional procedures, explained below.

Commission Self-Imposed Deadline for Draft Responses

In 1993, the Commission announced pilot procedures that would result in advisory opinion drafts to be made public for comment as soon as they are circulated to the Commission, and generally no later than close of business on the Thursday preceding the Commission's next open meeting at which the advisory opinion request is to be considered (generally the following Thursday). *See* Revision to Advisory Opinion Comment Procedure, 58 FR 62259 (Nov. 26, 1993). The timetable was to remain in effect for all advisory opinion requests received until May 31, 1994 and did not apply to expedited requests under 2 U.S.C. 437f(a)(2) and 11 CFR 112.4(b). *See infra.*

In this same spirit, for all advisory opinion requests subject to the 60-day deadline, the Commission will provide at least one draft response to the Requestor and the public no later than one week prior to the Commission open meeting at which the advisory opinion will be considered. This timetable will provide Requestors adequate time to decide whether to submit a notice to the Commission to appear at the meeting, as well as provide the public meaningful opportunity to submit comments on the draft and for the Commission to properly consider any such comments. For requests subject to the 20-day deadline, *see infra,* this timetable shall be shortened to provide a draft response no later than three business days prior to the open meeting at which the advisory opinion will be considered.

The Commission notes that, prior to the open meeting, additional advisory opinion draft responses may be produced after the initial draft(s) is released publicly. The Commission will make available to the public and to Requestors any and all additional draft responses as soon as possible. In the event any draft response is not released publicly until after the one-week/three-day deadlines, Requestors shall have an

automatic right to be heard at the meeting (limited to answering the Commissioners' questions, if any). *See supra* Section I(C).

The timetable described above is in addition to the existing 10-day deadline for accepting written public comments following the date the advisory opinion *request* is made public. *See* 2 U.S.C. 437f(d).

Expansion of 20-Day Expedited Process in Section 112.4(b) to Other Requestors

The Commission has an expedited procedure provided for in 2 U.S.C. 437f(a)(2) and implemented in 11 CFR 112.4(b) for certain advisory opinions. This expedited procedure is currently limited to any candidate or candidate's authorized committee that: (1) Submits a request within 60 calendar days preceding the date of an election for Federal office; (2) presents a specific transaction or activity related to the election; and (3) explains in the request the electoral connection. The Commission recognizes that this procedure does not apply to other entities or individuals, and in recognition of this will attempt to apply an expedited schedule to any entity or individual who, within 60 calendar days preceding the date of an election for Federal office, submits an advisory opinion request pertaining to a proposed public communication referencing a clearly identified Federal candidate.

The Commission notes that this new practice with respect to election-sensitive requests is in addition to the Commission's current, informal practice of expediting certain highly significant time-sensitive requests (whether or not relating to an upcoming election). The Commission endeavors to issue advisory opinions within 30 days under this general expedited process.

Withdrawal of Advisory Opinion Requests

A Requestor may withdraw an advisory opinion request at any time prior to the Commission vote on the request. Such withdrawal may be done in writing or on the record in the event a Requestor appears before the Commission.

Summary of Advisory Opinion Timetable

The following is a summary of the advisory opinion timetable, as modified by this program:

(1) Requestor submits advisory opinion request.

(2) Within 10 days of the submission of the request, OGC determines whether the request is ''complete'' and ''qualified.''

(3) The Commission shall provide 10 days for accepting written public comments on the advisory opinion request after the request is released to the public.

(4) One week prior to the open meeting at which the advisory opinion is to be considered (three days for expedited requests), the Commission will provide at least one draft response to the Requestor and the public for comment.

(5) Requestor may submit a notice indicating that they will be available to respond to questions from the Commission no later than 48 hours prior to the open meeting at which the advisory opinion is to be considered.

(6) In the event subsequent advisory opinion draft responses are made available to the public and Requestor after one week (or three days for 20-day expedited requests) prior to the open meeting at which the advisory opinion is to be considered, the Requestor shall have an automatic right to appear before the Commission.

II. Program Implementation

The new procedures for Requestors to appear before the Commission described in Sections I(B) through (D), *supra,* shall be in effect immediately upon the publication of this notice. The Commission will evaluate the new procedures and consider whether the procedures should, by an affirmative four votes of the Commission, be discontinued or modified. After one calendar year, the program will continue as a pilot program until such time that the Commission either terminates it by an affirmative four votes or makes it permanent by an affirmative four votes.

Dated: June 30, 2009.

On behalf of the Commission,

Steven T. Walther,

Chairman, Federal Election Commission.

[FR Doc. E9–15869 Filed 7–6–09; 8:45 am]

BILLING CODE 6715–01–P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–0281]

National Capital Region (NCR), Office of Child Care Services; Submission for OMB Review; General Services Administration (GSA) Child Care Specialist Feedback Form

AGENCY: NCR Office of Child Care Services, Public Buildings Service (PBS), GSA.

ACTION: Notice of request for comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the General Services Administration will be submitting to the Office of Management and Budget (OMB) a request to review and approve a previously approved information collection requirement. This information will be used to assess satisfaction with services delivered by staff from the Office of Child Care Services. The respondents are current users of the Office of Child Care Services. A request for public comments was published in the **Federal Register** at 74 FR 7065, February 12, 2009. No comments were received.

Public comments are particularly invited on: Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate and based on valid assumptions and methodology; and ways to enhance the quality, utility, and clarity of the information to be collected.

DATES: *Submit comments on or before:* August 6, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Leo G. Bonner, Regional Child Care Coordinator, Office of Child Care Services, at telephone (202) 401–7403 or via e-mail to *leo.bonner@gsa.gov.*

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to GSA Desk Officer, OMB, Room 10236, NEOB, Washington, DC 20503, and a copy to the Regulatory Secretariat (VPR), General Services Administration, 1800 F Street, NW., Room 4041, Washington, DC 20405. Please cite OMB Control No. 3090–0281, General Services Administration (GSA) Child Care Specialist Feedback Form, in all correspondence.

SUPPLEMENTARY INFORMATION:

A. Purpose

This information will be used to assess consumer satisfaction with services delivered by staff from the Office of Child Care Services.

B. Annual Reporting Burden

Respondents: 144.
Responses per Respondent: 1.
Hours per Response: .083 (5 minutes).
Total Burden Hours: 12.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from

the General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 3090–0281, General Services Administration (GSA) Child Care Specialist Feedback Form, in all correspondence.

Dated: June 29, 2009.

Casey Coleman,

Chief Information Officer.

[FR Doc. E9–15946 Filed 7–6–09; 8:45 am]

BILLING CODE 6820–A4–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0130]

Federal Acquisition Regulation; Submission for OMB Review; Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate. A request for public comments was published in the **Federal Register** at 74 FR 17664, April 16, 2009.

Public comments are particularly invited on: Whether this collection of information is necessary; whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before August 6, 2009.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: General Services Administration (GSA), OMB Desk Officer, Room 10236, NEOB, Washington, DC 20503, and send a copy to the Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405. Please cite OMB Control No. 9000–0130, Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate, in all correspondence.

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Procurement Analyst, Contract Policy Division, GSA, (202) 208–6925.

A. Purpose

Under the Free Trade Agreements Act of 1979, unless specifically exempted by statute or regulation, agencies are required to evaluate offers over a certain dollar limitation to supply an eligible product without regard to the restrictions of the Buy American Act or the Balance of Payments program. Offerors identify excluded end products and FTA end products on this certificate.

The contracting officer uses the information to identify the offered items which are domestic and FTA country end products so as to give these products a preference during the evaluation of offers. Items having components of unknown origin are considered to have been mined, produced, or manufactured outside the United States.

B. Annual Reporting Burden

Respondents: 1,083.
Responses Per Respondent: 5.
Annual Responses: 5,415.
Hours Per Response: .117.
Total Burden Hours: 634.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0130, Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate, in all correspondence.

Dated: June 23, 2009.

Al Matera,

Director, Office of Acquisition Policy.

[FR Doc. E9–15986 Filed 7–6–09; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0147]

Federal Acquisition Regulation; Information Collection; Pollution Prevention and Right-to-Know Information

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for comments regarding a renewal to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR), Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning Pollution Prevention and Right-to-Know Information.

Public comments are particularly invited on: Whether this collection of information is necessary; whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before September 8, 2009.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405. Please cite OMB Control No. 9000–0147, Pollution Prevention and Right-to-Know Information, in all correspondence.

FOR FURTHER INFORMATION CONTACT: Mr. William Clark, Procurement Analyst, Contract Policy Division at (202) 219–1813 or via e-mail to *william.clark@gsa.gov.*

A. Purpose

Federal Acquisition Regulation (FAR) Subpart 23.10, implements Executive Order (E.O.) 13148 of April 21, 2000, *Greening the Government through Leadership in Environmental Management,* and it also provides a means for agencies to obtain contractor information for the implementation of environmental management systems (EMSs) and the completion of facility compliance audits (FCAs) at certain Federal facilities. This information collection will be accomplished by means of Alternates I and II to FAR clause 52.223–5. Alternate I of 52.223–5 require contractors to provide information needed by a Federal facility to implement an EMS and Alternate II of 52.223–5 requires contractors to complete an FCA. FAR Subpart 23.10 and its associated contract clause at FAR 52.223–5 also implement the requirements of E.O. 13148 to require that Federal Facilities comply with the planning and reporting requirements of the Pollution Prevention Act (PPA) of 1990 (42 U.S.C. 13101–13109), and the Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986 (42 U.S.C. 11001–11050). The E.O.requires that contracts to be performed on a Federal facility provide for the contractor to supply to the Federal agency all information the Federal agency deems necessary to comply with these reporting requirements.

B. Annual Reporting Burden

Number of Respondents: 7,460.

Responses per Respondent: 1.

Annual Responses: 7,460.

Average Burden per Response: 2.834.

Total Burden Hours: 21,140.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0147, Pollution Prevention and Right-to-Know Information, in all correspondence.

Dated: June 29, 2009.

Al Matera,

Director, Office of Acquisition Policy.

[FR Doc. E9–15987 Filed 7–6–09; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0078]

Federal Acquisition Regulation; Information Collection; Make-or-Buy Program

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for reinstatement of an information collection requirement for an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve a reinstatement of a previously approved information collection requirement concerning Make-or-Buy Program.

Public comments are particularly invited on: Whether this collection of information is necessary; whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before September 8, 2009.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: General Services Administration (GSA), Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405. Please cite OMB Control No. 9000–0078, Make-or-Buy Program, in all correspondence.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Chambers, Procurement Analyst, Contract Policy Division, GSA, (202) 501–3221.

SUPPLEMENTARY INFORMATION:

A. Purpose

Price, performance, and/or implementation of socio-economic policies may be affected by make-or-buy decisions under certain Government prime contracts. Accordingly, FAR 15.407–2, Make-or-Buy Programs—

(i) Sets forth circumstances under which a Government contractor must submit for approval by the contracting officer a make-or-buy program, i.e., a written plan identifying major items to be produced or work efforts to be performed in the prime contractor's facilities and those to be subcontracted;

(ii) Provides guidance to contracting officers concerning the review and approval of the make-or-buy programs; and

(iii) Prescribes the contract clause at FAR 52.215–9, Changes or Additions to Make-or-Buy Programs, which specifies the circumstances under which the contractor is required to submit for the contracting officer's advance approval a notification and justification of any proposed change in the approved make-or-buy program.

The information is used to assure the lowest overall cost to the Government for required supplies and services.

B. Annual Reporting Burden

Respondents: 150.

Responses per Respondent: 3.

Total Responses: 450.

Hours per Response: 8.

Total Burden Hours: 3,600.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0078, Make-or-Buy Program, in all correspondence.

Dated: June 25, 2009.

Al Matera,

Director, Office of Acquisition Policy.

[FR Doc. E9–15984 Filed 7–6–09; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0029]

Federal Acquisition Regulation; Information Collection; Extraordinary Contractual Action Requests

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for comments regarding the reinstatement of a previously existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR), Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning Extraordinary Contractual Action Requests.

Public comments are particularly invited on: Whether this collection of information is necessary; whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before September 8, 2009.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405. Please cite OMB Control No. 9000–0029, Extraordinary Contractual Action Requests, in all correspondence.

FOR FURTHER INFORMATION CONTACT: Ms. Beverly Cromer, Procurement Analyst, Contract Policy Division, GSA, (202) 501–1448.

A. Purpose

This request covers the collection of information as a first step under Public Law 85–804, as amended by Public Law 93–155 and Executive Order 10789 dated November 14, 1958, that allows contracts to be entered into, amended, or modified in order to facilitate national defense. In order for a firm to be granted relief under the Act, specific evidence must be submitted which supports the firm's assertion that relief is appropriate and that the matter cannot be disposed of under the terms of the contract.

B. Annual Reporting Burden

Respondents: 100.
Responses per Respondent: 1.
Annual Responses: 100.
Hours per Response: 16.
Total Burden Hours: 1,600.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0029, Extraordinary Contractual Action Requests, in all correspondence.

Dated: June 23, 2009.

Al Matera,

Director, Office of Acquisition Policy.

[FR Doc. E9–15949 Filed 7–6–09; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0088]

Federal Acquisition Regulation; Information Collection; Travel Costs

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for comments regarding the reinstatement of a previously existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR), Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve a reinstatement of a currently approved information collection requirement concerning Travel Costs.

Public comments are particularly invited on: Whether this collection of information is necessary; whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before September 8, 2009.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405. Please cite OMB Control No. 9000–0088, Travel Costs, in all correspondence.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Chambers, Procurement Analyst, Contract Policy Division, GSA, (202) 501–3221.

A. Purpose

FAR 31.205–46, Travel Costs, requires that, except in extraordinary and temporary situations, costs incurred by a contractor for lodging, meals, and incidental expenses shall be considered to be reasonable and allowable only to the extent that they do not exceed on a daily basis the per diem rates in effect as of the time of travel as set forth in the Federal Travel Regulations for travel in the conterminous 48 United States, the Joint Travel Regulations, Volume 2, Appendix A, for travel is Alaska, Hawaii, the Commonwealth of Puerto Rico, and territories and possessions of the United States, and the Department of State Standardized Regulations, section 925, ''Maximum Travel Per Diem Allowances for Foreign Areas.'' The burden generated by this coverage is in the form of the contractor preparing a justification whenever a higher actual expense reimbursement method is used.

B. Annual Reporting Burden

Respondents: 5,800.
Responses per Respondent: 10.
Total Responses: 58,000.
Hours per Response: .25.
Total Burden Hours: 14,500.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (VPR), 1800 F

Street, NW., Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0088, Travel Costs, in all correspondence.

Dated: June 25, 2009.

Al Matera,

Director, Office of Acquisition Policy.

[FR Doc. E9–15980 Filed 7–6–09; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0077]

Federal Acquisition Regulation; Information Collection; Quality Assurance Requirements

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for comments regarding the reinstatement of a previously existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR), Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning Quality Assurance Requirements.

Public comments are particularly invited on: Whether this collection of information is necessary; whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before September 8, 2009.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405. Please cite OMB Control No. 9000–0077, Quality Assurance Requirements, in all correspondence.

FOR FURTHER INFORMATION CONTACT: Ms. Jeritta Parnell, Procurement Analyst, Contract Policy Division, GSA, (202) 501–4082.

A. Purpose

Supplies and services acquired under Government contracts must conform to the contract's quality and quantity requirements. FAR Part 46 prescribes inspection, acceptance, warranty, and other measures associated with quality requirements. Standard clauses related to inspection require the contractor to provide and maintain an inspection system that is acceptable to the Government; give the Government the right to make inspections and test while work is in process; and require the contractor to keep complete, and make available to the Government, records of its inspection work.

B. Annual Reporting Burden

Respondents: 850.

Responses per Respondent: 1.

Total Responses: 850.

Hours per Response: .25.

Total Burden hours: 213.

C. Annual Recordkeeping Burden

Recordkeepers: 52,254.

Hours per Recordkeeper: .68.

Total Burden Hours: 35,533.

Total Annual Burden: 213 + 35,533 = 35,746.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0077, Quality Assurance Requirements, in all correspondence.

Dated: June 23, 2009.

Al Matera,

Director, Office of Acquisition Policy.

[FR Doc. E9–15981 Filed 7–6–09; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0027]

Federal Acquisition Regulation; Information Collection; Value Engineering Requirements

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for comments regarding the reinstatement of a previously existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR), Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning Value Engineering Requirements.

Public comments are particularly invited on: Whether this collection of information is necessary; whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before September 8, 2009.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405. Please cite OMB Control No. 9000–0027, Value Engineering Requirements, in all correspondence.

FOR FURTHER INFORMATION CONTACT: Ms. Jeritta Parnell, Procurement Analyst, Contract Policy Division, GSA, (202) 501–4082.

A. Purpose

Value engineering is the technique by which contractors (1) voluntarily

suggest methods for performing more economically and share in any resulting savings or (2) are required to establish a program to identify and submit to the Government methods for performing more economically. These recommendations are submitted to the Government as value engineering change proposals (VECP's) and they must include specific information. This information is needed to enable the Government to evaluate the VECP and, if accepted, to arrange for an equitable sharing plan.

B. Annual Reporting Burden

Respondents: 400.
Responses per Respondent: 4.
Annual Responses: 1,600.
Hours per Response: 30.
Total Burden Hours: 48,000.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0027, Value Engineering Requirements, in all correspondence.

Dated: June 23, 2009.

Al Matera,

Director, Office of Acquisition Policy.

[FR Doc. E9–15983 Filed 7–6–09; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0095]

Federal Acquisition Regulation; Information Collection; Commerce Patent Regulations

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for comments regarding the reinstatement of a previously existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve a reinstatement of a previously approved information collection requirement concerning Commerce Patent Regulations.

Public comments are particularly invited on: Whether this collection of information is necessary; whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before September 8, 2009.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: General Services Administration (GSA), Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405. Please cite OMB Control No. 9000–0095, Commerce Patent Regulations, in all correspondence.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, Contract Policy Division, GSA, (202) 501–3775.

SUPPLEMENTARY INFORMATION:

A. Purpose

As a result of the Department of Commerce (Commerce) publishing a final rule in the **Federal Register** implementing Public Law 98–620 (52 FR 8552, March 18, 1987), a revision to FAR subpart 27.3 to implement the Commerce regulation was published in the **Federal Register** as an interim rule on June 12, 1989 (54 FR 25060). The final rule was published without change on June 21, 1990.

A Government contractor must report all subject inventions to the contracting officer, submit a disclosure of the invention, and identify any publication, or sale, or public use of the invention (52.227–11(c), 52.227–12(c), and 52.227–13(e)(2)). Contractors are required to submit periodic or interim and final reports listing subject inventions (27.303(b)(2)(i) and (ii)). In order to ensure that subject inventions are reported, the contractor is required to establish and maintain effective procedures for identifying and disclosing subject inventions (52.227–11, Alternate IV; 52.227–13(e)(1)). In addition, the contractor must require his employees, by written agreements, to disclose subject inventions (52.227–11(f)(2); 52.227–12(e)(2); 52.227–13(e)(4)). The contractor also has an obligation to utilize the subject invention, and agree to report, upon request, the utilization or efforts to utilize the subject invention (27.302(e); 52.227–11(f); 52.227–12(f)).

B. Annual Reporting Burden

Respondents: 1,200.
Responses per Respondent: 9.75.
Total Responses: 11,700.
Hours per Response: 3.9.
Total Burden Hours: 45,630.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0095, Commerce Patent Regulations, in all correspondence.

Dated: June 23, 2009.

Al Matera,

Director, Office of Acquisition Policy.

[FR Doc. E9–15979 Filed 7–6–09; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Scientific Misconduct

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Office of Research Integrity (ORI) and the Assistant Secretary for Health have taken final action in the following case:

Juan Luis R. Contreras, M.D., University of Alabama at Birmingham: Based on a finding of scientific misconduct made by the University of Alabama at Birmingham (UAB) on January 24, 2008, a report of the UAB Investigation Committee, dated November 21, 2007, and analysis conducted by ORI during its oversight review, and further discussion between UAB and ORI to clarify UAB's investigative findings and decision with respect to the requirements of 42 CFR Parts 50 and 93, the U.S. Public Health Service (PHS) found that Dr. Juan Luis R. Contreras, Assistant Professor, Department of Surgery—Transplantation, UAB, engaged in scientific misconduct in research supported by National Institute of Allergy and Infectious Diseases (NIAID), National Institutes of Health (NIH), grants R01 AI22293, R01 AI39793, and

U19 AI056542, National Institute of Diabetes and Digestive and Kidney Diseases (NIDDK), NIH, grant U19 DK57958, and NIH/Novartis Cooperative Research and Development Agreement 96–MH–01/NIHITC–0697.

PHS found that Respondent engaged in scientific misconduct by falsifying in seven publications reports of research results in NIH-supported experiments with non-human primate (NHP) renal allograft recipients.

Specifically, PHS found that Respondent engaged in scientific misconduct by falsely reporting in five publications [1] that at least 32 specific non-human primates in a renal allo-transplantation study had received bilateral nephrectomies, while in fact an intrinsic kidney was left in place in each animal, and generally, in two additional publications [2] by reporting that all long term surviving non-human primate renal allograft recipients had received bilateral nephrectomies of their native kidneys.

The objective of the research was to test the effectiveness of different immunomodulating agents, administered around the time of renal transplantation in non-human primates, in preventing rejection of the transplanted kidney. To determine whether or not the transplanted kidney was functioning (able to sustain life) after the immunomodulating therapy, the animals were to have both of their native kidneys removed at or shortly after the time of transplant, so that their survival would depend solely on the viability of the transplanted kidney. Failure to remove both native kidneys rendered it impossible to assess the effectiveness of the immunomodulating treatment.

Both Dr. Contreras and PHS are desirous of concluding this matter without further expense of time and other resources, and the parties have entered into a Voluntary Exclusion Agreement to settle the matter. Dr. Contreras accepted responsibility for the reporting described above, but denied that he intentionally committed scientific misconduct. The settlement is not an admission of liability on the part of the Respondent.

Dr. Contreras has entered into a Voluntary Exclusion Agreement in which he has voluntarily agreed, for a period of three (3) years, beginning on June 17, 2009:

(1) To exclude himself voluntarily from any contracting or subcontracting with any agency of the United States Government and from eligibility or involvement in nonprocurement programs of the United States Government referred to as ''covered transactions'' and defined by 2 CFR Parts 180 and 376; and

(2) To exclude himself from serving in any advisory capacity to PHS, including but not limited to service on any PHS advisory committee, board, and/or peer review committee, or as a consultant.

FOR FURTHER INFORMATION CONTACT: Director, Division of Investigative Oversight, Office of Research Integrity, 1101 Wootton Parkway, Suite 750, Rockville, MD 20852, (240) 453–8800.

John Dahlberg,

Director, Division of Investigative Oversight, Office of Research Integrity.

[FR Doc. E9–15909 Filed 7–6–09; 8:45 am]

BILLING CODE 4150–31–P

[1] Hutchings, A., Wu, J., Asiedu, C., Hubbard, W., Eckhoff, D., Contreras, J., Thomas, F.T., Neville, D., & Thomas, J.M. ''The immune decision toward allograft tolerance in non-human primates requires early inhibition of innate immunity and induction of immune regulation.'' *Transpl Immunol.* 11(3–4):335–344, July–September 2003. (Retraction required by UAB.)

Thomas, J.M., Eckhoff, D.E., Contreras, J.L., Lobashevsky, A.L., Hubbard, W.J., Moore, J.K., Cook, W.J., Thomas, F.T., & Neville, D.M. Jr. ''Durable donor-specific T and B cell tolerance in rhesus macaques induced with peritransplantation anti-CD3 immunotoxin and deoxyspergualin: Absence of chronic allograft nephropathy.'' *Transplantation 69*(12):2497–2503, June 27, 2000. (Retracted.)

Thomas, J.M., Contreras, J.L., Jiang, X.L., Eckhoff, D.E., Wang, P.X., Hubbard, W.J., Lobashevsky, A.L., Wang, W., Asiedu, C., Stavrou, S., Cook, W.J., Robbin, M.L., Thomas, F.T., & Neville, D.M. Jr. ''Peritransplant tolerance induction in macaques: Early events reflecting the unique synergy between immunotoxin and deoxyspergualin.'' *Transplantation 68*(11):1660–1673, December 15, 1999. (Retracted.)

Contreras, J.L., Eckhoff, D.E., Cartner, S., Frenette, L., Thomas, F.T., Robbin, M.L., Neville, D.M. Jr., & Thomas, J.M. ''Tolerability and side effects of anti-CD3-immunotoxin in preclinical testing in kidney and pancreatic islet transplant recipients.'' *Transplantation 68*(2):215–219, July 27, 1999. (Retracted.)

Contreras, J.L., Wang, P.X., Eckhoff, D.E., Lobashevsky, A.L., Asiedu, C., Frenette, L., Robbin, M.L., Hubbard, W.J., Cartner, S., Nadler, S., Cook, W.J., Sharff, J., Shiloach, J., Thomas, F.T., Neville, D.M. Jr., & Thomas, J.M. ''Peritransplant tolerance induction with anti-CD3-immunotoxin: A matter of proinflammatory cytokine control.'' *Transplantation 65*(9):1159–1169, May 15, 1998. (Retracted.)

[2] Hubbard, W.J., Eckhoff, D., Contreras, J.L., Thomas, F.T., Hutchings, A., & Thomas, J.M. ''STEALTH on the preclinical path to tolerance.'' *Graft 5*(6):322–330, 2002. (Retraction required by UAB—Journal has ceased publication.)

Hubbard, W.J., Contreras, J.V., Eckhoff, D.E., Thomas, F.T., Neville, D.M., & Thomas, J.M. ''Immunotoxins and tolerance induction in primates.'' *Current Opinion in Organ Transplantation* 5:29–34, 2000. (Partially retracted.)

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Developmental Disabilities Program Independent Evaluation Project.

OMB No.: New Collection.

Description: The Developmental Disabilities Program Independent Evaluation (DDPIE) Project is an independent (non-biased) evaluation to examine through rigorous and comprehensive performance-based research procedures the targeted impact on the lives of people with developmental disabilities and their families of three programs funded under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act): (1) State Councils on Developmental Disabilities (SCDDs); (2) State Protection and Advocacy Systems for Individuals with developmental disabilities (P&As); and (3) University Centers for Excellence in Developmental Disabilities (UCEDDs). The intent of this evaluation is to understand and report on the accomplishments of these programs, including collaborative efforts among the DD Network programs. The results of this evaluation will provide a report to the Administration on Developmental Disabilities (ADD) (the agency that administers these programs) with information on the effectiveness of its programs and policies and serve as a way for ADD to promote accountability to the public.

The independent evaluation is a response to accountability requirements for ADD as identified in the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act), the Government Performance and Results Act (GPRA) of 1993, and the Program Assessment Rating Tool (PART), administered by the Office of Management and Budget (OMB). This project meets the requirements of PART by providing a non-biased method of evaluating the effectiveness and impact of DD Network programs on the lives of people with developmental disabilities and their families.

ADD is seeking OMB approval for the evaluation tools (e.g., data collection instruments). The evaluation tools are designed to collect data for two purposes: (1) To measure the programs according to indicators (structural, process, output, and outcome) in key function areas; and (2) to establish performance standards for measuring

the impact of each of the programs. The evaluation tools are primarily protocols for conducting interviews with various staff of the three programs and stakeholders associated with the programs. The interview protocols were tested during a pilot study in 2008. There is also a self-administered form for each of the programs to be completed by Executive Directors or his/her designee. The self-administered form was developed as a result of the pilot study and, therefore, has not been tested for reliability and validity. It is intended that the clearance process will be a mechanism for determining the reliability, validity, and feasibility of using this instrument.

Respondents: Staff of State Councils on Developmental Disabilities, State Protection and Advocacy Systems for Individuals with developmental disabilities, and University Centers for Excellence in Developmental Disabilities, Education, Research, and Service; individuals with developmental disabilities; parents of individuals with developmental disabilities; siblings of individuals with developmental disabilities; guardians; advocates; policymakers; service providers; university faculty; and others (e.g., DDC chairs, members of Protection and Advocacy boards of directors or commissioners; Consumer Advisory Committee members)

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
DD Council: Executive Director Interview	20	1	4	80
DD Council: Interview with Council Chair/Council Members	60	1	0.75	45
DD Council: Group Interview with Policymakers, Collaborators, and Grantees	160	1	2	320
UCEDD: Telephone Interview with Current and Graduated Students	100	1	0.75	75
UCEDD: Interview with the Consumer Advisory Committee	60	1	0.75	45
UCEDD: Interview with Peer Researchers and Colleagues	100	1	0.75	75
UCEDD: Interview with Recipients of Community Services or Members of Organizations/Agencies that Are Trained To Provide Community Services	100	1	0.75	75
UCEDD: Self-administered Form	20	1	8	160
P&A: Executive Director Interview	20	1	4	80
P&A: Staff Interview	60	1	0.75	45
P&A: Board of Directors (Commissioners)—Chair and Members	60	1	0.75	45
P&A: Group Interview with Policymakers and Collaborators	160	1	2	320
P&A: Interview with Recipient of Community Education	100	1	0.75	75
P&A: Interview with Clients	100	1	0.75	75
P&A: Self-administered Form	20	1	8	160
UCEDD: Interview with Director	20	1	4	80
DD Council: Group Interview with Recipients of Self-Advocacy and Leadership Education and Training	100	1	0.75	75
DD Council: Group Interview with Recipients of Education and Training to Improve Community Capacity	100	1	0.75	75
DD Council: Self-administered Form	20	1	8	160
DD Council Estimate of Total Burden Hours for Activities to Support Administration of Proposed Information Collection Instruments	20	1	33.50	670
P&A Estimate of Total Burden Hours for Activities to Support Administration of Proposed Information Collection Instruments	20	1	33.50	670
UCEDD Estimate of Total Burden Hours for Activities to Support Administration of Proposed Information Collection Instruments	20	1	33.50	670

Estimated Total Annual Burden Hours: 4,075.

Additional Information:

Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, *Attn:* ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. *E-mail address: infocollection@acf.hhs.gov.*

OMB Comment:

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following:

Office of Management and Budget, Paperwork Reduction Project, *Fax:* 202–395–7245, *Attn:* Desk Officer for the Administration for Children and Families.

Dated: June 30, 2009.

Janean Chambers,

Reports Clearance Officer.

[FR Doc. E9–15841 Filed 7–6–09; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material,

and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism. Special Emphasis Panel Alcohol Pharmacotherapy and the Treatment and Prevention of HIV/AIDS. (RFA AA 09 007/008) and Other AIDS Related Research.

Date: August 6, 2009.

Time: 8 a.m. to 11 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5635 Fishers Lane, Bethesda, MD 20892. (Telephone Conference Call).

Contact Person: Katrina L Foster, PhD, Scientific Review Officer, National Inst on Alcohol Abuse & Alcoholism, National Institutes of Health, 5635 Fishers Lane, Rm. 2019, Rockville, MD 20852. 301–443–4032. *katrina@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards, National Institutes of Health, HHS)

Dated: June 29, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–15847 Filed 7–6–09; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences. Special Emphasis Panel Minority Biomedical Research Support.

Date: July 19–20, 2009.

Time: 7 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, Bethesda, MD 20814.

Contact Person: Margaret J. Weidman, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN18B, Bethesda, MD 20892. 301–594–3663. *weidmanma@nigms.nih.gov.*

Name of Committee: National Institute of General Medical Sciences. Special Emphasis Panel MBRS Score.

Date: July 20–21, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, Bethesda, MD 20814.

Contact Person: Lisa Dunbar, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12, Bethesda, MD 20892. 301–594–2849. *dunbarl@mail.nih.gov.*

Name of Committee: National Institute of General Medical Sciences. Special Emphasis Panel New Innovator Awards.

Date: July 21, 2009.

Time: 1 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892. (Telephone Conference Call).

Contact Person: Richard T. Okita, PhD, Program Director, Pharmacological and Physiological Sciences Branch, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 2A5–49, Bethesda, MD 20892. 301–594–4469. *okitar@nigms.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: June 29, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

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BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institutes of Health Guidelines for Human Stem Cell Research

SUMMARY: The National Institutes of Health (NIH) is hereby publishing final ''National Institutes of Health Guidelines for Human Stem Cell Research'' (Guidelines).

On March 9, 2009, President Barack H. Obama issued Executive Order 13505: *Removing Barriers to Responsible Scientific Research Involving Human Stem Cells.* The Executive Order states that the Secretary of Health and Human Services, through the Director of NIH, may support and conduct responsible, scientifically worthy human stem cell research, including human embryonic stem cell (hESC) research, to the extent permitted by law.

These Guidelines implement Executive Order 13505, as it pertains to extramural NIH-funded stem cell research, establish policy and procedures under which the NIH will fund such research, and helps ensure that NIH-funded research in this area is ethically responsible, scientifically worthy, and conducted in accordance with applicable law. Internal NIH policies and procedures, consistent with Executive Order 13505 and these Guidelines, will govern the conduct of intramural NIH stem cell research.

DATES: *Effective Date:* These Guidelines are effective on July 7, 2009.

Summary of Public Comments on Draft Guidelines: On April 23, 2009 the NIH published draft Guidelines for research involving hESCs in the **Federal Register** for public comment, 74 FR 18578 (April 23, 2009). The comment period ended on May 26, 2009.

The NIH received approximately 49,000 comments from patient advocacy groups, scientists and scientific societies, academic institutions, medical organizations, religious organizations, and private citizens. The NIH also received comments from members of Congress. This Notice presents the final Guidelines together with the NIH response to public comments that addressed provisions of the Guidelines.

Title of the Guidelines, Terminology, and Background

Respondents felt the title of the NIH draft guidelines was misleading, in that it is entitled ''National Institutes of Health Guidelines for Human Stem Cell Research,'' yet addresses only one type of human stem cell. The NIH notes that although the Guidelines pertain primarily to the donation of embryos for the derivation of hESCs, one Section also applies to certain uses of both hESCs and human induced pluripotent stem cells. Also, the Guidelines discuss applicable regulatory standards when research involving human adult stem cells or induced pluripotent stem cells constitutes human subject research.

Therefore, the title of the Guidelines was not changed.

Respondents also disagreed with the definition of human embryonic stem cells in the draft Guidelines, and asked that the NIH define them as originating from the inner cell mass of the blastocyst. The NIH modified the definition to say that human embryonic stem cells ''are cells that are derived from the inner cell mass of blastocyst stage human embryos, are capable of dividing without differentiating for a prolonged period in culture, and are known to develop into cells and tissues of the three primary germ layers.''

Financial Gain

Respondents expressed concern that derivers of stem cells might profit from the development of hESCs. Others noted that because the stem cells eligible for use in research using NIH funding under the draft Guidelines are those cells that are subject to existing patents, there will be insufficient competition in the licensing of such rights. These respondents suggested that this could inhibit research, as well as increase the cost of any future clinical benefits. The Guidelines do not address the distribution of stem cell research material. It is, however, the NIH's expectation that stem cell research materials developed with NIH funds, as well as associated intellectual property and data, will be distributed in accordance with the NIH's existing policies and guidance, including ''Sharing Biomedical Research Resources, Principles and Guidelines for Recipients of NIH Grants and Contracts'' and ''Best Practices for the Licensing of Genomic Inventions.'' *http://ott.od.nih.gov/policy/Reports.html* Even where such policies are not directly applicable, the NIH encourages others to refrain from imposing on the transfer of research tools, such as stem cells, any conditions that hinder further biomedical research. In addition, the Guidelines were revised to state that there should be documentation that ''no payments, cash or in kind, were offered for the donated embryos.''

Respondents were concerned that donor(s) be clearly ''apprised up front by any researchers that financial gain may come from the donation and that the donor(s) should know up front if he/she will share in the financial gain.'' The Guidelines address this concern by asking that donor(s) was/were informed during the consent process that the donation was made without any restriction or direction regarding the individual(s) who may receive medical benefit from the use of the stem cells, such as who may be the recipients of cell transplants. The Guidelines also require that the donor(s) receive(s) information that the research was not intended to provide direct medical benefit to the donor(s); that the results of research using the hESCs may have commercial potential, and that the donor(s) would not receive financial or any other benefits from any such commercial development.

IRB Review Under the Common Rule

Respondents suggested that the current regulatory structure of IRB review under the Common Rule (45 CFR Part 46, Subpart A) addresses the core ethical principles needed for appropriate oversight of hESC derivation. They noted that IRB review includes a full review of the informed consent process, as well as a determination of whether individuals were coerced to participate in the research and whether any undue inducements were offered to secure their participation. These respondents urged the NIH to replace the specific standards to assure voluntary and informed consent in the draft Guidelines with a requirement that hESC research be reviewed and approved by an IRB, in conformance with 45 CFR Part 46, Subpart A, as a prerequisite to NIH funding. Respondents also requested that the NIH create a registry of eligible hESC lines to avoid burdensome and repetitive assurances from multiple funding applicants. The NIH agrees that the IRB system of review under the Common Rule provides a comprehensive framework for the review of the donation of identifiable human biological materials for research. However, in the last several years, guidelines on hESC research have been issued by a number of different organizations and governments, and different practices have arisen around the country and worldwide, resulting in a patchwork of standards. The NIH concluded that employing the IRB review system for the donation of embryos would not ameliorate stated concerns about variations in standards for hESC research and would preclude the establishment of an NIH registry of hESCs eligible for NIH funding, because there would be no NIH approval of particular hESCs. To this end and in response to comments, these Guidelines articulate policies and procedures that will allow the NIH to create a Registry. These Guidelines also provide scientists who apply for NIH funding with a specific set of standards reflecting currently recognized ethical principles and practices specific to embryo donation that took place on or after the issuance of the Guidelines, while also establishing procedures for the review of donations that took place before the effective date of the Guidelines.

Federal Funding Eligibility of Human Pluripotent Cells From Other Sources

Respondents suggested that the allowable sources of hESCs potentially available for Federal funding be expanded to include hESC lines from embryos created expressly for research purposes, and lines created, or pluripotent cells derived, following parthenogenesis or somatic cell nuclear transfer (SCNT). The Guidelines allow for funding of research using hESCs derived from embryos created using in vitro fertilization (IVF) for reproductive purposes and no longer needed for these purposes, assuming the research has scientific merit and the embryos were donated after proper informed consent was obtained from the donor(s). The Guidelines reflect the broad public support for Federal funding of research using hESCs created from such embryos based on wide and diverse debate on the topic in Congress and elsewhere. The use of additional sources of human pluripotent stem cells proposed by the respondents involve complex ethical and scientific issues on which a similar consensus has not emerged. For example, the embryo-like entities created by parthenogenesis and SCNT require women to donate oocytes, a procedure that has health and ethical implications, including the health risk to the donor from the course of hormonal treatments needed to induce oocyte production.

Respondents noted that many embryos undergo Pre-implantation Genetic Diagnosis (PGD). This may result in the identification of chromosomal abnormalities that would make the embryos medically unsuitable for clinical use. In addition, the IVF process may also produce embryos that are not transferred into the uterus of a woman because they are determined to be not appropriate for clinical use. Respondents suggested that hESCs derived from such embryos may be extremely valuable for scientific study, and should be considered embryos that were created for reproductive purposes and were no longer needed for this purpose. The NIH agrees with these comments. As in the draft, the final Guidelines allow for the donation of embryos that have undergone PGD.

Donation and Informed Consent

Respondents commented in numerous ways that the draft Guidelines are too procedurally proscriptive in articulating the elements of appropriate informed consent documentation. This over-

reliance on the specific details and format of the informed consent document, respondents argued, coupled with the retroactive application of the Guidelines to embryos already donated for research, would result in a framework that fails to appreciate the full range of factors contributing to the complexity of the informed consent process. For example, respondents pointed to several factors that were precluded from consideration by the proposed Guidelines, such as contextual evidence of the consent process, other established governmental frameworks (representing local and community influences), and the changing standards for informed consent in this area of research over time. Respondents argued that the Guidelines should be revised to allow for a fuller array of factors to be considered in determining whether the underlying ethical principle of voluntary informed consent had been met. In addition to these general issues, many respondents made the specific recommendation that all hESCs derived before the final Guidelines were issued be automatically eligible for Federal funding without further review, especially those eligible under prior Presidential policy, i.e., ''grandfathered.'' The final Guidelines seek to implement the Executive Order by issuing clear guidance to assist this field of science to advance and reach its full potential while ensuring adherence to strict ethical standards. To this end, the NIH is establishing a set of conditions that will maximize ethical oversight, while ensuring that the greatest number of ethically derived hESCs are eligible for Federal funding. Specifically, for embryos donated in the U.S. on or after the effective date of the Guidelines, the only way to establish eligibility will be to either use hESCs listed on the NIH Registry, or demonstrate compliance with the specific procedural requirements of the Guidelines by submitting an assurance with supporting information for administrative review by the NIH. Thus, for future embryo donations in the United States, the Guidelines articulate one set of procedural requirements. This responds to concerns regarding the patchwork of requirements and guidelines that currently exist.

However, the NIH is also cognizant that in the more than a decade between the discovery of hESCs and today, many lines were derived consistent with ethical standards and/or guidelines developed by various states, countries, and other entities such as the International Society for Stem Cell Research (ISSCR) and the National Academy of Sciences (NAS). These various policies have many common features, rely on a consistent ethical base, and require an informed consent process, but they differ in details of implementation. For example, some require specific wording in a written informed consent document, while others do not. It is important to recognize that the principles of ethical research, *e.g.*, voluntary informed consent to participation, have not varied in this time period, but the requirements for implementation and procedural safeguards employed to demonstrate compliance have evolved. In response to these concerns, the Guidelines state that applicant institutions wishing to use hESCs derived from embryos donated prior to the effective date of the Guidelines may either comply with Section II (A) of the Guidelines or undergo review by a Working Group of the Advisory Committee to the Director (ACD). The ACD, which is a chartered Federal Advisory Committee Act (FACA) committee, will advise NIH on whether the core ethical principles and procedures used in the process for obtaining informed consent for the donation of the embryo were such that the cell line should be eligible for NIH funding. This Working Group will not undertake a *de novo* evaluation of ethical standards, but will consider the materials submitted in light of the principles and points to consider in the Guidelines, as well as 45 CFR Part 46 Subpart A. Rather than ''grandfathering,'' ACD Working Group review will enable pre-existing hESCs derived in a responsible manner to be eligible for use in NIH funded research.

In addition, for embryos donated outside the United States prior to the effective date of these Guidelines, applicants may comply with either Section II (A) or (B). For embryos donated outside of the United States on or after the effective date of the Guidelines, applicants seeking to determine eligibility for NIH research funding may submit an assurance that the hESCs fully comply with Section II (A) or submit an assurance along with supporting information, that the alternative procedural standards of the foreign country where the embryo was donated provide protections at least equivalent to those provided by Section II (A) of these Guidelines. These materials will be reviewed by the NIH ACD Working Group, which will recommend to the ACD whether such equivalence exists. Final decisions will be made by the NIH Director. This special consideration for embryos donated outside the United States is needed because donation of embryos in foreign countries is governed by the laws and policies of the respective governments of those nations. Although such donations may be responsibly conducted, such governments may not or cannot change their national donation requirements to precisely comply with the NIH Guidelines. The NIH believes it is reasonable to provide a means for reviewing such hESCs because ethically derived foreign hESCs constitute an important scientific asset for the U.S.

Respondents expressed concern that it might be difficult in some cases to provide assurance that there was a ''clear separation'' between the prospective donor(s)' decision to create embryos for reproductive purposes and the donor(s)' decision to donate the embryos for research purposes. These respondents noted that policies vary at IVF clinics, especially with respect to the degree to which connections with researchers exist. Respondents noted that a particular clinic's role may be limited to the provision of contact information for researchers. A clinic that does not have any particular connection with research would not necessarily have in place a written policy articulating the separation contemplated by the Guidelines. Other respondents noted that embryos that are determined not to be suitable for medical purposes, either because of genetic defects or other concerns, may be donated prior to being frozen. In these cases, it is possible that the informed consent process for the donation might be concurrent with the consent process for IVF treatment. Respondents also noted that the initial consent for IVF may contain a general authorization for donating embryos in excess of clinical need, even though a more detailed consent is provided at the actual time of donation. The NIH notes that the Guidelines specifically state that consent should have been obtained at the time of donation, even if the potential donor(s) had given prior indication of a general intent to donate embryos in excess of clinical need for the purposes of research. Accordingly, a general authorization for research donation when consenting for reproductive treatment would comply with the Guidelines, so long as specific consent for the donation is obtained at the time of donation. In response to comments regarding documentation necessary to establish a separation between clinical and research decisions, the NIH has changed the language of the Guidelines to permit applicant institutions to submit consent forms,

written policies or other documentation to demonstrate compliance with the provisions of the Guidelines. This change should provide the flexibility to accommodate a range of practices, while adhering to the ethical principles intended.

Some respondents want to require that the IVF physician and the hESC researcher should be different individuals, to prevent conflict of interest. Others say they should be the same person, because people in both roles need to have detailed knowledge of both areas (IVF treatment and hESC research). There is also a concern that the IVF doctor will create extra embryos if he/she is also the researcher. As a general matter, the NIH believes that the doctor and the researcher seeking donation should be different individuals. However, this is not always possible, nor is it required, in the NIH's view, for ethical donation.

Some respondents want explicit language (in the Guidelines and/or in the consent) stating that the embryo will be destroyed when the inner cell mass is removed. In the process of developing guidelines, the NIH reviewed a variety of consent forms that have been used in responsible derivations. Several had extensive descriptions of the process and the research to be done, going well beyond the minimum expected, yet they did not use these exact words. Given the wide variety and diversity of forms, as well as the various policy, statutory and regulatory obligations individual institutions face, the NIH declines to provide exact wording for consent forms, and instead endorses a robust informed consent process where all necessary details are explained and understood in an ongoing, trusting relationship between the clinic and the donor(s).

Respondents asked for clarification regarding the people who must give informed consent for the donation of embryos for research. Some commenters suggested that NIH should require consent from the gamete donors, in cases where those individuals may be different than the individuals seeking reproductive treatment. The NIH requests consent from ''the individual(s) who sought reproductive treatment'' because this/these individual(s) is/are responsible for the creation of the embryo(s) and, therefore, its/their disposition. With regard to gamete donation, the risks are associated with privacy and, as such, are governed by requirements of the Common Rule, where applicable.

Respondents also requested clarification on the statement in the draft Guidelines noting that ''although human embryonic stem cells are derived from embryos, such stem cells are not themselves human embryos.'' For the purpose of NIH funding, an embryo is defined by Section 509, Omnibus Appropriations Act, 2009, Public Law 111–8, 3/11/09, otherwise known as the Dickey Amendment, as any organism not protected as a human subject under 45 CFR Part 46 that is derived by fertilization, parthenogenesis, cloning or any other means from one or more human gametes or human diploid cells. Since 1999, the Department of Health and Human Services (HHS) has consistently interpreted this provision as not applicable to research using hESCs, because hESCs are not embryos as defined by Section 509. This long-standing interpretation has been left unchanged by Congress, which has annually reenacted the Dickey Amendment with full knowledge that HHS has been funding hESC research since 2001. These guidelines therefore recognize the distinction, accepted by Congress, between the derivation of stem cells from an embryo that results in the embryo's destruction, for which Federal funding is prohibited, and research involving hESCs that does not involve an embryo nor result in an embryo's destruction, for which Federal funding is permitted.

Some respondents wanted to ensure that potential donor(s) are either required to put their ''extra'' embryos up for adoption before donating them for research, or are at least offered this option. The Guidelines require that all the options available in the health care facility where treatment was sought pertaining to the use of embryos no longer needed for reproductive purposes were explained to the potential donor(s). Since not all IVF clinics offer the same services, the healthcare facility is only required to explain the options available to the donor(s) at that particular facility.

Commenters asked that donor(s) be made aware of the point at which their donation decision becomes irrevocable. This is necessary because if the embryo is de-identified, it may be impossible to stop its use beyond a certain point. The NIH agrees with these comments and revised the Guidelines to require that donor(s) should have been informed that they retained the right to withdraw consent for the donation of the embryo until the embryos were actually used to derive embryonic stem cells or until information which could link the identity of the donor(s) with the embryo was no longer retained, if applicable.

Medical Benefits of Donation

Regarding medical benefit, respondents were concerned that the language of the Guidelines should not somehow eliminate a donor's chances of benefitting from results of stem cell research. Respondents noted that although hESCs are not currently being used clinically, it is possible that in the future such cells might be used for the medical benefit of the person donating them. The Guidelines are meant to preclude individuals from donating embryos strictly for use in treating themselves only or from donating but identifying individuals or groups they do or do not want to potentially benefit from medical intervention using their donated cells. While treatment with hESCs is one of the goals of this research, in practice, years of experimental work must still be done before such treatment might become routinely available. The Guidelines are designed to make it clear that immediate medical benefit from a donation is highly unlikely at this time. Importantly, it is critical to note that the Guidelines in no way disqualify a donor from benefitting from the medical outcomes of stem cell research and treatments that may be developed in the future.

Monitoring and Enforcement Actions

Respondents have expressed concern about the monitoring of funded research and the invocation of possible penalties for researchers who do not follow the Guidelines. A grantee's failure to comply with the terms and conditions of award, including confirmed instances of research misconduct, may cause the NIH to take one or more enforcement actions, depending on the severity and duration of the non-compliance. For example, the following actions may be taken by the NIH when there is a failure to comply with the terms and conditions of any award: (1) Under 45 CFR 74.14, the NIH can impose special conditions on an award, including but not limited to increased oversight/monitoring/reporting requirements for an institution, project, or investigator; and (2) under 45 CFR 74.62 the NIH may impose enforcement actions, including but not limited to withholding funds pending correction of the problem, disallowing all or part of the costs of the activity that was not in compliance, withholding further awards for the project, or suspending or terminating all or part of the funding for the project. Individuals and institutions may be debarred from eligibility for all Federal financial assistance and contracts under 2 CFR part 376 and 48

CFR subpart 9.4, respectively. The NIH will undertake all enforcement actions in accordance with applicable statutes, regulations, and policies.

National Institutes of Health Guidelines for Research Using Human Stem Cells

I. Scope of the Guidelines

These Guidelines apply to the expenditure of National Institutes of Health (NIH) funds for research using human embryonic stem cells (hESCs) and certain uses of induced pluripotent stem cells (See Section IV). The Guidelines implement Executive Order 13505.

Long-standing HHS regulations for Protection of Human Subjects, 45 CFR part 46, subpart A establish safeguards for individuals who are the sources of many human tissues used in research, including non-embryonic human adult stem cells and human induced pluripotent stem cells. When research involving human adult stem cells or induced pluripotent stem cells constitutes human subject research, Institutional Review Board review may be required and informed consent may need to be obtained per the requirements detailed in 45 CFR part 46, subpart A. Applicants should consult *http://www.hhs.gov/ohrp/humansubjects/guidance/45cfr46.htm*.

It is also important to note that the HHS regulation, *Protection of Human Subjects*, 45 CFR part 46, subpart A, may apply to certain research using hESCs. This regulation applies, among other things, to research involving individually identifiable private information about a living individual, 45 CFR 46.102(f). The HHS Office for Human Research Protections (OHRP) considers biological material, such as cells derived from human embryos, to be individually identifiable when they can be linked to specific living individuals by the investigators either directly or indirectly through coding systems. Thus, in certain circumstances, IRB review may be required, in addition to compliance with these Guidelines. Applicant institutions are urged to consult OHRP guidances at *http://www.hhs.gov/ohrp/policy/index.html#topics*.

To ensure that the greatest number of responsibly derived hESCs are eligible for research using NIH funding, these Guidelines are divided into several sections, which apply specifically to embryos donated in the U.S. and foreign countries, both before and on or after the effective date of these Guidelines. Section II (A) and (B) describe the conditions and review processes for determining hESC eligibility for NIH funds. Further information on these review processes may be found at *http://www.NIH.gov*. Sections IV and V describe research that is not eligible for NIH funding.

These guidelines are based on the following principles:

1. Responsible research with hESCs has the potential to improve our understanding of human health and illness and discover new ways to prevent and/or treat illness.

2. Individuals donating embryos for research purposes should do so freely, with voluntary and informed consent.

As directed by Executive Order 13505, the NIH shall review and update these Guidelines periodically, as appropriate.

II. Eligibility of Human Embryonic Stem Cells for Research With NIH Funding

For the purpose of these Guidelines, ''human embryonic stem cells (hESCs)'' are cells that are derived from the inner cell mass of blastocyst stage human embryos, are capable of dividing without differentiating for a prolonged period in culture, and are known to develop into cells and tissues of the three primary germ layers. Although hESCs are derived from embryos, such stem cells are not themselves human embryos. All of the processes and procedures for review of the eligibility of hESCs will be centralized at the NIH as follows:

A. Applicant institutions proposing research using hESCs derived from embryos donated in the U.S. on or after the effective date of these Guidelines may use hESCs that are posted on the new NIH Registry or they may establish eligibility for NIH funding by submitting an assurance of compliance with Section II (A) of the Guidelines, along with supporting information demonstrating compliance for administrative review by the NIH. For the purposes of this Section II (A), hESCs should have been derived from human embryos:

1. That were created using in vitro fertilization for reproductive purposes and were no longer needed for this purpose;

2. That were donated by individuals who sought reproductive treatment (hereafter referred to as ''donor(s)'') and who gave voluntary written consent for the human embryos to be used for research purposes; and

3. For which all of the following can be assured and documentation provided, such as consent forms, written policies, or other documentation, provided:

a. All options available in the health care facility where treatment was sought pertaining to the embryos no longer needed for reproductive purposes were explained to the individual(s) who sought reproductive treatment.

b. No payments, cash or in kind, were offered for the donated embryos.

c. Policies and/or procedures were in place at the health care facility where the embryos were donated that neither consenting nor refusing to donate embryos for research would affect the quality of care provided to potential donor(s).

d. There was a clear separation between the prospective donor(s)'s decision to create human embryos for reproductive purposes and the prospective donor(s)'s decision to donate human embryos for research purposes. Specifically:

i. Decisions related to the creation of human embryos for reproductive purposes should have been made free from the influence of researchers proposing to derive or utilize hESCs in research. The attending physician responsible for reproductive clinical care and the researcher deriving and/or proposing to utilize hESCs should not have been the same person unless separation was not practicable.

ii. At the time of donation, consent for that donation should have been obtained from the individual(s) who had sought reproductive treatment. That is, even if potential donor(s) had given prior indication of their intent to donate to research any embryos that remained after reproductive treatment, consent for the donation for research purposes should have been given at the time of the donation.

iii. Donor(s) should have been informed that they retained the right to withdraw consent for the donation of the embryo until the embryos were actually used to derive embryonic stem cells or until information which could link the identity of the donor(s) with the embryo was no longer retained, if applicable.

e. During the consent process, the donor(s) were informed of the following:

i. That the embryos would be used to derive hESCs for research;

ii. What would happen to the embryos in the derivation of hESCs for research;

iii. That hESCs derived from the embryos might be kept for many years;

iv. That the donation was made without any restriction or direction regarding the individual(s) who may receive medical benefit from the use of the hESCs, such as who may be the recipients of cell transplants;

v. That the research was not intended to provide direct medical benefit to the donor(s);

vi. That the results of research using the hESCs may have commercial potential, and that the donor(s) would not receive financial or any other benefits from any such commercial development;

vii. Whether information that could identify the donor(s) would be available to researchers.

B. Applicant institutions proposing research using hESCs derived from embryos donated in the U.S. before the effective date of these Guidelines may use hESCs that are posted on the new NIH Registry or they may establish eligibility for NIH funding in one of two ways:

1. By complying with Section II (A) of the Guidelines; or

2. By submitting materials to a Working Group of the Advisory Committee to the Director (ACD), which will make recommendations regarding eligibility for NIH funding to its parent group, the ACD. The ACD will make recommendations to the NIH Director, who will make final decisions about eligibility for NIH funding.

The materials submitted must demonstrate that the hESCs were derived from human embryos: (1) That were created using in vitro fertilization for reproductive purposes and were no longer needed for this purpose; and (2) that were donated by donor(s) who gave voluntary written consent for the human embryos to be used for research purposes.

The Working Group will review submitted materials, *e.g.*, consent forms, written policies or other documentation, taking into account the principles articulated in Section II (A), 45 CFR part 46, subpart A, and the following additional points to consider. That is, during the informed consent process, including written or oral communications, whether the donor(s) were: (1) Informed of other available options pertaining to the use of the embryos; (2) offered any inducements for the donation of the embryos; and (3) informed about what would happen to the embryos after the donation for research.

C. For embryos donated outside the United States before the effective date of these Guidelines, applicants may comply with either Section II (A) or (B). For embryos donated outside of the United States on or after the effective date of the Guidelines, applicants seeking to determine eligibility for NIH research funding may submit an assurance that the hESCs fully comply with Section II (A) or submit an assurance along with supporting information, that the alternative procedural standards of the foreign country where the embryo was donated provide protections at least equivalent to those provided by Section II (A) of these Guidelines. These materials will be reviewed by the NIH ACD Working Group, which will recommend to the ACD whether such equivalence exists. Final decisions will be made by the NIH Director.

D. NIH will establish a new Registry listing hESCs eligible for use in NIH funded research. All hESCs that have been reviewed and deemed eligible by the NIH in accordance with these Guidelines will be posted on the new NIH Registry.

III. Use of NIH Funds

Prior to the use of NIH funds, funding recipients should provide assurances, when endorsing applications and progress reports submitted to NIH for projects using hESCs, that the hESCs are listed on the NIH registry.

IV. Research Using hESCs and/or Human Induced Pluripotent Stem Cells That, Although the Cells May Come From Eligible Sources, Is Nevertheless Ineligible for NIH Funding

This section governs research using hESCs and human induced pluripotent stem cells, *i.e.*, human cells that are capable of dividing without differentiating for a prolonged period in culture, and are known to develop into cells and tissues of the three primary germ layers. Although the cells may come from eligible sources, the following uses of these cells are nevertheless ineligible for NIH funding, as follows:

A. Research in which hESCs (even if derived from embryos donated in accordance with these Guidelines) or human induced pluripotent stem cells are introduced into non-human primate blastocysts.

B. Research involving the breeding of animals where the introduction of hESCs (even if derived from embryos donated in accordance with these Guidelines) or human induced pluripotent stem cells may contribute to the germ line.

V. Other Research Not Eligible for NIH Funding

A. NIH funding of the derivation of stem cells from human embryos is prohibited by the annual appropriations ban on funding of human embryo research (Section 509, Omnibus Appropriations Act, 2009, Pub. L. 111–8, 3/11/09), otherwise known as the Dickey Amendment.

B. Research using hESCs derived from other sources, including somatic cell nuclear transfer, parthenogenesis, and/or IVF embryos created for research purposes, is not eligible for NIH funding.

Dated: June 30, 2009.

Raynard S. Kington,

Acting Director, NIH.

[FR Doc. E9–15954 Filed 7–6–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Importer's ID Input Record

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day notice and request for comments; Extension of an existing information collection: 1651–0064.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: Importer's ID Input Record (Form 5106). This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (74 FR 16226) on April 9, 2009, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before August 6, 2009.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

SUPPLEMENTARY INFORMATION: U.S. Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on

proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act (Pub. L. 104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological techniques or other forms of information.

Title: Importer's ID Input Record.

OMB Number: 1651–0064.

Form Number: Form 5106.

Abstract: Form 5106 is filed with the first formal entry or the first request for services that will result in the issuance of a bill or a refund check upon adjustment of a cash collection. The number, name, and address conveyed on the Form 5106 is the basis for establishing bond coverage, release and entry of merchandise, liquidation, issuance of bills and refunds, and processing of drawback and FP&F actions.

Current Actions: There are no changes to the information collection. This submission is being made to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Businesses.

Estimated Number of Respondents: 500.

Estimated Number of Annual Responses per Respondent: 2.

Estimated Number of Total Annual Responses: 1,000.

Estimated Time per Response: 6 minutes.

Estimated Total Annual Burden Hours: 100.

If additional information is required contact: Tracey Denning, U.S. Customs and Border Protection, Office of Regulations and Rulings, 799 9th Street, NW., 7th Floor, Washington, DC 20229–1177, at 202–325–0265.

Dated: June 30, 2009.

Tracey Denning,

Agency Clearance Officer, Customs and Border Protection.

[FR Doc. E9–15837 Filed 7–6–09; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Application for Identification Card

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day notice and request for comments; Extension of an existing information collection: 1651–0008.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: Application for Identification Card (Form 3078). This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with a change to the burden hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (74 FR 16229) on April 9, 2009, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before August 5, 2009.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

SUPPLEMENTARY INFORMATION: U.S. Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act (Pub. L.104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological techniques or other forms of information.

Title: Application for Identification Card.

OMB Number: 1651–0008.

Form Number: CBP Form 3078.

Abstract: CBP Form 3078 is used by licensed Cartmen, Lightermen, Warehousemen, brokerage firms, foreign trade zones, container station operators, and their employees requiring access to CBP secure areas to apply for an identification card so that they may legally handle merchandise which is in CBP custody.

Current Actions: This submission is being made to extend the expiration date. There is an increase in the burden hours due to a revised estimate by CBP in the number of respondents.

Type of Review: Extension (with change).

Affected Public: Businesses.

Estimated Number of Respondents: 150,000.

Estimated Number of Total Annual Responses: 150,000.

Estimated Time per Response: 17 minutes.

Estimated Total Annual Burden Hours: 42,450.

If additional information is required contact: Tracey Denning, U.S. Customs and Border Protection, Office of Regulations and Rulings, 799 9th Street, NW., 7th Floor, Washington, DC 20229–1177, at 202–325–0265.

Dated: June 30, 2009.

Tracey Denning,

Agency Clearance Officer, Customs and Border Protection.

[FR Doc. E9–15838 Filed 7–6–09; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1846–DR; Docket ID FEMA–2008–0018]

Oklahoma; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Oklahoma (FEMA–1846–DR), dated June 19, 2009, and related determinations.

DATES: *Effective Date:* June 19, 2009.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated June 19, 2009, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Oklahoma resulting from wildfires during the period of April 9–12, 2009, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Oklahoma.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and Other Needs Assistance will be limited to 75 percent of the total eligible costs. If Public Assistance is later requested and warranted, Federal funds provided under that program will also be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Kenneth R. Tingman of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Oklahoma have been designated as adversely affected by this major disaster:

Carter, Cleveland, Grady, Lincoln, McClain, Murray, Oklahoma, Payne, and Stephens Counties for Individual Assistance.

All counties within the State of Oklahoma are eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. E9–15857 Filed 7–6–09; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1847–DR; Docket ID FEMA–2008–0018]

Missouri; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Missouri (FEMA–1847–DR), dated June 19, 2009, and related determinations.

DATES: *Effective Date:* June 19, 2009.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated June 19, 2009, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Missouri resulting from severe storms, tornadoes, and flooding during the period of May 8–16, 2009, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Missouri.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and Other Needs Assistance will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Thomas A. Hall, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Missouri have been designated as adversely affected by this major disaster:

Adair, Barry, Barton, Bollinger, Cape Girardeau, Christian, Dade, Dallas, Dent, Douglas, Greene, Howell, Iron, Jasper, Jefferson, Laclede, Lawrence, Madison, Newton, Ozark, Polk, Reynolds, Ripley, St. Francois Shannon, Texas, Washington, and Webster Counties for Individual Assistance.

Adair, Barton, Bollinger, Camden, Cape Girardeau, Cedar, Crawford, Dade, Dallas, Dent, Douglas, Greene, Hickory, Howell, Iron, Jasper, Knox, Laclede, Lewis, Madison, Maries, Marion, Miller, Newton, Oregon, Ozark, Perry, Phelps, Polk, Pulaski, Ray, Reynolds, Ripley, St. Francois, Ste. Genevieve, Saline, Shannon, Shelby, Stone,

Sullivan, Texas, Vernon, Washington, Wayne, Webster, and Wright Counties for Public Assistance.

All counties and the Independent City of St. Louis in the State of Missouri are eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. E9–15859 Filed 7–6–09; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5285–N–23]

Notice of Proposed Information Collection: Comment Request; Certified Eligibility for Adjustments for Damage or Neglect

AGENCY: Office of the Assistant Secretary for Housing, Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be 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.

DATES: *Comments Due Date:* September 8, 2009.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Lillian Deitzer, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; e-mail *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048.

FOR FURTHER INFORMATION CONTACT: Vance Morris, Director, Office of Single Family Asset Management, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 708–1672 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection 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 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: Certified Eligibility for Adjustments for Damage or Neglect.

OMB Control Number, if applicable: 2502–0349.

Description of the need for the information and proposed use: This information collection is needed to permit a one-time certification by mortgagees that they have acquired hazard insurance acceptable to HUD at a reasonable rate. The information collection will also permit the mortgagee to convey fire-damaged properties without a surcharge to the claim.

Agency form numbers, if applicable: None.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The estimated total number of hours needed to prepare the information collection is 25; the number of respondents is 50 generating 50 annual responses; the frequency of response is on occasion; and the estimated time needed to prepare the response is 30 minutes.

Status of the proposed information collection: Extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: June 30, 2009.

Ronald Y. Spraker,

Acting General Deputy Assistant Secretary for Housing—Deputy Federal Housing Commissioner.

[FR Doc. E9–15952 Filed 7–6–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5285–N–22]

Notice of Proposed Information Collection: Comment Request; Request for Occupied Conveyance

AGENCY: Office of the Assistant Secretary for Housing, Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be 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.

DATES: *Comments Due Date:* September 8, 2009.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Lillian Deitzer, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; e-mail *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048.

FOR FURTHER INFORMATION CONTACT: Program Contact, Meg Burns, Director, Office of Single Family Program Development, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 402–2121 (this is not a toll free number), for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection 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 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: Request for Occupied Conveyance.

OMB Control Number, if applicable: 2502–0268.

Description of the need for the information and proposed use: Usage of the form HUD–9539 will enable HUD to determine whether various persons qualify to remain as a tenant in occupancy. This information will also provide the basis for facilitating the management and administration of the property disposition program. Respondents are occupants of the property, former mortgagors, and tenants.

Agency form numbers, if applicable: HUD–9539.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The estimated total number of burden hours needed to prepare the information collection is 30,750. The number of respondents is 61,500, generating approximately 61,500 responses; The frequency of response is on occasion; and the time needed to prepare the response varies from 15 minutes to 30 minutes. The foregoing items previously had resulted from being estimated. Subsequently, for the purpose of this report, the foregoing items have remained the same by utilizing a particular methodology.

Status of the proposed information collection: Extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: June 30, 2009.

Ronald Y. Spraker,

Acting General Deputy Assistant Secretary for Housing—Deputy Federal Housing Commissioner.

[FR Doc. E9–15956 Filed 7–6–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5285–N–21]

Notice of Proposed Information Collection: Comment Request; Application for the Transfer of Physical Assets

AGENCY: Office of the Assistant Secretary for Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be 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.

DATES: *Comments Due Date:* September 8, 2009.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Lillian Deitzer, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; e-mail *Lillian_L._Deitzer@HUD.gov* or telephone (202)402–8048.

FOR FURTHER INFORMATION CONTACT: Kimberly Munson, Office of Asset Management, Policy and Participation Standards Division, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 708–3730 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection 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 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 the Transfer of Physical Assets.

OMB Control Number, if applicable: 2502–0275.

Description of the need for the information and proposed use: This information will be used to ensure that HUD multifamily housing properties are not placed in physical, financial, or managerial jeopardy during a transfer of physical assets.

Agency form numbers, if applicable: HUD–92266.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 28,187. The number of respondents is 14,758, the number of responses is 295, the frequency of response is on occasion, and the burden hour per response is 90.33.

Status of the proposed information collection: This is an extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: June 30, 2009.

Ronald Y. Spraker,

Acting General Deputy Assistant Secretary for Housing—Deputy Federal Housing Commissioner.

[FR Doc. E9–15962 Filed 7–6–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2009–N136; 80221–1113–0000–F5]

Endangered Species Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comment.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered species. With some exceptions, the Endangered Species Act (Act) prohibits activities with endangered and threatened species unless a Federal permit allows such activity. The Act also requires that we invite public comment before issuing these permits.

DATES: Comments on these permit applications must be received on or before August 6, 2009.

ADDRESSES: Written data or comments should be submitted to the U.S. Fish and Wildlife Service, Endangered Species Program Manager, Region 8, 2800 Cottage Way, Room W–2606, Sacramento, CA 95825 (*telephone:* 916–414–6464; fax: 916–414–6486). Please refer to the respective permit number for each application when submitting comments. All comments received, including names and addresses, will become part of the official administrative record and may be made available to the public.

FOR FURTHER INFORMATION CONTACT: Daniel Marquez, Fish and Wildlife Biologist; see **ADDRESSES** (*telephone:* 760–431–9440; *fax:* 760–431–9624).

SUPPLEMENTARY INFORMATION: The following applicants have applied for scientific research permits to conduct certain activities with endangered species under section 10(a)(1)(A) of the Act (16 U.S.C. 1531 *et seq.*). We seek review and comment from local, State, and Federal agencies and the public on the following permit requests. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Permit No. TE–213308

Applicant: Joseph E. DiDonato, Alameda, California.

The applicant requests a permit to take (harass by survey, capture, handle, and release) the California tiger salamander (*Ambystoma californiense*) in conjunction with surveys and population monitoring throughout the range of the species within the jurisdiction of the Sacramento Fish and Wildlife Service Office, California, for the purpose of enhancing its survival.

Permit No. TE–045994

Applicant: U.S. Geological Service, Biological Resources Division, Western Ecological Research Center, San Diego Field Station, San Diego, California.

The applicant requests an amendment to an existing permit (August 28, 2001, 66 FR 45322), in order to extend the geographic area and take (harass by survey, capture, handle, and release) the unarmored threespine stickleback (*Gasterosteus aculeatus williamsoni*) in conjunction with surveys and population demographic studies within Santa Barbara County, California, for the purpose of enhancing its survival.

Permit No. TE–213314

Applicant: Morro Coast Audubon Society, Morro Bay, California.

The applicant requests a permit to take (harass by survey, and handle) the Morro shoulderband snail (*Helminthoglypta waleriana*) in conjunction with surveys throughout the range of the species in California for the purpose of enhancing its survival.

Permit No. TE–211099

Applicant: Kenneth A. Glass, Oakhurst, California.

The applicant requests a permit to take (harass by survey, capture, handle, and release) the California tiger salamander (*Ambystoma californiense*) in conjunction with surveys and population monitoring throughout the range of the species in California for the purpose of enhancing its survival.

Permit No. TE–787716

Applicant: Scott B. Tremor, Santee, California.

The applicant requests an amendment to an existing permit (February 10, 1997, 62 FR 6002) to take (capture, handle, and release) the Stephens' kangaroo rat (*Dipodomys stephensi*) and San Bernardino kangaroo rat (*Dipodomys merriami parvus*) in conjunction with surveys throughout the range of each species in California for the purpose of enhancing their survival.

Permit No. TE–095858–3

Applicant: Arianne B. Preite, Anaheim Hills, California.

The applicant requests an amendment to an existing permit (December 8, 2004, 69 FR 71070) to take (capture, collect, and kill) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the Riverside fairy shrimp (*Streptocephalus wootoni*), the San Diego fairy shrimp (*Branchinecta sandiegonensis*), and the vernal pool tadpole shrimp (*Lepidurus packardi*) in conjunction with surveys throughout the range of each species in California for the purpose of enhancing their survival.

Permit No. TE–211099

Applicant: Joelle J. Fournier, San Diego, California.

The applicant requests a permit to take (harass by survey, and locate/monitor nests) the California least tern (*Sterna Antillarum browni*) in conjunction with surveys and population monitoring studies throughout the range of the species in California for the purpose of enhancing its survival.

Permit No. TE–213730

Applicant: Chad M. Young, Riverside, California.

The applicant requests a permit to take (capture, handle, tag, and release) the Stephens' kangaroo rat (*Dipodomys stephensi*) in conjunction with surveys and population monitoring throughout the range of the species in California for the purpose of enhancing its survival.

Permit No. TE–068745

Applicant: Jeffery T. Wilcox, San Jose, California.

The applicant requests an amendment to an existing permit, which we granted November 4, 2003, for a federally threatened species. The original permit allowed the applicant to take (harass by survey, capture, handle, transfer, and release) the California red-legged frog (*Rana aurora draytonii*) in conjunction with surveys and habitat management activities (prescribed fire) at the Blue Oak Ranch in Santa Clara County, California, for the purpose of enhancing its survival. The applicant requests an amendment to take (harass by survey, capture, handle and release) the California tiger salamander (*Ambystoma californiense*) in conjunction with surveys, population monitoring, and habitat management activities (prescribed fire) throughout the range of the species in California for the purpose of enhancing its survival.

Permit No. TE–777965

Applicant: LSA Associates Incorporated, Irvine, California.

The applicant requests an amendment to an existing permit (March 31, 1997, 62 FR 15192) to take (harass by survey) the Yuma clapper rail (*Rallus longirostris yumanensis*) and the light-footed clapper rail (*Rallus longirostris levipes*) in conjunction with surveys in California, Nevada, and Arizona, for the purpose of enhancing their survival; and take (harass by survey, and locate/monitor nests) the California least tern (*Sterna Antillarum browni*) in conjunction with surveys and population monitoring studies throughout the range of the species in California for the purpose of enhancing its survival.

Permit No. TE–215889

Applicant: Santa Clara University, Santa Clara, California.

The applicant requests a permit to take (survey, capture, mark, and recapture) the San Francisco garter snake (*Thamnophis sirtalis*) in conjunction with population monitoring and habitat quality/connectivity studies in Santa Clara County, California, for the purpose of enhancing its survival.

We invite public review and comment on each of these recovery permit applications. Comments and materials we receive will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

Dated: June 30, 2009.

Michael Long,

Acting Regional Director, Region 8, Sacramento, California.

[FR Doc. E9–15913 Filed 7–6–09; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items: Bishop Museum, Honolulu, HI

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items in the possession of the Bishop Museum, Honolulu, HI, that meet the definition of ''unassociated funerary objects'' under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural items. The National Park Service is not responsible for the determinations in this notice.

Five cultural items were collected from Kanupa Cave, South Kohala, HI, by J.S. Emerson and donated to the Bishop Museum in 1889, as part of the earliest of the Bishop Museum collections. The five unassociated funerary objects are three poi bowls, a wooden bowl and cover, and a fan.

In 1939, nine cultural items were collected from Kanupa Cave, South Kohala, HI, by Kenneth Emory, a Bishop Museum staff member. The nine unassociated funerary objects are six pieces of aha, hau and olona cordage, and three mat fragments.

The cultural affiliation of the cultural items is established as being Native Hawaiian through Bishop Museum records and consultation with the Hawaii Island Burial Council, Hui Malama I Na Kupuna O Hawai'i Nei, and the Office of Hawaiian Affairs. Both Hui Malama I Na Kupuna O Hawai'i Nei and the Office of Hawaiian Affairs have requested repatriation of the unassociated funerary objects. Each qualifies as a Native Hawaiian organization under NAGPRA, pursuant to 25 U.S.C. 3001(11), and each is entitled to claim and receive the unassociated funerary objects.

Officials of the Bishop Museum have determined that, pursuant to 25 U.S.C. 3001 (3)(B), the 14 cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native Hawaiian individual or individuals. Officials of the Bishop Museum also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary objects and Hui Malama I Na Kupuna O Hawai'i Nei and the Office of Hawaiian Affairs. Both Hui Malama I Na Kupuna O Hawai'i Nei and the Office of Hawaiian Affairs have requested repatriation of the unassociated funerary objects, and officials of the Bishop Museum cannot determine by the preponderance of the evidence which requesting party is the most appropriate claimant. Consequently, pursuant to 43 CFR 10.10 (c)(2), the Bishop Museum will retain the unassociated funerary objects until Hui Malama I Na Kupuna O Hawai'i Nei and the Office of Hawaiian Affairs mutually agree upon the appropriate recipient or the dispute is otherwise resolved pursuant to NAGPRA or as ordered by a court of competent jurisdiction.

Representatives of any other Native Hawaiian organization that believes itself to be culturally affiliated with the unassociated funerary objects should contact Betty Lou Kam, Vice President Cultural Resources, Bishop Museum, 1525 Bernice Street, Honolulu, HI 96817, telephone (808) 848–4144, before August 6, 2009. Repatriation of the unassociated funerary objects to Hui Malama I Na Kupuna O Hawai'i Nei and the Office of Hawaiian Affairs may proceed after that date when the affiliated Native Hawaiian organizations have mutually agreed upon a resolution.

Bishop Museum is responsible for notifying the Hawaii Island Burial Council, Hui Malama I Na Kupuna O Hawai'i Nei, and the Office of Hawaiian Affairs that this notice has been published.

Dated: June 18, 2009

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E9–16023 Filed 7–6–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: New York University College of Dentistry, New York City, NY

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the possession of the New York University College of Dentistry, New York City, NY. The human remains were removed from Crab Creek Coulee, Grant County, WA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by New York University College of Dentistry professional staff in consultation with representatives of the Confederated Tribes of the Colville Reservation, Washington; Confederated Tribes and Bands of the Yakama Nation, Washington; and Wanapum Band, a non-Federally recognized Indian group.

At an unknown date, human remains representing a minimum of one individual were removed from an unknown site on the Crab Creek Coulee, Grant County, WA, by Harlan Smith. At an unknown date, the human remains were acquired by C.B. Moore. In 1917, Mr. Moore donated the human remains to the Museum of the American Indian, Heye Foundation. In 1956, the human remains were transferred to Dr. Theodore Kazamiroff, New York University College of Dentistry. No

known individual was identified. No associated funerary objects are present.

The Museum of the American Indian records list the locality of origin as Crab Creek Coulee, WA. The morphology of the human remains is consistent with Native American ancestry. The condition of the human remains suggests that they were removed from a Historic Period burial that probably dated to the 1800s.

Tribal representatives identified Crab Creek, Grant County, WA, as part of the ancestral territory of both the Wanapum and Sinkayuse. Historic records from the early 19th century document Wanapum and Sinkayuse villages in Grant County. The northern boundary of the Wanapum extended to Crab Creek, while the southern edge of the Sinkayuse territory extended to Crab Creek. The extremities of the territories were defined by diffuse boundaries, and boundaries shifted according to who lived in or utilized land along the creek. At the time, the people living in the region did not organize themselves according to a tribe in the modern-day sense. Organization was along family, clan, and village lines. Trading and intermarriage were common between villages and groups.

During the 19th century, some Wanapum became part of the Confederated Tribes and Bands of the Yakima Nation, Washington, while others remained part of the state-recognized Wanapum Band that stayed in their ancestral territory. The Sinkayuse relocated among the Confederated Tribes of the Colville Reservation, Washington. Today, all three groups maintain close relations and coordinate repatriations for human remains from Grant County.

Officials of New York University College of Dentistry have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of New York University College of Dentistry also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Confederated Tribes of the Colville Reservation, Washington; Confederated Tribes and Bands of the Yakama Nation, Washington; and the Wanapum Band, a non-Federally recognized Indian group.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Dr. Louis Terracio, New York University College of Dentistry, 345 East 24th St., New York, NY 10010, telephone (212) 998–9917, before August 6, 2009. Repatriation of the human remains to the Confederated Tribes of the Colville Reservation, Washington; Confederated Tribes and Bands of the Yakama Nation, Washington; and the Wanapum Band, a non-Federally recognized Indian group, may proceed after that date if no additional claimants come forward.

The New York University College of Dentistry is responsible for notifying the Confederated Tribes of the Colville Reservation, Washington; Confederated Tribes and Bands of the Yakama Nation, Washington; and Wanapum Band, a non-Federally recognized Indian group, that this notice has been published.

Dated: June 15, 2009

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E9–16014 Filed 7–6–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Department of Anthropology Museum at the University of California, Davis, Davis, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession of the Department of Anthropology Museum at the University of California, Davis, Davis, CA. The human remains and associated funerary objects were removed from Lake County, CA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Department of Anthropology Museum at the University of California, Davis professional staff in consultation with representatives of the Cachil DeHe Band of Wintun Indians of the Colusa Indian Community of the Colusa Rancheria, California; Cortina Indian Rancheria of Wintun Indians of California; and Rumsey Indian Rancheria of Wintun Indians of California.

In 1971–1973, human remains representing a minimum of one individual were removed from CA–LAK–152 in Lake County, CA. Accompanying records indicate that the human remains were recovered by the Foundation for Archaeological Research during archeological excavations related to the construction of Indian Valley Reservoir by the Yolo County Flood Control and Water Conservation District. In 2006, the Yolo County Flood Control and Water Conservation District donated the Indian Valley archeological collection to the Department of Anthropology Museum at the University of California at Davis. No known individual was identified. The 71 associated funerary objects are 11 clamshell disk beads, 59 Olivella lipped and full lipped beads and bead fragments, and 1 obsidian biface.

Based on burial context and site characteristics, the human remains described above from Lake County are determined to be Native American in origin. The presence of clamshell disk beads with the burial indicates that it dates to Phase 2 of the Late Period (approximately A.D. 1500–1790). Linguistic evidence indicates that the Patwin (Southern Wintun) moved southward from the vicinity of the California–Oregon border into the Sacramento Valley sometime around A.D. 0, and then spread into the surrounding foothills sometime before the beginning of Phase 2 of the Late Period. The archeological assemblage from CA–LAK–152 also indicates an occupation that is consistent with the ethnographic Patwin. Based on geographical location and age of the associated funerary objects, the human remains and associated funerary objects are culturally affiliated with descendants of the Patwin.

In 1971–1973, human remains representing a minimum of one individual were removed from CA–LAK–153 in Lake County, CA. Accompanying records indicate that the human remains were recovered by the Foundation for Archaeological Research during archeological excavations related to the construction of Indian Valley Reservoir by the Yolo County Flood Control and Water Conservation District. In 2006, the Yolo County Flood Control and Water Conservation District donated the Indian Valley archeological collection to the Department of Anthropology Museum at the University of California at Davis. No known individual was identified. The 348 associated funerary objects are 39 clam

shell disk beads and bead fragments, 302 historic glass beads and bead fragments, 1 bone bead fragment, 1 possible stone bead fragment, and 5 pieces of incised bone that may be from a whistle or ear tube.

Based on burial context and site characteristics, the human remains described above from Lake County are determined to be Native American in origin. Accompanying field reports indicate this site may be the Patwin village of Loli recorded by Kroeber (1932:263). The presence of historic items indicates that the burial from CA–LAK–153 dates to the Historic Period (after A.D. 1790). Linguistic evidence indicates that the Patwin (Southern Wintun) moved southward from the vicinity of the California–Oregon border into the Sacramento Valley sometime around A.D. 0, and then spread into the surrounding foothills sometime before the beginning of Phase 2 of the Late Period. The archeological assemblages from CA–LAK–152 and CA–LAK–153 also indicate an occupation that is consistent with the ethnographic Patwin. Based on geographical location and age of the associated funerary objects, the human remains and associated funerary objects are culturally affiliated with descendants of the Patwin. Descendants of the Patwin are members of the Cachil DeHe Band of Wintun Indians of the Colusa Indian Community of the Colusa Rancheria, California; Cortina Indian Rancheria of Wintun Indians of California; and Rumsey Indian Rancheria of Wintun Indians of California.

Officials of the Department of Anthropology Museum at the University of California, Davis have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of two individuals of Native American ancestry. Officials of the Department of Anthropology Museum at the University of California, Davis also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the 419 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Department of Anthropology Museum at the University of California, Davis have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Cachil DeHe Band of Wintun Indians of the Colusa Indian Community of the Colusa Rancheria, California; Cortina Indian Rancheria of Wintun Indians of California; and Rumsey Indian Rancheria of Wintun Indians of California.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Elizabeth Guerra, Department of Anthropology Museum, 330 Young Hall, One Shields Avenue, University of California, Davis, CA 95616, telephone (530) 754–6280, before August 6, 2009. Repatriation of the human remains and associated funerary objects to the Cachil DeHe Band of Wintun Indians of the Colusa Indian Community of the Colusa Rancheria, California; Cortina Indian Rancheria of Wintun Indians of California; and Rumsey Indian Rancheria of Wintun Indians of California may proceed after that date if no additional claimants come forward.

The Department of Anthropology Museum at the University of California, Davis is responsible for notifying the Cachil DeHe Band of Wintun Indians of the Colusa Indian Community of the Colusa Rancheria, California; Cortina Indian Rancheria of Wintun Indians of California; and Rumsey Indian Rancheria of Wintun Indians of California that this notice has been published.

Dated: June 15, 2009

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E9–16017 Filed 7–6–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Thomas Burke Memorial Washington State Museum, University of Washington, Seattle, WA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary object in the control of the Thomas Burke Memorial Washington State Museum (Burke Museum), Seattle, WA. The human remains and associated funerary object were removed from south of Kent, King County, WA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary object. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Burke Museum professional staff in consultation with representatives of the Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington; Puyallup Tribe of the Puyallup Reservation, Washington; Sauk-Suiattle Indian Tribe of Washington; Snoqualmie Tribe, Washington; Suquamish Indian Tribe of the Port Madison Reservation, Washington; and Tulalip Tribes of the Tulalip Reservation, Washington.

In 1921, human remains representing a minimum of one individual were removed from south of Kent in King County, WA. The human remains were located under a log or root and removed by W.A. Steigleder while excavating for a road. The human remains were donated to the Burke Museum in 1921 (Burke Accn. #1879). No known individual was identified. The one associated funerary object is a carved stone club.

Based on archeological and geographic information, the human remains and associated funerary object have been determined to be Native American. The stone club is consistent with other Coast Salish material culture. The provenience where the human remains and associated funerary object were found is within the aboriginal territory of the Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington. Ancestors of the Muckleshoot traditionally occupied the Green River and White River Basin Valleys. Kent is located along the Green River area. The Skopamish Band inhabited the upper Green River area. The Skopamish and other Native Americans from the Green River and White River Basin Valleys were assigned to move to the Nisqually Reservation as per the terms of the Medicine Creek Treaty of December 26, 1854; however, Governor Isaac Stevens recommended the Muckleshoot Reservation be established in 1856. In 1857, the Muckleshoot Reservation was formally approved. The Skopamish and other Native American groups now represented by the Muckleshoot Indian Tribe were also signatories to the Point Elliot Treaty of January 22, 1855.

Officials of the Burke Museum have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of one individual of Native

American ancestry. Officials of the Burke Museum also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the one object described above is reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Burke Museum have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary object and the Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary object should contact Megon Noble, Burke Museum, University of Washington, Box 353010, Seattle, WA 98195–3010, telephone (206) 685–3849, before August 6, 2009. Repatriation of the human remains and associated funerary object to the Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington may proceed after that date if no additional claimants come forward.

The Burke Museum is responsible for notifying the Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington; Puyallup Tribe of the Puyallup Reservation, Washington; Sauk-Suiattle Indian Tribe of Washington; Snoqualmie Tribe, Washington; Suquamish Indian Tribe of the Port Madison Reservation, Washington; and Tulalip Tribes of the Tulalip Reservation, Washington that this notice has been published.

Dated: June 15, 2009

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E9–16020 Filed 7–6–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: U.S. Department of the Interior, National Park Service, Tumacacori National Historical Park, Tumacacori, AZ

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession of the U.S. Department of the Interior, National Park Service, Tumacacori National Historical Park, Tumacacori, AZ. The human remains and associated funerary objects were removed from areas near Tumacacori Mission in Santa Cruz County, AZ.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations within this notice are the sole responsibility of the superintendent, Tumacacori National Historical Park.

A detailed assessment of the human remains and associated funerary objects was made by Tumacacori National Historical Park and Western Archeological and Conservation Center professional staff in consultation with representatives of the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Mescalero Apache Tribe of the Mescalero Reservation, New Mexico; Pascua Yaqui Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; San Carlos Apache Tribe of the San Carlos Reservation, Arizona; Tohono O'odham Nation of Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico. The Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona did not attend the consultation meetings but was represented by the Gila River Indian Community of the Gila River Indian Reservation, Arizona. The Fort Sill Apache Tribe of Oklahoma; Jicarilla Apache Nation, New Mexico; Tonto Apache Tribe of Arizona; and the White Mountain Apache Tribe of the Fort Apache Reservation, Arizona were contacted but did not participate in the consultation meetings.

At an unknown date, human remains representing a minimum of one individual were removed from an unknown site within what is now Tumacacori National Historical Park in Santa Cruz County, AZ. No known individual was identified. The one associated funerary object is a cremation/burial jar.

In the 1930s, human remains representing a minimum of one individual were removed from the area near Tumacacori Mission in Santa Cruz County, AZ. The remains and associated funerary object were donated to Tumacacori National Historical Park in 1938 by Louis Caywood. No known individual was identified. The one associated funerary object is a cremation/burial jar.

Between December 1934 and March 1935, human remains representing a minimum of two individuals were removed from an unknown location area near Tumacacori Mission in Santa Cruz County, AZ. No known individuals were identified. The 38 associated funerary objects are 33 plainware pottery sherds from a cremation/burial jar, 2 bags of sherds from a cremation jar, 1 unworked burnt shell, 1 piece of worked faunal bone, and 1 pendant.

In 1955, human remains representing a minimum of nine individuals were removed from fields just outside park boundaries in Santa Cruz County, AZ. The remains and associated funerary objects were donated to the park by J.L. Kalb, a local rancher in whose fields the remains and objects were found. No known individuals were identified. The 43 associated funerary objects are 4 cremation/burial jars, 1 cremation/burial bowl, 11 pieces of burnt unworked bone, 9 unworked ceramic sherds, 2 worked ceramic sherds, 12 beads, 1 shell bracelet fragment, 1 piece of worked faunal bone, 1 unworked shell fragment, and 1 awl.

The Native American human remains described above are all cremations with associated pottery vessels and artifacts that are characteristic of the culture group commonly known to archeologists as the Hohokam and date between A.D. 300 and A.D. 1300. The term ''Hohokam'' is used here for convenience due to its common use as a descriptor of this culture; it is unknown what name these people applied to themselves, and their present-day descendants do not use this term. The ''Hohokam'' were a sedentary agricultural group that developed out of the local Archaic population. Their settlement pattern was predominantly of the rancheria type, with pithouse or house-in-pit architecture. Pit or urn cremations were the predominant burial practice prior to A.D. 1100. Extended supine inhumations then became more prevalent, completely replacing cremations by A.D. 1300. There was a pronounced, though far from complete, decline in population after about A.D. 1350.

The Ak Chin Indian Community of the Maricopa (Ak Chin) Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation; and the Tohono O'odham Nation of Arizona comprise one cultural group known as the O'odham. The Ak Chin Indian Community of the Maricopa (Ak Chin) Reservation, Arizona consists primarily of Akimel and Tohono O'odham, with a few families of Hia-Ced O'odham. The Gila River Indian Community of the Gila

River Indian Reservation, Arizona and the Salt River Pima-Maricopa Indian Community of the Salt River Reservation are both composed primarily of Akimel O'odham along with small populations of Maricopas.

The O'odham commonly refer to their ancestors as the ''Huhugam''. The Akimel O'odham, Tohono O'odham and the Hia-Ced O'odham (not Federally-recognized) are descendants of the ''Huhugam''. Their oral history documents the end time of the ''Hohokam'', and archeological evidence supports the link between historic O'odham groups and the prehistoric ''Hohokam''. Linguistic, oral tradition, and ethnographic evidence also support affiliation between the ''Hohokam'' and the present-day O'odham.

The Hopi Tribe of Arizona considers all of Arizona to be within traditional Hopi lands, or within areas where Hopi clans migrated in the past. According to Hopi oral history some clans moved out of the Valley of Mexico/Central Mexico and migrated north into the Gila and Salt River Basins. The Santa Cruz Valley, which extends from Northern Sonora, Mexico into southern Arizona to the confluence of the Gila and Salt Rivers, was a natural corridor for the movement of peoples from the south and served as a migration route for Hopi clans. Several researchers have noted similarities between Hopi ceremonies and those of the O'odham. On May 23, 1994, the Hopi Tribe of Arizona issued a resolution declaring its cultural affiliation with the ''Hohokam''.

Oral history suggests that some Zuni clans began their migrations in the Salt-Gila River basins and originated from the Hohokam. On July 11, 1995, the Zuni Tribe of the Zuni Reservation, New Mexico issued a ''Statement of Cultural Affiliation with Prehistoric and Historic Cultures'' which asserts a shared group identity with the ''Hohokam'' based on oral teachings and traditions, ethnohistoric documentation, and historic and archeological evidence. Zuni oral history speaks of ancestral migrations and settling throughout the region in search for the Middle Place of the World (present-day Pueblo of Zuni). A recent publication, *Zuni Origins*, discusses some of the evidence for shared group identity between the ''Hohokam'' of southern Arizona and the Zuni Tribe of the Zuni Reservation, New Mexico.

Officials of Tumacacori National Historical Park have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of 13 individuals of Native American ancestry. Officials of Tumacacori National Historical Park also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the 83 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of Tumacacori National Historical Park have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Ak Chin Indian Community of the Maricopa (Ak Chin) Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; Tohono O'odham Nation of Arizona; and the Zuni Tribe of the Zuni Reservation, New Mexico.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Lisa Carrico, superintendent, Tumacacori National Historical Park, P.O. Box 8067, Tumacacori, AZ 85640, telephone (520) 398–2341 Ext. 52, before August 6, 2009. Repatriation of the human remains and associated funerary objects to the Ak Chin Indian Community of the Maricopa (Ak Chin) Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; Tohono O'odham Nation of Arizona; and the Zuni Tribe of the Zuni Reservation, New Mexico may proceed after that date if no additional claimants come forward.

Tumacacori National Historical Park is responsible for notifying the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Mescalero Apache Tribe of the Mescalero Reservation, New Mexico; Pascua Yaqui Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; San Carlos Apache Tribe of the San Carlos Reservation, Arizona; Tohono O'odham Nation of Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico that this notice has been published.

Dated: June 22, 2009

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E9–16022 Filed 7–6–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC and Arizona State Museum, University of Arizona, Tucson, AZ

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and an associated funerary object in the control of the U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and in the physical custody of the Arizona State Museum, University of Arizona, Tucson, AZ. The human remains and associated funerary object were removed from a site within the boundaries of the Gila River Indian Reservation, Maricopa and Pinal Counties, AZ.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary object. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Arizona State Museum and Bureau of Indian Affairs professional staff in consultation with representatives of the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; and Tohono O'odham Nation of Arizona.

In 1973, human remains representing a minimum of four individuals were removed from a cave northwest of St. Johns Church, located within the boundaries of the Gila River Indian Reservation in Maricopa County, AZ. No additional site information is available. The human remains were collected by agents of the U.S. Department of Justice, Federal Bureau of

Investigation and were received by the Arizona State Museum later that same year. No known individuals were identified. The one associated funerary object is a textile fragment.

Museum records lack sufficient information to culturally affiliate the human remains with any specific tribe. However, examination by a forensic anthropologist indicates that the human remains are of Native American ancestry, and possibly date to the Historic Period.

Officials of the Bureau of Indian Affairs and Arizona State Museum have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of four individuals of Native American ancestry. Officials of the Bureau of Indian Affairs and Arizona State Museum also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the one object described above is reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Bureau of Indian Affairs and Arizona State Museum have determined that, pursuant to 25 U.S.C. 3001 (2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and associated funerary object and any present-day Indian tribe.

The Native American Graves Protection and Repatriation Review Committee (Review Committee) is responsible for recommending specific actions for disposition of culturally unidentifiable human remains. In 2008, the Bureau of Indian Affairs and Arizona State Museum requested that the Review Committee recommend disposition of the culturally unidentifiable human remains to the Gila River Indian Community of the Gila River Indian Reservation, Arizona, as the aboriginal and historic occupants of the lands near St. Johns Church in Maricopa County, AZ. The Review Committee considered the request at its October 11–12, 2008 meeting and recommended disposition of the human remains to the Gila River Indian Community of the Gila River Indian Reservation, Arizona. An April 3, 2009 letter from the Designated Federal Official on behalf of the Secretary of the Interior transmitted the authorization for the museum to effect disposition of the human remains of the four culturally unidentifiable individuals to the Gila River Indian Community of the Gila River Indian Reservation, Arizona contingent on the publication of a Notice of Inventory Completion in the **Federal Register**. This notice fulfills that requirement. In the same letter, the Secretary recommended the transfer of the associated funerary object to the Gila River Indian Community of the Gila River Indian Reservation, Arizona, to the extent allowed by Federal, state, or local law.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and/or associated funerary object should contact John McClelland, NAGPRA Coordinator, Arizona State Museum, University of Arizona, Tucson, AZ 85721, telephone (520) 626–2950, before July 7, 2009. Disposition of the human remains and associated funerary object to the Gila River Indian Community of the Gila River Indian Reservation, Arizona may proceed after that date if no additional claimants come forward.

The Arizona State Museum is responsible for notifying the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; and Tohono O'odham Nation of Arizona that this notice has been published.

Dated: May 29, 2009

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E9–16025 Filed 7–6–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: U.S. Department of Agriculture, Forest Service, Tongass National Forest, Chatham Area, Juneau, AK

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession of the U.S. Department of Agriculture, Forest Service, Tongass National Forest, Chatham Area, Juneau, AK. The human remains and associated funerary objects were removed from sites near Yakutat, Southeast Alaska.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by U.S. Department of Agriculture, Forest Service professional staff in consultation with representatives of the Central Council of the Tlingit & Haida Indian Tribes; Sealaska Corporation; Sealaska Heritage Foundation; Yak-Tat Kwaan, Incorporated; and Yakutat Tlingit Tribe.

In 1988, human remains representing a minimum of five individuals were removed from Shallow Water Town near Yakutat, AK, during an excavation by the U.S. Department of Agriculture, Forest Service (49 YAK 020). The excavation was part of a mitigation plan for the anticipated flooding which was to occur with the blocking of Russell Fjord by the Hubbard Glacier. Blockage of the Fjord was anticipated to force the Situk River to flood the valley bottom and wash out the site. No known individuals were identified. The six associated funerary objects are one bone button fragment and a minimum of five melted blue glass beads.

The human remains represent five separate cremations, and are assumed to be five separate individuals. The individuals are reasonably believed to be Yakutat Tlingit because the area is the traditional territory of the Teqwedi, specifically the Bear House Clan. Oral traditions of the Yakutat Tlingit confirm their affiliation with this site. Descendants of the Yakutat Tlingit are members of the Yakutat Tlingit Tribe. A charcoal sample associated with Cremation 1 was radiocarbon dated to 250 60 BP, which yields a corrected date of A.D. 1480 to 1955. The carbon date for Cremation 5 of 270 70 BP yields a corrected date of A.D. 1450 to 1955.

In 1988, human remains representing a minimum of one individual were removed from Diyaguna'Et near Yakutat, AK, by the U.S. Department of Agriculture, Forest Service (49 YAK 019). The excavation was part of a mitigation plan for the anticipated flooding which was to occur with the blocking of Russell Fjord by the Hubbard Glacier. Blockage of the Fjord was anticipated to force the Situk River to flood the valley bottom and wash out the site. No known individual was identified. The four associated funerary objects are one white glass bead, one rolled copper earring, and two rolled copper earrings entwined by black human hair.

The human remains were determined to be Native American based on observable dental traits. The individual

is reasonably believed to be Yakutat Tlingit, as the area is the traditional territory of the Teqwedi, specifically the Bear House Clan. Oral traditions of the Yakutat Tlingit confirm their affiliation with this site. Descendants of the Yakutat Tlingit are members of the Yakutat Tlingit Tribe. Charcoal samples taken from above and below the skeletal remains were dated and determined to be 130 50 BP (calibrated to A.D. 1650 to 1950) and 380 100 BP (calibrated to A.D. 1329 to 1955).

Officials of the U.S. Department of Agriculture, Forest Service have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of six individuals of Native American ancestry. Officials of the U.S. Department of Agriculture, Forest Service also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the 10 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the U.S. Department of Agriculture, Forest Service have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Yakutat Tlingit Tribe.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Forrest Cole, Forest Supervisor, Tongass National Forest, Federal Building, Ketchikan, AK 99901–6591, telephone (907) 225–6200, before August 6, 2009. Repatriation of the human remains and associated funerary objects to the Yakutat Tlingit Tribe may proceed after that date if no additional claimants come forward.

The U.S. Department of Agriculture, Forest Service is responsible for notifying the Central Council of Tlingit & Haida Indian Tribes; Sealaska Corporation; Sealaska Heritage Foundation; Yak-Tat Kwaan, Incorporated; and Yakutat Tlingit Tribe that this notice has been published.

Dated: June 15, 2009

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E9–16024 Filed 7–6–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Thomas Burke Memorial Washington State Museum, University of Washington, Seattle, WA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the possession of the Thomas Burke Memorial Washington State Museum (Burke Museum), University of Washington, Seattle, WA. The human remains were most likely removed from Vancouver, Clark County, WA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Burke Museum professional staff in consultation with representatives of the Confederated Tribes and Bands of the Yakama Nation, Washington; Confederated Tribes of the Chehalis Reservation, Washington; Confederated Tribes of the Grand Ronde Community of Oregon; Confederated Tribes of the Siletz Reservation, Oregon; Confederated Tribes of the Umatilla Indian Reservation, Oregon; Confederated Tribes of the Warm Springs Reservation of Oregon; Cowlitz Indian Tribe, Washington; Muckleshoot Indian Tribe of the Muckleshoot Indian Reservation, Washington; Nisqually Indian Tribe of the Nisqually Reservation, Washington; Snoqualmie Tribe, Washington; Spokane Tribe of the Spokane Reservation, Washington; Stillaguamish Tribe of Washington, and three non-Federally recognized Indian groups - Clatsop-Nehalem Confederated Tribes, Snoqualmoo Tribe, and Wanapum Band.

At an unknown date before 1962, human remains representing a minimum of one individual were removed from an unknown site in the city of Vancouver within Clark County, WA. No known individual was identified. No associated funerary objects are present.

These human remains were previously considered culturally unidentifiable, but after further review by a University of Washington physical anthropologist, the human remains have been determined to be Native American. There are only two fragments of the cranium present; however, they exhibit morphological evidence consistent with Native American morphology, such as the presence of wormian bones and a thick cranial vault, as well as cranial deformity.

Early and late published ethnographic documentation indicates that Vancouver, WA, was within the aboriginal territory of the Watlala, Multnomah, Clackamas, Toppenish, and Wasco (Hale 1841, Silverstein 1998, Spier 1936, Mooney 1896) whose descendents are represented today by the Confederated Tribes and Bands of the Yakama Nation, Washington; Confederated Tribes of the Warm Springs Reservation of Oregon; and Confederated Tribes of the Grand Ronde Community of Oregon. During the treaty period, the Clackamas were removed to the Grand Ronde Reservation.

Vancouver falls outside of the lands described in the *Indian Land Areas Judicially Established 1978*; however, the tribes with judicially established Indian land areas in close proximity of Vancouver include the Upper Chehalis to the north, the Cowlitz to the northeast, the Warm Springs to the south, and the Yakama to the west. The core territory of the Cowlitz Indian Tribe, Washington is to the north of Vancouver, but aboriginally the Cowlitz utilized resources and visited the Vancouver area. During the treaty period, the Cowlitz were removed to the Chehalis Reservation, Yakama Reservation, and Quinault Reservation. In 2000, the Cowlitz Indian Tribe, Washington was independently Federally-recognized.

From 1824 until 1860, the Hudson's Bay Company operated a trading post at Fort Vancouver. This post brought together diverse communities through trade including over 23 tribes. Specifically, in addition to the four above-mentioned tribes, the Confederated Tribes of the Chehalis Reservation, Washington; Confederated Tribes of the Siletz Reservation, Oregon; Confederated Tribes of the Umatilla Indian Reservation, Oregon; Muckleshoot Indian Tribe of the Muckleshoot Indian Reservation, Washington; Nisqually Indian Tribe of the Nisqually Reservation, Washington; Snoqualmie Tribe, Washington; Spokane Tribe of the Spokane Reservation, Washington; Stillaguamish Tribe of Washington, and the following non-Federally recognized Indian groups: the Clatsop-Nehalem Confederated

Tribes, Snoqualmoo Tribe, and Wanapum Band, also had a close association with Fort Vancouver. Church burial records indicate that the ancestors of the above-mentioned tribes were all buried at Fort Vancouver. In addition, many of these cultures practiced intentional cranial modification, as seen in the human remains described in this notice. Based on the morphology of the human remains, provenience, ethnographic and historical records, officials of the Burke Museum reasonably believe that these tribes are associated with the Native American human remains.

Officials of the Burke Museum have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of the Burke Museum also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Confederated Tribes and Bands of the Yakama Nation, Washington; Confederated Tribes of the Chehalis Reservation, Washington; Confederated Tribes of the Grand Ronde Community of Oregon; Confederated Tribes of the Siletz Reservation, Oregon; Confederated Tribes of the Umatilla Indian Reservation, Oregon; Confederated Tribes of the Warm Springs Reservation of Oregon; Cowlitz Indian Tribe, Washington; Muckleshoot Indian Tribe of the Muckleshoot Indian Reservation, Washington; Nisqually Indian Tribe of the Nisqually Reservation, Washington; Snoqualmie Tribe, Washington; Spokane Tribe of the Spokane Reservation, Washington; and Stillaguamish Tribe of Washington. Furthermore, officials of the Burke Museum have determined there is a cultural relationship between the human remains and three non-Federally recognized Indian groups - the Clatsop-Nehalem Confederated Tribes, Snoqualmoo Tribe, and Wanapum Band.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Dr. Peter Lape, Burke Museum, University of Washington, Box 353010, Seattle, WA 98195–3010, telephone (206) 685–2282, before August 6, 2009. Repatriation of the human remains to the Confederated Tribes and Bands of the Yakama Nation, Washington; Confederated Tribes of the Chehalis Reservation, Washington; Confederated Tribes of the Grand Ronde Community of Oregon; Confederated Tribes of the Siletz Reservation, Oregon; Confederated Tribes of the Umatilla Indian Reservation, Oregon; Confederated Tribes of the Warm Springs Reservation of Oregon; Cowlitz Indian Tribe, Washington; Muckleshoot Indian Tribe of the Muckleshoot Indian Reservation, Washington; Nisqually Indian Tribe of the Nisqually Reservation, Washington; Snoqualmie Tribe, Washington; Spokane Tribe of the Spokane Reservation, Washington; Stillaguamish Tribe of Washington, and three non-Federally recognized Indian groups - the Clatsop-Nehalem Confederated Tribes, Snoqualmoo Tribe, and Wanapum Band, may proceed after that date if no additional claimants come forward.

The Burke Museum is responsible for notifying the Confederated Tribes and Bands of the Yakama Nation, Washington; Confederated Tribes of the Chehalis Reservation, Washington; Confederated Tribes of the Grand Ronde Community of Oregon; Confederated Tribes of the Siletz Reservation, Oregon; Confederated Tribes of the Umatilla Indian Reservation, Oregon; Confederated Tribes of the Warm Springs Reservation of Oregon; Cowlitz Indian Tribe, Washington; Muckleshoot Indian Tribe of the Muckleshoot Indian Reservation, Washington; Nisqually Indian Tribe of the Nisqually Reservation, Washington; Snoqualmie Tribe, Washington; Spokane Tribe of the Spokane Reservation, Washington; Stillaguamish Tribe of Washington, and three non-Federally recognized Indian groups - the Clatsop-Nehalem Confederated Tribes, Snoqualmoo Tribe, and Wanapum Band, that this notice has been published.

Dated: May 29, 2009

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E9–16021 Filed 7–6–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: U.S. Department of Defense, Army Corps of Engineers, Sacramento District, Sacramento, CA and Phoebe A. Hearst Museum of Anthropology, University of California, Berkeley, Berkeley, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the control of the U.S. Department of Defense, Army Corps of Engineers, Sacramento District, Sacramento, CA, and in the physical custody of the Phoebe A. Hearst Museum of Anthropology, University of California, Berkeley, Berkeley, CA. The human remains and associated funerary objects were removed from Fresno County, CA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

An assessment of the human remains, and catalog records and associated documents relevant to the human remains, was made by Army Corps of Engineers, Sacramento Division professional staff in consultation with representatives of the Big Sandy Rancheria of Mono Indians of California; Cold Springs Rancheria of Mono Indians of California; Northfork Rancheria of Mono Indians of California; Picayune Rancheria of Chukchansi Indians of California; Santa Rosa Indian Community of the Santa Rosa Rancheria, California; Table Mountain Rancheria of California; Tule River Indian Tribe of the Tule River Reservation, California; and Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California.

Human remains representing a minimum of one individual removed from site CA–Fre–27 were described in a Notice of Inventory Completion previously published in the **Federal Register** (70 FR 1267–1268, January 6, 2005). After publication of the notice, the officials of the Army Corps of Engineers, Sacramento District conducted a further review of the evidence, and found cultural affiliation for the remaining four individuals that had been previously determined to be culturally unidentifiable.

In 1948, human remains were removed from site CA–Fre–27, Fresno County, CA, by F. Fenenga and F.A. Riddell, University of California Archaeological Survey, and transferred to the Phoebe A. Hearst Museum of Anthropology that same year. No known individuals were identified. The three associated funerary objects are one knife/axe, one point tip, and one non-human bone awl.

The human remains are determined to be Native American. Site CA–Fre–27 is a habitation site located on the east bank

of the Kings River within the current impoundment boundaries of the Pine Flat Reservoir. Characteristics of material culture, including steatite beads, brownware ceramics, and historic glass trade beads, indicate that the site was inhabited post- A.D. 1500. The site is within the historic territory of the Big Sandy Rancheria of Mono Indians of California; Cold Springs Rancheria of Mono Indians of California; Northfork Rancheria of Mono Indians of California; Picayune Rancheria of Chukchansi Indians of California; Santa Rosa Indian Community of the Santa Rosa Rancheria, California; Table Mountain Rancheria of California; Tule River Indian Tribe of the Tule River Reservation, California; and Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California.

Officials of the Army Corps of Engineers, Sacramento District have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of four individuals of Native American ancestry. Officials of the Army Corps of Engineers, Sacramento District also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the three objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Army Corps of Engineers, Sacramento District have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Big Sandy Rancheria of Mono Indians of California; Cold Springs Rancheria of Mono Indians of California; Northfork Rancheria of Mono Indians of California; Picayune Rancheria of Chukchansi Indians of California; Santa Rosa Indian Community of the Santa Rosa Rancheria, California; Table Mountain Rancheria of California; Tule River Indian Tribe of the Tule River Reservation, California; and Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Richard Perry, NAGPRA Point of Contact, USACE Army Corps of Engineers, 1325 J St., Sacramento, CA 95814, telephone (916) 557–5218, before August 6, 2009. Repatriation of the human remains and associated funerary objects to the Big Sandy Rancheria of Mono Indians of California; Cold Springs Rancheria of Mono Indians of California; Northfork Rancheria of Mono Indians of California; Picayune Rancheria of Chukchansi Indians of California; Santa Rosa Indian Community of the Santa Rosa Rancheria, California; Table Mountain Rancheria of California; Tule River Indian Tribe of the Tule River Reservation, California; and Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California may proceed after that date if no additional claimants come forward.

Officials of the Army Corps of Engineers, Sacramento District are responsible for notifying the Big Sandy Rancheria of Mono Indians of California; Cold Springs Rancheria of Mono Indians of California; Northfork Rancheria of Mono Indians of California; Picayune Rancheria of Chukchansi Indians of California; Santa Rosa Indian Community of the Santa Rosa Rancheria, California; Table Mountain Rancheria of California; Tule River Indian Tribe of the Tule River Reservation, California; and Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California that this notice has been published.

Dated: May 26, 2009

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E9–16019 Filed 7–6–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Oregon State University Department of Anthropology, Corvallis, OR; Correction

AGENCY: National Park Service, Interior.

ACTION: Notice; correction.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the possession of Oregon State University Department of Anthropology, Corvallis, OR. The human remains were removed from Harney County, OR.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

The accession record number for human remains described in a Notice of Inventory Completion published in the **Federal Register** (74 FR 20944, April 17, 2008) was listed incorrectly. This notice deletes the reference to the accession number in the **Federal Register** of April 17, 2008, by substituting the following paragraph for paragraph number 4:

On an unknown date, human remains representing a minimum of one individual were removed from a site in Drewsey, Harney County, OR. The donor and circumstances of removal are unknown. No known individual was identified. No associated funerary objects are present.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Dr. David McMurray, Oregon State University Department of Anthropology, 238 Waldo Hall, Corvallis, OR 97331, telephone (541) 737–4515, before August 6, 2009. Repatriation of the human remains to the Burns Paiute Tribe of the Burns Paiute Indian Colony of Oregon may proceed after that date if no additional claimants come forward.

Oregon State University Department of Anthropology is responsible for notifying the Burns Paiute Tribe of the Burns Paiute Indian Colony of Oregon; Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians of Oregon; Confederated Tribes of the Grand Ronde Community of Oregon; Confederated Tribes of the Siletz Reservation, Oregon; Confederated Tribes of the Umatilla Indian Reservation, Oregon; Confederated Tribes of the Warm Springs Reservation of Oregon; Coquille Tribe of Oregon; Cow Creek Band of Umpqua Indians of Oregon and the Klamath Tribes, Oregon that this notice has been published.

Dated: June 15, 2009

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E9–16015 Filed 7–6–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R9-IA-2009-N0132; 96300-1671-0000-P5]

Issuance of Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of issuance of permits.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), have issued the following permits to conduct certain activities with endangered species and/or marine mammals.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 212, Arlington, Virginia 22203; fax 703/358-2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone 703/358-2104.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on the dates below, as authorized by the provisions of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and/or the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the Fish and Wildlife Service issued the requested permits subject to certain conditions set forth therein. For each permit for an endangered species, the Service found that (1) the application was filed in good faith, (2) the granted permit would not operate to the disadvantage of the endangered species, and (3) the granted permit would be consistent with the purposes and policy set forth in Section 2 of the Endangered Species Act of 1973, as amended.

ENDANGERED SPECIES

Permit number	Applicant	Receipt of application *Federal Register* notice	Permit issuance date
200284	Thomas G. Dullinger	74 FR 23201; May 18, 2009	June 17, 2009
208672	Bud A. Woodruff	74 FR 21816, May 11, 2009	June 22, 2009
208816	Behrooz Taher	74 FR 21817; May 11, 2009	June 17, 2009
209672	David J. Hemmings	74 FR 20339, May 1, 2009	June 22, 2009
209996	Karl F. Kurz	74 FR 20339, May 1, 2009	June 22, 2009
210876	Bruce P. Ford	74 FR 20339, May 1, 2009	June 22, 2009
211156	Raymond L. Bunney	74 FR 21817; May 11, 2009	June 17, 2009
212475	Colorado Buck	74 FR 20339; May 1, 2009	June 22, 2009
212705	Kenneth M. Huffaker	74 FR 21816; May 11, 2009	June 17, 2009
213188	Joseph M. Vargo	74 FR 21817; May 11, 2009	June 17, 2009
213650	Mark C. Zimmerman	74 FR 23201; May 18, 2009	June 17, 2009

MARINE MAMMALS

Permit number	Applicant	Receipt of application *Federal Register* notice	Permit issuance date
182542	Bruce R. Schoeneweis	73 FR 35707, June 24, 2008	Dec. 5, 2008
186019	Peter E. Seda	73 FR 36891, June 30, 2008	Dec. 5, 2008

Dated: June 26, 2009.

Lisa J. Lierheimer,

Senior Permit Biologist, Branch of Permits, Division of Management

[FR Doc. E9–15969 Filed 7–6–09; 8:45 am]

BILLING CODE 4310-55-S

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Weekly Listing of Historic Properties

Pursuant to (36 CFR 60.13(b,c)) and (36 CFR 63.5), this notice, through publication of the information included herein, is to apprise the public as well as governmental agencies, associations and all other organizations and individuals interested in historic preservation, of the properties added to, or determined eligible for listing in, the National Register of Historic Places from May 11 to May 15, 2009.

For further information, please contact Edson Beall via: United States Postal Service mail, at the National Register of Historic Places, 2280, National Park Service, 1849 C St., NW., Washington, DC 20240; in person (by appointment), 1201 Eye St., NW., 8th Floor, Washington, DC 20005; by fax, 202–371–2229; by phone, 202–354–2255; or by e-mail, *Edson_Beall@nps.gov.*

Dated: June 23, 2009.

J. Paul Loether,

Chief, National Register of Historic Places/National Historic Landmarks Program.

KEY: State, County, Property Name, Address/Boundary, City, Vicinity, Reference Number, Action, Date, Multiple Name

ARIZONA

Yavapai County

North Prescott Townsite Historic District, Between Gurley, Sheldon, Alarcon and Summit Sts., Prescott, 08001188, Listed, 5/13/09

ARKANSAS

Clay County

Rector Waterworks Building, 703 S. Main St., Rector, 09000312, Listed, 5/12/09

Crittenden County

Highway A–7, Gilmore to Turrell, old US 63 between Acwin St. in Gilmore and ditch No. 2 in Turrell, Gilmore vicinity, 09000313, Listed, 5/12/09 (Arkansas Highway History and Architecture MPS)

Logan County

Paris Commercial Historic District, roughly bounded by N. Express, Short Mountain, N. First, E. Pine, E. and W. Academy Sts., Paris, 09000314, Listed, 5/12/09

Poinsett County

Highway A–7, Bridges Historic District, old US 63 over Ditch No. 1 and its reliefs, Marked Tree vicinity, 09000318, Listed, 5/12/09 (Historic Bridges of Arkansas MPS)

COLORADO

Weld County

Von Trotha-Firestien Farm at Bracewell, Address Restricted, Greeley, 09000291, Listed, 5/12/09 (Historic Farms and Ranches of Weld County MPS)

IDAHO

Latah County

Nordby Farmstead, 1301 Old Highway 95, Genesee, 09000293, Listed, 5/15/09 (Agricultural Properties of Latah County, Idaho)

Twin Falls County

Salmon Falls Dam, Three Creek Hwy, Rogerson vicinity, 09000328, Listed, 5/15/09

ILLINOIS

Sangamon County

Route 66 South of Lake Springfield, Olde Rt. 66/Olde Carriage Way, Springfield vicinity, 09000296, Listed, 5/12/09 (Route 66 through Illinois MPS)

IOWA

Hardin County

Eldora Downtown Historic District, Approximately ten blocks in downtown Eldora around the courthouse square, Eldora, 09000297, Listed, 5/12/09 (Iowa's Main Street Commercial Architecture MPS)

Union County

Iowana Hotel, 203 W. Montgomery St., Creston, 09000298, Listed, 5/12/09

MISSOURI

Cape Girardeau County

Jefferson School, 731 Jefferson Ave., Cape Girardeau, 09000300, Liisted, 5/12/09

Cole County

Stephens, Hugh and Bessie, House, 601 Jackson St., Jefferson City, 09000301, Listed, 5/12/09

Newton County

Bonnie & Clyde Garage Apartment, 3347½ Oak Ridge Dr., Joplin, 09000302, Listed, 5/15/09

NEW YORK

Kings County

Industrial Complex at 221 McKibbin Street, 221 McKibbin St., Brooklyn, 09000303, Listed, 5/12/09

New York County

240 Central Park South, 240 Central Park S., New York, 09000304, Listed, 5/12/09

NORTH CAROLINA

Cleveland County

West Warren Street Historic District, Roughly bounded by W. Warren, McBrayer, Blanton, and Whisnant Sts., Shelby, 09000331, Listed, 5/12/09

Gates County

Sunbury High School, 101 NC 32 N., Sunbury, 09000332, Listed, 5/12/09

TEXAS

Matagorda County

Bay City Post Office, 2100 Ave. F, Bay City, 09000307, Listed, 5/12/09

Williamson County

Zidell House, 2015 W. Lake Dr., Taylor, 09000308, Listed, 5/12/09

VIRGINIA

Clarke County

Bear's Den Rural Historic District, Generally runs along both sides of ridge along parts of Raven Rocks and Blue Ridge Mtn. Rds., Bluemont vicinity, 08001112, Listed, 5/14/09

WISCONSIN

Jefferson County

Curtis, David W. and Jane, House, 213 E. Sherman Ave., Fort Atkinson, 09000309, Listed, 5/12/09

Wood County

Soo Line Steam Locomotive 2442, circa 1800 S. Central Ave., Marshfield, 09000310, Listed, 5/13/09

[FR Doc. E9–15884 Filed 7–6–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before June 20, 2009. Pursuant to section 60.13 of 36 CFR Part 60, written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St., NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by July 22, 2009.

J. Paul Loether,

Chief, National Register of Historic Places/ National Historic Landmarks Program.

COLORADO

Jefferson County

Brook Forest Inn, 8136 S. Brook Forest Rd., Evergreen, 09000567

Montrose County

Denver & Rio Grande Railroad Box Outfit Car No. 04414, 82800Q 83rd Rd., Cimarron Visitor Center, Curecanti National Recreation Center (CURE), Cimarron, 09000568

KENTUCKY

Clark County

Upper Reaches of Boone Creek Rural Historic District, (Clark County MRA) Upper Boone Creek vicinity, Winchester, 09000569

Fayette County

Upper Reaches of Boone Creek Rural Historic District, (Clark County MRA) Upper Boone Creek vicinity, Lexington, 09000569

Franklin County

Central Frankfort Historic District, Bounded by East and West 2nd St., Logan St., the Kentucky River, High St., and Mero St., Frankfort, 09000570

Shelby County

Hinton-Scearce House, (Shelby County MRA) 212 Adams Pike, Shelbyville, 09000571

NEW YORK

Albany County

Lustron Houses of Jermain Street Historic District, (Lustron Houses in New York MPS) 1,3,5,7,8 Jermain St., Albany, 09000572

Columbia County

Dick House, 641 Co. Rte. 8, Germantown, 09000573

Herkimer County

Emmanuel Episcopal Church, 588 Albany St., Little Falls, 09000574

Lewis County

Lewis County Soldiers' and Sailors' Monument, Village Green, NY 26 and Bostwick Sts., Lowville, 09000575

RHODE ISLAND

Providence County

Borders Farm, 31–38 N. Rd, Foster, 09000576

TENNESSEE

Sumner County

Trousdale-Baskerville House, 211 W. Smith St., Gallatin, 09000577

WASHINGTON

King County

Roanoke Park Historic District, Bounded by Shelby St. on the N., Roanoke St. on the S., Harvard Ave. on the W., 10th Ave. on the E., Seattle, 09000578

Lincoln County

Atlas E Missile Site 9, 36000 Crescent Rd. N., Reardan, 09000579

WISCONSIN

Columbia County

Farnham, Fred and Lucia, House, 553 W. James St., Columbus, 09000580

Jones, John A. and Maggie, House, 307 N. Ludington St., Columbus, 09000581

[FR Doc. E9–15889 Filed 7–6–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R9-IA-2009-N0133; 96300-1671-0000-P5]

Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications for permits to conduct certain activities with endangered species. The Endangered Species Act requires that we invite public comment on these permit applications.

DATES: Written data, comments or requests must be received by August 7, 2009.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 30 days of the date of publication of this notice to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 212, Arlington, Virginia 22203; fax 703/358-2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone 703/358-2104.

SUPPLEMENTARY INFORMATION:

Endangered Species

The public is invited to comment on the following applications for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). Submit your written data, comments, or requests for copies of the complete applications to the address shown in **ADDRESSES**.

Applicant: Duke University, Department of Evolutionary Anthropology, Durham, NC, PRT-215717

The applicant requests a permit to acquire in interstate and foreign commerce and to import biological specimens from various non-human primate species (Order Primates), including all species of lemurids, prosimians, New and Old World monkeys, and apes for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a five-year period.

Applicant: Exotic Feline Breeding Compound, Inc., Rosamond, CA, PRT-215034

The applicant requests a permit to import one female captive-born Iranian leopard (*Panthera pardus saxicolor)* from the ZooParc de Beauval, France, for the purpose of enhancement of the survival of the species.

Applicant: Victoria E. Wobber, Cambridge, MA, PRT-207589

The applicant requests a permit to import biological samples from wild bonobos (*Pan paniscus*) held at Lola ya Bonobo Sancturary, Kinshasa, Democratic Republic of Congo, and wild common chimpanzees (*Pan troglodytes*) held at Tchimpounga Chimpanzee Sanctuary, Pointe Noire, Congo Republic, for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a 5 year period.

The following applicants request a permit to import the sport-hunted trophy of one male straight horned markhor (*Capra falconeri jerdoni*) from the Torghar Conservation Project, Pakistan, for the purpose of enhancement of the survival of the species.

Applicant: Jerry L. Brenner, West Olive, MI, PRT-217355

Applicant: Barbara L. Sackman, Sands Point, NY, PRT-217353

Applicant: Alan Sackman, Sands Point, NY, PRT 217349

The following applicants request a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: James L. Scull, Rapid City, SD, PRT-213672

Applicant: William R. Morgan III, Salisbury, MD, PRT-216076

Applicant: Donald E. Coon, Sheridan, WY, PRT-216468

Applicant: Wayne M. Pourciau, New Iberia, LA, PRT-217668

Applicant: Thomas H. Blue, Eagle Springs, NC, PRT-211307

Applicant: Arlan M. Buckmeier, Fairbanks, AK, PRT-211337

Applicant: Kevin Atkinson, Northville, MI, PRT-217634

Dated: June 26, 2009

Lisa J. Lierheimer,

Senior Permit Biologist, Branch of Permits, Division of Management Authority

[FR Doc. E9–16003 Filed 7–7–09; 8:45 am]

BILLING CODE 4310-55-S

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1163 (Preliminary)]

Woven Electric Blankets From China

AGENCY: United States International Trade Commission.

ACTION: Institution of antidumping investigation and scheduling of a preliminary phase investigation.

SUMMARY: The Commission hereby gives notice of the institution of an investigation and commencement of preliminary phase antidumping investigation No. 731–TA–1163 (Preliminary) under section 733(a) of the Tariff Act of 1930 (19 U.S.C. 1673b(a)) (the Act) to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from China of woven electric blankets (''WEBs''), provided for in subheading 6301.10.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value. Unless the Department of Commerce extends the time for initiation pursuant to section 732(c)(1)(B) of the Act (19 U.S.C. 1673a(c)(1)(B)), the Commission must reach a preliminary determination in antidumping investigations in 45 days, or in this case by August 14, 2009. The Commission's views are due at Commerce within five business days thereafter, or by August 21, 2009.

For further information concerning the conduct of this investigation and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

DATES: *Effective Date:* June 30, 2009.

FOR FURTHER INFORMATION CONTACT: Joshua Kaplan (202–205–3184), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://*

www.usitc.gov). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—This investigation is being instituted in response to a petition filed on June 30, 2009, by Sunbeam Products, Inc. dba Jarden Consumer Solutions, Boca Raton, FL.

Participation in the investigation and public service list.—Persons (other than petitioners) wishing to participate in the investigation as parties must file an entry of appearance with the Secretary to the Commission, as provided in sections 201.11 and 207.10 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register**. Industrial users and (if the merchandise under investigation is sold at the retail level) representative consumer organizations have the right to appear as parties in Commission antidumping investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to this investigation upon the expiration of the period for filing entries of appearance.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in this investigation available to authorized applicants representing interested parties (as defined in 19 U.S.C. 1677(9)) who are parties to the investigation under the APO issued in the investigation, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference.—The Commission's Director of Investigations has scheduled a conference in connection with this investigation for 9:30 a.m. on July 21, 2009, at the U.S. International Trade Commission Building, 500 E Street, SW., Washington, DC. Parties wishing to participate in the conference should contact Joshua Kaplan (202–205–3184) not later than July 17, 2009, to arrange for their appearance. Parties in support of the imposition of antidumping duties in this investigation and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the conference.

Written submissions.—As provided in sections 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before July 24, 2009, a written brief containing information and arguments pertinent to the subject matter of the investigation. Parties may file written testimony in connection with their presentation at the conference no later than three days before the conference. If briefs or written testimony contain BPI, they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Even where electronic filing of a document is permitted, certain documents must also be filed in paper form, as specified in II(C) of the Commission's Handbook on Electronic Filing Procedures, 67 FR 68168, 68173 (November 8, 2002).

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: This investigation is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.12 of the Commission's rules.

By order of the Commission.

Issued: July 1, 2009.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–15919 Filed 7–6–09; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Foreign Claims Settlement Commission

Commencement of Claims Program

AGENCY: Foreign Claims Settlement Commission of the United States.

ACTION: Notice.

SUMMARY: This notice announces the commencement by the Foreign Claims Settlement Commission (''Commission'') of a program for adjudication of certain categories of claims of United States nationals against the Government of Libya, as defined below, which were settled under the ''Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya'' (''Claims Settlement Agreement'') effective August 14, 2008.

DATES: These claims can now be filed with the Commission and the deadline for filing will be July 7, 2010. The deadline for completion of this claims adjudication program will be July 7, 2011.

FOR FURTHER INFORMATION CONTACT: Jaleh F. Barrett, Chief Counsel, Foreign Claims Settlement Commission of the United States, 600 E Street, NW., Room 6002, Washington, DC 20579, Tel. (202) 616–6975, FAX (202) 616–6993.

Notice of Commencement of Claims Adjudication Program

Pursuant to the authority conferred upon the Secretary of State and the Commission under subsection 4(a)(1)(C) of Title I of the International Claims Settlement Act of 1949 (Pub. L. 455, 81st Cong., approved March 10, 1950, as amended by Public Law 105–277, approved October 21, 1998 (22 U.S.C. 1623(a)(1)(C))), the Foreign Claims Settlement Commission hereby gives notice of the commencement of a program for adjudication of categories of claims of United States nationals against the Government of Libya. These claims, which have been referred to the Commission by the Department of State by letter dated January 15, 2009, are defined as:

Category A: This category of claims shall consist of claims by U.S. nationals who were held hostage or unlawfully detained in violation of international law, provided that (1) the claimant meets the standard for such claims adopted by the Commission; (2) the claim was set forth as a claim for injury other than emotional distress alone by the claimant named in the Pending Litigation; (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission; and (4) the claimant did not receive an award pursuant to the referral of December 11, 2008.

Category B: This category shall consist of claims of U.S. nationals for mental pain and anguish who are living close relatives of a decedent whose death formed the basis of a death claim compensated by the Department of State provided that (1) The claim was set forth as a claim for emotional distress, solatium, or similar emotional injury by the claimant named in the Pending Litigation; (2) the claimant is not eligible for compensation from the associated wrongful death claim, and the claimant did not receive any compensation from the wrongful death claim;

(3) the claimant has not received any compensation under any other part of the Claims Settlement Agreement, and does not qualify for any other category of compensation in this referral; and (4) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission.

Category C: This category shall consist of claims of U.S. nationals for compensation for wrongful death, in addition to amounts already recovered under the Claims Settlement Agreement, where there is a special circumstance in that the claimants obtained a prior U.S. court judgment in the Pending Litigation awarding damages for wrongful death, provided that (1) the Commission determines that the existence of a prior U.S. court judgment for wrongful death warrants compensation in addition to the amount already recovered under the Claims Settlement Agreement; and (2) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission.

Category D: This category shall consist of claims of U.S. nationals for compensation for physical injury in addition to amounts already recovered under the Commission process initiated by the December 11, 2008 referral, provided that (1) The claimant has received an award pursuant to the December 11, 2008 referral; (2) the Commission determines that the severity of the injury is a special circumstance warranting additional compensation, or that additional compensation is warranted because the injury resulted in the victim's death; and (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission.

Category E: This category shall consist of claims of U.S. nationals for wrongful death or physical injury resulting from one of the terrorist incidents (''Covered Incidents'') listed below, incidents which formed the basis for Pending Litigation in which a named U.S. plaintiff alleged wrongful death or physical injury, provided that (1) the claimant was not a plaintiff in the Pending Litigation; and (2) the claim meets the standard for physical injury or wrongful death, as appropriate, adopted by the Commission.

Category F: This category shall consist of commercial claims of U.S. nationals provided that (1) the claim was set forth by the claimant named in the Pending Litigation; (2) the Commission determines that the claim would be compensable under the applicable legal principles; and (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission.

The ''Pending Litigation'' referenced above is composed of the following cases:

Baker v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 03–cv–749.

Pflug v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 08–cv–505.

Certain Underwriters at Lloyds London v. *Great Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 06–cv–731.

Clay v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 06–cv–707.

Collett v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 01–cv–2103.

Cummock v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 02–cv–2134.

Estate of John Buonocore III v. *Great Socialist Libyan Arab Jamahiriya* (D.D.C.) 06–cv–727.

Simpson v. *Great Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 08–cv–529.

Fisher v. *Great Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 04–cv–2055.

Franqui v. *Syrian Arab Republic, et al.* (D.D.C.) 06–cv–734.

Hagerman v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 02–cv–2147.

Harris v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 06–cv–732.

Hartford Fire Insurance Company v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 98–cv–3096.

Kilburn v. *Islamic Republic of Iran, et al.* (D.D.C.) 01–cv–1301.

Knowland v. *Great Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 08–cv–1309.

La Reunion Aerienne v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 05–cv–1932.

McDonald v. *Socialist People's Arab Jamahiriya* (D.D.C.) 06–cv–729.

MacQuarrie v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 04–cv–176.

Patel v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 06–cv–626.

Pugh v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 02–cv–2026.

Simpson v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 00–cv–1722.

The ''Covered Incidents'' referenced above for purposes of Category E are composed of the following:

May 30, 1972 attack at Lod Airport in Israel, as alleged in *Franqui* v. *Syrian Arab Republic, et al.* (D.D.C.) 06–cv–734.

December 17, 1983 vehicle bomb explosion near Harrods Department Store in Knightsbridge, London, England, as alleged in *McDonald* v. *Socialist People's Arab Jamahiriya* (D.D.C.) 06–cv–729.

November 30, 1984 (approximate) kidnapping and subsequent death of Peter C. Kilburn, as alleged in *Kilburn* v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 01–cv–1301.

March 25, 1985 (approximate) kidnapping and subsequent death of Alec L. Collett, as alleged in *Collett* v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 01–cv–2103.

November 23, 1985 hijacking of Egypt Air flight 648, as alleged in *Certain Underwriters at Lloyds London* v. *Great Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 06–cv–731, and *Baker* v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 03–cv–749/*Pflug* v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 08–cv–505.

December 27, 1985 attack at the Leonardo da Vinci Airport in Rome, Italy, as alleged in *Estate of John Buonocore III* v. *Great Socialist Libyan Arab Jamahiriya* (D.D.C.) 06–cv–727/*Simpson* v. *Great Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 08–cv–529.

December 27, 1985 attack at the Schwechat Airport in Vienna, Austria, as alleged in *Knowland* v. *Great Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 08–cv–1309.

April 5, 1986 bombing of the La Belle Discotheque in Berlin, Germany, as alleged in *Clay* v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 06–cv–707, and *Harris* v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 06–cv–732.

September 5, 1986 hijacking of Pan Am flight 73, as alleged in *Patel* v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 06–cv–626.

Detention beginning February 10, 1987 of the passengers and crew of the private yacht ''Carin II,'' as alleged in *Simpson* v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 00–cv–1722.

December 21, 1988 bombing of Pan Am flight 103, as alleged in *Cummock* v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 02–cv–2134, *Fisher* v. *Great Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 04–cv–2055, *Hagerman* v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 02–cv–2147, *Hartford Fire Insurance Company* v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 98–cv–3096, and *MacQuarrie* v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 04–cv–176.

September 19, 1989 bombing of UTA flight 772, as alleged in *La Reunion Aerienne* v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 05–cv–1932, and *Pugh* v. *Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 02–cv–2026.

In conformity with the terms of the referral, the Commission will determine the claims in accordance with the provisions of 22 U.S.C. 1621 *et seq.,* which comprises Title I of the International Claims Settlement Act of 1949, as amended. The Commission will then certify to the Secretary of the Treasury those claims that it finds to be valid, for payment out of the claims fund established under the Claims Settlement Agreement.

The Commission will administer this claims adjudication program in accordance with its regulations, which

are published in Chapter V of Title 45, Code of Federal Regulations (45 CFR 500 *et seq.*). In particular, attention is directed to subsection 500.3(a) of these regulations based on 22 U.S.C. 1623(f) which limits the amount of attorney's fees that may be charged for legal representation before the Commission. These regulations are also available over the Internet at *http://www.gpoaccess.gov/cfr/index.html.*

Approval has been obtained from the Office of Management and Budget for the collection of this information. Approval No. 1105–0090, expiration date 06/30/2012.

Mauricio J. Tamargo,

Chairman.

[FR Doc. E9–15975 Filed 7–6–09; 8:45 am]

BILLING CODE 4410–01–P

DEPARTMENT OF JUSTICE

National Institute of Corrections

Solicitation for a Cooperative Agreement—The Instructional Theory Into Practice (ITIP) Guidance Tools Project

AGENCY: National Institute of Corrections, Department of Justice.

ACTION: Solicitation for Cooperative Agreement.

SUMMARY: The National Institute of Corrections (NIC) is soliciting proposals from organizations, groups, or individuals to enter into a cooperative agreement for a nine month project period. Work under this agreement will result in a ''tool kit'' to aid those charged with assessing the quality of lesson plans to include performance objectives, content delivery strategies, training activities, and supplemental materials. The tool kit will be framed around the Instructional Theory Into Practice model. In addition to providing assessment guidance, the tool kit will provide a brief history of the model, a description of the relevant research, a glossary, and a list of relevant references and websites.

It is anticipated that the tool kit will be used by training staff from: (1) Federal, State, and local corrections agencies, (2) all agency levels, and (3) agencies of all sizes and levels of funding. Consequently, the tool kit must provide sufficient rational and background information where needed, be easily understood, and convenient to use. Since many NIC Corrections Program Specialists (CPS) are responsible for coordinating and, in some cases, developing and delivering training, the tool kit will be developed and tested using input and feedback from NIC staff.

Ultimately the tool kit will allow users to develop lesson plans and review, assess, and provide feedback on lesson plans and training materials prepared by others. It must be easy to use by training coordinators.

DATES: Applications must be received by 4 p.m. EDT on July 24, 2009. Selection of the successful applicant and notification of review results to all applicants will be sent by August 31, 2009.

ADDRESSES: Mailed applications must be sent to Director, National Institute of Corrections, 320 First Street, NW., Room 5007, Washington, DC 20534. Applicants are encouraged to use Federal Express, UPS, or similar service to ensure delivery by the due date.

Hand delivered applications should be brought to 500 First Street, NW., Washington, DC 20534. At the front desk, call (202) 307–3106, extension 0 for pickup. Faxed applications will not be accepted. The only electronic applications (preferred) that will be accepted can be submitted via *http://www.grants.gov.*

FOR FURTHER INFORMATION CONTACT: A copy of this announcement can be downloaded from the NIC Web site at *http://www.nicic.gov.*

All technical or programmatic questions concerning this announcement should be directed to Dee Halley, Correctional Program Specialist, Research and Evaluation Division, National Institute of Corrections. She can be reached by calling 1–800–995–6423 extension 4–0374 or by e-mail at *dhalley@bop.gov.*

This project consists of six goals. The recipient of the award under this cooperative agreement will: (1) Develop a detailed work plan including major milestones, a description of NIC's role in the project, NIC review and approval points, and a project schedule. **Note:** the project schedule will be shown by quarters and reflect the number of months from the award date, as opposed to actual dates. (2) Develop a strategy to evaluate the utility and efficacy of the tool kit. This strategy should be practical and suggest short-term outcomes aimed at determining the quality of the lesson plans developed or reviewed using the tool kit. (3) Obtain input from NIC staff regarding, but not limited to, problems experienced in assessing lesson plans and training materials, providing guidance to developers on how lesson plans and materials can be improved, and how the tool kit can be structured in a way that increases the likelihood it will be used. (4) Provide a plan for the development of a tool kit to include the format and structure, major components with a brief content description and any appendices, forms, or additional information. (5) Develop and test the first draft of the tool kit. Included under this goal is the collection and assessment of feedback information, and development of recommended changes for NIC approval. (6) Revise the tool kit as indicated and deliver a camera ready copy of the product. For all awards in which a document will be a deliverable, the awardee must follow the Guidelines for Preparing and Submitting Manuscripts for Publication as found in the ''General Guidelines for Cooperative Agreements'' which will be included in the award package.

Required Expertise: Applicants should be able to demonstrate the capacity to accomplish all six project goals and have experience with curriculum and lesson plan development, training delivery, the ITIP model, learning styles, adult learning theory, and development of informational products and tools.

Application Requirements: The application should be concisely written, typed double-spaced and reference the NIC Opportunity Number and Title provided in this announcement. The program narrative text is to be limited to 25 double-spaced pages, exclusive of resumes and summaries of experience (do not submit full curriculum vitae). In addition to the program narrative, an application package must include OMB Standard Form 425, Application for Federal Assistance; a cover letter that identifies the audit agency responsible for the applicant's financial accounts as well as the audit period or fiscal year that the applicant operates under (*e.g.,* July 1 through June 30); and an outline of projected costs. The following additional forms must also be included: OMB Standard Form 424A, Budget Information—Non-Construction Programs; OMB Standard Form 424B, Assurances—Non-Construction Programs (all OMB Standard Forms are available at *http://www.grants.gov*); DOJ/FBOP/NIC Certification Regarding Lobbying, Debarment, Suspension and Other Responsibility Matters; and the Drug-Free Workplace Requirements (available at *http://www.nicic.org/Downloads/PDF/certif-frm.pdf.*)

Authority: Public Law 93–415.

Funds Available: NIC is seeking the applicants' best ideas regarding accomplishment of the scope of work and the related costs for achieving the goals of this solicitation. The final budget and award amount will be

negotiated between NIC and the successful applicant. Funds may only be used for the activities that are linked to the desired outcome of the project.

This project will be a collaborative venture with the NIC Research and Evaluation Division.

Eligibility of Applicants: An eligible applicant is any state or general unit of local government, private agency, educational institution, organization, individual or team with expertise in the described areas. Applicants must have demonstrated ability to implement a project of this size and scope.

Review Considerations: Applications received under this announcement will be subject to the NIC Review Process. The criteria for the evaluation of each application will be as follows:

Programmatic (40%)

Are all of the six project goals and adequately discussed? Is there a clear statement of how each project goal will be accomplished, to include: Major tasks that will lead to achieving the goal; the strategies to be employed; required staffing; and other required resources. Are there any innovative approaches, techniques, or design aspects proposed that will enhance the project?

Organizational (35%)

Does the proposed project staff possess the skills, knowledge, and expertise necessary to design and complete the tasks? Does the applicant agency, institution, organization, individual or team have the organization capacity to achieve the six project goals? Are the proposed project management and staffing plans realistic and sufficient to complete the project within the nine month time frame?

Project Management/Administration (25%)

Does the applicant identify reasonable objectives, milestones, and measures to track progress? If consultants and/or partnerships are proposed, is there a reasonable justification for their inclusion in the project, and a clear structure to insure effective coordination? Is the proposed budget realistic, provide sufficient cost detail/narrative, and represent good value relative to the anticipated results?

Note: NIC will NOT award a cooperative agreement to an applicant who does not have a Dun and Bradstreet Database Universal Number (DUNS) and is not registered in the Central Contractor Registry (CCR).

A DUNS number can be received at no cost by calling the dedicated toll-free DUNS number request line at 1–800–333–0505 (if you are a sole proprietor, you would dial 1–866–705–5711 and select option 1).

Registration in the CCR can be done online at the CCR Web site: *http://www.ccr.gov.* A CCR Handbook and worksheet can also be reviewed at the Web site.

Number of Awards: One.

NIC Opportunity Number: 09PEI28. This number should appear as a reference line in the cover letter, where indicated on Standard Form 424, and outside of the envelope in which the application is sent.

Catalog of Federal Domestic Assistance Number: 16.602.

Executive Order 12372: This program is not subject to the provisions of Executive Order 12372.

Morris L. Thigpen,

Director, National Institute of Corrections.

[FR Doc. E9–15883 Filed 7–6–09; 8:45 am]

BILLING CODE 4410–36–P

NATIONAL SCIENCE FOUNDATION

Notice of Intent To Seek Approval To Reinstate With Revision an Information Collection

AGENCY: National Science Foundation.

ACTION: Notice.

SUMMARY: The National Science Foundation (NSF) is announcing plans to request clearance for this collection. In accordance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, we are providing opportunity for public comment on this action. After obtaining and considering public comment, NSF will prepare the submission requesting OMB clearance of this collection for no longer than three years.

Comments are invited on (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; and (d) ways to minimize the burden of the collection of information of respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Written comments should be received by September 8, 2009, to be assured of consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Written comments regarding the information collection and requests for copies of the proposed information collection request should be addressed to Suzanne Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Room 295, Arlington, VA 22230, or by e-mail to *splimpton@nsf.gov*.

FOR FURTHER INFORMATION CONTACT: Suzanne Plimpton on (703) 292–7556 or send e-mail to *splimpton@nsf.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Title of Collection: Evaluation of the National Science Foundation's Math and Science Partnership (MSP) Program.

OMB Control No.: 3145–0200.

Expiration Date of Approval: June 30, 2009.

Abstract: The National Science Foundation (NSF) requests a three-year clearance for an evaluation of the Math and Science Partnership (MSP) program. The MSP program is a research and development (R&D) effort funded by the NSF to integrate the work of higher education, especially disciplinary faculty in math, sciences, and engineering, with that of K–12 communities in order to strengthen and reform math and science education. The program is authorized under the NSF Authorization Act of 2002 (Pub. L. 107–368), December 19, 2002 (to authorize appropriations for FY 2003–07 and ''for other purposes''). MSP is among 11 programs specifically authorized by the legislation (Sec. 11 authorizes a 12th program, the Centers for Research on Mathematics and Science Learning and Education Improvement).

The NSF's MSP program portfolio consists of about 80 awards or projects (*e.g.,* design grants, standard or continuing grants or cooperative agreements) that initially were funded between 2002 and 2004. The type of awards subject to study and data collection, however, include only the comprehensive MSPs, targeted MSPs and teacher institute partnerships, or a universe of approximately 65 discrete projects.

The evaluation's data collection and analysis activities will be conducted by COSMOS Corporation, Bethesda, MD, in partnership with Brown University via a contract administered by the NSF's Division of Research, Evaluation and Communication (REC). This evaluation involves both quantitative and qualitative data, collected from multiple

sources using multiple methods, including secondary analyses of project-related materials such as existing databases (MSP Management Information System—OMB 3145–0199), annual reports, Web sites, and relevant policy and methodological documents and original data collection through one-on-one interviews with key stakeholders conducted during site visits. For the MSP Management Information System, the contract team will analyze these data using quantitative statistical models. A second data source consists of annual project reports and other reports submitted by the MSP grantees to the NSF in accordance with Federal research project reporting requirements established at NSF under OMB 3145–0058. A third source is U.S. Department of Education's public use files on student achievement and school systems' demographic characteristics.

The fourth source for data is the proposed evaluation's original data collection activities. In particular and principally, a series of site visits will be conducted during 2006–2011.

The evaluation's overall framework consists of several substudies each focusing on a different, but essential part of the MSP grantees' work (*e.g.,* partnerships, the role of disciplinary faculty, student achievement). The relevant evaluation design under these conditions might be considered a meta-analytic rather than singular design—e.g., providing a rationale for the selection of substudies as well as some guidance for conducting the substudies. Consultations have occurred with a team of external experts on the research design during the evaluation's design phase and will continue to take place throughout the evaluation. The team of external experts represents the nation's leading researchers and scholars on methodology and content in the field of evaluation and representatives are from top-tier university schools of education and departments of mathematics or science; an education advocacy group; and an education research council.

The data collection instruments include face-to-face interviews, such as focus groups, and telephone or electronic surveys. An interview protocol based on the evaluation framework will be administered during the site visits. Expected respondents at site visits are Principal Investigators, co-Principal Investigators, administrators, teams of external experts, and other stakeholders who participated in MSP. There are no costs to respondents other than the time involved in the interview or survey process.

Information from the evaluation's data collections and analysis will be used to improve the NSF's program processes and outcomes. It will enable NSF to prepare and publish reports, and to respond to requests from Committees of Visitors, Congress, and the Office of Management and Budget, particularly as related to the Government Performance and Results Act (GPRA) and the Program Effectiveness Rating Tool (PART).

The primary evaluation questions include but are not limited to:

(1) How has the MSP Program effected or influenced the expertise, numbers, and diversity of the mathematics and science teaching force, K–12 student achievement in mathematics and science, and other presumed program outcomes?

(2) What factors or attributes have accelerated or constrained progress in the MSP Program's achievements? and

(3) How have institutions of higher education (IHEs) disciplinary faculty (mathematics, science, and engineering) participated in the MSP Program, and what has been their role in the Program's achievements?

Respondents: Individuals and not-for-profit institutions.

Estimated Number of Total Respondents: 216.

Total Burden on the Public: 456 hours.

Dated: July 1, 2009.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. E9–15916 Filed 7–6–09; 8:45 am]

BILLING CODE P

NATIONAL TRANSPORTATION SAFETY BOARD

Sunshine Act Meeting

Agenda

TIME AND DATE: 9:30 a.m., July 14, 2009.

PLACE: NTSB Conference Center, 429 L'Enfant Plaza SW., Washington, DC 20594.

STATUS: The one item is open to the public.

MATTER TO BE CONSIDERED: 8126 Railroad Accident Report—Collision Between Two Massachusetts Bay Transportation Authority Green Line Trains, Newton, Massachusetts, May 28, 2008.

NEWS MEDIA CONTACT: Telephone: (202) 314–6100.

The press and public may enter the NTSB Conference Center one hour prior to the meeting for set up and seating.

Individuals requesting specific accommodations should contact Rochelle Hall at (202) 314–6305 by Friday, July 10, 2009.

The public may view the meeting via a live or archived webcast by accessing a link under ''News & Events'' on the NTSB home page at *http://www.ntsb.gov.*

FOR MORE INFORMATION CONTACT: Candi Bing, (202) 314–6403.

Dated: Thursday, July 2, 2009.

Candi R. Bing,

Alternate Federal Register Liaison Officer.

[FR Doc. E9–16046 Filed 7–2–09; 4:15 pm]

BILLING CODE 7533–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0280]

Final Regulatory Guide: Issuance, Availability

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of Issuance and Availability of Regulatory Guide, RG 5.74.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or Commission) is issuing a new guide in the agency's ''Regulatory Guide'' series. This series was developed to describe and make available to the public information such as methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

FOR FURTHER INFORMATION CONTACT: Bonnie Schnetzler, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: (301) 415–7883 or e-mail to *Bonnie.Schnetzler@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC or Commission) is issuing a new guide in the agency's ''Regulatory Guide'' series. This series was developed to describe and make available to the public information such as methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the

staff needs in its review of applications for permits and licenses

RG 5.74, ''Managing the Safety/Security Interface,'' was issued with a temporary identification as Draft Regulatory Guide, DG–5021. This guide describes a method that the staff of the NRC considers acceptable for use in satisfying the requirements of 10 CFR 73.58, ''Safety/Security Interface Requirements for Nuclear Power Reactors,'' of 10 CFR Part 73, ''Physical Protection of Plants and Materials.'' To meet these objectives, NRC licensees shall assess and manage changes to safety and security activities so as to prevent or mitigate potential adverse effects that could negatively impact either plant safety or security.

II. Further Information

In July 2007, DG–5021 was published for public comment. The staff's responses to the public comments received are located in the NRC's Agencywide Documents Access and Management System under Accession Number ML091690082. Electronic copies of RG 5.74 are available through the NRC's public Web site under ''Regulatory Guides'' at *http://www.nrc.gov/reading-rm/doc-collections/*.

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR) located at 11555 Rockville Pike, Rockville, Maryland. The PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4205, by fax at (301) 415–3548, and by e-mail to *pdr.resource@nrc.gov*.

Regulatory guides are not copyrighted, and Commission approval is not required to reproduce them.

Dated at Rockville, Maryland, this 29th day of June, 2009.

For the Nuclear Regulatory Commission.

R.A. Jervey,

Acting Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. E9–15948 Filed 7–6–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0279]

Solicitation for Public Comment on Potential Changes to the Agency's Radiation Protection Regulations

AGENCY: Nuclear Regulatory Commission.

ACTION: Solicitation of Public Comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is seeking public comment on potential changes to the NRC's current radiation protection regulations to achieve greater alignment between the regulations and the 2007 recommendations of the International Commission on Radiological Protection (ICRP) contained in ICRP Publication 103. Stakeholders and the public are encouraged to submit comments concerning potential impacts, burdens, benefits, and concerns electronically to *http://www.regulations.gov.*

Background

ICRP Publication 103 (December 2007) contains the latest in a series of revised ICRP recommendations for radiation protection. On December 18, 2008, the NRC staff provided a Policy Issue Notation Vote Paper (SECY–08–0197) to the Commission which presented the regulatory options of moving, or not moving, towards a greater degree of alignment of the NRC regulatory framework with ICRP Publication 103. In a Staff Requirements Memorandum (SRM) dated April 2, 2009, the Commission approved the staff's recommendation to begin engagement with stakeholders and interested parties to initiate development of the technical basis for possible revision of the NRC's radiation protection regulations, as appropriate and where scientifically justified, to achieve greater alignment with the recommendations in ICRP Publication 103.

Discussion

The Commission believes that the current NRC regulatory framework continues to provide adequate protection of health and safety of workers, the public, and the environment. From a safety regulation perspective, ICRP Publication 103 proposes measures that go beyond what the NRC believes are needed to provide adequate protection. In order to ensure that the NRC is well informed of all the benefits and burdens associated with further alignment of NRC's current radiation protection regulations with ICRP Publication 103, the NRC is soliciting input from stakeholders and interested parties on the technical and regulatory issues associated with such changes. The NRC will utilize this feedback in developing the appropriate technical basis for any proposed rulemaking.

An overview of possible changes to both material and reactor-based radiation protection regulations is provided in SECY–08–0197, which is publically available in the Agencywide Documents Access and Management System (ADAMS) under accession No. ML083360582. The SRM to SECY–08–0197 is also publically available in ADAMS under accession No. ML090920103. In addition, stakeholders and interested parties may introduce other options, issues, and information for the NRC's consideration.

In an effort to facilitate public involvement, the staff will give presentations at a number of radiation protection related conferences and meetings including the Society of Nuclear Medicine Annual Meeting (July 13–17, 2009; Toronto, Canada), Fuel Cycle Information Exchange (June 23–25, 2009), and the Health Physics Society Annual Meeting (July 12–16, 2009); In addition, a Web site dedicated to the potential changes to the NRC's radiation protection regulations is available at *http://www.nrc.gov/about-nrc/regulatory/rulemaking/opt-revise.html.* Please submit any comments or questions by March 31, 2010 to *Regulations.gov* or *Reg4rp@nrc.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Donald Cool, telephone (301) 415–6347, e-mail, *Donald.Cool@nrc.gov* or Dr. Kimyata Morgan Butler, telephone (301) 415–0733, e-mail, *Kimyata.MorganButler@nrc.gov* of the Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Dated at Rockville, Maryland, this 25th day of June 2009.

For the Nuclear Regulatory Commission.

Mark R. Shaffer,

Director, Division of Intergovernmental Liaison and Rulemaking, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. E9–15950 Filed 7–6–09; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60189; File No. 600–23]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing and Order Approving an Extension of Temporary Registration as a Clearing Agency

June 29, 2009.

The Securities and Exchange Commission (''Commission'') is publishing this notice and order to solicit comments from interested persons and to extend the Fixed Income Clearing Corporation's (''FICC'')

temporary registration as a clearing agency through June 30, 2010.[1]

On February 2, 1987, pursuant to Sections 17A(b) and 19(a) of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 17Ab2–1 promulgated thereunder,[3] the Commission granted the MBS Clearing Corporation (''MBSCC'') registration as a clearing agency on a temporary basis for a period of eighteen months.[4] The Commission subsequently extended MBSCC's registration through June 30, 2003.[5]

On May 24, 1988, pursuant to Sections 17A(b) and 19(a) of the Act[6] and Rule 17Ab2–1 promulgated thereunder,[7] the Commission granted the Government Securities Clearing Corporation (''GSCC'') registration as a clearing agency on a temporary basis for a period of three years.[8] The Commission subsequently extended GSCC's registration through June 30, 2003.[9]

On January 1, 2003, MBSCC was merged into GSCC, and GSCC was renamed FICC.[10] The Commission subsequently extended FICC's temporary registration through June 30, 2009.[11]

On May 7, 2009, FICC requested that the Commission grant FICC permanent registration as a clearing agency or in the alternative extend FICC's temporary registration until such time as the Commission is prepared to grant FICC permanent registration.[12]

In April 2006, FICC announced its plan to have its Mortgage-Backed Securities Division (''MBS Division'') act as a central counterparty (''CCP'').[13] As such, FICC would act as the CCP for MBS Division members and would become the new legal counterparty to all original parties for eligible mortgage-backed securities transactions. Currently, FICC acts as the CCP for its Government Securities Division members' eligible U.S. Government securities transactions but does not act as the CCP for its MBS Division members' eligible mortgage-backed securities transactions.

Pursuant to this Notice and Order, the Commission is extending FICC's temporary registration as a clearing agency in order that FICC may continue to operate as a registered clearing agency and may continue to provide uninterrupted clearing and settlement services its users. The Commission will consider permanent registration of FICC at a future date after the Commission and FICC have had the opportunity to evaluate how FICC is functioning with its MBS Division acting as a CCP, assuming the MBS Division CCP service is implemented.

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. 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 600–23 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number 600–23. 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, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FICC and on FICC's Web site at *http://www.ficc.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number 600–23 and should be submitted on or before July 28, 2009.

It is therefore ordered that FICC's temporary registration as a clearing agency (File No. 600–23) be and hereby is extended through June 30, 2010.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[14]

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–15902 Filed 7–6–09; 8:45 am]

BILLING CODE 8010–01–P

[1] FICC is the successor to MBS Clearing Corporation and Government Securities Clearing Corporation.

[2] 15 U.S.C. 78q–1(b) and 78s(a).

[3] 17 CFR 240.17Ab2–1.

[4] Securities Exchange Act Release No. 24046 (February 2, 1987), 52 FR 4218.

[5] Securities Exchange Act Release Nos. 25957 (August 2, 1988), 53 FR 29537; 27079 (July 31, 1989), 54 FR 34212; 28492 (September 28, 1990), 55 FR 41148; 29751 (September 27, 1991), 56 FR 50602; 31750 (January 21, 1993), 58 FR 6424; 33348 (December 15, 1993), 58 FR 68183; 35132 (December 21, 1994), 59 FR 67743; 37372 (June 26, 1996), 61 FR 35281; 38784 (June 27, 1997), 62 FR 36587; 39776 (March 20, 1998), 63 FR 14740; 41211 (March 24, 1999), 64 FR 15854; 42568 (March 23, 2000), 65 FR 16980; 44089 (March 21, 2001), 66 FR 16961; 44831 (September 21, 2001), 66 FR 49728; 45607 (March 20, 2002), 67 FR 14755; 46136 (June 27, 2002), 67 FR 44655.

[6] *Supra* note 2.

[7] *Supra* note 3.

[8] Securities Exchange Act Release No. 25740 (May 24, 1988), 53 FR 19839.

[9] Securities Exchange Act Release Nos. 25740 (May 24, 1988), 53 FR 19639; 29236 (May 24, 1991), 56 FR 24852; 32385 (June 3, 1993), 58 FR 32405; 35787 (May 31, 1995), 60 FR 30324; 36508 (November 27, 1995), 60 FR 61719; 37983 (November 25, 1996), 61 FR 64183; 38698 (May 30, 1997), 62 FR 30911; 39696 (February 24, 1998), 63 FR 10253; 41104 (February 24, 1999), 64 FR 10510; 41805 (August 27, 1999), 64 FR 48682; 42335 (January 12, 2000), 65 FR 3509; 43089 (July 28, 2000), 65 FR 48032; 43900 (January 29, 2001), 66 FR 8988; 44553 (July 13, 2001), 66 FR 37714; 45164 (December 18, 2001), 66 FR 66957; 46135 (June 27, 2002), 67 FR 44655.

[10] Securities Exchange Act Release No. 47015 (December 17, 2002), 67 FR 78531 (December 24, 2002) [File Nos. SR–GSCC–2002–07 and SR–MBSCC–2002–01].

[11] Securities Exchange Act Release Nos. 48116 (July 1, 2003), 68 FR 41031; 49940 (June 29, 2004), 69 FR 40695; 51911 (June 23, 2005), 70 FR 37878; 54056 (June 28, 2006), 71 FR 38193; 55920 (June 18, 2007), 72 FR 35270; and 57949 (June 11, 2008), 73 FR 34808.

[12] Letter from Nikki Poulos, Managing Director and General Counsel, FICC (May 7, 2009).

[13] FICC White Paper: ''A Central Counterparty For Mortgage-Backed Securities: Paving The Way'' at *http://www.dtcc.com/downloads/leadership/whitepapers/ccp.pdf.*

[14] 17 CFR 200.30–3(a)(16).

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, July 9, 2009 at 1 p.m.

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 also may 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), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), (8), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Casey, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting scheduled for Thursday, July 9, 2009 will be:

institution and settlement of injunctive actions; institution and settlement of administrative proceedings; adjudicatory matters; regulatory matter regarding financial institutions; and other matters related to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 551–5400.

Dated: July 2, 2009.

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–16035 Filed 7–2–09; 11:15 am]

BILLING CODE P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60194; International Series Release No. 1311]

Order Under Section 36 of the Securities Exchange Act of 1934 Granting an Exemption From Exchange Act Section 6(h)(1) for Certain Persons Effecting Transactions in Foreign Security Futures and Under Exchange Act Section 15(a)(2) and Section 36 Granting Exemptions From Exchange Act Section 15(a)(1) and Certain Other Requirements

June 30, 2009.

I. Introduction and Background

The Commodity Futures Modernization Act of 2000 (''CFMA'') [1] authorized the trading of futures on individual stocks and narrow-based stock indexes, *i.e.,* security futures.[2] The CFMA defined security futures products [3] as ''securities'' under the Exchange Act,[4] the Securities Act of 1933 (''Securities Act''),[5] the Investment Company Act of 1940,[6] and the Investment Advisers Act of 1940,[7] and as contracts of sale for future delivery under the CEA.[8] Accordingly, the regulatory framework established by the CFMA provides the Securities and Exchange Commission (''Commission'') and the Commodity Futures Trading Commission (''CFTC'') with joint jurisdiction over security futures products. Futures on broad-based security indexes (security indexes that are not narrow-based), and options on such futures, remain under the exclusive jurisdiction of the CFTC. To distinguish between futures on narrow-based security indexes and futures on broad-based security indexes, the CFMA also amended the CEA and the Exchange Act to add an objective definition of a narrow-based security index.[9] This definition applies both to security indexes that underlie futures contracts listed and traded in the United States and those that underlie futures contracts traded on or subject to the rules of a foreign board of trade.[10]

The CFMA also added Section 6(h)(1) to the Exchange Act,[11] which makes it unlawful for any person to effect transactions in security futures products that are not listed on a national securities exchange or a national securities association registered pursuant to Section 15A(a) of the Exchange Act.[12] Because of this prohibition, U.S. persons are currently unable to enter into contracts for narrow-based index or single stock futures traded on or subject to the rules of a foreign board of trade.

The Food, Conservation and Energy Act of 2008 requires the Commission, the CFTC, or both, as appropriate, to take action under their existing authorities to permit, by June 30, 2009, the trading of futures on certain security indexes by resolving issues related to foreign security indexes.[13] The exemption the Commission is issuing today fulfills this statutory directive on the part of the Commission.

The Commission understands that institutional investors could use futures on foreign securities and foreign security indexes for, among other things, risk management and asset allocation. In particular, in connection with the Commission's rulemaking in 2001 relating to the definition of narrow-based security index and exclusions from that definition,[14] commenters expressed strong views that U.S. investors, particularly institutional investors, need to be able to trade in futures on foreign security indexes for risk management, asset allocation, and other purposes, and would suffer substantial adverse impact and competitive disadvantage with respect to non-U.S. investors if they could not trade such products.[15]

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[1] Public Law 106–554, 114 Stat. 2763 (2000).

[2] A security future is defined in Section 3(a)(55)(A) of the Securities Exchange Act of 1934 (''Exchange Act''), 15 U.S.C. 78c(a)(55)(A), and Section 1a(31) of the Commodity Exchange Act (''CEA''), 7 U.S.C. 1a(31).

[3] A security futures product is defined as a security future or any put, call, straddle, option, or privilege on any security future. *See* Section 3(a)(56) of the Exchange Act, 15 U.S.C. 78c(a)(56), and Section 1a(32) of the CEA, 7 U.S.C. 1a(32).

[4] Section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10).

[5] Section 2(a)(1) of the Securities Act of 1933 (''Securities Act''), 15 U.S.C. 77b(a)(1).

[6] Section 2(a)(36) of the Investment Company Act of 1940, 15 U.S.C. 80a–2(a)(36).

[7] Section 202(a)(18) of the Investment Advisers Act of 1940, 15 U.S.C. 80b–2(a)(18).

[8] Section 1a(31) of the CEA, 7 U.S.C. 1a(31).

[9] *See* Section 1a(25) of the CEA, 7 U.S.C. 1a(25), and Section 3(a)(55)(B) and (C) of the Exchange Act, 15 U.S.C. 78c(a)(55)(B) and (C). *See also* Rules 3a55–1 and 3a55–2 under the Exchange Act, 17 CFR 240.3a55–1 and 240.3a55–2; Rules 41.11, 41.12, and 41.13 under the CEA, 17 CFR 41.11, 41.12, and 41.13; and Securities Exchange Act Release No. 44724 (August 20, 2001), 66 FR 44490 (August 23, 2001).

[10] *See* Rule 3a55–3 under the Exchange Act, 17 CFR 240.3a55–3; Rule 41.13 under the CEA, 17 CFR 41.13; and Securities Exchange Act Release No. 44724, *supra* note 9.

[11] 15 U.S.C. 78f(h)(1).

[12] 15 U.S.C. 78o–3(a). The Exchange Act and the CEA also require that any security underlying a security future listed on a national securities exchange or national securities association, including each component security of a narrow-based security index, be registered under Section 12 of the Exchange Act. *See* Section 6(h)(3)(A) of the Exchange Act, 15 U.S.C. 78f(h)(3)(A), and Section 2(a)(1)(D)(i)(I) of the CEA, 7 U.S.C. 2(a)(1)(D)(i)(I). Accordingly, if the securities that compose foreign security indexes listed on or subject to the rules of a foreign board of trade are not registered under Section 12 of the Exchange Act, absent relief, a national securities exchange or national securities association would not be able to list and trade a security future based on such an index. The Exchange Act and CEA also require that securities underlying security futures be equity securities. Section 6(h)(3)(D) of the Exchange Act, 15 U.S.C. 78f(h)(3)(D), and Section 2(a)(1)(D)(i)(III) of the CEA, 7 U.S.C. 2(a)(1)(D)(i)(III). The Commission and the CFTC have exercised their authority pursuant to Sections 1a(25)(B)(vi) and 2(a)(1)(D) of the CEA and Sections 3(a)(55)(C)(vi), 3(b), 6(h), 23(a), and 36 of the Exchange Act, to adopt rules to allow security futures on debt securities and debt securities indexes under certain conditions. 7 U.S.C. 1a(25)(B)(vi) and 2(a)(1)(D) and 15 U.S.C. 78c(a)(55)(C)(vi), 78c(b), 78f(h), 78w(a), and 78mm. *See* Securities Exchange Act Release No. 54106 (July 6, 2006), 71 FR 39534 (July 13, 2006).

[13] Public Law 110–246, Sec. 13, 106, 122 Stat. 1651, 2197 (2008), *reprinted in* Notes to 7 U.S.C.A. Sec. 2.

[14] *See* Securities Exchange Act Release Nos. 44288 (May 9, 2001), 66 FR 27560 (May 17, 2001), and 44724, *supra* note 9.

[15] *See e.g.,* Comment Letters from Barclay's Global Investors, N.A., dated July 17, 2001; Futures Industry Association, dated July 18, 2001; General Motors Investment Management Corporation, dated June 11, 2001; The Goldman Sachs Group and its subsidiaries, dated July 18, 2001; and The Montreal Exchange, dated June 14, 2001 (cited in Securities Exchange Act Release No. 44724, *supra* note 9).

Under the federal securities laws, a primary mandate of the Commission is investor protection. In the Commission's view, the federal securities laws are intended to protect U.S. investors and capital markets (including purchasers in those markets, whether U.S. or foreign).[16] For instance, in protecting the U.S. capital markets and investors purchasing in those markets, Congress and the Commission have recognized that the ongoing dissemination of accurate information by issuers about themselves and their securities is essential to the effective operation of the trading markets. The Exchange Act and underlying rules have established a system of ongoing disclosure about issuers that have offered securities to the public, or that have securities that are listed on a national securities exchange or are broadly held by the public.[17] A public issuer's Exchange Act record provides the basic source of information to the market and to potential purchasers regarding the issuer and its management, business, financial condition, and prospects.[18]

In many circumstances, however, the reasonable expectation of participants in the global markets justifies reliance on laws applicable in jurisdictions outside the U.S. to establish requirements for transactions effected offshore. In this context, this ''territorial approach'' generally recognizes the primacy of the laws in which a market is located.[19] Thus, the Exchange Act periodic reporting requirements for issuers, including foreign issuers, with securities traded in U.S. markets, do not extend to securities of foreign issuers traded only in foreign markets if such issuers are not otherwise subject to Exchange Act reporting requirements. The Commission historically has sought to balance the information needs of investors with the public interest served by opportunities to invest in a variety of securities, including foreign securities, and believes that such an approach is appropriate in the context of permitting certain persons to engage in security futures transactions involving foreign securities.

Generally, Section 36 of the Exchange Act[20] authorizes the Commission—by rule, regulation, or order—to conditionally or unconditionally exempt any person, security, transaction (or any class or classes of persons, securities, or transactions) from any provision or provisions of the Exchange Act or any rule or regulation thereunder, to the extent such exemption is necessary or appropriate in the public interest and is consistent with the protection of investors. As discussed more fully below, pursuant to Section 36 the Commission is exempting, under certain conditions, from Section 6(h)(1) of the Exchange Act certain persons that effect transactions in security futures overlying foreign securities traded on or subject to the rules of a foreign board of trade. All other applicable provisions of the federal securities laws, including the antifraud provisions, will continue to apply to such transactions.

In addition, as discussed more fully below, the Commission is exempting certain foreign brokers or dealers from the registration requirements of Section 15(a)(1) of the Exchange Act and certain other requirements. Such foreign brokers or dealers remain subject to all other applicable provisions of the federal securities laws, including, without limitation, Section 10(b) of the Exchange Act[21] and Rule 10b–5 thereunder.[22] The Commission is granting the exemption pursuant to Section 15(a)(2) of the Exchange Act (which authorizes the Commission, by rule or order, as it deems consistent with the public interest and the protection of investors, to conditionally or unconditionally exempt from Section 15(a)(1) of the Exchange Act any broker or dealer or class of brokers or dealers specified in such rule or order) and Section 36 of the Exchange Act, in order to facilitate transactions contemplated by the exemption from Section 6(h)(1) of the Exchange Act.

II. Exemption From Section 6(h)(1) of the Exchange Act

The Commission finds that it is appropriate in the public interest and consistent with the protection of investors to grant an exemption from Section 6(h)(1) of the Exchange Act to permit certain persons to effect transactions in certain foreign security futures on foreign boards of trade. Specifically, the exemption permits, under certain conditions specified below, the following persons to effect transactions in security futures that are traded on or subject to the rules of a foreign board of trade: (1) Qualified institutional buyers (''QIBs'') as defined in Rule 144A under the Securities Act;[23] (2) persons that are not U.S. persons under Rule 902 of Regulation S of the Securities Act (''non-U.S. persons'');[24] (3) registered brokers or dealers that effect transactions on behalf of QIBs or non-U.S. persons; and (4) banks, as defined in Section 3(a)(6) of the Exchange Act,[25] acting pursuant to an exception or exemption from the definition of ''broker'' or ''dealer'' in Sections 3(a)(4)(B), 3(a)(4)(E), or 3(a)(5)(C) of the Exchange Act or the rules thereunder (''Eligible Bank''),[26] to effect transactions on behalf of QIBs or non-U.S. persons.

As described more fully below, the exemption permits such persons to effect transactions in security futures that are not listed on a national securities exchange or a national securities association registered pursuant to Section 15A(a) of the Exchange Act, under the following conditions:

Types of Security Futures.

- If the security future is on a single security:

[16] For example, under the ''territorial approach'' to Section 5 of the Securities Act, the registration of securities under the Securities Act is intended to provide that protection to U.S. markets and U.S. investors. Further, in order to ''protect investors and securities markets,'' under the Commission's territorial approach to Section 15 of the Exchange Act, absent an exemption, broker-dealer registration is generally required by ''foreign broker-dealers that, from outside the United States, induce or attempt to induce trades by any person in the United States.'' *See* Registration Requirements for Foreign Broker-Dealers, Securities Exchange Act Release No. 27017 (July 11, 1989), 54 FR 30013 (July 18, 1989) at 30017.

[17] The Exchange Act rules require public issuers to make periodic disclosures at annual and quarterly intervals, with other important information reported on a more current basis. Because of the enactment of the Sarbanes-Oxley Act, 15 U.S.C. 7201 *et seq.,* and the Commission's subsequent rulemaking and interpretive actions, the disclosure included in issuers' Exchange Act filings has been enhanced significantly. *See, e.g.,* Securities Act Release Nos. 8124 (August 28, 2002), 67 FR 57276 (September 9, 2002); 8220 (April 9, 2003), 68 FR 18788 (April 16, 2003); 8238 (June 5, 2003), 68 FR 36636 (June 18, 2003); and 8400 (March 16, 2004), 69 FR 15594 (March 25, 2004). *See also* Foreign Issuer Reporting Enhancements, Securities Exchange Act Release No. 58620 (September 23, 2008), 73 FR 58300 (October 6, 2008).

[18] Because an issuer's Exchange Act reports and other publicly available information form the basis for the market's evaluation of the issuer and the pricing of its securities, investors in the secondary market use that information in making their investment decisions.

[19] *See* Securities Act Release No. 6863 (April 24, 1990), 55 FR 18306 (May 2, 1990) (''Regulation S Adopting Release''). This territorial approach to the application of the registration provisions, however, does not affect the broad reach of the antifraud provisions of the federal securities laws. As the Commission noted in the Regulation S Adopting Release, ''[t]he antifraud provisions have been broadly applied by the courts to protect U.S. investors and investors in U.S. markets where either significant conduct occurs within the United States * * * or the conduct occurs outside the United States but has a significant effect within the United States or on the interests of U.S. investors. * * *'' *Id.* at 18308–18309.

[20] 15 U.S.C. 78mm.

[21] 15 U.S.C. 78j(b).

[22] 17 CFR 240.10b–5.

[23] *See* Rule 144A(a)(1), 17 CFR 230.144A(a)(1).

[24] *See* Rule 902(k) of Regulation S, 17 CFR 230.902(k).

[25] 15 U.S.C. 78c(a)(6).

[26] 15 U.S.C. 78c(a)(4)(B), 15 U.S.C. 78c(a)(4)(E), or 15 U.S.C. 78c(a)(5)(C).

• The underlying security must be (1) issued by a foreign private issuer and have its primary trading market outside the U.S., or (2) a note, bond, debenture, or evidence of indebtedness (''debt'') security issued or guaranteed by a foreign government that is eligible to be registered with the Commission under Schedule B of the Securities Act.[27]

• If the security future is on a narrow-based security index:

• At least 90 percent of the underlying securities in the index, at the time of the transaction, both in terms of the number of underlying securities and their weighting in the index, must be (1) issued by foreign private issuers where the primary trading market of each such underlying security is outside the U.S., or (2) debt securities issued or guaranteed by a foreign government that are eligible to be registered with the Commission under Schedule B of the Securities Act;[28] and

• No more than 10 percent of the number and weighting of securities in the index at the time of the transaction can fail to meet the above criteria, and the issuers of such securities must be required to file reports with the Commission pursuant to Section 13 or Section 15(d) of the Exchange Act.[29]

Foreign Exchange.

• The transaction must be effected on, or be subject to the rules of, an exchange or contract market that is not required to register with the Commission under Section 5 of the Exchange Act.[30]

Clearance and Settlement Outside the U.S.

• The security future must not result in physical delivery in the U.S. of the securities underlying the contract and must be cleared and settled outside the U.S.; and

• A position in the security future must not be able to be closed or liquidated by effecting an offsetting transaction on or through the facility of any exchange or association registered in the U.S. under Section 6 or 15A of the Exchange Act, respectively.

A. Types of Persons Covered by the Exemption

The Commission believes that it is necessary and appropriate in the public interest and for the protection of investors to limit the persons who may rely on this exemption because it is possible that the securities underlying a foreign security future may not be registered under Section 12 of the Exchange Act. For this reason, only the following persons are exempt from Section 6(h)(1) of the Exchange Act:

• QIBs;

• Non-U.S. persons;

• Brokers or dealers registered under Section 15(b) of the Exchange Act[31] to the extent that they effect transactions on behalf of QIBs or non-U.S. persons; and

• Eligible Banks[32] to the extent that they effect transactions on behalf of QIBs or non-U.S. persons.[33]

For purposes of this exemption, a broker or dealer or Eligible Bank that effects transactions on behalf of a QIB or a non-U.S. person engaged in trading security futures must reasonably believe that such person is a QIB or a non-U.S. person.[34]

As discussed above,[35] the registration requirements under Section 12 of the Exchange Act, together with the reporting requirements under Section 13 of the Exchange Act, underlie the full disclosure regime administered by the Commission. These registration and reporting requirements are intended to benefit and protect all investors, both institutions and individual investors.

The Commission nevertheless believes that subject to certain conditions, it is appropriate to permit certain sophisticated investors to trade security futures based on securities of foreign private issuers that are not subject to the reporting requirements of the Exchange Act. In particular, the Commission believes that, with regard to transactions in security futures based on foreign security indexes that may include unregistered securities of foreign private issuers, some of which may be non-reporting issuers, QIBs are sufficiently sophisticated and have enough resources to identify the information that they require to make their investment decisions and to obtain that information, and to engage in transactions not subject to the registration requirements of the U.S. securities laws.[36] The Commission also believes it is appropriate to exempt non-U.S. persons from Section 6(h)(1) of the Exchange Act because such persons do not have the expectation that the U.S. securities laws would apply to their transactions in such security futures traded on non-U.S. boards of trade.

The Commission reminds market participants that, absent registration under the Securities Act, when a QIB or non-U.S. person engages in a transaction pursuant to this exemption, the offer and sale of the security future must be exempt from such registration.[37] The statutory exemption from registration in Section 3(a)(14) of the Securities Act is unavailable for offers and sales of security futures that are not cleared by a registered clearing agency or listed on a registered national securities exchange.[38] The offer and sale of the security future must, therefore, be made in reliance on another exemption from registration, such as the exemption in Section 4(2) of the Securities Act for offerings not involving public offerings[39] or the safe harbor provisions

[27] *See* Schedule B, 15 U.S.C. 77aa.

[28] *Id. See also infra* notes 46–51 and accompanying text.

[29] 15 U.S.C. 78m and 78o(d).

[30] *See infra* notes 52–53 and accompanying text.

[31] A broker or dealer registered with the Commission pursuant to Section 15(b)(11) of the Exchange Act may rely on this exemption to engage in transactions in foreign security futures to the same extent as a broker or dealer registered with the Commission pursuant to Section 15(b)(1) of the Exchange Act. *See infra* notes 57–68 and accompanying text.

[32] *See supra* note 26 and accompanying text.

[33] A broker or dealer or Eligible Bank acting for its own account would not be able to rely on the exemption in this order unless such broker, dealer, or Eligible Bank is a QIB in its own right.

[34] *See* Rule 144A under the Securities Act, 17 CFR 230.144A, for certain non-exclusive means to satisfy this condition for QIBs.

[35] *See supra* notes 16–19 and accompanying text.

[36] For certain purposes, QIBs have been deemed to be within the classes of persons that have such knowledge and experience that they are capable of fending for themselves and thus do not need the full protections of the registration provisions of the Securities Act nor the benefits of the full issuer reporting provisions of the Exchange Act. *See* Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities under Rules 144 and 145, Securities Act Release No. 6862 (April 23, 1990), 55 FR 17933 (April 30, 1990) (''Rule 144A Adopting Release''). *See also infra* note 39.

[37] In addition, if the offer or sale of a security future is by or on behalf of the issuer of the underlying security, an affiliate of the issuer of the underlying security, or an underwriter, the offer or sale of the security future would be an offer or sale of the underlying security as well, as to which the registration provisions of the Securities Act would apply, unless an available exemption existed. *See* Section 2(a)(3) and Section 5 of the Securities Act, 15 U.S.C. 77b(a)(3) and 77e. *See also* Commission Guidance on the Application of Certain Provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and Rules thereunder to Trading in Security Futures Products, Securities Act Release No. 8107 (June 21, 2002), 67 FR 43234 (June 27, 2002).

[38] 15 U.S.C. 77c(a)(14).

[39] Transactions that do not involve any public offering are exempt from federal registration under Section 4(2) of the Securities Act. The Securities Act does not define these transactions. The U.S. Supreme Court, however, set the basic criteria for the Section 4(2) exemption in *SEC* v. *Ralston Purina Co.,* 346 U.S. 119 (1953). The Court indicated that the application of the non-public offering exemption depended on whether the offerees were able to fend for themselves and had access to the same kind of information that would be disclosed in registration. The Court noted that such persons, by virtue of their knowledge, would not need to rely on the protections afforded by registration. *See* Securities Act Release No. 8041 (December 19, 2001), 66 FR 66839 (December 29, 2001) at text accompanying note 22. In adopting Rule 144A (which is a resale exemption from registration) in 1990, the Commission determined that QIBs were in the category of persons able to fend for themselves and had access to the same kind of information that would be disclosed in registration. *See* Rule 144A Adopting Release, *supra* note 36.

of Regulation D or Regulation S, provided the conditions of those safe harbors, including the restrictions on general solicitation and general advertising, are satisfied.[40]

B. Types of Security Futures in Which Transactions May Be Effected

The exemption is conditioned on the type of security or securities underlying the security futures. In particular, the security future must overlie a single security of, or security index predominantly composed of securities of, foreign private issuers where the securities' primary trading market is outside the U.S., or debt securities of a government or political subdivision of a foreign country. This condition is intended to exclude from the exemption security futures based on unregistered securities that are more appropriately considered under the federal securities laws as securities of U.S. companies that should be registered under the federal securities laws. Moreover, the Commission intends this condition, which requires the security or securities underlying the security future to be foreign securities, to prevent this exemption from being used to avoid U.S. federal securities laws or facilitating a secondary market in the U.S. in securities that may not have been registered under the Securities Act or the Exchange Act.[41]

1. Futures on Single Securities

There are two types of foreign securities that may underlie a future on a single security within the terms of this exemption. First, a security future may overlie a security of a ''foreign private issuer,'' as defined under the Commission's rules,[42] where such security's primary trading market is outside the U.S.[43] These security futures are based on the securities of companies that are not considered under the federal securities laws as U.S. companies and that may not be reporting under the Exchange Act. Second, a security future may overlie a debt security issued or guaranteed by a foreign government[44] that is eligible to be registered with the Commission under Schedule B of the Securities Act.[45]

2. Futures on Indexes

If a foreign security future is based on a security index, the exemption is conditioned on at least 90 percent of the securities in the index, at the time of the transaction, both in terms of the number of underlying securities and their weighting in the index, being (1) securities issued by foreign private issuers, where each such security's primary trading market is outside the U.S.,[46] or (2) debt securities issued or guaranteed by a foreign government that are eligible to be registered with the Commission under Schedule B of the Securities Act.[47] The exemption permits up to 10 percent of the number and weighting of securities in the index to be securities of issuers that do not meet the above conditions[48]—*i.e.,* the issuers either are not foreign private issuers or are foreign private issuers but the securities' primary trading market is in the U.S.—if such securities are issued by companies that are required to file reports pursuant to Section 13 or 15(d) of the Exchange Act.[49] The Commission believes that 10 percent is an appropriate portion of an index that will allow an index to be considered ''foreign'' notwithstanding that a small proportion of securities of issuers in the index do not satisfy the criteria to be considered foreign under this exemption.[50]

The Commission's intent is for the exemption to permit transactions in security futures trading on foreign markets that overlie securities of foreign issuers that, in many cases, are not subject to the Exchange Act reporting provisions. The exemption, however, does allow transactions in foreign security futures on foreign security indexes that contain a limited number and weighting of securities of issuers that either are not foreign private issuers or that do not have their primary trading market outside the U.S, provided such issuers are subject to the reporting requirements of the Exchange Act. Allowing a limited number and weighting of securities that do not satisfy the foreign private issuer or primary trading market condition will not result in a distribution of unregistered securities in the U.S. of non-reporting issuers.

3. Primary Trading Market

The exemption also is conditioned on the primary trading market of any foreign private issuer's security being outside the U.S. For purposes of this condition, a security's primary trading market will be deemed to be outside the U.S. if at least 55 percent of the worldwide trading volume in the security took place in, on, or through the facilities of a securities market or markets located either (i) in a single foreign jurisdiction, or (ii) in no more than two foreign jurisdictions during the issuer's most recently completed fiscal

[40] *See* Regulation D, 17 CFR 230.501 *et seq.,* and Regulation S, 17 CFR 230.901 *et seq.* While the exemption in this order applies to transactions in foreign security futures by QIBs, as defined in Rule 144A, as well as non-U.S. persons, as defined in Regulation S, the exemption or safe harbor relied on in offering or selling a foreign security future to such persons may, but need not, be Regulation S. Rule 144A would not apply to the offer and sale of a security future because Rule 144A only applies to resale transactions (*see* 17 CFR 230.144A), whereas, the offer or sale of a security future is an offering by the clearing agency on or through the facilities of the exchange, not a resale transaction.

In analyzing the availability of an exemption or safe harbor from such registration requirements, the Commission provided some guidance in the General Statement in Regulation S by providing that any offer, offer to sell, sale, or offer to buy that occurs within the United States is subject to Section 5 of the Securities Act, while any such offer or sale that occurs outside the United States is not subject to Section 5. The determination as to whether a transaction is outside the United States will be based on the facts and circumstances of each case. As the Commission stated in adopting Regulation S, ''[i]f it can be demonstrated that an offer or sale of securities occurs 'outside the United States,' the registration provisions of the Securities Act will not apply, regardless of whether the conditions of [Regulation S] are met. For a transaction to qualify * * * both the sale and the offer pursuant to which it was made must be outside the United States.'' *See* Regulation S Adopting Release, *supra* note 19. Regulation S also contains restrictions on, among other matters, directed selling efforts into the U.S.—those activities that could reasonably be expected, or are intended, to condition the market with respect to the securities being offered in reliance on Regulation S. *Id.*

[41] *See supra* notes 37–40 and accompanying text.

[42] *See* Securities Act Rule 405, 17 CFR 230.405, and Exchange Act Rule 3b-4, 17 CFR 240.3b-4.

[43] *See infra* notes 50–51 and accompanying text.

[44] Rule 405 under the Securities Act defines ''foreign government'' as the government of a foreign country or political subdivision of a foreign country. 17 CFR 230.405.

[45] *See* Schedule B, 15 U.S.C. 77aa. Existing exemptions for futures on foreign government debt do not cover all foreign governments. *See* Rule 3a12–8, 17 CFR 240.3a12–8. Under Section 7 of the Securities Act, Schedule B may be used by foreign governments and political subdivisions to register securities under the Securities Act. Certain entities that are closely associated with foreign governments may also be eligible to use Schedule B. The Commission intends that the exemption be available for all security futures on foreign government debt. As a result, for foreign government debt securities, the Commission has included the condition that the security be eligible to be registered pursuant to Schedule B so that security futures on foreign government debt that may be acquired pursuant to this exemption include all foreign government securities that are eligible to be registered with the Commission pursuant to Schedule B.

[46] *See infra* notes 50–51 and accompanying text for a discussion of ''primary trading market.''

[47] 15 U.S.C. 77aa.

[48] For other contexts in which a 10 percent threshold exists under the federal securities laws *see, e.g.,* Exchange Act Section 16(a)(1), 15 U.S.C. 78p(a)(1), and Regulation AB (Rule 1101(k), 17 CFR 229.1101(k)).

[49] 15 U.S.C. 78m and 78o(d).

[50] For example, if the foreign index contains 30 securities, up to three securities could be the securities of an issuer that is not a foreign private issuer or that does not meet the primary market trading test (as discussed below), as long as the aggregate weighting of those securities also is no more than 10 percent of the index.

year. If the trading in the foreign private issuer's security is in two foreign jurisdictions, the trading for the issuer's security in at least one of the two foreign jurisdictions must be greater than the trading in the U.S. for the same class of the issuer's securities in order for such security's primary trading market to be considered outside the U.S.[51] Where a security's primary trading market is in the U.S., the Commission believes it is more appropriate, for these purposes, to require that the issuer of such security be subject to the reporting requirements under the Exchange Act. If 55 percent or more of the trading volume in a foreign private issuer's securities occurs through the facilities of a securities market or markets located outside the U.S., there is a greater likelihood that the foreign private issuer will be subject to a body of reporting and other securities regulatory requirements in a foreign jurisdiction and that the principal pricing determinants for the issuer's securities will be on a market within the jurisdiction of such other regulator.[52]

4. Closing Transactions Only

A security or securities underlying a security future may satisfy the conditions in this exemption described above at the time a transaction is effected, but may cease to satisfy such conditions while a security future position remains open. The exemption would allow persons who entered into positions in foreign security futures in compliance with this exemption to close such positions. For example, a person that opened a position in a foreign security future in compliance with the exemption could close such position even if the underlying index, because of changes in the value of the securities that compose the index, is now less than 90 percent composed of foreign private issues.

C. Exchange Registration

The Commission is not granting an exemption from Section 5 of the Exchange Act for transactions pursuant to this exemption. To the extent exchanges are required to register in the U.S., the listing standards in Section 6(h) of the Exchange Act would apply to any security future trading on that exchange. This exemption is not intended to exempt a U.S. exchange from having to satisfy these listing standards. As a result, the only exchanges that can trade security futures that do not meet these listing standards are those not registered, or required to register, in the U.S.

Accordingly, this exemption is conditioned on any transaction effected pursuant to this exemption being on an exchange that is not required to register with the Commission under Section 5 of the Exchange Act.[53] Specifically, for purposes of this exemption, a transaction must be effected on, or subject to the rules of, an exchange or contract market that has its principal place of business outside the U.S. and that is regulated as an exchange or contract market in a country other than the U.S. The Commission believes that an exchange or contract market would be required to register under Section 5 of the Exchange Act if it provides direct electronic access to persons located in the U.S.[54]

D. Issuance, Clearance and Settlement Outside the United States

A clearing agency is the issuer of the security future.[55] Any offer or sale by the clearing agency would have to be registered or exempt under the Securities Act. The purpose of the exemption from Section 6(h)(1) of the Exchange Act is to allow certain persons to effect transactions in security futures overlying securities traded outside the U.S. Therefore, as a condition to this exemption, any transaction in a security future must be cleared and settled on a foreign exchange or contract market located outside the U.S., or, if transactions on such foreign exchange or contract market are cleared and settled through a separate clearing entity, the transaction must be cleared and settled with the clearing entity, which must be located outside the U.S.

In addition, as a condition to the exemption, it must not be possible to close or liquidate a position in the foreign security future entered into on an exchange or contract market located outside the U.S. by effecting an offsetting transaction on or through the facility of any exchange or association registered in the U.S. under Section 6 or 15A of the Exchange Act, respectively.[56]

To limit the potential for an indirect distribution and development of a secondary market in the U.S. in securities that have not been registered under the Securities Act or the Exchange Act, this exemption is also conditioned on persons not taking delivery in the U.S. of the security or securities underlying the foreign security future in connection with settlement. Positions in foreign security futures cannot be transferred to another investor in the same manner as the underlying security, but can be disposed of only in an offsetting transaction on an exchange or contract market outside the U.S. This fact, together with the restriction on physical delivery in the U.S., is intended to help safeguard against development of a public market in the U.S. with respect to unregistered securities as a result of the ability to effect transactions in foreign security futures pursuant to this exemption.

III. Exemptions From Section 15(a)(1) of the Exchange Act and Certain Other Requirements

A foreign broker or dealer effecting transactions in foreign security futures with persons exempt from Section 6(h)(1) of the Exchange Act under this order will need to determine whether it is required to register as a broker or dealer in the U.S. Such foreign broker or dealer can rely on any of the exemptions from U.S. broker-dealer registration provided by Rule 15a-6 under the Exchange Act.[57] The Commission is

[51] Security futures can be surrogates for the underlying security. Thus, for purposes of the exemption, the 55-percent test is important to ensure that the majority of trading in the foreign private issuer's securities occurs offshore. Under this exemption, for purposes of determining whether the 55-percent test is met, trading volume is measured by the foreign private issuer's most recently completed fiscal year. The Commission uses this same test to assess U.S. market interest in a foreign private issuer's securities. *See* Foreign Private Issuer's Exemption from Registration, Securities Exchange Act Release No. 58465 (September 5, 2008), 73 FR 52752 (September 10, 2008) (''Release No. 34–58465''). The Commission has previously adopted similar tests to assess U.S. market interest in a foreign private issuer's securities in other contexts. *See* Regulation S, Rule 902(j)(1)(ii), 17 CFR 230.902(j)(1)(ii), and Termination of a Foreign Private Issuer's Registration of a Class of Securities Under Section 12(g) and Duty to File Reports Under Section 13(a) or 15(d), Securities Exchange Act Release No. 55540 (March 27, 2007), 72 FR 16934 (April 5, 2007).

[52] *See* Release No. 34–58465, *supra* note 51.

[53] 15 U.S.C. 78e.

[54] Activities of a foreign exchange or contract market in the U.S. relating to security futures also will be subject to applicable Securities Act provisions regarding the offer or sale of securities. *See supra* notes 37–40 and accompanying text.

[55] A clearing organization interposes itself in each transaction and adopts the position of buyer to every seller and seller to every buyer. Robert W. Kolb, *Futures, Options, & Swaps,* 16 (3d ed. 2000).

[56] 15 U.S.C. 78f and 15 U.S.C. 78o–3.

[57] 17 CFR 240.15a-6. By way of background, Rule 15a-6 provides conditional exemptions from U.S. broker-dealer registration requirements for foreign brokers or dealers that: (1) Effect unsolicited transactions; (2) provide research reports to certain institutional investors; (3) effect transactions for certain institutional investors through a U.S. registered broker or dealer; and (4) execute transactions directly with registered brokers or dealers and certain specified other persons. Because the Commission construes solicitation broadly, it would expect few transactions effected in reliance on this exemptive order to qualify for the unsolicited exemption. *See* Registration Requirements for Foreign Broker-Dealers, Securities Exchange Act Release No. 27017 (July 11, 1989), 54 FR 30013 (July 18, 1989). *See also* Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions, or Advertise Investment Services Offshore, Securities

today also issuing alternative exemptions, on which a foreign broker or dealer can rely, from Section 15(a)(1) of the Exchange Act and the reporting and other requirements of the Exchange Act (other than Sections 15(b)(4) and 15(b)(6)),[58] and the rules and regulations thereunder, that apply specifically to a broker or dealer whether or not registered with the Commission, as discussed below.[59]

A. Background

Paragraph (a)(3) of Rule 15a–6 permits a foreign broker or dealer to effect certain transactions for institutional investors through a registered broker or dealer. A ''registered broker or dealer'' is defined in the rule as ''a person that is registered with the Commission under Sections 15(b), 15B(a)(2), or 15C(a)(2) of the [Exchange] Act.'' [60] This term includes a broker or dealer registered with the Commission pursuant to Section 15(b)(11) of the Exchange Act (''Notice BD'').[61] Rule 15a–6(a)(3) sets forth conditions that the foreign broker or dealer and the registered broker or dealer must meet in order for the foreign broker or dealer to rely on the rule. Because a Notice BD is subject to a specialized regulatory scheme, however, a foreign broker or dealer may find it difficult to rely on the rule if the registered broker or dealer through which it effects transactions in accordance with Rule 15a–6(a)(3) is a Notice BD.

B. The Exemptions

The Commission finds that it is consistent with the public interest, the protection of investors, and the purposes of the Exchange Act to provide a conditional exemption for foreign brokers or dealers from the registration requirement of Section 15(a)(1) of the Exchange Act. The Commission also finds that it is necessary and appropriate, in the public interest, and is consistent with the protection of investors to provide conditional exemptions for foreign brokers or dealers from the reporting and other requirements of the Exchange Act (other than Sections 15(b)(4) and 15(b)(6)),[62] and the rules and regulations thereunder, that apply specifically to a broker or dealer whether or not registered with the Commission.

The conditional exemptions would be available to foreign brokers or dealers that induce or attempt to induce the purchase or sale of any foreign security futures by a QIB [63] that is exempt from Section 6(h)(1) of the Exchange Act under this order. The conditional exemptions also would extend exemptive relief to transactions that are intermediated by Notice BDs, recognizing the role that Notice BDs play with respect to security futures and the specialized regulatory scheme that applies to these particular brokers and dealers.

A foreign broker or dealer may rely on the conditional exemptions to induce or attempt to induce the purchase or sale of any foreign security future by a QIB exempt from Section 6(h)(1), so long as the foreign broker or dealer and the registered broker or dealer, through which any resulting transactions are effected, comply with the requirements of paragraphs (a)(3)(i) through (iii) [64] of Rule 15a–6 under the Exchange Act, except as otherwise provided below.[65] If the registered broker or dealer through which any resulting transactions with QIBs are effected is a Notice BD, then the Notice BD must comply with the alternative requirements, discussed below, in lieu of the requirements of paragraphs (a)(3)(iii)(A)(*5*) and (a)(3)(iii)(A)(*6*) of Rule 15a–6.[66]

Paragraphs (a)(3)(iii)(A)(*5*) and (a)(3)(iii)(A)(*6*) of Rule 15a–6 require the registered broker or dealer to be responsible for (1) complying with Rule 15c3–1 under the Exchange Act [67] with respect to the transaction, and (2) receiving, delivering, and safeguarding funds and securities in connection with the transaction in compliance with Rule

Exchange Act Release No. 39779 (March 23, 1998), 63 FR 14806 (March 27, 1998) at 14813 (''Foreign broker-dealers that have Internet Web sites and that intend to rely on Rule 15a-6's 'unsolicited' exemption should ensure that the 'unsolicited' customer's transactions are not in fact solicited, either directly or indirectly, through customers accessing their Web sites.''). Foreign brokers or dealers relying on the other exemptions in Rule 15a-6 should take care to ensure that they meet all of the related conditions. In addition, foreign brokers or dealers should be aware of potential Securities Act implications arising from the distribution of research reports pursuant to Rule 15a-6(a)(2). Specifically, in connection with the distribution of the research report in the U.S., it is important to evaluate whether such distribution may affect the availability of an exemption from registration for the offer or sale of a foreign security future to a QIB or non-U.S. person pursuant to the terms of this order. For example, the research report may be an offer of the securities discussed in the report, a general solicitation of investors, or a directed selling effort for such securities for purposes of the Securities Act. A research report on the underlying security of a foreign security future can be distributed under the Securities Act without being considered a directed selling effort (for Regulation S purposes) or a general solicitation (for Rule 144A purposes) if the conditions of Rule 138 or Rule 139 under the Securities Act, 17 CFR 230.138 and 17 CFR 230.139, are satisfied. Distributing a research report on the foreign security future itself in the U.S. would not, however, satisfy the conditions of those safe harbors.

[58] 15 U.S.C. 78o(b)(4) and 78o(b)(6).

[59] The Commission has issued a proposing release discussing possible amendments to Exchange Act Rule 15a-6. *See* Exchange Act Release No. 58047 (June 27, 2008), 73 FR 39182 (July 8, 2008). To date, the Commission has not taken final action with respect to the proposed amendments. Accordingly, the Commission is basing the exemption provided herein on the current requirements under Exchange Act Rule 15a–6.

[60] Rule 15a–6(b)(5) under the Exchange Act, 17 CFR 240.15a–6(b)(5).

[61] A ''Notice BD'' is a futures commission merchant or introducing broker that registers with the Commission as a broker or dealer pursuant to Section 15(b)(11) of the Exchange Act, 15 U.S.C. 78o(b)(11), and the rules adopted by the Commission. *See* Securities Exchange Act Release No. 44730 (August 21, 2001), 66 FR 45138 (August 27, 2001).

[62] 15 U.S.C. 78o(b)(4) and 78o(b)(6).

[63] The conditional exemptions in this order from the registration requirements in Section 15(a)(1) of the Exchange Act and related requirements cover foreign brokers' or dealers' transactions with QIBs. The exemption in this order from Section 6(h)(1) of the Exchange Act is applicable to persons that are QIBs. The Rule 15a–6(a)(3) exemption applies to a foreign broker's or dealer's transactions with U.S. institutional investors (*see* Rule 15a–6(b)(7) under the Exchange Act, 17 CFR 240.15a–6(b)(7)) and major U.S. institutional investors (*see* Rule 15a–6(b)(4) under the Exchange Act, 17 CFR 240.15a–6(b)(4)). There is substantial overlap, however, between the definitions of major U.S. institutional investor and QIB. Therefore, the conditional exemptions in this order from the registration requirements in Section 15(a)(1) of the Exchange Act and related requirements should simplify the process for engaging in transactions in foreign security futures without substantially altering the class of persons with which foreign brokers or dealers (intermediated by registered brokers or dealers) may transact.

[64] For purposes of this exemption, references in paragraphs (a)(3)(i) through (iii) and paragraph (b)(2) of Rule 15a–6 to major U.S. institutional investors shall be deemed to be references to QIBs. In addition, for purposes of this exemption, the reference in paragraph (a)(3)(iii)(D) to Form BD shall be deemed a reference to Form BD–N with respect to Notice BDs.

[65] In view of the experience and capabilities QIBs are likely to possess, the chaperoning requirement under paragraph (a)(3)(ii)(A)(*1*) may provide only limited benefits with respect to QIBs. Therefore, notwithstanding paragraph (a)(3)(ii)(A)(*1*) of the rule, in this context, foreign broker-dealers may engage in unchaperoned contacts with QIBs to the same extent as described in a 1997 staff no-action letter. *See* Letter re: Certain Securities Activities of U.S. Affiliated Foreign Dealers, from Giovanni P. Prezioso, Cleary, Gottlieb, Steen & Hamilton, to Richard R. Lindsey, Director, Division of Market Regulation, Securities and Exchange Commission (Apr. 9, 1997). Specifically, foreign associated persons of the foreign broker or dealer may have in-person contacts (without the participation of an associated person of a registered broker or dealer) during visits to the United States with QIBs, so long as the number of days on which such in-person contacts occur does not exceed 30 per year and the foreign associated persons engaged in such in-person contacts do not accept orders to effect securities transactions while in the United States.

[66] A Notice BD intermediating a foreign broker or dealer that is relying on the exemption under Exchange Act Rule 15a–6(a)(3) would need to comply with the requirements in paragraphs (a)(3)(iii)(A)(*5*) and (a)(3)(iii)(A)(*6*) in a similar manner as any other registered broker or dealer even if the requirements in such paragraphs would not otherwise be applicable.

[67] 17 CFR 240.15c3–1.

15c3–3 under the Exchange Act.[68] However, Section 15(b)(11)(B)(iii) of the Exchange Act, exempts Notice BDs from Section 15(c)(3) of the Exchange Act and the rules thereunder. Instead, Notice BDs are subject to analogous requirements of the CEA. Accordingly, for purposes of this exemption, a Notice BD, in lieu of compliance with paragraphs (a)(3)(iii)(A)(*5*) and (a)(3)(iii)(A)(*6*) of Rule 15a–6, would need to comply with the analogous CEA requirements, including being responsible for receiving, delivering, and safeguarding funds and securities in connection with transactions on behalf of the QIB in compliance with the CEA segregation [69] and net capital requirements.[70] Consistent with the regulatory framework established by the CFMA, this relief will permit a foreign broker or dealer to be intermediated by a Notice BD without subjecting the Notice BD to duplicative regulatory requirements.

IV. Rule 15c6–1 Under the Exchange Act (Settlement Cycle)

Rule 15c6–1 under the Exchange Act [71] prohibits a broker or dealer from effecting or entering into a contract for the purchase or sale of a security (other than an exempted security, government security, municipal security, commercial paper, bankers' acceptances, or commercial bills) that provides for payment of funds and delivery of securities later than the third business day after the date of the contract, unless otherwise expressly agreed to by the parties at the time of the transaction. The rule does not distinguish between U.S. securities and foreign securities. Thus, because security futures are considered securities under the Exchange Act,[72] this rule by its terms would apply to transactions in foreign security futures. The Commission has, however, previously exempted from the scope of Rule 15c6–1 under the Exchange Act all transactions that do not have transfer or delivery facilities in the U.S.[73] In addition, the Commission has granted an exemption to make it clear that Rule 15c6–1 does not apply to transactions that occur outside the U.S.[74] Therefore, transactions in foreign security futures pursuant to the exemption from Section 6(h)(1) of the Exchange Act in this order would fall within the scope of the Commission's prior exemption from Rule 15c6–1 under the Exchange Act.

V. Conditional Exemptions From Sections 6(h)(1) and 15(a)(1) of the Exchange Act and Certain Other Requirements

A. Conditional Exemption From Section 6(h)(1) of the Exchange Act

For these reasons stated in, and by, this order, the Commission is exempting from Section 6(h)(1) of the Exchange Act [75] any qualified institutional buyer (as defined in Rule 144A under the Securities Act) (''QIB''); [76] any person who is not a ''U.S. person,'' as the term is defined in Rule 902(k) of Regulation S under the Securities Act (''non-U.S. person''); [77] any broker or dealer registered under Section 15(b) of the Exchange Act [78] to the extent such broker or dealer effects transactions on behalf of a QIB or a non-U.S. person; and any bank, as defined in Section 3(a)(6) of the Exchange Act,[79] acting pursuant to an exception or exemption from the definition of ''broker'' or ''dealer'' in sections 3(a)(4)(B), 3(a)(4)(E), or 3(a)(5)(C) of the Exchange Act [80] or the rules thereunder (''Eligible Bank'') to effect transactions on behalf of a QIB or a non-U.S. person; *provided that* any transaction effected:

(1)(a) Is for a contract of sale for future delivery of:

(i) (A) A security issued by a foreign private issuer (as defined in Rule 3b–4(c) of the Exchange Act and Rule 405 under the Securities Act) [81] for which at least 55 percent of the worldwide trading volume in the security took place in, on, or through the facilities of a securities market or markets in a single foreign jurisdiction or in no more than two foreign jurisdictions during the issuer's most recently completed fiscal year. If the trading in the foreign private issuer's security is in two foreign jurisdictions, the trading for the issuer's securities in at least one of the two foreign jurisdictions must be greater than the trading in the U.S. for the same class of the issuer's securities in order for such security's primary trading market to be considered outside the U.S.; or

(B) A security that is a note, bond, debenture or evidence of indebtedness (''debt security'') issued or guaranteed by a foreign government as defined in Rule 405 of the Securities Act [82] that is eligible to be registered with the Commission under Schedule B of the Securities Act; [83] or

(ii) A ''narrow-based security index'' of which:

(A) At least 90 percent of the underlying securities in the index, at the time of the transaction, both in terms of the number of underlying securities and their weighting in the index, are: (*1*) Securities issued by a foreign private issuer for which at least 55 percent of the worldwide trading volume in the security took place in, on, or through the facilities of a securities market or markets located in a single foreign jurisdiction, or in no more than two foreign jurisdictions during the issuer's most recently completed fiscal year. If the trading in the foreign private issuer's security is in two foreign jurisdictions, the trading for the issuer's security in at least one of the two foreign jurisdictions must be greater than the trading in the U.S. for the same class of the issuer's securities in order for such security's primary trading market to be considered outside the U.S.; or (*2*) debt securities issued or guaranteed by a foreign government as defined in Rule 405 of the Securities Act[84] that are eligible to be registered with the Commission under Schedule B of the Securities Act; [85] and (B) no more than 10 percent of the underlying securities in the index, at the time of the transaction, both in terms of the number of underlying securities and their weighting in the index, do not meet the criteria in (1)(a)(ii)(A) above and, as to any such security, the issuer of such

[68] 17 CFR 240.15c3–3.

[69] For a discussion regarding analogous CEA provisions, *see* Applicability of CFTC and SEC Customer Protection, Recordkeeping, Reporting, and Bankruptcy Rules and the Securities Investor Protection Act of 1970 to Accounts Holding Security Futures Products, Joint Release by SEC and CFTC, Securities Exchange Act Release No. 46473 (September 9, 2002), 67 FR 58284 (September 13, 2002) (''Joint September 2002 Release'') (noting that transactions involving a futures account shall be subject to the segregation requirements of the CEA and that transactions involving a securities account shall be subject to Rule 15c3–3 under the Exchange Act and Securities Investor Protection Act of 1970).

[70] 17 CFR 1.17.

[71] 17 CFR 240.15c6–1.

[72] *See* the definition of ''security'' in Section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10).

[73] *See* Securities Exchange Act Release No. 35750 (May 22, 1995), 60 FR 27994 (May 26, 1995).

[74] *Id.* In particular, the Commission stated that if a U.S. broker-dealer were to execute a trade on a foreign exchange with a U.S. or foreign broker-dealer, the contract would not be subject to the rule. This exemption applies, however, only to the contract between the U.S. broker-dealer and the foreign broker-dealer. If the U.S. broker-dealer is executing the trade on a foreign exchange to satisfy its obligations to a U.S. customer, the contract with the U.S. customer is still subject to T+3 settlement unless that contract also is exempted. *Id.* At n. 9 and accompanying text.

[75] 15 U.S.C. 78f(h)(1).

[76] 17 CFR 230.144A.

[77] 17 CFR 230.902(k).

[78] 15 U.S.C. 78o(b).

[79] 15 U.S.C. 78c(a)(6).

[80] 15 U.S.C. 78c(a)(4)(B), 15 U.S.C. 78c(a)(4)(E), or 15 U.S.C. 78c(a)(5)(C).

[81] 17 CFR 240.3b–4(c) and 17 CFR 230.405.

[82] 17 CFR 230.405. Rule 405 defines ''foreign government'' as the government of a foreign country or political subdivision of a foreign country.

[83] *See* Schedule B, 15 U.S.C. 77aa.

[84] 17 CFR 230.405.

[85] *See* Schedule B, 15 U.S.C. 77aa.

security is required to file reports with the Commission pursuant to Section 13 or Section 15(d) of the Exchange Act;[86]

(b) Is a closing transaction to offset a position in a contract of sale for future delivery that satisfied the conditions in paragraph (1)(a) of this order at the time such position was opened.

(2) Is executed on, or subject to the rules of, an exchange or contract market that has its principal place of business outside the U.S., that is regulated as an exchange or contract market in a country other than the U.S., and that is not required to register with the Commission under Section 5 of the Exchange Act;[87]

(3) Is cleared and settled on, and with respect to such clearance and settlement subject to the rules of, an exchange, contract market, or clearing entity that is regulated as an exchange, contract market, or clearing entity in a country other than the U.S. and that is not required to register with the Commission under Section 5 or Section 17A of the Exchange Act;[88]

(4) Is for a security future, that cannot be closed or liquidated by effecting an offsetting transaction on or through the facility of any exchange or association registered in the U.S. under Section 6 or Section 15A of the Exchange Act,[89] respectively; and

(5) Does not result in such person taking physical delivery of the underlying security in the U.S. in connection with settlement;

B. Conditional Exemptions From Section 15(a)(1) of the Exchange Act and Certain Other Requirements

For the reasons stated in, and by, this order, the Commission is exempting foreign brokers or dealers (as defined in Rule 15a–6(b)(3) under the Exchange Act)[90] that induce or attempt to induce the purchase or sale of any foreign security futures by a QIB that is subject to the exemption from Section 6(h)(1) of the Exchange Act, from the registration requirements of Section 15(a)(1) of the Exchange Act[91] and the reporting and other requirements of the Exchange Act (other than Sections 15(b)(4) and 15(b)(6)),[92] and the rules and regulations thereunder, that apply specifically to a broker or dealer whether or not registered with the Commission; *provided that* the foreign broker or dealer and the registered broker or dealer (as defined in Rule 15a–6(b)(5) under the Exchange Act), through which any resulting transactions with QIBs are effected, comply with the requirements of paragraphs (a)(3)(i) through (iii)[93] of Rule 15a–6 under the Exchange Act, except as otherwise provided below.[94] If the registered broker or dealer through which any resulting transactions with QIBs are effected is a broker or dealer registered with the Commission pursuant to Section 15(b)(11) of the Exchange Act (''Notice BD''), then:

(1) In lieu of the requirement in paragraph (a)(3)(iii)(A)(*5*) of Rule 15a–6, the Notice BD shall be responsible for complying with Rule 1.17 under the Commodity Exchange Act (''CEA'') (17 CFR 1.17) with respect to the transactions; and

(2) In lieu of the requirement in paragraph (a)(3)(iii)(A)(*6*) of Rule 15a–6, the Notice BD shall be responsible for receiving, delivering, and safeguarding funds and securities in connection with transactions on behalf of the QIB in compliance with the segregation requirements of the CEA and the regulations thereunder.

Accordingly,

It is hereby ordered, pursuant to Section 36 of the Exchange Act,[95] that certain persons are exempt from the provisions of Section 6(h)(1) of the Exchange Act[96] that prohibit persons from effecting transactions in security futures products that are not listed on a national securities exchange or a national securities association registered pursuant to Section 15A(a) of the Exchange Act,[97] subject to the conditions set forth above.

It is hereby further ordered, pursuant to Section 15(a)(2) of the Exchange Act,[98] that a foreign broker or dealer as defined in Rule 15a–6(b)(3)[99] is exempt, with respect only to the activities described above in Section V.B. of this order, from the registration requirements of Section 15(a)(1) of the Exchange Act, subject to the conditions set forth above.[100]

It is hereby further ordered, pursuant to Section 36 of the Exchange Act,[101] that a foreign broker or dealer as defined in Rule 15a-6(b)(3)[102] is exempt, with respect only to the activities described above in Section V.B. of this order, from the reporting and other requirements of the Exchange Act (other than Sections 15(b)(4) and 15(b)(6)),[103] and the rules and regulations thereunder, that apply specifically to a broker or dealer whether or not registered with the Commission, subject to the conditions set forth above.

By the Commission.

Elizabeth M. Murphy,

Secretary.

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[86] 15 U.S.C. 78m and 78o(d).

[87] 15 U.S.C. 78e.

[88] 15 U.S.C. 78e and 78q–1.

[89] 15 U.S.C. 78f and 15 U.S.C. 78o–3.

[90] 17 CFR 240.15a–6(b)(3).

[91] 15 U.S.C. 78o(a)(1).

[92] 15 U.S.C. 78o(b)(4) and 78o(b)(6).

[93] For purposes of this exemption, references in paragraphs (a)(3)(i) through (iii) and paragraph (b)(2) of Rule 15a–6 to major U.S. institutional investors shall be deemed to be references to QIBs. In addition, for purposes of this exemption, the reference in paragraph (a)(3)(iii)(D) to Form BD shall be deemed a reference to Form BD–N with respect to Notice BDs.

[94] Notwithstanding paragraph (a)(3)(ii)(A)(*1*) of the rule, foreign associated persons of the foreign broker or dealer may have in-person contacts (without the participation of an associated person of a registered broker or dealer) during visits to the United States with QIBs, so long as the number of days on which such in-person contacts occur does not exceed 30 per year and the foreign associated persons engaged in such in-person contacts do not accept orders to effect securities transactions while in the United States. *See supra* note 65.

[95] 15 U.S.C. 78mm.

[96] 15 U.S.C. 78f(h)(1).

[97] 15 U.S.C. 78o–3(a).

[98] 15 U.S.C. 78o(a)(2).

[99] 17 CFR 240.15a–6(b)(3).

[100] 15 U.S.C. 78o(a)(1).

[101] 15 U.S.C. 78mm.

[102] 17 CFR 240.15a–6(b)(3).

[103] 15 U.S.C. 78o(b)(4) and 78o(b)(6).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60183; File No. SR–NASDAQ–2009–039]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change, as Modified by Amendment No. 1 Thereto, to Amend the By-Laws of The NASDAQ OMX Group, Inc.

June 26, 2009.

On April 27, 2009, The NASDAQ Stock Market LLC (''NASDAQ Exchange'') filed with the Securities and Exchange Commission (''Commission'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the By-Laws of The NASDAQ OMX Group, Inc. (''NASDAQ OMX''). The proposed rule change was published for comment in the **Federal Register** on May 12, 2009.[3] On June 2, 2009, the NASDAQ Exchange filed Amendment No. 1 to the proposed rule change.[4] The Commission

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 59858 (May 4, 2009), 74 FR 22191 (''Notice'').

[4] Amendment No. 1 modified the original rule proposal to indicate that the Board of Directors of NASDAQ OMX approved the proposed rule change on May 28, 2009, in addition to December 17, 2008, and to revise the proposed rule change with respect to ''Extension of Time Period for Commission Action.'' Because these are technical modifications,

Continued

received no comments regarding the proposal. This order approves the proposed rule change.

I. Description of the Proposal

As provided in Article XI of the NASDAQ OMX By-Laws, proposed amendments to the By-Laws are to be reviewed by the Board of Directors of each self-regulatory subsidiary of NASDAQ OMX, and if any such proposed amendment must, under Section 19 of the Act and the rules promulgated thereunder, be filed with, or filed with and approved by, the Commission before such amendment may be effective, then such amendment shall not be effective until filed with, or filed with and approved by, the Commission, as the case may be. Consistent with such requirement, the NASDAQ Exchange has filed proposed amendments to the NASDAQ OMX By-Laws.[5] As described more fully in the Notice, the NASDAQ Exchange proposed the following amendments to the By-Laws.

1. Amend Article I to reflect the recent name changes of the Philadelphia Stock Exchange and the Boston Stock Exchange to NASDAQ OMX PHLX, Inc. and NASDAQ OMX BX, Inc., respectively;

2. Amend Article III to require a stockholder making a proposal to supply more complete information about the stockholder's background.

3. Amend Article IV to state that both the NASDAQ OMX Audit and Management Compensation Committees shall be composed of independent directors within the meaning of the rules of the NASDAQ Exchange that govern NASDAQ OMX's listing (and, in the case of the Audit Committee, Section 10A of the Act).

4. Amend Article IV to revise the compositional requirements of the NASDAQ OMX Nominating Committee.

5. Amend Article VIII to: (a) Require NASDAQ OMX to provide indemnification against liability, advancement of expenses, and the power to purchase and maintain insurance on behalf of persons serving as a director, officer, or employee of any wholly owned subsidiary of NASDAQ OMX to the same extent as indemnification, advancement of expenses, and the power to maintain insurance is provided for directors, officers, or employees of NASDAQ OMX; (b) extend the discretionary authority of NASDAQ OMX under Section 8.1(c) of the By-Laws to provide indemnification to persons serving as an agent of NASDAQ OMX to persons serving as an agent of any wholly owned subsidiary of NASDAQ OMX; and (c) clarify that any repeal, modification or amendment of, or adoption of any provision inconsistent with, the indemnification and advancement of expenses provided for in Article VIII will not adversely affect the right of any person covered by the provision if the act or omission that any proceeding arises out of or is related to had occurred prior to the time for the repeal, amendment, adoption or modification.

6. Amend Article IX to revise the language of the provisions dealing with capital stock to reflect possible participation in the Direct Registration System (''DRS'').

7. Amend Article XII to conform certain provisions applicable to NASDAQ OMX's directors, officers, employees, and/or agents more closely to corresponding provisions in the Amended and Restated By-Laws of NYSE Euronext (''NYSE Euronext By-Laws'').

II. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[6] In particular, for the reasons discussed below, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,[7] which requires a national securities exchange to be so organized and have the capacity to carry out the purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act, and Section 6(b)(5) of the Act,[8] in that it is designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The NASDAQ Exchange proposes to revise the structure of the NASDAQ OMX Nominating Committee. Currently, the NASDAQ OMX Nominating Committee is required to be composed solely of persons who are not directors, or who are directors not standing for re-election. Under the amended By-Laws, the NASDAQ OMX Nominating Committee would be composed of four or five directors, all of whom must be independent within the meaning of the rules of the NASDAQ Exchange.[9] Further, the number of Non-Industry Directors (*i.e.*, Directors without material ties to the securities industry) must equal or exceed the number of Industry Directors, and at least two members of the committee must be Public Directors (*i.e.*, directors who have no material business relationship with a broker or dealer, NASDAQ OMX or its affiliates, or FINRA).[10]

The Commission believes that it is appropriate for NASDAQ OMX to revise the composition of its Nominating Committee so that it is composed exclusively of directors that would be considered independent within the meaning of the listing rules of the NASDAQ Exchange,[11] to provide for a compositional balance between Industry Directors, Non-Industry Directors, and to specify that at least two Nominating Committee members must be Public Directors. The Commission further believes that it is appropriate for the By-Laws to be amended to specify that the NASDAQ OMX Management Compensation Committee and the Audit Committee must be composed exclusively of independent director members within the meaning of the listing rules of the NASDAQ Exchange (and, in the case of the Audit Committee, Section 10A of the Act).[12] The NASDAQ Exchange has represented that NASDAQ OMX adheres to the director independence requirements in the NASDAQ Exchange's listing rules and, in the case the of the Audit Committee) Section 10A of the Act, but believed that such requirements should be set forth expressly in the By-Laws.

Currently, NASDAQ OMX directors, officers, and employees, as well as

the Commission is not publishing Amendment No. 1 for comment.

[5] Although there is a reference in the Notice to a proposed amendment to the Certificate of Incorporation of NASDAQ OMX (''NASDAQ OMX Certificate''), this proposal does not in fact amend the NASDAQ OMX Certificate. The Exchange recently amended the NASDAQ OMX Certificate pursuant to a separate filing with the Commission. *See* Securities Exchange Act Release No. 59460 (February 26, 2009), 74 FR 9841 (March 6, 2009).

[6] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[7] 15 U.S.C. 78(b)(1).

[8] 15 U.S.C. 78f(b)(5).

[9] *See* NASDAQ Exchange Rule 5605(a)(2). Rule 5605(a)(2) was formerly designated Rule 4200(a)(15). *See* Securities Exchange Act Release No. 59663 (March 31, 2009), 74 FR 15552 (April 6, 2009) (SR–NASDAQ–2009–018).

[10] *See* NASDAQ OMX By-laws, Article I (j), (m), and (n) for the definitions of Industry Director, Non-Industry Director, and Public Director, respectively.

[11] *Id.*

[12] *See* NASDAQ Exchange Rule 5605(a)(2). 15 U.S.C. 78j–1(m).

agents, are required by the By-Laws to give due regard to the preservation of the independence of each self-regulatory subsidiary of NASDAQ OMX, not to take any actions that would interfere with each self-regulatory subsidiary's regulatory functions, to cooperate with the Commission, to consent to U.S. jurisdiction, and to consent in writing to the applicability of these provisions. As more fully described in the Notice, the proposed rule change would conform Article XII of the By-Laws more closely to corresponding provisions in the NYSE Euronext By-Laws, which the Commission previously approved.[13]

III. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[14] that the proposed rule change (SR–NASDAQ–2009–039) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–15899 Filed 7–6–09; 8:45 am]

BILLING CODE 8010–01–P

[13] *See* NYSE Euronext Bylaws, Article III, Section 9.3; NYSE Euronext Bylaws, Article VII, Section 7.1. *See also* Securities Exchange Act Release No. 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (SR–NYSE–2006–120).

[14] 15 U.S.C. 78s(b)(2).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60184; File No. SR–NYSEArca–2009–52]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change To Amend the Schedule of Fees and Charges for Exchange Services

June 29, 2009.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on June 10, 2009, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') [sic], through its wholly owned subsidiary NYSE Arca Equities, Inc. (''NYSE Arca Equities''), is proposing to amend its Schedule of Fees and Charges for Exchange Services (''Fee Schedule'') to revise the Listing Fees applicable to Derivative Securities Products under NYSE Arca Rules 5.2(j)(3), 8.100, 8.200, 8.201, 8.202, 8.203, 8.204, 8.300, 8.500 and 8.600 on NYSE Arca, LLC (''NYSE Arca Marketplace''), the equities facility of NYSE Arca Equities. The revised Fee Schedule is attached as Exhibit 5 [sic]. The text of the proposed rule change is available on the Exchange's Web site at *http://www.nyse.com,* at the Exchange's principal office and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE Arca has determined to amend the Exchange's Fee Schedule to revise the Listing Fee applicable to Derivative Securities Products listed on the NYSE Arca Marketplace under Rules 5.2(j)(3) (Investment Company Units), 8.100 (Portfolio Depositary Receipts), 8.200 (Trust Issued Receipts), 8.201 (Commodity-Based Trust Shares), 8.202 (Currency Trust Shares), 8.203 (Commodity Index Trust Shares), 8.204 (Commodity Futures Trust Shares), 8.300 (Partnership Units), 8.500 (Trust Units), and 8.600 (Managed Fund Shares). Specifically, the Exchange proposes to add a new provision to the Fee Schedule which states that in the case where a sponsor, managing owner, general partner or equivalent (collectively, the ''Sponsor'') is listing a new Derivative Securities Product on the Exchange for the first time, the Sponsor will be charged a one time consultation fee in the amount of $20,000.

Under the current Fee Schedule for Derivative Securities Products, the Listing Fee is $5,000 and the Annual Fees range between $2,000 and $25,000 depending on the number of shares outstanding for each issue. The current Listing and Annual Fees applicable to Derivative Securities Products will remain unchanged and be applicable to all Sponsors of Derivative Securities Products. The proposed consulting charge would apply to all new Sponsors listing for the first time, a new Derivative Securities Product. Therefore, existing issuers, issuing a new Derivative Securities Product would not be charged the proposed consulting fee.

The Exchange believes that the imposition of this proposed one time consulting charge to new Sponsors of new Derivative Securities Products is necessary in order to adequately compensate the Exchange for all of the additional Exchange resources dedicated to such new Sponsors, such as the additional legal and business resources required to properly advise novice Sponsors through the listing process. The Exchange dedicates extensive time and resources to new Sponsors in the way of conference calls, meetings, correspondences, *etc.,* to educate such new Sponsors about the listing and approval process, a process that veteran Sponsors are already familiar with. The Exchange notes that the proposed new Sponsor Fee is substantially below the initial listing fee for issuers of traditional equity securities, *e.g.,* common stock. The Exchange further believes that the proposed consulting fee will enable the Exchange to continue to provide new issuers with the level of service necessary to successfully navigate an initial launch of a Derivative Securities Product.

2. Statutory Basis

NYSE Arca believes that the proposal is consistent with Section 6(b)[4] of the Securities Exchange Act of 1934 (the ''Act'') [sic], in general, and Section 6(b)(4)[5] of the Act, in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its issuers and other persons using its facilities. The Exchange believes that the proposal is

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4).

consistent with Section 6(b)(5)[6] of the Act, in particular, in that it does not unfairly discriminate against new Sponsors given the additional Exchange resources dedicated to such new Sponsors, such as the additional extensive time, legal and business resources required to properly advise novice Sponsors through the listing and approval process.[7] The Exchange believes that the proposed consulting fee is reasonable, given the amount of resources dedicated by the Exchange to new issuers of new Derivative Securities Products. The Exchange believes that the proposed changes to the Fee Schedule are equitable in that they apply uniformly to all new issuers of new Derivative Securities Products.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed change.

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 the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

[6] 15 U.S.C. 78f(b)(5).

[7] The Commission notes that the Exchange has represented that the proposed rule change does not unfairly discriminate against new Sponsors vis-à-vis Sponsors who have previously listed Derivative Securities Products or other first time issuers of other securities listed on the Exchange because of the additional extensive time, legal and business resources dedicated to new Sponsors. Telephone call between Sharon Lawson, Senior Special Counsel, and Terri Evans, Division of Trading and Markets, Commission, and Sudhir Bhattacharyya, Vice President, NYSE Euronext and Laura Morrison, Vice President, NYSE Euronext, June 18, 2009.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2009–52 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2009–52. 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 Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at NYSE Arca's principal office and on its Internet Web site at *http://www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2009–52 and should be submitted on or before July 28, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–15900 Filed 7–6–09; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60185; File No. SR–CBOE–2009–028]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Granting Approval of Proposed Rule Change Relating to Rebating Member Dues for Certain Members

June 29, 2009.

I. Introduction

On May 6, 2009, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend its Fee Schedule to rebate member dues for certain members. The proposed rule change was published for comment in the **Federal Register** on May 26, 2009.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

CBOE assesses dues with respect to every membership (unless a member is assessed the Hybrid Electronic Quoting Fee, in which case the member does not pay member dues).[4] Under CBOE Rule 3.17(c), the membership lease agreement between a lessor member and a lessee member designates who is responsible for Exchange dues, fees and other charges. The Exchange represents that, typically, leases provide that the lessee is responsible for dues and therefore lessors do not have to pay dues.

Under the lessor compensation component of the Interim Trading Permit (''ITP'') program, the Exchange compensates a lessor for an ''open lease'' while the ITP program is active

[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 59935 (May 18, 2009), 74 FR 24888 (''Notice'').

[4] Member dues are $450 per month. *See* CBOE Fees Schedule, Section 10.

and ITPs are outstanding.[5] The goal of this component of the ITP program is to put the lessor in a similar position as if the lessor's membership was leased. The Exchange asserts that this goal would be frustrated if the lessor is charged dues, because the lessor would be subject to an obligation the lessor would otherwise not be subject to if the lessor's membership was leased.

In a separate proposed rule change, the Exchange instituted a waiver of member dues for any month that a lessor member receives a payment from the Exchange for an open lease under the ITP program, effective as of May 1, 2009.[6] The Exchange now proposes to rebate dues to any lessor member who received such a payment from the Exchange during the period of August 1, 2008 through April 30, 2009.

III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[7] Specifically, the Commission finds that the proposal is consistent with Section 6(b)(4) of the Act,[8] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using its facilities.

As note above, CBOE recently adopted a waiver of member dues for any month that a lessor member receives a payment from the Exchange for an open lease under the ITP program, effective May 1, 2009.[9] The current proposal will effectively allow CBOE to apply this same waiver retroactively by rebating to a lessor member its member dues for any month in which the lessor member received a payment from the Exchange for an open lease under the ITP program for the period August 1, 2008 through April 30, 2009.

The Commission believes that the rebate will put lessor members who received compensation from the Exchange for an open lease under the ITP program but who paid member dues since August 1, 2008 in the same position as those lessor members who are currently having their member dues waived pursuant to the fee waiver adopted as of May 1, 2009.[10] The Commission also believes that the proposed rebate will further the goal of the Exchange's ITP program to put the lessor of an ''open lease'' in the same position as if the lessor's membership had been leased. The Commission notes that the Exchange represented that lease agreements typically provide that the lessee member is responsible for all dues and thus the lessor would generally not have to pay such dues. Accordingly, the Commission finds that the proposed fee rebate is consistent with the Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[11] that the proposed rule change (SR–CBOE–2009–028), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–15901 Filed 7–6–09; 8:45 am]

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[5] The ITP program is a program pursuant to which the Exchange has the authority to issue up to 50 ITPs. The ITP program is governed by CBOE Rule 3.27. The lessor compensation component of the ITP program is described in CBOE Rule 3.27(d). An ''open lease'' is defined in Rule 3.27(d) as a transferable Exchange membership available for lease.

[6] *See* Securities Exchange Act Release No. 59892 (May 8, 2009), 74 FR 22790 (May 14, 2009) (SR–CBOE–2009–027).

[7] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[8] 15 U.S.C. 78f(b)(4).

[9] *See supra,* note 5.

[10] *Id.*

[11] 15 U.S.C. 78s(b)(2).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60192; File No. SR–ISE–2009–42]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Fee Changes

June 30, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934,[1] notice is hereby given that on June 26, 2009, International Securities Exchange, LLC (''ISE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by ISE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

[1] 15 U.S.C. 78s(b)(1).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE is proposing to amend its Schedule of Fees. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.com*), at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ISE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The ISE 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, Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to amend the Exchange's Schedule of Fees. First, ISE currently waives most customer transaction fees, with such waiver scheduled to expire on June 30, 2009.[2] Zero customer transaction fees in options are part of the competitive pricing landscape. Since its inception, ISE has not charged fees for customer transactions for most products by way of a fee waiver. Despite having an effective rate of $0.00 per contract for customer transactions in these products, ISE's fee schedule reflects a customer fee of $0.05 with a waiver to offset the fee. Instead of extending the waiver on a year-to-year basis, the Exchange proposes to remove the fee waiver language from its fee schedule and replace the $0.05 fee with $0.00 for First Market options, effective July 1, 2009. ISE believes this change will make its customer fees easier for market participants to understand. The Exchange will continue to charge $0.05 per contract for customer transactions in Second Market options and proposes to create a new line item to reflect this.

Second, the Exchange currently has a fee cap for large-size foreign currency (''FX'') options orders. This fee discount applies for orders of 5,000 contracts or more and waives fees on incremental

[2] *See* Securities Exchange Act Release No. 58139 (July 10, 2008), 73 FR 41142 (July 17, 2008).

volume above 5,000 contracts. Contracts at or under the threshold are charged the constituent's prescribed execution fee. This waiver is for both Public Customer orders and Firm Proprietary orders. ISE adopted this fee incentive, on a pilot basis, to encourage members to execute large-sized FX options orders on the Exchange. The current pilot program is set to expire on June 30, 2009.[3] The Exchange now proposes to extend this fee waiver through June 30, 2010 in a continuing effort to attract more activity in its FX options.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the ''Exchange Act'') for this proposed rule change is the requirement under Section 6(b)(4) that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. In particular, the Exchange believes calculating the fee on a per symbol basis is necessary to allow the Exchange to target cancellations that do not have a valid justification.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A) of the Act[4] and subparagraph (f)(2) of Rule 19b–4[5] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–ISE–2009–42 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2009–42. 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 Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of ISE. 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–ISE–2009–42 and should be submitted on or before July 28, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–15903 Filed 7–6–09; 8:45 am]

BILLING CODE 8010–01–P

[3] *Id.*

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(f)(2).

[6] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60198; File No. SR–BX–2009–034]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Amend the Fee Schedule of the Boston Options Exchange Facility

June 30, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 26, 2009, NASDAQ OMX BX, Inc. (the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons and approves the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing an amendment to the Fee Schedule of the Boston Options Exchange Group, LLC (''BOX''). The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Internet Web site at *http://nasdaqomxbx.cchwallstreet.com/NASDAQOMXBX/Filings/*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

The self-regulatory organization 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

Executions on BOX resulting from orders sent via the InterMarket Linkage System (''Linkage Orders'') are currently subject to the same billing treatment as other executions on BOX. This includes either 'standard billing' or The Liquidity Make or Take Pricing Structure, as described in Section 7 of the BOX Fee Schedule, depending upon the particular options class.

The Exchange recently submitted a proposed rule change[3] *with the Commission which removed the following three (3) classes from the Liquidity Make or Take Pricing Structure:* (1) Standard & Poor's Depositary Receipts® (SPY); (2) Powershares® QQQ Trust Series 1 (QQQQ); and (3) iShares Russell 2000® Index Fund (IWM). Instead 'standard' transaction fees shall apply. Currently, transactions in these three classes are charged the Take fee of $0.30. Under the new standard fees all executions for Market Makers or Firms will be charged $0.20 and there will be no fees for Public Customer executions.[4]

In conjunction with the above referenced rule change the Exchange is now proposing to remove the application of Liquidity Make or Take Pricing from Linkage Orders in these three classes sent to and executed on BOX. Standard Linkage Fees shall instead apply to transactions in these three classes.

2. Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[5] in general, and Section 6(b)(4) of the Act,[6] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities for the purpose of executing Linkage Orders that are routed to BOX from other market centers. These three particular classes are some of the most liquid and actively traded multiply-listed options classes so there is no need to entice liquidity by using the Make or Take pricing structure. The proposed rule change will apply fees more appropriate for the level of liquidity in the specific classes.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–BX–2009–034 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2009–034. 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 Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the self-regulatory organization. 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–BX–2009–034 and should be submitted on or before July 29, 2009.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange[7] and, in particular, with the requirements of Section 6(b) of the Act.[8] Specifically, the Commission finds that the Exchange's proposal is consistent with Section 6(b)(4) of the Act,[9] which requires that the rules of the Exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.

The Exchange requests that the Commission approve the proposed rule change on an accelerated basis pursuant to Section 19(b)(2) of the Act.[10] The Commission finds good cause, pursuant to Section 19(b)(2)(B) of the Act,[11] for approving the proposed rule change prior to the 30th day after the date of publication of the notice of the filing thereof in the **Federal Register**. An accelerated approval will allow the Exchange to immediately implement a lower fee for market participants executing certain Linkage Orders on the Exchange.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act[12] that the proposed rule change (SR–BX–2009–034), is hereby approved on an accelerated basis.

[3] *See* SR–BX–2009–033.

[4] The $0.15 fee per executed contract of an Improvement Order for a Public Customer that is not submitted as a Customer Price Improvement Period Order (''CPO'') for a Price Improvement Period (''PIP'') auction—(''non-CPO'') will remain.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4).

[7] In approving this rule, the Commission notes that it has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78s(b)(2).

[11] 15 U.S.C. 78s(b)(2)(B).

[12] 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–16036 Filed 7–6–09; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60206; File No. SR–NYSEAmex–2009–34]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Its Schedule of Fees and Charges for Exchange Services

July 1, 2009.

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 June 29, 2009, the NYSE Amex LLC (''NYSE Amex'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Schedule of Fees and Charges for Exchange Services in order to extend until December 31, 2009 the current pilot program regarding transaction fees charged for trades executed through the intermarket options linkage (''Linkage''). The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room and *http://www.nyse.com*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to extend the pilot program establishing an NYSE Amex fee for Principal (''P'') Orders and Principal Acting as Agent (''P/A'') Orders executed through Linkage. The fee currently is effective for a pilot program set to expire on July 31, 2009, and this filing would extend the fee through December 31, 2009. The fee that NYSE Amex charges for P and P/A orders is the basic execution fee for trading on NYSE Amex. This is the same fee that all NYSE Amex Option Trading Permit Holders pay for non-customer transactions executed on the Exchange. The Exchange does not charge for the execution of Satisfaction Orders sent through Linkage and is not proposing to charge for such orders. The Exchange is making no substantive changes to the operation of the pilot program, other than extending the pilot program through December 31, 2009.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act,[3] in general, and with Section 6(b)(4)[4] of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities for the purpose of executing P and P/A orders through Linkage.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act[5] and Rule 19b–4(f)(6) thereunder.[6]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEAmex–2009–34 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAmex–2009–34. 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

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(4).

[5] 15 U.S.C. 78s(b)(3)(A).

[6] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the self-regulatory organization to submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

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 Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAmex–2009–34 and should be submitted on or before July 28, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–16042 Filed 7–6–09; 8:45 am]

BILLING CODE 8010–01–P

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60207; File No. SR–CBOE–2009–041]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to an Extension of the Linkage Fee Pilot Program

July 1, 2009.

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 June 30, 2009, the Chicago Board Options Exchange, Incorporated (''CBOE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Fees Schedule to extend until July 31, 2010 the Options Intermarket Linkage (''Linkage'') fees pilot program. The text of the proposed rule change is available at the Exchange, at the Commission's Public Reference Room and *http://www.cboe.org/legal*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange's fees for Principal (''P'') and Principal Acting as Agent (''P/A'') orders[3] are operating under a pilot program scheduled to expire on July 31, 2009.[4] The Exchange proposes to amend its Fees Schedule to extend the pilot program until July 31, 2010. The Exchange is proposing no other changes to the operation of the pilot program.

The Exchange assesses its members the following Linkage order related fees: (i) $.30 per contract transaction fee, and (ii) $.15 per contract surcharge fee on transactions in options on the Nasdaq–100 Index (MNX and NDX) and options on the Russell 2000 Index (RUT)[5]. Satisfaction orders are not assessed Exchange fees.

The Exchange believes that extension of the Linkage fee pilot program until July 31, 2010 would give the Commission further opportunity to evaluate the appropriateness of Linkage fees.

The Exchange also proposes to amend Section 21 of the Fees Schedule to change the Linkage fees pilot expiration date included in that section to July 31, 2010, thereby extending the term of the DPM Linkage Fees Credit program for PA orders.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act[6], in general, and furthers the objectives of Section 6(b)(4)[7] of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE members and other persons using its facilities. The Exchange believes that extension of the Linkage fee pilot program until July 31, 2010 would give the Commission further opportunity to evaluate the appropriateness of Linkage fees.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of

[3] Under the Plan for the Purpose of Creating and Operating an Options Intermarket Linkage (''Plan'') and Exchange Rule 6.80(12), which tracks the language of the Plan, a ''Linkage Order'' means an Immediate or Cancel Order routed through the Linkage as permitted under the Plan. There are three types of Linkage Orders: (i) ''P/A Order'', which is an order for the principal account of a specialist (or equivalent entity an another Participant Exchange that is authorized to represent Public Customer orders), reflecting the terms of a related unexecuted Public Customer order for which the specialist is acting as agent; (ii) ''P Order'', which is an order for the principal account of an Eligible Market Maker and is not a P/A Order; and (iii) ''Satisfaction Order,'' which is an order sent through the Linkage to notify a member of another Participant Exchange of a Trade-Through and to seek satisfaction of the liability arising from that Trade-Through.

[4] *See* Securities Exchange Act Release No. 58117 (July 8, 2008), 73 FR 40645 (July 15, 2008), (SR–CBOE–2008–69).

[5] *See* CBOE Fees Schedule, Footnote 14. Surcharge fees are also assessed on OEX, XEO, SPX, volatility index options, DJX and DXL options however Linkage fees do not apply to these products as they are not multiply listed.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2009–041 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2009–041. 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 Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2009–041 and should be submitted on or before July 28, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–16041 Filed 7–6–09; 8:45 am]

BILLING CODE 8010–01–P

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the self-regulatory organization to submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60193; File No. SR–NASDAQ–2009–052]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to the Nasdaq Listing Rules To Make Certain Technical Changes and Typographical Corrections

June 30, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 16, 2009, The NASDAQ Stock Market LLC (''Nasdaq'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes a rule change to make technical changes and typographical corrections to Nasdaq's Listing Rules. The text of the proposed rule change is available from Nasdaq's Web site at *http://nasdaq.cchwallstreet.com,* at Nasdaq's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item IV below, and is set forth in sections A, B, and C below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On March 12, 2009, Nasdaq filed a proposed rule change to revise the rules relating to the qualification, listing, and delisting of companies listed on, or applying to list on, Nasdaq to improve the organization of the rules, eliminate redundancies and simplify the rule language.[3] These rules (the ''New Listing Rules'') were operative April 13, 2009. Nasdaq has observed that the March filing introduced a handful of typographical errors to the New Listing Rules and certain rules require clarification or other technical changes. As a consequence, Nasdaq proposes to add clarifying language and correct typographical errors (such as adding omitted words, deleting unnecessary words, and adding omitted punctuation) in Rules 5000, 5110, 5400, 5500, 5810, 5815, 5835, and IM–5605. In addition, Nasdaq proposes to update a cross-reference in Rule 5710(a), which was not updated at the time of the adoption of the New Listing Rules, and correct references in Rules 5705(a) and (b). Nasdaq is also proposing to add descriptive titles and language to Rules 5550 and 5810 and to correct the title of Rule 5630 so that it is consistent with the underlying requirement of that rule. Last, Nasdaq is proposing to assign rule numbers to introductory paragraphs to certain New Listing Rules series, and renumber certain rules as a consequence in order to facilitate online navigation of the New Listing Rules. In that regard, Nasdaq is proposing to adopt a convention to ensure that introductory language to the rule series is numbered consistently throughout the New Listing Rules, and kept separate from the titles of the rule series to which such introductory language applies. As a

[1] 15 U.S.C. 78a.

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 59663 (March 31, 2009), 74 FR 15552 (April 6, 2009) (SR–NASDAQ–2009–018).

result, Rules 5000, 5100, 5400, 5500, 5600, 5700, 5800, and 5900 will be renumbered as 5001, 5101, 5401, 5501, 5601, 5701, 5801, and 5901 respectively.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[4] in general and with Section 6(b)(5) of the Act,[5] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change is designed to bring consistency to the numbering and structure of certain rules, and to conform certain other rules to conventions already applied to other New Listing Rules. In addition, the proposed rule change corrects certain typographical errors inadvertently included when adopting the New Listing Rules.

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, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A)[6] of the Act and subparagraph (f)(6) of Rule 19b–4[7] thereunder.

A proposed rule change filed under Rule 19b–4(f)(6)[8] normally does not become operative for 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii),[9] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay will benefit the market and investors by making technical changes to conform the presentation of certain rules to be consistent to the conventions used in the New Listing Rules and correcting minor typographical errors, which should help to avoid confusion among Nasdaq's members and other market participants. For these reasons, the Commission designates the proposed rule change as operative upon filing.[10]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2009–052 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2009–052. 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 Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2009–052 and should be submitted on or before July 28, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–15904 Filed 7–6–09; 8:45 am]

BILLING CODE 8010–01–P

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[8] 17 CFR 240.19b–4(f)(6).

[9] 17 CFR 240.19b–4(f)(6)(iii).

[10] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78(c)(f).

[11] 17 CFR 200.30–3(a)(12).

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. WTO/DS394]

WTO Dispute Settlement Proceeding Regarding China—Measures Related to the Exportation of Various Raw Materials

AGENCY: Office of the United States Trade Representative.

ACTION: Notice; request for comments.

SUMMARY: The Office of the United States Trade Representative (''USTR'') is providing notice that on June 23, 2009, in accordance with the Marrakesh Agreement Establishing the World Trade Organization (''WTO Agreement''), the United States requested consultations regarding restraints on the export from China of various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc (the ''materials''). That request may be found at *http://www.wto.org* contained in a document designated as WT/DS394/1. USTR invites written comments from the public concerning the issues raised in this dispute.

DATES: Although USTR will accept any comments received during the course of the dispute settlement proceedings, comments should be submitted on or before July 31, 2009 to be assured of timely consideration by USTR.

ADDRESSES: Comments should be submitted electronically to *http://www.regulations.gov,* docket number USTR–2009–0016. If you are unable to provide submissions by *http://www.regulations.gov,* please contact Sandy McKinzy at (202) 395–9483 to arrange for an alternative method of transmission. If (as explained below), the comment contains confidential information, then the comment should be submitted by fax only to Sandy McKinzy at (202) 395–3640.

FOR FURTHER INFORMATION CONTACT: Shubha Sastry, Assistant General Counsel, or Katherine Tai, Associate General Counsel, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20508, (202) 395–6139 or (202) 395–9589.

SUPPLEMENTARY INFORMATION: USTR is providing notice that consultations have been requested pursuant to the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (''DSU''). If such consultations should fail to resolve the matter and a dispute settlement panel is established pursuant to the DSU, such panel, which would hold its meetings in Geneva, Switzerland, would be expected to issue a report on its findings and recommendations within six to nine months after it is established.

Major Issues Raised by the United States

On June 23, 2009, the United States requested consultations regarding China's restraints on the export from China of various forms of bauxite (''bauxite'' includes but is not limited to items falling under the following HS numbers, as listed in Attachment 1 of Notice ''2009 Export Licensing Management Commodities List'' (Ministry of Commerce and General Administration of Customs, Notice (2008) No. 100, January 1, 2009) (''2009 Export Licensing List'') and/or Table 7 of Notice Regarding the 2009 Tariff Implementation Program (State Council Tariff Policy Commission, shuiweihui (2008) No. 40, January 1, 2009) (''2009 Export Duty List''): 2508300000/25083000, 2606000000/26060000, 26204000), coke (''coke'' includes but is not limited to items falling under the following HS numbers, as listed in the 2009 Export Licensing List and/or the 2009 Export Duty List: 2704001000/27040010), fluorspar (''fluorspar'' includes but is not limited to items falling under the following HS numbers, as listed in the 2009 Export Licensing List and/or the 2009 Export Duty List: 2529210000/25292100, 2529220000/25292200), magnesium (''magnesium'' includes but is not limited to items falling under the following HS numbers, as listed in the 2009 Export Licensing List and/or the 2009 Export Duty List: 81041100, 81041900, 81042000), manganese (''manganese'' includes but is not limited to items falling under the following HS numbers, as listed in the 2009 Export Licensing List and/or the 2009 Export Duty List: 26020000, 8111001010/81110010, 8111001090/81110010), silicon carbide (''silicon carbide'' includes but is not limited to items falling under the following HS numbers, as listed in the 2009 Export Licensing List and/or the 2009 Export Duty List: 2849200000, 3824909910), silicon metal (''silicon metal'' includes but is not limited to items falling under the following HS numbers, as listed in the 2009 Export Licensing List and/or the 2009 Export Duty List: 28046900), yellow phosphorus (''yellow phosphorus'' includes but is not limited to items falling under the following HS numbers, as listed in the 2009 Export Licensing List and/or the 2009 Export Duty List: 28047010), and zinc (''zinc'' includes but is not limited to items falling under the following HS numbers, as listed in the 2009 Export Licensing List and/or the 2009 Export Duty List: 2608000001/26080000, 2608000090/26080000, 7901119000/79011190, 7901120000/79011200, 7901200000/79012000, 79020000, 26201100, 26201900).

These restraints include: Quantitative restrictions on the export of bauxite, coke, fluorspar, silicon carbide, and zinc; export duties on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus, and zinc; additional requirements and procedures (administered through China's ministries and other organizations under the State Council as well as chambers of commerce) in connection with the export of the materials, including, but not limited to, restricting the right to export based on, for example, prior export experience, establishing criteria that foreign-invested enterprises must satisfy in order to export that are different from those that domestic entities must satisfy, and requiring exporters to pay fees; and a minimum export price system for the materials and requiring the examination and approval of export contracts and export prices (administered through China's ministries and other organizations under the State Council as well as chambers of commerce).

USTR believes that these export restraints are inconsistent with China's obligations under Articles VIII, X, and XI of the *General Agreement on Tariffs and Trade 1994;* paragraphs 5.1, 5.2, 8.2, and 11.3 of Part I of the *Protocol on the Accession of the People's Republic of China* (''Accession Protocol''); and the provisions of paragraph 1.2 of Part I of the Accession Protocol (which incorporates commitments in paragraphs 83, 84, 162, and 165 of the *Report of the Working Party on the Accession of China*).

Public Comment: Requirements for Submissions

Interested persons are invited to submit written comments concerning the issues raised in this dispute. Persons may submit public comments electronically to *http://www.regulations.gov,* docket number USTR–2009–0016. If you are unable to provide submissions by *http://www.regulations.gov,* please contact Sandy McKinzy at (202) 395–9483 to arrange for an alternative method of transmission.

To submit comments via *http://www.regulations.gov,* enter docket number USTR–2009–0016 on the home page and click ''go.'' The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice by selecting ''Notice'' under ''Document Type'' on the left side of the search-results page, and click on the link entitled ''Send a Comment or Submission.'' (For further information on using the *http://www.regulations.gov* Web site, please consult the resources provided on the Web site by clicking on ''How To Use This Site'' on the left side of the home page.)

The *http://www.regulations.gov* site provides the option of providing comments by filling in a ''General Comments'' field, or by attaching a document. It is expected that most comments will be provided in an attached document. If a document is attached, it is sufficient to type ''See attached'' in the ''General Comments'' field.

A person requesting that information contained in a comment submitted by that person be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the submitter. Confidential business information must be clearly designated as such and the submission must be marked ''BUSINESS CONFIDENTIAL'' at the top and bottom of the cover page and each succeeding page. Any comment containing business confidential information must be submitted by fax to Sandy McKinzy at (202) 395–3640. A non-confidential summary of the confidential information must be submitted to *http://www.regulations.gov.* The non-confidential summary will be placed in the docket and open to public inspection.

Information or advice contained in a comment submitted, other than business confidential information, may be determined by USTR to be confidential in accordance with section 135(g)(2) of the Trade Act of 1974 (19 U.S.C. 2155(g)(2)). If the submitter believes that information or advice may qualify as such, the submitter—

1. Must clearly so designate the information or advice;
2. Must clearly mark the material as ''SUBMITTED IN CONFIDENCE'' at the top and bottom of the cover page and each succeeding page; and
3. Must provide a non-confidential summary of the information or advice.

Any comment containing confidential information must be submitted by fax to Sandy McKinzy at (202) 395–3640. A non-confidential summary of the confidential information must be submitted to *http://www.regulations.gov* or by fax. The non-confidential summary will be placed in the docket and open to public inspection.

USTR will maintain a docket on this dispute settlement proceeding, accessible to the public. The public file will include non-confidential comments received by USTR from the public with respect to the dispute; if a dispute settlement panel is convened or in the event of an appeal from such a panel, the U.S. submissions, any non-confidential submissions, or non-confidential summaries of submissions, received from other participants in the dispute; the report of the panel; and, if applicable, the report of the Appellate Body.

Comments will be placed in the docket and open to public inspection pursuant to 15 CFR § 2006.13, except confidential business information exempt from public inspection in accordance with 15 CFR 2006.15 or information determined by USTR to be confidential in accordance with 19 U.S.C. 2155(g)(2). Comments open to public inspection may be viewed on the *http://www.regulations.gov* Web site.

Daniel Brinza,

Assistant United States Trade Representative for Monitoring and Enforcement.

[FR Doc. E9–15861 Filed 7–6–09; 8:45 am]

BILLING CODE 3190–W9–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate for the use of foreign U–69 guard bars, Manganese Castings, Turnout braces, and weld kits in the Federal-aid construction project for the CREATE Project in Illinois.

DATES: The effective date of the waiver is July 8, 2009.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366–1562, or via e-mail at *gerald.yakowenko@dot.gov.* For legal questions, please contact Mr. Michael Harkins, FHWA Office of the Chief Counsel, (202) 366–4928, or via e-mail at *michael.harkins@dot.gov.* Office hours for the FHWA are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the Federal Register's home page at: *http://www.archives.gov* and the Government Printing Office's database at: *http://www.access.gpo.gov/nara.*

Background

The FHWA's Buy America regulations in 23 CFR 635.410 require a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application of such requirements would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate for the U–69 guard bars, Manganese Castings, Turnout braces, and weld kits for the CREATE project in Illinois.

In accordance with Division I, section 126 of the ''Omnibus Appropriations Act, 2009'' (Pub. L. 111–8), the FHWA published a notice of intent to issue a waiver on its Web site for the U–69 guard bars, Manganese Castings, Turnout braces, and weld kits (*http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=33*) on May 20th. The FHWA received no comments in response to this notice, which suggested that the U–69 guard bars, Manganese Castings, Turnout braces, and weld kits may not be available domestically. During the 15-day comment period, the FHWA conducted an additional nationwide review to locate potential domestic manufacturers for the U–69 guard bars, Manganese Castings, Turnout braces, and weld kits. Based on all the information available to the agency, the FHWA concludes that there are no domestic manufacturers for the U–69 guard bars, Manganese Castings, Turnout braces, and weld kits. Thus, the FHWA concludes that a Buy America waiver is appropriate as provided by 23 CFR 635.410(c)(1).

In accordance with the provisions of section 117 of the SAFETEA–LU Technical Corrections Act of 2008 (Pub. L. 110–244, 122 Stat. 1572), the FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate. The FHWA invites public comment on this finding for an additional 15 days following the effective date of the finding. Comments may be submitted to the FHWA's Web site via the link provided to the Illinois waiver page noted above.

Authority: 23 U.S.C. 313; Public Law 110–161, 23 CFR 635.410.

Issued on: June 26, 2009.

King W. Gee,

Associate Administrator for Infrastructure.

[FR Doc. E9–15854 Filed 7–6–09; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Notice of Limitation on Claims Against Proposed Public Transportation Projects

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of Limitation on Claims.

SUMMARY: This notice announces final environmental actions taken by the Federal Transit Administration (FTA) for Beckley Intermodal Gateway Project, Beckley, West Virginia; Charlotte Gateway Station Project, Charlotte, North Carolina; Renaissance Square Center, Rochester, New York; New Haven Rail Yard Maintenance Facility Improvements, New Haven, Connecticut; North Highway 89 Pathway Project, Teton County, Wyoming; Tucson Modern Streetcar Project, Tucson, Arizona; New Mexico Rail Runner Park and Ride, Sante Fe, New Mexico; Jordan River Service Center, Salt Lake City, Utah; Alaska Railroad Shoulder Maintenance Project, City of Wasilla to City of Fairbanks, Alaska; Tukwila Commuter Rail Station Project, King County, Washington; and Union Station Rehabilitation and Bus Transfer Facility, Winston Salem, North Carolina. The purpose of this notice is to announce publicly the environmental decisions by FTA on the subject projects and to activate the limitation on any claims that may challenge these final environmental actions.

DATES: By this notice, FTA is advising the public of final agency actions subject to Title 23, United States Code (U.S.C.) section 139(l). A claim seeking judicial review of the FTA actions announced herein for the listed public transportation projects will be barred unless the claim is filed on or before January 4, 2010.

FOR FURTHER INFORMATION CONTACT: Elizabeth Zelasko, Environmental Protection Specialist, Office of Planning and Environment, 202–366–0244, or Christopher Van Wyk, Attorney-Advisor, Office of Chief Counsel, 202–366–1733. FTA is located at 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 9 a.m. to 5:30 p.m., EST, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: Notice is hereby given that FTA has taken final agency actions by issuing certain approvals for the public transportation projects listed below. The actions on these projects, as well as the laws under which such actions were taken, are described in the documentation issued in connection with the project to comply with the National Environmental Policy Act (NEPA), and in other documents in the FTA administrative record for the project. The final agency environmental decision documents—Records of Decision (RODs) or Findings of No Significant Impact (FONSIs)—for the listed projects are available online at *http://www.fta.dot.gov/planning/environment/planning_environment_documents.html* or may be obtained by contacting the FTA Regional Office for the metropolitan area where the project is located. Contact information for FTA's Regional Offices may be found at *http://www.fta.dot.gov*.

This notice applies to all FTA decisions on the listed projects as of the issuance date of this notice and all laws under which such actions were taken, including, but not limited to, the NEPA [42 U.S.C. §§ 4321–4375], section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. § 303], section 106 of the National Historic Preservation Act [16 U.S.C. § 470f], and the Clean Air Act [42 U.S.C. §§ 7401–7671q]. This notice does not, however, alter or extend the limitation period of 180 days for challenges of project decisions subject to previous notices published in the **Federal Register**.

The projects and actions that are the subject of this notice are:

1. *Project name and location:* Beckley Intermodal Gateway, Beckley, West Virginia. *Project sponsor:* City of Beckley. *Project description:* The City of Beckley is constructing a 4.2-acre transit center on an existing surface parking lot bounded by Robert C. Byrd Drive, Neville Street, Leslie C. Gates Place, and Prince Street. The transit center will include a multi-level parking garage, space for municipal functions, transit supported retail services, and space for tourism and economic development agencies. *Final agency actions:* Section 106 Finding of No Adverse Effect; Project-level air conformity determination; no use of section 4(f) properties; and FONSI dated March 31, 2009. *Supporting documentation:* Final Beckley Intermodal Gateway Environmental Assessment available in March 2009.

2. *Project name and location:* Charlotte Gateway Station, Charlotte, North Carolina. *Project sponsor:* Charlotte Area Transit System (CATS). *Project description:* CATS, in cooperation with the City of Charlotte and the North Carolina Department of Transportation, has planned a six-acre, multi-modal transportation facility that will serve as a centralized downtown transportation hub for CATS buses, commuter rail, streetcar, other rapid transit operations, Amtrak intercity passenger rail, and Greyhound bus service. The transportation facility will also include over 200,000 square feet of retail, office, and future air rights developments. The Charlotte Gateway Station will be located along the Norfolk Southern Atlanta-Washington mainline tracks between 3rd, Graham, and Trade Streets within walking distance of the downtown business district. *Final agency actions:* Section 106 Finding of No Adverse Effect; Project-level air quality conformity determination; no use of section 4(f) properties; and FONSI dated April 22, 2009. *Supporting documentation:* Environmental Assessment for the Charlotte Gateway Station available in April 2009.

3. *Project name and location:* Renaissance Square Center, Rochester, New York. *Project sponsor:* Rochester Genesee Regional Transportation Authority (RGRTA). *Project description:* RGRTA is proposing to construct the Renaissance Square Center, which is a mixed-used development in downtown Rochester on a site that includes portions of blocks bounded by East Main Street, North Clinton Avenue, Pleasant Street, and St. Paul Street. Several parcels and buildings and two streets will be acquired and demolished to construct a new, five-story, multi-use building. This building will serve as an intermodal transit center for RGTRA's regional transit service and for intercity bus service operated by Greyhound and Trailways. The building will also house the downtown campus for Monroe Community College and a downtown Performing Arts Center. *Final agency actions:* Section 106 Programmatic Agreement; Project-level air conformity determination; section 4(f) de minimis finding; and FONSI dated February 17, 2009. *Supporting documentation:* Renaissance Square Environmental Assessment and section 4(f) Evaluation available in December 2008.

4. *Project name and location:* New Haven Rail Yard Maintenance Facility Improvements, New Haven, Connecticut. *Project sponsor:* Connecticut Department of Transportation (CTDOT). *Project description:* CTDOT is proposing to enhance the existing 74-acre rail yard to provide maintenance shops, facilities, and yard space for storage of a new fleet of M–8 commuter rail cars. The proposed project includes construction of 25 storage tracks, a 48,000 square foot component change-out shop, an 85,200 square foot service and inspection shop, an independent wheel true shop, a building for maintaining the right-of-way, a material distribution warehouse,

a rail car wash facility, a heavy repair/paint shop, and a parking structure for employee vehicles. Other existing facilities would either be incorporated into the new design or demolished. *Final agency actions:* Section 106 Finding of No Adverse Effect; section 4(f) de minimis impact finding; Project-level air quality conformity determination; and FONSI dated May 7, 2009. *Supporting documentation:* New Haven Rail Maintenance Facility Improvements Environmental Assessment and section 4(f) Evaluation dated March 2009.

5. *Project name and location:* North Highway 89 Pathway Project, Teton County, Wyoming. *Project sponsor:* Teton County, through Jackson Hole Community Pathways. *Project description:* The project, planned in partnership with the U.S. Fish and Wildlife Service and the National Elk Refuge, is a shared-use pathway along the east side of Highway 89 between the Town of Jackson and the southern boundary of Grand Teton National Park. The project was selected for a Paul S. Sarbanes Transit in the Parks Program grant and will include the construction of one underpass for users to access the National Museum of Wildlife Art and one bridge across the Gros Ventre River. *Final agency actions:* Section 106 Finding of No Historic Properties Affected; no use of section 4(f) properties; and FONSI dated March 31, 2009. *Supporting documentation:* Environmental Assessment for the North Highway 89 Pathway Project made available in March 2009.

6. *Project name and location:* Tucson Modern Streetcar, Tucson, Arizona. *Project sponsor:* City of Tucson Department of Transportation (TDOT). *Project description:* TDOT proposes to construct a 3.6-mile modern streetcar line that will connect downtown Tucson, the Rio Nuevo Master Plan redevelopment area, the 4th Avenue and Main Gate business districts, the University of Arizona (UA), and the Arizona Health Sciences Center (AHSC). The Tucson Modern Streetcar project will also involve the construction of 19 stations and the purchase of seven new vehicles. *Final agency actions:* Section 106 Finding of No Adverse Effect; Project-level air conformity determination; no use of section 4(f) properties; and FONSI dated January 22, 2009. *Supporting documentation:* Tucson Urban Corridor Environmental Assessment and section 4(f) Evaluation available in August 2008.

7. *Project name and location:* Commuter rail station facilities and interchange modifications at I–25 and NM 599 in Metropolitan Sante Fe, New Mexico. *Project sponsor:* New Mexico Department of Transportation (NMDOT). *Project description:* FTA will provide funding for the construction of a park-and-ride lot, bus drop-off area, access roads to accommodate these transit facilities, and the pedestrian walkway for the New Mexico Rail Runner Commuter Rail Line, which is sponsored by the NMDOT. This station will be located within the loop ramp connecting I–25 and NM 599; and the access road will be within the existing highway right-of-way along I–25. The Federal Highway Administration (FHWA) and NMDOT prepared an Environmental Assessment for the New Mexico Rail Runner: NM 599 Station in October 2008. FTA adopted the environmental assessment and associated mitigation commitments presented within the document related to the selected alternative. *Final agency actions:* Project-level air conformity determination; Section 106 Finding of No Historic Properties Affected; no use of section 4(f) properties; and FTA FONSI dated February 2, 2009. *Supporting documentation:* FWHA Environmental Assessment for the New Mexico Rail Runner: NM 599 Station available in October 2008.

8. *Project name and location:* Jordan River Service Center, Salt Lake City, Utah. *Project Sponsor.* Utah Transit Authority (UTA). *Project description:* UTA is constructing a new maintenance facility to address the need for additional light rail vehicle storage and maintenance capacity. The Jordan River Service Center will be located at a former furniture warehouse site in the City of South Salt Lake, Utah, in an area zoned for light industrial use adjacent to the under-construction West Valley light rail line. At full build out, the Jordan River Service Center will maintain and store approximately 100 vehicles. *Final agency actions:* Section 106 Finding of No Historic Properties Affected; no use of section 4(f) properties; Project-level air quality conformity determination; and FONSI dated June 5, 2009. *Supporting documentation:* Environmental Assessment for the Jordan River Service Center available in April 2009.

9. *Project description and location:* Alaska Railroad Shoulder Maintenance Project, Wasilla to Fairbanks, Alaska. *Project sponsor:* Alaska Railroad Corporation. *Project description:* The Alaska Railroad Corporation (ARRC) will conduct shoulder improvements at various locations between Wasilla and Fairbanks, Alaska, to enhance track safety over the next ten years. These improvements will stabilize the track and provide necessary rail support to allow for heavier and faster trains. The project was previously proposed by ARRC and the Federal Railroad Administration (FRA) in 2005. The FRA prepared the Alaska Railroad Shoulder Maintenance Project, Wasilla to Fairbanks, Alaska, NEPA Environmental Assessment in July 2005. FTA conducted an independent review of the FRA environmental assessment, the administrative record, and updated project details, and developed its own FONSI based on the information contained within those materials. *Final agency actions:* No Historic Properties Affected; no use of section 4(f) properties; and FTA FONSI dated June 3, 2009. *Supporting documentation:* FRA Alaska Railroad Shoulder Maintenance Project, Wasilla to Fairbanks, Alaska, NEPA Environmental Assessment available in July 2005.

10. *Project name and location:* Tukwila Commuter Rail Station Project, Tukwila, Washington. *Project sponsor:* Sound Transit. *Project description:* Sound Transit is proposing to replace a temporary Sounder commuter rail station in Tukwila, Washington, with a permanent station. The permanent station will be located south of Interstate 405 and east of State Road 181 on undeveloped land extending from the east margin of the Burlington Northern Sante Fe (BNSF) right-of-way to the western margin of the Union Pacific Railroad right-of-way. The permanent station will include a 350-space parking facility, bus and bike access, a ticketing booth, and other facilities. *Final agency actions:* Section 106 Finding of No Historic Properties Affected; Project level air conformity determination; no use of section 4(f) properties; and FONSI dated March 2009. *Supporting documentation:* Tukwila Commuter Rail Station Environmental Assessment available in January 2009.

11. *Project name and location:* Union Station Rehabilitation and Bus Transfer Facility, Winston-Salem, North Carolina. *Project Sponsor:* North Carolina Department of Transportation (NCDOT). *Project description:* NCDOT and the City of Winston-Salem are proposing to rehabilitate the former train station that was constructed in 1926 to serve passengers on the Southern, Norfolk & Western, and Winston-Salem Southbound Railroads. Since 1975, the building has been in private ownership and used as an automobile repair facility. Under the proposed rehabilitation plan, the station would be converted to a multimodal transit center. Project elements include the construction of a bus loop and parking lot, creation of a roundabout

from the intersection of Martin Luther King Jr. Drive, Excelsior Street, and the U.S. 421/I–40 business ramps, and construction of a bridge and train platform adjacent to the station to accommodate potential Piedmont Authority for Regional Transportation (PART) and Amtrak rail service. *Final agency actions:* Section 106 Finding of No Adverse Effect; no use of section 4(f) properties; Project level air quality conformity determination; and FONSI dated August 12, 2008. *Supporting documentation:* Environmental Assessment for the Winston-Salem Union Station Rehabilitation available in June 2008.

Issued on June 29, 2009.

Susan Borinsky,

Associate Administrator for Planning and Environment, Washington, DC.

[FR Doc. E9–16004 Filed 7–6–09; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2009–25]

Petitions for Exemption; Summary of Petitions Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received.

SUMMARY: This notice contains a summary of certain petitions seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received on or before July 17, 2009.

ADDRESSES: You may send comments identified by Docket Number FAA–2009–0592 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Docket:* To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

FOR FURTHER INFORMATION CONTACT: Tyneka Thomas (202) 267–7626 or Ralen Gao (202) 267–3768, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on June 30, 2009.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

Petitions for Exemption

Docket No.: FAA–2009–0592.

Petitioner: Republic Airline, Inc.

Section of 14 CFR Affected: 14 CFR 121.291(b)(1).

Description of Relief Sought: To permit Republic Airline, Inc., to operate Embraer ERJ–190 aircraft without conducting a partial demonstration of emergency evacuation procedures.

[FR Doc. E9–15905 Filed 7–6–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Designation of an Entity Pursuant to Executive Order 13382

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the name of one newly-designated entity whose property and interests in property are blocked pursuant to Executive Order 13382 of June 28, 2005, ''Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters.''

DATES: The designation by the Director of OFAC of the entity identified in this notice, pursuant to Executive Order 13382 is effective on June 30, 2009.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, *tel.:* (202) 622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/offices/enforcement/ofac*) or via facsimile through a 24-hour fax-on demand service, *tel.:* (202) 622–0077.

Background

On June 28, 2005, the President, invoking the authority, *inter alia,* of the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) (''IEEPA''), issued Executive Order 13382 (70 FR 38567, July 1, 2005) (the ''Order''), effective at 12:01 a.m. eastern daylight time on June 29, 2005. In the Order, the President took additional steps with respect to the national emergency described and declared in Executive Order 12938 of November 14, 1994, regarding the proliferation of weapons of mass destruction and the means of delivering them.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, or that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, of: (1) The persons listed in an Annex to the Order; (2) any foreign person determined by the Secretary of State, in consultation with the Secretary of the Treasury, the Attorney General, and other relevant agencies, to have engaged, or attempted to engage, in activities or transactions that have materially contributed to, or pose a risk of materially contributing to, the proliferation of weapons of mass destruction or their means of delivery (including missiles capable of delivering such weapons), including any efforts to manufacture, acquire, possess, develop,

transport, transfer or use such items, by any person or foreign country of proliferation concern; (3) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to have provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, any activity or transaction described in clause (2) above or any person whose property and interests in property are blocked pursuant to the Order; and (4) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to the Order.

On June 30, 2009, the Director of OFAC, in consultation with the Departments of State, Justice, and other relevant agencies, designated the following entity whose property and interests in property are blocked pursuant to Executive Order 13382.

The designee is listed as follows:

Hong Kong Electronics (a.k.a. Hong Kong Electronics Kish Co.), Sanaee St., Kish Island, Iran [NPWMD].

Dated: June 30, 2009.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. E9–15926 Filed 7–6–09; 8:45 am]

BILLING CODE 4811–45–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–New (Financial Records)]

Proposed Information Collection (Access to Financial Records) Activity: Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed new collection, and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed to contact beneficiaries whose correspondence was return to VA.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before September 8, 2009.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *http://www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–New (Financial Records)'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Access to Financial Records, 38 CFR 3.115.

OMB Control Number: 2900–New (Financial Records).

Type of Review: New collection.

Abstract: Under 38 CFR. 3.11, VA is authorized to request access to financial records to obtain the current address of beneficiaries from financial institutions in receipt of a VA direct deposit payment. VA will only request the current address for beneficiaries whose mail was returned to the VA.

Affected Public: Business or Others for Profit.

Estimated Annual Burden: 4,167 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 50,000.

Dated: July 1, 2009.

By direction of the Secretary,

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. E9–15925 Filed 7–6–09; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Class Deviation From Federal Acquisition Regulation 32.905 Electronic Submission of Invoices

AGENCY: Department of Veterans Affairs (VA).

ACTION: Notice.

SUMMARY: This is to notify interested parties of a class deviation to the Federal Acquisition Regulation (FAR) regarding the submission of electronic invoices for payment. VA intends to deviate from FAR 32.905 in order to add an interim clause to the VA Acquisition Regulation (VAAR).

The electronic invoicing clause allows vendors to voluntarily submit invoices electronically which will improve the accuracy and efficiency of payment processing. This service will apply to all Government contracts managed by VA's Financial Services Center in Austin, Texas. A proposed and final rule to make this service mandatory will be published in the **Federal Register** in the coming months.

FOR FURTHER INFORMATION CONTACT: Marcia Rodrigues, Procurement Analyst, Office of Acquisition and Logistics, (001AL–P1A), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. *Telephone:* (202) 461–6864 (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: The authority for the electronic invoicing clause is the E–Government Act of 2002. The interim clause will allow VA to comply with the findings, purposes, and responsibilities of the Act. The interim clause gives contractors a choice to submit for invoice payment in electronic form using one of three transmission methods: (1) Electronic Invoice Presentment and Payment System; (2) American National Standards Institute (ANSI) X.12

electronic data interchange (EDI) formats; and (3) Other electronic form as specified by the contract administration office and the designated agency office.

VA Acquisition Regulation Solicitation Provision and Contract Clause (October 2008)

Subpart 832.10—Electronic Invoicing Requirements

832.1001 Contract Clause for Electronic Submission of Payment Requests

In all solicitations and contracts in which the VA Financial Services Center (FSC) in Austin, Texas is the financial office administering the invoicing and payments, the contracting officer shall insert the clause found at 852.273–76, Electronic Invoice Submission.

852.273–76 Electronic Invoice Submission (Interim—October 2008)

As prescribed in 832.1001, insert the following clause:

(a) To improve the timeliness of payments and lower overall administrative costs, VA strongly encourages contractors to submit invoices using its electronic invoicing system. At present, electronic submission is voluntary and any nominal registration fees will be the responsibility of the contractor. VA intends to mandate electronic invoice submission, subject to completion of the federal rulemaking process. At present, VA is using a 3rd party agent to contact contractors regarding this service. During the voluntary period, contractors interested in registering for the electronic system should contact the VA's Financial Services Center at *http://www.fsc.va.gov/einvoice.asp*.

Approved: June 29, 2009.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

[FR Doc. E9–15862 Filed 7–6–09; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Joint Biomedical Laboratory Research and Development and Clinical Science Research and Development Services Scientific Merit Review Board Subcommittee for Eligibility; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Public Law 92–463 (Federal Advisory Committee Act) that the Subcommittee for Eligibility of the Joint Biomedical Laboratory Research and Development and Clinical Science Research and Development Services Scientific Merit Review Board will meet on Monday, July 20, 2009, from 8 a.m. to 12 p.m. at the St. Gregory Luxury Hotel and Suites, 2033 M Street, NW., Washington, DC.

The purpose of the Merit Review Board is to provide advice on the scientific quality, budget, safety and mission relevance of investigator-initiated research proposals submitted for VA merit review consideration. Proposals submitted for review by the Board involve a wide range of medical specialties within the general areas of biomedical, behavioral and clinical science research.

The subcommittee meeting will be open to the public for approximately one-half hour at the start of the meeting to discuss the general status of the program. The remaining portion of the subcommittee meeting will be closed to the public for the review, discussion, examination, reference to staff, consultant critiques and evaluation, of non-clinician credentials and research proposals to be performed for the Department of Veterans Affairs.

As provided by subsection 10(d) of Public Law 92–463, as amended, closing portions of a subcommittee meeting is in accordance with 5 U.S.C. 552b(c)(6) and (c)(9)(B). Anyone who might plan to attend or would like to obtain a copy of minutes of the subcommittee meeting and roster of the members of the subcommittees should contact LeRoy G. Frey, PhD, Chief, Program Review (121F), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 at (202) 461–1664.

Dated: July 1, 2009.

By Direction of the Secretary.

E. Philip Riggin,

Committee Management Officer.

[FR Doc. E9–15972 Filed 7–6–09; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Tuesday,
July 7, 2009

Part II

Federal Deposit Insurance Corporation

12 CFR Parts 308 and 363
Annual Independent Audits and Reporting Requirements; Final Rule

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 308 and 363

RIN 3064–AD21

Annual Independent Audits and Reporting Requirements

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The FDIC is amending part 363 of its regulations concerning annual independent audits and reporting requirements for certain insured depository institutions, which implements section 36 of the Federal Deposit Insurance Act (FDI Act), largely as proposed, but with certain modifications made in response to the comments received. The amendments are designed to further the objectives of section 36 by incorporating certain sound audit, reporting, and audit committee practices from the Sarbanes-Oxley Act of 2002 (SOX) into part 363 and they also reflect the FDIC's experience in administering part 363. The amendments will provide clearer and more complete guidance to institutions and independent public accountants concerning compliance with the requirements of section 36 and part 363. As required by section 36, the FDIC has consulted with the other Federal banking agencies. The FDIC is also making a technical amendment to its rules and procedures (part 308, subpart U) for the removal, suspension, or debarment of accountants and accounting firms.

DATES: This final rule is effective August 6, 2009.

Applicability date: The final rule applies to part 363 Annual Reports with a filing deadline on or after the effective date of these amendments. Under the final rule, the filing deadline for Part 363 Annual Reports is 120 days after the end of its fiscal year for an institution that is neither a public company nor a subsidiary of a public company and 90 days after the end of its fiscal year for an institution that is a public company or a subsidiary of public company.

Compliance date: The compliance date for the provision of the final rule that directs covered institutions' boards of directors to develop and adopt an approved set of written criteria for determining whether a director who is to serve on the audit committee is an outside director and is independent of management (guideline 27) is delayed until December 31, 2009. The provision of the final rule that requires the total assets of a holding company's insured depository institution subsidiaries to comprise 75 percent or more of the holding company's consolidated total assets in order for an institution to be eligible to comply with part 363 at the holding company level (§ 363.1(b)(1)(ii)) is effective for fiscal years ending on or after June 15, 2010.

FOR FURTHER INFORMATION CONTACT: Harrison E. Greene, Jr., Senior Policy Analyst (Bank Accounting), Division of Supervision and Consumer Protection, at *hgreene@fdic.gov* or (202) 898–8905; or Michelle Borzillo, Senior Counsel, Supervision and Legislation Section, Legal Division, at *mborzillo@fdic.gov* or (202) 898–7400.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

Section 36 of the Federal Deposit Insurance Act (FDI Act) and the FDIC's implementing regulations (part 363) are generally intended to facilitate early identification of problems in financial management at insured depository institutions with total assets above certain thresholds through annual independent audits, assessments of the effectiveness of internal control over financial reporting and compliance with laws and regulations pertaining to insider loans and dividend restrictions, the establishment of independent audit committees, and related reporting requirements. The asset-size threshold for an institution for internal control assessments is $1 billion and the threshold for the other requirements generally is $500 million. Given changes in the industry; certain sound audit, reporting, and audit committee practices incorporated in the Sarbanes-Oxley Act of 2002 (SOX); and the FDIC's experience in administering part 363, the FDIC is amending part 363 of its regulations. These amendments are designed to further the objectives of section 36 by incorporating these sound practices into part 363 and to provide clearer and more complete guidance to institutions and independent public accountants concerning compliance with the requirements of section 36 and part 363.

After making certain modifications to the proposed amendments to part 363 in response to the comments received, the most significant revisions included in the final rule will: (1) Extend the time period for a non-public institution to file its part 363 Annual Report by 30 days and replace the 30-day extension of the filing deadline that may be granted if an institution (public or non-public) is confronted with extraordinary circumstances beyond its reasonable control with a late filing notification requirement that would have general applicability; (2) provide relief from the annual reporting requirements for institutions that are merged out of existence before the filing deadline; (3) provide relief from reporting on internal control over financial reporting for businesses acquired during the fiscal year; (4) require management's assessment of compliance with the laws and regulations pertaining to insider loans and dividend restrictions to state management's conclusion regarding compliance and disclose any noncompliance with such laws and regulations; (5) require an institution's management and the independent public accountant to identify the internal control framework used to evaluate internal control over financial reporting and disclose all identified material weaknesses that have not been remediated prior to the institution's most recent fiscal year-end; (6) clarify the independence standards with which independent public accountants must comply and enhance the enforceability of compliance with these standards; (7) specify that the duties of the audit committee include the appointment, compensation, and oversight of the independent public accountant, including ensuring that audit engagement letters do not contain unsafe and unsound limitation of liability provisions; (8) require certain communications by independent public accountants to audit committees; (9) establish retention requirements for audit working papers; (10) require boards of directors to adopt written criteria for evaluating an audit committee member's independence and provide expanded guidance for boards of directors to use in determining independence; (11) provide that ownership of 10 percent or more of any class of voting securities of an institution is not an automatic bar for considering an outside director to be independent of management; (12) require the total assets of a holding company's insured depository institution subsidiaries to comprise 75 percent or more of the holding company's consolidated total assets in order for an institution to be eligible to comply with part 363 at the holding company level; and (13) provide illustrative management reports to assist institutions in complying with the annual reporting requirements.

The FDIC is also amending its rules and procedures (part 308, subpart U) for the removal, suspension, or debarment of accountants and accounting firms from performing audit services required by section 36 of the FDI Act to specify

where an accountant or accounting firm should file required notices of orders and actions with the FDIC.

II. Background

Section 112 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) added section 36, ''Early Identification of Needed Improvements in Financial Management,'' to the FDI Act (12 U.S.C. 1831m). Section 36 is generally intended to facilitate early identification of problems in financial management at insured depository institutions above a certain asset size threshold through annual independent audits, assessments of the effectiveness of internal control over financial reporting and compliance with designated laws and regulations, and related reporting requirements. Section 36 also includes requirements for audit committees at these insured depository institutions. Section 36 grants the FDIC discretion to set the asset size threshold for compliance with these statutory requirements, but it states that the threshold cannot be less than $150 million. Sections 36(d) and (f) also obligate the FDIC to consult with the other Federal banking agencies in implementing these sections of the FDI Act, and the FDIC has performed the required consultation.

Part 363 of the FDIC's regulations (12 CFR part 363), which implements section 36 of the FDI Act, was initially adopted by the FDIC's Board of Directors in 1993. At present, part 363 requires each insured depository institution with $500 million or more in total assets (covered institution) to submit to the FDIC and other appropriate Federal and State supervisory agencies an annual report (Part 363 Annual Report) comprised of audited financial statements, and a management report containing a statement of management's responsibilities and an assessment by management of compliance with laws and regulations pertaining to insider loans and dividend restrictions. The management report component of the annual report for an institution with $1 billion or more in total assets must also include an assessment by management of the effectiveness of internal control over financial reporting and an independent public accountant's attestation report on internal control over financial reporting. In addition, part 363 provides that each covered institution's board of directors must establish an independent audit committee comprised of outside directors. For an institution with between $500 million and $1 billion in total assets, part 363 requires a majority of the members of the audit committee to be independent of management of the institution. For a larger institution, all of the members of the audit committee must be independent of management. Part 363 also includes Guidelines and Interpretations (Appendix A to part 363), which are intended to assist institutions and independent public accountants in understanding and complying with section 36 and part 363.

III. Discussion of Proposed Amendments and Comments Received

On October 16, 2007, the FDIC's Board approved the publication of proposed amendments to part 363 and part 308, subpart U, of the FDIC's regulations, which were published in the **Federal Register** on November 2, 2007, for a 90-day comment period (72 FR 62310). The comment period closed on January 31, 2008.

Given the number and extent of changes to part 363 and its Guidelines and Interpretations and to enable readers to more easily understand the context of the changes, this notice includes the entire text of part 363 as amended, not just the amended text. Also, the following ''Table of Changes to Part 363 and Appendices'' is intended to assist readers in determining which sections of part 363 are affected by the final rule.

TABLE OF CHANGES TO PART 363 AND APPENDICES

	Unchanged	Revised	New	Reserved
Part 363—Annual Independent Audits and Reporting Requirements				
Table of Contents		X		
OMB Control Number § 363.0	X			
Scope and Definitions:				
§ 363.1(a)		X		
§ 363.1(b)(1)		X		
§ 363.1(b)(2)		X		
§ 363.1(b)(3)	X			
§ 363.1(c)			X	
§ 363.1(d)			X	
Annual Reporting Requirements:				
§ 363.2(a)		X		
§ 363.2(b)		X		
§ 363.2(b)(1)		X		
§ 363.2(b)(2)		X		
§ 363.2(b)(3)		X		
§ 363.2(c)			X	
Independent Public Accountant:				
§ 363.3(a)	X			
§ 363.3(b)		X		
§ 363.3(c)		X		
§ 363.3(d)			X	
§ 363.3(e)			X	
§ 363.3(f)			X	
§ 363.3(g)			X	
Filing and Notice Requirements:				
§ 363.4(a)		X		
§ 363.4(b)		X		
§ 363.4(c)		X		
§ 363.4(d)	X			
§ 363.4(e)			X	

TABLE OF CHANGES TO PART 363 AND APPENDICES—Continued

	Unchanged	Revised	New	Reserved
§ 363.4(f)			X	
Audit Committees:				
§ 363.5(a)		X		
§ 363.5(b)		X		
§ 363.5(c)			X	
Appendix A to Part 363—Guidelines and Interpretations				
Table of Contents		X		
Introduction	X			
Scope (§ 363.1):				
Guideline 1	X			
Guideline 2	X			
Guideline 3		X		
Guideline 4		X		
Guideline 4A			X	
Annual Reporting Requirements (§ 363.2):				
Guideline 5		X		
Guideline 5A			X	
Guideline 6		X		
Guideline 7		X		
Guideline 7A			X	
Guideline 8		X		
Guideline 8A			X	
Guideline 8B			X	
Guideline 8C			X	
Guideline 9		X		
Guideline 10		X		
Guideline 11		X		
Guideline 12				X
Role of Independent Public Accountant (§ 363.3):				
Guideline 13		X		
Guideline 14				X
Guideline 15		X		
Guideline 16				X
Guideline 17	X			
Guideline 18		X		
Guideline 18A			X	
Guideline 19	X			
Guideline 20		X		
Guideline 21	X			
Filing and Notice Requirements (§ 363.4):				
Guideline 22				X
Guideline 23		X		
Guideline 24	X			
Guideline 25				X
Guideline 26		X		
Audit Committees (§ 363.5):				
Guideline 27		X		
Guideline 28		X		
Guideline 29				X
Guideline 30		X		
Guideline 31		X		
Guideline 32		X		
Guideline 33	X			
Guideline 34	X			
Guideline 35		X		
Other:				
Guideline 36		X		
Table 1 to Appendix A:				
Designated Federal Laws and Regulations		X		
Appendix B—Illustrative Management Reports			X	

In response to its request for comments, the FDIC received 23 comment letters that addressed the proposed amendments to part 363. These commenters represented 12 financial institutions; 3 bankers' trade organizations; 4 accounting firms; 1 accountants' trade organization; 1 State regulatory organization; and 2 law firms.

Regarding the technical amendment to part 308, Subpart U, the FDIC did not receive any comments on its proposal to specify the location where an accountant or accounting firm should file required notices of orders and actions regarding removal, suspension, or debarment.

With respect to the comments received on the proposed amendments to part 363, eight commenters expressed general support for the proposal, seven commenters were generally not supportive, and eight commenters did not express an overall view on the proposal. While comments were received on almost every aspect of the proposed amendments, no commenter specifically commented on each aspect. However, eleven commenters expressed concerns regarding the regulatory burden associated with various aspects of the proposal. In addition, commenters expressed concerns about the following aspects of the proposed amendments:

- Disclosure of noncompliance with the designated laws and regulations,
- Insured depository institution percentage-of-consolidated-total-assets threshold for eligibility to comply with part 363 at a holding company level,
- Management's report on internal control over financial reporting,
- Independent public accountant's report on internal control over financial reporting,
- Independent public accountant's communications with audit committees,
- Time period for the retention of the independent public accountant's working papers,
- Independence standards applicable to independent public accountants,
- Filing requirement for and public availability of AICPA peer review reports and PCAOB inspection reports on independent public accountants,
- Filing requirement for and public availability of audit engagement letters, and
- Audit committee member independence.

The following sections discuss the proposed amendments and the comments and concerns raised by the commenters, including the responses received on two specific aspects of the proposed amendments for which the FDIC specifically requested comments: (1) Disclosure of noncompliance with the designated safety and soundness laws and regulations pertaining to insider loans and dividend restrictions, and (2) the 75 percent of total assets threshold for eligibility to comply with the requirements of part 363 at the holding company level.

A. Scope and Definitions (§ 363.1 and Guidelines 1–4A)

1. Applicability

The FDIC proposed to amend § 363.1(a) to more clearly state that part 363 applies to any insured depository institution that has consolidated total assets of $500 million or more at the beginning of its fiscal year.

One commenter that represents over 30 community banks recommended that the FDIC raise the asset size threshold from $500 million to $1 billion for requiring compliance with part 363. In November 2005, when the FDIC increased the asset size threshold for assessments of internal control over financial reporting from $500 million to $1 billion, it concluded that exempting all institutions below this higher size level from all of the requirements of part 363 would not be consistent with the objective of the underlying statute, *i.e.,* early identification of needed improvements in financial management. The Federal banking agencies rely upon financial information to evaluate the condition of insured depository institutions and to determine the adequacy of regulatory capital. Accurate and reliable measurement of an institution's loans, other assets, and earnings has a direct bearing on the determination of regulatory capital. The agencies are able to place greater reliance on measurements contained in financial statements that have been subject to an independent audit. Independent audits help to identify weaknesses in internal control over financial reporting and risk management at institutions and reinforce corrective measures, thus complementing supervisory efforts in contributing to the safety and soundness of insured depository institutions. Therefore, after considering this comment, the FDIC has determined that, except where a $1 billion or higher asset threshold already applies, the $500 million asset size threshold continues to be the appropriate level for requiring compliance with part 363.

2. Compliance by Subsidiaries of Holding Companies

At present, an insured depository institution that is a subsidiary of a holding company may use consolidated holding company financial statements to satisfy the audited financial statements requirement of part 363 regardless of whether the assets of the insured depository institution subsidiary or subsidiaries of the holding company represent substantially all or only a minor portion of the holding company's consolidated total assets. When the assets of insured depository institution subsidiaries do not comprise a substantial portion of a holding company's consolidated total assets, the FDIC staff has found that the holding company's consolidated financial statements, including the accompanying notes to the financial statements, do not tend to provide sufficient information that is indicative of the financial position and results of operations of these institutions. Also, when the insured depository institution subsidiaries do not contribute significantly to the holding company's financial position and results of operations, the extent of audit coverage given to these institutions in the audit of the consolidated holding company may be limited. Such limited audit coverage would not be consistent with the purpose and intent of section 36 of the FDI Act, which focuses on insured depository institutions rather than holding companies. In this situation, the assurance that would be provided by an independent audit performed substantially at the level of the insured depository institution subsidiaries is not otherwise available.

Therefore, given the differing characteristics of the holding companies that own insured depository institutions as well as the relationship of an insured depository institution's total assets to the consolidated total assets of its parent holding company, and in keeping with the intent and purpose of section 36 of the FDI Act, the FDIC proposed to amend §§ 363.1(b)(1) and (2) by revising the criteria for determining whether the audited financial statements requirement and the other requirements of part 363 may be satisfied at a holding company level. More specifically, in order for a covered institution to be eligible to comply with the requirements of part 363 at the top-tier or any other mid-tier holding company level, the FDIC proposed that the consolidated total assets of the insured depository institution (or the consolidated total assets of all insured depository institutions, regardless of size, if the top-tier or mid-tier holding company owns or controls more than one insured depository institution) must comprise 75 percent or more of the consolidated total assets of the top-tier or mid-tier holding company. The FDIC believes that this percentage-of-assets threshold should ensure that the extent of independent audit work performed at the insured depository institution level is sufficient to satisfy the intent of section 36 of the FDI Act, that is, the early identification of needed improvements in financial management at insured institutions. The FDIC also believes that this threshold will continue to provide flexibility to the vast majority of covered institutions that are part of a holding company structure with respect to the level at which they may comply with part 363.

When determining an appropriate percentage-of-assets threshold for

compliance with part 363 at a holding company level, the FDIC considered the range of percentage-of-assets ratios for covered institutions that are part of a holding company structure. The vast majority of insured institutions subject to part 363 that are in a holding company structure are subsidiaries of organizations where the assets of the insured depository institution subsidiaries of the holding company comprise 90 percent or more of the holding company's consolidated total assets. Of the remaining institutions subject to part 363 that are in a holding company structure, most are subsidiaries of organizations where the assets of the insured institutions comprise either from 75 to 90 percent or less than 25 percent of the top-tier parent company's consolidated total assets. Smaller numbers of institutions are subsidiaries of organizations where the assets of the insured institutions comprise from 25 to 50 percent or from 50 to 75 percent of the top-tier parent company's consolidated total assets. However, in a number of cases where the insured institution subsidiaries comprise less than 75 percent of the top-tier holding company's consolidated total assets, the insured institution subsidiaries that are subject to part 363 currently comply with the regulation at a mid-tier holding company level where the assets of the insured institution subsidiaries comprise 90 percent or more of the mid-tier holding company's consolidated total assets. Thus, these institutions would not need to change how they comply with part 363 in response to the establishment of the proposed 75 percent threshold, provided they continue to comply at the same mid-tier holding company level and this holding company continues to meet the 75 percent threshold.

To assist it in considering the costs and benefits of a threshold, the FDIC specifically requested comment as to whether 75 percent or more of consolidated total assets is an appropriate threshold. Six commenters expressed views that the 75 percent threshold is reasonable, is in the public's best interest, and provides ease of application while obtaining appropriate audit coverage of the insured depository institutions.

Three commenters were opposed to the proposed 75 percent threshold. These commenters expressed the following concerns:

- The goal is reasonable but the proposed 75 percent threshold may not be appropriate. Instead, lower the threshold and require institutions that are below the threshold to consult with the FDIC prior to reporting at the holding company level.
- Compliance at the holding company level should not be dependent on the aggregate size of the subsidiary insured depository institutions relative to the holding company.
- Institutions should have until the end of their first full fiscal year after the FDIC promulgates the final rule to comply with the proposed change.
- The 75 percent threshold is arbitrary and may result in treating very similar institutions differently. An objectives-based approach should be used.

The FDIC continues to recognize that those institutions currently complying with part 363 at the holding company level that will not meet the proposed 75-percent-of-consolidated-total-assets threshold will incur additional costs from having to comply with the regulation at the institution level or at a suitable mid-tier holding company level. Requiring institutions that do meet the 75 percent threshold, or a lower percentage threshold, to consult with the FDIC prior to reporting at a holding company level would add a new element of regulatory burden and would not provide certainty nor contribute to the ease of application of the 75 percent threshold. The FDIC has concluded that the 75-percent-of-assets threshold strikes an appropriate balance between insured institution financial data and audit coverage and the cost of compliance with part 363.

The FDIC agrees with the comment that institutions that currently report at the holding company level, but do not meet the 75-percent-of-consolidated-total-assets threshold, should be afforded sufficient time to comply with this new requirement. Accordingly, the FDIC has decided to delay the effective date for implementing this threshold until fiscal years ending on or after June 15, 2010. Thus, for fiscal years ending on or before June 14, 2010, all insured depository institutions may continue to satisfy the audited financial statements requirement of part 363 at a holding company level whether or not the institution's consolidated total assets (or the consolidated total assets of all of its parent holding company's insured institutions) comprise 75 percent or more of the holding company's consolidated total assets at the beginning of the fiscal year.

Guideline 3 to part 363, *Compliance by Holding Company Subsidiaries,* states that when a holding company submits audited consolidated financial statements and other reports or notices required by part 363 on behalf of any subsidiary institution, an accompanying cover letter should identify all subsidiary institutions to which the statements, reports, or other notices pertain. Because many cover letters received by the FDIC have not sufficiently identified these subsidiary institutions, the FDIC proposed to amend guideline 3 to clarify what information should be included in the cover letter. No comments were received on this aspect of the proposal.

3. Financial Reporting

The FDIC proposed to add a new § 363.1(c) and a new guideline 4A, *Financial Reporting,* to specify that ''financial reporting'' includes both financial statements prepared in accordance with generally accepted accounting principles and those prepared for regulatory reporting purposes. Also, as proposed, guideline 4A clarifies that financial statements prepared for regulatory reporting purposes consist of the schedules equivalent to the basic financial statements that are included in an institution's appropriate regulatory report and that financial statements prepared for regulatory reporting purposes do not include regulatory reports prepared by a non-bank subsidiary of a holding company or an institution.

One commenter recommended that the FDIC further clarify the definition of financial reporting for purposes of part 363 to more clearly align it with current reporting practices. This commenter also stated that, when reporting at a holding company level, ''regulatory reporting'' would not extend to assertions about internal control over financial reporting at the subsidiary institution level. Another commenter, an accountants' trade organization, stated that the proposed amendment seems to imply that institutions' regulatory reports may not be prepared in conformity with generally accepted accounting principles (GAAP). This commenter recommended that the FDIC clarify the definition of financial reporting to state that both financial statements and the regulatory reports be prepared in accordance with GAAP to make it consistent with current practice.

While the FDIC believes that the proposed amendments are consistent with explanatory guidance it issued on this subject in December 1994,[1] the FDIC has decided to modify the proposed definition of financial reporting set forth in § 363.1(c) and guideline 4A, *Financial Reporting,* to state more clearly that, when reporting

[1] *See* FDIC Financial Institution Letter (FIL) 86–94, dated December 23, 1994.

at a holding company level, it includes the financial statements and regulatory reports of an institution's holding company. The modified definition would also state that, for recognition and measurement purposes, regulatory reporting requirements shall conform to GAAP.

4. Definitions

The FDIC proposed to add § 363.1(d), *Definitions,* to define several common terms used in part 363 and the guidelines and received no comments on these definitions.

B. Annual Reporting Requirements (§ 363.2 and Guidelines 5–12)

1. Audited Financial Statements

Consistent with sound management practices and the objective of internal control over financial reporting, the FDIC proposed to amend § 363.2(a) to require that the annual financial statements reflect all material correcting adjustments identified by the independent public accountant. Financial statements issued by insured depository institutions that are public companies or by their parent holding companies that are public companies are already subject to such a requirement pursuant to section 401 of SOX. The FDIC believes this requirement should also apply to institutions subject to part 363 that are not public companies.

In response to a commenter's recommendation, the FDIC revised this proposed requirement to provide additional context regarding the phrase ''material correcting adjustments identified by the independent public accountant'' by explaining that these adjustments should be those that are necessary for the financial statements to conform with GAAP.

2. Part 363 Management Report Contents

The FDIC has noted differences in the content of the management reports included in Part 363 Annual Reports and the adequacy of the information in these management reports regarding the results of management's assessments of the effectiveness of internal control over financial reporting and compliance with the laws and regulations pertaining to insider loans and dividend restrictions. Identified material weaknesses in internal control over financial reporting and instances of noncompliance with insider lending requirements and dividend restrictions have not always been disclosed.

In addition, management's assessment of internal control over financial reporting has often failed to disclose the internal control framework used to perform the assessment of the effectiveness of these controls and to clearly state whether controls over the preparation of the regulatory financial statements have been included within the scope of management's assessment. The omission of this information from an institution's management report reduces the usefulness of the report as a means of identifying needed improvements in financial management, which is the objective of section 36 of the FDI Act. The regulations adopted by the Securities and Exchange Commission (SEC) in 2003 implementing the requirement in section 404 of SOX for a management report on internal control over financial reporting requires management to identify the internal control framework it used to evaluate the effectiveness of these controls and to disclose any identified material weakness.

To provide clearer guidance on the information that should be included in the management report, the FDIC proposed to expand § 363.2(b) to require management's assessment of compliance with the laws and regulations pertaining to insider loans and dividend restrictions to include a clear statement as to management's conclusion regarding compliance and to disclose any noncompliance with such laws and regulations. In addition, the proposed amendment to § 363.2(b) would require management's assessment of internal control over financial reporting to identify the internal control framework that management used to make its evaluation, include a statement that the evaluation included controls over the preparation of regulatory financial statements, include a clear statement as to management's conclusion regarding the effectiveness of internal control over financial reporting, disclose all material weaknesses identified by management, and preclude management from concluding that internal control over financial reporting is effective if there are any material weaknesses.

The FDIC specifically requested comment as to whether the disclosure in the management report of instances of noncompliance with the laws and regulations pertaining to insider loans and dividend restrictions should be made available for public inspection or be designated as privileged and confidential and not be made available to the public by the FDIC. Three commenters supported public availability only for disclosures of ''material'' noncompliance and twelve commenters were not supportive of public availability of disclosures of noncompliance. These commenters were concerned that minor errors may be mistaken for a systemic compliance failure and stated that noncompliance should be addressed through the examination process.

The FDIC has considered these comments and notes that all insured depository institutions, regardless of size, are required to comply with the designated safety and soundness laws and regulations that deal with insider loans and dividend restrictions. Moreover, these laws and regulations have not substantially changed since part 363 was first implemented in 1993. Thus, well before an insured depository institution reaches $500 million in total assets and becomes subject to part 363, it should already have appropriate policies, procedures, controls, and systems in place to monitor insider lending activities and assess its dividend-paying capacity and thereby ensure compliance with the safety and soundness laws and regulations in these two designated areas. Public availability of disclosures of instances of noncompliance with these designated laws and regulations should act as a further stimulus to management's efforts to ensure that its policies, procedures, controls, and systems are sound and operating effectively. Therefore, the FDIC has concluded that, to reinforce the importance of management's responsibility for complying with the laws and regulations pertaining to insider loans and dividend restrictions, instances of noncompliance with these laws and regulations should be disclosed in management's assessment (that is included in the management report) and made available to the public.

Nevertheless, based on the comments it received on this issue, the FDIC believes it would be useful to provide further guidance regarding disclosure of noncompliance with the designated safety and soundness laws and regulations. Accordingly, the FDIC is adding guideline 8C, *Management's Disclosure of Noncompliance with Designated Laws and Regulations,* to Appendix A to part 363. This guideline states that management is not required to specifically identify the individual or individuals (*e.g.,* officers or directors) who were responsible for or were the subject of any such noncompliance and provides general parameters for making the disclosure. For example, the disclosure should include appropriate qualitative and quantitative information to describe the nature, type, and severity of the noncompliance. Also, similar instances of noncompliance may be aggregated.

While the majority of commenters did not comment on the proposed revisions applicable to management's report on internal control over financial reporting, four commenters expressed concerns or made recommendations as follows:

- The report is not necessary, its costs exceed the benefits derived, and it is difficult for small community banks to recruit personnel with the level of training and experience necessary to implement the accounting and reporting rules.
- Consider a ''delayed phase-in'' of the requirements for assessing internal control over financial reporting similar to the phase-in utilized by the SEC in its rules implementing section 404 of SOX.
- Raise the asset size threshold for this requirement from $1 billion to $3 billion to ease regulatory burden.
- The requirement to disclose all identified material weaknesses in internal control over financial reporting in management's report should be clarified as to whether the disclosure covers all identified material weaknesses, regardless of their status as of the institution's fiscal year-end, or only those in existence as of the end of the fiscal year that have not been remediated prior to that date.

Management has been required to assess and report on the effectiveness of an institution's internal control over financial reporting since part 363 was first implemented in 1993. In November 2005, when the FDIC increased the asset size threshold for internal control assessments from $500 million to $1 billion, it concluded, and continues to believe, that the $1 billion asset size threshold is appropriate for requiring assessments and reports on internal control over financial reporting. Therefore, the FDIC has decided to retain the $1 billion asset size threshold for requiring assessments and reports on internal control over financial reporting. Also, for the reasons previously stated, the FDIC does not believe that a ''delayed phase-in'' of the requirement for assessing and reporting on internal control over financial reporting is necessary or appropriate. Moreover, a phase-in of the requirement for management to assess and report on internal control over financial reporting in effect already exists because this requirement takes effect only when an institution's total assets exceed $1 billion, not when the institution first becomes subject to the other audit and reporting requirements of section 36 and part 363 when its assets reach $500 million.

With respect to management's reporting on the material weaknesses it has identified in the management report component of its Part 363 Annual Report, the FDIC notes that section 36 of the FDI Act requires management to perform an assessment of internal control over financial reporting as of year-end. Therefore, to clarify management's reporting responsibility, the FDIC has revised § 363.2(b)(3)(iii) to explain that management must disclose all material weaknesses in internal control over financial reporting that it has identified and that have not been remediated prior to the end of the institution's fiscal year.

Because part 363 and its guidelines provide only limited guidance concerning the contents of the management report and the related signature requirements for this report, institutions and auditors have expressed interest in examples of acceptable reports. Therefore, to assist managements of insured depository institutions in complying with the annual reporting requirements of § 363.2, the FDIC proposed to add *Appendix B to Part 363—Illustrative Management Reports*. Appendix B provides guidance regarding reporting scenarios that satisfy the annual reporting requirements of part 363, illustrative management reports, and an illustrative cover letter for use when an institution complies with the annual reporting requirements at the holding company level. The FDIC also states in Appendix B that the use of the illustrative management reports and cover letter is not required. The FDIC encourages the managements of insured depository institutions to tailor the wording of their management reports to fit their particular circumstances, especially when reporting on material weaknesses in internal control over financial reporting or noncompliance with designated laws and regulations.

Two commenters stated that the illustrative management reports are helpful and will mitigate regulatory burden. Another commenter suggested that the illustrative management reports would be better suited in an accounting and auditing guide that could be updated regularly to reflect changes in professional standards or other requirements that would affect these reports and that the accounting and auditing guide could illustrate the differences in reporting under AICPA and PCAOB standards. This commenter also stated that the illustrative management report on internal control over financial reporting at the holding company level is inconsistent with current practice and that it does not clearly and appropriately describe the scope of the internal control assessments by management or the independent public accountant. This commenter added that the language in the illustrative management report on internal control at the holding company level does not make it clear to a reader whether management has separately assessed the effectiveness of internal control over financial reporting at each subsidiary institution listed in the report.

The FDIC has considered this commenter's suggestion that the illustrative management reports would be better suited in an accounting and auditing guide. In this regard, the FDIC notes that auditing and attestation standards require auditors to evaluate the elements that management is required to present in its report on its assessment of internal control over financial reporting, but these standards do not fully address the requirements of part 363 for management reports on internal control nor do they provide guidance to management regarding the preparation of management reports for part 363 purposes. Given the varying degrees of familiarity of institution management with professional auditing and attestation standards as well as the lack of availability of illustrative management reports that satisfy the requirements of part 363, the FDIC has determined that the illustrative management reports should be provided in Appendix B to part 363. However, in response to this commenter's statements concerning the illustrative management reports on internal control over financial reporting at the holding company level, the FDIC has revised the text of these illustrative management reports, which are presented in sections 5(c) and (d) and 6(b) of Appendix B. More specifically, the sample text in these illustrative reports that identifies the subsidiary institutions that are subject to part 363 has been revised by removing the language stating that these institutions are included in the scope of management's assessment of internal control over financial reporting. The FDIC believes that the revised illustrative management reports on internal control over financial reporting at the holding company level are consistent with current practices and professional auditing and attestation standards.

Regarding management's responsibility for assessing compliance with the laws and regulations pertaining to insider loans and dividend restrictions, the FDIC proposed to revise and update Table 1 to Appendix A of part 363 to reflect changes in these laws and regulations that have occurred since this table was last revised in 1997. The

FDIC received no comments on the revised and updated Table 1.

3. Management Report Signatures

Section 36(b)(2) of the FDI Act requires an institution's management report to be signed by the chief executive officer and the chief accounting officer or chief financial officer. In its reviews of management reports, the FDIC has noted that these reports are often not signed by the officers at the appropriate corporate level when the audited financial statements requirement is satisfied at the holding company level or when one or more of the components of the management report is satisfied at the holding company level and the remaining components of the management report are satisfied at the insured depository institution level. Therefore, the FDIC proposed to add § 363.2(c) to specify which corporate officers must sign the management report and also the level of the corporate signers (*i.e.,* insured depository institution level or the holding company level). No comments were received on this aspect of the proposal.

4. Institutions Merged Out of Existence

To reduce regulatory burden and provide certainty for merging institutions, the FDIC proposed to add guideline 5A, *Institutions Merged Out of Existence,* to explicitly provide relief from filing a Part 363 Annual Report for an institution that is merged out of existence after the end of its fiscal year, but before the deadline for filing its Part 363 Annual Report. However, a covered institution that is acquired after the end of its fiscal year, but retains its separate corporate existence rather than being merged out of existence, would continue to be required to file a Part 363 Annual Report for that fiscal year. Three commenters commented in support of this aspect of the proposal, one of whom stated that the proposed amendment will reduce both regulatory burden and uncertainty.

5. Management's Assessment of the Effectiveness of Internal Control Over Financial Reporting

The FDIC has publicly advised institutions with $1 billion or more in total assets that are public companies or subsidiaries of public companies that they have considerable flexibility in determining how best to satisfy the SEC's requirements for management's assessment of internal control over financial reporting which implement section 404 of SOX, and the FDIC's requirements in part 363.[2] The reporting flexibility available to institutions subject to both the section 404 and the part 363 requirements was initially described in the preamble to the SEC's section 404 final rule release (68 FR 36642, June 18, 2003). This final rule release explained that the flexible reporting approach described in the preamble had been developed by the SEC staff in consultation with the staff of the Federal banking agencies. To codify this reporting flexibility in part 363, the FDIC proposed to add guideline 8A, *Management's Assessment of the Effectiveness of Internal Control Over Financial Reporting.* For an institution with $1 billion or more in total assets that is subject to both part 363 and the SEC's rules implementing section 404 of SOX (or whose parent holding company is subject to section 404 and the condition in § 363.1(b)(2) is met), the proposed guideline describes two options for complying with the filing requirements regarding management's report on internal control over financial reporting. These options are to prepare (1) two separate reports, one to satisfy the FDIC's part 363 requirements and another to satisfy the SEC's section 404 requirements, or (2) a single report that satisfies all of the FDIC's part 363 requirements and all of the SEC's section 404 requirements. No comments were received on proposed new guideline 8A.

6. Internal Control Reports for Acquired Businesses

Currently, under the reporting requirements of part 363, both management's and the independent public accountant's evaluation of an institution's internal control over financial reporting must include controls at an institution in its entirety, including all of its consolidated businesses, including businesses that were recently acquired. However, like the SEC staff, the FDIC recognizes that it may not always be possible for management to conduct an evaluation of the internal control over financial reporting of an acquired business in the period between the consummation date of the acquisition and the due date of management's internal control evaluation. The SEC staff has provided guidance to public companies stating that the staff would not object to the exclusion of the acquired business from management's evaluation of internal control over financial reporting, provided certain disclosures are made and other conditions are met.[3] The FDIC has received and granted several written requests from institutions subject to the internal control reporting requirements of part 363 to exclude recently acquired businesses from the scope of management's internal control evaluation.

To reduce regulatory burden, including the burden of submitting written requests to the FDIC, and provide certainty to institutions, the FDIC proposed to add guideline 8B, *Internal Control Reports for Acquired Businesses,* to explicitly provide relief from the reporting requirements regarding internal control over financial reporting related to business acquisitions made by an institution during its fiscal year. As proposed and consistent with the SEC staff's guidance, guideline 8B would permit management's evaluation of internal control over financial reporting to exclude internal control over financial reporting for the acquired business, provided management's report identifies the acquired business, states that the acquired business is excluded from management's evaluation of internal control over financial reporting, and indicates the significance of the acquired business to the institution's consolidated financial statements. Also, proposed guideline 8B would clarify that if the acquired business is an insured depository institution that is subject to part 363 and it is not merged out of existence before the deadline for filing its Part 363 Annual Report, the acquired business (institution) must continue to comply with all of the applicable requirements of part 363. One commenter commented on this aspect of the proposal and supported the amendment as proposed, stating that it will reduce both regulatory burden and uncertainty.

7. Standards for Internal Control

At present, guideline 10, *Standards for Internal Control,* provides that each institution should determine its own standards for establishing, maintaining, and assessing the effectiveness of its internal control over financial reporting, but it does not describe the characteristics of a suitable internal control framework. The FDIC proposed to amend guideline 10 to provide guidance regarding the attributes of a suitable internal control framework. The proposed attributes are consistent with

[2] 70 FR 71231, November 28, 2005; 70 FR 44295, August 2, 2005; FDIC Financial Institution Letter (FIL) 137–2004, December 21, 2004.

[3] *See* Question 3 in the SEC staff's *Frequently Asked Questions on Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports* at *http://www.sec.gov/info/accountants/controlfaq1004.htm.*

the attributes the SEC described in the preamble to the SEC's section 404 final rule release (68 FR 36648, June 18, 2003). The FDIC believes that a framework with these attributes is appropriate for all institutions whether or not they are public companies. No comments were received on this aspect of the proposal.

C. Independent Public Accountant (§ 363.3 and Guidelines 13–21)

1. Internal Control Over Financial Reporting

As with its experience in reviewing the portion of the management report in which management provides its assessment of the effectiveness of the institution's internal control over financial reporting, the FDIC has found some independent public accountants' internal control attestation reports to be less than sufficiently informative. Such attestation reports are, therefore, inconsistent with the objectives of section 36 of the FDI Act. As a consequence, the FDIC proposed to amend § 363.3(b), which governs the independent public accountant's report on internal control over financial reporting, to specify that, consistent with generally accepted standards for attestation engagements, the Public Company Accounting Oversight Board's (PCAOB) auditing standards, and related PCAOB staff implementation guidance, the accountant's report must:

- Not be dated prior to the date of management's report on its assessment of the effectiveness of internal control over financial reporting;
- Identify the internal control framework that the accountant used to make the evaluation (which must be the same as the internal control framework used by management);
- Include a statement that the accountant's evaluation included controls over the preparation of regulatory financial statements;
- Include a clear statement as to the accountant's conclusion regarding the effectiveness of internal control over financial reporting;
- Disclose all material weaknesses identified by the accountant; and
- Conclude that internal control is ineffective if there are any material weaknesses.

The FDIC also proposed to amend guideline 18, *Attestation Report,* to be consistent with § 363.3(b)(2) by reiterating that the attestation report on internal control over financial reporting should include a statement as to regulatory reporting.

The majority of commenters did not comment on the independent public accountant's report on internal control over financial reporting. However, four commenters expressed concerns or made recommendations as follows:

- Since the AICPA Auditing Standards Board's proposed revisions to the attestation standards for nonpublic companies will likely be similar to the requirements for public companies, and based upon the experiences of public companies complying with SOX 404, the requirement for the independent public accountant to examine, attest to, and report on management's assertion concerning internal control over financial reporting for both GAAP and regulatory reporting purposes will be too costly. Instead of having the accountant examine internal control, banking regulators should assess the adequacy of internal control over financial reporting as part of the examination process.
- The requirements that the independent public accountant's report on internal control over financial reporting identify the internal control framework used, state that the evaluation included controls over the preparation of regulatory financial statements, express the accountant's conclusion as to whether internal control is effective, and disclose all material weaknesses that can be deleted because they are already addressed by the AICPA and PCAOB standards. The rule should instead refer to the professional auditing and attestation standards.
- The FDIC should consider a delayed phase-in of the requirement for the independent public accountant to assess internal control over financial reporting similar to the phase-in set forth in the SEC's rules implementing SOX 404.
- The requirement to disclose material weaknesses in internal control over financial reporting in the independent public accountant's report should be clarified as to whether the disclosure covers all identified material weaknesses, regardless of their status as of the institution's fiscal year-end, or only those in existence as of the end of the fiscal year that have not been remediated prior to that date, which is the disclosure requirement in the professional auditing and attestation standards.

Independent public accountants have been required to examine, attest to, and report on management's assertion concerning the effectiveness of an institution's internal control over financial reporting since part 363 was first implemented in 1993. This requirement is also set forth in section 36 of the FDI Act. In November 2005, the FDIC increased the asset size threshold for internal control assessments from $500 million to $1 billion for both management and the independent public accountant. At that time, the FDIC noted that recent and impending changes to the auditing and attestation standards governing internal control assessments that were making them more robust had and would continue to increase the cost and burden of the audit and reporting requirements of part 363. The FDIC concluded then that the increase to a $1 billion asset size threshold for requiring assessments and reports on internal control over financial reporting achieved an appropriate balance between burden reduction and maintaining safety and soundness for institutions subject to part 363. The FDIC continues to believe today that $1 billion remains a suitable size threshold for internal control assessments. Also, for the reasons previously stated in Section III.B.2, the FDIC does not believe that a ''delayed phase-in'' of the requirement for the independent public accountant to report on management's assertion regarding internal control over financial reporting is necessary or appropriate. Additionally, the FDIC notes that under the SEC's most recent amendments, a non-accelerated filer need not file the auditor's attestation report on internal control over financial reporting until it files an annual report for a fiscal year ending on or after December 15, 2009. Since part 363 has long required such internal control audits, the FDIC believes that it would be contrary to the objectives of section 36 of the FDI Act to allow institutions subject to part 363 with $1 billion or more in total assets, that are not accelerated filers or subsidiaries of accelerated filers for Federal securities law purposes, to discontinue undergoing assessments of the effectiveness of their internal control over financial reporting by their external auditors until the SEC requires such audits for non-accelerated filers.

In response to the comments regarding the disclosure of material weaknesses in internal control over financial reporting, the FDIC has revised § 363.3(b)(3) to clarify that the independent auditor's internal control report must disclose all material weaknesses that the independent auditor has identified and that have not been remediated prior to the end of the institution's fiscal year.

The FDIC has considered the suggestion that the rule be revised to refer to the existing standards of the auditing standard setters rather than including specific requirements in the rule. In this regard, both the current and

proposed rules state that the independent public accountant's attestation and report on internal control over financial reporting shall be made in accordance with generally accepted standards for attestation engagements. However, as previously noted, the FDIC has found some independent public accountants' internal control attestation reports to be less than sufficiently informative, and given the varying degrees of familiarity of institution management and audit committee members with professional auditing standards, the FDIC has decided to retain the specific requirements set forth in the proposed rule. The FDIC also believes that including these requirements in the proposed rule will assist audit committee members in the performance of their duties regarding the oversight of the external auditor. However, the FDIC has revised § 363.3(b) to clarify that the auditor's report on internal control over financial reporting should satisfy the requirements set forth in both part 363 and applicable professional standards. In this regard, and consistent with guidance the FDIC issued in February 2008,[4] the FDIC has also revised § 363.3(b) and added guideline 18A to clarify that the attestation report on internal control over financial reporting may be made in accordance with the PCAOB's auditing standards even if the institution is a nonpublic company or a subsidiary of a nonpublic company.

2. Communications With Audit Committee

According to section 204 of SOX, an accountant who audits a public company's financial statements should report on a timely basis to the company's audit committee: (1) All critical accounting policies, (2) alternative accounting treatments discussed with management, and (3) written communications provided to management, such as a management letter or schedule of unadjusted differences. The FDIC has encouraged institutions, regardless of whether they are public companies, to arrange with their accountant to institute these reporting practices.[5] Requirements that are similar, but not identical, to those set forth in section 204 apply to accountants who audit the financial statements of entities that are not public.[6] Therefore, consistent with current best practices and standards for audits of both public and non-public entities, the FDIC proposed to amend part 363 by adding § 363.3(d), *Communications with audit committee,* to set a uniform minimum requirement for such communication. As proposed, § 363.3(d) would require the independent public accountant to report the information identified in section 204 of SOX to the audit committee.

While the majority of commenters did not comment on the independent public accountant's communications with audit committees, three commenters expressed the following concerns:

- The communication requirements for auditors of nonpublic entities are included in the AICPA's standards and those for auditors of public companies are established by the PCAOB and the SEC. Rather than memorializing these communication requirements in the rule, refer to the existing standards of the AICPA, the PCAOB, and the SEC.
- The proposed amendments overlap the requirements of the AICPA standards and do not align with the communication required by SEC rules and regulations and may cause confusion as to the required communications. The requirements should either be removed in their entirety or clarified and aligned.
- SOX practices and principles regarding audit committee communications should be restricted to publicly held banks.
- Auditors should not be required to report critical accounting policies, alternative accounting treatments, and schedules of unadjusted differences to the audit committee. Management should have discretion as to whether these communications should be reported to the audit committee.

The FDIC has considered the concerns raised by the commenters, including the suggestion that the rule be revised to refer to the existing standards of the auditing standard setters (AICPA, PCAOB, and SEC) rather than including specific requirements in the rule. Although the existing auditing standards for both public and nonpublic companies set forth the requirements for the independent public accountant's communications with audit committees, the FDIC believes that, given the varying degrees of familiarity of audit committee members with professional auditing standards, setting forth the requirements for the auditor's communications with audit committees in the proposed rule will assist audit committee members in the performance of their duties regarding the oversight of the external auditor. Therefore, the FDIC has decided to retain the requirements set forth in the proposed rule. However, the FDIC has revised § 363.3(d) to clarify that the auditor should satisfy the audit committee communication requirements set forth in both part 363 and applicable professional standards. Also, based on its review of the professional standards regarding auditors' communications with audit committees, the FDIC believes that the revised requirements in the proposed rule are consistent with the existing professional standards.

3. Retention of Working Papers

Section 36(g)(3)(A) of the FDI Act states that an independent public accountant who performs audit services required by section 36 must agree to provide related working papers to the FDIC, any appropriate Federal banking agency, and any State bank supervisor. The SEC's rules and the auditing standards for public companies specify a 7-year retention period for audit working papers while the auditing standards for nonpublic companies provide that the retention period for audit working papers should not be shorter than five years.[7] The FDIC believes that a uniform retention period should apply to audits of all institutions subject to part 363. Accordingly, the FDIC proposed to amend part 363 by adding § 363.3(e), *Retention of working papers.* As proposed, § 363.3(e) would require the independent public accountant to retain the working papers related to its audit of the financial statements and, if applicable, its evaluation of internal control over financial reporting for seven years.

One commenter stated that the five-year retention period specified by the AICPA's auditing standards is appropriate for nonpublic companies. Another commenter was concerned that the proposed seven-year retention period may cause extra burden and expense for independent public accountants of nonpublic institutions.

Under section 36 and part 363, the requirement for institutions to undergo audits of their financial statements and, if applicable, assessments of their internal control over financial reporting does not depend on whether they are public or nonpublic companies. Thus, the FDIC believes that the retention requirement for the working papers associated with auditors' performance of these services should also be independent of whether institutions are public or nonpublic companies. In this regard, the FDIC notes that the AICPA's

[4] *See* FDIC Financial Institution Letter (FIL) 5–2008, dated February 1, 2008.

[5] *See* FDIC Financial Institution Letter (FIL) 17–2003, dated March 5, 2003.

[6] *See* Statement on Auditing Standards No. 114, *The Auditor's Communication With Those Charged With Governance,* December 2006.

[7] *See* Rule 2–06 of the SEC's Regulation S–X, the PCAOB's Auditing Standard No. 3, *Audit Documentation,* June 2004, and the AICPA's Statement on Auditing Standards No. 103, *Audit Documentation,* December 2005.

auditing standards for nonpublic companies acknowledge that working paper retention periods may exceed five years. After considering the comments, the FDIC continues to believe that a uniform retention period for audit working papers should apply to all institutions subject to part 363. Therefore, the FDIC has decided to retain the proposed seven-year retention period for working papers related to audits of financial statements and evaluations of internal control over financial reporting.

4. Independence

Section 36 of the FDI Act states that an ''independent public accountant'' must perform the audit and attestation services required by section 36 but it does not define ''independent,'' leaving this to the FDIC's rulemaking authority. As adopted by the FDIC in 1993, part 363 includes guideline 14, *Independence,* which identifies the independence standards applicable to accountants performing services under section 36 and part 363. This guideline specifies that the independent public accountant must comply with the independence standards applicable to audits of both nonpublic and public companies. In 2003, the agencies jointly issued rules of practice to implement the enforcement provisions of section 36(g)(4), which authorize the FDIC or an appropriate Federal banking agency to remove, suspend, or bar an accountant, for good cause, from performing audit and attestation services for institutions subject to section 36 and part 363.[8] To enhance the enforceability of the independence standards with which an accountant must comply for purposes of part 363, the FDIC proposed to move the independence requirements for independent public accountants from guideline 14, *Independence,* to new § 363.3(f), *Independence.* As proposed, § 363.3(f) would retain the original independence concept of part 363, *i.e.,* auditor compliance with the independence standards applicable to both nonpublic and public company audits, by clarifying that the independent public accountant must comply with the independence standards and interpretations of the PCAOB for audits of public companies that have been approved by the SEC in addition to the independence standards and interpretations of the AICPA and the SEC.

Two commenters stated that the proposed amendment with its explicit reference to compliance with the PCAOB's independence standards represents a best practice and that the coordination of the independence standards in part 363 with the independence standards of the AICPA, the SEC, and the PCAOB will reduce uncertainty. Nevertheless, one commenter recommended that the FDIC clarify whether an independent public accountant should (a) comply with the most restrictive independence requirement addressing a particular matter or (b) comply with the independence requirements that pertain only to public companies. In contrast, six commenters (which included the three bankers' trade organizations and two of the four accounting firms) were opposed to or expressed concerns about the proposed amendment. These commenters stated that:

- The FDIC should individually evaluate and clarify the applicability of each new SEC and PCAOB independence standard.
- The FDIC should revise part 363 to require the auditors of public institutions to meet the independence rules of the SEC and the PCAOB and the auditors of nonpublic institutions to meet only the AICPA's independence rules.
- Applying the independence standards of the SEC and the PCAOB equally to all independent public accountants may prohibit certain independent public accountants from performing engagements for nonpublic institutions subject to part 363.
- Adding the PCAOB's independence rules to the existing requirement for compliance with the independence rules of the SEC and the AICPA could be problematic for some community banks because: (1) Some banks may not have ready access to multiple accounting firms that satisfy the independence requirements of the PCAOB, the SEC, and the AICPA; and (2) it creates a third set of standards that the audit committee will need to review on a regular basis in order to fulfill its duties.
- Education efforts to explain the auditor independence requirements of part 363 will be needed because: (1) Many institutions subject to part 363 are nonpublic; and (2) many independent public accountants that provide services to nonpublic institutions are not registered with the PCAOB and may not be familiar with the independence standards of the SEC and the PCAOB.

The foundation for auditor independence standards is the principle that auditors who provide audit services must be independent in fact and appearance with respect to their audit clients. The FDIC notes that the independence rules of the SEC and AICPA have been applicable to audits of both public and nonpublic institutions subject to part 363 since the implementation of part 363 in 1993. More recently, SOX granted additional authority to set independence standards for accounting firms performing audits of public companies (issuers) to the PCAOB. In this regard, the PCAOB's independence standards do not become effective unless and until they are approved by the SEC, which means that they are tantamount to SEC independence standards.

The FDIC acknowledges that both the AICPA's and the SEC's auditor independence standards, including those of the PCAOB, have evolved over time. The FDIC recognizes that the effect of periodic changes in these auditor independence standards carries over to accountants with insured depository institution audit clients subject to part 363 regardless of whether these clients are public or nonpublic institutions. Thus, as the AICPA, the SEC, and the PCAOB periodically revise their auditor independence standards, independent public accountants performing audit and attest services under part 363 must take appropriate steps to ensure that they continue to satisfy the qualifications for accountants with respect to independence that are set forth in part 363. While changes in independence standards can be burdensome to auditors and their clients, given the importance of the independence of the accountants who provide audit services to institutions subject to part 363, which in number comprise the largest 16 percent of the insured depository institutions, the FDIC continues to believe that it is in the public interest for independence standards to apply uniformly to all accountants performing these services. To achieve this objective, auditors of institutions subject to part 363 should continue to comply with all of the independence standards applicable to both nonpublic and public institutions that are established by the AICPA, the SEC, and the PCAOB rather than to comply with these standards on a selective or exclusionary basis. Therefore, the FDIC has decided to proceed with the proposed amendment to the auditor independence provisions of part 363.

However, as recommended by a commenter, the FDIC has revised the proposed rule to clarify that if a provision within one of the applicable independence standards is more restrictive than a provision addressing the same subject matter in one of the other independence standards, the independent public accountant must

[8] 68 FR 48256, August 13, 2003.

comply with the more restrictive independence requirement. For example, an external auditor is permitted to provide internal audit outsourcing services to an audit client under the AICPA's independence rules, but the independence rules of the SEC and the PCAOB generally prohibit an external auditor from providing such services to an audit client. In this example, the external auditor would have to comply with the more restrictive independence requirements of the SEC and the PCAOB.

5. Peer Reviews

Section 36(g)(3)(A)(ii) of the FDI Act requires an independent public accountant to have received a peer review or be enrolled in a peer review program that meets acceptable guidelines. At present, guideline 15 to part 363 provides that to be acceptable, a peer review should, among other things, be generally consistent with AICPA standards. Since part 363 was originally adopted, the PCAOB has been created and conducts inspections of registered public accounting firms, some of which audit insured depository institutions subject to part 363 or their parent holding companies. These inspections serve a similar purpose as peer reviews. In addition, the PCAOB issues reports on its inspections of these accounting firms.

In response to this development and in light of the agencies' issuance of rules of practice implementing the enforcement provisions of section 36, the FDIC proposed to add new § 363.3(g) on peer reviews. The FDIC proposed to move the requirements for peer reviews, the filing of peer review reports, and the retention of peer review working papers from guideline 15, *Peer Reviews,* and guideline 16, *Filing Peer Review Reports,* to § 363.3(g). As proposed, § 363.3(g) clarified that acceptable peer reviews include peer reviews performed in accordance with the AICPA's Peer Review Standards and inspections conducted by the PCAOB. It also provided that the FDIC would not make available for public inspection the portion of any peer review report and inspection report determined to be nonpublic by the AICPA and the PCAOB, respectively. Finally, the FDIC proposed to revise guideline 15 to explain that to be acceptable a peer review, other than a PCAOB inspection, should be generally consistent with AICPA Peer Review Standards.

In their comments on the proposal, all four accounting firms and the accountants' trade organization did not object to filing the public portions of PCAOB inspection reports, but were opposed to filing the nonpublic portions of these reports. These commenters also expressed the following concerns:

- The proposed requirement is contrary to existing law (SOX) and the professional standards of the PCAOB. An accounting firm should be required to submit the nonpublic portion of a PCAOB inspection report to the FDIC only if it is made public by the PCAOB.
- Pursuant to Section 104(g)(2) of SOX, the PCAOB cannot disclose the nonpublic portion of an inspection report unless criticisms of the accounting firm's quality controls remain unremediated 12 months after the issuance of the report. There are only two exceptions to the statutory prohibition: (1) Disclosure to the SEC and State boards of public accountancy, and (2) to a ''Federal functional regulator'' when the PCAOB Board, in its discretion, determines that disclosure is necessary. The PCAOB has not made such a determination regarding any Federal banking agency.
- Since AICPA peer review reports and public portions of the PCAOB inspection reports are available to the FDIC on the AICPA and PCAOB Web sites, there should not be a requirement for auditors to submit reports directly to the FDIC.

In response to the concerns raised by the commenters, the FDIC has revised the proposed amendment to require independent public accountants to file only the public portions of PCAOB inspection reports. The revised amendment also requires independent public accountants to file previously nonpublic portions of any PCAOB inspection report within 15 days of the PCAOB making such portions public. The FDIC has retained the existing requirement for independent public accountants to file peer review reports, accompanied by any letters of comments, response, and acceptance.

Regarding AICPA peer review reports, the FDIC notes that these reports are publicly available on the AICPA Web site for some, but not all, independent public accountants and accounting firms. The AICPA's standards for performing and reporting on peer reviews do not require independent public accountants or accounting firms to post their peer review reports on the AICPA Web site. However, members of the AICPA's audit quality centers and the Private Companies Practice Section post their review reports on the AICPA Web site, certain firms voluntarily make their peer review reports public, and other firms make some aspects of their peer review reports available when required by a State board of public accountancy or the Government Accountability Office. Furthermore, since section 36 of the FDI Act requires peer review reports to be filed with the FDIC and made available for public inspection, the FDIC cannot override this statutory requirement despite the present availability of most of these reports on the PCAOB and AICPA Web sites. The FDIC has therefore retained the filing requirement for AICPA peer review reports and the public portions of PCAOB inspection reports.

6. Notice of Termination

Guideline 26, *Notices Concerning Accountants,* permits an institution that is a public company or a subsidiary of a public company to satisfy the requirement for filing a notice of termination of its independent public accountant by using its current report (*e.g.,* SEC Form 8–K) concerning a change in accountant to satisfy the similar notice requirements of part 363. To reduce regulatory burden and provide flexibility to the independent public accountant of such an institution, the FDIC proposed to amend guideline 20, *Notice of Termination,* to permit the independent public accountant to satisfy the requirement to file a notice of termination of its services in a similar manner. No comments were received on this aspect of the proposal.

D. Filing and Notice Requirements (§ 363.4 and Guidelines 22–26)

1. Annual Reporting

At present, the annual reporting requirements of part 363 require each insured depository institution to file its Part 363 Annual Report within 90 days after the end of its fiscal year. Each institution is also required to file the independent public accountant's report on the audited financial statements and, if applicable, the accountant's attestation report on management's assessment of internal control over financial reporting, both of which are components of the Part 363 Annual Report, within 15 days of receipt by the institution, which, at times, has presented a conflict with the annual report filing requirement. The FDIC has also noted that earlier filing deadlines established by the SEC for annual reports filed by certain public companies under the Federal securities laws (*e.g.,* SEC Form 10–K) and more robust auditing standards related to internal control over financial reporting have had an impact on the management of institutions, on the resources of independent public accountants, and on auditing costs.

To reduce cost and burden, the FDIC proposed to amend § 363.4(a) by

extending the time period within which an insured depository institution that is not a public company or a subsidiary of a public company must file its Part 363 Annual Report from within 90 days to within 120 days after the end of its fiscal year. As proposed, an insured depository institution that is a public company, or that is a subsidiary of a public company that meets certain criteria, would continue to be required to file its Part 363 Annual Report within 90 days after the end of its fiscal year, which is consistent with the maximum time frame that public companies have for filing annual reports under the Federal securities laws. The proposed amendment would also eliminate the ambiguity in § 363.4 concerning the filing deadline for the components of the Part 363 Annual Report that are prepared by the independent public accountant.

An insured depository institution with consolidated total assets of less than $1 billion that is a public company or a subsidiary of a public company is required to file management's assessment of the effectiveness of internal control over financial reporting with the SEC or the appropriate Federal banking agency in accordance with the compliance dates of the SEC's rules implementing section 404 of SOX. Management's findings and conclusions with respect to internal control over financial reporting, as disclosed in the assessment that management files with the SEC or the appropriate Federal banking agency, provide information that would aid in meeting the objective of section 36 of the FDI Act. Therefore, the FDIC proposed to add a provision to § 363.4(a) that would require an institution of this size to submit a copy of management's section 404 internal control assessment with its Part 363 Annual Report, but this assessment would not be considered part of the institution's Part 363 Annual Report.

Five commenters expressed support for the proposed extension of the filing deadline for the Part 363 Annual Report for an institution that is not a public company or a subsidiary of a public company. These commenters stated that the additional 30 days will help to ensure that auditors are able to devote sufficient resources to the nonpublic engagements, provide nonpublic institutions with the additional time needed to comply with the filing requirements, and may help to reduce the cost of independent audits.

At present, part 363 specifies that the Part 363 Annual Reports and reports on peer reviews shall be available for public inspection. Except for management letters, which are exempt from public disclosure pursuant to existing guideline 18, part 363 does not address the availability of other reports and notifications required to be filed under part 363. Consistent with the FDIC's longstanding practice, the FDIC has revised the proposed rule to clarify that, except for the annual reports, AICPA peer review reports, and PCAOB inspection reports, which shall be available for public inspection, all other reports and notifications required to be filed under part 363 are exempt from public disclosure by the FDIC.

2. Independent Public Accountant's Reports

Section 36(h)(2)(A) of the FDI Act and § 363.4(c) require an institution to file a copy of any management letter or other report issued by its independent public accountant that pertains to the financial statement audit and the attestation on internal control over financial reporting within 15 days after receipt by the institution. The FDIC's experience in administering part 363 indicates that institutions are often uncertain as to which types of reports they receive from their independent public accountant must be submitted to the FDIC, the appropriate Federal banking agency, and any appropriate State bank supervisor pursuant to this filing requirement. As stated above, this uncertainty extends to this 15-day filing requirement and its relationship to the filing deadline for the Part 363 Annual Report. To clarify the requirements for the filing of accountants' reports, the FDIC proposed to amend § 363.4(c), *Independent public accountant's letters and reports,* by providing examples of the types of reports issued by an institution's independent public accountant, except for the accountant's reports that are required to be included in the institution's Part 363 Annual Report, that are to be filed within 15 days after receipt. As proposed, Guideline 25, *Independent Accountant's Reports,* would be deleted because it would be redundant and no longer needed.

In the *Interagency Advisory on the Unsafe and Unsound Use of Limitation of Liability Provisions in External Audit Engagement Letters,* the Federal banking agencies expressed their concerns about limitation of liability provisions included in external audit engagement letters and advised institutions against entering into engagement letters containing such provisions.[9] To enable the FDIC to timely review institutions' engagement letters with their independent public accountants, the FDIC also proposed to amend § 363.4(c) to require institutions to file copies of audit engagement letters, including any related agreements and amendments, with the FDIC, the appropriate Federal banking agency, and any appropriate State bank supervisor within 15 days of acceptance by the institution.

Eight commenters (which included two bank trade organizations, three accounting firms, and the accountants' trade organization) opposed requiring institutions to file audit engagement letters and were concerned about their public availability. These commenters stated that:

- It is not essential, practical, or beneficial for an institution to file the audit engagement letter. The requirement for the audit committee to ensure that the letter does not contain any inappropriate limitation of liability provisions is sufficient and appropriate.
- Instead of requiring institutions to file audit engagement letters, the FDIC could require management's report to include a statement that the audit engagement letter has been reviewed for unsafe and unsound limitation of liability provisions.
- The final rule should specify that audit engagement letters filed with the FDIC are ''exempt from disclosure'' under FOIA.

The FDIC notes that, since the publication of the proposed rule, the AICPA's Professional Ethics Executive Committee has adopted Interpretation No. 501–8, *Failure to Follow Requirements of Governmental Bodies, Commissions, or Other Regulatory Agencies on Indemnification and Limitation of Liability Provisions in Connection With Audit and Other Attest Services,* which became effective July 31, 2008.[10] This ethics interpretation states:

> Certain governmental bodies, commissions, or other regulatory agencies (collectively, regulators) have established requirements through laws, regulations, or published interpretations that prohibit entities subject to their regulation (regulated entity) from including certain types of indemnification and limitation of liability provisions in agreements for the performance of audit or other attest services that are required by such regulators or that provide that the existence of such provisions causes a member to be disqualified from providing such services to these entities. For example, Federal banking regulators, State insurance commissions, and the Securities and Exchange Commission have established such requirements.

[9] *See* 71 FR 6847, February 9, 2006, and FDIC Financial Institution Letter (FIL) 13–2006, issued on the same date.

[10] The full text of the Interpretation can be found on the AICPA's Web site at the following link: *http://www.aicpa.org/download/ethics/EDITED_Adopted_501_8_final.pdf.*

If a member enters into, or directs or knowingly permits another individual to enter into, a contract for the performance of audit or other attest services that are subject to the requirements of these regulators, the member should not include, or knowingly permit or direct another individual to include, an indemnification or limitation of liability provision that would cause the regulated entity or member to be disqualified from providing such services to the regulated entity. A member who enters into, or directs or knowingly permits another individual to enter into, such an agreement for the performance of audit or other attest services that would that would cause the regulated entity or a member to be in violation of such requirements, or that would cause a member to be disqualified from providing such services to the regulated entity, would be considered to have committed an act discreditable to the profession.

In consideration of the comments received and the issuance of this ethics interpretation, the FDIC has reevaluated this aspect of the proposal and has decided to remove the proposed requirement to file audit engagement letters, which will eliminate the burden that would have been associated with this filing requirement. However, the FDIC cautions institutions and independent public accountants that including unsafe and unsound limitation of liability provisions in audit engagement letters could result in adverse consequences. For example, the FDIC could determine that an audit of an institution's financial statements and, if applicable, its internal control over financial reporting that has been performed pursuant to an engagement letter containing these unsafe and unsound provisions does not satisfy the requirements of part 363. The institution could then be directed to engage a different independent public accountant to perform another audit. The independent public accountant whose engagement letter contained the unsafe and unsound limitation of liability provisions could also be subject to supervisory action by the FDIC or the institution's primary Federal regulator as well as disciplinary action by the relevant State board of public accountancy and the AICPA for an act discreditable to the profession.

3. Notification of Late Filing

Guideline 23, *Relief From Filing Deadlines,* currently provides that in the occasional event that an institution is confronted with extraordinary circumstances beyond its reasonable control that justifies an extension of the deadline for filing its Part 363 Annual Report or another required report or notice, the institution may submit a written request for an extension of the filing deadline of not more than 30 days that explains the reasons for the request. Such a request may be granted for good cause. Over the last several years, the reasons set forth in the requests for extensions of time for filing Part 363 Annual Reports that have been submitted to the FDIC generally did not represent extraordinary circumstances beyond the institution's reasonable control, the standard currently set forth in guideline 23. Also, several extension requests were repeats of requests from the same institutions from the previous year.

Based upon this experience and given the proposed amendment to § 363.4(a) to extend the filing deadline for Part 363 Annual Reports for non-public institutions from 90 to 120 days, the FDIC proposed to replace the extensions of time for filing reports that are available only in extraordinary circumstances under guideline 23 with a new § 363.4(e), *Notification of Late Filing.* In place of filing extensions that have limited applicability, this new section would be applicable to all institutions and would require an institution that is unable to timely file all or any portion of its Part 363 Annual Report or any other report or notice required to be filed under part 363 to submit a written notice of late filing before the filing deadline for the report or notice. The late filing notice must disclose the institution's inability to timely file all or specified portions of its Part 363 Annual Report or other report or notice, the reasons therefore in reasonable detail, and the date by which the report or notice will be filed.

The FDIC also proposed to amend guideline 23 by changing its focus from extension requests to late filing notices consistent with the approach taken in new § 363.4(e). Amended guideline 23 explains that submitting a late filing notice will not cure the apparent violation of part 363 arising from an institution's failure to timely file a Part 363 Annual Report or any other required report or notice. The supervisory response to such an apparent violation would take into account the facts and circumstances surrounding an institution's delay in filing. As proposed, guideline 23 also provides that, if the late filing applies to only a portion of the Part 363 Annual Report or any other report or notice, the components of the report or notice that have been completed should be filed within the prescribed filing period accompanied by either a cover letter that indicates which components are omitted or a combined late filing notice and cover letter.

One commenter suggested that the FDIC revise the proposed rule to provide for extensions of the filing due date for up to 60 days for institutions that are not public companies or subsidiaries of public companies instead of establishing a late filing notification requirement. In the FDIC's dealings with institutions unable to file their Part 363 Annual Reports by the filing deadline in the current rule, whether they are seeking extensions of the deadline or not, it is not uncommon for institutions to experience delays in their ability to file these reports that extend well in excess of 60 days after the filing deadline. Therefore, the FDIC believes that establishing a late filing notification requirement is a more practical approach for addressing the broad range of situations when institutions are unable to timely file reports required under part 363 than providing for longer extensions of the filing deadline in those cases where an institution meets an extraordinary circumstances standard. Accordingly, the FDIC has decided to adopt this aspect of the rule as proposed without revision.

4. Place for Filing

Current guideline 22 identifies the office of the FDIC, the appropriate Federal banking agency, and the appropriate State bank supervisor to which reports and notices (other than peer review reports) required by part 363 are to be filed. Nevertheless, the FDIC has found that some institutions submit required reports and notices to incorrect locations. The FDIC staff also receives questions from institutions asking where reports and notices should be filed. To make the information as to where Part 363 Annual Reports, written notices of late filing, and other reports and notices (except peer review reports) are to be filed more prominent, the FDIC proposed to move this information from guideline 22, *Place for Filing,* to a new § 363.4(f), *Place for Filing.* No comments were received on this aspect of the proposal.

E. Audit Committees (§ 363.5 and Guidelines 27–35)

1. Composition

Section 36(g)(1) of the FDI Act and § 363.5(a) require each insured depository institution subject to part 363 to have an independent audit committee comprised entirely of outside directors. As defined in § 363.5(a)(3), in general, an outside director is a director who is not an officer or employee of the institution or any affiliate of the institution. In addition, the outside directors who serve on the audit committee must be ''independent of

management,'' although a minority of the audit committee members of institutions with $500 million or more but less than $1 billion in total assets need not be ''independent of management.'' Guideline 27, *Composition,* requires each institution's board of directors to determine at least annually whether existing and potential audit committee members satisfy the requirements governing audit committee composition.

In order for a board of directors to perform its evaluation of audit committee members in a consistent, effective, and reviewable manner, the FDIC believes the board should be guided by an approved policy or set of criteria that identifies the factors to be taken into account by the board. Accordingly, the FDIC proposed to amend guideline 27 to require each institution's board of directors to maintain an approved set of written criteria for determining whether a director who is to serve on the audit committee is an outside director and is independent of management and to apply these criteria, at least annually, to determine whether each existing or potential audit committee member meets the requirements of section 36 and part 363. The proposed amendment to guideline 27 also requires that the results of and basis for the board's determination with respect to each existing and potential audit committee member be recorded in the board's minutes.

Two commenters expressed support for the proposed requirement in guideline 27 for each institution's board of directors to adopt written criteria for determining if audit committee members meet the requirements of section 36 and part 363 and view it as a best practice. One of these commenters also recommended that the FDIC revise or expand § 363.5(b) or guideline 28 to clarify the extent to which audit committee members who meet the SEC's definition of ''audit committee financial expert'' will be deemed to have ''banking or related financial management expertise'' for part 363 purposes.

However, three commenters, including one bankers' trade organization, were not supportive of the proposed amendments to guideline 27. These commenters objected to the documentation requirements for audit committee members' independence and the requirements for the board of directors' minutes to reflect the results of and basis for the board's determinations regarding audit committee members' independence. As an alternative, two of these commenters recommended that audit committees be permitted to survey existing and potential members and make the survey available to examiners but not reflect the survey results in the board of directors' minutes.

In addition to being a best practice, the FDIC believes that the adoption and implementation by an institution's board of directors of an approved policy or set of criteria that identifies the factors to be taken into account for evaluating audit committee member independence improves corporate governance. Documenting the results of and basis for determinations with respect to each existing and potential audit committee member in the board's minutes further supports good corporate governance and provides evidence that the board is properly discharging its responsibilities under part 363 in the process for selecting audit committee members. Applying an approved policy or set of criteria and documenting the results provide a more robust and consistent process than having audit committees themselves survey existing and potential committee members for review by examiners, but with no oversight by the entire board of directors.

Nevertheless, an annual survey of existing and potential audit committee members by the board may be a useful mechanism for determining whether these individuals satisfy the board's policy or set of criteria. For these reasons, the FDIC has decided to adopt guideline 27 as proposed without any revision.

As to the suggestion regarding clarification of the extent to which audit committee members who have the attributes of an ''audit committee financial expert'' under the SEC's rules will be deemed to have ''banking or related financial management expertise,'' the FDIC has revised guideline 32, *Banking or Related Financial Management Expertise,* to clarify that such persons will satisfy the criteria set forth in the guideline.

Guideline 30, *Holding Company Audit Committees,* provides guidance for complying with the audit committee requirements of part 363 at the holding company level. The FDIC proposed to amend guideline 30 for consistency with the proposed revisions to the holding company provisions of § 363.1(b) and to reflect the difference in the audit committee composition requirements in § 363.5(a) for institutions with more than and less than $1 billion in total assets. No comments were received on this aspect of the proposal.

2. ''Independent of Management'' Considerations

Guideline 28, *''Independent of Management'' Considerations,* identifies five factors for a board of directors to consider when determining the independence of an outside director. Guideline 29, *Lack of Independence,* states that a director who owns or controls 10 percent or more of any class of the institution's voting securities should not be considered ''independent of management.'' The FDIC has found that some of the factors in guideline 28 are so general that they fail to provide meaningful guidance to boards of directors. At the same time, many of the institutions subject to part 363 or their parent holding companies are public companies with securities listed on a national securities exchange. Under the SEC's Rule 10A–3 (17 CFR 240.10A–3), each audit committee member of a listed issuer must be a director of the issuer and must otherwise be independent. The listing standards of the national securities exchange must set forth the criteria for determining the independence of directors who are to serve on a listed issuer's audit committee.

Based on its review, the FDIC stated in the proposal to amend part 363 that it believed that the independence criteria for audit committee members included in the listing standards of the national securities exchanges, together with the FDIC's existing stock ownership criterion in guideline 29, represented an appropriate framework for determining whether an outside director is ''independent of management'' for purposes of part 363. Furthermore, for an institution whose audit committee members or whose parent holding company's audit committee members, if the holding company meets the holding company provisions of § 363.1(b), are subject to the listing standards of a national securities exchange, the FDIC observed that allowing the institution to use these standards for part 363 purposes would reduce the institution's burden.

Therefore, the FDIC proposed to combine guidelines 28 and 29 and provide expanded guidance for an institution's board of directors to use in its assessment of an outside director's relationship to the institution for the purposes of making ''independent of management'' determinations regarding audit committee members. For example, the proposed amendment to guideline 28 included a list of criteria that an institution's board of directors should consider when determining whether an outside director would be considered

''independent of management.'' In developing the proposed list of criteria, the FDIC considered, but did not entirely replicate, the portion of the listing standards of the national securities exchanges that apply to audit committees. An institution's board of directors may also conclude that it should consider additional criteria that may be appropriate in its particular circumstances. As an alternative to these criteria, revised guideline 28 would permit an institution that is a public company or a subsidiary of a public company (when the holding company provisions of § 363.1(b) are met) that is subject to the listing standards of a national securities exchange to apply the audit committee provisions of the listing standards for purposes of determining audit committee member independence. Similarly, all other institutions, including those that are not public companies, may elect, but would not be required, to adopt the audit committee provisions of the listing standards of a national securities exchange or association as their criteria for determining audit committee member independence.

While two commenters supported the proposed amendments regarding audit committee independence, five commenters (which included two bankers' trade organizations and three financial institutions) expressed certain concerns or suggested changes to the proposal. These commenters suggested that:

- Shareholders of closely-held companies should not be automatically prohibited from serving on the audit committee solely because they own 10 percent or more of the institution's voting stock.
- The FDIC should raise the proposed compensation limitation threshold from $60,000 to $100,000.
- The meaning of ''financial services'' as it relates to indirect compensation should be clarified. Furthermore, the need for ''indirect compensation'' limits is questionable given all of the other independence requirements.
- Proposed guideline 28(b)(7) should be revised by removing from the definition of ''payment'' loans and other services extended to directors in the ordinary course of an institution's business as well as payments arising solely from investments in the bank's securities and payments made under non-discretionary charitable contribution matching programs. The $200,000 or 5 percent of gross revenues test in this guideline should be measured against the revenues of the recipient of the payment, and not the outside employer.
- Applying the director independence standards of the national securities exchanges to privately held banks will impose challenges for community banks located in areas where it is difficult to find competent directors to serve on the audit committee.
- Existing guidelines 28 and 29 provide sufficient guidance for institutions to determine the independence of a director.
- Audit committee independence criteria should consider an individual institution's complexity and risk profile. For community banks, audit committee member independence can be difficult to accomplish and maintain.

In response to these comments and concerns, the FDIC has carefully reviewed the provisions of proposed revised guideline 28 on the ''independent of management'' considerations that should be applied to audit committee members. First, the FDIC has reconsidered the existing 10 percent stock ownership limit for audit committee members. In this regard, the SEC's and the national securities exchanges' rules do not impose such a limit on audit committee members. Therefore, consistent with these entities' rules, the FDIC is revising guideline 28 to provide that ownership of 10 percent or more of any class of voting securities of an institution would not be an automatic bar for considering an outside director to be independent of management. The revised guideline further provides that when an outside director's stock ownership equals or exceeds the 10 percent threshold, the institution's board of directors would be required to determine and document its determination as to whether such ownership would interfere with the outside director's exercise of independent judgment in carrying out the responsibilities of an audit committee member.

Next, the FDIC has reconsidered the compensation limit applicable to audit committee members for direct and indirect compensation and, as suggested by commenters, has revised guideline 28 to increase the compensation threshold from $60,000 to $100,000. Additionally, the comments seeking greater clarity concerning the meaning of indirect compensation and the types of payments deemed to be compensation have merit. Therefore, the FDIC has revised the guideline to provide examples of indirect compensation and to specify that certain payments would not be included within the meaning of the terms direct and indirect compensation.

In response to the suggestion to remove loans and other services extended to directors in the ordinary course of an institution's business as well as payments arising solely from investments in the bank's securities and payments made under non-discretionary charitable contribution matching programs from the definition of ''payment,'' the FDIC has revised and expanded guideline 28(b)(8) to specify what payments are not included within the meaning of the terms direct and indirect compensation and payments. As to the suggestion regarding the basis of the measurement for the $200,000 or 5 percent of gross revenue test, the FDIC has decided to retain this requirement as proposed so as to maintain consistency with the similar requirements set forth in the listing standards of the national securities exchanges and thereby minimize confusion in the application of this requirement.

Based on questions it has received from covered institutions and its experience in administering the criteria set forth the existing guidelines 28 and 29 regarding audit committee member independence, the FDIC concluded that these guidelines did not provide sufficient guidance for institutions to determine the independence of a director for the purposes of serving on an institution's audit committee. Therefore, the FDIC's experience contradicts the views of the commenter who asserted that the existing guidelines provide sufficient guidance.

The FDIC acknowledges that some community banks may encounter challenges in accomplishing and maintaining audit committee member independence. In recognition of these challenges, the FDIC amended the audit committee provisions of part 363 in 2005 to allow a minority of the outside directors who serve on the audit committee of covered institutions with less than $1 billion in total assets not to be independent of management. After reviewing the criteria listed in proposed guideline 28 as they would be modified as discussed above, the FDIC believes that the nature and types of relationships included in the list represent a reasonable framework for evaluating whether outside directors who are candidates for the audit committees of covered institutions of all sizes, both public and nonpublic, are independent of management. Of particular note, the criteria include a $100,000 limit on certain forms of direct and indirect compensation to a director or immediate family members. In

contrast, the SEC's and the national securities exchanges' rules currently limit the compensation of audit committee members to fees received as a director and audit committee member and prohibit all other compensation, direct and indirect. The FDIC chose not to impose this prohibition, which applies to audit committee members of certain public companies, on all insured institutions subject to part 363. The absence of this prohibition on compensation from the criteria in guideline 28 should benefit nonpublic community institutions subject to part 363. Similarly, the removal of the 10 percent stock ownership limit from the audit committee independence criteria should benefit community institutions. Therefore, the FDIC believes that the proposed amendments to guideline 28, as modified in response to comments, will provide institutions' boards of directors with appropriate guidance and sufficient flexibility for establishing their institutions' criteria for making ''independent of management'' determinations for audit committee members.

In light of the revisions to guideline 28 regarding the criteria for determining an audit committee member's independence, boards of directors and audit committee members of covered institutions are reminded that under part 363 the selection of a director to serve as an audit committee member is basically a three step process. The first step is to determine which of the composition requirements set forth in § 363.5(a)(1) and (2) are applicable to the institution's audit committee. The second step is to determine if each director who is to serve on the audit committee is an ''outside director'' as defined in § 363.5(a)(3). The third step is to determine if each ''outside director'' is independent of management in accordance with the provisions of guideline 28.

3. Audit Committee Duties

According to section 36(g)(1)(B) of the FDI Act and § 363.5(a), an audit committee's duties include reviewing the basis for the part 363 Annual Report with both management and the independent public accountant. Guideline 31 further provides that the audit committee's duties should be appropriate to the size of the institution and the complexity of its operations and it identifies additional duties that could be appropriate for the audit committee. These additional duties include discussing with management the selection and termination of the institution's independent public accountant. In addition, guideline 26 provides that, before engaging an independent public accountant, an institution should review and satisfy itself that the accountant is in compliance with the required qualifications set forth in guidelines 13 through 15, including the accountant's independence and receipt of a peer review.

Under section 301 of SOX, the audit committee of each public company listed on a national securities exchange or association must be responsible for the appointment, compensation, and oversight of the accounting firm engaged to prepare or issue an audit report or perform related work. As the SEC noted when it adopted its final rule implementing section 301, ''the auditing process may be compromised when a company's outside auditors view their responsibility as serving the company's management rather than its full board of directors or audit committee. This may occur if the auditor views management as the employer with hiring, firing and compensating powers. Under these conditions, the auditor may not have the appropriate incentive to raise concerns and conduct an objective review. * * * One way to help promote auditor independence, then, is for the auditor to be hired, evaluated and, if necessary, terminated by the audit committee.'' Because the intent and purpose of section 36 of the FDI Act is the early identification of needed improvements in financial management, it is critical for the accountants that perform audit and attestation services for insured depository institutions subject to section 36 to have an appropriate incentive to raise concerns and conduct an objective review. In this regard, the FDIC believes it is a sound corporate governance practice for an institution's audit committee, rather than its management, to be responsible for the appointment, compensation, and oversight of the accountant, regardless of whether the institution is a public company.

Therefore, the FDIC proposed to amend § 363.5(a), *Composition and Duties,* and guideline 31, *Duties,* to specify that, in addition to reviewing with management and the independent public accountant the basis for the reports issued under part 363, the duties of the audit committee include the appointment, compensation, and oversight of the independent public accountant who performs services required under part 363. In order to discharge these duties with respect to the independent public accountant, the audit committee should also review and satisfy itself as to the independent public accountant's compliance with the independence, peer review, and other qualifications under part 363. Additionally, the audit committee should be familiar with and ensure management's compliance with the requirement to file notices concerning the engagement, resignation, or dismissal of an independent public accountant. The FDIC proposed to include these duties in guideline 31.

Three commenters expressed support for the proposed amendments regarding the duties of the audit committee and stated that it represents a best practice regardless of an entity's asset size. However, one commenter, who was not supportive of the proposed amendments, recommended that the proposal be revised to remove the mandate for the audit committee to appoint and oversee the independent accountants in cases where the bank is privately-owned, more than 80 percent of the voting shares are owned by a sole owner or the principal owner's immediate family, the shareholders authorize procedures to be followed with respect to the appointment and oversight of the independent accountants, and the bank has a Uniform Financial Institutions Rating of 1 or 2. This commenter also stated that while appointing the independent accountant is expected to be normal for an audit committee of a publicly-owned company, the value for a privately-owned company is less clear. Additionally, this commenter stated that banks that are wholly owned by a single or a few shareholders, who are all immediate family members, do not need a separate board committee to do what they can do directly and that the mandate for a separate audit committee in these cases adds nothing to safety and soundness but adds additional bureaucracy and cost to the bank.

Although the FDIC has considered these comments, this commenter's concerns, in essence, relate to the requirement for covered institutions, particularly for those that are privately-owned, to establish independent audit committees. In response, the FDIC notes that section 36(g) of the FDI Act requires each institution to which section 36 applies to have an independent audit committee made up of outside directors who are independent of management. Consequently, the FDIC lacks the rulemaking authority to permit a covered institution not to have an independent audit committee or to permit a covered institution's entire board of directors to act as an audit committee based on the nature of the institution's ownership. In this regard, in enacting section 36, Congress recognized the significant public interest in sound financial management

and controls at covered institutions, including the important role of an independent audit committee, regardless of their ownership structure. Therefore, the FDIC has decided to adopt the proposed changes pertaining to audit committee duties without revision.

4. Independent Public Accountant Engagement Letters

In response to an observed increase in the types and frequency of provisions in financial institutions' external audit engagement letters that limit the auditors' liability, the Federal banking agencies issued an *Interagency Advisory on the Unsafe and Unsound Use of Limitation of Liability Provisions in External Audit Engagement Letters* (Interagency Advisory) in February 2006.[11] When they issued the Interagency Advisory, the agencies stated their belief that when institutions agree to limit their external auditors' liability in provisions in engagement letters, such provisions may weaken the external auditors' objectivity, impartiality, and performance, which may reduce the reliability of audits and thereby raise safety and soundness concerns. The reliability of audits is central to achieving the intent and purpose of section 36 of the FDI Act. Therefore, the FDIC proposed to add § 363.5(c), *Independent Public Accountant Engagement Letters,* and amend guideline 31, *Duties,* to incorporate the principal provisions of the Interagency Advisory.

As proposed, § 363.5(c) and guideline 31 would require the audit committee to ensure that audit engagement letters and any related agreements with the independent public accountant for services to be performed under part 363 do not contain any limitation of liability provisions that: (1) Indemnify the independent public accountant against claims made by third parties; (2) hold harmless or release the independent public accountant from liability for claims or potential claims that might be asserted by the client insured depository institution, other than claims for punitive damages; or (3) limit the remedies available to the client insured depository institution. Consistent with the Interagency Advisory, the proposed amendment would not preclude the use of alternative dispute resolution agreements and jury trial waivers. Four commenters expressed support for these proposed amendments to part 363. One of these commenters viewed this audit committee duty as a best practice. The FDIC is adopting these amendments as proposed.

5. Transition Period for Forming and Restructuring Audit Committees

When an insured depository institution first exceeds the $500 million total assets threshold and becomes subject to part 363, particularly an institution with few shareholders, the FDIC has observed that, in some cases, such an institution encounters difficulty in satisfying the requirements governing the composition of the independent audit committee. If the board of directors lacks a sufficient number of outside directors who are independent of management to serve on the audit committee, the board members must identify and attract qualified individuals in their community who would be willing to become directors and audit committee members and who would be ''independent of management.'' The lack of guidance in part 363 on the amount of time in which an institution must bring its audit committee into compliance with the requirements governing its composition when an institution first becomes subject to part 363 further complicates this process. This lack of guidance on the time frame for attaining compliance also affects the other two asset-size thresholds applicable to audit committee composition.

To provide both clarity and regulatory relief, the FDIC proposed to replace outdated guideline 35, which dealt with compliance with the audit committee requirements of part 363 when the regulation took effect in 1993, with a revised guideline 35, *Transition Period for Forming and Restructuring Audit Committees.* As proposed, guideline 35 would provide a one-year transition period for forming or restructuring the audit committee when an institution first becomes subject to part 363, when an institution's assets first reach the $1 billion asset-size threshold, and when an institution's assets first reach the $3 billion asset-size threshold. The proposed revised guideline would state that, when an institution first crosses one of these three thresholds based on its total assets at the beginning of its fiscal year, no regulatory action would be taken if the institution forms or restructures its audit committee to comply with the applicable requirements governing the composition of the committee by the end of that fiscal year, provided the institution complied with any applicable audit committee requirements for its preceding fiscal year. The FDIC has also revised guideline 35 to clarify that, when an institution first becomes subject to part 363, this one-year transition period extends to the requirement for an institution's board of directors to develop a set of written criteria for determining whether a director who is to serve on the audit committee is an outside director and is independent of management. Two commenters expressed support for the proposed revisions to guideline 35, which the FDIC is adopting as proposed.

F. Other Changes to Part 363

The FDIC also proposed to make other changes to part 363 to improve its clarity, readability, and consistency of language, and to correct or eliminate outdated terms, references, and provisions in the regulation and Appendix A. No comments on the proposal specifically addressed these other changes, which the FDIC is adopting as proposed.

G. Proposed Amendment to Part 308, Subpart U

In August 2003, pursuant to section 36(g)(4) of the FDI Act, the FDIC and the other Federal banking agencies jointly issued final rules governing their authority to take disciplinary actions against independent public accountants and accounting firms that perform audit and attestation services required by section 36.[12] Under the final rules, certain violations of law, negligent conduct, reckless violation of professional standards, or lack of qualifications to perform auditing services may be considered good cause to remove, suspend, or bar an accountant or firm from providing audit and attestation services for institutions subject to section 36. The rules also prohibit an accountant or accounting firm from performing these services if the accountant or firm has been removed, suspended, or debarred by one of the agencies, or if the SEC or PCAOB takes certain disciplinary actions against the accountant or firm. Additionally, the final rules require an accountant or an accounting firm to provide the agencies with written notification of the accountant's or firm's removal, suspension, or debarment. Part 308, subpart U, of the FDIC's regulations implements the requirements of section 36(g)(4) of the FDI Act for institutions that are supervised by the FDIC. The FDIC proposed to amend § 308.604(c) to identify the FDIC location where an accountant or accounting firm should file required notices of orders and

[11] *See* 71 FR 6847, February 9, 2006, and FDIC Financial Institution Letter (FIL) 13–2006, issued on the same date.

[12] *See* 68 FR 48256, April 13, 2003, and the FDIC's Financial Institution Letter (FIL) FIL–66–2003, dated August 18, 2003.

actions regarding removal, suspension, or debarment. The FDIC received no comments on this proposed amendment, which it is adopting as proposed.

IV. Final Rule

The FDIC has considered the comments received on its proposed amendments to part 363 and is adopting the amendments with the modifications and revisions that are more fully discussed in section III of this notice. The following is a summary of the most significant changes made to the proposal and incorporated into the final rule in response to the comments received:

- To reduce regulatory burden, the proposed requirement to file audit engagement letters within 15 days of acceptance by a covered institution was deleted.
- Guidance was added to the proposed requirement to disclose noncompliance with the designated safety and soundness laws and regulations—insider loans and dividend restrictions—to explain the extent of the required disclosure and to clarify that the disclosure applies only to noncompliance with these two designated categories of laws and regulations and not every safety and soundness law and regulation.
- To provide holding company subsidiary institutions that would not meet the proposed 75 percent of consolidated total assets threshold that permits, but does not require, compliance with part 363 at the holding company level sufficient time to comply at the institution level, the effective date of this threshold was delayed until fiscal years ending on or after June 15, 2010. Until then, institutions may continue to choose to satisfy the requirements of part 363 at a holding company level (to the extent currently permitted by part 363) whether or not the consolidated total assets of the insured depository institution subsidiaries of the holding company comprise 75 percent or more of the holding company's consolidated total assets at the beginning of its fiscal year.
- The proposed requirements regarding the disclosure of material weaknesses in internal control over financial reporting by management and the independent public accountant were clarified and revised for consistency with the applicable auditing standards. The final rule provides that management and the accountant must disclose those material weaknesses in internal control over financial reporting that each has identified that have not been corrected prior to the institution's fiscal year-end.
- The proposed requirements regarding the auditor's communications with audit committees were clarified and revised to explain that auditors must satisfy the communication requirements set forth in the professional standards and those set forth in part 363.
- The proposed requirement that auditors comply with the independence rules of the AICPA, the SEC, and the PCAOB was clarified to require compliance with the more restrictive requirement when a provision within one of the applicable independence standards differs from a provision addressing the same subject matter in one of the other independence standards.
- The proposal was revised to require only the public portions of PCAOB inspection reports to be filed with the FDIC.
- The provision of part 363 stating that an outside director who owns 10 percent or more of an institution's stock is not independent of management was revised to be consistent with the SEC's and the national securities exchanges' rules. Rather than being an automatic bar for considering an outside director to be independent of management, the rule was revised to require the institution's board of directors to document its determination as to whether an outside director's ownership of 10 percent or more of the institution's stock would interfere with the director's independent judgment in carrying out the responsibilities of an audit committee member.
- The proposed maximum level of compensation, other than director and committee fees, that an audit committee member may receive and be considered independent of management was increased from $60,000 to $100,000.
- Except for the part 363 Annual Report and the independent public accountants' peer review reports and inspection reports, which the FDI Act requires to be made publicly available, part 363 was revised to exempt all other reports and notifications filed under part 363 from public disclosure by the FDIC.

V. Effective and Compliance Dates

Except as noted below, the final rule is effective August 6, 2009.

The final rule applies to Part 363 Annual Reports with a filing deadline on or after the effective date of these amendments. Under the final rule, the filing deadline for Part 363 Annual Reports is 120 days after the end of its fiscal year for an institution that is neither a public company nor a subsidiary of a public company and 90 days after the end of its fiscal year for an institution that is a public company or a subsidiary of a public company.

To provide the boards of directors of institutions currently subject to part 363 sufficient time to comply with the new provision of guideline 27 regarding the development of an approved set of written criteria for determining whether a director who is to serve on the audit committee is an outside director and is independent of management, the FDIC has determined that it is appropriate to set a delayed compliance date of December 31, 2009, for developing and adopting these written criteria. However, this delayed compliance date does not apply to the other provisions of guideline 27 regarding the composition of the audit committee, which have not been substantively changed. More specifically, at least annually, the board of each institution should determine whether each existing or potential audit committee member is an outside director and, depending on an institution's size, whether the requisite number of existing and potential audit committee members are ''independent of management'' of the institution. Also, the minutes of the board of directors should contain the results of and the basis for its determinations with respect to each existing and potential audit committee member.

Also, to provide institutions that currently comply with part 363 at the holding level but would not meet the 75-percent-of-consolidated-total-assets threshold for eligibility to comply at the holding company level set forth in the final rule (§ 363.1(b)(1)(ii)) sufficient time to comply with this new requirement, the FDIC has determined that it is appropriate for the effective date of this provision of the final rule to be delayed until fiscal years ending on or after June 15, 2010. In this regard, § 363.1(b)(1) of the final rule not only specifically provides for this delayed effective date but it also states that, for fiscal years ending on or before June 14, 2010, a covered institution that is a subsidiary of a holding company may continue to satisfy the audited financial statements requirement of part 363 at a holding company level whether or not the covered institution's total assets (or the consolidated total assets of all of its parent holding company's insured depository institution subsidiaries) comprise 75 percent or more of the holding company's consolidated total assets at the beginning of the fiscal year.

Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA) requires an agency that is issuing a final rule to provide a final regulatory flexibility analysis or to certify that the rule will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 603(a) and 5 U.S.C. 603(b). Under regulations issued by the Small Business Administration (*see* 13 CFR 121.201), a small entity includes a bank holding company, commercial bank, or savings association with assets of $175 million or less (collectively, small banking organizations). This final rule would modify the audit and reporting requirements applicable to insured depository institutions with total assets of $500 million or more. The FDIC believes that this final rule will not have a significant economic impact on a substantial number of small entities because the final rule expressly exempts insured depository institutions with total assets of less than $500 million. In addition, the FDIC did not receive any comments that the proposal would have a direct significant impact on small banking organizations. Accordingly, the FDIC certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This final rule contains modifications to a collection of information that has been reviewed and approved by the Office of Management and Budget (OMB) under control number 3064–0113, pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 et seq.). The estimated annual burden for the revisions in this final rule is consistent with the burden estimate for those revisions in the proposed rule, taking into account a reduction in the number of respondents, and approved by OMB. The principal revisions that bear on the collection of information under part 363 are the extension of the filing deadline for the part 363 Annual Report from 90 to 120 days after the end of the fiscal year for an institution that is not a public company or a subsidiary of a public company, the replacement of 30-day extension requests (when an institution is confronted with extraordinary circumstances beyond its reasonable control) with late filing notices (regardless of the reason), the modification of the criteria governing the acceptability of reports at the holding company level rather than at the institution level, the expanded guidance on the content of the management report and the independent public accountant's internal control attestation report, the board of directors' use of an approved set of written criteria for determining whether an audit committee member is an outside director and is ''independent of management,'' and the new guidelines for institutions merged out of existence and for internal control reports for acquired businesses. It is anticipated that the overall effect of these changes will be a small burden increase for affected insured institutions.

The estimated reporting burden for the collection of information under part 363 is 83,324 hours per year.

Number of Respondents: 5,205.
Total Time per Response: 5.16 hrs.
Total Annual Responses: 16,163.
Total Annual Burden Hours: 83,324.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (Title II, Pub. L. 104–121) provides generally for agencies to report rules to Congress and the General Accountability Office (GAO) for review. The reporting requirement is triggered when a Federal agency issues a final rule. The FDIC will file the appropriate reports with Congress and the GAO as required by SBREFA. The Office of Management and Budget has determined that the rule does not constitute a ''major rule'' as defined by SBREFA.

List of Subjects

12 CFR Part 308

Administrative practice and procedure, Bank deposit insurance, Banks, Banking, Claims, Crime, Equal access to justice, Investigations, Lawyers, Penalties, State nonmember banks.

12 CFR Part 363

Accounting, Administrative practice and procedure, Banks, Banking, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Board of Directors of the FDIC amends title 12, chapter III, of the Code of Federal Regulations as follows:

PART 308—RULES OF PRACTICE AND PROCEDURE

Subpart U—Removal, Suspension, and Debarment of Accountants From Performing Audit Services

■ 1. The authority citation for part 308 continues to read as follows:

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 93(b), 164, 505, 1815(e), 1817, 1818, 1820, 1828, 1829, 1829b, 1831i, 1831m(g)(4), 1831o, 1831p–1, 1832(c), 1884(b), 1972, 3102, 3108(a), 3349, 3909, 4717; 15 U.S.C. 78(h) and (i), 78o–4(c), 78o–5, 78q–1, 78s, 78u, 78u–2, 78u–3 and 78w, 6801(b), 6805(b)(1); 28 U.S.C. 2461 note; 31 U.S.C. 330, 5321; 42 U.S.C. 4012a; Sec. 3100(s), Pub. L. 104–134, 110 Stat. 1321–358.

■ 2. Revise § 308.604(c) to read as follows:

§ 308.604 Notice of removal, suspension, or debarment.

* * * * *

(c) *Timing and place of notice.* Written notice required by this paragraph shall be given no later than 15 calendar days following the effective date of an order or action, or 15 calendar days before an accountant or accounting firm accepts an engagement to provide audit services, whichever date is earlier. The written notice must be filed by the independent public accountant or accounting firm with the FDIC, Accounting and Securities Disclosure Section, 550 17th Street, NW., Washington, DC 20429.

■ 3. Revise part 363 to read as follows:

PART 363—ANNUAL INDEPENDENT AUDITS AND REPORTING REQUIREMENTS

Sec.
363.0 OMB control number.
363.1 Scope and definitions.
363.2 Annual reporting requirements.
363.3 Independent public accountant.
363.4 Filing and notice requirements.
363.5 Audit committees.
Appendix A to Part 363—Guidelines and Interpretations
Appendix B to Part 363—Illustrative Management Reports

Authority: 12 U.S.C 1831m.

§ 363.0 OMB control number.

The information collection requirements in this part have been approved by the Office of Management and Budget under OMB control number 3064–0113.

§ 363.1 Scope and definitions.

(a) *Applicability.* This part applies to any insured depository institution with respect to any fiscal year in which its consolidated total assets as of the beginning of such fiscal year are $500 million or more. The requirements specified in this part are in addition to any other statutory and regulatory requirements otherwise applicable to an insured depository institution.

(b) *Compliance by subsidiaries of holding companies.* (1) For an insured depository institution that is a subsidiary of a holding company, the audited financial statements

requirement of § 363.2(a) may be satisfied:

(i) For fiscal years ending on or before June 14, 2010, by audited consolidated financial statements of the top-tier or any mid-tier holding company.

(ii) For fiscal years ending on or after June 15, 2010, by audited consolidated financial statements of the top-tier or any mid-tier holding company provided that the consolidated total assets of the insured depository institution (or the consolidated total assets of all insured depository institutions, regardless of size, if the holding company owns or controls more than one insured depository institution) comprise 75 percent or more of the consolidated total assets of this top-tier or mid-tier holding company as of the beginning of its fiscal year.

(2) The other requirements of this part for an insured depository institution that is a subsidiary of a holding company may be satisfied by the top-tier or any mid-tier holding company if the insured depository institution meets the criterion specified in § 363.1(b)(1) and if:

(i) The services and functions comparable to those required of the insured depository institution by this part are provided at this top-tier or mid-tier holding company level; and

(ii) The insured depository institution has as of the beginning of its fiscal year:

(A) Total assets of less than $5 billion; or

(B) Total assets of $5 billion or more and a composite CAMELS rating of 1 or 2.

(3) The appropriate Federal banking agency may revoke the exception in paragraph (b)(2) of this section for any institution with total assets in excess of $9 billion for any period of time during which the appropriate Federal banking agency determines that the institution's exemption would create a significant risk to the Deposit Insurance Fund.

(c) *Financial reporting.* For purposes of the management report requirement of § 363.2(b) and the internal control reporting requirement of § 363.3(b), ''financial reporting,'' at a minimum, includes both financial statements prepared in accordance with generally accepted accounting principles for the insured depository institution or its holding company and financial statements prepared for regulatory reporting purposes. For recognition and measurement purposes, financial statements prepared for regulatory reporting purposes shall conform to generally accepted accounting principles and section 37 of the Federal Deposit Insurance Act.

(d) *Definitions.* For purposes of this part, the following definitions apply:

(1) *AICPA* means the American Institute of Certified Public Accountants.

(2) *GAAP* means generally accepted accounting principles.

(3) *PCAOB* means the Public Company Accounting Oversight Board.

(4) *Public company* means an insured depository institution or other company that has a class of securities registered with the U.S. Securities and Exchange Commission or the appropriate Federal banking agency under Section 12 of the Securities Exchange Act of 1934 and *nonpublic company* means an insured depository institution or other company that does not meet the definition of a *public company.*

(5) *SEC* means the U.S. Securities and Exchange Commission.

(6) *SOX* means the Sarbanes-Oxley Act of 2002.

§ 363.2 Annual reporting requirements.

(a) *Audited financial statements.* Each insured depository institution shall prepare annual financial statements in accordance with GAAP, which shall be audited by an independent public accountant. The annual financial statements must reflect all material correcting adjustments necessary to conform with GAAP that were identified by the independent public accountant.

(b) *Management report.* Each insured depository institution annually shall prepare, as of the end of the institution's most recent fiscal year, a management report that must contain the following:

(1) A statement of management's responsibilities for preparing the institution's annual financial statements, for establishing and maintaining an adequate internal control structure and procedures for financial reporting, and for complying with laws and regulations relating to safety and soundness that are designated by the FDIC and the appropriate Federal banking agency;

(2) An assessment by management of the insured depository institution's compliance with such laws and regulations during such fiscal year. The assessment must state management's conclusion as to whether the insured depository institution has complied with the designated safety and soundness laws and regulations during the fiscal year and disclose any noncompliance with these laws and regulations; and

(3) For an insured depository institution with consolidated total assets of $1 billion or more as of the beginning of such fiscal year, an assessment by management of the effectiveness of such internal control structure and procedures as of the end of such fiscal year that must include the following:

(i) A statement identifying the internal control framework [1] used by management to evaluate the effectiveness of the insured depository institution's internal control over financial reporting;

(ii) A statement that the assessment included controls over the preparation of regulatory financial statements in accordance with regulatory reporting instructions including identification of such regulatory reporting instructions; and

(iii) A statement expressing management's conclusion as to whether the insured depository institution's internal control over financial reporting is effective. Management must disclose all material weaknesses in internal control over financial reporting, if any, that it has identified that have not been remediated prior to the insured depository institution's fiscal year-end. Management is precluded from concluding that the institution's internal control over financial reporting is effective if there are one or more material weaknesses.

(c) *Management report signatures.* Subject to the criteria specified in § 363.1(b):

(1) If the audited financial statements requirement specified in § 363.2(a) is satisfied at the insured depository institution level and the management report requirement specified in § 363.2(b) is satisfied in its entirety at the insured depository institution level, the management report must be signed by the chief executive officer and the chief accounting officer or chief financial officer of the insured depository institution;

(2) If the audited financial statements requirement specified in § 363.2(a) is satisfied at the holding company level and the management report requirement specified in § 363.2(b) is satisfied in its entirety at the holding company level, the management report must be signed by the chief executive officer and the chief accounting officer or chief financial officer of the holding company; and

(3) If the audited financial statements requirement specified in § 363.2(a) is

[1] For example, in the United States, the Committee of Sponsoring Organizations (COSO) of the Treadway Commission has published *Internal Control—Integrated Framework,* including an addendum on safeguarding assets. Known as the COSO report, this publication provides a suitable and available framework for purposes of management's assessment.

satisfied at the holding company level and:

(i) The management report requirement specified in § 363.2(b) is satisfied in its entirety at the insured depository institution level, or

(ii) One or more of the components of the management report specified in § 363.2(b) is satisfied at the holding company level and the remaining components of the management report are satisfied at the insured depository institution level, the management report must be signed by the chief executive officers and the chief accounting officers or chief financial officers of both the holding company and the insured depository institution and the management report must clearly indicate the level (institution or holding company) at which each of its components is being satisfied.

§ 363.3 Independent public accountant.

(a) *Annual audit of financial statements.* Each insured depository institution shall engage an independent public accountant to audit and report on its annual financial statements in accordance with generally accepted auditing standards or the PCAOB's auditing standards, if applicable, and section 37 of the Federal Deposit Insurance Act (12 U.S.C. 1831n). The scope of the audit engagement shall be sufficient to permit such accountant to determine and report whether the financial statements are presented fairly and in accordance with GAAP.

(b) *Internal control over financial reporting.* For each insured depository institution with total assets of $1 billion or more at the beginning of the institution's fiscal year, the independent public accountant who audits the institution's financial statements shall examine, attest to, and report separately on the assertion of management concerning the effectiveness of the institution's internal control structure and procedures for financial reporting. The attestation and report shall be made in accordance with generally accepted standards for attestation engagements or the PCAOB's auditing standards, if applicable. The accountant's report must not be dated prior to the date of the management report and management's assessment of the effectiveness of internal control over financial reporting. Notwithstanding the requirements set forth in applicable professional standards, the accountant's report must include the following:

(1) A statement identifying the internal control framework used by the independent public accountant, which must be the same as the internal control framework used by management, to evaluate the effectiveness of the insured depository institution's internal control over financial reporting;

(2) A statement that the independent public accountant's evaluation included controls over the preparation of regulatory financial statements in accordance with regulatory reporting instructions including identification of such regulatory reporting instructions; and

(3) A statement expressing the independent public accountant's conclusion as to whether the insured depository institution's internal control over financial reporting is effective. The report must disclose all material weaknesses in internal control over financial reporting that the independent public accountant has identified that have not been remediated prior to the insured depository institution's fiscal year-end. The independent public accountant is precluded from concluding that the insured depository institution's internal control over financial reporting is effective if there are one or more material weaknesses.

(c) *Notice by accountant of termination of services.* An independent public accountant performing an audit under this part who ceases to be the accountant for an insured depository institution shall notify the FDIC, the appropriate Federal banking agency, and any appropriate State bank supervisor in writing of such termination within 15 days after the occurrence of such event, and set forth in reasonable detail the reasons for such termination. The written notice shall be filed at the place identified in § 363.4(f).

(d) *Communications with audit committee.* In addition to the requirements for communications with audit committees set forth in applicable professional standards, the independent public accountant must report the following on a timely basis to the audit committee:

(1) All critical accounting policies and practices to be used by the insured depository institution,

(2) All alternative accounting treatments within GAAP for policies and practices related to material items that the independent public accountant has discussed with management, including the ramifications of the use of such alternative disclosures and treatments, and the treatment preferred by the independent public accountant, and

(3) Other written communications the independent public accountant has provided to management, such as a management letter or schedule of unadjusted differences.

(e) *Retention of working papers.* The independent public accountant must retain the working papers related to the audit of the insured depository institution's financial statements and, if applicable, the evaluation of the institution's internal control over financial reporting for seven years from the report release date, unless a longer period of time is required by law.

(f) *Independence.* The independent public accountant must comply with the independence standards and interpretations of the AICPA, the SEC, and the PCAOB. To the extent that any of the rules within any one of these independence standards (AICPA, SEC, and PCAOB) is more or less restrictive than the corresponding rule in the other independence standards, the independent public accountant must comply with the more restrictive rule.

(g) *Peer reviews and inspection reports.* (1) Prior to commencing any services for an insured depository institution under this part, the independent public accountant must have received a peer review, or be enrolled in a peer review program, that meets acceptable guidelines. Acceptable peer reviews include peer reviews performed in accordance with the AICPA's Peer Review Standards and inspections conducted by the PCAOB.

(2) Within 15 days of receiving notification that a peer review has been accepted or a PCAOB inspection report has been issued, or before commencing any audit under this part, whichever is earlier, the independent public accountant must file two copies of the most recent peer review report and the public portion of the most recent PCAOB inspection report, if any, accompanied by any letters of comments, response, and acceptance, with the FDIC, Accounting and Securities Disclosure Section, 550 17th Street, NW., Washington, DC 20429, if the report has not already been filed. The peer review reports and the public portions of the PCAOB inspection reports will be made available for public inspection by the FDIC.

(3) Within 15 days of the PCAOB making public a previously nonpublic portion of an inspection report, the independent public accountant must file two copies of the previously nonpublic portion of the inspection report with the FDIC, Accounting and Securities Disclosure Section, 550 17th Street, NW., Washington, DC 20429. Such previously nonpublic portion of the PCAOB inspection report will be made available for public inspection by the FDIC.

§ 363.4 Filing and notice requirements.

(a) *Part 363 Annual Report.* (1) Each insured depository institution shall file with each of the FDIC, the appropriate Federal banking agency, and any appropriate State bank supervisor, two copies of its Part 363 Annual Report. A Part 363 Annual Report must contain audited comparative annual financial statements, the independent public accountant's report thereon, a management report, and, if applicable, the independent public accountant's attestation report on management's assessment concerning the institution's internal control structure and procedures for financial reporting as required by §§ 363.2(a), 363.3(a), 363.2(b), and 363.3(b), respectively.

(2) Subject to the criteria specified in § 363.1(b), each insured depository institution with consolidated total assets of less than $1 billion as of the beginning of its fiscal year that is required to file, or whose parent holding company is required to file, management's assessment of the effectiveness of internal control over financial reporting with the SEC or the appropriate Federal banking agency in accordance with section 404 of SOX must submit a copy of such assessment to the FDIC, the appropriate Federal banking agency, and any appropriate State bank supervisor with its Part 363 Annual Report as additional information. This assessment will not be considered part of the institution's Part 363 Annual Report.

(3)(i) Each insured depository institution that is neither a public company nor a subsidiary of a public company that meets the criterion specified in § 363.1(b)(1) shall file its Part 363 Annual Report within 120 days after the end of its fiscal year.

(ii) Each insured depository institution that is a public company or a subsidiary of public company that meets the criterion specified in § 363.1(b)(1) shall file its Part 363 Annual Report within 90 days after the end of its fiscal year.

(b) *Public availability.* Except for the annual report in paragraph (a)(1) of this section and the peer reviews and inspection reports in § 363.3(g), which shall be available for public inspection, the FDIC has determined that all other reports and notifications required by this part are exempt from public disclosure by the FDIC.

(c) *Independent public accountant's letters and reports.* Except for the independent public accountant's reports that are included in its Part 363 Annual Report, each insured depository institution shall file with the FDIC, the appropriate Federal banking agency, and any appropriate State bank supervisor, a copy of any management letter or other report issued by its independent public accountant with respect to such institution and the services provided by such accountant pursuant to this part within 15 days after receipt.

Such reports include, but are not limited to:

(1) Any written communication regarding matters that are required to be communicated to the audit committee (for example, critical accounting policies, alternative accounting treatments discussed with management, and any schedule of unadjusted differences),

(2) Any written communication of significant deficiencies and material weaknesses in internal control required by the AICPA's or the PCAOB's auditing standards;

(3) For institutions with total assets of less than $1 billion as of the beginning of their fiscal year that are public companies or subsidiaries of public companies that meet the criterion specified in § 363.1(b)(1), any independent public accountant's report on the audit of internal control over financial reporting required by section 404 of SOX and the PCAOB's auditing standards; and

(4) For all institutions that are public companies or subsidiaries of public companies that meet the criterion specified in § 363.1(b)(1), any independent public accountant's written communication of all deficiencies in internal control over financial reporting that are of a lesser magnitude than significant deficiencies required by the PCAOB's auditing standards.

(d) *Notice of engagement or change of accountants.* Each insured depository institution shall provide, within 15 days after the occurrence of any such event, written notice to the FDIC, the appropriate Federal banking agency, and any appropriate State bank supervisor of the engagement of an independent public accountant, or the resignation or dismissal of the independent public accountant previously engaged. The notice shall include a statement of the reasons for any such resignation or dismissal in reasonable detail.

(e) *Notification of late filing.* No extensions of time for filing reports required by § 363.4 shall be granted. An insured depository institution that is unable to timely file all or any portion of its Part 363 Annual Report or any other report or notice required by § 363.4 shall submit a written notice of late filing to the FDIC, the appropriate Federal banking agency, and any appropriate State bank supervisor. The notice shall disclose the institution's inability to timely file all or specified portions of its Part 363 Annual Report or any other report or notice and the reasons therefore in reasonable detail. The late filing notice shall also state the date by which the report or notice will be filed. The written notice shall be filed on or before the deadline for filing the Part 363 Annual Report or any other report or notice, as appropriate.

(f) *Place for filing.* The Part 363 Annual Report, any written notification of late filing, and any other report or notice required by § 363.4 should be filed as follows:

(1) *FDIC:* Appropriate *FDIC Regional or Area Office (Division of Supervision and Consumer Protection), i.e.,* the FDIC regional or area office in the FDIC region or area that is responsible for monitoring the institution or, in the case of a subsidiary institution of a holding company, the consolidated company. A filing made on behalf of several covered institutions owned by the same parent holding company should be accompanied by a transmittal letter identifying all of the institutions covered.

(2) *Office of the Comptroller of the Currency (OCC):* Appropriate OCC Supervisory Office.

(3) *Federal Reserve:* Appropriate Federal Reserve Bank.

(4) *Office of Thrift Supervision (OTS):* Appropriate OTS District Office.

(5) *State bank supervisor:* The filing office of the appropriate State bank supervisor.

§ 363.5 Audit committees.

(a) *Composition and duties.* Each insured depository institution shall establish an audit committee of its board of directors, the composition of which complies with paragraphs (a)(1), (2), and (3) of this section. The duties of the audit committee shall include the appointment, compensation, and oversight of the independent public accountant who performs services required under this part, and reviewing with management and the independent public accountant the basis for the reports issued under this part.

(1) Each insured depository institution with total assets of $1 billion or more as of the beginning of its fiscal year shall establish an independent audit committee of its board of directors, the members of which shall be outside directors who are independent of management of the institution.

(2) Each insured depository institution with total assets of $500 million or more but less than $1 billion

as of the beginning of its fiscal year shall establish an audit committee of its board of directors, the members of which shall be outside directors, the majority of whom shall be independent of management of the institution. The appropriate Federal banking agency may, by order or regulation, permit the audit committee of such an insured depository institution to be made up of less than a majority of outside directors who are independent of management, if the agency determines that the institution has encountered hardships in retaining and recruiting a sufficient number of competent outside directors to serve on the audit committee of the institution.

(3) An outside director is a director who is not, and within the preceding fiscal year has not been, an officer or employee of the institution or any affiliate of the institution.

(b) *Committees of large institutions.* The audit committee of any insured depository institution with total assets of more than $3 billion as of the beginning of its fiscal year shall include members with banking or related financial management expertise, have access to its own outside counsel, and not include any large customers of the institution. If a large institution is a subsidiary of a holding company and relies on the audit committee of the holding company to comply with this rule, the holding company's audit committee shall not include any members who are large customers of the subsidiary institution.

(c) *Independent public accountant engagement letters.* (1) In performing its duties with respect to the appointment of the institution's independent public accountant, the audit committee shall ensure that engagement letters and any related agreements with the independent public accountant for services to be performed under this part do not contain any limitation of liability provisions that:

(i) Indemnify the independent public accountant against claims made by third parties;

(ii) Hold harmless or release the independent public accountant from liability for claims or potential claims that might be asserted by the client insured depository institution, other than claims for punitive damages; or

(iii) Limit the remedies available to the client insured depository institution.

(2) Alternative dispute resolution agreements and jury trial waiver provisions are not precluded from engagement letters provided that they do not incorporate any limitation of liability provisions set forth in paragraph (c)(1) of this section.

Appendix A to Part 363—Guidelines and Interpretations

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Introduction

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Introduction

Congress added section 36, ''Early Identification of Needed Improvements in Financial Management'' (section 36), to the Federal Deposit Insurance Act (FDI Act) in 1991.

The FDIC Board of Directors adopted 12 CFR part 363 of its rules and regulations (the Rule) to implement those provisions of section 36 that require rulemaking. The FDIC also approved these ''Guidelines and Interpretations'' (the Guidelines) and directed that they be published with the Rule to facilitate a better understanding of, and full compliance with, the provisions of section 36.

Although not contained in the Rule itself, some of the guidance offered restates or refers to statutory requirements of section 36 and is therefore mandatory. If that is the case, the statutory provision is cited.

Furthermore, upon adopting the Rule, the FDIC reiterated its belief that every insured depository institution, regardless of its size or charter, should have an annual audit of its financial statements performed by an independent public accountant, and should establish an audit committee comprised entirely of outside directors.

The following Guidelines reflect the views of the FDIC concerning the interpretation of section 36. The Guidelines are intended to assist insured depository institutions (institutions), their boards of directors, and their advisors, including their independent public accountants and legal counsel, and to clarify section 36 and the Rule. It is recognized that reliance on the Guidelines may result in compliance with section 36 and the Rule which may vary from institution to institution. Terms which are not explained in the Guidelines have the meanings given them in the Rule, the FDI Act, or professional accounting and auditing literature.

Scope of Rule and Definitions (§ 363.1)

1. *Measuring Total Assets.* To determine whether this part applies, an institution should use total assets as reported on its most recent Report of Condition (Call Report) or Thrift Financial Report (TFR), the date of which coincides with the end of its preceding fiscal year. If its fiscal year ends on a date other than the end of a calendar quarter, it should use its Call Report or TFR for the quarter end immediately preceding the end of its fiscal year.

2. *Insured Branches of Foreign Banks.* Unlike other institutions, insured branches of foreign banks are not separately incorporated or capitalized. To determine whether this part applies, an insured branch should measure claims on non-related parties reported on its Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks (form FFIEC 002).

3. *Compliance by Holding Company Subsidiaries.* Audited consolidated financial statements and other reports or notices required by this part that are submitted by a holding company for any subsidiary institution should be accompanied by a cover letter identifying all subsidiary institutions subject to part 363 that are included in the holding company's submission. When submitting a Part 363 Annual Report, the

cover letter should identify all subsidiary institutions subject to part 363 included in the consolidated financial statements and state whether the other annual report requirements (*i.e.,* management's statement of responsibilities, management's assessment of compliance with designated safety and soundness laws and regulations, and, if applicable, management's assessment of the effectiveness of internal control over financial reporting and the independent public accountant's attestation report on management's internal control assessment) are being satisfied for these institutions at the holding company level or at the institution level. An institution filing holding company consolidated financial statements as permitted by § 363.1(b)(1) also may report on changes in its independent public accountant on a holding company basis. An institution that does not meet the criteria in § 363.1(b)(2) must satisfy the remaining provisions of this part on an individual institution basis and maintain its own audit committee. Subject to the criteria in §§ 363.1(b)(1) and (2), a multi-tiered holding company may satisfy all of the requirements of this part at the top-tier or any mid-tier holding company level.

4. *Comparable Services and Functions.* Services and functions will be considered ''comparable'' to those required by this part if the holding company:

(a) Prepares reports used by the subsidiary institution to meet the requirements of this part;

(b) Has an audit committee that meets the requirements of this part appropriate to its largest subsidiary institution; and

(c) Prepares and submits management's assessment of compliance with the Designated Laws and Regulations defined in guideline 7A and, if applicable, management's assessment of the effectiveness of internal control over financial reporting based on information concerning the relevant activities and operations of those subsidiary institutions within the scope of the Rule.

4A. *Financial Statements Prepared for Regulatory Reporting Purposes.* (a) As set forth in § 363.3(c) of this part, ''financial reporting,'' at a minimum, includes both financial statements prepared in accordance with generally accepted accounting principles for the insured depository institution or its holding company and financial statements prepared for regulatory reporting purposes. More specifically, financial statements prepared for regulatory reporting purposes include the schedules equivalent to the basic financial statements that are included in an insured depository institution's or its holding company's appropriate regulatory report (for example, Schedules RC, RI, and RI–A in the Consolidated Reports of Condition and Income (Call Report) for an insured bank; and Schedules SC and SO, and the Summary of Changes in Equity Capital section in Schedule SI in the Thrift Financial Report (TFR) for an insured thrift institution). For recognition and measurement purposes, financial statements prepared for regulatory reporting purposes shall conform to generally accepted accounting principles and section 37 of the Federal Deposit Insurance Act.

(b) Financial statements prepared for regulatory reporting purposes do not include regulatory reports prepared by a non-bank subsidiary of a holding company or an institution. For example, if a bank holding company or an insured depository institution owns an insurance subsidiary, financial statements prepared for regulatory reporting purposes would not include any regulatory reports that the insurance subsidiary is required to submit to its appropriate insurance regulatory agency.

Annual Reporting Requirements (§ 363.2)

5. *Annual Financial Statements.* Each institution (other than an insured branch of a foreign bank) should prepare comparative annual consolidated financial statements (balance sheets and statements of income, changes in equity capital, and cash flows, with accompanying footnote disclosures) in accordance with GAAP for each of its two most recent fiscal years. Statements for the earlier year may be presented on an unaudited basis if the institution was not subject to this part for that year and audited statements were not prepared.

5A. *Institutions Merged Out of Existence.* An institution that is merged out of existence after the end of its fiscal year, but before the deadline for filing its Part 363 Annual Report (120 days after the end of its fiscal year for an institution that is neither a public company nor a subsidiary of a public company that meets the criterion specified in § 363.1(b)(1), and 90 days after the end of its fiscal year for an institution that is a public company or a subsidiary of a public company that meets the criterion specified in § 363.1(b)(1)), is not required to file a Part 363 Annual Report for the last fiscal year of its existence.

6. *Holding Company Statements.* Subject to the criterion specified in § 363.1(b)(1), subsidiary institutions may file copies of their holding company's audited financial statements filed with the SEC or prepared for their FR Y–6 Annual Report under the Bank Holding Company Act of 1956 to satisfy the audited financial statements requirement of § 363.2(a).

7. *Insured Branches of Foreign Banks.* An insured branch of a foreign bank should satisfy the financial statements requirement by filing one of the following for each of its two most recent fiscal years:

(a) Audited balance sheets, disclosing information about financial instruments with off-balance-sheet risk;

(b) Schedules RAL and L of form FFIEC 002, prepared and audited on the basis of the instructions for its preparation; or

(c) With written approval of the appropriate Federal banking agency, consolidated financial statements of the parent bank.

7A. *Compliance with Designated Laws and Regulations.* The designated laws and regulations are the Federal laws and regulations concerning loans to insiders and the Federal and, if applicable, State laws and regulations concerning dividend restrictions (the Designated Laws and Regulations). Table 1 to this Appendix A lists the designated Federal laws and regulations pertaining to insider loans and dividend restrictions (but not the State laws and regulations pertaining to dividend restrictions) that are applicable to each type of institution.

8. *Management Report.* Management should perform its own investigation and review of compliance with the Designated Laws and Regulations and, if required, the effectiveness of internal control over financial reporting. Management should maintain records of its determinations and assessments until the next Federal safety and soundness examination, or such later date as specified by the FDIC or the appropriate Federal banking agency. Management should provide in its assessment of the effectiveness of internal control over financial reporting, or supplementally, sufficient information to enable the accountant to report on its assertions. The management report of an insured branch of a foreign bank should be signed by the branch's managing official if the branch does not have a chief executive officer or a chief accounting or financial officer.

8A. *Management's Reports on Internal Control Over Financial Reporting Under Part 363 and Section 404 of SOX.* An institution with $1 billion or more in total assets as of the beginning of its fiscal year that is subject to both part 363 and the SEC's rules implementing section 404 of SOX (as well as a public holding company permitted under the holding company exception in § 363.1(b)(2) to file an internal control report on behalf of one or more subsidiary institutions with $1 billion or more in total assets) can choose either of the following two options for filing management's report on internal control over financial reporting.

(i) Management can prepare two separate reports on the institution's or the holding company's internal control over financial reporting to satisfy the FDIC's part 363 requirements and the SEC's section 404 requirements; or

(ii) Management can prepare a single report on internal control over financial reporting provided that it satisfies all of the FDIC's part 363 requirements and all of the SEC's section 404 requirements.

8B. *Internal Control Reports and Part 363 Annual Reports for Acquired Businesses.* Generally, the FDIC expects management's and the related independent public accountant's report on an institution's internal control over financial reporting to include controls at an institution in its entirety, including all of its consolidated entities. However, it may not always be possible for management to conduct an assessment of the internal control over financial reporting of an acquired business in the period between the consummation date of the acquisition and the due date of management's internal control assessment.

(a) In such instances, the acquired business's internal control structure and procedures for financial reporting may be excluded from management's assessment report and the accountant's attestation report on internal control over financial reporting. However, the FDIC expects management's assessment report to identify the acquired business, state that the acquired business is excluded, and indicate the significance of this business to the institution's consolidated financial statements. Notwithstanding management's exclusion of the acquired business's internal control from its

assessment, management should disclose any material change to the institution's internal control over financial reporting due to the acquisition of this business. Also, management may not omit the assessment of the acquired business's internal control from more than one annual part 363 assessment report on internal control over financial reporting. When the acquired business's internal control over financial reporting is excluded from management's assessment, the independent public accountant may likewise exclude this acquired business's internal control over financial reporting from the accountant's evaluation of internal control over financial reporting.

(b) If the acquired business is or has a consolidated subsidiary that is an insured depository institution subject to part 363 and the institution is not merged out of existence before the deadline for filing its Part 363 Annual Report (120 days after the end of its fiscal year for an institution that is neither a public company nor a subsidiary of a public company that meets the criterion specified in § 363.1(b)(1), and 90 days after the end of its fiscal year for an institution that is a public company or a subsidiary of public company that meets the criterion specified in § 363.1(b)(1)), the acquired institution must continue to comply with all of the applicable requirements of part 363, including filing its Part 363 Annual Report.

8C. *Management's Disclosure of Noncompliance With the Designated Laws and Regulations.* Management's disclosure of noncompliance, if any, with the Designated Laws and Regulations should separately indicate the number of instances or frequency of noncompliance with the Federal laws and regulations pertaining to insider loans and the Federal (and, if applicable, State) laws and regulations pertaining to dividend restrictions. The disclosure is not required to specifically identify by name the individuals (*e.g.,* officers or directors) who were responsible for or were the subject of any such noncompliance. However, the disclosure should include appropriate qualitative and quantitative information to describe the nature, type, and severity of the noncompliance and the dollar amount of the insider loan(s) or dividend(s) involved. Similar instances of noncompliance may be aggregated as to number of instances and quantified as to the dollar amounts or the range of dollar amounts of insider loans and/or dividends for which noncompliance occurred. Management may also wish to describe any corrective actions taken in response to the instances of noncompliance as well any controls or procedures that are being developed or that have been developed and implemented to prevent or detect and correct future instances of noncompliance on a timely basis.

9. *Safeguarding of Assets. ''Safeguarding of assets,''* as the term relates to internal control policies and procedures regarding financial reporting and which has precedent in accounting and auditing literature, should be encompassed in the management report and the independent public accountant's attestation discussed in guideline 18. Testing the existence of and compliance with internal controls on the management of assets, including loan underwriting and documentation, represents a reasonable implementation of section 36. The FDIC expects such internal controls to be encompassed by the assertion in the management report, but the term ''safeguarding of assets'' need not be specifically stated. The FDIC does not require the accountant to attest to the adequacy of safeguards, but does require the accountant to determine whether safeguarding policies exist.[2]

10. *Standards for Internal Control.* The management of each insured depository institution with $1 billion or more in total assets as of the beginning of its fiscal year should base its assessment of the effectiveness of the institution's internal control over financial reporting on a suitable, recognized control framework established by a body of experts that followed due-process procedures, including the broad distribution of the framework for public comment. In addition to being available to users of management's reports, a framework is suitable only when it:

- Is free from bias;
- Permits reasonably consistent qualitative and quantitative measurements of an institution's internal control over financial reporting;
- Is sufficiently complete so that those relevant factors that would alter a conclusion about the effectiveness of an institution's internal control over financial reporting are not omitted; and
- Is relevant to an evaluation of internal control over financial reporting.

In the United States, *Internal Control—Integrated Framework,* including its addendum on safeguarding assets, which was published by the Committee of Sponsoring Organizations of the Treadway Commission, and is known as the COSO report, provides a suitable and recognized framework for purposes of management's assessment. Other suitable frameworks have been published in other countries or may be developed in the future. Such other suitable frameworks may be used by management and the institution's independent public accountant in assessments, attestations, and audits of internal control over financial reporting.

11. *Service Organizations.* Although service organizations should be considered in determining if internal control over financial reporting is effective, an institution's independent public accountant, its management, and its audit committee should exercise independent judgment concerning that determination. Onsite reviews of service organizations may not be necessary to prepare the report required by the Rule, and the FDIC does not intend that the Rule establish any such requirement.

12. [Reserved.]

Role of Independent Public Accountant (§ 363.3)

13. *General Qualifications.* To provide audit and attest services to insured depository institutions, an independent public accountant should be registered or licensed to practice as a public accountant, and be in good standing, under the laws of the State or other political subdivision of the United States in which the home office of the institution (or the insured branch of a foreign bank) is located. As required by section 36(g)(3)(A)(i), the accountant must agree to provide copies of any working papers, policies, and procedures relating to services performed under this part.

14. [Reserved.]

15. *Peer Review Guidelines.* The following peer review guidelines are acceptable:

(a) The external peer review should be conducted by an organization independent of the accountant or firm being reviewed, as frequently as is consistent with professional accounting practices;

(b) The peer review (other than a PCAOB inspection) should be generally consistent with AICPA Peer Review Standards; and

(c) The review should include, if available, at least one audit on an insured depository institution or consolidated depository institution holding company.

16. [Reserved.]

17. *Information to be Provided to the Independent Public Accountant.* Attention is directed to section 36(h) which requires institutions to provide specified information to their accountants. An institution also should provide its accountant with copies of any notice that the institution's capital category is being changed or reclassified under section 38 of the FDI Act, and any correspondence from the appropriate Federal banking agency concerning compliance with this part.

18. *Attestation Report and Management Letters.* The independent public accountant should provide the institution with any management letter and, if applicable, an internal control attestation report (as required by section 36(c)(1)) at the conclusion of the audit. The independent public accountant's attestation report on internal control over financial reporting must specifically include a statement as to regulatory reporting. If a holding company subsidiary relies on its holding company's management report to satisfy the Part 363 Annual Report requirements, the accountant may attest to and report on the management's assertions in one report, without reporting separately on each subsidiary covered by the Rule. The FDIC has determined that management letters are exempt from public disclosure.

18A. *Internal Control Attestation Standards for Independent Auditors.* (a) § 363.3(b) provides that the independent public accountant's attestation and report on management's assertion concerning the effectiveness of an institution's internal control structure and procedures for financial reporting shall be made in accordance with generally accepted standards for attestation engagements or the PCAOB's auditing standards, if applicable. The standards that should be followed by the institution's independent public accountant concerning internal control over financial reporting for institutions with $1 billion or more in total assets can be summarized as follows:

(1) For an insured institution that is neither a public company nor a subsidiary of a

[2] It is management's responsibility to establish policies concerning underwriting and asset management and to make credit decisions. The auditor's role is to test compliance with management's policies relating to financial reporting.

public company, its independent public accountant need only follow the AICPA's attestation standards.

(2) For an insured institution that is a public company that is required to comply with the auditor attestation requirement of section 404 of SOX, its independent public accountant should follow the PCAOB's auditing standards.

(3) For an insured institution that is a public company but is not required to comply with the auditor attestation requirement of section 404 of SOX, its independent public accountant is not required to follow the PCAOB's auditing standards. In this case, the accountant need only follow the AICPA's attestation standards.

(4) For an insured institution that is a subsidiary of a public company that is required to comply with the auditor attestation requirement of section 404 of SOX, but is not itself a public company, the institution and its independent public accountant have flexibility in complying with the internal control requirements of part 363. If the conditions specified in § 363.1(b)(2) are met, management and the independent public accountant may choose to report on internal control over financial reporting at the consolidated holding company level. In this situation, the independent public accountant's work would be performed for the public company in accordance with the PCAOB's auditing standards. Alternatively, the institution may choose to comply with the internal control reporting requirements of part 363 at the institution level and its independent public accountant could follow the AICPA's attestation standards.

(b) If an independent public accountant need only follow the AICPA's attestation standards, the accountant and the insured institution may instead agree to have the internal control attestation performed under the PCAOB's auditing standards.

19. *Reviews With Audit Committee and Management.* The independent public accountant should meet with the institution's audit committee to review the accountant's reports required by this part before they are filed. It also may be appropriate for the accountant to review its findings with the institution's board of directors and management.

20. *Notice of Termination.* The notice of termination required by § 363.3(c) should state whether the independent public accountant agrees with the assertions contained in any notice filed by the institution under § 363.4(d), and whether the institution's notice discloses all relevant reasons for the accountant's termination. Subject to the criterion specified in § 363.1(b)(1) regarding compliance with the audited financial statements requirement at the holding company level, the independent public accountant for an insured depository institution that is a public company and files reports with its appropriate Federal banking agency, or is a subsidiary of a public company that files reports with the SEC, may submit the letter it furnished to management to be filed with the institution's or the holding company's current report (*e.g.,* SEC Form 8–K) concerning a change in accountant to satisfy the notice requirements of § 363.3(c). Alternatively, if the independent public accountant confirms that management has filed a current report (*e.g.,* SEC Form 8–K) concerning a change in accountant that satisfies the notice requirements of § 363.4(d) and includes an independent public accountant's letter that satisfies the requirements of § 363.3(c), the independent public accountant may rely on the current report (*e.g.,* SEC Form 8–K) filed with the FDIC by management concerning a change in accountant to satisfy the notice requirements of § 363.3(c).

21. *Reliance on Internal Auditors.* Nothing in this part or this Appendix is intended to preclude the ability of the independent public accountant to rely on the work of an institution's internal auditor.

Filing and Notice Requirements (§ 363.4)

22. [Reserved.]

23. *Notification of Late Filing.* (a) An institution's submission of a written notice of late filing does not cure the requirement to timely file the Part 363 Annual Report or other reports or notices required by § 363.4. An institution's failure to timely file is considered an apparent violation of part 363.

(b) If the late filing notice submitted pursuant to § 363.4(e) relates only to a portion of a Part 363 Annual Report or any other report or notice, the insured depository institution should file the other components of the report or notice within the prescribed filing period together with a cover letter that indicates which components of its Part 363 Annual Report or other report or notice are omitted. An institution may combine the written late filing notice and the cover letter into a single notice that is submitted together with the other components of the report or notice that are being timely filed.

24. *Public Availability.* Each institution's Part 363 Annual Report should be available for public inspection at its main and branch offices no later than 15 days after it is filed with the FDIC. Alternatively, an institution may elect to mail one copy of its Part 363 Annual Report to any person who requests it. The Part 363 Annual Report should remain available to the public until the Part 363 Annual Report for the next year is available. An institution may use its Part 363 Annual Report under this part to meet the annual disclosure statement required by 12 CFR 350.3, if the institution satisfies all other requirements of 12 CFR Part 350.

25. [Reserved.]

26. *Notices Concerning Accountants.* With respect to any selection, change, or termination of an independent public accountant, an institution's management and audit committee should be familiar with the notice requirements in § 363.4(d) and guideline 20, and management should send a copy of any notice required under § 363.4(d) to the independent public accountant when it is filed with the FDIC. An insured depository institution that is a public company and files reports required under the Federal securities laws with its appropriate Federal banking agency, or is a subsidiary of a public company that files such reports with the SEC, may use its current report (*e.g.,* SEC Form 8–K) concerning a change in accountant to satisfy the notice requirements of § 363.4(d) subject to the criterion of § 363.1(b)(1) regarding compliance with the audited financial statements requirement at the holding company level.

Audit Committees (§ 363.5)

27. *Composition.* The board of directors of each institution should determine whether each existing or potential audit committee member meets the requirements of section 36 and this part. To do so, the board of directors should maintain an approved set of written criteria for determining whether a director who is to serve on the audit committee is an outside director (as defined in § 363.5(a)(3)) and is independent of management. At least annually, the board of each institution should determine whether each existing or potential audit committee member is an outside director. In addition, at least annually, the board of an institution with $1 billion or more in total assets as of the beginning of its fiscal year should determine whether all existing and potential audit committee members are ''independent of management of the institution'' and the board of an institution with total assets of $500 million or more but less than $1 billion as of the beginning of its fiscal year should determine whether the majority of all existing and potential audit committee members are ''independent of management of the institution.'' The minutes of the board of directors should contain the results of and the basis for its determinations with respect to each existing and potential audit committee member. Because an insured branch of a foreign bank does not have a separate board of directors, the FDIC will not apply the audit committee requirements to such branch. However, any such branch is encouraged to make a reasonable good faith effort to see that similar duties are performed by persons whose experience is generally consistent with the Rule's requirements for an institution the size of the insured branch.

28. *''Independent of Management'' Considerations.* It is not possible to anticipate, or explicitly provide for, all circumstances that might signal potential conflicts of interest in, or that might bear on, an outside director's relationship to an insured depository institution and whether the outside director should be deemed ''independent of management.'' When assessing an outside director's relationship with an institution, the board of directors should consider the issue not merely from the standpoint of the director himself or herself, but also from the standpoint of persons or organizations with which the director has an affiliation. These relationships can include, but are not limited to, commercial, banking, consulting, charitable, and family relationships. To assist boards of directors in fulfilling their responsibility to determine whether existing and potential members of the audit committee are ''independent of management,'' paragraphs (a) through (d) of this guideline provide guidance for making this determination.

(a) If an outside director, either directly or indirectly, owns or controls, or has owned or

controlled within the preceding fiscal year, 10 percent or more of any outstanding class of voting securities of the institution, the institution's board of directors should determine, and document its basis and rationale for such determination, whether such ownership of voting securities would interfere with the outside director's exercise of independent judgment in carrying out the responsibilities of an audit committee member, including the ability to evaluate objectively the propriety of management's accounting, internal control, and reporting policies and practices. Notwithstanding the criteria set forth in paragraphs (b), (c), and (d) of this guideline, if the board of directors determines that such ownership of voting securities would interfere with the outside director's exercise of independent judgment, the outside director will not be considered ''independent of management.''

(b) The following list sets forth additional criteria that, at a minimum, a board of directors should consider when determining whether an outside director is ''independent of management.'' The board of directors may conclude that additional criteria are also relevant to this determination in light of the particular circumstances of its institution.

Accordingly, an outside director will not be considered ''independent of management'' if:

(1) The director serves, or has served within the last three years, as a consultant, advisor, promoter, underwriter, legal counsel, or trustee of or to the institution or its affiliates.

(2) The director has been, within the last three years, an employee of the institution or any of its affiliates or an immediate family member is, or has been within the last three years, an executive officer of the institution or any of its affiliates.

(3) The director has participated in the preparation of the financial statements of the institution or any of its affiliates at any time during the last three years.

(4) The director has received, or has an immediate family member who has received, during any twelve-month period within the last three years, more than $100,000 in direct and indirect compensation from the institution, its subsidiaries, and its affiliates for consulting, advisory, or other services other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service). Direct compensation also would not include compensation received by the director for former service as an interim chairman or interim chief executive officer.

(5) The director or an immediate family member is a current partner of a firm that performs internal or external auditing services for the institution or any of its affiliates; the director is a current employee of such a firm; the director has an immediate family member who is a current employee of such a firm and who participates in the firm's audit, assurance, or tax compliance practice; or the director or an immediate family member was within the last three years (but no longer is) a partner or employee of such a firm and personally worked on the audit of the insured depository institution or any of its affiliates within that time.

(6) The director or an immediate family member is, or has been within the last three years, employed as an executive officer of another entity where any of the present executive officers of the institution or any of its affiliates at the same time serves or served on that entity's compensation committee.

(7) The director is a current employee, or an immediate family member is a current executive officer, of an entity that has made payments to, or received payments from, the institution or any of its affiliates for property or services in an amount which, in any of the last three fiscal years, exceeds the greater of $200 thousand, or 5 percent of such entity's consolidated gross revenues. This would include payments made by the institution or any of its affiliates to not-for-profit entities where the director is an executive officer or where an immediate family member of the director is an executive officer.

(8) For purposes of paragraph (b) of this guideline:

(i) An ''immediate family member'' includes a person's spouse, parents, children, siblings, mothers and fathers-in-law, sons and daughters-in-law, brothers and sisters-in-law, and anyone (other than domestic employees) who shares such person's home.

(ii) The term affiliate of, or a person affiliated with, a specified person, means a person or entity that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

(iii) The term indirect compensation for consulting, advisory, or other services includes the acceptance of a fee for such services by a director's immediate family member or by an organization in which the director is a partner or principal that provides accounting, consulting, legal, investment banking, or financial advisory services to the institution, any of its subsidiaries, or any of its affiliates.

(iv) The terms direct and indirect compensation and payments do not include payments, such as dividends arising solely from investments in the institution's equity securities provided the same per share amounts are paid to all shareholders of that class; interest income from investments in the institution's deposit accounts and debt securities; loans from the institution that conform to all regulatory requirements applicable to such loans except that interest payments or other fees paid in association with such loans would be considered payments; and payments under non-discretionary charitable contribution matching programs.

(c) An insured depository institution that is a public company and a listed issuer (as defined in Rule 10A–3 of the Securities Exchange Act of 1934 (Exchange Act)), or is a subsidiary of a public company that meets the criterion specified in § 363.1(b)(1) and is a listed issuer, may choose to use the definition of audit committee member independence set forth in the listing standards applicable to the public institution or its public company parent for purposes of determining whether an outside director is ''independent of management.''

(d) All other insured depository institutions may choose to use the definition of audit committee member independence set forth in the listing standards of a national securities exchange that is registered with the SEC pursuant to section 6 of the Exchange Act or a national securities association that is registered with the SEC pursuant to section 15A(a) of the Exchange Act for purposes of determining whether an outside director is ''independent of management.''

29. [Reserved.]

30. *Holding Company Audit Committees.* (a) When an insured depository institution satisfies the requirements for the holding company exception specified in §§ 363.1(b)(1) and (2), the audit committee requirement of this part may be satisfied by the audit committee of the top-tier or any mid-tier holding company. Members of the audit committee of the holding company should meet all the membership requirements applicable to the largest subsidiary depository institution subject to part 363 and should perform all the duties of the audit committee of a subsidiary institution subject to part 363, even if the holding company directors are not directors of the institution.

(b) When an insured depository institution subsidiary with total assets of $1 billion or more as of the beginning of its fiscal year does not meet the requirements for the holding company exception specified in §§ 363.1(b)(1) and (2) or maintains its own separate audit committee to satisfy the requirements of this part, the members of the audit committee of the top-tier or any mid-tier holding company may serve on the audit committee of the subsidiary institution if they are otherwise independent of management of the subsidiary institution, and, if applicable, meet any other requirements for a large subsidiary institution covered by this part.

(c) When an insured depository institution with total assets of $500 million or more but less than $1 billion as of the beginning of its fiscal year does not meet the requirements for the holding company exception specified in §§ 363.1(b)(1) and (2) or maintains its own separate audit committee to satisfy the requirements of this part, the members of the audit committee of the top-tier or any mid-tier holding company may serve on the audit committee of the subsidiary institution provided a majority of the institution's audit committee members are independent of management of the subsidiary institution.

(d) Officers and employees of a top-tier or any mid-tier holding company may not serve on the audit committee of a subsidiary institution subject to part 363.

31. *Duties.* The audit committee should perform all duties determined by the institution's board of directors and it should maintain minutes and other relevant records of its meetings and decisions. The duties of the audit committee should be appropriate to the size of the institution and the complexity of its operations, and, at a minimum, should include the appointment, compensation, and oversight of the independent public accountant; reviewing with management and the independent public accountant the basis for their respective reports issued under

§§ 363.2(a) and (b) and §§ 363.3(a) and (b); reviewing and satisfying itself as to the independent public accountant's compliance with the required qualifications for independent public accountants set forth in §§ 363.3(f) and (g) and guidelines 13 through 16; ensuring that audit engagement letters comply with the provisions of § 363.5(c) before engaging an independent public accountant; being familiar with the notice requirements in § 363.4(d) and guideline 20 regarding the selection, change, or termination of an independent public accountant; and ensuring that management sends a copy of any notice required under § 363.4(d) to the independent public accountant when it is filed with the FDIC. Appropriate additional duties could include:

(a) Reviewing with management and the independent public accountant the scope of services required by the audit, significant accounting policies, and audit conclusions regarding significant accounting estimates;

(b) Reviewing with management and the accountant their assessments of the effectiveness of internal control over financial reporting, and the resolution of identified material weaknesses and significant deficiencies in internal control over financial reporting, including the prevention or detection of management override or compromise of the internal control system;

(c) Reviewing with management the institution's compliance with the Designated Laws and Regulations identified in guideline 7A;

(d) Discussing with management and the independent public accountant any significant disagreements between management and the independent public accountant; and

(e) Overseeing the internal audit function.

32. *Banking or Related Financial Management Expertise.* At least two members of the audit committee of a large institution shall have ''banking or related financial management expertise'' as required by section 36(g)(1)(C)(i). This determination is to be made by the board of directors of the insured depository institution. A person will be considered to have such required expertise if the person has significant executive, professional, educational, or regulatory experience in financial, auditing, accounting, or banking matters as determined by the board of directors. Significant experience as an officer or member of the board of directors or audit committee of a financial services company would satisfy these criteria. A person who has the attributes of an ''audit committee financial expert'' as set forth in the SEC's rules would also satisfy these criteria.

33. *Large Customers.* Any individual or entity (including a controlling person of any such entity) which, in the determination of the board of directors, has such significant direct or indirect credit or other relationships with the institution, the termination of which likely would materially and adversely affect the institution's financial condition or results of operations, should be considered a ''large customer'' for purposes of § 363.5(b).

34. *Access to Counsel.* The audit committee should be able to retain counsel at its discretion without prior permission of the institution's board of directors or its management. Section 36 does not preclude advice from the institution's internal counsel or regular outside counsel. It also does not require retaining or consulting counsel, but if the committee elects to do either, it also may elect to consider issues affecting the counsel's independence. Such issues would include whether to retain or consult only counsel not concurrently representing the institution or any affiliate, and whether to place limitations on any counsel representing the institution concerning matters in which such counsel previously participated personally and substantially as outside counsel to the committee.

35. *Transition Period for Forming and Restructuring Audit Committees.*

(a) When an insured depository institution's total assets as of the beginning of its fiscal year are $500 million or more for the first time and it thereby becomes subject to part 363, no regulatory action will be taken if the institution (1) develops and approves a set of written criteria for determining whether a director who is to serve on the audit committee is an outside director and is independent of management and (2) forms or restructures its audit committee to comply with § 363.5(a)(2) by the end of that fiscal year.

(b) When an insured depository institution's total assets as of the beginning of its fiscal year are $1 billion or more for the first time, no regulatory action will be taken if the institution forms or restructures its audit committee to comply with § 363.5(a)(1) by the end of that fiscal year, provided that the composition of its audit committee meets the requirements specified in § 363.5(a)(2) at the beginning of that fiscal year, if such requirements were applicable.

(c) When an insured depository institution's total assets as of the beginning of its fiscal year are $3 billion or more for the first time, no regulatory action will be taken if the institution forms or restructures its audit committee to comply with § 363.5(b) by the end of that fiscal year, provided that the composition of its audit committee meets the requirements specified in § 363.5(a)(1) at the beginning of that fiscal year, if such requirements were applicable.

Other

36. *Modifications of Guidelines.* The FDIC's Board of Directors has delegated to the Director of the FDIC's Division of Supervision and Consumer Protection authority to make and publish in the **Federal Register** minor technical amendments to the Guidelines in this Appendix and the guidance and illustrative reports in Appendix B, in consultation with the other appropriate Federal banking agencies, to reflect the practical experience gained from implementation of this part. It is not anticipated any such modification would be effective until affected institutions have been given reasonable advance notice of the modification. Any material modification or amendment will be subject to review and approval of the FDIC Board of Directors.

TABLE 1 TO APPENDIX A

Designated federal laws and regulations applicable to					
		National banks	State member banks	State non-member banks	Savings associations
Insider Loans—Parts and/or Sections of Title 12 of the United States Code					
375a	Loans to Executive Officers of Banks	√	√	(A)	(A)
375b	Extensions of Credit to Executive Officers, Directors, and Principal Shareholders of Banks.	√	√	(A)	(A)
1468(b)	Extensions of Credit to Executive Officers, Directors, and Principal Shareholders.				√
1828(j)(2)	Extensions of Credit to Officers, Directors, and Principal Shareholders.			√	
1828(j)(3)(B)	Extensions of Credit to Officers, Directors, and Principal Shareholders.	(B)		(C)	
Parts and/or Sections of Title 12 of the Code of Federal Regulations					
31	Extensions of Credit to Insiders	√			
32	Lending Limits	√			

TABLE 1 TO APPENDIX A—Continued

		Designated federal laws and regulations applicable to			
		National banks	State member banks	State non-member banks	Savings associations
215	Loans to Executive Officers, Directors, and Principal Shareholders of Member Banks.	√	√	(D)	(E)
337.3	Limits on Extensions of Credit to Executive Officers, Directors, and Principal Shareholders of Insured Nonmember Banks.	.....	.....	√	
563.43	Loans by Savings Associations to Their Executive Officers, Directors, and Principal Shareholders.	.....	.....	.....	√
Dividend Restrictions—Parts and/or Sections of Title 12 of the United States Code					
56	Prohibition on Withdrawal of Capital and Unearned Dividends	√	√		
60	Dividends and Surplus Fund	√	√		
1467a(f)	Declaration of Dividend	.....	.....	.....	√
1831o(d)(1)	Prompt Corrective Action—Capital Distributions Restricted	√	√	√	√
Parts and/or Sections of Title 12 of the Code of Federal Regulations					
5 Subpart E	Payment of Dividends	√			
6.6	Prompt Corrective Action—Restrictions on Undercapitalized Institutions.	√			
208.5	Dividends and Other Distributions	.....	√		
208.45	Prompt Corrective Action—Restrictions on Undercapitalized Institutions.	.....	√		
325.105	Prompt Corrective Action—Restrictions on Undercapitalized Institutions.	.....	.....	√	
563 Subpart E	Capital Distributions	.....	.....	.....	√
565.6	Prompt Corrective Action—Restrictions on Undercapitalized Institutions.	.....	.....	.....	√

A. Subsections (g) and (h) of section 22 of the Federal Reserve Act [12 U.S.C. 375a, 375b].
B. Applies only to insured Federal branches of foreign banks.
C. Applies only to insured State branches of foreign banks.
D. *See* 12 CFR 337.3.
E. *See* 12 CFR 563.43.

Appendix B to Part 363—Illustrative Management Reports

Table of Contents

1. General
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6. Illustrative Management Report—Combined Statement of Management's Responsibilities, Report on Management's Assessment of Compliance With Designated Laws and Regulations, and Report on Management's Assessment of Internal Control Over Financial Reporting
7. Illustrative Cover Letter—Compliance by Holding Company Subsidiaries

1. *General.* The reporting scenarios, illustrative management reports, and the cover letter (when complying at the holding company level) in Appendix B to part 363 are intended to assist managements of insured depository institutions in complying with the annual reporting requirements of § 363.2 and guideline 3, *Compliance by Holding Company Subsidiaries,* of Appendix A to part 363. However, use of the illustrative management reports and cover letter is not required. The managements of insured depository institutions are encouraged to tailor the wording of their management reports and cover letters to fit their particular circumstances, especially when reporting on material weaknesses in internal control over financial reporting or noncompliance with designated laws and regulations. Terms that are not explained in Appendix B have the meanings given them in part 363, the FDI Act, or professional accounting and auditing literature. Instructions to the preparer of the management reports are shown in brackets within the illustrative reports.

2. *Reporting Scenarios for Institutions that are Holding Company Subsidiaries.*

(a) Subject to the criteria specified in § 363.1(b), an insured depository institution that is a subsidiary of a holding company has flexibility in satisfying the reporting requirements of part 363. When reporting at the holding company level, the management report, or the individual components thereof, should identify those subsidiary institutions that are subject to part 363 and the extent to which they are included in the scope of the management report or a component of the report. The following reporting scenarios reflect how an insured depository institution that meets the criteria set forth in § 363.1(b) could satisfy the annual reporting requirements of § 363.2. Other reporting scenarios are possible.

(i) An institution that is a subsidiary of a holding company may satisfy the requirements for audited financial statements; management's statement of responsibilities; management's assessment of the institution's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions; management's assessment of the effectiveness of internal control over financial reporting, if applicable; and the independent public accountant's attestation on management's assertion as to the effectiveness of internal control over financial reporting, if applicable, at the insured depository institution level.

(ii) An institution that is a subsidiary of a holding company may satisfy the requirements for audited financial statements; management's statement of responsibilities; management's assessment of the institution's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions; management's assessment of the effectiveness of internal control over

financial reporting, if applicable;, and the independent public accountant's attestation on management's assertion as to the effectiveness of internal control over financial reporting, if applicable, at the holding company level.

(iii) An institution that is a subsidiary of a holding company may satisfy the requirement for audited financial statements at the holding company level and may satisfy the requirements for management's statement of responsibilities; management's assessment of the institution's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions; management's assessment of the effectiveness of internal control over financial reporting, if applicable; and the independent public accountant's attestation on management's assertion as to the effectiveness of internal control over financial reporting, if applicable, at the insured depository institution level.

(iv) An institution that is a subsidiary of a holding company may satisfy the requirements for audited financial statements; management's statement of responsibilities; and management's assessment of the institution's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions at the insured depository institution level and may satisfy the requirements for the assessment by management of the effectiveness of internal control over financial reporting, if applicable; and the independent public accountant's attestation on management's assertion as to the effectiveness of internal control over financial reporting, if applicable, at the holding company level.

(b) For an institution with total assets of $1 billion or more as of the beginning of its fiscal year, the assessment by management of the effectiveness of internal control over financial reporting and the independent public accountant's attestation on management's assertion as to the effectiveness of internal control over financial reporting, if applicable, must both be performed at the same level, *i.e.,* either at the insured depository institution level or at the holding company level.

(c) Financial statements prepared for regulatory reporting purposes encompass the schedules equivalent to the basic financial statements in an institution's appropriate regulatory report, *e.g.,* the bank Consolidated Reports of Condition and Income (Call Report) and the Thrift Financial Report (TFR). Guideline 4A in Appendix A to part 363 identifies the schedules equivalent to the basic financial statements in the Call Report and TFR. When internal control assessments and attestations are performed at the holding company level, the FDIC believes that holding companies have flexibility in interpreting ''financial reporting'' as it relates to ''regulatory reporting'' and has not objected to several reporting approaches employed by holding companies to cover ''regulatory reporting.'' Certain holding companies have had management's assessment and the accountant's attestation cover the schedules equivalent to the basic financial statements that are included in the appropriate regulatory report, *e.g.,* Call Report and the TFR, of each subsidiary institution subject to part 363. Other holding companies have had management's assessment and the accountant's attestation cover the schedules equivalent to the basic financial statements that are included in the holding company's year-end regulatory report (FR Y–9C report) to the Federal Reserve Board.

3. *Illustrative Statements of Management's Responsibilities.* The following illustrative statements of management's responsibilities satisfy the requirements of § 363.2(b)(1).

(a) Statement Made at Insured Depository Institution Level

Statement of Management's Responsibilities

The management of ABC Depository Institution (the ''Institution'') is responsible for preparing the Institution's annual financial statements in accordance with generally accepted accounting principles; for establishing and maintaining an adequate internal control structure and procedures for financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report]; and for complying with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions.

ABC Depository Institution

_____

John Doe, Chief Executive Officer

Date: _____

_____

Jane Doe, Chief Financial Officer

Date: _____

(b) Statement Made at Holding Company Level

Statement of Management's Responsibilities

The management of BCD Holding Company (the ''Company'') is responsible for preparing the Company's annual financial statements in accordance with generally accepted accounting principles; for establishing and maintaining an adequate internal control structure and procedures for financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report]; and for complying with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions. The following subsidiary institutions of the Company that are subject to Part 363 are included in this statement of management's responsibilities: [Identify the subsidiary institutions.]

BCD Holding Company

_____

John Doe, Chief Executive Officer

Date: _____

_____

Jane Doe, Chief Financial Officer

Date: _____

4. *Illustrative Reports on Management's Assessment of Compliance With Designated Laws and Regulations.* The following illustrative reports on management's assessment of compliance with Designated Laws and Regulations satisfy the requirements of § 363.2(b)(2).

(a) Statement Made at Insured Depository Institution Level—Compliance With Designated Laws and Regulations Pertaining to Insider Loans and Dividend Restrictions

Management's Assessment of Compliance With Designated Laws and Regulations

The management of ABC Depository Institution (the ''Institution'') has assessed the Institution's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX. Based upon its assessment, management has concluded that the Institution complied with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX.

ABC Depository Institution

_____

John Doe, Chief Executive Officer

Date: _____

_____

Jane Doe, Chief Financial Officer

Date: _____

(b) Statement Made at Insured Depository Institution Level—Noncompliance With Designated Laws and Regulations Pertaining to Both Insider Loans and Dividend Restrictions

Management's Assessment of Compliance With Designated Laws and Regulations

The management of ABC Depository Institution (the ''Institution'') has assessed the Institution's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX. Based upon its assessment, management has determined that, because of the instance(s) of noncompliance noted below, the Institution did not comply with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX.

[Identify and describe the instance or instances of noncompliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions, including appropriate qualitative and quantitative information to describe the nature, type, and severity of the noncompliance and the dollar amounts of the insider loan(s) and dividend(s) involved.]

ABC Depository Institution

_____

John Doe, Chief Executive Officer

Date: _____

_____

Jane Doe, Chief Financial Officer

Date: _____

(c) Statement Made at Insured Depository Institution Level—Compliance With Designated Laws and Regulations Pertaining to Insider Loans and Noncompliance With Designated Laws and Regulations Pertaining to Dividend Restrictions

Management's Assessment of Compliance With Designated Laws and Regulations

The management of ABC Depository Institution (the ''Institution'') has assessed the Institution's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX. Based upon its assessment, management has concluded that the Institution complied with the Federal laws and regulations pertaining to insider loans during the fiscal year that ended on December 31, 20XX. Also, based upon its assessment, management has determined that, because of the instance(s) of noncompliance noted below, the Institution did not comply with the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX.

[Identify and describe the instance or instances of noncompliance with the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions, including appropriate qualitative and quantitative information to describe the nature, type, and severity of the noncompliance and the dollar amount(s) of the dividend(s) involved.]

ABC Depository Institution

_____

John Doe, Chief Executive Officer

Date: _____

_____

Jane Doe, Chief Financial Officer

Date: _____

(d) Statement Made at Insured Depository Institution Level—Noncompliance With Designated Laws and Regulations Pertaining to Insider Loans and Compliance With Designated Laws and Regulations Pertaining to Dividend Restrictions

Management's Assessment of Compliance With Designated Laws and Regulations

The management of ABC Depository Institution (the ''Institution'') has assessed the Institution's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX. Based upon its assessment, management has determined that, because of the instance(s) of noncompliance noted below, the Institution did not comply with the Federal laws and regulations pertaining to insider loans during the fiscal year that ended on December 31, 20XX. Also, based upon its assessment, management has concluded that the Institution complied with the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX.

[Identify and describe the instance or instances of noncompliance with the Federal laws and regulations pertaining to insider loans, including appropriate qualitative and quantitative information to describe the nature, type, and severity of the noncompliance and the dollar amount(s) of the insider loan(s) involved.]

ABC Depository Institution

_____

John Doe, Chief Executive Officer

Date: _____

_____

Jane Doe, Chief Financial Officer

Date: _____

(e) Statement Made at Holding Company Level—Compliance With Designated Laws and Regulations Pertaining to Insider Loans and Dividend Restrictions

Management's Assessment of Compliance With Designated Laws and Regulations

The management of BCD Holding Company (the ''Company'') has assessed the Company's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX. Based upon its assessment, management has concluded that the Company complied with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX. The following subsidiary institutions of the Company that are subject to Part 363 are included in this assessment of compliance with these designated laws and regulations: [Identify the subsidiary institutions.]

BCD Holding Company

_____

John Doe, Chief Executive Officer

Date: _____

_____

Jane Doe, Chief Financial Officer

Date: _____

(f) Statement Made at Holding Company Level—Noncompliance With Designated Laws and Regulations Pertaining to Both Insider Loans and Dividend Restrictions

Management's Assessment of Compliance With Designated Laws and Regulations

The management of BCD Holding Company (the ''Company'') has assessed the Company's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX. The following subsidiary institutions of the Company that are subject to Part 363 are included in this assessment of compliance with these designated laws and regulations: [Identify the subsidiary institutions.]

Based upon its assessment, management has determined that, because of the instance(s) of noncompliance noted below, the Company did not comply with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX.

[Identify and describe the instance or instances of noncompliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions, including appropriate qualitative and quantitative information to identify the subsidiary institutions of the Company that are subject to Part 363 that had instances of noncompliance and describe the nature, type, and severity of the noncompliance and the dollar amount(s) of the insider loan(s) and dividend(s) involved.]

BCD Holding Company

_____

John Doe, Chief Executive Officer

Date: _____

_____

Jane Doe, Chief Financial Officer

Date: _____

(g) Statement Made at Holding Company Level—Compliance With Designated Laws and Regulations Pertaining to Insider Loans and Noncompliance With Designated Laws and Regulations Pertaining to Dividend Restrictions

Management's Assessment of Compliance With Designated Laws and Regulations

The management of BCD Holding Company (the ''Company'') has assessed the Company's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX. The following subsidiary institutions of the Company that are subject to Part 363 are included in this assessment of compliance with these designated laws and regulations: [Identify the subsidiary institutions.]

Based upon its assessment, management has concluded that the Company complied with the Federal laws and regulations pertaining to insider loans during the fiscal year that ended on December 31, 20XX. Also, based upon its assessment, management has determined that, because of the instance(s) of noncompliance noted below, the Company did not comply with the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX.

[Identify and describe the instance or instances of noncompliance with the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions, including appropriate qualitative and quantitative

information to identify the subsidiary institutions of the Company that are subject to Part 363 that had instances of noncompliance and describe the nature, type, and severity of the noncompliance and the dollar amount(s) of the dividend(s) involved.]

BCD Holding Company

_____

John Doe, Chief Executive Officer

Date: _____

_____

Jane Doe, Chief Financial Officer

Date: _____

(h) Statement Made at Holding Company Level—Noncompliance With Designated Laws and Regulations Pertaining to Insider Loans and Compliance With Designated Laws and Regulations Pertaining to Dividend Restrictions

Management's Assessment of Compliance With Designated Laws and Regulations

The management of BCD Holding Company (the ''Company'') has assessed the Company's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX. The following subsidiary institutions of the Company that are subject to Part 363 are included in this assessment of compliance with these designated laws and regulations: [Identify the subsidiary institutions.]

Based upon its assessment, management has determined that, because of the instance(s) of noncompliance noted below, the Company did not comply with the Federal laws and regulations pertaining to insider loans during the fiscal year that ended on December 31, 20XX. Also, based upon its assessment, management has concluded that the Company complied with the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX.

[Identify and describe the instance or instances of noncompliance with the Federal laws and regulations pertaining to insider loans, including appropriate qualitative and quantitative information to identify the subsidiary institutions of the Company that are subject to Part 363 that had instances of noncompliance and describe the nature, type, and severity of the noncompliance and the dollar amount(s) of the insider loan(s) involved.]

BCD Holding Company

_____

John Doe, Chief Executive Officer

Date: _____

_____

Jane Doe, Chief Financial Officer

Date: _____

5. *Illustrative Reports on Management's Assessment of Internal Control Over Financial Reporting.* The following illustrative reports on management's assessment of internal control over financial reporting satisfy the requirements of § 363.2(b)(3).

(a) Statement Made at Insured Depository Institution Level—No Material Weaknesses

Management's Assessment of Internal Control Over Financial Reporting

ABC Depository Institution's (the ''Institution'') internal control over financial reporting is a process effected by those charged with governance, management, and other personnel, designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of reliable financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, *i.e.,* [specify the regulatory reports]. The Institution's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the Institution; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, and that receipts and expenditures of the Institution are being made only in accordance with authorizations of management and directors of the Institution; and (3) provide reasonable assurance regarding prevention, or timely detection and correction of unauthorized acquisition, use, or disposition of the Institution's assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent, or detect and correct misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies and procedures may deteriorate.

Management is responsible for establishing and maintaining effective internal control over financial reporting including controls over the preparation of regulatory financial statements. Management assessed the effectiveness of the Institution's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], as of December 31, 20XX, based on the framework set forth by the Committee of Sponsoring Organizations of the Treadway Commission in *Internal Control—Integrated Framework.* Based upon its assessment, management has concluded that, as of December 31, 20XX, the Institution's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], is effective based on the criteria established in *Internal Control—Integrated Framework.*

Management's assessment of the effectiveness of internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], as of December 31, 20XX, has been audited by [name of auditing firm], an independent public accounting firm, as stated in their report dated March XX, 20XY.

ABC Depository Institution

_____

John Doe, Chief Executive Officer

Date: _____

_____

Jane Doe, Chief Financial Officer

Date: _____

(b) Statement Made at Insured Depository Institution Level—One or More Material Weaknesses

Management's Assessment of Internal Control Over Financial Reporting

ABC Depository Institution's (the ''Institution'') internal control over financial reporting is a process effected by those charged with governance, management, and other personnel, designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of reliable financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, *i.e.,* [specify the regulatory reports]. The Institution's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the Institution; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, and that receipts and expenditures of the Institution are being made only in accordance with authorizations of management and directors of the Institution; and (3) provide reasonable assurance regarding prevention, or timely detection and correction of unauthorized acquisition, use, or disposition of the Institution's assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent, or detect and correct misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies and procedures may deteriorate.

Management is responsible for establishing and maintaining effective internal control over financial reporting including controls over the preparation of regulatory financial statements. Management assessed the effectiveness of the Institution's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory

report], as of December 31, 20XX, based on the framework set forth by the Committee of Sponsoring Organizations of the Treadway Commission in *Internal Control—Integrated Framework.* Because of the material weakness (or weaknesses) noted below, management determined that the Institution's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions the [specify the regulatory report], was not effective as of December 31, 20XX.

[Identify and describe the material weakness or weaknesses.]

Management's assessment of the effectiveness of internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], as of December 31, 20XX, has been audited by [name of auditing firm], an independent public accounting firm, as stated in their report dated March XX, 20XY.

ABC Depository Institution

_____

John Doe, Chief Executive Officer

Date: _____

_____

Jane Doe, Chief Financial Officer

Date: _____

(c) Statement Made at Holding Company Level—No Material Weaknesses

Management's Assessment of Internal Control Over Financial Reporting

BCD Holding Company's (the ''Company'') internal control over financial reporting is a process designed effected by those charged with governance, management, and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of reliable financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, *i.e.,* [specify the regulatory reports]. The Company's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the Company; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, and that receipts and expenditures of the Company are being made only in accordance with authorizations of management and directors of the Company; and (3) provide reasonable assurance regarding prevention, or timely detection and correction of unauthorized acquisition, use, or disposition of the Company's assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent, or detect and correct misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies and procedures may deteriorate.

Management is responsible for establishing and maintaining effective internal control over financial reporting including controls over the preparation of regulatory financial statements. Management assessed the effectiveness of the Company's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], as of December 31, 20XX, based on the framework set forth by the Committee of Sponsoring Organizations of the Treadway Commission in *Internal Control—Integrated Framework.* Based on that assessment, management concluded that, as of December 31, 20XX, the Company's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], is effective based on the criteria established in *Internal Control—Integrated Framework.* The following subsidiary institutions of the Company that are subject to Part 363 are included in this assessment of the effectiveness of internal control over financial reporting: [Identify the subsidiary institutions.]

Management's assessment of the effectiveness of internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], as of December 31, 20XX, has been audited by [name of auditing firm], an independent public accounting firm, as stated in their report dated March XX, 20XY.

BCD Holding Company

_____

Date: _____

John Doe, Chief Executive Officer

_____

Date: _____

Jane Doe, Chief Financial Officer

(d) Statement Made at Holding Company Level—One or More Material Weaknesses

Management's Assessment of Internal Control Over Financial Reporting

BCD Holding Company's (the ''Company'') internal control over financial reporting is a process effected by those charged with governance, management, and other personnel, designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of reliable financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, *i.e.,* [specify the regulatory reports]. The Company's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the Company; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, and that receipts and expenditures of the Company are being made only in accordance with authorizations of management and directors of the Company; and (3) provide reasonable assurance regarding prevention, or timely detection and correction of unauthorized acquisition, use, or disposition of the Company's assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent, or detect and correct misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies and procedures may deteriorate.

Management is responsible for establishing and maintaining effective internal control over financial reporting including controls over the preparation of regulatory financial statements. Management assessed the effectiveness of the Company's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], as of December 31, 20XX, based on the framework set forth by the Committee of Sponsoring Organizations of the Treadway Commission in *Internal Control—Integrated Framework.* Because of the material weakness (or weaknesses) noted below, management determined that the Company's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], was not effective as of December 31, 20XX. The following subsidiary institutions of the Company that are subject to Part 363 are included in this assessment of the effectiveness of internal control over financial reporting: [Identify the subsidiary institutions.]

[Identify and describe the material weakness or weaknesses.]

Management's assessment of the effectiveness of internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], as of December 31, 20XX, has been audited by [name of auditing firm], an independent public accounting firm, as stated in their report dated March XX, 20XY.

BCD Holding Company

_____

Date: _____

John Doe, Chief Executive Officer

_____

Date: _____

Jane Doe, Chief Financial Officer

6. *Illustrative Management Report—Combined Statement of Management's Responsibilities, Report on Management's Assessment of Compliance With Designated Laws and Regulations, and Report on Management's Assessment of Internal Control Over Financial Reporting,* if applicable. The following illustrative management reports satisfy the requirements of §§ 363.2(b)(1), (2), and (3).

(a) Management Report Made at Insured Depository Institution Level—Compliance With Designated Laws and Regulations Pertaining to Insider Loans and Dividend Restrictions and No Material Weaknesses in Internal Control Over Financial Reporting

Management Report

Statement of Management's Responsibilities

The management of ABC Depository Institution (the ''Institution'') is responsible for preparing the Institution's annual financial statements in accordance with generally accepted accounting principles; for establishing and maintaining an adequate internal control structure and procedures for financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report]; and for complying with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions.

Management's Assessment of Compliance With Designated Laws and Regulations

The management of the Institution has assessed the Institution's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX. Based upon its assessment, management has concluded that the Institution complied with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX.

Management's Assessment of Internal Control Over Financial Reporting

The Institution's internal control over financial reporting is a process effected by those charged with governance, management, and other personnel, designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of reliable financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, *i.e.,* [specify the regulatory reports]. The Institution's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the Institution; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, and that receipts and expenditures of the Institution are being made only in accordance with authorizations of management and directors of the Institution; and (3) provide reasonable assurance regarding prevention, or timely detection and correction, of unauthorized acquisition, use, or disposition of the Institution's assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent, or detect and correct, misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies and procedures may deteriorate.

Management assessed the effectiveness of the Institution's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], as of December 31, 20XX, based on the framework set forth by the Committee of Sponsoring Organizations of the Treadway Commission in *Internal Control—Integrated Framework.* Based upon its assessment, management has concluded that, as of December 31, 20XX, the Institution's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], is effective based on the criteria established in *Internal Control—Integrated Framework.*

Management's assessment of the effectiveness of internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], as of December 31, 20XX, has been audited by [name of auditing firm], an independent public accounting firm, as stated in their report dated March XX, 20XY.

ABC Depository Institution

_____

John Doe, Chief Executive Officer

Date: _____

Jane Doe, Chief Financial Officer

Date: _____

(b) Management Report Made at Holding Company Level—Compliance With Designated Laws and Regulations Pertaining to Insider Loans and Dividend Restrictions and No Material Weaknesses in Internal Control Over Financial Reporting

Management Report

[*Instruction*—The following illustrative introductory paragraph for the management report is applicable only if the same group of subsidiary institutions of the holding company that are subject to Part 363 are included in all three components of the management report required by Part 363: the statement of management's responsibilities, the report on management's assessment of compliance with the Designated Laws and Regulations pertaining to insider loans and dividend restrictions, and the report on management's assessment of internal control over financial reporting.]

In this management report, the following subsidiary institutions of the BCD Holding Company (the ''Company'') that are subject to Part 363 are included in the statement of management's responsibilities; the report on management's assessment of compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions; and the report on management's assessment of internal control over financial reporting: [Identify the subsidiary institutions.]

[*Instruction*—The following illustrative introductory paragraph for the management report is applicable if the same group of subsidiary institutions of the holding company that are subject to Part 363 are included in the statement of management's responsibilities and management's assessment of compliance with the Designated Laws and Regulations pertaining to insider loans and dividend restrictions, but only some of the subsidiary institutions in the group are included in management's assessment of internal control over financial reporting.]

In this management report, the following subsidiary institutions of BCD Holding Company (the ''Company'') that are subject to Part 363 are included in the statement of management's responsibilities and the report on management's assessment of compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions: [Identify the subsidiary institutions.] In addition, the following subsidiary institutions of the Company that are subject to Part 363 are included in the report on management's assessment of internal control over financial reporting: [Identify the subsidiary institutions.]

Statement of Management's Responsibilities

The management of the Company is responsible for preparing the Company's annual financial statements in accordance with generally accepted accounting principles; for establishing and maintaining an adequate internal control structure and procedures for financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report]; and for complying with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions.

Management's Assessment of Compliance With Designated Laws and Regulations

The management of the Company has assessed the Company's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if

applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX. Based upon its assessment, management has concluded that the Company complied with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX.

Management's Assessment of Internal Control Over Financial Reporting

The Company's internal control over financial reporting is a process effected by those charged with governance, management, and other personnel, designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of reliable financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, *i.e.,* [specify the regulatory reports]. The Company's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the Company; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, and that receipts and expenditures of the Company are being made only in accordance with authorizations of management and directors of the Company; and (3) provide reasonable assurance regarding prevention, or timely detection and correction of unauthorized acquisition, use, or disposition of the Company's assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent, or detect and correct misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies and procedures may deteriorate.

Management assessed the effectiveness of the Company's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], as of December 31, 20XX, based on the framework set forth by the Committee of Sponsoring Organizations of the Treadway Commission in *Internal Control—Integrated Framework.* Based upon its assessment, management has concluded that, as of December 31, 20XX, the Company's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], is effective based on the criteria established in *Internal Control—Integrated Framework.*

Management's assessment of the effectiveness of internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], as of December 31, 20XX, has been audited by [name of auditing firm], an independent public accounting firm, as stated in their report dated March XX, 20XX.

BCD Holding Company

_____

John Doe, Chief Executive Officer

Date: _____

Jane Doe, Chief Financial Officer

Date: _____

7. *Illustrative Cover Letter—Compliance by Holding Company Subsidiaries.* The following illustrative cover letter satisfies the requirements of guideline 3, *Compliance by Holding Company Subsidiaries,* of Appendix A to part 363.

To: (Appropriate FDIC Regional or Area Office) Division of Supervision and Consumer Protection, FDIC, and (Appropriate District or Regional Office of the Primary Federal Regulator(s), if not the FDIC), and (Appropriate State Bank Supervisor(s), if applicable)

Dear [Insert addressees]:

BCD Holding Company (the ''Company'') is filing two copies of the Part 363 Annual Report for the fiscal year ended December 31, 20XX, on behalf of its insured depository institution subsidiaries listed in the chart below that are subject to Part 363. The Part 363 Annual Report contains audited comparative annual financial statements, the independent public accountant's report on the audited financial statements, management's statement of responsibilities, management's assessment of compliance with the Designated Laws and Regulations pertaining to insider loans and dividend restrictions, and [if applicable] management's assessment of and the independent public accountant's attestation report on internal control over financial reporting. The chart below also indicates the level (institution or holding company) at which the requirements of Part 363 are being satisfied for each listed insured depository institution subsidiary. [If applicable] The Company's other insured depository institution subsidiaries that are subject to Part 363, which comply with all of the Part 363 annual reporting requirements at the institution level, have filed [or will file] their Part 363 Annual Reports separately.

Institutions subject to part 363	Audited financial statements	Management's statement of responsibilities	Management's assessment of compliance with designated laws and regulations	Management's internal control assessment	Independent auditor's internal control attestation report
ABC Depository Institution.	Holding Company Level.	Holding Company Level.	Holding Company Level.	Holding Company Level.	Holding Company Level.
DEF Depository Institution.	Holding Company Level.	Institution Level	Institution Level	Institution Level	Institution Level.

If you have any questions regarding the annual report [or reports] of the Company's insured depository institution subsidiaries subject to Part 363 or if you need any further information, you may contact me at 987–654–3210.

BCD Holding Company

_____

[Insert officer's name and title.]

Date: _____

Dated at Washington, DC, this 23rd day of June 2009.

By order of the Board of Directors.

Valerie J. Best,

Assistant Executive Secretary, Federal Deposit Insurance Corporation.

[FR Doc. E9–15378 Filed 7–6–09; 8:45 am]

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Federal Register

Tuesday,
July 7, 2009

Part III

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 218

Taking and Importing Marine Mammals; U.S. Navy's Research, Development, Test, and Evaluation Activities Within the Naval Sea Systems Command Naval Undersea Warfare Center Keyport Range Complex; Proposed Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 218

RIN 0648–AX11

Taking and Importing Marine Mammals; U.S. Navy's Research, Development, Test, and Evaluation Activities Within the Naval Sea Systems Command Naval Undersea Warfare Center Keyport Range Complex

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS has received a request from the U.S. Navy (Navy) for authorization to take marine mammals incidental to the Navy's Research, Development, Test, and Evaluation (RDT&E) activities within the Naval Sea System Command (NAVSEA) Naval Undersea Warfare Center (NUWC) Keyport Range Complex and the associated proposed extensions for the period of September 2009 through September 2014. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is proposing regulations to govern that take and requesting information, suggestions, and comments on these proposed regulations.

DATES: Comments and information must be received no later than August 6, 2009.

ADDRESSES: You may submit comments, identified by 0648–AX11, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*
- *Hand delivery or mailing of paper, disk, or CD–ROM:* Comments should be addressed to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All personal identifying information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Shane Guan, Office of Protected Resources, NMFS, (301) 713–2289, ext. 137.

SUPPLEMENTARY INFORMATION:

Availability

A copy of the Navy's application may be obtained by writing to the address specified above (see **ADDRESSES**), telephoning the contact listed above (*see* **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* The Navy's Draft Environmental Impact Statement (DEIS) for the Keyport Range Complex RDT&E and range extension activities was published on September 12, 2008, and may be viewed at *http://www-keyport.kpt.nuwc.navy.mil.* NMFS participated in the development of the Navy's DEIS as a cooperating agency under the National Environmental Policy Act (NEPA).

Background

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

Authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as:

> An impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The National Defense Authorization Act of 2004 (NDAA) (Public Law 108–136) removed the ''small numbers'' and ''specified geographical region'' limitations in sections 101(a)(5)(A) and (D) and amended the definition of ''harassment'' as it applies to a ''military readiness activity'' to read as follows (Section 3(18)(B) of the MMPA):

> (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

Summary of Request

On May 15, 2008, NMFS received an application from the Navy requesting authorization for the take of 5 species of marine mammals incidental to the RDT&E activities within the NAVSEA NUWC Keyport Range Complex Extension over the course of 5 years. These RDT&E activities are classified as military readiness activities. On April 29, 2009, NMFS received additional information and clarification on the Navy's proposed NAVSEA NUWC Keyport Range Complex Extension RDT&E activities. The Navy states that these RDT&E activities may cause various impacts to marine mammal species in the proposed action area. The Navy requests an authorization to take individuals of these marine mammals by Level B Harassment. Please refer to Tables 6–23, 6–24, 6–25, and 6–26 of the Navy's Letter of Authorization (LOA) application for detailed information of the potential marine mammal exposures from the RDT&E activities in the Keyport Range Complex Extension per year. However, due to the proposed mitigation and monitoring measures and standard range operating procedures in place, NMFS estimates that the take of marine mammals is likely to be lower than the amount requested. NMFS does not expect any marine mammals to be killed or injured as a result of the Navy's proposed activities, and NMFS is not proposing to authorize any injury or mortality incidental to the Navy's proposed RDT&E activities within the Keyport Range Complex Extension.

Background of Navy Request

The Navy proposes to extend the NAVSEA NUWC Keyport Range Complex in Washington State. The NAVSEA NUWC Keyport Range Complex has the infrastructure to support RDT&E activities. Centrally located within Washington State, the

NAVSEA NUWC Keyport Range Complex has extensive existing range assets and capabilities. The NAVSEA NUWC Keyport Range Complex is composed of Keyport Range Site, Dabob Bay Range Complex (DBRC) Site, and Quinault Underwater Tracking Range (QUTR) Site (*see* Figure 1–1 of the Navy's LOA application).

The goal of the Proposed Action is to extend the operational areas of each range site. Extending the Range Complex operating areas outside existing range boundaries will allow the Navy to support existing and future range activities including evolving manned and unmanned vehicle program needs in multiple marine environments. With the proposed extension of the Keyport and QUTR range sites, the range sites could support more activities, which include increases in the numbers of tests and days of testing. No additional operational tempo is proposed for the DBRC Site. Existing and evolving range activities applied for in this LOA application include RDT&E and training of system capabilities such as guidance, control, and sensor accuracy of manned and unmanned vehicles in multiple marine environments (*e.g.,* differing depths, salinity levels, temperatures, sea states, etc.).

The range extension is necessary to provide adequate testing area and volume (*i.e.,* surface area and water depth) in multiple marine environments. The extension enables the NUWC Keyport to fulfill its mission of providing test and evaluation services in both surrogate and simulated war-fighting environments for emerging manned and unmanned vehicle program activities. Within the NAVSEA NUWC Keyport Range Complex Extension, the NUWC Keyport activities include testing, training, and evaluation of systems capabilities such as guidance, control, and sensor accuracy of manned and unmanned vehicles in multiple marine environments (*e.g.,* differing depths, salinity levels, temperatures, sea states, etc.).

NUWC Keyport consists of 340 acres (138 hectares [ha]) on the shores of Liberty Bay and Port Orchard Reach (a.k.a. Port Orchard Narrows), and is located adjacent to the town of Keyport, due west of Seattle. NUWC Keyport, a part of NAVSEA, is the center for integrated undersea warfare systems dependability, integrated mine and undersea warfare supportability, and undersea vehicle maintenance and engineering. It provides test and evaluation, in-service engineering, maintenance, Fleet readiness, and industrial-based support for undersea warfare systems, including RDT&E of torpedoes, unmanned vehicles, sensors, targets, countermeasure systems, and acoustic systems.

The NAVSEA NUWC Keyport Range Complex is divided into open ocean/offshore areas and in shore areas:

- *Open Ocean Area*—air, surface, and subsurface areas of the NAVSEA NUWC Keyport Range Complex that lie outside of 12 nautical miles (nm) from land.
- *Offshore Area*—air, surface, and subsurface ocean areas within 12 nm of the Pacific Coast.
- *Inshore*—air, surface, and subsurface areas within the Puget Sound, Port Orchard Reach, Hood Canal, and Dabob Bay.

Keyport Range Site

Located adjacent to NUWC Keyport, this range provides approximately 1.5 square nautical miles (nm^2) (5.1 square kilometers [km^2]) of shallow underwater testing, including in-shore shallow water sites and a shallow lagoon to support integrated undersea warfare systems and vehicle maintenance and engineering activities (see Figures 1–2 and 1–3 of the Navy's LOA application). The Navy has conducted underwater testing at the Keyport Range Site since 1914. Underwater tracking of test activities is accomplished by using temporary or portable range equipment. The range is currently used an average of 6 times per year for vehicle testing and a variety of boat and diver training activities, each lasting 1–30 days. There may be several activities in 1 day. The range site also supports: (1) Detection, classification, and localization of test objectives and (2) magnetics measurement programs. Explosive warheads are not placed on test units or tested within the Keyport Range Site.

DBRC Site

Currently, the DBRC Site assets include the Dabob Bay Military Operating Area (MOA), the Hood Canal North and South MOAs adjacent to Submarine Base (SUBASE) Bangor, and the Connecting Waters (*see* Figures 1–2 and 1–4 of the Navy's LOA application). The DBRC Site is the Navy's premier location within the U.S. for RDT&E of underwater systems such as torpedoes, countermeasures, targets, and ship systems. Primary activities at the DBRC Site support proofing of underwater systems, research and development test support, and Fleet training and tactical evaluations involving aircraft, submarines, and surface ships. Tests and evaluations of underwater systems, from the first prototype and pre-production stages up through Fleet activities (inception to deployment), ensure reliability and availability of underwater systems and their Fleet components. As with the Keyport Range Site, there are no explosive warheads tested or placed on test units.

The DBRC Site also supports acoustic/magnetic measurement programs. These programs include underwater vehicle/ship noise/magnetic signature recording, radiated sound investigations, and other acoustic evaluations. In the course of these activities, various combinations of aircraft, submarines, and surface ships are used as launch platforms. Test equipment may also be launched or deployed from shore off a pier or placed in the water by hand. NUWC Keyport currently conducts activities within four underwater testing areas in the DBRC Site. These areas are:

- *Dabob Bay MOA*—a deep-water range in Jefferson County approximately 14.5 nm^2 (49.9 km^2) in size. The acoustic tracking space within the range is approximately 7.3 by 1.3 nm (13.5 by 2.4 km) (9.5 nm^2 [32.4 km^2]) with a maximum depth of 600 ft (183 m). The Dabob Bay MOA is the principal range and the only component of the DBRC Site with extensive acoustic monitoring instrumentation installed on the seafloor, allowing for object tracking, communications, passive sensing, and target simulation.
- *Hood Canal MOAs*—There are two deep-water operating areas adjacent to SUBASE Bangor in Hood Canal: Hood Canal MOA South, which is approximately 4.5 nm^2 (15.4 km^2) in size, and Hood Canal MOA North, which is approximately 7.9 nm^2 (27.0 km^2) in size. Both areas have an average depth of 200 ft (61 m). The Hood Canal MOAs are used for vessel sensor accuracy tests and launch and recovery of test systems where tracking is optional.
- *Connecting Waters*—the portion of the Hood Canal that connects the Dabob Bay MOA with the Hood Canal MOAs. The shortest distance between the Dabob Bay MOA and Hood Canal MOA South by water is approximately 5.8 nm^2 (19.8 km^2). Water depth in the Connecting Waters is typically greater than 300 ft (91 m).

QUTR Site

The Navy has conducted underwater testing at the QUTR Site since 1981 and maintains a control center at the Kalaloch Ranger Station. As at the other range sites, no explosive warheads are used at the QUTR Site. The QUTR Site is a rectangular-shaped test area of about 48.3 nm^2 (165.5 km^2), located approximately 6.5 nm (12 km) off the Pacific Coast at Kalaloch, Washington. It

lies within the boundaries of the Olympic Coast National Marine Sanctuary (OCNMS).

The QUTR Site is instrumented to track surface vessels, submarines, and various undersea vehicles. Bottom sensors are permanently mounted on the sea floor for tracking and are maintained and configured by the Navy. The sensors are connected to the shore via cables, which extend under the beach to the bluffs and end at a Navy trailer in Kalaloch (National Park Service [NPS] property). In addition, portable range equipment may be set up prior to conducting various activities on the range and removed after it is no longer needed. All communications are sent back to NUWC Keyport for monitoring.

This range underlies a small portion (W–237A) of the larger airspace unit W–237. This airspace complex comprises the northern portion of the Pacific Northwest Ocean Surface/Subsurface Operating Area (OPAREA), NOAA chart number 18500 (NOAA, 2006). Activities in this airspace are scheduled and coordinated with Naval Air Station (NAS) Whidbey Island and Commander Submarine Force, U.S. Pacific Fleet (COMSUBPAC).

All range areas in the NAVSEA NUWC Keyport Range Complex Extension include areas where marine mammals may be found. Range activities will be conducted in the Keyport Site, the DBRC, and the QUTR Site. The proposed annual usage at each site is listed in Table 1. This includes tracking sonar systems, side-scan, and thermal propulsion systems.

TABLE 1—PROJECTED ANNUAL DAYS OF USE BY RANGE SITE

	Keyport range site	DBRC site	QUTR site—offshore	QUTR site—surf zone
Current	55	200	14	0
Proposed	60	200	16	30

Description of the Specified Activities

Typical activities conducted in the NAVSEA NUWC Keyport Range Complex Extension on the three existing range sites primarily support undersea warfare RDT&E program requirements, but they also support general equipment test and military personnel training needs, including Fleet activities. These activities involve mid- and high-frequency acoustic sources with the potential to affect marine mammals that may be present within the NAVSEA NUWC Keyport Range Complex Extension. Current and proposed activities within the Keyport Range Complex Extension are listed below:

Range Activities: Testing That Involves Active Acoustic Devices

A list of the primary active acoustic sources used within the NAVSEA NUWC Keyport Range Complex with information on the frequency bands is shown in Table 2. In this document, low frequency is defined as below 1 kiloHertz (kHz), mid frequency is defined as between 1 kHz and 10 kHz, and high frequency is defined as above 10 kHz.

TABLE 2—PRIMARY ACOUSTIC SOURCES COMMONLY USED WITHIN THE NAVSEA NUWC KEYPORT RANGE COMPLEX

Source	Frequency (kHz)	Maximum source level (dB re 1 μPa-m)
Sonar:		
General range tracking (at Keyport Range Site)	10–100	195
General range tracking (at DBRC and QUTR Sites)	10–100	203
UUV tracking	10–100	195
Torpedoes	10–100	233
Range targets and special tests (at Keyport Range Site)	5–100	195
Range targets and special tests (at DBRC and QUTR Sites)	5–100	238
Special sonars (*e.g.,* UUV payload)	100–2,500	235
Fleet aircraft—active sonobuoys and helo-dipping sonars	2–20	225
Side-scan	100–700	235
Other Acoustic Sources:		
Acoustic modems	10–300	210
Target simulator	0.1–10	170
Aid to navigation (range equipment)	70–80	210
Sub-bottom profiler	2–7	210
	35–45	220
Engine noise (surface vessels, submarines, torpedoes, UUVs)	0.05–10	170

(1) General Range Tracking

General range tracking on the instrumented ranges and portable range sites have active output in relatively wide frequency bands. Operating frequencies are 10 to 100 kHz. At the Keyport Range Site the sound pressure level (SPL) of the source (source level) is a maximum of 195 dB re 1 μPa-m. At the DBRC and QUTR sites, the source level for general range tracking is a maximum of 203 dB re 1 μPa-m.

(2) UUV Tracking Systems

UUV tracking systems operate at frequencies of 10 to 100 kHz with maximum source levels of 195 dB re 1 μPa-m at all range sites.

(3) Torpedo Sonars

Torpedo sonars are used for several purposes including detection, classification, and location and vary in frequency from 10 to 100 kHz. The maximum source level of a torpedo sonar is 233 dB re 1 μPa-m.

(4) Range Targets and Special Tests

Range targets and special test systems are within the 5 to 100 kHz frequency range at the Keyport Range Site with a maximum source level of 195 dB re 1 μPa-m. At the DBRC and QUTR sites, the maximum source level is 238 dB re 1 μPa-m.

(5) Special Sonars

Special sonars can be carried as a payload on a UUV, suspended from a range craft, or set on or above the sea floor. These can vary widely from 100 kHz to a very high frequency of 2,500 kHz for very short range detection and classification. The maximum source level of these acoustic sources is 235 dB re 1 μPa-m.

(6) Sonobuoys and Helicopter Dipping Sonar

Sonobuoys and helicopter dipping sonars are deployed from Fleet aircraft and operate at frequencies of 2 to 20 kHz with maximum source levels of 225 dB re 1 μPa-m. Dipping sonars are active or passive devices that are lowered on cable by helicopters or surface vessels to detect or maintain contact with underwater targets.

(7) Side Scan Sonar

Side-scan sonar is used for mapping, detection, classification, and localization of items on the sea floor such as cabling, shipwrecks, and mine shapes. It is high frequency typically 100 to 700 kHz using multiple frequencies at one time with a very directional focus. The maximum source level is 235 dB re 1 μPa-m. Side-scan and multibeam sonar systems are towed or mounted on a test vehicle or ship.

(8) Other Acoustic Sources

Other acoustic sources may include acoustic modems, targets, aids to navigation, subbottom profilers, and engine noise.

- An acoustic modem is a communication device that transmits an acoustically encoded signal from a source to a receiver. Acoustic modems emit pulses from 10 to 300 kHz at source levels less than 210 dB re 1 μPa-m.
- Target simulators operate at frequencies of 100 Hertz (Hz) (0.1 kHz) to 10 kHz at source levels of less than 170 dB re 1 μPa-m.
- Aids to navigation transmit location data from ship to shore and back to ship so the crew can have real-time detailed location information. This is typical of the range equipment used in support of testing. New aids to navigation can also be deployed and tested using 70 to 80 kHz at source levels less than 210 dB re 1 μPa-m.
- Subbottom profilers are often commercial off-the-shelf sonars used to determine characteristics of the sea bottom and subbottom such as mud above bedrock or other rocky substrate. These operate at 2 to 7 kHz at source levels less than 210 dB re 1 μPa-m, and 35 to 45 kHz at less than 220 dB re 1 μPa-m.
- There are many sources of engine noise including but not limited to surface vessels, submarines, torpedoes, and other UUVs. The acoustic energy generally ranges from 50 Hz to 10 kHz at source levels less than 170 dB re 1 μPa-m. Targets, both mobile and stationary, may simulate engine noise at these same frequencies.

Additionally, a variety of surface vessels operate active acoustic depth sensors (fathometers) within the range sites, including Navy, private, and commercial vessels. In some cases, one or more frequencies are projected underwater. Bottom type, depth contours, and objects (*e.g.,* cables, sunken ships) can be located using this equipment. The depth sensors used by NUWC Keyport are the same fathometers used by commercial and recreational vessels for navigational safety. Because these instruments are widely used and are not found to adversely impact the human or natural environment, they are not analyzed further.

Range Activities: Testing That Involves Non-Acoustic Activities

(1) Magnetic

There are two types: (a) Magnetic sensors, and (b) magnetic sources. Magnetic sensors are passive and do not have a magnetic field associated with them. The sensors are bottom mounted, over the side (stationary or towed) or can be integrated into a UUV. They are used to sense the magnetic field of an object such as a surface vessel, a submarine, or a buried target. Magnetic sources are used to represent magnetic targets or are energized items such as power cables for energy generators (*e.g.* tidal). Magnetic sources generate electromagnetic fields (EMF). Evaluation of EMF (Navy 2008a) has shown that sources (*e.g.* Organic Airborne and Surface Influence Sweep (OASIS)) used are typically below 23 gauss (G) and are considered relatively minute strength.

(2) Oceanographic Sensor

These sensors have been used historically to determine marine characteristics such as conductivity, temperature, and pressure of water to determine sound velocity in water. This provides information about how sound will travel through the water. These sensors can be deployed over the side from a surface craft, suspended in water, or carried on a UUV.

(3) Laser Imaging Detection and Ranging (LIDAR)

Also known as light detection and ranging, LIDAR is used to measure distance, speed, rotation, and chemical composition and concentration of remote solid objects such as a ship or submerged object. LIDAR uses the same principle as radar. The LIDAR instrument transmits short pulses of laser light towards the target. The transmitted light interacts with and is changed by the target. Some of this light is reflected back to the instrument where it is analyzed. The change in the properties of the light enables some property of the target to be determined. The time it takes the light to travel to the target and back to the LIDAR can be used to determine the distance to the target. Since light attenuates rapidly in water, underwater LIDAR uses light in the blue-green part of the spectrum as it attenuates the least. Common civilian uses of LIDAR in the ocean include seabed mapping and fish detection. All safety issues associated with the use of lasers are evaluated for all applicable test activities within the range sites according to Navy and Federal regulations. This bounds the intensity of LIDAR used pursuant to this request to those systems that meet human safety standards.

(4) Inert Mine Hunting and Inert Mine Clearing Exercises

Associated with testing, a series of inert mine shapes are set out in a uniform or random pattern to test the detection, classification and localization capability of the system under test. They are made from plastic, metal, and concrete and vary in shape. An inert mine shape can measure about 10 by 1.75 ft (3 by 0.5 m) and weigh about 800 lbs (362 kg). Inert mine shapes either sit on the bottom or are tethered by an anchor to the bottom at various depths. Inert mine shapes can be placed approximately 200–300 yards (183–274 m) apart using a support craft and remain on the bottom until they need to be removed. All major components of all inert mine systems used as 'targets' for inert mine hunting systems are removed within 2 years.

NMFS does not believe that those Range activities that involve non-acoustic testing will have adverse impacts to marine mammals, therefore,

they are not analyzed further and will not be covered under the proposed rule.

Increased Activities Due to Range Extension

The proposed range extension would expand the geographic area for all three range sites and increase the tempo of activities in the Keyport and QUTR ranges sites. A detailed list of the proposed annual range is provided in Table 3.

(1) Keyport Range Site

Range boundaries of the Keyport Range Site would be extended to the north, east and south, increasing the size of the range from 1.5 nm^2 to 3.2 nm^2 (5.1 km^2 to 11.0 km^2). The average annual days of use of the Keyport Range Site would increase from the current 55 days to 60 days.

(2) DBRC Site

The southern boundary of DBRC Site would be extended to the Hamma Hamma River and its northern boundary would be extended to 1 nm (2 km) south of the Hood Canal Bridge (Highway 104). This extension would increase the size of the current operating area from approximately 32.7 nm^2 (112.1 km^2) to approximately 45.7 nm^2 (150.8 km^2) and would afford a straight run of approximately 27.5 nm (50.9 km). There would be no change in the number and types of activities from the existing range activities at DBRC Site, and no increase in average annual days of use due to the range extension at this site.

(3) QUTR Site

Range boundaries of QUTR Site would be extended to coincide with the overlying special use airspace of W–237A plus a 7.8 nm^2 (26.6 km^2) surf zone at Pacific Beach. The total range area would increase from approximately 48.3 nm^2 (165.5 km^2) to approximately 1,839.8 nm^2 (6,310.2 km^2). The average annual number of days of use for offshore activities would increase from 14 days/year to 16 days/year in the offshore area. The average annual days of use for surf-zone activities would increase from 0 days/year to 30 days/year.

Table 3. Proposed Annual Range Activities and Operations

		Proposed Number of Activities/Year*		
Range Activity	Platform/System Used	Keyport Range Site	DBRC Site	QUTR Site
Test Vehicle Propulsion	Thermal propulsion systems	5	130	30
	Electric/Chemical propulsion systems	55	140	30
Other Testing Systems and Activities	Submarine testing	0	45	15
	Inert mine detection, classification and localization	5	20	10
	Non-Navy testing	5	5	5
	Acoustic & non-acoustic sensors (magnetic array, oxygen)	20	10	5
	Countermeasure test	5	50	5
	Impact testing	0	10	5
	Static in-water testing	10	10	6
	UUV test	45	120	40
	Unmanned Aerial System (UAS) test	0	2	2
Fleet Activities** (excluding RDT&E)	Surface Ship activities	1	10	10
	Aircraft activities	0	10	10
	Submarine activities	0	30	30
	Diver activities	45	5	15
Deployment Systems (RDT&E)	Range support vessels:			
	Surface launch craft	35	180	30
	Special purpose barges	25	75	0
	Fleet vessels***	15	20	20
	Aircraft (rotary and fixed wing)	0	10	20
	Shore and pier	45	30	30

* There may be several activities in 1 day. These numbers provide an estimate of types of range activities over the year.
** Fleet activities in the NAVSEA NUWC Keyport Range Complex do not include the use of surface ship and submarine hull-mounted active sonars.
*** As previously noted, Fleet vessels can include very small craft such as SEAL Delivery Vehicles.

Description of Marine Mammals in the Area of the Specified Activities

The information on marine mammals and their distribution and density are based on the data gathered from NMFS, United States Fish and Wildlife Service (USFWS) and recent references, literature searches of search engines, peer review journals, and other technical reports, to provide a regional context for each species. The data were compiled from available sighting records, literature, satellite tracking, and stranding and by-catch data.

A total of 24 cetacean species and subspecies and 5 pinniped species are known to occur in Washington State waters; however, several are seen only rarely. Seven of these marine mammal species are listed as Federally-endangered under the Endangered Species Act (ESA) occur or have the potential to occur in the proposed action area: blue whale (*Balaenoptera musculus*), fin whale (*B. physalus*), Sei whale (*B. borealis*), humpback whale (*Megaptera novaengliae*), north Pacific right whale (*Eubalaena japonica*), sperm whale (*Physeter macrocephalus*), and the southern resident population of

killer whales (*Orcinus orca*). The species, Steller sea lion (*Eumetopias jubatus*), is listed as threatened under the ESA.

Survey data concerning the inland waters of Puget Sound are sparse. There have been few comprehensive studies of marine mammals in inland waters, and those that have occurred have focused on inland waters farther north (Strait of Juan de Fuca, San Juan/Gulf Islands, Strait of Georgia) (Osmek *et al.,* 1998). Most published information focuses on single species (*e.g.,* harbor seals, Jeffries *et al.,* 2003) or are stock assessment reports published by NMFS (*e.g.,* Carretta *et al.,* 2008).

Survey data for the offshore waters of Washington State, including the area of the QUTR Site, are somewhat better, particularly for cetaceans. The NMFS conducted vessel surveys in the region in 1996 and 2001, which are summarized in Barlow (2003) and Appler *et al.* (2004). Vessel surveys were again conducted by NMFS in summer 2005, and included finer-scale survey lines within the OCNMS (Forney, 2007). Cetacean densities from this most recent effort were used wherever possible; older density values (2001 or 1996) were used when more recent values were not available. Some cetacean densities (gray and killer whale, harbor porpoise) were obtained from sources other than the broad scale surveys indicated above and the methodologies of deriving the densities are included in the Navy's LOA application.

Pinniped at-sea density is not often available because pinniped abundance is most often obtained via shore counts of animals at known rookeries and haulouts. Therefore, densities of pinnipeds were derived differently from those of cetaceans. Several parameters were identified from the literature, including area of stock occurrence, number of animals (which may vary seasonally) and season, and those parameters were then used to calculate density. Determining density in this manner is risky as the parameters used usually contain error (*e.g.,* geographic range is not exactly known and needs to be estimated, abundance estimates usually have large variances) and, as is true of all density estimates, they assume that animals are always distributed evenly within an area, which is likely rarely true. However, this remains one of the few means available to determine at-sea density for pinnipeds.

Sea otters occur along the northern Washington coast. Density of sea otters was published as animals/km, which was modified to provide density per area. Since sea otters are under the U.S. Fish and Wildlife Service jurisdiction, they are not considered in this document.

The following are brief descriptions of the temporal and spatial distribution and abundance of marine mammals throughout the NAVSEA NUWC Keyport Range Complex Extension.

Keyport Range Site

A total of five cetaceans and three pinnipeds are known to occur within central Puget Sound, which encompasses the Keyport action area, but several of these species have never been observed in Port Orchard Narrows or in the action area (Table 4). Humpback whales, minke whales, killer whales, and Steller sea lions are expected to be uncommon to rare in southern Puget Sound and have never been seen in the Keyport action area. Density estimates for these species are available for Puget Sound as a whole, but since these species have never been recorded or observed in the action area, the densities for the action area are shown as ''0'' to reflect this. The proposed extension area of the Keyport Range Site is listed as critical habitat for Southern Resident killer whales. The current Keyport Range Site is outside the critical habitat area.

Table 4. Marine Mammal Known to Occur or Potentially Occur within the Keyport Action Area

Species		ESA/MMP Status	Occurrence in Keyport Action Area	Density Estimate (km^3)	
				Warm Season	Cold Season
CETACEAN					
Mysticetes					
Minke whale		- / -	Very rare, year round.	0[a]	0[a]
Humpback whale		E/D	Very rare, warm season; has never been recorded in action area.	0[a]	0[a]
Gray whale		- / -	Very rare, migrant and summer/fall resident population in primarily northern Puget Sound	0[a]	0[a]
Odontocetes					
Killer whale	Transient	- / -	Very rare, year round; has never been recorded in action area	0[a]	0[a]
	S. Resident	E, CH/D	Very rare, summer/fall season; has never been recorded in action area.	0[a]	0[a]
Dall's porpoise		- / -	Rare, year round.	0[a]	0[a]
PINNIPEDS					
Harbor seal		- / -	Common year-round resident.	0.55	0.55
California sea lion		- / -	Rare, cold season.	0[a]	0[a]
Steller sea lion		T/D	Rare, cold season; has never been recorded in action area	0[a]	0[a]

Notes: D = Depleted, E = Endangered, CH = Critical Habitat, T = Threatened.
Warm season = May-October, Cold season = November-April.
abundant = the species is expected to be encountered during a single visit to the area and the number of individuals encountered during an average visit may be as many as hundreds or more; common = the species is expected to be encountered once or more during 2-3 visits to the area and the number of individuals encountered during an average visit is unlikely to be more than a few 10s; uncommon = the species is expected to be encountered at most a few times a year; rare = the species is not expected to be encountered more than once in several years; very rare = not expected to be encountered more than once in 10 years.
[a] Density estimates for these species were calculated for Puget Sound as a whole, but these species have never been recorded or observed in the action area. Thus the densities for the action area are shown as "0" to reflect this.

DBRC Site

Six cetaceans and three pinnipeds are known to occur or potentially occur within the DBRC action area (Table 5). Density estimates for these species are available for Puget Sound as a whole, but since these species have never been recorded or observed in the action area, the densities for the action area are shown as "0" to reflect this. There is no designated or proposed critical habitat for marine mammals within the DBRC action area.

Table 5. Marine Mammal Known to Occur or Potentially Occur within the DBRC Action Area

Species		ESA/MMP Status	Occurrence in Keyport Action Area	Density Estimate (km^3)	
				Warm Season	Cold Season
CETACEAN					
Mysticetes					
Minke whale		- / -	Very rare, year round; has never been recorded in action area.	0[(a)]	0[(a)]
Humpback whale		E/D	Very rare, warm season; has never been recorded in action area.	0[(a)]	0[(a)]
Gray whale		- / -	Very rare, spring/fall migrant and summer/fall resident population in primarily northern Puget Sound	0[(a)]	0[(a)]
Odontocetes					
Killer whale	Transient	- / -	Uncommon, spring/summer	Jan-Jun: 0.038	Jul-Dec: 0
	S. Resident	E/D	Very rare, no recorded occurrence in Hood Canal.	0[(a)]	0[(a)]
Dall's porpoise		- / -	Very rare, year round.	0	0
PINNIPEDS					
Harbor seal		- / -	Common year-round resident.	1.31	1.31
California sea lion		- / -	Common resident and seasonal migrant.	0[(a)]	0.052
Steller sea lion		T/D	Very rare, cold season; has never been recorded in action area	0[(a)]	0[(a)]

Notes: D = Depleted, E = Endangered, CH = Critical Habitat, T = Threatened.
Warm season = May-October, Cold season = November-April.
abundant = the species is expected to be encountered during a single visit to the area and the number of individuals encountered during an average visit may be as many as hundreds or more; common = the species is expected to be encountered once or more during 2-3 visits to the area and the number of individuals encountered during an average visit is unlikely to be more than a few 10s; uncommon = the species is expected to be encountered at most a few times a year; rare = the species is not expected to be encountered more than once in several years; very rare = not expected to be encountered more than once in 10 years.
[(a)] These species have never been recorded or observed in the action area. Thus the densities for the action area are shown as "0" to reflect this.

3.2.3 QUTR Site

The diversity of marine mammals that occur in QUTR is greater than that in the Puget Sound ranges and is listed in Table 6.

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Table 6. Marine Mammal Known to Occur or Potentially Occur within the QUTR Action Area

Species		ESA/MMP Status	Occurrence in Keyport Action Area	Density Estimate (km^3)	
				Warm Season	Cold Season
CETACEAN					
Mysticetes					
Blue whale		E/D	Rare, warm season	0.0003	0
Fin whale		E/D	Rare, year-round	0.0012	0.0012
Gray whale	Resident	- / -	Uncommon, year-round	0.003	0.003
	Migratory	- / -	Abundant briefly during cold season migration	0	NA
Humpback whale		E/D	Uncommon, warm season	0.0237	0
Minke whale		- / -	Rare, year-round	0.0004	0.0004
North Pacific right Whale		E/D	Very rare, warm season	0[(a)]	0[(a)]
Sei whale		E/D	Very rare, year-round	0.0002	0.0002
Odontocetes					
Baird's beaked whale		- / -	Uncommon, year-round	0.0027	0.0027
Hubb's & Stejneger's beaked whale		- / -	Uncommon, year-round	0.0027	0.0027
Dall's porpoise		- / -	Abundant, year-round	0.1718	0.1718
Harbor porpoise		- / -	Abundant, year-round	2.86	2.86
Northern right whale dolphin		- / -	Common, year-round	0.0419	0.0419
Pacific white-sided dolphin		- / -	Abundant, warm season	0.1929	0
Risso's dolphin		- / -	Uncommon, year-round	0.002	0.002
Short-beaked common dolphin		- / -	Uncommon, warm season	0.0012	0
Striped dolphin		- / -	Very rare, year-round	0.0002	0
Dwarf & pygmy sperm whales		- / -	Uncommon, warm season	0.0015	0
Sperm whale		E/D	Uncommon, warm season	0.0011	0.0011
Killer whale	N. Resident	- / -	Rare, year-round	0.0028	0.0028
	S. Resident	E/D	Rare, year-round		
	Offshore	- / -	Uncommon, year-round		
	Transient	- / -	Uncommon, cold season		
PINNIPEDS					
Phocids					
Harbor seal		- / -	Abundant, year-round	0.44	0.44
Northern elephant seal		- / -	Uncommon, year-round	Dec-Feb: 0.019 Mar-Apr: 0.026 May-Jul: 0.038 Aug-Nov: 0.047	
Otariids					
California sea lion		- / -	Common, year-round except May-July.	Aug-Apr: 0.283 May-Jul: 0	
Northern fur seal		- /D	Common, year-round	0.091	0.117
Steller sea lion		T/D	Uncommon, year-round	0.0096	0.0096

MUSTELIDS				
Sea otter	- / -	Does not presently occur within the action area	0[a]	0[a]

Notes: D = Depleted, E = Endangered, CH = Critical Habitat, T = Threatened.
Warm season = May-October, Cold season = November-April.
abundant = the species is expected to be encountered during a single visit to the area and the number of individuals encountered during an average visit may be as many as hundreds or more; common = the species is expected to be encountered once or more during 2-3 visits to the area and the number of individuals encountered during an average visit is unlikely to be more than a few 10s; uncommon = the species is expected to be encountered at most a few times a year; rare = the species is not expected to be encountered more than once in several years; very rare = not expected to be encountered more than once in 10 years.
[a] These species have never been recorded or observed in the action area. Thus the densities for the action area are shown as "0" to reflect this.

More detailed description of marine mammal density estimates within the NAVSEA NUWC Keyport Range Complex Extension is provided in the Navy's LOA application.

A Brief Background on Sound

An understanding of the basic properties of underwater sound is necessary to comprehend many of the concepts and analyses presented in this document. A summary is included below.

Sound is a wave of pressure variations propagating through a medium (for the sonar considered in this proposed rule, the medium is marine water). Pressure variations are created by compressing and relaxing the medium. Sound measurements can be expressed in two forms: intensity and pressure. Acoustic intensity is the average rate of energy transmitted through a unit area in a specified direction and is expressed in watts per square meter (W/m^2). Acoustic intensity is rarely measured directly, it is derived from ratios of pressures; the standard reference pressure for underwater sound is 1 microPascal (microPa); for airborne sound, the standard reference pressure is 20 microPa (Urick, 1983).

Acousticians have adopted a logarithmic scale for sound intensities, which is denoted in decibels (dB). Decibel measurements represent the ratio between a measured pressure value and a reference pressure value (in this case 1 microPa or, for airborne sound, 20 microPa). The logarithmic nature of the scale means that each 10 dB increase is a tenfold increase in power (*e.g.,* 20 dB is a 100-fold increase, 30 dB is a 1,000-fold increase). Humans perceive a 10-dB increase in noise as a doubling of sound level, or a 10 dB decrease in noise as a halving of sound level. The term "sound pressure level" implies a decibel measure and a reference pressure that is used as the denominator of the ratio. Throughout this document, NMFS uses 1 microPa as a standard reference pressure unless noted otherwise.

It is important to note that decibels underwater and decibels in air are not the same and cannot be directly compared. To estimate a comparison between sound in air and underwater, because of the different densities of air and water and the different decibel standards (*i.e.,* reference pressures) in water and air, a sound with the same intensity (*i.e.,* power) in air and in water would be approximately 61.5 dB lower in air. Thus, a sound that is 160 dB loud underwater would have the same approximate effective intensity as a sound that is 98.5 dB loud in air.

Sound frequency is measured in cycles per second, or Hertz (abbreviated Hz), and is analogous to musical pitch; high-pitched sounds contain high frequencies and low-pitched sounds contain low frequencies. Natural sounds in the ocean span a huge range of frequencies: from earthquake noise at 5 Hz to harbor porpoise clicks at 150,000 Hz (150 kHz). These sounds are so low or so high in pitch that humans cannot even hear them; acousticians call these infrasonic and ultrasonic sounds, respectively. A single sound may be made up of many different frequencies together. Sounds made up of only a small range of frequencies are called "narrowband", and sounds with a broad range of frequencies are called "broadband"; airguns are an example of a broadband sound source and tactical sonars are an example of a narrowband sound source.

When considering the influence of various kinds of sound on the marine environment, it is necessary to understand that different kinds of marine life are sensitive to different frequencies of sound. Based on available behavioral data, audiograms derived using auditory evoked potential, anatomical modeling, and other data, Southall *et al.* (2007) designated "functional hearing groups" and estimated the lower and upper frequencies of functional hearing of the groups. Further, the frequency range in which each group's hearing is estimated as being most sensitive is represented in the flat part of the M-weighting functions developed for each group. The functional groups and the associated frequencies are indicated below:

- Low frequency cetaceans (13 species of mysticetes): Functional hearing is estimated to occur between approximately 7 Hz and 22 kHz.
- Mid-frequency cetaceans (32 species of dolphins, six species of larger toothed whales, and 19 species of beaked and bottlenose whales): Functional hearing is estimated to occur between approximately 150 Hz and 160 kHz.
- High frequency cetaceans (eight species of true porpoises, six species of river dolphins, *Kogia,* the franciscana, and four species of cephalorhynchids): Functional hearing is estimated to occur between approximately 200 Hz and 180 kHz.
- Pinnipeds in Water: Functional hearing is estimated to occur between approximately 75 Hz and 75 kHz, with the greatest sensitivity between approximately 700 Hz and 20 kHz.
- Pinnipeds in Air: Functional hearing is estimated to occur between approximately 75 Hz and 30 kHz.

Because ears adapted to function underwater are physiologically different from human ears, comparisons using decibel measurements in air would still not be adequate to describe the effects of a sound on a cetacean. When sound travels away from its source, its loudness decreases as the distance from the source increases (propagation). Thus, the loudness of a sound at its source is higher than the loudness of that same sound a kilometer distant. Acousticians often refer to the loudness of a sound at its source (typically measured one meter from the source) as the source level and the loudness of sound elsewhere as the received level. For example, a humpback whale three kilometers from an airgun that has a source level of 230 dB may only be

exposed to sound that is 160 dB loud, depending on how the sound propagates. As a result, it is important not to confuse source levels and received levels when discussing the loudness of sound in the ocean.

As sound travels from a source, its propagation in water is influenced by various physical characteristics, including water temperature, depth, salinity, and surface and bottom properties that cause refraction, reflection, absorption, and scattering of sound waves. Oceans are not homogeneous and the contribution of each of these individual factors is extremely complex and interrelated. The physical characteristics that determine the sound's speed through the water will change with depth, season, geographic location, and with time of day (as a result, in actual sonar operations, crews will measure oceanic conditions, such as sea water temperature and depth, to calibrate models that determine the path the sonar signal will take as it travels through the ocean and how strong the sound signal will be at a given range along a particular transmission path). As sound travels through the ocean, the intensity associated with the wavefront diminishes, or attenuates. This decrease in intensity is referred to as propagation loss, also commonly called transmission loss.

Metrics Used in This Document

This section includes a brief explanation of the two sound measurements (sound pressure level (SPL) and sound exposure level (SEL)) frequently used in the discussions of acoustic effects in this document.

SPL

Sound pressure is the sound force per unit area, and is usually measured in microPa, where 1 Pa is the pressure resulting from a force of one newton exerted over an area of one square meter. SPL is expressed as the ratio of a measured sound pressure and a reference level. The commonly used reference pressure level in underwater acoustics is 1 microPa, and the units for SPLs are dB re: 1 microPa.

SPL (in dB) = 20 log (pressure/reference pressure)

SPL is an instantaneous measurement and can be expressed as the peak, the peak-peak, or the root mean square (rms). Root mean square, which is the square root of the arithmetic average of the squared instantaneous pressure values, is typically used in discussions of the effects of sounds on vertebrates. All references to SPL in this document refer to the root mean square. SPL does not take the duration of a sound into account. SPL is the applicable metric used in the risk continuum, which is used to estimate behavioral harassment takes (*see* Level B Harassment Risk Function (Behavioral Harassment) Section).

SEL

SEL is an energy metric that integrates the squared instantaneous sound pressure over a stated time interval. The units for SEL are dB re: 1 microPa^2-s.

SEL = SPL + 10log (duration in seconds)

As applied to tactical sonar, the SEL includes both the SPL of a sonar ping and the total duration. Longer duration pings and/or pings with higher SPLs will have a higher SEL. Surface-ship hull-mounted sonars, known as tactical sonars, are not used by NAVSEA NUWC Keyport. If an animal is exposed to multiple pings, the SEL in each individual ping is summed to calculate the total SEL. The total SEL depends on the SPL, duration, and number of pings received. The thresholds that NMFS uses to indicate the received levels at which the onset of temporary threshold shift (TTS) and permanent threshold shift (PTS) in hearing are likely to occur are expressed in SEL.

Potential Impacts to Marine Mammal Species

The following sections discuss the potential effects from noise related to active acoustic devices that would be used in the proposed Keyport Range Complex Extension.

For activities involving active acoustic sources such as tactical sonar, NMFS's analysis identifies the probability of lethal responses, physical trauma, sensory impairment (permanent and temporary threshold shifts and acoustic masking), physiological responses (particular stress responses), behavioral disturbance (that rises to the level of harassment), and social responses that would be classified as behavioral harassment or injury and/or would be likely to adversely affect the species or stock through effects on annual rates of recruitment or survival. It should be noted that the description below is based on more powerful mid-frequency active sonar (MFAS) used on surface ships. The NAVSEA NUWC Keyport Range does not utilize these sources in RDT&E activities. Many of these severe effects (*e.g.,* mortality, acoustically mediated bubble growth, and stranding) are not likely to occur for acoustic sources used in the proposed Keyport Range activities, as shown in Estimated Takes of Marine Mammals section.

Direct Physiological Effects

Based on the literature, there are two basic ways that MFAS might directly result in physical trauma or damage: Noise-induced loss of hearing sensitivity (more commonly-called ''threshold shift'') and acoustically mediated bubble growth. Separately, an animal's behavioral reaction to an acoustic exposure might lead to physiological effects that might ultimately lead to injury or death, which is discussed later in the Stranding section.

Threshold Shift (Noise-Induced Loss of Hearing)

When animals exhibit reduced hearing sensitivity (*i.e.,* sounds must be louder for an animal to recognize them) following exposure to a sufficiently intense sound, it is referred to as a noise-induced threshold shift (TS). An animal can experience temporary threshold shift (TTS) or permanent threshold shift (PTS). TTS can last from minutes or hours to days (*i.e.,* there is recovery), occurs in specific frequency ranges (*i.e.,* an animal might only have a temporary loss of hearing sensitivity between the frequencies of 1 and 10 kHz)), and can be of varying amounts (for example, an animal's hearing sensitivity might be reduced by only 6 dB or reduced by 30 dB). PTS is permanent (*i.e.,* there is no recovery), but as with TTS occurs in a specific frequency range and amount.

The following physiological mechanisms are thought to play a role in inducing auditory TSs: Effects to sensory hair cells in the inner ear that reduce their sensitivity, modification of the chemical environment within the sensory cells, residual muscular activity in the middle ear, displacement of certain inner ear membranes, increased blood flow, and post-stimulatory reduction in both efferent and sensory neural output (Southall *et al.,* 2007). The amplitude, duration, frequency, temporal pattern, and energy distribution of sound exposure all affect the amount of associated TS and the frequency range in which it occurs. As amplitude and duration of sound exposure increase, so, generally, does the amount of TS. For continuous sounds, exposures of equal energy (the same SEL) will lead to approximately equal effects. For intermittent sounds, less TS will occur than from a continuous exposure with the same energy (some recovery will occur between exposures) (Kryter *et al.,* 1966; Ward, 1997). For example, one short but loud (higher SPL) sound exposure may induce the same impairment as one

longer but softer sound, which in turn may cause more impairment than a series of several intermittent softer sounds with the same total energy (Ward, 1997). Additionally, though TTS is temporary, very prolonged exposure to sound strong enough to elicit TTS, or shorter-term exposure to sound levels well above the TTS threshold, can cause PTS, at least in terrestrial mammals (Kryter, 1985) (although in the case of MFAS, animals are not expected to be exposed to levels high enough or durations long enough to result in PTS).

PTS is considered auditory injury (Southall *et al.,* 2007). Irreparable damage to the inner or outer cochlear hair cells may cause PTS, however, other mechanisms are also involved, such as exceeding the elastic limits of certain tissues and membranes in the middle and inner ears and resultant changes in the chemical composition of the inner ear fluids (Southall *et al.,* 2007).

Although the published body of scientific literature contains numerous theoretical studies and discussion papers on hearing impairments that can occur with exposure to a loud sound, only a few studies provide empirical information on the levels at which noise-induced loss in hearing sensitivity occurs in nonhuman animals. For cetaceans, published data are limited to a captive bottlenose dolphin and beluga whale (Finneran *et al.,* 2000, 2002b, 2005a; Schlundt *et al.,* 2000; Nachtigall *et al.,* 2003, 2004).

Marine mammal hearing plays a critical role in communication with conspecific, and interpreting environmental cues for purposes such as predator avoidance and prey capture. Depending on the frequency range of TTS degree (dB), duration, and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious (similar to those discussed in auditory masking, below). For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that takes place during a time when the animal is traveling through the open ocean, where ambient noise is lower and there are not as many competing sounds present.

Alternatively, a larger amount and longer duration of TTS sustained during time when communication is critical for successful mother/calf interactions could have more serious impacts. Also, depending on the degree and frequency range, the effects of PTS on an animal could range in severity, although it is considered generally more serious because it is a long term condition. Of note, reduced hearing sensitivity as a simple function of development and aging has been observed in marine mammals, as well as humans and other taxa (Southall *et al.,* 2007), so we can infer that strategies exist for coping with this condition to some degree, though likely not without cost. There is no empirical evidence that exposure to MFAS can cause PTS in any marine mammals; instead the probability of PTS has been inferred from studies of TTS (see Richardson *et al.,* 1995).

Acoustically Mediated Bubble Growth

One theoretical cause of injury to marine mammals is rectified diffusion (Crum and Mao, 1996), the process of increasing the size of a bubble by exposing it to a sound field. This process could be facilitated if the environment in which the ensonified bubbles exist is supersaturated with gas. Repetitive diving by marine mammals can cause the blood and some tissues to accumulate gas to a greater degree than is supported by the surrounding environmental pressure (Ridgway and Howard, 1979). The deeper and longer dives of some marine mammals (for example, beaked whales) are theoretically predicted to induce greater supersaturation (Houser *et al.,* 2001b). If rectified diffusion were possible in marine mammals exposed to high-level sound, conditions of tissue supersaturation could theoretically speed the rate and increase the size of bubble growth. Subsequent effects due to tissue trauma and emboli would presumably mirror those observed in humans suffering from decompression sickness.

It is unlikely that the short duration of sonar pings would be long enough to drive bubble growth to any substantial size, if such a phenomenon occurs. Recent work conducted by Crum *et al.* (2005) demonstrated the possibility of rectified diffusion for short duration signals, but at sound exposure levels and tissue saturation levels that are improbable to occur in a diving marine mammal. However, an alternative but related hypothesis has also been suggested: Stable bubbles could be destabilized by high-level sound exposures such that bubble growth then occurs through static diffusion of gas out of the tissues. In such a scenario the marine mammal would need to be in a gas-supersaturated state for a long enough period of time for bubbles to become of a problematic size. Yet another hypothesis (decompression sickness) has speculated that rapid ascent to the surface following exposure to a startling sound might produce tissue gas saturation sufficient for the evolution of nitrogen bubbles (Jepson *et al.,* 2003; Fernandez *et al.,* 2005). In this scenario, the rate of ascent would need to be sufficiently rapid to compromise behavioral or physiological protections against nitrogen bubble formation. Collectively, these hypotheses can be referred to as ''hypotheses of acoustically mediated bubble growth.''

Although theoretical predictions suggest the possibility for acoustically mediated bubble growth, there is considerable disagreement among scientists as to its likelihood (Piantadosi and Thalmann, 2004; Evans and Miller, 2003). Crum and Mao (1996) hypothesized that received levels would have to exceed 190 dB in order for there to be the possibility of significant bubble growth due to supersaturation of gases in the blood (*i.e.,* rectified diffusion). More recent work conducted by Crum *et al.* (2005) demonstrated the possibility of rectified diffusion for short duration signals, but at SELs and tissue saturation levels that are highly improbable to occur in diving marine mammals. To date, Energy Levels (ELs) predicted to cause in vivo bubble formation within diving cetaceans have not been evaluated (NOAA, 2002b). Although it has been argued that traumas from some recent beaked whale strandings are consistent with gas emboli and bubble-induced tissue separations (Jepson *et al.,* 2003), there is no conclusive evidence of this. However, Jepson *et al.* (2003, 2005) and Fernandez *et al.* (2004, 2005) concluded that in vivo bubble formation, which may be exacerbated by deep, long duration, repetitive dives may explain why beaked whales appear to be particularly vulnerable to sonar exposures. Further investigation is needed to further assess the potential validity of these hypotheses. More information regarding hypotheses that attempt to explain how behavioral responses to MFAS can lead to strandings is included in the Behaviorally Mediated Bubble Growth section, after the summary of strandings.

Acoustic Masking

Marine mammals use acoustic signals for a variety of purposes, which differ among species, but include communication between individuals, navigation, foraging, reproduction, and learning about their environment (Erbe and Farmer, 2000; Tyack, 2000). Masking, or auditory interference, generally occurs when sounds in the environment are louder than and of a similar frequency to, auditory signals an animal is trying to receive. Masking is a phenomenon that affects animals that

are trying to receive acoustic information about their environment, including sounds from other members of their species, predators, prey, and sounds that allow them to orient in their environment. Masking these acoustic signals can disturb the behavior of individual animals, groups of animals, or entire populations.

The extent of the masking interference depends on the spectral, temporal, and spatial relationships between the signals an animal is trying to receive and the masking noise, in addition to other factors. In humans, significant masking of tonal signals occurs as a result of exposure to noise in a narrow band of similar frequencies. As the sound level increases, though, the detection of frequencies above those of the masking stimulus decreases also. This principle is expected to apply to marine mammals as well because of common biomechanical cochlear properties across taxa.

Richardson *et al.* (1995) argued that the maximum radius of influence of an industrial noise (including broadband low frequency sound transmission) on a marine mammal is the distance from the source to the point at which the noise can barely be heard. This range is determined by either the hearing sensitivity of the animal or the background noise level present. Industrial masking is most likely to affect some species' ability to detect communication calls and natural sounds (*i.e.,* surf noise, prey noise, etc.; Richardson *et al.,* 1995).

The echolocation calls of odontocetes (toothed whales) are subject to masking by high frequency sound. Human data indicate low frequency sound can mask high frequency sounds (*i.e.,* upward masking). Studies on captive odontocetes by Au *et al.* (1974, 1985, 1993) indicate that some species may use various processes to reduce masking effects (*e.g.,* adjustments in echolocation call intensity or frequency as a function of background noise conditions). There is also evidence that the directional hearing abilities of odontocetes are useful in reducing masking at the high frequencies these cetaceans use to echolocate, but not at the low-to moderate frequencies they use to communicate (Zaitseva *et al.,* 1980).

As mentioned previously, the functional hearing ranges of marine mammals all encompass the frequencies of the active acoustic sources used in the Navy's Keyport Range activities. Additionally, almost all species' vocal repertoires span across the frequencies of the sources used by the Navy. The closer the characteristics of the masking signal to the signal of interest, the more likely masking is to occur. However, because the pulse length and duty cycle of source signals are of short duration and would not be continuous, masking is unlikely to occur as a result of exposure to active acoustic sources during the RDT&E activities in the Keyport Range Complex Extension Study Area.

Impaired Communication

In addition to making it more difficult for animals to perceive acoustic cues in their environment, anthropogenic sound presents separate challenges for animals that are vocalizing. When they vocalize, animals are aware of environmental conditions that affect the ''active space'' of their vocalizations, which is the maximum area within which their vocalizations can be detected before it drops to the level of ambient noise (Brenowitz, 2004; Brumm *et al.,* 2004; Lohr *et al.,* 2003). Animals are also aware of environmental conditions that affect whether listeners can discriminate and recognize their vocalizations from other sounds, which are more important than detecting a vocalization (Brenowitz, 1982; Brumm *et al.,* 2004; Dooling, 2004; Marten and Marler, 1977; Patricelli *et al.,* 2006). Most animals that vocalize have evolved an ability to make adjustments to their vocalizations to increase the signal-to-noise ratio, active space, and recognizability of their vocalizations in the face of temporary changes in background noise (Brumm *et al.,* 2004; Patricelli *et al.,* 2006). Vocalizing animals will make one or more of the following adjustments to their vocalizations: Adjust the frequency structure; adjust the amplitude; adjust temporal structure; or adjust temporal delivery.

Many animals will combine several of these strategies to compensate for high levels of background noise. Anthropogenic sounds that reduce the signal-to-noise ratio of animal vocalizations, increase the masked auditory thresholds of animals listening for such vocalizations, or reduce the active space of an animal's vocalizations impair communication between animals. Most animals that vocalize have evolved strategies to compensate for the effects of short-term or temporary increases in background or ambient noise on their songs or calls. Although the fitness consequences of these vocal adjustments remain unknown, like most other trade-offs animals must make, some of these strategies probably come at a cost (Patricelli *et al.,* 2006). For example, vocalizing more loudly in noisy environments may have energetic costs that decrease the net benefits of vocal adjustment and alter a bird's energy budget (Brumm, 2004; Wood and Yezerinac, 2006). Shifting songs and calls to higher frequencies may also impose energetic costs (Lambrechts, 1996).

Stress Responses

Classic stress responses begin when an animal's central nervous system perceives a potential threat to its homeostasis. That perception triggers stress responses regardless of whether a stimulus actually threatens the animal; the mere perception of a threat is sufficient to trigger a stress response (Moberg, 2000; Sapolsky *et al.,* 2005; Seyle, 1950). Once an animal's central nervous system perceives a threat, it mounts a biological response or defense that consists of a combination of the four general biological defense responses: Behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune response.

In the case of many stressors, an animal's first and most economical (in terms of biotic costs) response is behavioral avoidance of the potential stressor or avoidance of continued exposure to a stressor. An animal's second line of defense to stressors involves the autonomic nervous system and the classical ''fight or flight'' response which includes the cardiovascular system, the gastrointestinal system, the exocrine glands, and the adrenal medulla to produce changes in heart rate, blood pressure, and gastrointestinal activity that humans commonly associate with ''stress.'' These responses have a relatively short duration and may or may not have significant long-term effects on an animal's welfare.

An animal's third line of defense to stressors involves its neuroendocrine or sympathetic nervous systems; the system that has received the most study has been the hypothalmus-pituitary-adrenal system (also known as the HPA axis in mammals or the hypothalamus-pituitary-interrenal axis in fish and some reptiles). Unlike stress responses associated with the autonomic nervous system, virtually all neuro-endocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction (Moberg, 1987; Rivier, 1995) and altered metabolism (Elasser *et al.,* 2000), reduced immune competence (Blecha, 2000) and behavioral disturbance. Increases in the circulation of glucocorticosteroids (cortisol,

corticosterone, and aldosterone in marine mammals; Romano *et al.,* 2004) have been equated with stress for many years.

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and distress is the biotic cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose a risk to the animal's welfare. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other biotic functions, which impair those functions that experience the diversion. For example, when mounting a stress response diverts energy away from growth in young animals, those animals may experience stunted growth. When mounting a stress response diverts energy from a fetus, an animal's reproductive success and its fitness will suffer. In these cases, the animals will have entered a pre-pathological or pathological state which is called ''distress'' (sensu Seyle, 1950) or ''allostatic loading'' (sensu McEwen and Wingfield, 2003). This pathological state will last until the animal replenishes its biotic reserves sufficient to restore normal function.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses have also been documented fairly well through controlled experiments; because this physiology exists in every vertebrate that has been studied, it is not surprising that stress responses and their costs have been documented in both laboratory and free-living animals (for examples see, Holberton *et al.,* 1996; Hood *et al.,* 1998; Jessop *et al.,* 2003; Krausman *et al.,* 2004; Lankford *et al.,* 2005; Reneerkens *et al.,* 2002; Thompson and Hamer, 2000). Although no information has been collected on the physiological responses of marine mammals to exposure to anthropogenic sounds, studies of other marine animals and terrestrial animals would lead us to expect some marine mammals to experience physiological stress responses and, perhaps, physiological responses that would be classified as ''distress'' upon exposure to mid-frequency and low frequency sounds.

For example, Jansen (1998) reported on the relationship between acoustic exposures and physiological responses that are indicative of stress responses in humans (for example, elevated respiration and increased heart rates). Jones (1998) reported on reductions in human performance when faced with acute, repetitive exposures to acoustic disturbance. Trimper *et al.* (1998) reported on the physiological stress responses of osprey to low-level aircraft noise while Krausman *et al.* (2004) reported on the auditory and physiology stress responses of endangered Sonoran pronghorn to military overflights. Smith *et al.* (2004a, 2004b) identified noise induced physiological transient stress responses in hearing-specialist fish that accompanied short- and long-term hearing losses. Welch and Welch (1970) reported physiological and behavioral stress responses that accompanied damage to the inner ears of fish and several mammals.

Hearing is one of the primary senses cetaceans use to gather information about their environment and to communicate with conspecifics. Although empirical information on the relationship between sensory impairment (TTS, PTS, and acoustic masking) on cetaceans remains limited, it seems reasonable to assume that reducing an animal's ability to gather information about its environment and to communicate with other members of its species would be stressful for animals that use hearing as their primary sensory mechanism. Therefore, we assume that acoustic exposures sufficient to trigger onset PTS or TTS would be accompanied by physiological stress responses because terrestrial animals exhibit those responses under similar conditions (NRC, 2003). More importantly, marine mammals might experience stress responses at received levels lower than those necessary to trigger onset TTS. Based on empirical studies of the time required to recover from stress responses (Moberg, 2000), we also assume that stress responses are likely to persist beyond the time interval required for animals to recover from TTS and might result in pathological and pre-pathological states that would be as significant as behavioral responses to TTS.

Behavioral Disturbance

Behavioral responses to sound are highly variable and context-specific. Exposure of marine mammals to sound sources can result in (but is not limited to) the following observable responses: Increased alertness; orientation or attraction to a sound source; vocal modifications; cessation of feeding; cessation of social interaction; alteration of movement or diving behavior; habitat abandonment (temporary or permanent); and, in severe cases, panic, flight, stampede, or stranding, potentially resulting in death (Southall *et al.,* 2007).

Many different variables can influence an animal's perception of and response to (nature and magnitude) an acoustic event. An animal's prior experience with a sound type affects whether it is less likely (habituation) or more likely (sensitization) to respond to certain sounds in the future (animals can also be innately pre-disposed to respond to certain sounds in certain ways) (Southall *et al.,* 2007). Related to the sound itself, the perceived nearness of the sound, bearing of the sound (approaching vs. retreating), similarity of a sound to biologically relevant sounds in the animal's environment (*i.e.,* calls of predators, prey, or conspecifics), and familiarity of the sound may affect the way an animal responds to the sound (Southall *et al.,* 2007). Individuals (of different age, gender, reproductive status, etc.) among most populations will have variable hearing capabilities, and differing behavioral sensitivities to sounds that will be affected by prior conditioning, experience, and current activities of those individuals. Often, specific acoustic features of the sound and contextual variables (*i.e.,* proximity, duration, or recurrence of the sound or the current behavior that the marine mammal is engaged in or its prior experience), as well as entirely separate factors such as the physical presence of a nearby vessel, may be more relevant to the animal's response than the received level alone.

There are few empirical studies of avoidance responses of free-living cetaceans to mid-frequency sonars. Much more information is available on the avoidance responses of free-living cetaceans to other acoustic sources, like seismic airguns and low frequency sonar, than mid-frequency active sonar. Richardson *et al.,* (1995) noted that avoidance reactions are the most obvious manifestations of disturbance in marine mammals.

Behavioral Responses (Southall et al. (2007))

Southall *et al.,* (2007) reports the results of the efforts of experts in acoustic research from behavioral, physiological, and physical disciplines that convened and reviewed the available literature on marine mammal hearing and physiological and behavioral responses to anthropogenic sound with the goal of proposing exposure criteria for certain effects. This compilation of literature is very valuable, though Southall *et al.* notes that not all data is equal: Some have poor statistical power, insufficient controls, and/or limited information on received levels, background noise, and

other potentially important contextual variables; such data were reviewed and sometimes used for qualitative illustration, but were not included in the quantitative analysis for the criteria recommendations.

In the Southall *et al.,* (2007) report, for the purposes of analyzing responses of marine mammals to anthropogenic sound and developing criteria, the authors differentiate between single pulse sounds, multiple pulse sounds, and non-pulse sounds. Sonar signal is considered a non-pulse sound. Southall *et al.,* (2007) summarize the reports associated with low, mid, and high frequency cetacean responses to non-pulse sounds in Appendix C of their report (incorporated by reference and summarized in the three paragraphs below).

The reports that address responses of low frequency cetaceans to non-pulse sounds include data gathered in the field and related to several types of sound sources (of varying similarity to sonar signals) including: Vessel noise, drilling and machinery playback, low frequency M-sequences (sine wave with multiple phase reversals) playback, low frequency active sonar playback, drill vessels, Acoustic Thermometry of Ocean Climate (ATOC) source, and non-pulse playbacks. These reports generally indicate no (or very limited) responses to received levels in the 90 to 120 dB re 1 micro Pa range and an increasing likelihood of avoidance and other behavioral effects in the 120 to 160 dB range. As mentioned earlier, however, contextual variables play a very important role in the reported responses, and the severity of effects are not linear when compared to received level. Also, few of the laboratory or field datasets had common conditions, behavioral contexts or sound sources, so it is not surprising that responses differ.

The reports that address responses of mid-frequency cetaceans to non-pulse sounds include data gathered both in the field and the laboratory and related to several different sound sources (of varying similarity to sonar signals) including: Pingers, drilling playbacks, vessel and ice-breaking noise, vessel noise, Acoustic Harassment Devices (AHDs), Acoustic Deterrent Devices (ADDs), HFAS/MFAS, and non-pulse bands and tones. Southall *et al.* were unable to come to a clear conclusion regarding these reports. In some cases, animals in the field showed significant responses to received levels between 90 and 120 dB, while in other cases these responses were not seen in the 120 to 150 dB range. The disparity in results was likely due to contextual variation and the differences between the results in the field and laboratory data (animals responded at lower levels in the field).

The reports that address the responses of high frequency cetaceans to non-pulse sounds include data gathered both in the field and the laboratory and related to several different sound sources (of varying similarity to sonar signals) including: Acoustic harassment devices, Acoustical Telemetry of Ocean Climate (ATOC), wind turbine, vessel noise, and construction noise. However, no conclusive results are available from these reports. In some cases, high frequency cetaceans (harbor porpoises) are observed to be quite sensitive to a wide range of human sounds at very low exposure RLs (90 to 120 dB). All recorded exposures exceeding 140 dB produced profound and sustained avoidance behavior in wild harbor porpoises (Southall *et al.,* 2007).

In addition to summarizing the available data, the authors of Southall *et al.* (2007) developed a severity scaling system with the intent of ultimately being able to assign some level of biological significance to a response. Following is a summary of their scoring system: A comprehensive list of the behaviors associated with each score may be found in the report:

- 0–3 (Minor and/or brief behaviors) includes, but is not limited to: No response; minor changes in speed or locomotion (but with no avoidance); individual alert behavior; minor cessation in vocal behavior; minor changes in response to trained behaviors (in laboratory).
- 4–6 (Behaviors with higher potential to affect foraging, reproduction, or survival) includes, but is not limited to: Moderate changes in speed, direction, or dive profile; brief shift in group distribution; prolonged cessation or modification of vocal behavior (duration > duration of sound), minor or moderate individual and/or group avoidance of sound; brief cessation of reproductive behavior; or refusal to initiate trained tasks (in laboratory).
- 7–9 (Behaviors considered likely to affect the aforementioned vital rates) includes, but are not limited to: Extensive of prolonged aggressive behavior; moderate, prolonged or significant separation of females and dependent offspring with disruption of acoustic reunion mechanisms; long-term avoidance of an area; outright panic, stampede, stranding; threatening or attacking sound source (in laboratory).

In Table 7 we have summarized the scores that Southall *et al.* (2007) assigned to the papers that reported behavioral responses of low frequency cetaceans, mid-frequency cetaceans, and high frequency cetaceans to non-pulse sounds.

TABLE 7—DATA COMPILED FROM THREE TABLES FROM SOUTHALL ET AL. (2007) INDICATING WHEN MARINE MAMMALS (LOW-FREQUENCY CETACEAN = L, MID-FREQUENCY CETACEAN = M, AND HIGH-FREQUENCY CETACEAN = H) WERE REPORTED AS HAVING A BEHAVIORAL RESPONSE OF THE INDICATED SEVERITY TO A NON-PULSE SOUND OF THE INDICATED RECEIVED LEVEL

[As discussed in the text, responses are highly variable and context specific]

Received RMS sound pressure level (dB re 1 microPa)	Response Score											
	80 to <90	90 to < 100	100 to < 110	110 to <120	120 to < 130	130 to < 140	140 to < 150	150 to < 160	160 to < 170	170 to < 180	180 to < 190	190 to < 200
9												
8		M	M		M		M				M	M
7						L	L					
6	H	L/H	L/H	L/M/H	L/M/H	L	L/H	H	M/H	M		
5					M							
4			H	L/M/H	L/M		L					
3		M	L/M	L/M	M							
2			L	L/M	L	L	L					
1			M	M	M							
0	L/H	L/H	L/M/H	L/M/H	L/M/H	L	M				M	M

Potential Effects of Behavioral Disturbance

The different ways that marine mammals respond to sound are sometimes indicators of the ultimate effect that exposure to a given stimulus will have on the well-being (survival, reproduction, etc.) of an animal. There is little marine mammal data quantitatively relating the exposure of marine mammals to sound to effects on reproduction or survival, though data exist for terrestrial species from which we can draw comparisons for marine mammals.

Attention is the cognitive process of selectively concentrating on one aspect of an animal's environment while ignoring other things (Posner, 1994). Because animals (including humans) have limited cognitive resources, there is a limit to how much sensory information they can process at any time. The phenomenon called ''attentional capture'' occurs when a stimulus (such as a stimulus that an animal is not concentrating on or attending to) ''captures'' an animal's attention. This shift in attention can occur consciously or unconsciously (for example, when an animal hears sounds that it associates with the approach of a predator) and the shift in attention can be sudden (Dukas, 2002; van Rij, 2007). Once a stimulus has captured an animal's attention, the animal can respond by ignoring the stimulus, assuming a ''watch and wait'' posture, or treat the stimulus as a disturbance and respond accordingly, which includes scanning for the source of the stimulus or ''vigilance'' (Cowlishaw *et al.,* 2004).

Vigilance is normally an adaptive behavior that helps animals determine the presence or absence of predators, assess their distance from conspecifics, or to attend cues from prey (Bednekoff and Lima, 1998; Treves, 2000). Despite those benefits, however, vigilance has a cost of time: When animals focus their attention on specific environmental cues, they are not attending to other activities such as foraging. These costs have been documented best in foraging animals, where vigilance has been shown to substantially reduce feeding rates (Saino, 1994; Beauchamp and Livoreil, 1997; Fritz *et al.,* 2002).

Animals will spend more time being vigilant, which may translate to less time foraging or resting, when disturbance stimuli approach them more directly, remain at closer distances, have a greater group size (for example, multiple surface vessels), or when they co-occur with times that an animal perceives increased risk (for example, when they are giving birth or accompanied by a calf). Most of the published literature, however, suggests that direct approaches will increase the amount of time animals will dedicate to being vigilant. For example, bighorn sheep and Dall's sheep dedicated more time being vigilant, and less time resting or foraging, when aircraft made direct approaches over them (Frid, 2001; Stockwell *et al.,* 1991).

Several authors have established that long-term and intense disturbance stimuli can cause population declines by reducing the body condition of individuals that have been disturbed, followed by reduced reproductive success, reduced survival, or both (Daan *et al.,* 1996; Madsen, 1994; White, 1983). For example, Madsen (1994) reported that pink-footed geese (*Anser brachyrhynchus*) in undisturbed habitat gained body mass and had about a 46-percent reproductive success compared with geese in disturbed habitat (being consistently scared off the fields on which they were foraging) which did not gain mass and had a 17 percent reproductive success. Similar reductions in reproductive success have been reported for mule deer (*Odocoileus hemionus*) disturbed by all-terrain vehicles (Yarmoloy *et al.,* 1988), caribou disturbed by seismic exploration blasts (Bradshaw *et al.,* 1998), caribou disturbed by low-elevation military jetfights (Luick *et al.,* 1996), and caribou disturbed by low-elevation jet flights (Harrington and Veitch, 1992). Similarly, a study of elk (*Cervus elaphus*) that were disturbed experimentally by pedestrians concluded that the ratio of young to mothers was inversely related to disturbance rate (Phillips and Alldredge, 2000).

The primary mechanism by which increased vigilance and disturbance appear to affect the fitness of individual animals is by disrupting an animal's time budget and, as a result, reducing the time they might spend foraging and resting (which increases an animal's activity rate and energy demand). For example, a study of grizzly bears (*Ursus horribilis*) reported that bears disturbed by hikers reduced their energy intake by an average of 12 kcal/min (50.2 × 103 kJ/min), and spent energy fleeing or acting aggressively toward hikers (White *et al.,* 1999).

On a related note, many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hr cycle). Substantive behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007).

Stranding and Mortality

When a live or dead marine mammal swims or floats onto shore and becomes ''beached'' or incapable of returning to sea, the event is termed a ''stranding'' (Geraci *et al.,* 1999; Perrin and Geraci, 2002; Geraci and Lounsbury, 2005; NMFS, 2007). The legal definition for a stranding within the United States is that ''(A) a marine mammal is dead and is (i) on a beach or shore of the United States; or (ii) in waters under the jurisdiction of the United States (including any navigable waters); or (B) a marine mammal is alive and is (i) on a beach or shore of the United States and is unable to return to the water; (ii) on a beach or shore of the United States and, although able to return to the water, is in need of apparent medical attention; or (iii) in the waters under the jurisdiction of the United States (including any navigable waters), but is unable to return to its natural habitat under its own power or without assistance.'' (16 U.S.C. 1421h).

Marine mammals are known to strand for a variety of reasons, such as infectious agents, biotoxicosis, starvation, fishery interaction, ship strike, unusual oceanographic or weather events, sound exposure, or combinations of these stressors sustained concurrently or in series. However, the cause or causes of most stranding are unknown (Geraci *et al.,* 1976; Eaton, 1979, Odell *et al.,* 1980; Best, 1982). Numerous studies suggest that the physiology, behavior, habitat relationships, age, or condition of cetaceans may cause them to strand or might pre-dispose them to strand when exposed to these phenomena. These suggestions are consistent with the conclusions of numerous other studies that have demonstrated that combinations of dissimilar stressors commonly combine to kill an animal or dramatically reduce its fitness, even though one exposure without the other does not produce the same result (Chroussos, 2000; Creel, 2005; DeVries *et al.,* 2003; Fair and Becker, 2000; Foley *et al.,* 2001; Moberg, 2000; Relyea, 2005a; 2005b, Romero, 2004; Sih *et al.,* 2004).

Several sources have published lists of mass stranding events of cetaceans during attempts to identify relationships

between those stranding events and military sonar (Hildebrand, 2004; IWC, 2005; Taylor *et al.,* 2004). For example, based on a review of stranding records between 1960 and 1995, the International Whaling Commission (IWC, 2005) identified ten mass stranding events of Cuvier's beaked whales that had been reported and one mass stranding of four Baird's beaked whales (*Berardius bairdii*). The IWC concluded that, out of eight stranding events reported from the mid-1980s to the summer of 2003, seven had been associated with the use of mid-frequency sonar, one of those seven had been associated with the use of low frequency sonar, and the remaining stranding event had been associated with the use of seismic airguns.

Most of the stranding events reviewed by the IWC involved beaked whales. A mass stranding of Cuvier's beaked whales in the eastern Mediterranean Sea occurred in 1996 (Frantzis, 1998) and mass stranding events involving Gervais' beaked whales, Blainville's beaked whales, and Cuvier's beaked whales occurred off the coast of the Canary Islands in the late 1980s (Simmonds and Lopez-Jurado, 1991). The stranding events that occurred in the Canary Islands and Kyparissiakos Gulf in the late 1990s and the Bahamas in 2000 have been the most intensively studied mass stranding events and have been associated with naval maneuvers that were using sonar.

Between 1960 and 2006, 48 strandings (68 percent) involved beaked whales, 3 (4 percent) involved dolphins, and 14 (20 percent) involved other whale species. Cuvier's beaked whales were involved in the greatest number of these events (48 strandings or 68 percent), followed by sperm whales (7 strandings or 10 percent), and Blainville's and Gervais' beaked whales (4 each or 6 percent). Naval activities that might have involved active sonar are reported to have coincided with 9 (13 percent) or 10 (14 percent) of those stranding events. Between the mid-1980s and 2003 (the period reported by the IWC), we identified reports of 44 mass cetacean stranding events of which at least 7 were coincident with naval exercises that were using mid-frequency sonar. A list of stranding events that are considered to be associated with MFAS is presented in the proposed rulemaking for the Navy's training in the Hawaii Range Complex (73 FR 35510; June 23, 2008).

Association Between Mass Stranding Events and Exposure to MFAS

Several authors have noted similarities between some of these mass stranding incidents: They occurred in islands or archipelagoes with deep water nearby, several appeared to have been associated with acoustic waveguides like surface ducting, and the sound fields created by vessels transmitting mid-frequency sonar (Cox *et al.,* 2006, D'Spain *et al.,* 2006). However, only low intensity sonars and low intensity acoustic sources are proposed for the Keyport Range Complex RDT&E and range extension activities, and no powerful MFAS such as the 53C series tactical sonar would be used for these activities; therefore, their zones of influence are much smaller compared to these highest powered surface vessel sources, and animals can be more easily detected in these smaller areas, thereby increasing the probability that sonar operations can be modified to reduce the risk of injury to marine mammals. In addition, the proposed test events differ significantly from major Navy exercises and training, which involve multi-vessel training scenarios using the AN/SQS–53/56 source that have been associated with past strandings. Therefore, their zones of influence are much smaller and are less likely to affect marine mammals. Although Cuvier's beaked whales have been the most common species involved in these stranding events (81 percent of the total number of stranded animals), other beaked whales (including *Mesoplodon europeaus, M. densirostris,* and *Hyperoodon ampullatus*) comprise 14 percent of the total. Other species (*Stenella coeruleoalba, Kogia breviceps* and *Balaenoptera acutorostrata*) have stranded, but in much lower numbers and less consistently than beaked whales.

Based on the available evidence, however, we cannot determine whether (a) Cuvier's beaked whale is more prone to injury from high-intensity sound than other species, (b) their behavioral responses to sound make them more likely to strand, or (c) they are more likely to be exposed to mid-frequency active sonar than other cetaceans (for reasons that remain unknown). Because the association between active sonar (mid-frequency) exposures and marine mammal mass stranding events is not consistent—some marine mammals strand without being exposed to sonar and some sonar transmissions are not associated with marine mammal stranding events despite their co-occurrence—other risk factors or a grouping of risk factors probably contribute to these stranding events.

Behaviorally Mediated Responses to HFAS/MFAS That May Lead to Stranding

Although the confluence of Navy mid-frequency active tactical sonar with the other contributory factors noted in the report was identified as the cause of the 2000 Bahamas stranding event, the specific mechanisms that led to that stranding (or the others) are not understood, and there is uncertainty regarding the ordering of effects that led to the stranding. It is unclear whether beaked whales were directly injured by sound (acoustically mediated bubble growth, addressed above) prior to stranding or whether a behavioral response to sound occurred that ultimately caused the beaked whales to strand and be injured.

Although causal relationships between beaked whale stranding events and active sonar remain unknown, several authors have hypothesized that stranding events involving these species in the Bahamas and Canary Islands may have been triggered when the whales changed their dive behavior in a startle response to exposure to active sonar or to further avoid exposure (Cox *et al.,* 2006, Rommel *et al.,* 2006). These authors proposed three mechanisms by which the behavioral responses of beaked whales upon being exposed to active sonar might result in a stranding event. These include: Gas bubble formation caused by excessively fast surfacing; remaining at the surface too long when tissues are supersaturated with nitrogen; or diving prematurely when extended time at the surface is necessary to eliminate excess nitrogen. More specifically, beaked whales that occur in deep waters that are in close proximity to shallow waters (for example, the ''canyon areas'' that are cited in the Bahamas stranding event; see D'Spain and D'Amico, 2006), may respond to active sonar by swimming into shallow waters to avoid further exposures and strand if they were not able to swim back to deeper waters. Second, beaked whales exposed to active sonar might alter their dive behavior. Changes in their dive behavior might cause them to remain at the surface or at depth for extended periods of time, which could lead to hypoxia directly by increasing their oxygen demands or indirectly by increasing their energy expenditures (to remain at depth) and increase their oxygen demands as a result. If beaked whales are at depth when they detect a ping from an active sonar transmission and change their dive profile, this could lead to the formation of significant gas bubbles, which could damage multiple

organs or interfere with normal physiological function (Cox *et al.,* 2006; Rommel *et al.,* 2006; Zimmer and Tyack, 2007). Baird *et al.* (2005) found that slow ascent rates from deep dives and long periods of time spent within 50 m of the surface were typical for both Cuvier's and Blainville's beaked whales, the two species involved in mass strandings related to naval sonar. These two behavioral mechanisms may be necessary to purge excessive dissolved nitrogen concentrated in their tissues during their frequent long dives (Baird *et al.,* 2005). Baird *et al.* (2005) further suggests that abnormally rapid ascents or premature dives in response to high intensity sonar could indirectly result in physical harm to the beaked whales, through the mechanisms described above (gas bubble formation or non-elimination of excess nitrogen).

Because many species of marine mammals make repetitive and prolonged dives to great depths, it has long been assumed that marine mammals have evolved physiological mechanisms to protect against the effects of rapid and repeated decompressions. Although several investigators have identified physiological adaptations that may protect marine mammals against nitrogen gas supersaturation (alveolar collapse and elective circulation; Kooyman *et al.,* 1972; Ridgway and Howard, 1979), Ridgway and Howard (1979) reported that bottlenose dolphins that were trained to dive repeatedly had muscle tissues that were substantially supersaturated with nitrogen gas. Houser *et al.* (2001) used these data to model the accumulation of nitrogen gas within the muscle tissue of other marine mammal species and concluded that cetaceans that dive deep and have slow ascent or descent speeds would have tissues that are more supersaturated with nitrogen gas than other marine mammals. Based on these data, Cox *et al.* (2006) hypothesized that a critical dive sequence might make beaked whales more prone to stranding in response to acoustic exposures. The sequence began with (1) very deep (to depths as deep as 2 kilometers) and long (as long as 90 minutes) foraging dives with (2) relatively slow, controlled ascents, followed by (3) a series of ''bounce'' dives between 100 and 400 m (328 and 1,323 ft) in depth (also see Zimmer and Tyack, 2007). They concluded that acoustic exposures that disrupted any part of this dive sequence (for example, causing beaked whales to spend more time at surface without the bounce dives that are necessary to recover from the deep dive) could produce excessive levels of nitrogen supersaturation in their tissues, leading to gas bubble and emboli formation that produces pathologies similar to decompression sickness.

Recently, Zimmer and Tyack (2007) modeled nitrogen tension and bubble growth in several tissue compartments for several hypothetical dive profiles and concluded that repetitive shallow dives (defined as a dive where depth does not exceed the depth of alveolar collapse, approximately 72 m (236 ft) for *Ziphius*), perhaps as a consequence of an extended avoidance reaction to sonar sound, could pose a risk for decompression sickness and that this risk should increase with the duration of the response. Their models also suggested that unrealistically more rapid ascent rates from normal dive behaviors are unlikely to result in supersaturation to the extent that bubble formation would be expected. Tyack *et al.* (2006) suggested that emboli observed in animals exposed to midfrequency range sonar (Jepson *et al.,* 2003; Fernandez *et al.,* 2005) could stem from a behavioral response that involves repeated dives shallower than the depth of lung collapse. Given that nitrogen gas accumulation is a passive process (*i.e.,* nitrogen is metabolically inert), a bottlenose dolphin was trained to repetitively dive a profile predicted to elevate nitrogen saturation to the point that nitrogen bubble formation was predicted to occur. However, inspection of the vascular system of the dolphin via ultrasound did not demonstrate the formation of asymptomatic nitrogen gas bubbles (Houser *et al.,* 2007).

If marine mammals respond to a Navy vessel that is transmitting active sonar in the same way that they might respond to a predator, their probability of flight responses should increase when they perceive that Navy vessels are approaching them directly, because a direct approach may convey detection and intent to capture (Burger and Gochfeld, 1981; 1990; Cooper, 1997; 1998). The probability of flight responses should also increase as received levels of active sonar increase (and the vessel is, therefore, closer) and as vessel speeds increase (that is, as approach speeds increase). For example, the probability of flight responses in Dall's sheep (*Ovis dalli dalli*) (Frid, 2001a, b), ringed seals (*Phoca hispida*) (Born *et al.,* 1999), Pacific brant (*Branta bernic nigricans*) and Canada geese (*B. canadensis*) increased as a helicopter or fixed-wing aircraft approached groups of these animals more directly (Ward *et al.,* 1999). Bald eagles (*Haliaeetus leucocephalus*) perched on trees alongside a river were also more likely to flee from a paddle raft when their perches were closer to the river or were closer to the ground (Steidl and Anthony, 1996).

Despite the many theories involving bubble formation (both as a direct cause of injury (see Acoustically Mediated Bubble Growth Section) and an indirect cause of stranding (see Behaviorally Mediated Bubble Growth Section), Southall *et al.,* (2007) summarizes that scientific disagreement or complete lack of information exists regarding the following important points: (1) Received acoustical exposure conditions for animals involved in stranding events; (2) pathological interpretation of observed lesions in stranded marine mammals; (3) acoustic exposure conditions required to induce such physical trauma directly; (4) whether noise exposure may cause behavioral reactions (such as atypical diving behavior) that secondarily cause bubble formation and tissue damage; and (5) the extent to which the post mortem artifacts introduced by decomposition before sampling, handling, freezing, or necropsy procedures affect interpretation of observed lesions.

Unlike those past stranding events that were coincident with military mid-frequency sonar use and were speculated to most likely have been caused by exposure to the sonar, those naval exercises involved multiple vessels in waters with steep bathymetry where deep channeling of sonar signals was more likely. The proposed RDT&E activities within the Keyport Range Complex Extension would not involve multi-vessel operations, would not use powerful sonar such as the AN/SQQ–53C/56 MFAS, and the bathymetry bears no similarity to where those mass strandings occurred (*e.g.,* Greece (1996); the Bahamas (2000); Madeira (2000); Canary Islands (2002); Hanalei Bay, Kaua'i, Hawaii (2004); and Spain (2006)). Consequently, because of the nature of the Keyport Range operations (which involve less powerful active sonar (MFAS/HFAS) and other sound sources, and no high-speed, multi-vessel training scenarios) and the fact that the Keyport Range Complex Extension has none of the bathymetric features that have been associated with mass strandings in the past, NMFS concludes it is unlikely that sonar use would result in a stranding event in the Keyport Range Complex region.

Estimated Take of Marine Mammals

With respect to the MMPA, NMFS's effects assessment serves four primary purposes: (1) To prescribe the permissible methods of taking (*i.e.,* Level B Harassment (behavioral

harassment), Level A harassment (injury), or mortality, including an identification of the number and types of take that could occur by Level A or B harassment or mortality) and to prescribe other means of effecting the least practicable adverse impact on such species or stock and its habitat (*i.e.,* mitigation); (2) to determine whether the specified activity will have a negligible impact on the affected species or stocks of marine mammals (based on the likelihood that the activity will adversely affect the species or stock through effects on annual rates of recruitment or survival); (3) to determine whether the specified activity will have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (however, there are no subsistence communities that would be affected in the Keyport Range Complex Study Area, so this determination is inapplicable for this rulemaking); and (4) to prescribe requirements pertaining to monitoring and reporting.

In the Potential Impacts to Marine Mammal Species section, NMFS identifies the lethal responses, physical trauma, sensory impairment (permanent and temporary threshold shifts and acoustic masking), physiological responses (particular stress responses), and behavioral responses that could potentially result from exposure to active acoustic sources (*e.g.,* powerful sonar). In this section, we will relate the potential effects to marine mammals from active acoustic sources to the MMPA regulatory definitions of Level A and Level B Harassment and attempt to quantify the effects that might occur from the specific RDT&E activities that the Navy is proposing in the Keyport Range Complex.

Definition of Harassment

As mentioned previously, with respect to military readiness activities, Section 3(18)(B) of the MMPA defines ''harassment'' as: (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

Level B Harassment

Of the potential effects that were described in the Potential Impacts to Marine Mammals Species section, the following are the types of effects that fall into the Level B Harassment category:

Behavioral Harassment—Behavioral disturbance that rises to the level described in the definition above, when resulting from exposures to active acoustic sources, is considered Level B Harassment. Some of the lower level physiological stress responses will also likely co-occur with the predicted harassments, although these responses are more difficult to detect and fewer data exist relating these responses to specific received levels of sound. When Level B Harassment is predicted based on estimated behavioral responses, those takes may have a stress-related physiological component as well.

In the effects section above, we described the Southall *et al.,* (2007) severity scaling system and listed some examples of the three broad categories of behaviors: (0–3: Minor and/or brief behaviors); 4–6 (Behaviors with higher potential to affect foraging, reproduction, or survival); 7–9 (Behaviors considered likely to affect the aforementioned vital rates). Generally speaking, MMPA Level B Harassment, as defined in this document, would include the behaviors described in the 7–9 category, and a subset, dependent on context and other considerations, of the behaviors described in the 4–6 categories. Behavioral harassment generally does not include behaviors ranked 0–3 in Southall *et al.,* (2007).

Acoustic Masking and Communication Impairment—Acoustic masking is considered Level B Harassment, as it can disrupt natural behavioral patterns by interrupting or limiting the marine mammal's receipt or transmittal of important information or environmental cues.

TTS—As discussed previously, TTS can affect how an animal behaves in response to the environment, including conspecifics, predators, and prey. The following physiological mechanisms are thought to play a role in inducing auditory fatigue: Effects to sensory hair cells in the inner ear that reduce their sensitivity, modification of the chemical environment within the sensory cells, residual muscular activity in the middle ear, displacement of certain inner ear membranes, increased blood flow, and post-stimulatory reduction in both efferent and sensory neural output. Ward (1997) suggested that when these effects result in TTS rather than PTS, they are within the normal bounds of physiological variability and tolerance and do not represent a physical injury. Additionally, Southall *et al.* (2007) indicate that although PTS is a tissue injury, TTS is not because the reduced hearing sensitivity following exposure to intense sound results primarily from fatigue, not loss, of cochlear hair cells and supporting structures and is reversible. Accordingly, NMFS classifies TTS (when resulting from exposure to active acoustic sources) as Level B Harassment, not Level A Harassment (injury).

Level A Harassment

Of the potential effects that were described in the Potential Impacts to Marine Mammal Species section, following are the types of effects that fall into the Level A Harassment category:

PTS—PTS (resulting either from exposure to active acoustic sources) is irreversible and considered an injury. PTS results from exposure to intense sounds that cause a permanent loss of inner or outer cochlear hair cells or exceed the elastic limits of certain tissues and membranes in the middle and inner ears and results in changes in the chemical composition of the inner ear fluids.

Acoustically Mediated Bubble Growth—A few theories suggest ways in which gas bubbles become enlarged through exposure to intense sounds (HFAS/MFAS) to the point where tissue damage results. In rectified diffusion, exposure to a sound field would cause bubbles to increase in size. Alternately, bubbles could be destabilized by high level sound exposures such that bubble growth then occurs through static diffusion of gas out of the tissues. Tissue damage from either of these processes would be considered an injury.

Behaviorally Mediated Bubble Growth—Several authors suggest mechanisms in which marine mammals could behaviorally respond to exposure to HFAS/MFAS by altering their dive patterns in a manner (unusually rapid ascent, unusually long series of surface dives, etc.) that might result in unusual bubble formation or growth ultimately resulting in tissue damage (emboli, etc.).

Acoustic Take Criteria for Naval Sonar

For the purposes of an MMPA incidental take authorization, three types of take are identified: Level B harassment; Level A harassment; and mortality (or serious injury leading to mortality). The categories of marine mammal responses (physiological and behavioral) that fall into the two harassment categories were described in the previous section.

Because the physiological and behavioral responses of the majority of the marine mammals exposed to HFAS/

MFAS cannot be detected or measured, a method is needed to estimate the number of individuals that will be taken, pursuant to the MMPA, based on the proposed action. To this end, NMFS uses acoustic criteria that estimate the received level (when exposed to HFAS/MFAS) at which Level B or Level A harassment would occur. The acoustic criteria for HFAS/MFAS are discussed below.

Because relatively few applicable data exist to support acoustic criteria specifically for HFAS, and it is suspected that the majority of the adverse effects are from the MFAS due to their larger impact ranges, NMFS will apply the criteria developed for the MFAS to the HFAS as well.

NMFS utilizes three acoustic criteria for HFAS/MFAS: PTS (injury—Level A Harassment), behavioral harassment from TTS, and sub-TTS (Level B Harassment). Because the TTS and PTS criteria are derived similarly and the PTS criteria was extrapolated from the TTS data, the TTS and PTS acoustic criteria will be presented first, before the behavioral criteria. For more information regarding these criteria, please see the Navy's LOA application for the Keyport Range Complex RDT&E and range extension activities.

Level B Harassment Threshold (TTS)

As mentioned above, behavioral disturbance, acoustic masking, and TTS are all considered Level B Harassment. Marine mammals would usually be behaviorally disturbed at lower received levels than those at which they would likely sustain TTS, so the levels at which behavioral disturbance is likely to occur are considered the onset of Level B Harassment. The behavioral responses of marine mammals to sound are variable, context specific, and, therefore, difficult to quantify (see Risk Function section, below). TTS is a physiological effect that has been studied and quantified in laboratory conditions. NMFS also uses an acoustic criteria to estimate the number of marine mammals that might sustain TTS incidental to a specific activity (in addition to the behavioral criteria).

A number of investigators have measured TTS in marine mammals. These studies measured hearing thresholds in trained marine mammals before and after exposure to intense sounds. The existing cetacean TTS data are summarized in the following bullets.

• Schlundt *et al.* (2000) reported the results of TTS experiments conducted with 5 bottlenose dolphins and 2 belugas exposed to 1-second tones. This paper also includes a reanalysis of preliminary TTS data released in a technical report by Ridgway *et al.* (1997). At frequencies of 3, 10, and 20 kHz, sound pressure levels (SPLs) necessary to induce measurable amounts (6 dB or more) of TTS were between 192 and 201 dB re 1 microPa (EL = 192 to 201 dB re 1 microPa^2-s). The mean exposure SPL and EL for onset-TTS were 195 dB re 1 microPa and 195 dB re 1 microPa^2-s, respectively.

• Finneran *et al.* (2001, 2003, 2005) described TTS experiments conducted with bottlenose dolphins exposed to 3-kHz tones with durations of 1, 2, 4, and 8 seconds. Small amounts of TTS (3 to 6 dB) were observed in one dolphin after exposure to ELs between 190 and 204 dB re 1 microPa^2-s. These results were consistent with the data of Schlundt *et al.* (2000) and showed that the Schlundt *et al.* (2000) data were not significantly affected by the masking sound used. These results also confirmed that, for tones with different durations, the amount of TTS is best correlated with the exposure EL rather than the exposure SPL.

• Nachtigall *et al.* (2003) measured TTS in a bottlenose dolphin exposed to octave-band sound centered at 7.5 kHz. Nachtigall *et al.* (2003a) reported TTSs of about 11 dB measured 10 to 15 minutes after exposure to 30 to 50 minutes of sound with SPL 179 dB re 1 microPa (EL about 213 dB re microPa^2-s). No TTS was observed after exposure to the same sound at 165 and 171 dB re 1 microPa. Nachtigall *et al.* (2004) reported TTSs of around 4 to 8 dB 5 minutes after exposure to 30 to 50 minutes of sound with SPL 160 dB re 1 microPa (EL about 193 to 195 dB re 1 microPa^2-s). The difference in results was attributed to faster post exposure threshold measurement—TTS may have recovered before being detected by Nachtigall *et al.* (2003). These studies showed that, for long duration exposures, lower sound pressures are required to induce TTS than are required for short-duration tones.

• Finneran *et al.* (2000, 2002) conducted TTS experiments with dolphins and belugas exposed to impulsive sounds similar to those produced by distant underwater explosions and seismic waterguns. These studies showed that, for very short-duration impulsive sounds, higher sound pressures were required to induce TTS than for longer-duration tones.

• Mooney *et al.* (2009) exposed a bottlenose dolphin with a ''typical'' mid-frequency naval sonar signal (two down sweeps of 0.5 s each separated by a 0.5 s gap, fundamental frequency approximately 3–4 kHz with multiple harmonics) recorded within the Puget Sound, Washington. Successive three-ping blocks, each block spaced 24 s apart, were used to simulate a ''typical'' mid-frequency sonar application. To evaluate TTS, hearing thresholds for a 5.6 kHz tone were measured before and after noise exposure using the physiological method of auditory evoked potentials. Sonar SPLs were gradually increased up to 203 dB SPL (rms) (measured at the location of the dolphin's ear) for individual pings. The ping number was then increased over multiple exposure sessions until a threshold shift was induced. Results showed that only the five blocks of sonar pings, presenting an SPL of 203 dB (SEL of 214 dB re 1 microPa^2-s), reliably induced shifts for three consecutive research sessions.

• Kastak *et al.* (1999a, 2005) conducted TTS experiments with three species of pinnipeds, California sea lion, northern elephant seal and a Pacific harbor seal, exposed to continuous underwater sounds at levels of 80 and 95 dB sensation level (the level above its hearing threshold) at 2.5 and 3.5 kHz for up to 50 minutes. Mean TTS shifts of up to 12.2 dB occurred with the harbor seals showing the largest shift of 28.1 dB. Increasing the sound duration had a greater effect on TTS than increasing the sound level from 80 to 95 dB.

Some of the more important data obtained from these studies are onset-TTS levels (exposure levels sufficient to cause a just-measurable amount of TTS) often defined as 6 dB of TTS (for example, Schlundt *et al.,* 2000) and the fact that energy metrics (sound exposure levels (SEL), which include a duration component) better predict when an animal will sustain TTS than pressure (SPL) alone. NMFS' TTS criteria (which indicate the received level at which onset TTS (<6dB) is induced, expressed in SELs) for HFAS/MFAS are as follows:

• Cetaceans—195 dB re 1 microPa^2-s (based on mid-frequency cetaceans—no published data exist on auditory effects of noise in low or high frequency cetaceans (Southall *et al.,* 2007)).

• Pinnipeds:

—Harbor Seals (and closely related species)—183 dB re 1 microPa^2-s

—Northern Elephant Seals (and closely related species)—204 dB re 1 microPa^2-s

—California Sea Lions (and closely related species)—206 dB re 1 microPa^2-s

A detailed description of how TTS criteria were derived from the results of the above studies may be found in Chapter 3 of Southall *et al.* (2007), as well as the Navy's Keyport Range Complex LOA application.

Level A Harassment Threshold (PTS)

For acoustic effects, because the tissues of the ear appear to be the most susceptible to the physiological effects of sound, and because threshold shifts tend to occur at lower exposures than other more serious auditory effects, NMFS has determined that PTS is the best indicator for the smallest degree of injury that can be measured. Therefore, the acoustic exposure associated with onset-PTS is used to define the lower limit of the Level A harassment.

PTS data do not currently exist for marine mammals and are unlikely to be obtained due to ethical concerns. However, PTS levels for these animals may be estimated using TTS data from marine mammals and relationships between TTS and PTS that have been discovered through study of terrestrial mammals. NMFS uses the following acoustic criteria for injury (expressed in SELs):

• Cetaceans—215 dB re 1 microPa^2-s (based on mid-frequency cetaceans—no published data exist on auditory effects of noise in low or high frequency cetaceans (Southall *et al.,* 2007)).

• Pinnipeds:

—Harbor Seals (and closely related species)—203 dB re 1 microPa^2-s

—Northern Elephant Seals (and closely related species)—224 dB re 1 microPa^2-s

—California Sea Lions (and closely related species)—226 dB re 1 microPa^2-s

These criteria are based on a 20 dB increase in SEL over that required for onset-TTS. Extrapolations from terrestrial mammal data indicate that PTS occurs at 40 dB or more of TS, and that TS growth occurs at a rate of approximately 1.6 dB TS per dB increase in EL. There is a 34-dB TS difference between onset-TTS (6 dB) and onset-PTS (40 dB). Therefore, an animal would require approximately 20-dB of additional exposure (34 dB divided by 1.6 dB) above onset-TTS to reach PTS. A detailed description of how TTS criteria were derived from the results of the above studies may be found in Chapter 3 of Southall *et al.* (2007), as well as the Navy's Keyport Range Complex LOA application. Southall *et al.* (2007) recommend a precautionary dual criteria for TTS (230 dB re 1 microPa (SPL) in addition to 215 re 1 microPa^2-s (SEL)) to account for the potentially damaging transients embedded within non-pulse exposures. However, in the case of HFAS/MFAS, the distance at which an animal would receive 215 (SEL) is farther from the source than the distance at which they would receive 230 (SPL) and therefore, it is not necessary to consider 230 dB.

We note here that behaviorally mediated injuries (such as those that have been hypothesized as the cause of some beaked whale strandings) could potentially occur in response to received levels lower than those believed to directly result in tissue damage. As mentioned previously, data to support a quantitative estimate of these potential effects (for which the exact mechanism is not known and in which factors other than received level may play a significant role) do not exist.

Level B Harassment Risk Function (Behavioral Harassment)

The first MMPA authorization for take of marine mammals incidental to tactical active sonar was issued in 2006 for Navy Rim of the Pacific training exercises in Hawaii. For that authorization, NMFS used 173 dB SEL as the criterion for the onset of behavioral harassment (Level B Harassment). This type of single number criterion is referred to as a step function, in which (in this example) all animals estimated to be exposed to received levels above 173 dB SEL would be predicted to be taken by Level B Harassment and all animals exposed to less than 173 dB SEL would not be taken by Level B Harassment. As mentioned previously, marine mammal behavioral responses to sound are highly variable and context specific (affected by differences in acoustic conditions; differences between species and populations; differences in gender, age, reproductive status, or social behavior; or the prior experience of the individuals), which does not support the use of a step function to estimate behavioral harassment.

Unlike step functions, acoustic risk continuum functions (which are also called ''exposure-response functions,'' ''dose-response functions,'' or ''stress response functions'' in other risk assessment contexts) allow for probability of a response that NMFS would classify as harassment to occur over a range of possible received levels (instead of one number) and assume that the probability of a response depends first on the ''dose'' (in this case, the received level of sound) and that the probability of a response increases as the ''dose'' increases. The Navy and NMFS have previously used acoustic risk functions to estimate the probable responses of marine mammals to acoustic exposures in the Navy FEISs on SURTASS LFA sonar (DoN, 2001c) and the North Pacific Acoustic Laboratory experiments conducted off the Island of Kauai (ONR, 2001). The specific risk functions used here were also used in the MMPA regulations and FEIS for Hawaii Range Complex (HRC), Southern California Range Complex (SOCAL), Atlantic Fleet Active Sonar Testing (AFAST), and the Naval Surface Warfare Center Panama City Division (NSWC PCD) mission activities. As discussed in the Effects section, factors other than received level (such as distance from or bearing to the sound source) can affect the way that marine mammals respond; however, data to support a quantitative analysis of those (and other factors) do not currently exist. NMFS will continue to modify these criteria as new data become available.

The methodology described below is based on surface ship acoustic sources. The NAVSEA NUWC Keyport Range does not utilize these sources in RDT&E activities. It should be noted though, that the sources methodology described below is utilized for the modeling of potential exposures to mid- and high-frequency active sonar.

To assess the potential effects on marine mammals associated with active sonar used during training activity the Navy and NMFS applied a risk function that estimates the probability of behavioral responses that NMFS would classify as harassment for the purposes of the MMPA given exposure to specific received levels of MFA sonar. The mathematical function is derived from a solution in Feller (1968) as defined in the SURTASS LFA Sonar Final OEIS/EIS (DoN, 2001), and relied on in the Supplemental SURTASS LFA Sonar EIS (DoN, 2007a), for the probability of MFA sonar risk for Level B behavioral harassment with input parameters modified by NMFS for MFA sonar for mysticetes and odontocetes (NMFS, 2008). The same risk function and input parameters will be applied to high frequency active (HFA) (<10 kHz) sources until applicable data become available for high frequency sources.

In order to represent a probability of risk, the function should have a value near zero at very low exposures, and a value near one for very high exposures. One class of functions that satisfies this criterion is cumulative probability distributions, a type of cumulative distribution function. In selecting a particular functional expression for risk, several criteria were identified:

• The function must use parameters to focus discussion on areas of uncertainty;

• The function should contain a limited number of parameters;

• The function should be capable of accurately fitting experimental data; and

• The function should be reasonably convenient for algebraic manipulations.

As described in U.S. Department of the Navy (2001), the mathematical function below is adapted from a solution in Feller (1968).

$$R = \frac{1-\left(\frac{L-B}{K}\right)^{-A}}{1-\left(\frac{L-B}{K}\right)^{-2A}}$$

Where:

R = Risk (0–1.0)
L = Received level (dB re: 1 μPa)
B = Basement received level = 120 dB re: 1 μPa
K = Received level increment above B where 50 percent risk = 45 dB re: 1 μPa
A = Risk transition sharpness parameter = 10 (odontocetes) or 8 (mysticetes)

In order to use this function to estimate the percentage of an exposed population that would respond in a manner that NMFS classifies as Level B harassment, based on a given received level, the values for B, K and A need to be identified.

B Parameter (Basement)—The B parameter is the estimated received level below which the probability of disruption of natural behavioral patterns, such as migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered approaches zero for the HFAS/MFAS risk assessment. At this received level, the curve would predict that the percentage of the exposed population that would be taken by Level B Harassment approaches zero. For HFAS/MFAS, NMFS has determined that B = 120 dB re 1 μPa (SPL). This level is based on a broad overview of the levels at which many species have been reported responding to a variety of sound sources.

K Parameter (Representing the 50-Percent Risk Point)—The K parameter is based on the received level that corresponds to 50 percent risk, or the received level at which we believe 50 percent of the animals exposed to the designated received level will respond in a manner that NMFS classifies as Level B Harassment. The K parameter (K = 45 dB) is based on three datasets in which marine mammals exposed to mid-frequency sound sources were reported to respond in a manner that NMFS would classify as Level B Harassment. There is widespread consensus that marine mammal responses to HFA/MFA sound signals need to be better defined using controlled exposure experiments (Cox *et al.,* 2006; Southall *et al.,* 2007). The Navy is contributing to an ongoing behavioral response study in the Bahamas that is expected to provide some initial information on beaked whales, the species identified as the most sensitive to MFAS. NMFS is leading this international effort with scientists from various academic institutions and research organizations to conduct studies on how marine mammals respond to underwater sound exposures. Until additional data are available, however, NMFS and the Navy have determined that the following three data sets are most applicable for direct use in establishing the K parameter for the HFAS/MFAS risk function. These data sets, summarized below, represent the only known data that specifically relate altered behavioral responses (that NMFS would consider Level B Harassment) to exposure to HFAS/MFAS sources.

Even though these data are considered the most representative of the proposed specified activities, and therefore the most appropriate on which to base the K parameter (which basically determines the midpoint) of the risk function, these data have limitations, which are discussed in Appendix C of the NAVSEA NUWC Keyport Range Complex Extension EIS/OEIS.

1. Controlled Laboratory Experiments with Odontocetes (SSC Dataset)—Most of the observations of the behavioral responses of toothed whales resulted from a series of controlled experiments on bottlenose dolphins and beluga whales conducted by researchers at SSC's facility in San Diego, California (Finneran *et al.,* 2001, 2003, 2005; Finneran and Schlundt, 2004; Schlundt *et al.,* 2000). In experimental trials (designed to measure TTS) with marine mammals trained to perform tasks when prompted, scientists evaluated whether the marine mammals performed these tasks when exposed to mid-frequency tones. Altered behavior during experimental trials usually involved refusal of animals to return to the site of the sound stimulus, but also included attempts to avoid an exposure in progress, aggressive behavior, or refusal to further participate in tests.

Finneran and Schlundt (2004) examined behavioral observations recorded by the trainers or test coordinators during the Schlundt *et al.* (2000) and Finneran *et al.* (2001, 2003, 2005) experiments. These included observations from 193 exposure sessions (fatiguing stimulus level > 141 dB re 1microPa) conducted by Schlundt *et al.* (2000) and 21 exposure sessions conducted by Finneran et al. (2001, 2003, 2005). The TTS experiments that supported Finneran and Schlundt (2004) are further explained below:

- Schlundt *et al.* (2000) provided a detailed summary of the behavioral responses of trained marine mammals during TTS tests conducted at SSC San Diego with 1-sec tones and exposure frequencies of 0.4 kHz, 3 kHz, 10 kHz, 20 kHz and 75 kHz. Schlundt *et al.* (2000) reported eight individual TTS experiments. The experiments were conducted in San Diego Bay. Because of the variable ambient noise in the bay, low-level broadband masking noise was used to keep hearing thresholds consistent despite fluctuations in the ambient noise. Schlundt *et al.* (2000) reported that ''behavioral alterations,'' or deviations from the behaviors the animals being tested had been trained to exhibit, occurred as the animals were exposed to increasing fatiguing stimulus levels.
- Finneran *et al.* (2001, 2003, 2005) conducted two separate TTS experiments using 1-sec tones at 3 kHz. The test methods were similar to that of Schlundt *et al.* (2000) except the tests were conducted in a pool with very low ambient noise level (below 50 dB re 1 microPa^2/Hz), and no masking noise was used. In the first, fatiguing sound levels were increased from 160 to 201 dB SPL. In the second experiment, fatiguing sound levels between 180 and 200 dB SPL were randomly presented.

Bottlenose dolphins exposed to 1-sec intense tones exhibited short-term changes in behavior above received sound levels of 178 to 193 dB re 1 microPa (rms), and beluga whales did so at received levels of 180 to 196 dB and above.

2. Mysticete Field Study (Nowacek *et al.,* 2004)—The only available and applicable data relating mysticete responses to exposure to mid-frequency sound sources are from Nowacek *et al.* (2004). Nowacek *et al.* (2004) documented observations of the behavioral response of North Atlantic right whales exposed to alert stimuli containing mid-frequency components in the Bay of Fundy. Investigators used archival digital acoustic recording tags (DTAG) to record the behavior (by measuring pitch, roll, heading, and depth) of right whales in the presence of an alert signal, and to calibrate received sound levels. The alert signal was 18 minutes of exposure consisting of three 2-minute signals played sequentially three times over. The three signals had a 60 percent duty cycle and consisted of: (1) Alternating 1-sec pure tones at 500 Hz and 850 Hz; (2) a 2-sec logarithmic down-sweep from 4,500 Hz to 500 Hz; and (3) a pair of low (1,500 Hz)-high (2,000 Hz) sine wave tones amplitude modulated at 120 Hz and each 1 sec long. The purposes of the

alert signal were (a) to pique the mammalian auditory system with disharmonic signals that cover the whales' estimated hearing range; (b) to maximize the signal to noise ratio (obtain the largest difference between background noise) and (c) to provide localization cues for the whale. The maximum source level used was 173 dB SPL.

Nowacek *et al.* (2004) reported that five out of six whales exposed to the alert signal with maximum received levels ranging from 133 to 148 dB re 1 microPa significantly altered their regular behavior and did so in identical fashion. Each of these five whales: (i) Abandoned their current foraging dive prematurely as evidenced by curtailing their 'bottom time'; (ii) executed a shallow-angled, high power (*i.e.*, significantly increased fluke stroke rate) ascent; (iii) remained at or near the surface for the duration of the exposure, an abnormally long surface interval; and (iv) spent significantly more time at subsurface depths (1–10 m) compared with normal surfacing periods, when whales normally stay within 1 m (1.1 yd) of the surface.

3. Odontocete Field Data (Haro Strait—USS SHOUP)—In May 2003, killer whales were observed exhibiting behavioral responses generally described as avoidance behavior while the U.S. Ship (USS) SHOUP was engaged in MFAS in the Haro Strait in the vicinity of Puget Sound, Washington. Those observations have been documented in three reports developed by Navy and NMFS (NMFS, 2005a; Fromm, 2004a, 2004b; DON, 2003). Although these observations were made in an uncontrolled environment, the sound field that may have been associated with the sonar operations was estimated using standard acoustic propagation models that were verified (for some but not all signals) based on calibrated in situ measurements from an independent researcher who recorded the sounds during the event. Behavioral observations were reported for the group of whales during the event by an experienced marine mammal biologist who happened to be on the water studying them at the time. The observations associated with the USS SHOUP provide the only data set available of the behavioral responses of wild, non-captive animals upon actual exposure to AN/SQS–53 sonar.

U.S. Department of Commerce (NMFS, 2005a); U.S. Department of the Navy (2004b); Fromm (2004a, 2004b) documented reconstruction of sound fields produced by USS SHOUP associated with the behavioral response of killer whales observed in Haro Strait. Observations from this reconstruction included an approximate closest approach time which was correlated to a reconstructed estimate of received level (which ranged from 150 to 180 dB) at an approximate whale location with a mean value of 169.3 dB SPL.

Calculation of K Parameter—NMFS and the Navy used the mean of the following values to define the midpoint of the function: (1) The mean of the lowest received levels (185.3 dB) at which individuals responded with altered behavior to 3 kHz tones in the SSC data set; (2) the estimated mean received level value of 169.3 dB produced by the reconstruction of the USS SHOUP incident in which killer whales exposed to MFA sonar (range modeled possible received levels: 150 to 180 dB); and (3) the mean of the 5 maximum received levels at which Nowacek *et al.* (2004) observed significantly altered responses of right whales to the alert stimuli than to the control (no input signal) is 139.2 dB SPL. The arithmetic mean of these three mean values is 165 dB SPL. The value of K is the difference between the value of B (120 dB SPL) and the 50 percent value of 165 dB SPL; therefore, K=45.

A Parameter (Steepness)—NMFS determined that a steepness parameter (A)=10 is appropriate for odontocetes (except harbor porpoises) and pinnipeds and A=8 is appropriate for mysticetes.

The use of a steepness parameter of A=10 for odontocetes (except harbor porpoises) for the HFAS/MFAS risk function was based on the use of the same value for the SURTASS LFA risk continuum, which was supported by a sensitivity analysis of the parameter presented in Appendix D of the SURTASS/LFA FEIS (DoN, 2001c). As concluded in the SURTASS FEIS/EIS, the value of A=10 produces a curve that has a more gradual transition than the curves developed by the analyses of migratory gray whale studies (Malme *et al.,* 1984; Buck and Tyack, 2000; and SURTASS LFA Sonar EIS, Subchapters 1.43, 4.2.4.3 and Appendix D, and NMFS, 2008).

NMFS determined that a lower steepness parameter (A=8), resulting in a shallower curve, was appropriate for use with mysticetes and HFAS/MFAS. The Nowacek *et al.* (2004) dataset contains the only data illustrating mysticete behavioral responses to a mid-frequency sound source. A shallower curve (achieved by using A=8) better reflects the risk of behavioral response at the relatively low received levels at which behavioral responses of right whales were reported in the Nowacek *et al.* (2004) data. Compared to the odontocete curve, this adjustment results in an increase in the proportion of the exposed population of mysticetes being classified as behaviorally harassed at lower RLs, such as those reported here and is supported by the only dataset currently available.

Basic Application of the Risk Function—The risk function is used to estimate the percentage of an exposed population that is likely to exhibit behaviors that would qualify as harassment (as that term is defined by the MMPA applicable to military readiness activities, such as the Navy's testing and research activities with HFA/MFA sonar) at a given received level of sound. For example, at 165 dB SPL (dB re 1 Pa rms), the risk (or probability) of harassment is defined according to this function as 50 percent, and Navy/NMFS applies that by estimating that 50 percent of the individuals exposed at that received level are likely to respond by exhibiting behavior that NMFS would classify as behavioral harassment. The risk function is not applied to individual animals, only to exposed populations.

The data primarily used to produce the risk function (the K parameter) were compiled from four species that had been exposed to sound sources in a variety of different circumstances. As a result, the risk function represents a general relationship between acoustic exposures and behavioral responses that is then applied to specific circumstances. That is, the risk function represents a relationship that is deemed to be generally true, based on the limited, best-available science, but may not be true in specific circumstances. In particular, the risk function, as currently derived, treats the received level as the only variable that is relevant to a marine mammal's behavioral response. However, we know that many other variables—the marine mammal's gender, age, and prior experience, the activity it is engaged in during an exposure event, its distance from a sound source, the number of sound sources, and whether the sound sources are approaching or moving away from the animal—can be critically important in determining whether and how a marine mammal will respond to a sound source (Southall *et al.,* 2007). The data that are currently available do not allow for incorporation of these other variables in the current risk functions; however, the risk function represents the best use of the data that are available (Figure 1).

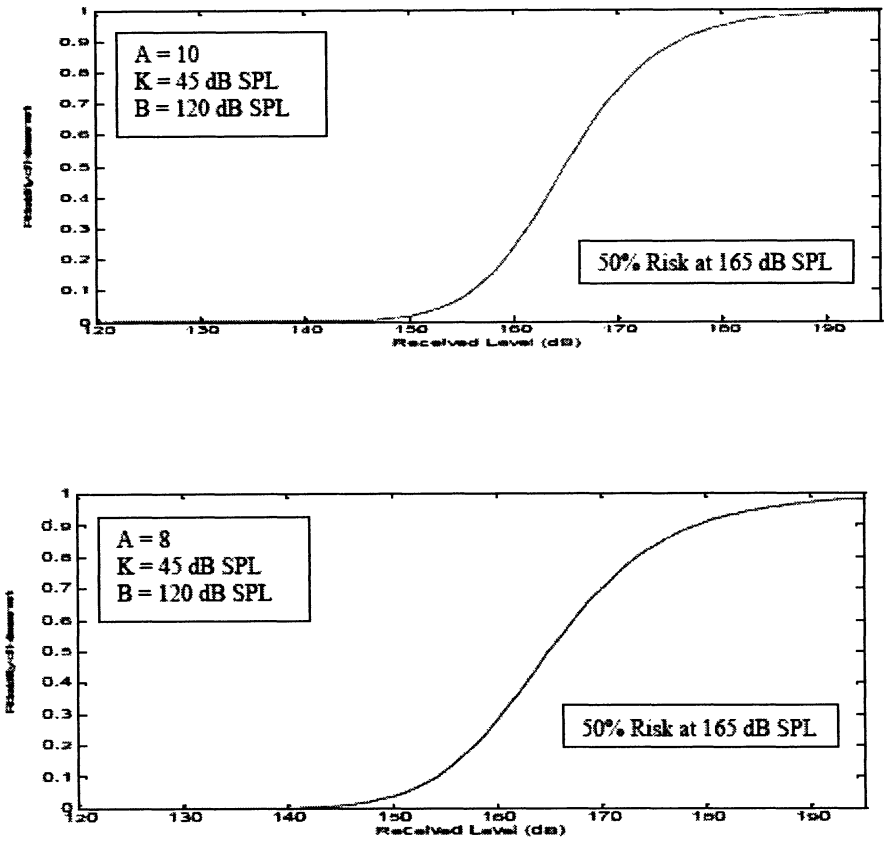

Figure 1. Risk Functions for Odontocetes (above) and Mysticetes (below).

As more specific and applicable data become available for HFAS/MFAS sources, NMFS can use these data to modify the outputs generated by the risk function to make them more realistic. Ultimately, data may exist to justify the use of additional, alternate, or multivariate functions. For example, as mentioned previously, the distance from the sound source and whether it is perceived as approaching or moving away can affect the way an animal responds to a sound (Wartzok *et al.,* 2003).

Specific Consideration for Harbor Porpoises

The information currently available regarding these inshore species that inhabit shallow and coastal waters suggests a very low threshold level of response for both captive and wild animals. Threshold levels at which both captive (*e.g.,* Kastelein *et al.,* 2000; 2005a; 2006) and wild harbor porpoises (*e.g.,* Johnston, 2002) responded to sound (*e.g.,* acoustic harassment devices (ADHs), acoustic deterrent devices (ADDs), or other non-pulsed sound sources) is very low (*e.g.,* ~120 dB SPL), although the biological significance of the disturbance is uncertain. Therefore, the risk function curve as presented is not used. Instead, a step function threshold of 120 dB SPL is used to estimate take of harbor porpoises (*i.e.,* assumes that all harbor porpoises exposed to 120 dB or higher MFAS/HFAS will respond in a way NMFS considers behavioral harassment).

Modeling Acoustic Effects

The methodology for analyzing potential impacts from mid- and high-frequency acoustic sources is presented in this section, which defines the model process in detail, describes how the impact threshold derived from Navy-NMFS consultations are derived, and discusses relative potential impact based on species biology.

Modeling methods applied herein were originally developed for mid-frequency (1–10 kHz) active (MFA) sonars (*e.g.,* surface-ship hull-mounted sonars, which are not used in the NAVSEA NUWC Keyport Range Complex). Nevertheless, the methods and thresholds are agreed upon by the U.S. Navy and NMFS as the best available science with which to determine the extent of physiological or behavioral effects on marine mammals that would result from the use of mid-frequency active (MFA) and high frequency active (HFA) acoustic sources for this proposed action. Detailed descriptions of the modeling process and results are provided in LOA Application.

The Navy acoustic exposure model process uses a number of inter-related software tools to assess potential exposure of marine mammals to Navy generated underwater sound. For sonar, these tools estimate potential impact volumes and areas over a range of thresholds for sonar specific operating modes. Results are based upon extensive pre-computations over the range of acoustic environments that might be encountered in the operating area.

The process includes four steps used to calculate potential exposures:

- Identify unique acoustic environments that encompass the operating area. Parameters include depth and seafloor geography, bottom characteristics and sediment type, wind and surface roughness, sound velocity profile, surface duct, sound channel, and convergence zones.
- Compute transmission loss (TL) data appropriate for each sensor type in each of these acoustic environments.

Propagation can be complex depending on a number of environmental parameters listed in step one, as well as sonar operating parameters such as directivity, source level, ping rate, and ping length. The Navy standard CASS–GRAB acoustic propagation model is used to resolve these complexities for underwater propagation prediction.

- Use that TL to estimate the total sound energy received at each point in the acoustic environment.
- Apply this energy to predicted animal density for that area to estimate potential acoustic exposure, with animals distributed in 3–D based on best available science on animal dive profiles.

The primary potential impact to marine mammals from underwater acoustics is Level B harassment from noise. A certain proportion of marine mammals are expected to experience behavioral disturbance at different received sound pressure levels and are counted as Level B harassment exposures. A detailed discussion of the modeling is provided in the Navy's LOA application.

Step 1. Acoustic Sources

For modeling purposes, acoustic source parameters were based on records from previous RDT&E activities, to reflect the underwater sound use expected to occur during activities in the NAVSEA NUWC Keyport Range Complex. The actual acoustic source parameters in many cases are classified, however, modeling used to calculate exposures to marine mammals employed actual and preferred parameters which have in the past been used during RDT&E activities in the NAVSEA NUWC Keyport Range Complex.

Every use of underwater acoustic energy includes the potential to harass marine animals in the vicinity of the source. The number of animals exposed to potential harassment in any such action is dictated by the propagation field and the manner in which the acoustic source is operated (*i.e.,* source level, depth, frequency, pulse length, directivity, platform speed, repetition rate). A wide variety of systems/equipment that utilize narrowband acoustic sources are employed at the NAVSEA NUWC Keyport Range Complex. Eight have been selected as representative of the types of operating in this range and are described in Table 8. Take estimates for these sources are calculated and reported on a per-run basis.

TABLE 8—MID- AND HIGH-FREQUENCY ACOUSTIC SOURCES EMPLOYED IN THE KEYPORT RANGE COMPLEX

Source designation	Acoustic source description	Frequency class	Takes reported
S1	Sub-bottom profiler	Mid-frequency	Per 4-hour run.
S2	UUV source	High-frequency	Per 2-hour run.
S3	REMUS Modem	Mid-frequency	Per 2-hour run.
S4	REMUS–SAS–HF	High-frequency	Per 2-hour run.
S5	Range Target	Mid-frequency	Per 20-minute run.
S6	Test Vehicle 1	High-frequency	Per 10-minute run.
S7	Test Vehicle 2	High-frequency	Per 10-minute run.
S8	Test Vehicle 3	High-frequency	Per 10-minute run.

The acoustic modeling that is necessary to support the take estimates for each of these sources relies upon a generalized description of the manner of the operating modes. This description includes the following:

- ''Effective'' energy source level—The total energy across the band of the source, scaled by the pulse length (10 log10 [pulse length]).
- Source depth—Depth of the source in meters. Each source was modeled in the middle of the water column.
- Nominal frequency—Typically the center band of the source emission. These are frequencies that have been reported in open literature and are used to avoid classification issues. Differences between these nominal values and actual source frequencies are small enough to be of little consequence to the output impact volumes.
- Source directivity—The source beam is modeled as the product of a horizontal beam pattern and a vertical beam pattern. Two parameters define the horizontal beam pattern:
- Horizontal beam width—Width of the source beam (degrees) in the horizontal plane (assumed constant for all horizontal steer directions).
- Horizontal steer direction—Direction in the horizontal in which the beam is steered relative to the direction in which the platform is heading.

The horizontal beam has constant response across the width of the beam and with flat, 20-dB down sidelobes. (Note that steer directions φ, $-\varphi$, 180o $-$ φ, and 180o + φ all produce equal impact volumes.)

Similarly, two parameters define the vertical beam pattern:

- Vertical beam width—Width of the source beam (degrees) in the vertical plane measured at the 3-dB down point. (The width is that of the beam steered towards broadside and not the width of the beam at the specified vertical steer direction.)
- Vertical steer direction—Direction in the vertical plane that the beam is steered relative to the horizontal (upward looking angles are positive).

To avoid sharp transitions that a rectangular beam might introduce, the power response at vertical angle θ is

$$\max\left\{\frac{\sin 2\lfloor n(\theta_s-\theta)\rfloor}{\left[n\sin(\theta_s-\theta)\right]^2},0.01\right\}$$

where $n = 180°/\theta_w$ is the number of half-wavelength-spaced elements in a line array that produces a main lobe with a beam width of θ_w. θ_s is the vertical beam steer direction.

Ping spacing—Distance between pings. For most sources this is generally just the product of the speed of advance of the platform and the repetition rate of the source. Animal motion is generally of no consequence as long as the source motion is greater than the speed of the animal (nominally, three knots). For stationary (or nearly stationary) sources, the ''average'' speed of the animal is used in place of the platform speed. The attendant assumption is that the animals are all moving in the same constant direction.

These parameters are defined for each of the acoustic sources in the following Table 9.

TABLE 9—DESCRIPTION OF NAVSEA NUWC KEYPORT RANGE COMPLEX SOURCES

Acoustic source description	Center frequency	Source level	Emission spacing	Vertical directivity horizontal	Horizontal directivity horizontal
Sub-bottom profiler	4.5 kHz	207 dB	0.2 m	20 deg	20 deg.
UUV source	15 kHz	205 dB	1.9 m	30 deg	50 deg.
REMUS Modem	10 kHz	186 dB	45 m	60 deg	360 deg.
REMUS–SAS–HF	150 kHz	220 dB	1.9 m	9 deg	15 deg.
Range Target	5 kHz	233 dB	93 m	60 deg	360 deg.
Test Vehicle 1	20 kHz	233 dB	45 m	20 deg	60 deg.
Test Vehicle 2	25 kHz	230 dB	540 m	20 deg	60 deg.
Test Vehicle 3	30 kHz	233 dB	617 m	20 deg	60 deg.

Step 2. Environmental Provinces

Propagation loss ultimately determines the extent of the Zone of Influence (ZOI) for a particular source activity. Propagation loss as a function of range responds to a number of environmental parameters:

- Water depth
- Sound speed variability throughout the water column
- Bottom geo-acoustic properties, and
- Wind speed

Due to the importance that propagation loss plays in modeling effects, the Navy has over the last four to five decades invested heavily in measuring and modeling these environmental parameters. The result of this effort is the following collection of global databases of these environmental parameters, most of which are accepted as standards for all Navy modeling efforts.

- Water depth—Digital Bathymetry Data Base Variable Resolution (DBDBV)
- Sound speed—Generalized Digital Environmental Model (GDEM)
- Bottom loss—Low-Frequency Bottom Loss (LFBL), Sediment Thickness Database, and High-Frequency Bottom Loss (HFBL), and
- Wind speed—U.S. Navy Marine Climatic Atlas of the World

Representative environmental parameters are selected for each of the three operating areas: DBRC, Keyport, and Quinault. Sources of local environmental-acoustic properties were supplemented with Navy Standard OAML data to determine model inputs for bathymetry, sound-speed, and sediment properties.

The DBRC and Keyport ranges are located inland with limited water-depth variability: The maximum water depth in Dabob Bay is approximately 200 meters; the maximum in the Keyport range is approximately 30 meters (98 feet). The Quinault range, on the other hand, is located seaward of the Washington State Coast to depths greater than a kilometer.

Sound speed profiles for winter and summer from the OAML open-ocean database are presented in Figure 6–10 of the Navy's LOA application. The winter profile is a classic half-channel (sound speed monotonically increasing with depth). The summer profile consists of a shallow surface duct over a modest thermocline. Individual profiles taken from World Ocean Data Base (NODC, 2005) for DBRC and Keyport are generally consistent with these open-ocean profiles. Some of these profiles exhibit some effects of additional fresh water near the surface; others have a little warmer surface layer than this summer profile. However, the truncated deep-water profiles are adequately representative of the inland ranges.

The bottom type in the Quinault range varies consistently with water depth. The shallower depths (less than 500 meters) tend to have sandy bottoms (HFBL class = 2); the deeper depths tend to be silt (HFBL class = 8).

The sediment type of the DBRC and Keyport areas that we used for our modeling were different from those found in the Low Frequency Bottom Loss (LFBL) database or implied by the High-Frequency Bottom Loss (HFBL) database. Although the water depth of these areas can be greater that 50 m, the LFBL database assigned them the default ''coarse sand'' sediment type that was assigned to areas with water depth less than 50 m (Vidmar, 1994). Core data from these areas were collected as part of environmental monitoring (Llanso, 1998). Cores 14 and 15 from the northern parts of the DBRC area indicated sediments with sands and silty sands. A silty sand sediment type was assigned to these areas (HFBL class = 2). Core 304R from the southern part of the DBRC area indicated sediments with clay. A clay-silt sediment type (HFBL class = 4) was assigned to this area taking into account the transition from the more sandy northern area to the clay of the southern area. These assignments are consistent with the observation (Helton, 1976) that the boundary area between the northern and southern areas had sediments that were mostly mud with a small amount of sand. The Keyport area did not have any cores in the study area but had three cores surrounding the area: Core 308R to the northwest indicated sand sediment; core 69 to the northeast indicated sand and silty sand sediments; and core 34 to the south indicated clay sediment. Given the surrounding cores we assigned a sand-silt-clay sediment type to this area (HFBL class = 4).

The Keyport range has a proposed extension to the east and south of the existing boundaries. In addition to the existing DBRC boundary, there is one extension to the south and another extension to the south and the north. The Quinault range is extended into a much larger deep-water region coincident with W–237A with a surf zone at Pacific Beach.

Step 3. Impact Volumes and Impact Ranges

Many naval actions include the potential to injure or harass marine animals in the neighboring waters through noise emissions. Given fixed harassment metrics and thresholds, the number of animals exposed to potential harassment in any such action is dictated by the propagation field and the characteristics of the noise source.

The expected impact volume associated with a particular activity is defined as the expected volume of water in which some acoustic metric exceeds a specified threshold. The product of this volume with a volumetric animal density yields the expected value of the number of animals exposed to that acoustic metric at a level that exceeds the threshold. There are two acoustic metrics for mid- and high-frequency acoustic sources effects: An energy term (energy flux density) or a pressure term (peak pressure). The thresholds associated with each of these metrics define the levels at which the animals exposed will experience some degree of harassment (ranging from behavioral change to hearing loss).

Impact volume is particularly relevant when trying to estimate the effect of repeated source emissions separated in either time or space. Impact range is

defined as the maximum range at which a particular threshold is exceeded for a single source emission.

The two measures of potential harm to marine wildlife due to mid- and high-frequency acoustic sources operations are the accumulated (summed over all source emissions) energy flux density received by the animal over the duration of the activity, and the peak pressure (loudest sound received) by the animal over the duration of the activity.

Regardless of the type of source, estimating the number of animals that may be harassed in a particular environment entails the following steps.

• Each source emission is modeled according to the particular operating mode of that source. The ''effective'' energy source level is computed by integrating over the bandwidth of the source, and scaling by the pulse length. The location of the source at the time of each emission must also be specified.

• For the relevant environmental acoustic parameters, Transmission Loss (TL) estimates are computed, sampling the water column over the appropriate depth and range intervals. TL data are sampled at the typical depth(s) of the source and at the nominal center frequency of the source.

• The accumulated energy and maximum sound pressure level (SPL) are sampled over a volumetric grid within the waters surrounding a source action. At each grid point, the received signal from each source emission is modeled as the source level reduced by the appropriate propagation loss from the location of the source at the time of each emission to that grid point. The maximum SPL field is calculated by taking the maximum level of the received signal over all emissions, and the energy field is calculated by summing the energy of the signal over all emissions, and adjusting for pulse length.

• The impact volume for a given threshold is estimated by summing the incremental volumes represented by each grid point for which the appropriate metric exceeds that threshold. For maximum SPL, calculation of the expected volume represented by each grid point depends on the maximum SPL at that point, and requires an extra step to apply the risk function.

Finally, the number of takes is estimated as the product (scalar or vector, depending upon whether an animal density depth distribution is available) of the impact volume and the animal densities.

(4) Computing Impact Volumes for Active Sonars

The computation for impact volumes of active acoustic sources uses the following steps:

• Identification of the underwater propagation model used to compute transmission loss data, a listing of the source-related inputs to that model, and a description of the output parameters that are passed to the energy accumulation algorithm.

• Definitions of the parameters describing each acoustic source type.

• Description of the algorithms and sampling rates associated with the energy accumulation algorithm.

A detailed discussion of computing methodologies is provided in the Navy's LOA application.

Estimated Takes of Marine Mammals

When analyzing the results of the acoustic exposure modeling to provide an estimate of effects, it is important to understand that there are limitations to the ecological data used in the model, and that the model results must be interpreted within the context of a given species' ecology. When reviewing the acoustic effects modeling results, it is also important to understand there have been no confirmed acoustic effects on any marine species in previous NAVSEA NUWC Keyport Range Complex exercises or from any other mid- and high-frequency active sonar RDT&E activities within the NAVSEA NUWC Keyport Range Complex.

The annual estimated number of exposures from acoustic sources are given for each species. The modeled exposure is the probability of a response that NMFS would classify as harassment under the MMPA. These exposures are calculated for all activities modeled and represent the total exposures per year and are not based on a per day basis.

Range Operating Policies and Procedures (ROP) Description operating policies and procedures, as described in NUWC Keyport Report 1509, *Range Operating Policies and Procedures Manual (ROP),* are followed for all NUWC Keyport range activities. NUWC Keyport would continue to implement the ROP policies and procedures within the NAVSEA NUWC Keyport Range Complex with implementation of the proposed range extension. The ROP is followed to protect the health and safety of the public and Navy personnel and equipment as well as to protect the marine environment. The policies and procedures address issues such as safety, development of approved run plans, range operation personnel responsibility, deficiency reporting, all facets of range activities, and the establishment of ''exclusion zones'' to ensure that there are no marine mammals within a prescribed area prior to the commencement of each in-water exercise within the NAVSEA NUWC Keyport Range Complex. All range operators are trained by NOAA in marine mammal identification, and active acoustic activities are suspended or delayed if whales, dolphins, or porpoises (cetaceans) are observed within range areas.

The modeling for acoustic sources using the risk function methodology predicts 15,130 annual acoustic exposures that result in Level B harassment and 2,026 annual exposures of pinnipeds that exceed the TTS threshold for Level B Harassment under these criteria. The model predicts 0 annual exposures that exceed the PTS threshold (Level A Harassment). The Navy is not requesting Level A harassment authorization for any marine mammal. The summary of modeled mid- and high-frequency acoustic source exposure harassment numbers by species are presented in Tables 9 through 12 and represent potential harassment after implementation of the ROP. Implementation of the ROP would result in a zero take with respect to all cetaceans except for the harbor porpoise.

Table 9. Estimated Annual MMPA Level B Exposures for Inland Water - Keyport Range Site

	TTS (Level B) Exposures	Risk Function Sub-TTS Behavioral Exposures
Harbor Seal	41	109
Total Level B Exposures (by criteria method)	41	109

Table 10. Estimated Annual MMPA Level B Exposures for Inland Water – DBRC Site

	TTS (Level B) Exposures	Risk Function Sub-TTS Behavioral Exposures
Killer whale	0	0
California sea lion	0	109
Harbor Seal	1,998	3,320
Total Level B Exposures (by criteria method)	1,998	3,429

Table 11. Estimated Annual MMPA Level B Exposures for Open Water – QUTR Site

	TTS (Level B) Exposures	Risk Function Sub-TTS Behavioral Exposures
Endangered & Threatened Species		
Blue whale	0	0
Fin whale	0	0
Humpback whale	0	0
Sei whale	0	0
Sperm whale	0	0
Killer whale	0	0
Steller sea lion	0	0
Non-ESA Listed Species		
Minke whale	0	0
Gray whale	0	0
Dwarf and pygmy sperm whale	0	0
Baird's beaked whale	0	0
Mesoplodons	0	0
Risso's dolphin	0	0
Pacific white-sided dolphin	0	0
Short-beaked common dolphin	0	0
Striped dolphin	0	0
Northern right whale dolphin	0	0
Dall's porpoise	0	0
Harbor porpoise*	0	11,282
Northern fur seal	0	44
California sea lion	0	5
Northern elephant seal	0	14
Harbor seal	23	78
Total Level B Exposures (by criteria method)	23	11,423

* For harbor porpoises, the model results represent the step function criteria where 100% of the population exposed to 120 dB SPL are listed. This is not a risk function calculation.

Table 12. Combined Estimated Annual MMPA Level B Exposures (TTS and Behavior) for Proposed Annual RDT&E Activities Operations at All Sites after Implementation of Proposed Mitigation Measures

	TTS (Level B) Exposures	Risk Function Sub-TTS Behavioral Exposures
Endangered & Threatened Species		
Blue whale	0	0
Fin whale	0	0
Humpback whale	0	0
Sei whale	0	0
Sperm whale	0	0
Killer whale	0	0
Steller sea lion	0	0
Non-ESA Listed Species		
Minke whale	0	0
Gray whale	0	0
Dwarf and pygmy sperm whale	0	0
Baird's beaked whale	0	0
Mesoplodons	0	0
Risso's dolphin	0	0
Pacific white-sided dolphin	0	0
Short-beaked common dolphin	0	0
Striped dolphin	0	0
Northern right whale dolphin	0	0
Dall's porpoise	0	0
Harbor porpoise*	1	11,282
Northern fur seal	0	44
California sea lion	0	114
Northern elephant seal	0	14
Harbor seal	2,062	3,507
Total Level B Exposures (by criteria method)	2,063	14,961

* For harbor porpoises, the model results represent the step function criteria where 100% of the population exposed to 120 dB SPL are listed. This is not a risk function calculation.

It is highly unlikely that a marine mammal would experience any long-term effects because the large NAVSEA NUWC Keyport Range Complex test areas make individual mammals' repeated and/or prolonged exposures to high-level sonar signals unlikely. Specifically, mid- and high-frequency acoustic sources have limited marine mammal exposure ranges and relatively high platform speeds. Moreover, there are no exposures that exceed the PTS threshold and result in Level A harassment from sonar and other active acoustic sources. Therefore, long-term effects on individuals, populations or stocks are unlikely.

When analyzing the results of the acoustic exposure modeling to provide an estimate of effects, it is important to understand that there are limitations to the ecological data (diving behavior, migration or movement patterns and population dynamics) used in the model, and that the model results must be interpreted within the context of a given species' ecology.

When reviewing the acoustic exposure modeling results, it is also important to understand that the estimates of marine mammal sound exposures are presented with consideration of standard protective measure operating procedures. The ROP along with monitoring and mitigation measures for the Keyport Range Complex RDT&E activities, including detection of marine mammals, protective measures such as stand off distances and delaying or halting activities, and power down procedures if marine mammals are detected within one of the exclusion zones, are provided below.

Because of the time delay between pings, an animal encountering the sonar will accumulate energy for only a few sonar pings over the course of a few minutes. Therefore, exposure to sonar would be a short-term event, minimizing any single animal's exposure to sound levels approaching the harassment thresholds.

Effects on Marine Mammal Habitat

The proposed extended area for the Keyport Range Site is also critical habitat of the Southern Resident killer whales. The current Keyport Range Site is outside the critical habitat area. There are no other areas within the Keyport Range Complex with extensions that are specifically considered as important physical habitat for marine mammals.

The prey of marine mammals are considered part of their habitat. The Navy's DEIS for the Keyport Range Complex RDT&E and range extension activities contain a detailed discussion of the potential effects to fish from active acoustic sources. Below is a summary of conclusions regarding those effects.

Effects on Fish From Active Acoustic Sources

The extent of data, and particularly scientifically peer-reviewed data, on the effects of high intensity sounds on fish is limited. In considering the available literature, the vast majority of fish species studied to date are hearing

generalists and cannot hear sounds above 500 to 1,500 Hz (depending upon the species), and, therefore, behavioral effects on these species from higher frequency sounds are not likely. Moreover, even those fish species that may hear above 1.5 kHz, such as a few sciaenids and the clupeids (and relatives), have relatively poor hearing above 1.5 kHz as compared to their hearing sensitivity at lower frequencies. Therefore, even among the species that have hearing ranges that overlap with some mid- and high-frequency sounds, it is likely that the fish will only actually hear the sounds if the fish and source are very close to one another. Finally, since the vast majority of sounds that are of biological relevance to fish are below 1 kHz (*e.g.,* Zelick *et al.,* 1999; Ladich and Popper, 2004), even if a fish detects a mid- or high-frequency sound, these sounds will not mask detection of lower frequency biologically relevant sounds. Based on the above information, there will likely be few, if any, behavioral impacts on fish.

Alternatively, it is possible that very intense mid- and high frequency signals could have a physical impact on fish, resulting in damage to the swim bladder and other organ systems. However, even these kinds of effects have only been shown in a few cases when the fish has been very close to the source. Such effects have never been indicated in response to any Navy sonar. Moreover, at greater distances (the distance clearly would depend on the intensity of the signal from the source) there appears to be little or no impact on fish, and particularly no impact on fish that do not have a swim bladder or other air bubble that would be affected by rapid pressure changes.

Proposed Mitigation Measures

In order to issue an incidental take authorization (ITA) under Section 101(a)(5)(A) of the MMPA, NMFS must set forth the ''permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.'' The National Defense Authorization Act (NDAA) of 2004 amended the MMPA as it relates to military-readiness activities and the incidental take authorization process such that ''least practicable adverse impact'' shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the ''military readiness activity.''

In addition, any mitigation measure prescribed by NMFS should be known to accomplish, have a reasonable likelihood of accomplishing (based on current science), or contribute to the accomplishment of one or more of the general goals listed below:

(a) Avoidance or minimization of injury or death of marine mammals wherever possible (goals b, c, and d may contribute to this goal).

(b) A reduction in the numbers of marine mammals (total number or number at a biologically important time or location) exposed to received levels underwater active acoustic sources or other activities expected to result in the take of marine mammals (this goal may contribute to a, above, or to reducing harassment takes only).

(c) A reduction in the number of times (total number or number at biologically important time or location) individuals would be exposed to received levels of underwater active acoustic sources or other activities expected to result in the take of marine mammals (this goal may contribute to a, above, or to reducing harassment takes only).

(d) A reduction in the intensity of exposures (either total number or number at biologically important time or location) to received levels of underwater active acoustic sources expected to result in the take of marine mammals (this goal may contribute to a, above, or to reducing the severity of harassment takes only).

(e) A reduction in adverse effects to marine mammal habitat, paying special attention to the food base, activities that block or limit passage to or from biologically important areas, permanent destruction of habitat, or temporary destruction/disturbance of habitat during a biologically important time.

(f) For monitoring directly related to mitigation—an increase in the probability of detecting marine mammals, thus allowing for more effective implementation of the mitigation (shut-down zone, etc.).

NMFS worked with the Navy and identified potential practicable and effective mitigation measures, which included a careful balancing of the likely benefit of any particular measure to the marine mammals with the likely effect of that measure on personnel safety, practicality of implementation, and impact on the military readiness activity. These mitigation measures are listed below.

Proposed Mitigation Measures for Active Acoustic Sources, Surface Operations and Other Activities

Current protective measures known as the ROP employed by the NAVSEA NUWC Keyport include applicable training of personnel and implementation of activity specific procedures resulting in minimization and/or avoidance of interactions with protected resources and are provided below.

(1) Range activities shall be conducted in such a way as to ensure marine mammals are not harassed or harmed by human-caused events.

(2) Marine mammal observers are on board ship during range activities. All range personnel shall be trained in marine mammal recognition. Marine mammal observer training is normally conducted by qualified organizations such as NOAA/National Marine Mammal Lab (NMML) on an as needed basis.

(3) Vessels on a range use safety lookouts during all hours of range activities. Lookout duties include looking for any and all objects in the water, including marine mammals. These lookouts are not necessarily looking only for marine mammals. They have other duties while aboard. All sightings are reported to the Range Officer in charge of overseeing the activity.

(4) Visual surveillance shall be accomplished just prior to all in-water exercises. This surveillance shall ensure that no marine mammals are visible within the boundaries of the area within which the test unit is expected to be operating. Surveillance shall include, as a minimum, monitoring from all participating surface craft and, where available, adjacent shore sites.

(5) The Navy shall postpone activities until cetaceans (whales, dolphins, and porpoises) leave the project area. When cetaceans have been sighted in an area, all range participants increase vigilance and take reasonable and practicable actions to avoid collisions and activities that may result in close interaction of naval assets and marine mammals. Actions may include changing speed and/or direction and are dictated by environmental and other conditions (*e.g.,* safety, weather).

(6) An ''exclusion zone'' shall be established and surveillance will be conducted to ensure that there are no marine mammals within this exclusion zone prior to the commencement of each in-water exercise. For cetaceans (whales, dolphins, and porpoises), the exclusion zone must be at least as large as the entire area within which the test unit may operate, and must extend at least 1,000 yards (914.4 m) from the intended track of the test unit. For pinnipeds, the exclusion zone extends out 100 yards (91 m) from the intended track of the test unit.

(7) Range craft shall not approach within 100 yards (91 m) of marine mammals and shall be followed to the extent practicable considering human and vessel safety priorities. All Navy vessels and aircraft, including helicopters, are expected to comply with this directive. This includes marine mammals ''hauled-out'' on islands, rocks, and other areas such as buoys.

(8) Passive acoustic monitoring shall be utilized to detect marine mammals in the area before and during activities, especially when visibility is reduced.

(9) Procedures for reporting marine mammal sightings on the NAVSEA NUWC Keyport Range Complex shall be promulgated, and sightings shall be entered into the Range Operating System and forwarded to NOAA/NMML Platforms of Opportunity Program.

Research and Conservation Measures for Marine Mammals

The Navy provides a significant amount of funding and support for marine research. The Navy provided $26 million in Fiscal Year 2008 and plans for $22 million in Fiscal Year 2009 to universities, research institutions, Federal laboratories, private companies, and independent researchers around the world to study marine mammals. Over the past five years the Navy has funded over $100 million in marine mammal research. The U.S. Navy sponsors seventy percent of all U.S. research concerning the effects of human-generated sound on marine mammals and 50 percent of such research conducted worldwide. Major topics of Navy-supported research include the following:

- Better understanding of marine species distribution and important habitat areas,
- Developing methods to detect and monitor marine species before and during training,
- Understanding the effects of sound on marine mammals, sea turtles, fish, and birds, and
- Developing tools to model and estimate potential effects of sound.

The Navy's Office of Naval Research currently coordinates six programs that examine the marine environment and are devoted solely to studying the effects of noise and/or the implementation of technology tools that will assist the Navy in studying and tracking marine mammals. The six programs are as follows:

- Environmental Consequences of Underwater Sound,
- Non-Auditory Biological Effects of Sound on Marine Mammals,
- Effects of Sound on the Marine Environment,
- Sensors and Models for Marine Environmental Monitoring,
- Effects of Sound on Hearing of Marine Animals, and
- Passive Acoustic Detection, Classification, and Tracking of Marine Mammals.

Furthermore, research cruises led by NMFS and by academic institutions have received funding from the Navy.

The Navy has sponsored several workshops to evaluate the current state of knowledge and potential for future acoustic monitoring of marine mammals. The workshops brought together acoustic experts and marine biologists from the Navy and other research organizations to present data and information on current acoustic monitoring research efforts and to evaluate the potential for incorporating similar technology and methods on instrumented ranges. However, acoustic detection, identification, localization, and tracking of individual animals still requires a significant amount of research effort to be considered a reliable method for marine mammal monitoring. The Navy supports research efforts on acoustic monitoring and will continue to investigate the feasibility of passive acoustics as a potential mitigation and monitoring tool.

Overall, the Navy will continue to fund ongoing marine mammal research, and is planning to coordinate long-term monitoring/studies of marine mammals on various established ranges and operating areas. The Navy will continue to research and contribute to university/external research to improve the state of the science regarding marine species biology and acoustic effects. These efforts include mitigation and monitoring programs; data sharing with NMFS and via the literature for research and development efforts.

Long-Term Prospective Study

NMFS, with input and assistance from the Navy and several other agencies and entities, will perform a longitudinal observational study of marine mammal strandings to systematically observe for and record the types of pathologies and diseases and investigate the relationship with potential causal factors (*e.g.,* sonar, seismic, weather). The study will not be a true ''cohort'' study, because we will be unable to quantify or estimate specific sonar or other sound exposures for individual animals that strand. However, a cross-sectional or correlational analysis, a method of descriptive rather than analytical epidemiology, can be conducted to compare population characteristics, *e.g.,* frequency of strandings and types of specific pathologies between general periods of various anthropogenic activities and non-activities within a prescribed geographic space. In the long term study, we will more fully and consistently collect and analyze data on the demographics of strandings in specific locations and consider anthropogenic activities and physical, chemical, and biological environmental parameters. This approach in conjunction with true cohort studies (tagging animals, measuring received sounds, and evaluating behavior or injuries) in the presence of activities and non-activities will provide critical information needed to further define the impacts of MTEs and other anthropogenic and non-anthropogenic stressors. In coordination with the Navy and other federal and non-federal partners, the comparative study will be designed and conducted for specific sites during intervals of the presence of anthropogenic activities such as sonar transmission or other sound exposures and absence to evaluate demographics of morbidity and mortality, lesions found, and cause of death or stranding. Additional data that will be collected and analyzed in an effort to control potential confounding factors include variables such as average sea temperature (or just season), meteorological or other environmental variables (*e.g.,* seismic activity), fishing activities, etc. All efforts will be made to include appropriate controls (*i.e.,* no sonar or no seismic); environmental variables may complicate the interpretation of ''control'' measurements. The Navy and NMFS along with other partners are evaluating mechanisms for funding this study.

Proposed Monitoring Measures

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

Monitoring measures prescribed by NMFS should accomplish one or more of the following general goals:

(a) An increase in the probability of detecting marine mammals, both within the safety zone (thus allowing for more

effective implementation of the mitigation) and in general to generate more data to contribute to the analyses mentioned below.

(b) An increase in our understanding of how many marine mammals are likely to be exposed to levels of HFAS/MFAS (or other stimuli) that we associate with specific adverse effects, such as behavioral harassment, TTS, or PTS.

(c) An increase in our understanding of how marine mammals respond to HFAS/MFAS (at specific received levels) or other stimuli expected to result in take and how anticipated adverse effects on individuals (in different ways and to varying degrees) may impact the population, species, or stock (specifically through effects on annual rates of recruitment or survival) through any of the following methods:

- Behavioral observations in the presence of HFAS/MFAS compared to observations in the absence of sonar (need to be able to accurately predict received level and report bathymetric conditions, distance from source, and other pertinent information).
- Physiological measurements in the presence of HFAS/MFAS compared to observations in the absence of sonar (need to be able to accurately predict received level and report bathymetric conditions, distance from source, and other pertinent information), and/or
- Pre-planned and thorough investigation of stranding events that occur coincident to naval activities.
- Distribution and/or abundance comparisons in times or areas with concentrated HFAS/MFAS versus times or areas without HFAS/MFAS.

(d) An increased knowledge of the affected species.

(e) An increase in our understanding of the effectiveness of certain mitigation and monitoring measures.

With these goals in mind, the following monitoring procedures for the proposed Navy's NAVSEA NUWC Keyport Range Complex RDT&E and range extension activities have been worked out between NMFS and the Navy. Keyport will conduct two special surveys per year to monitor HFAS and MFAS respectively. This will occur at the DBRC Range site. This will include visual surveys composed of vessel, shore monitoring and passive acoustic monitoring. Marine mammal observers may be on range craft and/or on shore side. NMFS and the Navy continue to improve the plan and may modify the monitoring plan based on input received during the public comment period.

Several monitoring techniques were prescribed for other Navy activities related to sonar exercises (see monitoring plan for Navy's Hawaii Range Complex; Navy, 2008). Every known monitoring technique has advantages and disadvantages that vary temporally and spatially. Therefore, a combination of techniques is proposed to be used so that the detection and observation of marine animals is maximized. Monitoring methods proposed during mission activity events in the NAVSEA NUWC Keyport Range Complex Study Area include a combination of the following research elements that would be used to collect data for comprehensive assessment:

- Visual Surveys—Vessel, Shore-based, and Aerial (as applicable)
- Passive Acoustic Monitoring (PAM)
- Marine Mammal Observers (MMOs) on Range craft

Visual Surveys

Visual surveys of marine animals can provide detailed information about their behavior, distribution, and abundance. Baseline measurements and/or data for comparison can be obtained before, during and after mission activities. Changes in behavior and geographical distribution may be used to infer if and how animals are impacted by sound. In accordance with all safety considerations, observations will be maximized by working from all available platforms: vessels, aircraft, land and/or in combination. Shore-based (for inland waters), vessel and aerial (as applicable) surveys may be conducted from shore support, range craft, Navy vessels, or contracted vessels. Visual surveys will be conducted during NAVSEA NUWC Keyport range events which are identified as being able to provide the highest likelihood of success.

Vessel surveys are often preferred by researchers because of their slow speed, offshore survey ability, duration and ability to more closely approach animals under observation. They also result in higher rate of species identification, the opportunity to combine line transect and mark-recapture methods of estimating abundance, and collection of oceanographic and other relevant data. Vessels can be less expensive per unit of time, but because of the length of time to cover a given survey area, may actually be more expensive in the long run compared to aerial surveys (Dawson *et al.,* 2008). Changes in behavior and geographical distribution may be used to infer if and how animals are impacted by sound. However, it should be noted that animal reaction (reactive movement) to the survey vessel itself is possible (Dawson *et al.,* 2008). Vessel surveys typically do not allow for observation of animals below the ocean surface (*e.g.* in the water column) as compared to aerial surveys (DoN, 2008a; Slooten *et al.,* 2004).

NAVSEA NUWC Keyport will conduct two special surveys per year to monitor HFAS and MFAS respectively. This will occur at the DBRC Range site. The determination to monitor in the DBRC area includes the following reasoning: (1) It would provide the highest amount of activity; (2) it is a controlled environment; (3) permanently bottom mounted monitoring hydrophones are in place; (4) most likely environment to get accurate data; and (5) conducive to excellent shore side observation.

For specified events, shore-based and vessel surveys will be used 1 day prior to and 1–2 days post activity. The variation in the number of days after allows for the detection of animals that gradually return to an area, if they indeed do change their distribution in response to the associated events. DBRC is a small area and animals are likely to return more quickly than if the test were in open ocean.

Surveys will include the range site with special emphasis given to the particular path of the test run. Passive acoustic system (hydrophone or towed array) would be used to determine if marine mammals are in the area before and/or after the event. When conducting a particular survey, the survey team will collect: (1) Species identification and group size; (2) location and relative distance from the acoustic source(s); (3) the behavior of marine mammals, including standard environmental and oceanographic parameters; (4) date, time and visual conditions associated with each observation; (5) direction of travel relative to the active acoustic source; and (6) duration of the observation. Animal sightings and relative distance from a particular active acoustic source will be used post-survey to determine potential received energy (dB re 1 micro Pa-sec). This data will be used, post-survey, to estimate the number of marine mammals exposed to different received levels (energy based on distance to the source, bathymetry, oceanographic conditions and the type and power of the acoustic source) and their corresponding behavior.

Although photo-identification studies are not typically a component of Navy RDT&E activity monitoring surveys, the Navy supports using the contracted platforms to obtain opportunistic data collection. Therefore, absent classification issues any unclassified digital photographs, if taken, of marine mammals during visual surveys will be

provided to local researchers for their regional research if requested.

1. Shore-Based Surveys

A large number of test events in the Keyport Range complex are conducted in inland waters allowing for excellent shore based surveillance opportunities. When practicable, for test events planned adjacent to nearshore areas, where there are elevated topography or coastal structures, shore-based visual survey methods will be implemented using binoculars or theodolite. These methods have been proven valuable in similar monitoring studies such as ATOC and others (Frankel and Clark, 1998; Clark and Altman, 2006).

2. Vessel Surveys

Keyport Range Complex activities conducted in the inland waters are supported both from the shore (described above) and from range craft. The primary purpose of surveys performed from these range craft will be to document and monitor potential behavioral effects of the mission activities on marine mammals. As such, parameters to be monitored for potential effects are changes in the occurrence, distribution, numbers, surface behavior, and/or disposition (injured or dead) of marine mammal species before, during and after the mission activities. Post-analysis will focus on how the location, speed and vector of the survey vessel and the location and direction of the sonar source (*e.g.,* Navy surface vessel) relates to the animal. Any other vessels or aircraft observed in the area will also be documented.

Passive Acoustic Monitoring

There are both benefits and limitations to passive acoustic monitoring (Mellinger *et al.,* 2007). Passive acoustic monitoring (PAM) allows detection of marine mammals that vocalize but may not be seen during a visual survey. When interpreting data collected from PAM, it is understood that species specific results must be viewed with caution because not all animals within a given population are calling, or may only be calling only under certain conditions (Mellinger, 2007; ONR, 2007). The Keyport Range Complex study area has advanced features which allow for passive acoustic monitoring. These hydrophones are both permanently bottom mounted, towed or over-the-side. Subject matter experts are available for detection and identification of species type.

Marine Mammal Observer on Navy Vessels

All Keyport Range Complex operators are trained by NOAA in marine mammal identification. Additional use of civilian biologists as Marine Mammal Observers (MMOs) aboard range craft and Navy vessels may be used to research the effectiveness of Navy marine observers, as well as for data collection during other monitoring surveys.

MMOs will be field-experienced observers who are Navy biologists or contracted observers. These civilian MMOs will be placed alongside existing Navy marine observers during a sub-set of Keyport Range Complex RDT&E activities. This can only be done on certain vessels and observers may be required to have security clearance. NUWC Keyport may also use MMOs on range craft during test events being monitored. MMOs will not be placed aboard Navy platforms for every Navy testing event, but during specifically identified opportunities deemed appropriate for data collection efforts. The events selected for MMO participation will take into account safety, logistics, and operational concerns. Use of MMOs will verify Navy marine observer sighting efficiency, offer an opportunity for more detailed species identification, provide an opportunity to bring animal protection awareness to the vessels' crew, and provide the opportunity for an experienced biologist to collect data on marine mammal behavior. Data collected by the MMOs is anticipated to assist the Navy with potential improvements to marine observer training as well as providing the marine observers with a chance to gain additional knowledge on marine mammals.

Events selected for MMO participation will be an appropriate fit in terms of security, safety, logistics, and compatibility with Keyport Range Complex RDT&E activities. The MMOs will not be part of the Navy's formal vessel reporting chain of command during their data collection efforts, and Navy marine observers will follow the appropriate chain of command in reporting marine mammal sightings. Exceptions will be made if an animal is observed by the MMO within the shutdown zone and was not seen by the Navy marine observer. The MMO will inform the Navy marine observer of the sighting so that appropriate action may be taken by the chain of command. For less biased data, it is recommended that MMOs schedule their daily observations to duplicate the Navy marine observers' schedule.

Civilian MMOs will be aboard Navy vessels involved in the study. As described earlier, MMOs will meet and adhere to necessary qualifications, security clearance, logistics and safety concerns. MMOs will monitor for marine mammals from the same height above water as the Navy marine observers and as all visual survey teams, they will collect the same data collected by Navy marine observers, including but not limited to: (1) Location of sighting; (2) species (if not possible, identification of whale or dolphin); (3) number of individuals; (4) number of calves present, if any; (5) duration of sighting; (6) behavior of marine animals sighted; (7) direction of travel; (8) environmental information associated with sighting event including Beaufort sea state, wave height, swell direction, wind direction, wind speed, glare, percentage of glare, percentage of cloud cover; and (9) when in relation to navy exercises did the sighting occur.

In addition, the Navy is developing an Integrated Comprehensive Monitoring Program (ICMP) for marine species to assess the effects of Keyport Range Complex RDT&E activities on marine species and investigate population trends in marine species distribution and abundance in locations where Keyport Range Complex RDT&E activities regularly occur. As part of the ICMP, knowledge gained from other Navy MMO monitored events will be incorporated into NUWC Keyport monitoring/mitigations as part of the adaptive management approach.

The ICMP will provide the overarching coordination that will support compilation of data from range-specific monitoring plans (*e.g.,* Keyport Range Complex plan) as well as Navy funded research and development (R&D) studies. The ICMP will coordinate the monitoring program's progress toward meeting its goals and develop a data management plan. The ICMP will be evaluated annually to provide a matrix for progress and goals for the following year, and will make recommendations on adaptive management for refinement and analysis of the monitoring methods.

The primary objectives of the ICMP are to:

- Monitor and assess the effects of Navy activities on protected species;
- Ensure that data collected at multiple locations is collected in a manner that allows comparison between and among different geographic locations;
- Assess the efficacy and practicality of the monitoring and mitigation techniques;

• Add to the overall knowledge-base of marine species and the effects of Navy activities on marine species.

The ICMP will be used both as: (1) A planning tool to focus Navy monitoring priorities (pursuant to ESA/MMPA requirements) across Navy Range Complexes and Exercises; and (2) an adaptive management tool, through the consolidation and analysis of the Navy's monitoring and watchstander data, as well as new information from other Navy programs (*e.g.*, R&D), and other appropriate newly published information.

In combination with the adaptive management component of the proposed NAVSEA NUWC Keyport Range Complex rule and the other planned Navy rules (*e.g.,* Atlantic Fleet Active Sonar Training, Hawaii Range Complex, and Southern California Range Complex), the ICMP could potentially provide a framework for restructuring the monitoring plans and allocating monitoring effort based on the value of particular specific monitoring proposals (in terms of the degree to which results would likely contribute to stated monitoring goals, as well as the likely technical success of the monitoring based on a review of past monitoring results) that have been developed through the ICMP framework, instead of allocating based on maintaining an equal (or commensurate to effects) distribution of monitoring effort across Range complexes. For example, if careful prioritization and planning through the ICMP (which would include a review of both past monitoring results and current scientific developments) were to show that a large, intense monitoring effort would likely provide extensive, robust and much-needed data that could be used to understand the effects of sonar throughout different geographical areas, it may be appropriate to have other Range Complexes dedicate money, resources, or staff to the specific monitoring proposal identified as ''high priority'' by the Navy and NMFS, in lieu of focusing on smaller, lower priority projects divided throughout their home Range Complexes. The ICMP will identify:

• A means by which NMFS and the Navy would jointly consider prior years' monitoring results and advancing science to determine if modifications are needed in mitigation or monitoring measures to better effect the goals laid out in the Mitigation and Monitoring sections of this proposed Keyport Range Complex rule.

• Guidelines for prioritizing monitoring projects

• If, as a result of the Navy-NMFS 2011 Monitoring Workshop and similar to the example described in the paragraph above, the Navy and NMFS decide it is appropriate to restructure the monitoring plans for multiple ranges such that they are no longer evenly allocated (by Range Complex), but rather focused on priority monitoring projects that are not necessarily tied to the geographic area addressed in the rule, the ICMP will be modified to include a very clear and unclassified recordkeeping system that will allow NMFS and the public to see how each Range Complex/project is contributing to all of the ongoing monitoring (resources, effort, money, etc.).

Adaptive Management

Our understanding of the effects of HFAS/MFAS on marine mammals is still in its relative infancy, and yet the science in this field is evolving fairly quickly. These circumstances make the inclusion of an adaptive management component both valuable and necessary within the context of 5-year regulations for activities that have been associated with marine mammal mortality in certain circumstances and locations (though not the Keyport Range Complex Study Area). The use of adaptive management will give NMFS the ability to consider new data from different sources to determine (in coordination with the Navy), on an annual basis, if new or modified mitigation or monitoring measures are appropriate for subsequent annual LOAs. Following are some of the possible sources of applicable data:

• Results from the Navy's monitoring from the previous year (either from the Keyport Range Complex Study Area or other locations).

• Results from specific stranding investigations (either from the Keyport Range Complex Study Area or other locations, and involving coincident Keyport Range Complex RDT&E or not involving coincident use).

• Results from the research activities associated with Navy's HFAS/MFAS.

• Results from general marine mammal and sound research (funded by the Navy or otherwise).

• Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations and subsequent Letters of Authorization.

Mitigation measures could be modified or added if new data suggest that such modifications would have a reasonable likelihood of accomplishing the goals of mitigation laid out in this proposed rule and if the measures are practicable. NMFS would also coordinate with the Navy to modify or add to the existing monitoring requirements if the new data suggest that the addition of a particular measure would more effectively accomplish the goals of monitoring laid out in this proposed rule. The reporting requirements associated with this proposed rule are designed to provide NMFS with monitoring data from the previous year to allow NMFS to consider the data in issuing annual LOAs. NMFS and the Navy will meet annually prior to LOA issuance to discuss the monitoring reports, Navy R&D developments, and current science and whether mitigation or monitoring modifications are appropriate.

Reporting

In order to issue an ITA for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must set forth ''requirements pertaining to the monitoring and reporting of such taking.'' Effective reporting is critical both to monitoring compliance as well as ensuring that the most value is obtained from the required monitoring. Some of the reporting requirements are still in development and the final rule may contain additional details not contained in the proposed rule. Additionally, proposed reporting requirements may be modified, removed, or added based on information or comments received during the public comment period.

Notification of Injured or Dead Marine Mammals

Navy personnel will ensure through proper chain of command that NMFS (regional stranding coordinator) is notified immediately (or as soon as clearance procedures allow) if an injured or dead marine mammal is found during or shortly after, and in the vicinity of, any Keyport Range Complex RDT&E activities utilizing active acoustic sources. The Navy will provide NMFS with species or description of the animal (s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available). The Stranding Response Plan contains more specific reporting requirements for specific circumstances.

Annual Report

The Navy will submit its first annual report to the Office of Protected Resources, NMFS, no later than 120 days before the expiration of the LOA. These reports will, at a minimum, include the following information:

• The estimated number of hours of sonar and other operations involving active acoustic sources, broken down by source type.

• If possible, the total number of hours of observation effort (including observation time when sonar was not operating).

• A report of all marine mammal sightings (at any distance) to include, when possible and to the best of their ability, and if not classified:

—Species.
—Number of animals sighted.
—Location of marine mammal sighting.
—Distance of animal from any operating sonar sources.
—Whether animal is fore, aft, port, starboard.
—Direction animal is moving in relation to source (away, towards, parallel).
—Any observed behaviors of marine mammals.

• The status of any sonar sources (what sources were in use) and whether or not they were powered down or shut down as a result of the marine mammal observation.

• The platform that the marine mammals were sighted from.

Keyport Range Complex Comprehensive Report

The Navy will submit to NMFS a draft report that analyzes and summarizes all of the multi-year marine mammal information gathered during test activities involving active acoustic sources for which annual reports are required as described above. This report will be submitted at the end of the fourth year of the rule (anticipated to be December 2013), covering activities that have occurred through June 1, 2012. The Navy will respond to NMFS comments on the draft comprehensive report if submitted within 3 months of receipt. The report will be considered final after the Navy has addressed NMFS' comments, or three months after the submittal of the draft if NMFS does not comment by then.

Analysis and Negligible Impact Determination

Pursuant to NMFS' regulations implementing the MMPA, an applicant is required to estimate the number of animals that will be ''taken'' by the specified activities (*i.e.*, takes by harassment only, or takes by harassment, injury, and/or death). This estimate informs the analysis that NMFS must perform to determine whether the activity will have a ''negligible impact'' on the species or stock. Level B (behavioral) harassment occurs at the level of the individual(s) and does not assume any resulting population-level consequences, though there are known avenues through which behavioral disturbance of individuals can result in population-level effects. A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.*, population-level effects). An estimate of the number of Level B harassment takes alone is not enough information on which to base an impact determination.

In addition to considering estimates of the number of marine mammals that might be ''taken'' through behavioral harassment, NMFS must consider other factors, such as the likely nature of any responses (their intensity, duration, etc.), the context of any responses (critical reproductive time or location, migration, etc.), as well as the number and nature of estimated Level A takes, the number of estimated mortalities, and effects on habitat.

The Navy's specified activities have been described based on best estimates of the planned RDT&E activities the Navy would conduct within the proposed NAVSEA NUWC Keyport Range Complex Extension. The acoustic sources proposed to be used in the NAVSEA NUWC Keyport Range Complex Extension are low intensity and total proposed sonar operation hours are under 1,570 hours. Taking the above into account, along with the fact that NMFS anticipates no mortalities and injuries to result from the action, the fact that there are no specific areas of reproductive importance for marine mammals recognized within the Keyport Range Complex Extension study area, the sections discussed below, and dependent upon the implementation of the proposed mitigation measures, NMFS has determined that Navy RDT&E activities utilizing underwater acoustic sources will have a negligible impact on the affected marine mammal species and stocks present in the proposed action area.

Behavioral Harassment

As discussed in the Potential Effects of Exposure of Marine Mammals to HFAS/MFAS and illustrated in the conceptual framework, marine mammals can respond to HFAS/MFAS in many different ways, a subset of which qualifies as harassment. One thing that the take estimates do not take into account is the fact that most marine mammals will likely avoid strong sound sources to some extent. Although an animal that avoids the sound source will likely still be taken in some instances (such as if the avoidance results in a missed opportunity to feed, interruption of reproductive behaviors, etc.) in other cases avoidance may result in fewer instances of take than were estimated or in the takes resulting from exposure to a lower received level than was estimated, which could result in a less severe response. The Keyport Range Complex application involves mid-frequency and high frequency active sonar operations shown in Table 2, and none of the tests would involve powerful tactical sonar such as the 53C series MFAS. Therefore, any disturbance to marine mammals resulting from MFAS and HFAS in the proposed Keyport Range Complex RDT&E activities is expected to be significantly less in terms of severity when compared to major sonar exercises (*e.g.*, AFAST, HRC, SOCAL). In addition, high frequency signals tend to have more attenuation in the water column and are more prone to lose their energy during propagation. Therefore, their zones of influence are much smaller, thereby making it easier to detect marine mammals and prevent adverse effects from occurring.

There is little information available concerning marine mammal reactions to MFAS/HFAS. The Navy has only been conducting monitoring activities since 2006 and has not compiled enough data to date to provide a meaningful picture of effects of HFAS/MFAS on marine mammals, particularly in the Keyport Range Complex Study Area. From the four major training exercises (MTEs) of HFAS/MFAS in the AFAST Study Area for which NMFS has received a monitoring report, no instances of obvious behavioral disturbance were observed by the Navy watchstanders in the 700+ hours of effort in which 79 sightings of marine mammals were made (10 during active sonar operation). One cannot conclude from these results that marine mammals were not harassed from HFAS/MFAS, as a portion of animals within the area of concern may not have been seen (especially those more cryptic, deep-diving species, such as beaked whales or *Kogia* sp.) and some of the non-biologist watchstanders might not have had the expertise to characterize behaviors. However, the data demonstrate that the animals that were observed did not respond in any of the obviously more severe ways, such as panic, aggression, or anti-predator response.

In addition to the monitoring that will be required pursuant to these regulations and subsequent LOAs, which is specifically designed to help us better understand how marine mammals respond to sound, the Navy and NMFS have developed, funded, and begun conducting a controlled exposure

experiment with beaked whales in the Bahamas.

Diel Cycle

As noted previously, many animals perform vital functions, such as feeding, resting, traveling, and socializing on a diel cycle (24-hr cycle). Substantive behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.*, 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.*, 2007).

In the previous section, we discussed the fact that potential behavioral responses to HFAS/MFAS that fall into the category of harassment could range in severity. By definition, the takes by Level B behavioral harassment involve the disturbance of a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns (such as migration, surfacing, nursing, breeding, feeding, or sheltering) to a point where such behavioral patterns are abandoned or significantly altered. These reactions would, however, be more of a concern if they were expected to last over 24 hours or be repeated in subsequent days. Different sonar testing may not occur simultaneously. Some of the marine mammals in the Keyport Range Complex Study Area are residents and others would not likely remain in the same area for successive days, it is unlikely that animals would be exposed to HFAS/MFAS at levels or for a duration likely to result in a substantive response that would then be carried on for more than one day or on successive days.

TTS

NMFS and the Navy have estimated that individuals of some species of marine mammals may sustain some level of TTS from HFAS/MFAS operations. As mentioned previously, TTS can last from a few minutes to days, be of varying degree, and occur across various frequency bandwidths. The TTS sustained by an animal is primarily classified by three characteristics:

- Frequency—Available data (of mid-frequency hearing specialists exposed to mid to high frequency sounds—Southall *et al.*, 2007) suggest that most TTS occurs in the frequency range of the source up to one octave higher than the source (with the maximum TTS at ½ octave above).
- Degree of the shift (*i.e.,* how many dB is the sensitivity of the hearing reduced by)—generally, both the degree of TTS and the duration of TTS will be greater if the marine mammal is exposed to a higher level of energy (which would occur when the peak dB level is higher or the duration is longer). The threshold for the onset of TTS (> 6 dB) for Navy sonars is 195 dB (SEL), which might be received at distances of up to 275–500 m from the most powerful MFAS source, the AN/SQS–53 (the maximum ranges to TTS from other sources would be less). An animal would have to approach closer to the source or remain in the vicinity of the sound source appreciably longer to increase the received SEL, which would be difficult considering the marine observers and the nominal speed of a sonar vessel (10–12 knots). Of all TTS studies, some using exposures of almost an hour in duration or up to 217 dB SEL, most of the TTS induced was 15 dB or less, though Finneran *et al.* (2007) induced 43 dB of TTS with a 64-sec exposure to a 20 kHz source (MFAS emits a 1-s ping 2 times/minute).
- Duration of TTS (Recovery time)—see above. Of all TTS laboratory studies, some using exposures of almost an hour in duration or up to 217 dB SEL, almost all recovered within 1 day (or less, often in minutes), though in one study (Finneran *et al.*, 2007), recovery took 4 days.

Based on the range of degree and duration of TTS reportedly induced by exposures to non-pulse sounds of energy higher than that to which free-swimming marine mammals in the field are likely to be exposed during HFAS/MFAS testing activities, it is unlikely that marine mammals would sustain a TTS from MFAS that alters their sensitivity by more than 20 dB for more than a few days (and the majority would be far less severe). Also, for the same reasons discussed in the Diel Cycle section, and because of the short distance within which animals would need to approach the sound source, it is unlikely that animals would be exposed to the levels necessary to induce TTS in subsequent time periods such that their recovery were impeded. Additionally, though the frequency range of TTS that marine mammals might sustain would overlap with some of the frequency ranges of their vocalization types, the frequency range of TTS from MFAS (the source from which TTS would more likely be sustained because the higher source level and slower attenuation make it more likely that an animal would be exposed to a higher level) would not usually span the entire frequency range of one vocalization type, much less span all types of vocalizations.

Acoustic Masking or Communication Impairment

As discussed above, it is also possible that anthropogenic sound could result in masking of marine mammal communication and navigation signals. However, masking only occurs during the time of the signal (and potential secondary arrivals of indirect rays), versus TTS, which occurs continuously for its duration. Masking effects from HFAS/MFAS are expected to be minimal. If masking or communication impairment were to occur briefly, it would be in the frequency range of MFAS, which overlaps with some marine mammal vocalizations; however, it would likely not mask the entirety of any particular vocalization or communication series because the pulse length, frequency, and duty cycle of the HFAS/MFAS signal does not perfectly mimic the characteristics of any marine mammal's vocalizations.

PTS, Injury, or Mortality

The Navy's model estimated that no marine mammal would be taken by Level A harassment (injury, PTS included) or mortality due to the low intensity of the active sound sources being used.

Based on the aforementioned assessment, NMFS preliminarily determines that there would be the following number of takes: 11,283 harbor porpoises, 44 northern fur seals, 114 California sea lions, 14 northern elephant seals, and 5,569 (5,468 Washington Inland Waters stock and 101 Oregon/Washington Coastal stock) harbor seals at Level B harassment (TTS and sub-TTS) as a result of the proposed Keyport Range Complex RDT&E sonar testing activities. These numbers do not represent the number of individuals that would be taken, since it's most likely that many individual marine mammals would be taken multiple times. However, under the worst case scenario that each animal is taken only once, it is expected that these take numbers represent approximately 29.89%, 0.01%, 0.05%, 0.01%, 37.42%, and 0.41% of the Oregon/Washington Coastal stock harbor porpoises, Eastern Pacific stock northern fur seals, U.S. stock California sea lions, California breeding stock northern elephant seals, Washington Inland Waters stock harbor seals, and Oregon/Washington Coastal stock harbor seals, respectively, in the vicinity of the proposed Keyport Range Complex Study Area (calculation based

on NMFS 2007 U.S. Pacific Marine Mammal Stock Assessments and 2007 U.S. Alaska Marine Mammal Stock Assessments).

No Level A take (injury, PTS included) or mortality would occur as the result of the proposed RDT&E and range extension activities for the Keyport Range Complex.

Based on these analyses, NMFS has preliminarily determined that the total taking over the 5-year period of the regulations and subsequent LOAs from the Navy's NAVSEA NUWCX Keyport Range Complex RDT&E and range extension activities will have a negligible impact on the marine mammal species and stocks present in the Keyport Range Complex Study Area.

Subsistence Harvest of Marine Mammals

NMFS has preliminarily determined that the total taking of marine mammal species or stocks from the Navy's mission activities in the Keyport Range Complex study area would not have an unmitigable adverse impact on the availability of the affected species or stocks for subsistence uses, since there are no such uses in the specified area.

ESA

There are eight marine mammal species/stocks over which NMFS has jurisdiction that are listed as endangered or threatened under the ESA that could occur in the NAVSEA NUWCX Keyport Range Complex study area: Blue whales, fin whales, sei whales, humpback whales, North Pacific right whales, sperm whales, Southern Resident killer whales, and Steller sea lions. The Navy has begun consultation with NMFS pursuant to section 7 of the ESA, and NMFS will also consult internally on the issuance of regulations and LOAs under section 101(a)(5)(A) of the MMPA for mission activities in the Keyport Range Complex study area. Consultation will be concluded prior to a determination on the issuance of a final rule and an LOAs.

NEPA

The Navy is preparing an Environmental Impact Statement (EIS) for the proposed Keyport Range Complex RDT&E and range extension activities. A draft EIS was released for public comment from September 12–October 27, 2008 and is available at *http://www-keyport.kpt.nuwc.navy.mil.* NMFS is a cooperating agency (as defined by the Council on Environmental Quality (40 CFR 1501.6)) in the preparation of the EIS. NMFS has reviewed the Draft EIS and will be working with the Navy on the Final EIS (FEIS).

NMFS intends to adopt the Navy's FEIS, if adequate and appropriate, and we believe that the Navy's FEIS will allow NMFS to meet its responsibilities under NEPA for the issuance of the 5-year regulations and LOAs (as warranted) for mission activities in the Keyport Range Complex study area. If the Navy's FEIS is not adequate, NMFS would supplement the existing analysis and documents to ensure that we comply with NEPA prior to the issuance of the final rule and LOA.

Preliminary Determination

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat and dependent upon the implementation of the mitigation and monitoring measures, NMFS preliminarily finds that the total taking from NAVSEA NUWC Keyport Range Complex RDT&E and range extension activities utilizing active acoustic sources in the NAVSEA NUWC Keyport Range Complex study area will have a negligible impact on the affected marine mammal species or stocks. NMFS has proposed regulations for these exercises that prescribe the means of effecting the least practicable adverse impact on marine mammals and their habitat and set forth requirements pertaining to the monitoring and reporting of such taking.

Classification

This action does not contain a collection of information requirements for purposes of the Paperwork Reduction Act.

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

Pursuant to the Regulatory Flexibility Act, the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The RFA requires Federal agencies to prepare an analysis of a rule's impact on small entities whenever the agency is required to publish a notice of proposed rulemaking. However, a Federal agency may certify, pursuant to 5 U.S.C. 605(b), that the action will not have a significant economic impact on a substantial number of small entities. The Navy is the sole entity that will be affected by this proposed rulemaking, not a small governmental jurisdiction, small organization or small business, as defined by the RFA. This proposed rulemaking authorizes the take of marine mammals incidental to a specified activity. The specified activity defined in the proposed rule includes the use of active acoustic sources during RDT&E activities that are only conducted by and for the U.S. Navy. Additionally, the proposed regulations are specifically written for ''military readiness'' activities, as defined by the Marine Mammal Protection Act, as amended by the National Defense Authorization Act, which means that they cannot apply to small businesses. Additionally, any requirements imposed by a Letter of Authorization issued pursuant to these regulations, and any monitoring or reporting requirements imposed by these regulations, will be applicable only to the Navy. Because this action, if adopted, would directly affect the Navy and not a small entity, NMFS concludes the action would not result in a significant economic impact on a substantial number of small entities. Accordingly, no IRFA and none has been prepared.

List of Subjects in 50 CFR Part 218

Exports, Fish, Imports, Incidental take, Indians, Labeling, Marine mammals, Navy, Penalties, Reporting and recordkeeping requirements, Seafood, Sonar, Transportation.

Dated: June 30, 2009.

James W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

For reasons set forth in the preamble, 50 CFR part 218 is proposed to be amended as follows.

PART 218—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

1. The authority citation for part 218 continues to read as follows:

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

2. Subpart S is added to part 218 to read as follows:

Subpart S—Taking Marine Mammals Incidental to U.S. Navy Research, Development, Test, and Evaluation Activities in the Naval Sea System Command Naval Undersea Warfare Center Keyport Range Complex and the Associated Proposed Extensions Study Area

Sec.

218.170 Specified activity and specified geographical area.
218.171 Permissible methods of taking.
218.172 Prohibitions.
218.173 Mitigation.
218.174 Requirements for monitoring and reporting.

218.175 Applications for Letters of Authorization.
218.176 Letters of Authorization.
218.177 Renewal of Letters of Authorization and adaptive management.
218.178 Modifications to Letters of Authorization.

Subpart S—Taking Marine Mammals Incidental to U.S. Navy Research, Development, Test, and Evaluation Activities in the Naval Sea System Command (NAVSEA) Naval Undersea Warfare Center (NUWC) Keyport Range Complex and the Associated Proposed Extensions Study Area

§ 218.170 Specified activity and specified geographical area.

(a) Regulations in this subpart apply only to the U.S. Navy for the taking of marine mammals that occur in the area outlined in paragraph (b) of this section and that occur incidental to the activities described in paragraph (c) of this section.

(b) These regulations apply only to the taking of marine mammals by the Navy that occurs within the Keyport Range Complex Action Area, which includes the extended Keyport Range Site, the extended DBRC Range Complex (DBRC) Site, and the extended Quinault Underwater Tracking Range (QUTR) Site, as presented in the Navy's LOA application. The NAVSEA NUWC Keyport Range Complex is divided into open ocean/offshore areas and in-shore areas:

(1) Open Ocean Area—air, surface, and subsurface areas of the NAVSEA NUWC Keyport Range Complex Extension that lie outside of 12 nautical miles (nm) from land.

(2) Offshore Area—air, surface, and subsurface ocean areas within 12 nm of the Pacific Coast.

(3) In-shore—air, surface, and subsurface areas within the Puget Sound, Port Orchard Reach, Hood Canal, and Dabob Bay.

(c) These regulations apply only to the taking of marine mammals by the Navy if it occurs incidental to the following activities within the designated amounts of use:

(1) Range Activities Using Active Acoustic Devices:

(i) General range tracking: Narrow frequency output between 10 to 100 kHz with source levels (SL) between 195–203 dB re 1 microPa-m.

(ii) UUV Tracking Systems: Operating frequency of 10 to 100 kHz with SLs less than 195 dB re 1 microPa-m at all range sites.

(iii) Torpedo Sonars: Operating frequency from 10 to 100 kHz with SL under 233 dB re 1 microPa-m.

(iv) Range Targets and Special Test Systems: 5 to 100 kHz frequency range with a SL less than 195 dB re 1 microPa-m at the Keyport Range Site and SL less than 238 dB re microPa-m at the DBRC and QUTR sites.

(v) Special Sonars: Frequencies vary from 100 to 2,500 kHz with SL less than 235 dB re 1 microPa-m.

(vi) Sonobuoys and Helicopter Dipping Sonar: Operate at frequencies of 2 to 20 kHz with SLs of less than 225 dB re 1 microPa-m.

(vii) Side Scan Sonar: Multiple frequencies typically at 100 to 700 kHz with SLs less than 235 dB re 1 microPa-m.

(viii) Other Acoustic Sources:

(A) Acoustic Modems: Emit pulses at frequencies from 10 to 300 kHz with SLs less than 210 dB re 1 microPa-m.

(B) Target Simulators: Operate at frequencies of 100 Hz to 10 kHz at source levels of less than 170 dB re 1 microPa-m.

(C) Aids to Navigation: Operate at frequencies of 70 to 80 kHz at SLs less than 210 dB re 1 microPa-m.

(D) Subbottom Profilers: Operate at 2 to 7 kHz at SLs less than 210 dB re 1 microPa-m, and 35 to 45 kHz at SLs less than 220 dB re 1 microPa-m.

(E) Surface Vessels, Submarines, Torpedoes, and Other UUVs: Acoustic energy from engines usually from 50 Hz to 10 kHz at SLs less than 170 dB re 1 microPa-m.

(2) Increased Tempo and Activities due to Range Extension: Proposed annual range activities and operations as listed in the following table:

Range Activity	Platform/System Used	Proposed Number of Activities/Year* Keyport Range Site	DBRC Site	QUTR Site
Test Vehicle Propulsion	Thermal propulsion systems	5	130	30
	Electric/Chemical propulsion systems	55	140	30
Other Testing Systems and Activities	Submarine testing	0	45	15
	Inert mine detection, classification and localization	5	20	10
	Non-Navy testing	5	5	5
	Acoustic & non-acoustic sensors (magnetic array, oxygen)	20	10	5
	Countermeasure test	5	50	5
	Impact testing	0	10	5
	Static in-water testing	10	10	6
	UUV test	45	120	40
	Unmanned Aerial System (UAS) test	0	2	2
Fleet Activities** (excluding RDT&E)	Surface Ship activities	1	10	10
	Aircraft activities	0	10	10
	Submarine activities	0	30	30
	Diver activities	45	5	15
Deployment Systems (RDT&E)	Range support vessels:			
	Surface launch craft	35	180	30
	Special purpose barges	25	75	0
	Fleet vessels***	15	20	20
	Aircraft (rotary and fixed wing)	0	10	20
	Shore and pier	45	30	30

* There may be several activities in 1 day. These numbers provide an estimate of types of range activities over the year.
** Fleet activities in the NAVSEA NUWC Keyport Range Complex do not include the use of surface ship and submarine hull-mounted active sonars.
*** As previously noted, Fleet vessels can include very small craft such as SEAL Delivery Vehicles.

§ 218.171 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§ 216.106 and 218.176 of this chapter, the Holder of the Letter of Authorization may incidentally, but not intentionally, take marine mammals within the area described in § 218.170(b), provided the activity is in compliance with all terms, conditions, and requirements of these regulations and the appropriate Letter of Authorization.

(b) The activities identified in § 218.170(c) must be conducted in a manner that minimizes, to the greatest extent practicable, any adverse impacts on marine mammals and their habitat.

(c) The incidental take of marine mammals under the activities identified in § 218.170(c) is limited to the following species, by Level B harassment only and the indicated number of times:

(1) Harbor porpoise (*Phocoena phocoena*)—56,415 (an average of 11,283 annually),

(2) Northern fur seal (*Callorhinus ursinus*)—220 (an average of 44 annually);

(3) California sea lion (*Zalophus californianus*)—570 (an average of 114 annually);

(4) Northern elephant seal (*Mirounga angustirostris*)—70 (an average of 14 annually);

(5) Harbor seal (*Phoca vitulina richardsi)* (Washington Inland Waters stock)—27,340 (an average of 5,468 annually); and

(6) Harbor seal (*P. v. richardsi*) (Oregon/Washington Coastal stock)—505 (an average of 101 annually);

§ 218.172 Prohibitions.

Notwithstanding takings contemplated in § 218.171 and authorized by a Letter of Authorization issued under § 216.106 of this chapter and § 218.176, no person in connection with the activities described in § 218.170 may:

(a) Take any marine mammal not specified in § 218.171(b);

(b) Take any marine mammal specified in § 218.171(b) other than by incidental take as specified in § 218.171 (b);

(c) Take a marine mammal specified in § 218.171(b) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of these regulations or a Letter of Authorization issued under § 216.106 of this chapter and § 218.176.

§ 218.173 Mitigation.

When conducting RDT&E activities identified in § 218.170(c), the mitigation measures contained in this subpart and subsequent Letters of Authorization issued under § 216.106 of this chapter and § 218.176 must be implemented. These mitigation measures include, but are not limited to:

(a) Marine mammal observers training:

(1) All range personnel shall be trained in marine mammal recognition.

(2) Marine mammal observer training shall be conducted by qualified organizations approved by NMFS.

(b) Lookouts onboard vessels:

(1) Vessels on a range shall use lookouts during all hours of range activities.

(2) Lookout duties include looking for marine mammals.

(3) All sightings of marine mammals shall be reported to the Range Officer in charge of overseeing the activity.

(c) Visual surveillance shall be conducted just prior to all in-water exercises.

(1) Surveillance shall include, as a minimum, monitoring from all participating surface craft and, where available, adjacent shore sites.

(2) When cetaceans have been sighted in the vicinity of the operation, all range participants increase vigilance and take reasonable and practicable actions to avoid collisions and activities that may result in close interaction of naval assets and marine mammals.

(3) Actions may include changing speed and/or direction, subject to environmental and other conditions (*e.g.,* safety, weather).

(d) An ''exclusion zone'' shall be established and surveillance will be conducted to ensure that there are no marine mammals within this exclusion zone prior to the commencement of each in-water exercise.

(1) For cetaceans, the exclusion zone shall extend out 1,000 yards (914.4 m) from the intended track of the test unit.

(2) For pinnipeds, the exclusion zone shall extend out 100 yards (91 m) from the intended track of the test unit.

(e) Range craft shall not approach within 100 yards (91 m) of marine mammals, to the extent practicable considering human and vessel safety priorities. This includes marine mammals ''hauled-out'' on islands, rocks, and other areas such as buoys.

(f) In the event of a collision between a Navy vessel and a marine mammal, NUWC Keyport activities shall notify immediately the Navy chain of Command, which shall notify NMFS immediately.

(g) Passive acoustic monitoring shall be utilized to detect marine mammals in the area before and during activities.

(h) Procedures for reporting marine mammal sightings on the NAVSEA NUWC Keyport Range Complex shall be promulgated, and sightings shall be entered into the Range Operating System and forwarded to NOAA/NMML Platforms of Opportunity Program.

§ 218.174 Requirements for monitoring and reporting.

(a) The Holder of the Letter of Authorization issued pursuant to § 216.106 of this chapter and § 218.176 for activities described in § 218.170(c) is required to cooperate with the NMFS when monitoring the impacts of the activity on marine mammals.

(b) The Holder of the Authorization must notify NMFS immediately (or as soon as clearance procedures allow) if the specified activity identified in § 218.170(c) is thought to have resulted in the mortality or injury of any marine mammals, or in any take of marine mammals not identified or authorized in § 218.171(c).

(c) The Navy must conduct all monitoring and required reporting under the Letter of Authorization, including abiding by the NAVSEA NUWC Keyport Range Complex Monitoring Plan, which is incorporated herein by reference, and which requires the Navy to implement, at a minimum, the monitoring activities summarized below:

(1) Visual Surveys:

(i) The Holder of this Authorization shall conduct a minimum of 2 special visual surveys per year to monitor HFAS and MFAS respectively at the DBRC Range site.

(ii) For specified events, shore-based and vessel surveys shall be used 1 day prior to and 1–2 days post activity.

(A) Shore-based Surveys:

(*1*) Shore-based monitors shall observe test events that are planned in advance to occur adjacent to near shore areas where there are elevated topography or coastal structures, and shall use binoculars or theodolite to augment other visual survey methods.

(*2*) Shore-based surveys of the test area and nearby beaches shall be conducted for stranded marine animals following nearshore events. If any distressed, injured or stranded animals are observed, an assessment of the animal's condition (alive, injured, dead, or degree of decomposition) shall be reported immediately to the Navy and the information shall be transmitted immediately to NMFS through the appropriate chain of command.

(B) Vessel-based Surveys:

(*1*) Vessel-based surveys shall be designed to maximize detections of marine mammals near mission activity event.

(*2*) Post-analysis shall focus on how the location, speed and vector of the range craft and the location and direction of the sonar source (*e.g.,* Navy surface vessel) relates to the animal.

(*3*) Any other vessels or aircraft observed in the area shall also be documented.

(iii) Surveys shall include the range site with special emphasis given to the particular path of the test run. When conducting a particular survey, the survey team shall collect the following information.

(A) Species identification and group size;

(B) Location and relative distance from the acoustic source(s);

(C) The behavior of marine mammals including standard environmental and oceanographic parameters;

(D) Date, time and visual conditions associated with each observation;

(E) Direction of travel relative to the active acoustic source; and

(F) Duration of the observation.

(iv) Animal sightings and relative distance from a particular active acoustic source shall be used post-survey to determine potential received energy (dB re 1 micro Pa-sec). This data shall be used, post-survey, to estimate the number of marine mammals exposed to different received levels (energy based on distance to the source, bathymetry, oceanographic conditions and the type and power of the acoustic source) and their corresponding behavior.

(2) Passive Acoustic Monitoring (PAM):

(i) The Navy shall deploy a hydrophone array in the Keyport Range Complex Study Area for PAM.

(ii) The array shall be utilized during the two special monitoring surveys in DBRC as described in § 218.174(c)(1)(i).

(iii) The array shall have the capability of detecting low-frequency vocalizations (<1,000 Hz) for baleen whales and relatively high frequency (up to 30 kHz) for odontocetes.

(iv) Acoustic data collected from the PAM shall be used to detect acoustically active marine mammals as appropriate.

(3) Marine Mammal Observers on range craft or Navy vessels:

(i) Navy Marine mammal observers (NMMOs) may be placed on a range craft or Navy platform during the event being monitored.

(ii) The NMMO must possess expertise in species identification of regional marine mammal species and experience collecting behavioral data.

(iii) NMMOs may be placed alongside existing lookouts during the two specified monitoring events as described in § 218.174(c)(1)(i).

(iv) NMMOs shall inform the lookouts of any marine mammal sighting so that appropriate action may be taken by the chain of command. NMMOs shall schedule their daily observations to duplicate the lookouts' schedule.

(v) NMMOs shall observe from the same height above water as the lookouts, and they shall collect the same data collected by lookouts listed in § 218.174(c)(1)(iii).

(d) The Navy shall complete an Integrated Comprehensive Monitoring Program (ICMP) Plan in 2009. This planning and adaptive management tool shall include:

(1) A method for prioritizing monitoring projects that clearly describes the characteristics of a proposal that factor into its priority.

(2) A method for annually reviewing, with NMFS, monitoring results, Navy R&D, and current science to use for potential modification of mitigation or monitoring methods.

(3) A detailed description of the Monitoring Workshop to be convened in 2011 and how and when Navy/NMFS will subsequently utilize the findings of the Monitoring Workshop to potentially modify subsequent monitoring and mitigation.

(4) An adaptive management plan.

(5) A method for standardizing data collection for NAVSEA NUWC Keyport Range Complex Extension and across range complexes.

(e) Notification of Injured or Dead Marine Mammals—Navy personnel shall ensure that NMFS (regional stranding coordinator) is notified immediately (or as soon as clearance procedures allow) if an injured or dead marine mammal is found during or shortly after, and in the vicinity of, any Navy training exercise utilizing underwater explosive detonations. The Navy shall provide NMFS with species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available).

(f) Annual Keyport Range Complex Monitoring Plan Report—The Navy shall submit a report annually on December 1 describing the implementation and results (through September 1 of the same year) of the Keyport Range Complex Monitoring Plan. Data collection methods will be standardized across range complexes to allow for comparison in different geographic locations. Although additional information will also be gathered, the NMMOs collecting marine mammal data pursuant to the Keyport Range Complex Monitoring Plan shall, at a minimum, provide the same marine mammal observation data required in § 218.174(c). The Keyport Range Complex Monitoring Plan Report may be provided to NMFS within a larger report that includes the required Monitoring Plan Reports from Keyport Range Complex and multiple range complexes.

(g) Keyport Range Complex 5-yr Comprehensive Report—The Navy shall submit to NMFS a draft comprehensive report that analyzes and summarizes *all* of the multi-year marine mammal information gathered during tests involving active acoustic sources for which individual reports are required in § 218.174(d–f). This report will be submitted at the end of the fourth year of the rule (June 2013), covering activities that have occurred through September 1, 2013.

(h) The Navy shall respond to NMFS comments and requests for additional information or clarification on the Keyport Range Complex Extension Comprehensive Report, the Annual Keyport Range Complex Monitoring Plan Report (or the multi-Range Complex Annual Monitoring Report, if that is how the Navy chooses to submit the information) if submitted within 3 months of receipt. The report will be considered final after the Navy has addressed NMFS' comments, or three months after the submittal of the draft if NMFS does not comment by then.

(i) In 2011, the Navy shall convene a Monitoring Workshop in which the Monitoring Workshop participants will be asked to review the Navy's Monitoring Plans and monitoring results and make individual recommendations (to the Navy and NMFS) of ways of improving the Monitoring Plans. The recommendations shall be reviewed by the Navy, in consultation with NMFS, and modifications to the Monitoring Plan shall be made, as appropriate.

§ 218.175 Applications for Letters of Authorization.

To incidentally take marine mammals pursuant to these regulations for the activities identified in § 218.170(c), the U.S. Navy must apply for and obtain either an initial Letter of Authorization in accordance with § 218.176 or a renewal under § 218.177.

§ 218.176 Letters of Authorization.

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed the period of validity of this subpart, but must be renewed annually subject to annual renewal conditions in § 218.177.

(b) Each Letter of Authorization will set forth:

(1) Permissible methods of incidental taking;

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

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization will be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

§ 218.177 Renewal of Letters of Authorization and adaptive management.

(a) A Letter of Authorization issued under § 216.106 and § 218.176 for the activity identified in § 218.170(c) will be renewed annually upon:

(1) Notification to NMFS that the activity described in the application submitted under § 218.175 shall be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months;

(2) Timely receipt of the monitoring reports required under § 218.174(b); and

(3) A determination by the NMFS that the mitigation, monitoring and reporting measures required under § 218.173 and the Letter of Authorization issued under §§ 216.106 and 218.176, were undertaken and will be undertaken during the upcoming annual period of validity of a renewed Letter of Authorization.

(b) If a request for a renewal of a Letter of Authorization issued under §§ 216.106 and 218.177 indicates that a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season will occur, the NMFS will provide the public a period of 30 days for review and comment on the request. Public comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration, and

(2) Proposed changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the **Federal Register**.

(d) NMFS, in response to new information and in consultation with the Navy, may modify the mitigation or monitoring measures in subsequent LOAs if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from the Navy's monitoring from the previous year (either from Keyport Range Complex Study Area or other locations).

(2) Findings of the Monitoring Workshop that the Navy will convene in 2011 (§ 218.174(i)).

(3) Compiled results of Navy funded research and development (R&D) studies (presented pursuant to the ICMP (§ 218.174(d)).

(4) Results from specific stranding investigations (either from the Keyport Range Complex Study Area or other locations).

(5) Results from the Long Term Prospective Study described in the preamble to these regulations.

(6) Results from general marine mammal and sound research (funded by the Navy (described below) or otherwise).

(7) Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent Letters of Authorization.

§ 218.178 Modifications to Letters of Authorization.

(a) Except as provided in paragraph (b) of this section and § 218.177(d), no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to § 216.106 of this chapter and § 218.176 and subject to the provisions of this subpart shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under § 218.177, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 218.171(b), a Letter of Authorization issued pursuant to § 216.106 of this chapter and § 218.176 may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the **Federal Register** within 30 days subsequent to the action.

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Federal Register

Tuesday,
July 7, 2009

Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Proposed Rule to List Five Foreign Bird Species in Colombia and Ecuador, South America, Under the Endangered Species Act; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS-R9-IA-2009-12; 96100-1671-9FLS–B6]

RIN 1018–AV75

Endangered and Threatened Wildlife and Plants; Proposed Rule to List Five Foreign Bird Species in Colombia and Ecuador, South America, under the Endangered Species Act

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list as endangered four species of birds from Colombia — the blue-billed curassow (*Crax alberti*), the brown-banded antpitta (*Grallaria milleri*), the Cauca guan (*Penelope perspicax*), and the gorgeted wood-quail (*Odontophorus strophium*) — and one bird species from Ecuador — the Esmeraldas woodstar (*Chaetocercus berlepschi*) — as endangered under the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*). This proposal, if made final, would extend the Act's protection to these species. The Service seeks data and comments from the public on this proposed rule.

DATES: We will accept comments received or postmarked on or before September 8, 2009. We must receive requests for public hearings, in writing, at the address shown in the **ADDRESSES** section by August 21, 2009.

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

• *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.

• *U.S. mail or hand-delivery:* Public Comments Processing, Attn: RIN 1018-AV75; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all comments on *http://www.regulations.gov* . This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Douglas Krofta, Chief, Branch of Listing, Endangered Species Program, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Room 420, Arlington, VA 22203; telephone 703-358-2105; facsimile 703-358-1735. If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we request comments or suggestions on this proposed rule. We are particularly seek comments concerning:

(1) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to these species and regulations that may be addressing those threats.

(2) Additional information concerning the taxonomy, range, distribution, and population size of these species, including the locations of any additional populations of these species.

(3) Any information on the biological or ecological requirements of these species.

(4) Current or planned activities in the areas occupied by these species and possible impacts of these activities on these species.

(5) Any information concerning the effects of climate change on these species or their habitats.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov*, your entire comment—including any personal identifying information—will be posted on the website. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov*.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov* , or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Endangered Species Program, 4401 N. Fairfax Drive, Room 420, Arlington, VA 22203; telephone 703-358-2171.

Background

Section 4(b)(3)(A) of the Act requires us to make a finding (known as a ''90–day finding'') on whether a petition to add, remove, or reclassify a species from the list of endangered or threatened species has presented substantial information indicating that the requested action may be warranted. To the maximum extent practicable, the finding shall be made within 90 days following receipt of the petition and published promptly in the **Federal Register**. If we find that the petition has presented substantial information indicating that the requested action may be warranted (a positive finding), section 4(b)(3)(A) of the Act requires us to commence a status review of the species if one has not already been initiated under our internal candidate assessment process. In addition, section 4(b)(3)(B) of the Act requires us to make a finding within 12 months following receipt of the petition on whether the requested action is warranted, not warranted, or warranted but precluded by higher-priority listing actions (this finding is referred to as the ''12–month finding''). Section 4(b)(3)(C) of the Act requires that a finding of warranted but precluded for petitioned species should be treated as having been resubmitted on the date of the warranted-but-precluded finding, and is, therefore, subject to a new finding within 1 year and subsequently thereafter until we publish a proposal to list or a finding that the petitioned action is not warranted. The Service publishes an annual notice of resubmitted petition findings (annual notice) for all foreign species for which listings were previously found to be warranted but precluded.

Previous Federal Action

On November 24, 1980, we received a petition (1980 petition) from Dr. Warren B. King, Chairman of the International Council for Bird Preservation (ICBP), to add 60 foreign bird species to the list of Threatened and Endangered Wildlife (50 CFR 17.11(h)), including two species from Colombia (the Cauca guan and the gorgeted wood-quail) that are the subject of this proposed rule. In response to the 1980 petition, we published a positive 90–day finding on May 12, 1981 (46 FR 26464), to initiate a status review for 58 foreign species, noting that 2 of the species identified in the petition were already listed under the Act. On January 20, 1984 (49 FR 2485), we published a 12–month finding within an annual review on pending petitions and description of progress on all species petition findings addressed therein. In that notice, we found that all 58 foreign bird species from the 1980 petition were warranted but precluded by higher-priority listing actions. On May 10, 1985, we published the first annual

notice (50 FR 19761), in which we continued to find that listing all 58 foreign bird species from the 1980 petition was warranted but precluded. In our next annual notice, published on January 9, 1986 (51 FR 996), we found that listing 54 species from the 1980 petition, including the two Colombian species mentioned above, continued to be warranted but precluded, whereas new information caused us to find that listing four other species in the 1980 petition was no longer warranted. We published additional annual notices on the remaining 54 species included in the 1980 petition on July 7, 1988 (53 FR 25511); December 29, 1988 (53 FR 52746); and November 21, 1991 (56 FR 58664), in which we indicated that the Cauca guan and the gorgeted wood-quail, along with the remaining species in the 1980 petition, continued to be warranted but precluded.

On May 6, 1991, we received a petition (1991 petition) from Alison Stattersfield, of ICBP, to add 53 species of foreign birds to the list of Endangered and Threatened Wildlife, including the blue-billed curassow and the brown-banded antpitta, from Colombia, and Esmeraldas woodstar, from Ecuador. In response to the 1991 petition, we published a positive 90–day finding on December 16, 1991 (56 FR 65207), for all 53 species and announced the initiation of a status review. On March 28, 1994 (59 FR 14496), we published a 12–month finding on the 1991 petition, along with a proposed rule to list 30 African birds under the Act (15 each from the 1980 petition and 1991 petition). In that document, we announced our finding that listing the remaining 38 species from the 1991 petition, including the blue-billed curassow and the brown-banded antpitta, from Colombia, and Esmeraldas woodstar, from Ecuador, was warranted but precluded by higher-priority listing actions. On January 12, 1995 (60 FR 2899), we reiterated the warranted-but-precluded status of the remaining species from the 1991 petition. We made subsequent warranted but precluded findings for all outstanding foreign species from the 1980 and 1991 petitions, including all five of the Colombian and Ecuadorian bird species that are the subject of this proposed rule, as published in our annual notices of review (ANOR) on May 21, 2004 (69 FR 29354), and April 23, 2007 (72 FR 20184).

Per the Service's listing priority guidelines (September 21, 1983; 48 FR 43098), we identified the listing priority numbers (LPNs) (ranging from 1 to 12) for all outstanding foreign species in our 2007 ANOR (72 FR 20184), published on April 23, 2007. In that notice, the five species included in this proposed rule were designated with an LPN of 2, and it was determined that their listing continued to be warranted but precluded because of other listing activity. A listing priority of 2 indicates that the subject species face imminent threats of high magnitude. With the exception of LPN 1, which addresses monotypic genera that face imminent threats of high magnitude, category 2 represents the Service's highest priority.

On July 29, 2008 (73 FR 44062), we published in the **Federal Register** a notice announcing our annual petition findings for foreign species (2008 ANOR). In that notice, we announced that listing was warranted for 30 foreign bird species, including the five species that are the subject of this proposed rule. The five species were selected from the list of warranted-but-precluded species because of their LPN, their similarity of habitat, and the similarity of threats to these species. Combining species that face similar threats within the same general geographic area into one proposed rule allows us to maximize our limited staff resources, thus increasing our ability to complete the listing process for warranted-but-precluded species.

Species Information and Factors Affecting the Species

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act. The five factors are: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence.

Under the Act, we may determine a species to be endangered or threatened. An endangered species is defined as a species that is in danger of extinction throughout all or a significant portion of its range. A threatened species is defined as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. Therefore, we evaluated the best available scientific and commercial information on each species under the five listing factors to determine whether they met the definition of endangered or threatened.

Below is a species-by-species analysis of these five factors using the best available scientific and commercial information to determine whether the species meet the definition of endangered or threatened. The species are considered in alphabetical order, beginning with the Colombian species: blue-billed curassow, brown-banded antpitta, Cauca guan, gorgeted wood-quail, and followed by the Ecuadorian species: the Esmeraldas woodstar.

Colombian Bird Species

I. Blue-Billed Curassow (*Crax alberti*)

Species Description

The blue-billed curassow, endemic to Colombia, is a large (82-92 centimeters (cm) (32-36 inches (in)), tree-dwelling member of the Cracid family (Cracidae) (Collar *et al.* 1992, p. 154; del Hoyo 1994, p. 361; Salaman *et al.* 2001, p. 183). The species is locally known as ''*Paujíl* de pico azul'' or ''*Pavón Colombiano*'' and is also referred to in English as the blue-knobbed curassow (Cuervo 2002, p. 138; United Nations Environment Programme – World Conservation Monitoring Centre (UNEP-WCMC) 2008c, p. 1). In older literature, the species is referred to as Prince Albert's curassow (Throp 1964, p. 124). The blue-billed curassow is described as mainly black with blue at the base of its bill. The male has a white-plumaged crissum (the area under the tail), whereas the female has a black and white crest and black and white barring on her wings (BirdLife International (BLI) 2007d, p. 1; Throp 1964, p. 124).

Taxonomy

The species was first taxonomically described by Fraser in 1852 and placed in the family Cracidae.

Habitat and Life History

Blue-billed curassows prefer undisturbed, heterogeneous primary forests in the humid lowlands of the Sierra Nevada de Santa Marta Mountains at elevations up to 1,200 meters (m) (3,937 feet (ft)) (Collar *et al.* 1992, p. 154; del Hoyo 1994, p. 361; Salaman *et al.* 2001, p. 183). The blue-billed curassow requires a large home range of primary tropical forest (Cuervo 2002, pp. 138-140). The species will rarely cross narrow deforested corridors, such as those caused by roads or oil pipelines, and will not cross large open areas between forest fragments (Cuervo and Salaman 1999, p. 7). The species is described as being trusting of humans (del Hoyo 1994, p. 336).

This terrestrial bird feeds mostly on fruit and leaves, and sometimes feeds upon worms and carrion. It plays an important role in dispersing seeds and regenerating tropical forests (BLI 2007d, p. 1; Brooks 2006, p. 17; Brooks and Strahl 2000, pp. 5-8; Cuervo and Salaman 1999, p. 8).

Cracids are also slow to reproduce, with a replacement rate of at least 6 years (Silva and Strahl 1991, p. 50). Curassows reach sexual maturity in their second year (Throp 1964, p. 130). Blue-billed curassows form monogamous pairs that share responsibilities for young (Cuervo and Salaman 1999, p. 9; Todd *et al.* 2008). The breeding season begins in December and goes through March (Cuervo and Salaman 1999, p. 8). During the mating season, the male blue-billed curassows makes ''booming'' calls that can be heard 500 m (0.31 mi) away (Ochoa-Quintero *et al.* 2005, pp. 42, 44). Large nests made of sticks and leaves are built in dense lianas (woody vines) (Cuervo and Salaman 1999, p. 8). The typical blue-billed curassow clutch size is 1-2 large white eggs, which is a low clutch size relative to other Galliformes (del Hoyo 1994, p. 336; Throp 1964, p. 130), and young are hatched in July after an approximately 29–day incubation period (del Hoyo 1994, p. 361; Hilty and Brown 1986, p. 129; Throp 1964, p. 131). In captivity, curassows are long-lived species (Todd *et al.* 2008, p.7). Throp (1964, p. 132) recorded a blue-billed curassow still laying eggs at 20 years of age. However, in the wild, one generation is considered to be 10 years (Cuervo 2002, p. 141).

Historical Range and Distribution

The blue-billed curassow historically occurred in northern Colombia, from the base of the Sierra Nevada de Santa Marta (in the northern Departments of Magdalena La Guijaira, and Cesar), west to the Sinú valley (Department of Córdoba), through the Río Magdalena (through the Departments (from south to north) of Huila, Tolima, Caldas, Antioquia, Santander, Bolivar, Magdalena, and La Guajira) (BLI 2007a, p. 1; Cuervo and Salaman 1999, p. 7; del Hoyo 1994, p. 361). The species' historic range encompassed an area of approximately 106,700 square kilometers (km^2) (41,197 square miles (mi^2)) (Cuervo 2002, p. 141). There were no confirmed observations of blue-billed curassows between 1978 and 1997 (Brooks and Gonzalez-Garcia 2001, p. 183), and surveys conducted in 1998 failed to locate any males (BLI 2007d, p. 3) (as detailed under Factor B, below), prompting researchers to believe the species to be extinct in the wild (del Hoyo 1994, p. 361). However, a series of reported observations made in 1993 were confirmed in the year 2000 (Cuervo 2002, pp. 136-137).

Current Range and Distribution

The current range of the blue-billed curassow is estimated to be a 2,090-km^2 (807-mi^2) area (BLI 2007d, p. 2) of fragmented, disjunct, and isolated tropical moist and humid lowlands and premontane forested foothills in the Río Magdalena and lower Cauca Valleys of the Sierra Nevada de Santa Marta Mountains. The species may be found at elevations up to 1,200 m (3,937 ft) (Collar *et al.* 1992, p. 154; Cuervo and Salaman 1999, p. 7; del Hoyo 1994, p. 361; Donegan and Huertas 2005, p. 29; Salaman *et al.* 2001, p. 183), but it is more commonly found below 600 m (del Hoyo 1994, p. 361). Little information is available on the size of the forest fragments in which the species has been observed. However, researchers conducting fieldwork in the Department of Antioquía in 1999 and 2001 noted that the patch sizes varied from 3 km^2 (1.2 mi^2) to 10 km^2 (3.9 mi^2) in size (Ochoa-Quintero *et al.* 2005, p. 46).

In 1993, sightings were reported in the northern Departments of Córdoba (at La Terretera, near Alto Sinú) and Bolívar (in the Serranía de San Jacinto (San Jacinto Mountains)) (Williams, in litt., as cited in BLI 2007d, p. 2). Additional observations were made in the northernmost Department of La Guajira in 2003 (in the Valle de San Salvador Valley) (Strewe and Navarro 2003, p. 32). More recently, individuals have been observed in the tropical forests of the central Departments of Antioquía (on the slopes of the Serranía de San Lucas and Bajo Cauca-Nechí Regional Reserve area), the Departments of Santander and Boyacá (on the slopes of the Serranía de las Quinchas), and in the southeastern Department of Cauca (in northeastern and lower Cauca Valley) (BLI 2007d, p. 2; Cuervo 2002, pp. 135-138; Donegan and Huertas 2005, p. 29; Ochoa-Quintero *et al.* 2005, p. 43-4; Urueña *et al.* 2006, p. 42). Experts consider the most important refuges for this species to be: (1) Serranía de San Lucas (Antioquía); (2) Paramillo National Park (Antioquía and Córdoba Departments); (3) Bajo Cauca-Nechí Regional Reserve (Antioquía and Córdoba Departments); and, (4) Serranía de las Quinchas Bird Reserve (Santander and Boyacá Departments) (BLI 2007d, p. 3; Cuervo 2002, p. 139). These refugia are discussed under Factor A, below.

Population Estimates

There is little information on population numbers for the various reported locations of the species, and political instability within the country makes it difficult to know the exact population size of this species (Houston Zoo 2008). In 2002, Cuervo (2002, p. 141) considered the Serranía de las Quinchas and Serranía de San Lucas populations to be the stronghold of the species. However, surveys in 2003 led researchers to believe that Serranía de las Quinchas serves as the species' stronghold (BLI 2007d, pp. 2, 5-6). In 2003, the population at Serranía de las Quinchas (Boyacá Department) location was estimated to be between 250 and 1,000 birds. The only other information on the subpopulation level is a report from Strewe and Navarro (2003, p. 32), based on field studies conducted between 2000 and 2001, that hunting had nearly extirpated the blue-billed curassow from a site in San Salvador (La Guijara) (Factor B).

Using the International Union for Conservation of Nature and Natural Resources (IUCN) categories, the blue-billed curassow population was estimated according to IUCN criteria to be more than 1,000 but fewer than 2,500 in 1994 (BLI 2007d, p. 2). In 2001, Brooks and Gonzalez-Garcia (2001, p. 184) estimated the total population to be much fewer than 2,000 individuals. In 2002, it was estimated that the species had lost 88 percent of its habitat and half of its population within the last three generations, or 30 years (Cuervo 2002, p. 141). Local reports indicate an overall declining trend characterized by recent rapid declines of all subpopulations (BLI 2007d, p. 1; Cuervo 2002, p. 138; Strahl *et al.* 1995, p.25). For further information on population size, see Factor E, below.

Conservation Status

The blue-billed curassow is identified as a critically endangered species under Colombian law (EcoLex 2002, p. 12). The species is considered one of the most threatened cracids by the IUCN Cracid Specialist Group. The species is categorized by the IUCN as 'Critically Endangered,' with habitat loss as a primary threat (BLI 2004b, p. 1; Cuervo 2002, p. 141; del Hoyo 1994 p. 340; Strahl *et al.* 1995, pp. 4-5; Urueña *et al.* 2006, pp. 41-2).

Summary of Factors Affecting the Blue-Billed Curassow

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

The blue-billed curassow prefers undisturbed, heterogeneous forests and is rarely found in secondary or even slightly disturbed forests (Cuervo and Salaman 1999, p. 7). The blue-billed curassow occur today in several disjunct locations along a much-restricted part of its historic distribution (Brooks and Gonzalez-Garcia 2001, p. 183; Collar *et al.* 1992, pp. 61-62; Cuervo and Salaman 1999, p. 7). Researchers note that the blue-billed curassow requires large territories, but there is little information as to the actual size of the remaining forest fragments (Cuervo and Salaman 1999, p. 7). In 1999 and 2001, researchers conducting fieldwork in the Department of Antioquiá noted that the patch sizes in which the species were observed or heard varied from 3 km^2 (1.2 mi^2) to 10 km^2 (3.9 mi^2) in size (Ochoa-Quintero *et al.* 2005, p. 46). Since the 1990s, the species has been observed in the Departments of Córdoba (at La Terretera, near Alto Sinú, 1993) and Bolívar (in the Serranía de San Jacinto, 1993) (Williams in litt., as cited in BLI 2007d, p. 2); La Guajira (in the Valle de San Salvador Valley, 2003) (Strewe and Navarro 2003, p. 32); Antioquía (on the slopes of the Serranía de San Lucas and Bajo Cauca-Nechí Regional Reserve area, 1999 and 2001) (Ochoa-Quintero *et al.* 2005, p. 43-44); Santander and Boyacá (on the slopes of the Serranía de las Quinchas); and Cauca (in northeastern and lower Cauca Valley) (BLI 2007d, p. 2; Cuervo 2002, pp. 135-138; Donegan and Huertas 2005, p. 29; Urueña *et al.* 2006, p. 42).

Deforestation rates and patterns: Primary forest habitats throughout Colombia have undergone extensive deforestation. Viña *et al.* (2004, pp. 123-124) used satellite imagery to analyze deforestation rates and patterns along the Colombian-Ecuadorian Border (in the Departments of Putumayo and Sucumbios, respectively), finding that, from 1973 to 1996, a total of 829 km^2 (320 mi^2) of tropical forests within the study area were converted to other uses. This corresponds to a nearly one-third total loss of primary forest habitat, or a nearly 2 percent mean annual rate of deforestation within the study area. During the study, the area within Colombia experienced a three-times-larger annual rate of loss than that in Ecuador, due to more intense pressures from human colonization and illegal crop cultivation (Viña *et al.* 2004, p. 124). The human population within the area increased from approximately 50,000 to over 250,000 people during the 23–year period (Perz *et al.* 2005, pp. 26-28). A similar phenomenon occurred in the Río Magdalena Valley, which coincides with the species' historic range as well as its disjunct and restricted current range. The Río Magdalena runs from south to north approximately 1,540 km (950 mi) through western Colombia and served as the main waterway connecting coffee (*Coffea* spp.) plantations to the ports on the Western Colombian coast in the 1920s, when the river was reportedly plagued by occasional droughts and erosion. In the 1930s, a railway was completed along much of the Río Magdalena Valley; this infrastructural improvement contributed to a growth in several industries, including coffee (throughout the Río Magdalena valley), bananas (*Musa* spp.) (Magdalena Department), and oil fields (Santander Department) (Ocampo and Botero 2000, pp. 76-78). Deforestation and habitat loss throughout the lowland forests across northern Colombia over the past 100 years contributed to the increasing rarity of the species, and extirpated the species from a large portion of its previous range by the 1980s (Brooks and Gonzalez-Garcia 2001, p. 183; Collar *et al.* 1992, pp. 61-62; Cuervo and Salaman 1999, p. 7).

In a similar study specific to the western Andean Amazon area of Colombia (in the Departments of Arauca, Casemere, Meta, Vichada, Amazonas, Caquetá, Guainia, Guaviare, Putumayo, and Vaupés), deforestation between 1980 and 1990 totaled 52,320 km^2 (20,201 mi^2) (Perz *et al.* 2005, pp. 26-28). The most recent reports indicate that habitat loss is ongoing and may be accelerating. Between the years 1990 and 2005, Colombia lost a total of 7,920 km^2 (3,058 mi^2) of primary forest (Butler 2006a, pp. 1-3; Food and Agriculture Organization of the United Nations (FAO) 2003a, p. 1). Researchers have observed that road building and other infrastructure improvements in previously remote forested areas have increased accessibility and facilitated further habitat destruction, exploitation, and human settlement (Álvarez 2005, p. 2042; Cárdenas and Rodríguez Becerra 2004, pp. 125-130; Etter *et al.* 2006, p. 1; Hunter 1996, p. 158-159; Viña *et al.* 2004, pp. 118-119). In Antioquia, cattle ranches are extensive in areas where the blue-billed curassow occurs; cattle ranching is considered a less labor-intensive land use, meaning that more people need to turn to alternative sources of income generation, such as cultivation or extractive industries (Melo and Ochoa 2004, as cited in Urueña *et al.* 2006, p. 42). In Serranía de las Quinchas, the economy is based principally on timber extraction, agriculture, and cattle ranching (Urueña and Quevedo unpubl. data 2004, as cited in Urueña *et al.* 2006, p. 47). These activities contribute to further habitat fragmentation and reduction. In terms of habitat destruction, an influx of settlers displaced from the Departments of Antioquia, Tolima, and Cundinamarca, due to violence and public disorder in these Departments, are the principal threat to the mountainous regions in these Departments (Urueña *et al.* 2006, p. 42).

The decline in blue-billed curassow population numbers (see Population estimates, above) is inextricably linked to habitat loss. The blue-billed curassow became increasingly rare during the 20th Century, as much of the lower-elevation forests in their historic range of the Río Magdalena and Río Cauca Valleys were deforested, forcing the blue-billed curassow to move to higher elevations (Cuervo and Salaman 1999, p. 8). By the 1980s, the species had disappeared from a large portion of its previous range (Collar *et al.* 1992, pp. 61-62), which historically encompassed approximately 106,700 km^2 (41,197 mi^2) (Cuervo 2002, p. 141). In 2002, it was estimated that, within the three prior generations (30 years), the species had lost 88 percent of its original habitat and that the remaining suitable habitat had been reduced to 13,300 km^2 (5135 m2) (Cuervo 2002, p. 141). The current range of the blue-billed curassow is estimated to be 2,090 km^2 (807 mi^2) (BLI 2007d, p.2) (see also ''Small Population Size,'' Factor E).

Deforestation and fragmentation caused by human encroachment are ongoing throughout the blue-billed curassow's range, including: Antioquía (on the slopes of the Serranía de San Lucas and Bajo Cauca-Nechí Regional Reserve area); Santander and Boyacá Departments (on the slopes of the Serranía de las Quinchas); and in the southeastern Department of Cauca (in northeastern and lower Cauca Valley), where timber extraction and mining continue (Urueña *et al.* 2006, p. 42). Human activities that are contributing to habitat loss include: forest clearing for subsistence agriculture, cash crops (such as coffee), and grazing (Álvarez 2005, p. 2042; BLI 2007d, p. 3; Cárdenas and Rodríguez Becerra 2004, p. 355; Oldham and Massey 2002, pp. 9-12; Urueña *et al.* 2006, p. 42); habitat alteration, human population displacement, and hunting as a result of armed conflict (Álvarez 2001, p. 305; Álvarez 2003, pp. 51-52); habitat

destruction and alteration as a result of fire (Álvarez 2005, p. 2041; Moreno *et al.* 2006, p. 1); habitat loss for dams and reservoir development (Cuervo 2002, p. 139; Kreger 2005, pp.5-6); illicit crop cultivation (such as the coca plant (*Erythroxylum coca*)) (Álvarez 2001, pp. 1086-1087; Álvarez 2007, pp. 133-135; Cárdenas and Rodríguez Becerra 2004, p. 355; Oldham and Massey 2002, pp. 9-12); gold mining activities (Cuervo 2002, p. 139); habitat pollution due to oil development and distribution (Álvarez 2005, p. 2041; Cárdenas and Rodríguez Becerra 2004, p. 355); and increased access and habitat destruction resulting from road development (Cuervo 2002, pp. 139-140). Roads create barriers to animal movements, expose animals to traffic hazards, and increase human access into habitat, thus facilitating further exploitation and habitat destruction (Hunter 1996, 158-159). Local human populations have recently settled in forested areas that previously provided habitat for blue-billed curassows. This human settlement is accelerating habitat loss and fragmentation with only 5 percent of the species' restricted range now covered by forest (Brooks and Gonzalez-Garcia 2001, pp. 183-184), and is leaving only fragmented, disjunct, and isolated populations in the remaining four or five patches of tropical humid and premontane forests (Álvarez 2003, p. 51; Brooks and Strahl 2000, pp. 14-15; Collar *et al.* 1994, pp. 61-62; Cuervo and Salaman 1999, p. 7; Donegan and Huertas 2005, p. 29).

Illegal drugs and their eradication: The cultivation of illegal crops (including coca) poses additional threats to the environment beyond encouraging the destruction of montane forests (Balslev 1993, p. 3). Van Schoik and Schulberg (1993, p. 21) noted that coca crop production destroys the soil quality by causing the soil to become more acidic, which depletes the soil nutrients and ultimately impedes the regrowth of secondary forests in abandoned fields. Although Colombia continues to be the leading coca bush producer (United Nations Office of Drugs and Crime (UNODC) *et al.* 2007, p. 7), since 2003, cocaine cultivation has remained stable at about 800 km² (309 mi²) of land under cultivation (UNODC *et al.* 2007, p. 8). This stabilization of production is partially attributed to alternative development projects that were implemented between 1999 and 2004 to encourage pursuits other than illegal crop cultivation (UNODC *et al.* 2007, p. 77). This is also attributed to heightened eradication efforts. Between 2002 and 2004, aerial spraying occurred over more than 1,300 km² (502 mi²) annually, peaking in 2004, when 1,360 km² (525 mi²) of illicit crops were sprayed (UNODC and the Government of Colombia (GOC) 2005, p. 11). In 2006, eradication efforts were undertaken on over 2,130 km² (822 mi²) of land, which included sraying of 1,720 km² (664 mi²) and manual eradication on the remaining land. Eradication efforts undertaken in 2006 occurred over an area 2.7 times greater than the net cultivation area (UNODC *et al.* 2007, p. 8). Drug eradication efforts in Colombia have further degraded and destroyed primary forest habitat by using nonspecific aerial herbicides to destroy illegal crops (Álvarez 2005, p. 2042; BLI 2007d, p. 3; Cárdenas and Rodríguez Becerra 2004, p. 355; Oldham and Massey 2002, pp. 9-12). Herbicide spraying has introduced harmful chemicals into blue-billed curassow habitat and has led to further destruction of the habitat by forcing illicit growers to move to new, previously untouched forested areas (Álvarez 2002, pp. 1088-1093; Álvarez 2005, p. 2042; Álvarez 2007, pp. 133-143; BLI 2007d, p. 3; Cárdenas and Rodríguez Becerra 2004, p. 355; Oldham and Massey 2002, pp. 9-12). Between 1998 and 2002, cultivation of illicit crops increased by 21 percent each year, with a concomitant increase in deforestation of formerly pristine areas of approximately 60 percent (Álvarez 2002, pp. 1088-1093).

Effects of habitat fragmentation: A study conducted on the effects of habitat fragmentation on Andean birds within western Colombia determined two primary conditions that increased a species' vulnerability to habitat fragmentation and susceptibility to local extirpation and extinction: (1) species that were located at the upper or lower limit of their altitudinal or geographical distribution (as is the case for the blue-billed curassow, which formerly occupied the now-cleared lower elevation forests and is relegated to isolated forest fragments within its current range), and (2) species that were large fruit-eating birds with limited distributions and narrow habitat preferences (also traits of the blue-billed curassow) (Kattan and Álvarez-Lopez 1996, pp. 5-6). The study also determined that 31 percent of the historical bird populations in western Colombia had become extinct or locally extirpated by 1990, largely as a result of habitat fragmentation from deforestation and human encroachment (Kattan and Álvarez-Lopez 1996, p. 5; Kattan *et al.* 1994, p. 141). The most direct physical consequence of habitat fragmentation is loss of habitat heterogeneity; habitat heterogeneity is a characteristic preferred by the blue-billed curassow (see Habitat and Life History, above) (Kattan and Álvarez-Lopez 1996, p. 6). Local reports indicate an overall declining trend characterized by recent rapid declines of all the populations of blue-billed curassows (BLI 2007d, p. 1; Cuervo 2002, p. 138; Strahl *et al.* 1995, p. 25). Moreover, the ability of the blue-billed curassow to repopulate an isolated patch of suitable habitat following decline or extirpation is highly unlikely due to the species' small overall population size, its tendency to avoid degraded habitats, and the large distances between the remaining primary forest fragments in addition to the species' reticence to cross large areas of open habitat (Cuervo and Salaman 1999, p. 7; Hanski 1998, pp. 45-46).

In addition to the direct detrimental effect of habitat loss, blue-billed curassows and other cracids are susceptible to indirect effects of habitat disturbance and fragmentation (Brooks and Strahl 2000, p. 10; Silva and Strahl 1991, p. 38). A study conducted in northwestern Colombia suggests that habitat destruction and fragmentation may increase a species' vulnerability to predation (Arango-Vélez and Kattan 1997, pp. 140-142) (Factor C). Habitat fragmentation, in combination with growing numbers of human settlements, has made the species' habitat more accessible and more vulnerable to hunting (Factor B) and predation (Factor C). Habitat loss also compounds the species' decline in population numbers (estimated to be between 1,000 and 2,500 individuals) (BLI 2004b, p. 1) (see Factor E, Small population size).

Refugia: Several areas within the blue-billed curassow's current range are designated as national parks or other types of preserves, including Tayrona and Sierra Nevada de Santa Marta National Parks (both in Antioquía Department) (Cuervo 2002, p. 140) and the Colorados Sanctuary (Bolívar Department), which protects part of the Serranía de San Jacinto (BLI 2007d, pp. 2-3; Urueña *et al.* 2006, p. 42). Experts consider the most important refuges for this species, containing the largest remaining areas of suitable habitat, to be in the following areas (arranged geographically, from north to south): (1) Serranía de San Lucas, (2) Paramillo National Park, (3) Bajo Cauca-Nechí Regional Reserve, and (4) El Paujíl Bird Reserve (BLI 2007d, p. 3; Cuervo 2002, p. 139-140; Urueña *et al.* 2006, p. 42), four of the five locations where the species has been observed in the 21st Century (see Current Range, above). The habitat within these refugia underserves

the needs of the species for various reasons (including past and ongoing habitat destruction and incomplete habitat inclusion), as enumerated below. In addition, inadequate regulatory mechanisms hamper protection of the species and its habitat (Factor D).

(1) Serranía de San Lucas (Antioquía) is not a protected area, but is one of the largest remaining tracts of forest that is the least disturbed (WWF 2001b, p. 1). Even so, only a few isolated forest patches survive above 1,000 m (3,280 ft) in the northern lowlands (Antioquiá Department) (Donegan and Salaman 1999, p. 4). Ongoing pressures on this habitat include human encroachment for natural resources, colonization, ranching, logging, and crop production, as well as pollution of the Magdelena and Cauca Rivers (WWF 2001b, p. 3). In 1996, there was a gold rush that led to deforestation for logging, settlements, conversion to agriculture, and coca production (BLI 2007d, p 3). Using satellite imagery and fieldwork, Cuervo (2002, p. 140) determined that deforestation on the eastern slopes of the Serranía de San Lucas was extensive between 1995 and 1996. In 2005, highway construction was underway as part of a national plan to connect the East Andes, the West Andes, and the Pacific ports, including roadbuilding through the Serranía de San Lucas and adjacent lowlands (Álvarez 2005, p. 2042). Because the species prefers pristine habitat, this ongoing habitat alteration negatively impacts the integrity of this location and the survival of the species therein.

(2) The Paramillo National Park (Antioquía and Córdoba Departments), created in 1977, encompasses an area 4600 km^2 (1776 mi^2) in size and includes moist and cloud forest habitats (Corantioquia 2008, p. 1). However, it only protects the upper elevational limit of the habitat occupied by the species, where the species is rarer (Cuervo 2002, p. 140). This Park is inhabited by an indigenous community (Emberá), for whom the Park was created. Farmers also inhabit the interior regions of the Park (BLI 2007a, p. 1-2). The areas to the south of the Park have undergone intense habitat disturbance from logging, drug crop production, and inundation from flooding caused by the construction of the Urrá Dam (Cuervo 2002, p. 139). Deforestation has occurred throughout a large portion of the Park's buffer zone as well as in the extreme southern reaches within Park boundaries (Cuervo 2002, p. 140). Between 2003 and 2004, cocaine cultivation within the Paramillo National Park went from 1.1km^2 to 4.6 km^2 (UNODC and GOC 2005, p. 45). The Urrá Dam was constructed on the Sinú River between 1993 and 1998; the Sinú River Valley was part of the blue-billed curassows' historic range (BirdLife International (BLI) 2007a, p. 1; Cuervo and Salaman 1999, p. 7; del Hoyo 1994, p. 361). The reservoir flooded the area and led to displacement of human populations and other habitat alterations, including fish kills caused by blocked spawning and migratory routes (NGO Working Group on Export Development Canada 2003, p.31).

(3) The Bajo Cauca-Nechí Regional Reserve (Antioquía and Córdoba Departments), created in 1999, is located within a large tract (450 km^2 (174 mi^2)) of forested land at an elevation of 800 m (2,625 ft). Bajo Cauca is the second most populated region in the Department of Antioquia. Logging is important in this region, and the Reserve allows commercial exploitation of wood (Fundación Viztaz 2007, p. 2). Surveys are scant in this area, which is believed to be home to many species as yet unidentified by science (Cuervo 2002, p. 137; Donegan and Salaman 1999, p. 12). Although the Reserve provides suitable habitat for the species, and the blue-billed curassow is presumed to inhabit this area, it has not been confirmed within the Reserve (BLI 2007d, p. 3).

(4) El Paujíl Bird Reserve (Santander and Boyacá Departments) is a private reserve established in Serranía de las Quinchas (WorldTwitch Colombia 2004, p.3). In the early 1990s, the Serranía de las Quinchas (Boyacá Department, central Colombia) was considered one of the last remaining well-preserved cloud forests and the largest tract of lowland wet forest in the region, with up to 500 km^2 (193 mi^2) of forest remaining. Within a decade, the forest had dwindled to 120 km^2 (46 mi^2) (WorldTwitch Colombia 2004, p. 3). In 2002, the largest known subpopulation of blue-billed curassow was located in the Serranía de las Quinchas and became regarded as the stronghold of the species (BLI 2007d, p. 2). El Paujíl Bird Reserve was created in 2004 specifically to protect the blue-billed curassow and its habitat (BLI 2007b, p. 2). Comprising 10 km^2 (3.9 mi^2) of lowland tropical forest up to elevations of 700 m (2297 ft), the Reserve includes suitable habitat for the species. However, collection of eggs and chicks are ongoing within the region (Cuervo 2002, p. 139; Urueña *et al.* 2006, p. 42) (Factor B), and there are questions as to the effectiveness of this Reserve to protect the species (Factor D).

Summary of Factor A

The blue-billed curassow prefers undisturbed habitat, and the remaining small populations are limited to four or five small, disjunct, and isolated areas in seven different Departments. Within the past three generations, or 30 years, the species is estimated to have lost 88 percent of its habitat and half of its population. Deforestation and conversion of primary forests for human settlements and agriculture has led to habitat fragmentation throughout the species' range and to isolation of remaining populations. Habitat loss and fragmentation were factors in the species' historical decline (over the past 50 years) and caused localized extirpations, and continue to be factors negatively affecting the blue-billed curassow in the wild. Human encroachment into the species' preferred primary forest habitat has resulted in habitat alteration and disturbance activities that have caused declines in the blue-billed curassow population. Cultivation of illegal drug crops, such as cocaine, leads to further deforestation and alters soil compositions, hindering regeneration of abandoned fields. In addition, drug eradication programs involving the aerial spraying of non-specific herbicides lead to further environmental degradation and destruction of primary forest habitat. Three of the four most important refugia continue to undergo habitat destruction, and regulatory mechanisms are inadequate to mitigate the primary threats to this species (Factor D). A private refuge, the El Paujíl Bird Reserve, was formed to protect the blue-billed curassow and its habitat, which includes a large amount of suitable habitat, but may be lacking in its ability to adequately protect the species (Factors B and D). Habitat fragmentation contributes to the species' vulnerability to hunting (discussed under Factor B) and predation (discussed under Factor C) by increasing human and predator access to the habitat. The species' historic range, which encompassed approximately 106,700 km^2 (41,197 mi^2), has been reduced to 2,090 km^2 (807 mi^2). Experts estimate that 88 percent of this habitat loss has occurred within the last three generations, or 30 years. Habitat destruction and fragmentation of the remaining primary forest habitat is expected to continue, as human encroachment and associated activities continue within the blue-billed curassow's range. Therefore, we find that the present destruction, modification, and curtailment of habitat

are threats to the blue-billed curassow throughout all of its range.

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

Blue-billed curassows are hunted by indigenous people and local residents for subsistence, sport, trade, and entertainment (Brooks and Gonzalez-Garcia 2001, p. 183; Brooks and Strahl 2000, p. 10; Cuervo and Salaman 1999, p. 9; Throp 1964, p. 127; Urueña *et al.* 2006, p. 42). Cracids, including the blue-billed curassow, are considered particularly vulnerable to hunting pressures and are among those species most rapidly depleted by hunting (Redford 1992, p. 419). Several factors contribute to the species' vulnerability to hunting and collection: their large size, ease of location during the breeding season, trusting nature, and low productivity (1-2 eggs) relative to other Galliformes (del Hoyo 1994, p. 336). Cracids are also slow to reproduce, with a replacement rate of at least 6 years (Silva and Strahl 1991, p. 50), which makes it difficult for the species to rebound from hunting pressures.

Hunting affects the blue-billed curassow in all life stages. In 1999, hunters in Antioquío (where the blue-billed curassow is known on the slopes of the Serranía de San Lucas and Bajo Cauca-Nechí Regional Reserve area) reported killing as many as 20 blue-billed curassows within the prior 20 years (Donegan and Salaman 1999, p. 21). In 2004, it was reported that hunting had abated somewhat, because productive hunting grounds had become too remote from villages and because the communities have access to domestic meat (Melo and Ochoa 2004, as cited in Urueña *et al.* 2006, p. 42). However, both eggs and chicks continue to be collected in some areas (such as Serranía de las Quinchas, where El Paujíl Reserve is located) to be sold at local markets (Cuervo 2002, p. 139; Urueña *et al.* 2006, p. 42), despite measures to protect the species from collection (Factor D). In 1999, live trapped birds (typically chicks) sold for up to US$100 (greater than the average monthly income) (Donegan and Salaman 1999, p. 21). These birds are either consumed or maintained as captive animals. The blue-billed curassow, as well as other cracids (e.g., chachalacas (*Ortalis* spp.) and guans (*Penelope* spp.)) serve as a major source of protein for indigenous people and attract a great deal of ecotourism (Brooks and Strahl 2000, p. 8). People colonizing forested areas capture juvenile birds as pets and hold them in captivity in fenced yards or in cages (Cuervo and Salaman 1999, p. 8; Donegan and Salaman 1999, p. 21). Indigenous people also collect feathers and other body parts of curassows for rituals, ornamentation, arrowheads, and for sale to tourists (Silva and Strahl 1991, p. 38).

Most hunting occurs during the mating season, when males are more easily located by their booming mating calls (Cuervo and Salaman 1999, p. 9; del Hoyo 1994, p. 336), which can be heard from up to 500 m (0.31 mi) away (Ochoa-Quintero *et al.* 2005, pp. 42, 44). The direct take of males leads to disequilibrium of sex ratios for this species, which forms monogamous pairs (Cuervo and Salaman 1999, p. 9; Todd *et al.* 2008), and it also leads to the disruption of mating activities (Cuervo and Salaman 1999, p. 9; del Hoyo 1994, p. 336). Researchers attribute hunting pressure as the cause for the near extinction of the blue-billed curassow population in the San Salvador Valley (Strewe and Navarro 2003, p. 32). Researchers also attribute to hunting the absence of blue-billed curassows from parts of its historical range where suitable habitat (primary forest) still exists to hunting (Brooks and Strahl 2000, p. 10). In 1998, for instance, no males were observed during field surveys, prompting researchers to conclude that hunting continued to be a serious risk to the species (BLI 2007d, p. 3).

Habitat fragmentation and concomitant human encroachment (Factor A) have made the species' habitat more accessible and more vulnerable to hunting. A study conducted in French Guiana provided a quantitative estimate of the effect of hunting on a related cracid species, the black curassow (*Crax alector*) (del Hoyo 1994, p. 336). The black curassow has similar habitat requirements (undisturbed primary tropical to subtropical humid forest at 0-1,400 m (0-4600 ft) elevation) as the blue-billed curassow (BLI 2007e). The estimated population density of black curassows in non-hunted areas was between 7 and 9 birds per 1 km^2 (0.4 mi^2); in areas with intermittent hunting, the numbers fell to between 0.5 and 2.25 birds; and in areas where hunting was regular, numbers fell to between 0.5 and 0.73 birds (del Hoyo 1994, p. 336). We believe that the effects of hunting on the blue-billed curassow would result in similar population reductions based on its similarity of habitat requirements and life history traits.

In 1988, Colombia listed the blue-billed curassow in Appendix III of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (UNEP-WCMC 2008c). An Appendix-III listing requires that: (1) the listing range country (in this case, Colombia) must issue an export permit for all exports of the species; (2) specimens for these exports must be legally obtained; (3) live specimens must be transported such that risk of injury, damage, and cruelty are minimized; (4) exports from any other range countries require a certificate of origin; and (5) re-exports require a re-export certificate issued by the country of re-export (UNEP-WCMC 2008a). According to the World Conservation Monitoring Centre (WCMC), a total of 12 live birds have been traded internationally since 1990 (UNEP-WCMC 2008e). This trade included imports of two individuals into the United States and five birds into Mexico in the early 1990s. Therefore, commercial international trade in wild specimens over the past 20 years has not been extensive.

The remaining CITES-documented trade has consisted of exports of captive-bred specimens from the United States to Colombia and Belgium. The blue-billed curassow has been collected from the wild for use in zoos and in captive-breeding programs, both domestically and abroad. A small number of birds have been collected by the Cali Zoo and Santa Fe de Medellin Zoo in Colombia (Cuervo 2002, p. 142), and small collections are held in the United States, including the Houston Zoo and San Diego Zoo, as well as in Japan and Mexico (Brooks and Strahl 2000, p. 15; Cuervo 2002, p. 142). The Cali and Houston Zoo collections are being used for captive breeding, which we consider vital to conserving and recovering this species (Factor E). International trade for zoos and captive-breeding purposes does not contribute to the endangerment of the species. We believe that this limited amount of international trade, controlled via CITES, is not a threat to the species.

Summary of Factor B

The blue-billed curassow is hunted and collected from the wild at all life stages throughout its current range. Blue-billed curassow eggs and chicks are collected for food and sale in local markets, or are often captured and held in captivity as pets or as a future food source. Hunting results in the direct removal of eggs, juveniles, and adults from the population. Blue-billed curassows are slow to reproduce, produce a low clutch size, and exhibit a poor replacement rate (see Habitat and Life History). Hunting can destroy pair bonds and remove potentially reproductive adults from the breeding

pool. The species is particularly vulnerable to hunting and collection pressures due to the ease in locating this large bird during its breeding season. The majority of hunting occurs during the mating season, when males are heard calling for females, leading to disproportionate hunting of males. Hunting disturbances during the breeding season disrupt breeding activities, further compounding the threats associated with hunting mortalities. There are continued reports of hunting pressures on the species; these pressures have been and continue to be compounded by ongoing human encroachment into previously undisturbed forests (Factor A). Hunting and collection negatively affect the global population of the blue-billed curassow, due to its small population size and fragmented distribution. Hunting, combined with habitat fragmentation (Factor A), increases the possibility of local extirpation since the blue-billed curassow is unlikely to re-occupy an area that has been depleted through hunting because it avoids crossing large, open areas between habitat fragments (see Factor E, Likelihood to Disperse). Therefore, we find that hunting, collection, and associated disturbances are threats to the blue-billed curassow.

C. Disease or Predation

Disease: We are unaware of information regarding disease or the potential for significant disease outbreaks in the blue-billed curassow. As a result, we do not consider disease to be a threat to the species.

Predation: According to Delacour and Amadon (1973), predators of cracids include snakes (suborder Serpentes), foxes (family Canidae), wild cats (*Felis silvestris*), feral dogs (*Canus lupus familiaris*), and raptors (order Falconiformes). Arango-Vélez and Kattan (1997, pp. 137-143) studied nest predation rates on Andean birds within fragmented forest habitats of northwestern Colombia. Although not specific to the blue-billed curassow, the study focused on understory nesting birds with similar nesting habits and in forest fragment sizes similar to where the blue-billed curassow is currently found (Arango-Vélez and Kattan 1997, p. 138). The study found that nest predation by generalist predators is more prevalent in smaller, isolated forest patches. However, in the study, increased predation in smaller habitat fragments could not be solely attributed to the ''edge effect,'' whereby smaller patch sizes facilitate predators' access and ability to capture prey throughout the fragments. Rather, reduced habitat patch sizes caused a shift from larger to smaller predators, which tended to prey upon the eggs and juveniles of understory birds, rendering ground-dwelling birds such as blue-billed curassows particularly susceptible (Arango-Vélez and Kattan 1997, pp. 140-142). Other studies concerning the effects of habitat fragmentation on avian predation show similar results (Hoover *et al.* 1995, p. 151; Keyser 2002, p. 186; Keyser *et al.* 1998, p. 991; Renjifo 1999, p. 1133; Wilcove 1985, p. 1214). Gibbs (1991, p. 157) found that a larger proportion of ground-nests and elevated nests were predated in patches smaller than 1 km^2 (0.39 mi^2) and that ground-nesting birds were predated more heavily than elevated-nesting birds. In addition to the importance of patch size for influencing the level of predation, the composition of the areas surrounding the patch is also important (Arango-Vélez and Kattan 1997, p. 141). For instance, in lowland Costa Rica, the edge effect (where predation is greater at the edge of forest patches than in the interior of the patch) was greatest in forest patches bordered by secondary growth than by pasture (Gibbs 1991, p. 157).

Summary of Factor C

Snakes, foxes, feral cats, feral dogs, and raptors are all predators of cracids. Predation results in the direct removal of eggs, juveniles, and adults from the population. Blue-billed curassows are slow to reproduce, produce a low clutch size, and exhibit a poor replacement rate (see Habitat and Life History). Predation can destroy pair bonds and remove potentially reproductive adults from the breeding pool. Studies on similar species in similar Andean habitats indicate that vulnerability to predation by generalist predators increases with increased habitat fragmentation and smaller patch sizes. Predation exacerbates the genetic complications associated with the species' small population size (Factor E). Because of the species' small population size and inability to recolonize isolated habitat fragments (Factor E), predation renders the species vulnerable to local extirpation. Therefore, we find that predation, compounded by ongoing habitat destruction (Factor A) and hunting (Factor B), is a threat to the blue-billed curassow.

D. The Inadequacy of Existing Regulatory Mechanisms

Regulatory mechanisms may provide species-specific or habitat-specific protections. An evaluation of the adequacy of regulatory mechanisms within Colombia to mitigate or remove the threats to the blue-billed curassow is provided below, beginning with species-specific and followed by habitat-specific protection mechanisms.

The Colombian government has enacted and ratified numerous domestic and international laws, decrees, and resolutions for managing and conserving wildlife and flora (Matallana-T. 2005, p. 121). Colombian Law No. 99 of 1993 (Creating the Ministry of the Environment and Renewable Natural Resources and organizing the National Environmental System (SINA)) sets out the principles governing environmental policy in Colombia, and provides that the country's biodiversity be protected and used primarily in a sustainable manner (EcoLex 1993, p. 2). Resolution No. 584 of 2002 (Species that are endangered wildlife in the national territory) provides a list of Colombian wildlife and flora that are considered threatened. Threatened is defined as those species whose natural populations are at risk of extinction, as their habitat, range, or ecosystems that support them have been affected by either natural causes or human actions. Threatened species are further categorized as critically endangered, endangered, or vulnerable. A critically endangered species (CR) is one that faces a very high probability of extinction in the wild in the immediate future, based on a drastic reduction of its natural populations and a severe deterioration of its range; an endangered species (EN) is one that has a high probability of extinction in the wild in the near future, based on a declining trend of its natural populations and a deterioration of its range; and a vulnerable species (VU) is one that is not in imminent danger of extinction in the near future, but it could be if natural population trends continue downward and deterioration of its range continues (EcoLex 2002, p. 10).

The blue-billed curassow is considered a critically endangered species under Colombian law pursuant to paragraph 23 of Article 5 of Law No. 99, as outlined in Resolution No. 584 (EcoLex 2002, p. 12). This status confers certain protections upon the species. Resolution No. 849 of 1973 ([Laws governing] commercial hunting of saínos, boas, anacondas and birds throughout the country) and Resolution No. 787of 1977 ([Laws governing] sport hunting of mammals, birds and reptiles of wildlife), regulate and prohibit commercial and sport hunting of all wild bird species, respectively, except those specifically identified by the Ministry of the Environment or otherwise permitted (EcoLex 1973, p.1; EcoLex 1977, p. 3). Because of its status as a critically endangered species, the

Ministry of the Environment does not permit the blue-billed curassow to be hunted commercially or for sport. Neither Resolution prohibits subsistence hunting. As discussed under Factor B, commercial and sport hunting are not threats to this species, but subsistence hunting continues to threaten the species throughout its range, including within protected areas. Thus, these Resolutions are ineffective at reducing the existing threat of subsistence hunting to the blue-billed curassow.

Additional efforts to protect the species from subsistence hunting are inadequate. Within El Paujíl Reserve, for instance, there are penalties for shooting or trapping the species (BLI 2007d, p. 3). However, as recently as 2006, it was reported that both chicks and eggs continued to be collected in the Serranía de las Quinchas region, where the Reserve is located, for domestic use and for sale at local markets (Cuervo 2002, p. 139; Urueña *et al.* 2006, p. 42) (Factor B). Thus, private efforts to protect the species from hunting appear to be inadequate within a region where national laws are ineffective at protecting the species from such take.

The blue-billed curassow is listed in Appendix III of CITES (see Factor B). CITES is an international treaty among 174 nations, including Colombia (which became a Party in 1981) and the United States (which became a Party in 1975) (UNEP-WCMC 2008a, p. 1). In the United States, CITES is implemented through the U.S. Endangered Species Act (Act). The Act designates the Secretary of the Interior as the Scientific and Management Authorities to implement the treaty, with all functions carried out by the Service. Under this treaty, countries work together to ensure that international trade in animal and plant species is not detrimental to the survival of wild populations, by regulating the import, export, re-export, and introduction from the sea of CITES-listed animal and plant species (USFWS 2008, p. 1). As discussed under Factor B, we do not consider commercial international trade to be a threat impacting the blue-billed curassow.

Colombia has numerous laws and regulations pertaining to forests and forestry management, including: the Forestry Law of 1959 (Law 2 – [On] forest economy [of the] nation and conservation [of] renewable natural resources) (EcoLex 1959); the Forestry Code of 1974 (Decree 2,811 – National code of renewable natural resources and protection of the environment) (Faolex 1974), and the forest plan of 1996 (Decree 1,791 – Forest Improvement Plan) (Faolex 1996). A new forest law was developed and approved in 2006 (Law No. 1,021, General [Forestry] Law). The new law seeks to: (1) further promote forest plantations and create financial mechanisms for investments, (2) provide for rigorous control and expanded sustainable use of natural forests, (3) and regulate and further develop forest concessions in the country (International Tropical Timber Organization (ITTO) 2006, p. 218). However, the ITTO considers the Colombian forestry sector to be lacking in law enforcement and on-the-ground control of forest resources, with no specific standards for large-scale forestry production, no forestry concession policies, and a lack of transparency in the application of the various laws regulating wildlife and their habitats (ITTO 2006, p. 222).

Resource management in Colombia is highly decentralized. Resources are managed within local municipalities by one of 33 Autonomous Regional Corporations known as CARs (Corporaciones Autónomas Regionales) (Matallana-T. 2005, p. 121). CARs are corporate bodies of a public nature, endowed with administrative and financial autonomy to manage the environment and renewable natural resources (Law 99 of 1993). The blue-billed curassow is currently known to occur within seven different Departments, each of which is managed by a separate local entity. These corporations grant concessions, permits, and authorizations for forest harvesting (ITTO 2006, p. 219). Forty percent of Colombia's public resources are managed by local municipalities, making Colombia one of the most decentralized countries in terms of forestry management in Latin America (Matallana-T. 2005, p. 121). Monitoring of resource use and forest development authorized by these corporations is conducted mostly by local nongovernmental organizations. Governmental institutions responsible for oversight appear to be underresourced and unable to maintain an effective presence in the field (ITTO 2006, p. 222). Consequently, there is no vehicle for overall coordination of species management for multijurisdictional species such as the blue-billed curassow. The private Proaves-Colombia Foundation plans to generate a national strategy for the conservation of the blue-billed curassow through the project, ''Saving the Blue-billed Curassow'' (Quevedo *et al.* 2005, as cited in Urueña *et al.* 2006, p. 42). In 2004, this project evaluated and prioritized threats in Serranía de las Quinchas region (Machado 2004, as cited in Urueña *et al.* 2006, p. 42), assessed population density and structure (Arias 2005, as cited in Urueña *et al.* 2006, p. 42), studied habitat use and behavioral aspects in Paujíl de Pico Bird Reserve (Urueña 2005, as cited in Urueña *et al.* 2006, p. 42), and promoted an environmental education campaign and the creation of El Paujíl Bird Reserve (Urueña and Quevedo 2005, as cited in Urueña *et al.* 2006, p. 42). However, a national strategy for the conservation of blue-billed curassows is not currently in place, and it is unclear if or when it will be enacted, and whether the Colombian government will adopt the strategy. Therefore, we are unable to determine that this conservation strategy will mitigate threats to the blue-billed curassow.

Currently there are approximately 49 nationally recognized protected areas in Colombia (Matallano-T. 2005, p. 121). The five most common categories of habitat protection are: (1) National Natural Park (an area whose ecosystems have not been substantially altered by human exploitation or occupation, and where plant and animal species, or complex geomorphological landscapes have historical, cultural, scientific, educational, aesthetic, or recreational value); (2) Wildlife Sanctuary for Fauna and Flora (an area dedicated to preserve species or communities of wildlife, and to conserve genetic resources of wildlife); (3) National Natural Reserve (an area that preserves flora and fauna and is established for the study of its natural wealth); (4) Panoramic Park (a parcel of land of panoramic, cultural or natural value preserved for education and relaxation); and (5) Unique National Area (a rare or unique ecosystem) (Matallano-T. 2005, p. 121). Several areas considered to be important refuges for the blue-billed curassow are protected areas and are managed by autonomous corporations, including: (1) The Paramillo National Natural Park (Antioquía and Córdoba Departments) and (2) The Bajo Cauca–Nechí Regional Natural Reserve (Antioquía and Córdoba Departments) (BLI 2007d, p. 3; Cuervo 2002, p. 139), both of which are managed by Corantioquia (Corantioquia 2008, p. 1).

(1) The Paramillo National Natural Park (Antioquía and Córdoba Departments) is a large Park, but no protective measures have been implemented to curb human impacts on the habitat and species by the indigenous and farming residents within the park (BLI 2007a, pp. 1-2; BLI 2007d, p. 3) (Factor A). Cocaine cultivation is occurring within the Park boundaries (UNODC and GOC 2005, p. 45). Dam construction on the Siní River, part of the species' historic range (BLI

2007a, p. 1; Cuervo and Salaman 1999, p. 7; del Hoyo 1994, p. 361), has caused ongoing flooding in the area since its completion in 1998 (Cuervo 2002, p. 139; NGO Working Group on Export Development Canada 2003, p. 31). Thus, the designation of this area as a Park has not mitigated human-induced habitat destruction (Factor A).

(2) The Bajo Cauca-Nechí Regional Natural Reserve (Antioquía and Córdoba Departments) encompasses suitable habitat for the blue-billed curassow, but the species has not been confirmed within the Reserve (BLI 2007d, p. 3). Nonetheless, it is notable that this Reserve, which is designated to preserve and research flora and fauna, allows logging (Fundación Viztaz 2007, p. 2). Thus, should the species be located therein, this Reserve's designation as a preserve would not mitigate the threat from habitat destruction (Factor A).

The privately-owned El Paujíl Bird Preserve, which was established specifically to protect the blue-billed curassow and its habitat (BLI 2007d, p. 2) (Factor A), has measures in place to penalize shooting or trapping the species (BLI 2007d, p. 3). However, egg and chick collection are ongoing within the Serranía de las Quinchas area, where the private reserve is located (Factor B). Aside from the Paramillo National Park, which includes habitat in the upper elevational limit of the blue-billed curassow's preferred range (Cuervo 2002, p. 140), no effective protective measures have been undertaken (BLI 2007d, p. 2; Brooks and Gonzalez-Garcia 2001, p. 183) such that the regulatory mechanisms in place in these protected areas do not mitigate habitat destruction, which is a primary risk factor for this species (Factor A). Thus, these protected areas do not provide sufficient protections to mitigate the effects from habitat loss (Factor A) or reduce threats from hunting and collection (Factor B).

Summary of Factor D

Colombia has numerous laws and regulatory mechanisms intended to protect and manage wildlife and their habitats. The blue-billed curassow is considered critically endangered under Colombian law and lives within several managed forests or protected areas. However, on-the-ground enforcement of existing wildlife protection and forestry laws and oversight of the local jurisdictions implementing and regulating activities are ineffective at mitigating the primary threats to the blue-billed curassow. As discussed for Factor A, habitat destruction, degradation, and fragmentation continue throughout the existing range of the blue-billed curassow. As discussed for Factor B, uncontrolled hunting and commercial use of the blue-billed curassow are ongoing and continue to negatively affect the continued existence of the species. Moreover, the lack of a species conservation strategy and the decentralized management of natural resources in Colombia provide no overall coordination in the conservation for species such as the blue-billed curassow, which ranges in multiple jurisdictions. Despite ongoing work toward developing a national conservation strategy for the species, it has not yet been developed, it is not known whether it will be formally adopted by the Government of Colombia, and we are unable to determine that the strategy will be effective in reducing the threats to this species on a local or rangewide basis. Therefore, we find that the existing regulatory mechanisms currently in place for the blue-billed curassow do not reduce or remove the factors threatening the species.

E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

Three additional factors affect the blue-billed curassow: its limited ability to disperse to unoccupied habitat, the species' small population size and captive-breeding programs.

Likelihood to Disperse: The blue-billed curassow exhibits several characteristics that make it unlikely that the species would disperse into isolated habitat fragments to repopulate extirpated patches of suitable habitat. The blue-billed curassow requires a large home range of primary tropical forest (Cuervo 2002, pp. 138-140). The habitat patches within the blue-billed curassow's current range are described by researchers as fragmented, disjunct, and isolated (Collar *et al.* 1992, p. 154; Cuervo and Salaman 1999, p. 7; del Hoyo 1994, p. 361; Donegan and Huertas 2005, p. 29; Salaman *et al.* 2001, p. 183). The species will rarely cross narrow deforested corridors, such as those caused by roads or oil pipelines, and it will not cross large open areas between forest fragments (Cuervo and Salaman 1999, p. 7). In addition to the species' small overall population size (see below), researchers believe it is unlikely that the blue-billed curassow would repopulate an isolated patch of suitable habitat following decline or extirpation of the species from that patch (Cuervo and Salaman 1999, p. 7; Hanski 1998, pp. 45-46) (see Factor E, Captive Breeding Program).

Small Population Size: Deforestation and habitat loss throughout the blue-billed curassow's historic range has resulted in fragmented, disjunct, and isolated populations in the remaining four or five patches of tropical humid and premontane forests and caused regional extirpations of the blue-billed curassow (Brooks and Gonzalez-Garcia 2001, p. 183; Collar *et al.* 1992, pp. 61-62; Cuervo and Salaman 1999, p. 7). It is estimated that the largest subpopulation (in the Serranía de las Quinchas, Boyacá Department) contains between 250 and 999 birds (BLI 2007d, p. 2), and that the total population is much fewer than 2,000 individuals (Brooks and Gonzalez-Garcia 2001, p. 184). Cuervo (2002, p. 141) estimated that the species had lost more than half of its population over the last three generations, or 30 years. Further, it is estimated that, at the current rate of decline, the blue-billed curassow could lose up to 79 percent of its current population within the next 10 years and could be extinct within the next three generations, or 30 years (BLI 2007d, p. 3; Cuervo 2002, p. 141).

The blue-billed curassow's restricted and fragmented range, combined with its small population size (Cuervo 2002, p. 138; Cuervo and Salaman 1999, p. 7; del Hoyo 1994, p. 361), makes the species particularly vulnerable to the threat of adverse genetic effects and susceptible to extinction through natural or manmade events that destroy individuals and their habitat (BLI 2007d, pp. 1-2; Brooks and Gonzalez-Garcia 2001, pp. 185-190; Cuervo 2002, p. 140). Meta-population analysis involves the study of the dynamics of an entire population by studying movements within local populations (Hanski 1998, p. 41). ''A meta-population composed of extinction-prone local populations in a small patch network is necessarily more threatened than are meta-populations in large and well connected networks'' (Hanski 1998, p. 42). Considering that not all blue-billed curassow individuals in a population are breeding at any one time, the actual number of individuals contributing to population growth will be a smaller number than the total number of individuals.

Small population sizes render species vulnerable to any of several risks, including loss of genetic variation, inbreeding depression, and accumulation of deleterious genes. Inbreeding can have individual or population-level consequences either by increasing the phenotypic expression (the outward appearance or observable structure, function, or behavior of a living organism) of recessive,

deleterious alleles or by reducing the overall fitness of individuals in the population (Charlesworth and Charlesworth 1987, p. 238; Shaffer 1981, p. 131). Small, isolated populations of wildlife species are also susceptible to demographic problems (Shaffer 1981, p. 131), which may include reduced reproductive success of individuals and chance disequilibrium of sex ratios. Chance disequilibrium of sex ratios would be further exacerbated by preferential hunting of male birds (Factor B). This species' risk of extinction is further compounded by ongoing collection of eggs and chicks, and by hunting-related disturbances that may disrupt breeding pairs (Factor B). Once a population is reduced below a certain number of individuals, it tends to rapidly decline towards extinction (Franklin 1980, pp. 147-148; Gilpin and Soulé 1986, p. 25; Holsinger 2000, pp. 64-65; Soulé 1987, p.181).

Captive-Breeding Program: A captive-breeding program is being developed within the species' range (see Current Range and Distribution, above)by Fundación Ecolombia, based at the Wildlife Rehabilitation Centre in Los Farallones (Antioquía Department, Colombia). The captive-held population includes three males and two females. The program has met with little success because attempts to breed the species in captivity have been unsuccessful to date (two sterile eggs laid in 2003 and none since). The species is historically known to be a poor breeder in captivity (Throp 1964, p. 127). The program is exploring artificial insemination for future breeding (Wildlife Protection Foundation (WPF) 2007, p. 2). The Houston Zoo, however, which has maintained cracids since the 1960s, has bred the species for 30 years and has successfully raised at least 10 blue-billed curassows in captivity (Houston Zoo 2008, p. 2; Todd *et al.* 2008, p. 1). The Houston Zoo also conducts outreach and breeding research. While this has resulted in limited exports of captive-bred birds for scientific purposes (i.e., to zoos; see also Factor B), the number of birds in captivity has dropped worldwide. In addition, the number of specimens originally imported into the United States was small (Houston Zoo 2008, p. 2), which would limit their conservation value for reintroduction into the wild. Thus, the captive breeding program is not currently contributing to reintroduction, but serves a conservation value by providing specimens for zoos that conduct outreach and breeding research. Further, reintroduction would appear to be important for recovery of this species because the species is not likely to disperse into or repopulate suitable habitat on its own.

Summary of Factor E

The blue-billed curassow's small population size increases its vulnerability to genetic risks associated with small population sizes that negatively impact the species' long-term viability and increase the possibility of localized extirpations of the remaining fragmented populations. Further, the species is unlikely to repopulate areas of suitable habitat from which a subpopulation has been extirpated because it avoids crossing the disturbed areas that separate the remaining suitable habitat for this species. Range-country attempts at captive breeding have been unsuccessful, and the stock in U.S. captive-breeding programs is limited; therefore, the captive-breeding program is not contributing to reintroduction of the species in the wild and so is not currently mitigating the problem of small population size. Therefore, we believe that, in combination with the risks to the species from habitat destruction (Factor A), hunting (Factor B), and predation (Factor C), the blue-billed curassow is vulnerable to localized extirpation or extinction from which the species would be unable to recover, due it its small population size and apparent inability to repopulate fragmented, isolated habitats such as those currently present within this species' range.

Status Determination for the Blue-Billed Curassow

The five primary factors that threaten the survival of the blue-billed curassow are: (1) habitat destruction, fragmentation, and degradation (Factor A); (2) overexploitation due to hunting and collecting of eggs and chicks (Factor B); (3) predation (Factor C); (4) inadequacy of regulatory mechanisms to reduce the threats to the species (Factor D); and (5) small population size and isolation of remaining populations (Factor E).

The direct loss of habitat through widespread deforestation and conversion of primary forests to human settlement and agricultural uses has led to the fragmentation of habitat throughout the range of the blue-billed curassow and isolation of the remaining populations (Factor A). The species' historic range, which encompassed approximately 106,700 km^2 (41,197 mi^2), has been reduced to 2,090 km^2 (807 mi^2). Experts estimate that 88 percent of this habitat loss has occurred within the last three generations, or 30 years. The best available information indicates that the species' population was reduced by 50 percent in the 30 years prior to 2002 and that ongoing habitat destruction and degradation are continuing at a rate that would lead to the extinction of the blue-billed curassow in the next 30 years if measures are not taken to ameliorate the loss of habitat. Thus, habitat loss poses an imminent threat of extinction and is a factor that currently endangers the species.

The blue-billed curassow is hunted or collected, whole or in parts, in all life stages (eggs, juveniles, adults, feathers, and other body parts) throughout its current range by both indigenous people and by local settlers for both sustenance and sport; for domestic use in rituals; and for sale to tourists (Factor B). Several life-history traits of the species contribute to its vulnerability to hunting and collection: its large size, ease of location during breeding season, trusting nature, low productivity (1-2 eggs), and a replacement rate of 6 years (taking an individual of the species an average of 6 years to replace itself). Adults are hunted mainly during the breeding season, when males are most vulnerable and more easily located by their loud mating calls that are audible at long distances. The direct take of males disrupts sex ratios in this species, which forms monogamous pairs, and this take also disrupts mating activities. Hunting pressure has caused severe depletion or near extirpation in portions of its historical range, despite the continued availability of suitable habitat (primary forest). The effects of hunting are exacerbated by ongoing habitat fragmentation (Factor A), which increases accessibility into the species' habitat, rendering it more vulnerable to hunting. Concomitantly, increased conversion of primary forest habitat has encouraged further human settlement within the blue-billed curassow's habitat. Hunting poses an imminent threat of extinction and is a factor that currently endangers the species.

Blue-billed curassows are vulnerable to predation by generalist predators, including snakes, foxes, feral cats, feral dogs, and raptors (Factor C). Habitat fragmentation (Factor A) contributes to this vulnerability, because research indicates that predation increases with increased habitat fragmentation and smaller patch sizes. Predation leads to the direct removal of eggs, juveniles, and adults from the population, exacerbating risks associated with the species' small population size (see below). Predation can destroy pair bonds and remove potentially reproductive adults from the breeding pool. The blue-billed curassow is slow

to reproduce and produces a low clutch size, and predation exacerbates this species' already poor replacement rate (see Habitat and Life History).

The threats from habitat destruction, hunting, and predation are compounded by the species' small population size (Factor E). The blue-billed curassow's population has been reduced by 50 percent within the last 30 years. The species' low population estimate of fewer than 2,000 individuals, combined with its restricted, fragmented, and isolated habitat, makes the species particularly vulnerable to numerous human factors (e.g., agricultural development, armed conflict, fire, dams and reservoir development, increased human settlement, illicit drug production and control, mining activities, oil development and distribution, and road development). Further, the species' reticence to cross large open areas makes it unlikely that the species would repopulate suitable habitat in remaining isolated forest patches that are separated by large distances, all of which put the species at a risk of extinction.

Finally, despite numerous laws and regulatory mechanisms (Factor D) to administer and manage wildlife and their habitats, on-the-ground enforcement of these laws and oversight of the local jurisdictions implementing and regulating activities within the species' habitat are inadequate to mitigate the effects of habitat loss (Factor A) and hunting (Factor B). Habitat destruction and hunting continues within the species' range and, aside from El Paujíl Bird Preserve, no other areas provide effective protective measures for protecting the blue-billed curassow from ongoing hunting or its habitat from ongoing destruction.

We have carefully assessed the best available scientific and commercial information regarding the past, present, and potential future threats faced by the blue-billed curassow. We consider the ongoing threats to the blue-billed curassow, habitat destruction (Factor A), hunting (Factor B), and predation (Factor C), exacerbated by the species' small population size and limited dispersal ability (Factor E), and compounded by inadequate regulatory mechanisms to mitigate these threats (Factor D), to be equally present and of the same magnitude throughout the species' entire current range. Based on this information, we determine that the blue-billed curassow is endangered throughout its range. Therefore, we are proposing to list the blue-billed curassow as an endangered species.

II. Brown-Banded Antpitta (*Grallaria milleri*)

Species Description

The brown-banded antpitta is a member of the Ground-Antbird Family (Formicariidae), is approximately 18 cm (7 in) long from bill to tail, and endemic to the west slope of the central Andes of Colombia (Krabbe and Schulenberg 2003, p. 682; Fjeldsä and Krabbe 1990, p. 414; Hilty and Brown 1986, p. 422). The species is locally known as ''Tororoi'' (Beltrán and Kattan 2002). This bird is a uniform dark brown, with a dingy white throat and underbelly.

Taxonomy

The brown-banded antpitta was first taxonomically described by Chapman in 1911 and placed in the Ground-Antbird Family (Formicariidae). The type specimen (the actual specimen that was first described by Chapman) was obtained from Laguneta (Quindío Department) (Beltrán and Kattan 2002, p. 327). Laguneta is, therefore, referred to as the ''type locality.''

Habitat and Life History

The brown-banded antpitta currently inhabits the humid understory and forest floor habitats of mid-montane and cloud forests between 2,400 and 2,600 m (7,874 and 8,530 ft) with high density of herbaceous plants and shrubs (Krabbe and Schulenberg 2003, p. 719; Kattan and Beltrán 1999, p. 272). The species has been observed in older (30–year-old) secondary-growth forest habitats and alder (*Alnus acuminata*) plantations (Cuervo 2002, pp. 326-327; Krabbe and Schulenberg 2003, p. 719).

Researchers consider antpitta life histories to be among the least known of Neotropical bird species (Dobbs *et al.* 2001, p. 225). The brown-banded antpitta, as with other antpittas, is a secretive species, with a low population density and high habitat specificity (Kattan and Beltrán 2002, p. 232). Antpittas are considered to be nearly flightless (Krabbe and Schulenberg 2003, p. 698) and their dispersal capabilities are not well known (Cuervo 2002, p. 327), except that one banded individual traveled a distance of 0.041 km^2 (0.02 mi^2) (Kattan and Beltrán 2002, p. 234). This ground-dwelling species lives either singly or in pairs (Beltrán and Kattan 2002, p. 327) and has a high territorial fidelity (Cuervo 2002, p. 327). It can be seen running along the forest floor picking up prey (Krabbe and Schulenberg 2003, p. 719), which apparently consists of beetles (*Coleoptera* spp.) and earthworms.

Nothing is known about the brown-banded antpitta's reproductive ecology, except that its peak reproductive period is between March and May (Beltrán and Kattan 2002, pp. 326-327) and that both parents feed the young (del Hoyo 2003, p. 719). Drawing from studies on similar species, including the Colombian species, scaled antpitta (*Grallaria guatimalensis*) and chestnut-crowned antpitta (*Grallaria ruficapilla*), antpittas tend to nest on fallen logs, on the forks of tree trunks, or atop the crowns of low-growing palms, situated at nearly groundlevel to no higher than 3 m (10 ft) off the ground (Dobbs *et al.* 2001, p. 226; Wiedenfeld 1982, p. 581). The typical clutch size for antpittas is considered to be two eggs (Dobbs *et al.* 2001, p. 227; Wiedenfeld 1982, p. 581). Antpitta nests are roughly circular cups, loosely constructed of dead leaves that are generally hard to distinguish from the surroundings (Dobbs *et al.* 2001, p. 227; Wiedenfeld 1982, p. 581). Antpittas appear to rely on camouflage, both to hide the location of their nests (Wiedenfeld 1982, p. 580), as well as in response to disturbance, when birds remain absolutely still to avoid detection by potential predators (Dobbs *et al.* 2001, p. 226).

Historical Range and Distribution

The brown-banded antpitta was historically known from a single location, near Laguneta in the central Andes (centrally located in the Department of Quindío), which ranges in altitude from 1,859 m (6,100 ft) in the surrounding valleys to 3,140 m (10,300 ft) at its highest point (Chapman 1917, pp. 35-36, 396). In 1917, the valley leading to Laguneta was described as gently rising until about 2,530 m (8,300 ft), when the terrain rose steeply up to 2,896 ft (9,500 ft). The vegetation was described as open, with scattered palms and little other vegetation until about 2,835 m (9,300 ft), where the forest began (Chapman 1917, p. 36). At 3,140 m (10,300 ft), the forest was described as dense with little undergrowth, except in occasional clearings dominated by dense shrubs so thick as to be impenetrable without a knife (Chapman 1917, p. 35). Eleven specimens were collected between 1911 and 1942; the species was last observed and collections were made at the type locality at Laguneta in 1942 (Beltrán and Kattan 2002, p. 325; Collar *et al.* 1992, p. 698).

Chapman (1917, p. 36) described the practice of slash-and-burn agriculture around Laguneta in 1917, noting that much of the hillside between 2,530 and 2,835 m (8,300-9,300 ft) was bare and close-cropped, having been burned and cleared. By 1994, the forested area providing habitat for the brown-banded

antpitta in and around the type locality near Laguneta had been mostly destroyed (Collar *et al.* 1994, p. 136), and despite subsequent surveys (in 1986, 1988, and 1991), the species was not observed there. In 1992, researchers considered the brown-banded antpitta to be locally extirpated, if not extinct throughout its range (Collar *et al.* 1992, p. 689; Cuervo 2002, pp. 326-327; Kattan and Beltrán 1997, pp. 367-369). Although the brown-banded antpitta was rediscovered in 1994 (Kattan and Beltrán 1997, pp. 367-369), researchers continue to consider the species to be locally extinct (extirpated) from its type locality of Laguneta (Quindío Department) (Beltrán 2002 in litt., as cited in Beltrán and Kattan, p. 327) due to extensive deforestation (Beltrán and Kattan 2002, p. 327).

Current Range and Distribution

The current range of the brown-banded antpitta is described as humid understory and forest floors of mid-montane and cloud forests, preferring altitudes between 2,400 and 2,600 m (7,874 and 8,530 ft), in areas with a high density of herbs and shrubs (Krabbe and Schulenberg 2003, p. 719; Kattan and Beltrán 1999, p. 272). The current range is estimated to be 300 km^2 (116 mi^2) (BLI 2007f, p. 1). The species is known today from only three areas in the upper Río Magdalena valley. The first area is the humid forests in the Central Andes of Colombia's Ucumarí Regional Park (Risaralda Department), where it was first sighted in 1994 (Kattan and Beltrán 1997, pp. 369-370) and recently observed in 2000 (Beltrán and Kattan 2002, p. 326). The site is approximately 44 km^2 (17 mi^2) in the Otún River watershed (Kattan and Beltrán 1999, p. 273). The second areas is the south-east slope of Volcán Tolima in the Río Toche Valley on private land (the house of La Carbonera) (Tolima Department), where it was first observed in 1998 and recently observed in 2000 (Beltrán and Kattan 2002, p. 325). This location is 0.05 km^2 (0.02 mi^2) in size at elevations ranging from 2,750 to 2,900 m (9,022 to 9,514 ft) (Beltrán and Kattan 2002, p. 326). The third area is the Río Blanco river basin (Caldas Department), where it was most recently observed in 2000 (Beltrán and Kattan 2002, p. 326). This site is a strip of land less than 200 linear km (124 linear mi) on the Central Cordilla, between 2,300 and 3,100 m (7,546 and 10,171 ft) in elevation (BLI 2004c, p. 2; Kattan and Beltrán 2002, p. 238). Experts consider the most important refuges for this species to be: (1) the Ucumarí Regional Park (Risaralda Department), (2) the Río Toche Valley (Tolima), (3) the Río Blanco river basin (Caldas Department), and (4) the Reserve of Cañon and Quindío Departments, where suitable habitat exists but the species may be extirpated. These refugia are further discussed under Factor A, below.

Population Estimates

There have been few quantitative surveys of the brown-banded antpitta. Available population information is provided for the four areas considered to be important refugia for the species (as discussed in Factor A). The population located within the Ucumarí Regional Park has been surveyed twice. In the first survey, conducted from 1994 to 1997, 11 brown-banded antpittas were captured and banded. In a subsequent survey of a 0.17-1-km^2-(0.07-0.62-mi^2) area within the Ucumarí Regional Park during 1995-2000, Kattan and Beltrán (2002, p. 232-3) captured and banded 36 brown-banded antpittas. Based on these surveys, the subpopulation within the 0.63 km^2 (0.24 mi^2) Park was estimated to include up to 106 individuals, averaging to approximately 1.3 individuals per 0.01 km^2 (0.004 mi^2) (Kattan and Beltrán 1997, pp. 367-369; Kattan and Beltrán 1999, p. 276). Thus, this subpopulation contains at least 36, and possibly as many as 106 individuals.

Qualitative surveys conducted from 1998 to 2000 in the Río Toche Valley determined that the brown-banded antpitta is uncommon and local (Beltrán and Kattan 2002, p. 326). One individual was observed in 1999 (Cuervo in litt., as cited in Beltrán (2002 p. 326). There is no information on the estimated population size of brown-banded antpitta within the Río Toche. Thus, this subpopulation contains at least one individual, but there is no estimate of the upper limit of the population.

A census of the population in the Río Blanco river basin was undertaken in June 2000, within an approximately 5-km (3-mi) transect. Researchers inferred the presence of at least 30 individuals, based on vocalizations they elicited in response to recordings of the species' alarm call (Beltrán and Kattan 2002, p. 326). There is no information on the estimated population size of brown-banded antpitta within the Río Blanco area. Thus, this population may contain 30 individuals, but the upper limit of the population estimate is unknown.

The species is not currently known to inhabit the Reserve del Cañon del Quindío. Although the species was observed there in 1911 and 1942 (Beltrán and Kattan 2002, p. 325; Collar *et al.* 1992, p. 698) and the area contains suitable habitat, the species has not been observed there since 1942 (Beltrán and Kattan 2002, p. 235).

The IUCN estimates that the largest subpopulation contains 424 individuals (BLI 2007f, p. 4), but it is unclear as to which subpopulation this estimate refers. The global population of brown-banded antpitta is estimated by the IUCN to be larger than 250 individuals, but not more than 999 birds (BLI 2007f, p. 1), equating to approximately 338 to 756 individuals (BLI 2007f, p. 4). It is estimated that the species has lost up to 9 percent of its population in the last 10 years, or 3 generations, and that this rate of decline will continue over the next 10 years (BLI 2007f, p. 4). Additional information on the population size of this species is provided in the discussion of Factor E, below.

Conservation Status

The brown-banded antpitta is identified as an endangered species under Colombian law pursuant to paragraph 23 of Article 5 of the Law 99 of 1993, as outlined in Resolution No. 584 of 2002 (EcoLex 2002, p. 12). The IUCN has classified the species as ''Endangered'' since 1994 because it is known from very few locations and occupies a very small range (BLI 2004c, p. 1).

Summary of Factors Affecting the Brown-Banded Antpitta

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

The brown-banded antpitta inhabits the humid understory and forest floor habitats of mid-montane and cloud forests between 1,800 and 2,600 m (5,905 and 8,530 ft) that have a high density of herbs and shrubs (Krabbe and Schulenberg 2003, p. 719; Kattan and Beltrán 1999, p. 272). The current range is estimated to be 300 km^2 (116 mi^2) (BLI 2007f, p. 1), and the species is known today in only three locations: (1) Urcumaí Regional Park (Kattan and Beltrán 1997, pp. 369-370) (Risaralda Department), (2) the south-east slope of Volcán Tolima in the Río Toche Valley (Tolima Department), and (3) the Río Blanco catchment (Caldas Department). These locations are discussed further under Refugia, below.

Deforestation rates and patterns: Colombia has experienced extensive deforestation in the last half of the 20th Century as a result of habitat conversion for human settlements, road building, agriculture, and timber extraction. A 23–year study, from 1973 to 1996, demonstrated that these activities reduced the amount of primary forest cover in Colombia by approximately

3,605 hectares (ha) (8,908 acres (ac)) annually, representing a nearly one-third total loss of primary forest habitat (Viña *et al.* 2004, pp. 123-124). Beginning in the 1980s, habitat loss increased dramatically as a result of influxes of people settling in formerly pristine areas (Perz *et al.* 2005, pp. 26-28; Viña *et al.* 2004, p. 124). More recent studies indicate that the rate of habitat destruction is accelerating. Between the years 1990 and 2005, Colombia lost approximately 52,800 ha (130,471 ac) of primary forest annually (Butler 2006a, pp. 1-3; FAO 2003a, p. 1). Human activities, such as encroachment, cultivation, grazing, and infrastructural development, have resulted in extensive deforestation and environmental degradation of primary forests in the Río Magdalena valley, part of the brown-banded antpitta's range (Cuervo and Salaman 1999, p. 8; Ocampo and Botero 2000, pp. 76-78). These studies and activities in Colombia are described in greater detail above for the blue-billed curassow (Factor A, Deforestation Rates and Patterns).

A study conducted on the effects of habitat fragmentation on Andean birds within western Colombia determined that 31 percent of the historical bird populations in western Colombia had become extinct or locally extirpated by 1990, largely as a result of habitat fragmentation from deforestation and human encroachment (Kattan and Álvarez-Lopez 1996, p. 5; Kattan *et al.* 1994, p. 141). Deforestation has led to local extirpation of the brown-banded antpitta in its type locality, near Laguneta in the central Andes (Quindío Department), where the natural vegetation has been reduced to 10 percent of its former area (Beltrán 2002 in litt., as cited in Beltrán and Kattan, p. 327). Deforestation continues in mid-montane and cloud forests in the Departments Caldas and Risaralda, where this species has been observed (Dolphijn 2005, p. 2). Human encroachment and ongoing deforestation throughout this species' current range are discussed under Refugia, below.

In addition to the direct detrimental effect of habitat loss, there are several indirect effects of habitat disturbance and fragmentation (Brooks and Strahl 2000, p. 10; Silva and Strahl 1991, p. 38). Roads create barriers to animal movement, expose animals to traffic hazards, and increase human access into habitat, facilitating further exploitation and habitat destruction (Hunter 1996, 158-159). Researchers have observed that road building and other infrastructure improvements in previously remote forested areas have increased accessibility and facilitated further habitat destruction, exploitation, and human settlement (Álvarez 2005, p. 2042; Cárdenas and Rodríguez Becerra 2004, pp. 125-130; Etter *et al.* 2006, p. 1; Hunter 1996, 158-159; Viña *et al.* 2004, pp. 118-119).

Illegal drugs and their eradication: Illegal drug crops are cultivated within the brown-banded antpitta's range. In 2003, nearly 80 percent of the heroin entering the United States came from opium (*Papaver somniferum*) farms in the Department of Tolima (Forero and Weiner 2003, p. 1). Cocaine cultivation occurs in other parts of the species' range. In 2003, authorities first detected cocaine being cultivated in Caldas, traditionally the center of the Colombian coffee-growing industry; it was estimated that less than 1 km^2 of land was under cocaine cultivation (0.54 km^2 (0.21 mi^2)). By 2004, cultivation had risen 563 percent, covering a 36 km^2- (14 mi^2-) area (UNODC and GOC 2005, p. 27). Coca crops deplete the soil of nutrients, which hampers regeneration following abandonment of fields (Van Schoik and Schulberg 1993, p. 21). Drug eradication efforts in Colombia have further degraded and destroyed primary forest habitat by using nonspecific aerial herbicides to destroy illegal crops (Álvarez 2005, p. 2042; BLI 2007d, p. 3; Cárdenas and Rodríguez Becerra 2004, p. 355; Oldham and Massey 2002, pp. 9-12). Herbicide spraying has introduced harmful chemicals into brown-banded antpitta habitat and has led to further destruction of the habitat by forcing illicit growers to move to new, previously untouched forested areas (Álvarez 2002, pp. 1088-1093; Álvarez 2005, p. 2042; Álvarez 2007, pp. 133-143; BLI 2007d, p. 3; Cárdenas and Rodríguez Becerra 2004, p. 355; Oldham and Massey 2002, pp. 9-12). Between 1998 and 2002, cultivation of illicit crops increased by 21 percent each year, with a concomitant increase in deforestation of formerly pristine areas of approximately 60 percent (Álvarez 2002, pp. 1088-1093).

Refugia: The most important refugia for the brown-banded antpitta include: (1) Ucumarí Regional Park, (2) the Río Toche Valley, (3) the Río Blanco catchment, and (4) Reserva Departamental del Cañon del Quindío. These refugia are discussed below.

(1) Ucumarí Regional Park (Risaralda Department) covers an area of approximately 44 km^2 (17 mi^2) in the Otún River watershed, with elevations ranging from 1,700 to 2,600m (5,577 to 8,530 ft) (Beltrán and Kattan 2002, pp. 325-326; Kattan and Beltrán 1999, p. 273; Kattan *et al.* 2006, pp. 301-302). The brown-banded antpitta prefers habitat within the upper range limits of this Park, at altitudes between 2,400 and 2,600 m (7,874 and 8,530 ft) (Krabbe and Schulenberg 2003, p. 719; Kattan and Beltrán 1999, p. 272). Most of the forested habitat within the park was cleared in the 1960s for cattle ranching, leaving the remaining natural forests only on the steepest slopes (Kattan and Beltrán 1999, p. 273). Much of the Park has been allowed to naturally regenerate, and plantations of alder (*Alnus acuminata*) and ash (*Fraxinus chinensis*) are overgrown with natural vegetation (Kattan and Beltrán 1997, p. 369). The Park also contains a small area of private pasturelands (Kattan and Beltrán 1997, p. 369), and agricultural expansion, selective logging, and firewood collection are ongoing in the region (BLI 2008a, p. 1).

(2) In Río Toche Valley (Tolima Department), on the south-east slope of Volcán Tolima, the brown-banded antpitta is considered uncommon and local (Beltrán and Kattan 2002, p. 326; BLI 2004c, p. 2; Kattan and Beltrán 2002, p. 238). This habitat is described as fragmented, and it is estimated that the natural cover has been reduced by 15 percent at elevations between 1,900 and 3,200 m (6,234 and 10,499 ft). The majority of suitable habitat is above 2,200 m (7,218 ft) in elevation, and Kattan and Beltrán (2002, p. 238) consider it to be of sufficient size to support a population of brown-banded antpitta, making this an important area of suitable habitat for the species (p. 327).

(3) Río Blanco catchment (Caldas Department) comprises a strip less than 200 km (124 mi) long on the Central Cordilla, between 2,300 and 3,100 m (7,546 and 10,171 ft) (Beltrán and Kattan 2002, p. 325; BLI 2004c, p. 2; Kattan and Beltrán 2002, p. 238). The area is considered to be of sufficient size to support the species (Kattan and Beltrán 2002, p. 238). However, the species has only been observed at this location once, in the year 2000 (Beltrán and Kattan 2002, p. 328).

(4) Reserva Departamental del Cañon del Quindío (Quindío Department): The Department of Conservation and Management of Alto Quindío owns and manages this 56-km^2 (22-mi^2) reserve, which ranges in elevation from 2,600 to 4,000 m (ft) (8,530 to 13,123 ft) (Corporación Autónoma Regional del Quindío 2008). The type locality for the brown-banded antpitta (Laguneta) is located in the Department of Quindío (Beltrán and Kattan 2002, p. 325). Beltrán and Kattan (2002, pp. 238, 327) believe that this Reserve comprises habitat suitable for the brown-banded

antpitta (as described under Current Range, above) and represents an important habitat conservation area for the species (Beltrán and Kattan 2002, p. 327). However, the species has not been observed in Quindío since 1942 (Beltrán and Kattan 2002, p. 325; Collar *et al.* 1992, p. 698) and is considered to be locally extinct there (Beltrán 2002 in litt., as cited in Beltrán and Kattan 2002, p. 327).

Nearly all the other forested habitat below 3,300 m (10,827 ft) in the Central Andes where the brown-banded antpitta occurred historically has been deforested and cleared for agricultural land use (BLI 2004c, p. 2). The remaining forests providing suitable habitat for the brown-banded antpitta have become fragmented and isolated and are either surrounded by or being converted to pasture and agricultural crops (e.g., coffee plantations, potatoes, and beans) (BLI 2004c, p. 2). Approximately 85 percent of forested habitat at altitudes between 1,900 m (6,234 ft) and 3,200 m (10,499 ft) has been converted to other land uses (BLI 2004c, p. 2; Cuervo 2002, p. 327; Stattersfield *et al.* 1998, p. 205). In 1998, forest conversion within the range of the brown-banded antpitta was projected to continue (Stattersfield *et al.* 1998, p. 205). Cuervo (2002, p. 328) estimated that the available suitable habitat for this species totals no more than 500 km^2 (310 mi^2); BirdLife International estimated that the species currently occupies an area 300 km^2 (116 mi^2) in size (BLI 2007f, p. 1).

Deforestation has greatly affected the current population size and distributional range of the brown-banded antpitta (Collar *et al.* 1992, p. 698; Kattan and Beltrán 1997, p. 367). The species was thought to be extinct or on the verge of extinction (Beltrán and Kattan 2002, pp. 326-327; Collar *et al.* 1992, p. 689; Kattan and Beltrán 1997, pp. 367-369), until its rediscovery in 1994 (Kattan and Beltrán 1997, pp. 367-369). The brown-banded antpitta is now confirmed within three localities, including the Ucumarí Regional Park, the Río Toche Valley, and the Río Blanco basin. These habitats are characterized as heterogeneous and fragmented (Beltrán and Kattan 2002, p. 327; Kattan and Beltrán 2002, p. 237). The species is considered extirpated from its type locality (Beltrán 2002 in litt., as cited in Beltrán and Kattan, p. 327), despite the existence of suitable habitat (Beltrán and Kattan 2002, p. 328), suggesting that the species is unable to recolonize areas from which it has been extirpated.

Summary of Factor A

The brown-banded antpitta prefers the humid understory and forest floor habitats of mid-montane and cloud forests between 2,400 and 2,600 m (7,874 and 8,530 ft) and has been observed in older (30–year-old) secondary-growth forest habitats and alder plantations. Habitat destruction, alteration, conversion, and fragmentation continue to be factors affecting the brown-banded antpitta. The direct loss of habitat through widespread deforestation and conversion of primary forests for human settlement and agricultural uses has led to the habitat fragmentation throughout the brown-banded antpitta's range. Cultivation of illegal drug crops, such as cocaine, leads to further deforestation and alters soil compositions, hindering regeneration of abandoned fields. In addition, drug eradication programs involving the aerial spraying of nonspecific herbicides lead to further environmental degradation and destruction of primary forest habitat. The current populations are small, very localized, and limited to a narrow elevational band that contains fragmented, disjunct, and isolated habitat. The species does not appear capable of recolonizing areas of suitable habitat that are isolated from extant locations (see Factor E, Likelihood to Disperse).

Historically, the species was known only in one location, near Laguneta, which had been reduced to 10 percent of its original vegetative cover by 1994. Currently, the species' range is estimated to be 300 km^2. The destruction and fragmentation of the remaining primary forested habitat is expected to continue, with ongoing human encroachment bringing increased population pressures and drug crop production, along with infrastructural improvements that facilitate encroachment into previously inaccessible areas. Therefore, we find that the present destruction, modification, and curtailment of habitat are a threat to the brown-banded antpitta throughout all of its range.

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

We are not aware of any information currently available that addresses the occurrence of overutilization that may be causing a decline of the brown-banded antpitta. Therefore, we do not consider overutilization for commercial, recreational, scientific, or educational purposes to be a threat to the brown-banded antpitta.

C. Disease or Predation

Disease: We are unaware of information regarding disease or the potential for significant disease outbreaks in the brown-banded antpitta. As a result, we do not consider disease to be impacting the status of the species in the wild.

Predation: Both terrestrial and avian predators prey upon antpittas, including the mountain coati (*Nasuella olivacea*), tayra (*Eira barbara*—in the weasel family), squirrel cuckoo (*Piaya cayana*), and crimson-rumped toucanet (*Aulacorhynchus haematopygus*) (Dobbs *et al.* 2001, p. 231). Brown-banded antpittas are a ground dwelling, nearly flightless species (Beltrán and Kattan 2002, p. 327; Krabbe and Schulenberg 2003, p. 719). Antpittas generally react non-confrontationally in response to potential predators, relying on camouflage as a defense mechanism. Nesting birds rarely call from atop their nests (Wiedenfeld 1982, p. 580); they rely on their cryptic plumage and remain still to avoid detection when potential predators approach (Dobbs *et al.* 2001, pp. 226, 230). As discussed in detail above for the blue-billed curassow (Factor C, Predation), research on Andean understory nesting birds that are similar to the ground-dwelling brown-banded antpitta (Beltrán and Kattan 2002, p. 327) indicated that predation rates increase in isolated and fragmented forest habitats, especially smaller forest patches that facilitate predator access to the understory (Arango-Vélez and Kattan 1997, p. 138; Gibbs 1991, p. 157; Hoover *et al.* 1995, p. 151; Keyser *et al.* 1998, p. 991; Keyser 2002, p. 186; Renjifo 1999, p. 1133; Wilcove 1985, p. 1214).

Summary of Factor C

Mountain coatis, tayras, squirrel cuckoos, and crimson-rumped toucanets are known antpitta predators. Predation results in the direct removal of eggs, juveniles, and adults from the population. The brown-banded antpitta produces a low clutch size (see Habitat and Life History), and predation can remove potentially reproductive adults from the breeding pool. Moreover, habitat fragmentation has occurred and is ongoing throughout the brown-banded antpitta's range (Factor A). Studies on similar species in similar Andean habitats indicate that vulnerability to predation increases with increased habitat fragmentation and smaller patch sizes. The brown-banded antpitta does not have sophisticated anti-predator response mechanisms, making this species particularly vulnerable to an increased

risk of predation. Predation exacerbates the genetic complications associated with the species' small population size (Factor E). Because of the species' small population size and inability to recolonize isolated habitat fragments (Factor E), predation renders the species vulnerable to local extirpation. Therefore, we find that predation, exacerbated by ongoing habitat destruction (Factor A), is a threat to the brown-banded antpitta.

D. The Inadequacy of Existing Regulatory Mechanisms

Regulatory mechanisms may provide species-specific or habitat-specific protections. An evaluation of the adequacy of regulatory mechanisms within Colombia to mitigate or remove the threats to the brown-banded antpitta is provided below, beginning with species-specific and followed by habitat-specific protection mechanisms.

Colombia has enacted numerous laws to protect species and their habitats (Matallana-T. 2005, p. 121). The brown-banded antpitta is listed as an endangered species under Colombian Law 99 of 1993 (EcoLex 1993, p. 2) and Resolution No. 584 of 2002 (EcoLex 2002, pp. 10, 12). A full description of these laws and the categorization of threatened species in Colombia were provided above, as part of the Factor D analysis for the blue-billed curassow. This threat status confers protections upon the species, including protection from commercial take under Resolution No. 849 of 1973 and Resolution No. 787 of 1977 (EcoLex 1973, p.1; EcoLex 1977, p. 3). Hunting is not a threat to this species. Therefore, this law is not effective at reducing the primary threat to the species—habitat destruction.

Colombia has enacted numerous forestry laws and forestry management practices (Law No. 2 (EcoLex 1959); Decree No. 2,811 (Faolex 1974); Decree No. 1,791 (Faolex 1996); Law No. 1,021 (EcoLex 2006)). Weaknesses in the implementation of these laws and the decentralized nature of Colombian resource management are described in detail above for the blue-billed curassow (Factor D) (ITTO 2006, pp. 218-9, 222; Matallana-T. 2005, pp. 121-122). The brown-banded antpitta ranges in multiple Departments (currently known in Risaralda, Caldas, and Tolima), all of which are administered by different autonomous Corporaciónes. Habitat destruction, the primary threat to the brown-banded antpitta, is ongoing throughout the species' range (Factor A). The lack of a national conservation strategy for the brown-banded antpitta, combined with decentralized natural resource management in Colombia, may hamper conservation of the brown-banded antpitta. The existing laws and the decentralized nature of forestry management are ineffective at protecting the brown-banded antpitta and its habitat even within protected areas (Brooks and Gonzalez-Garcia 2001, p. 183).

Colombia has several categories of national habitat protection (Matallana-T. 2005, p. 121-122), which were described above, as part of the Factor D analysis for the blue-billed curassow (Matallana-T. 2005, p. 121-122). Of the four areas identified as refugia for the brown-banded antpitta, two are considered protected areas under Colombian law: (1) the Ucumarí Regional Park and (2) Reserva del Cañon del Quindío.

(1) The Ucumarí Regional Park (Risaralda Department) is managed by the Corporación Autónoma Regional de Risaralda (CARDER) (BLI 2008a, p. 3), with the primary goals of conservation and ecotourism. The Park is managed for multiple uses, including agriculture and cattle grazing (BLI 2008a, p. 1), and includes recreation and commercial areas for activities such as camping and freshwater fishing (CARDER 1995, pp. 3-4). According to the management plan for the Park that was instituted in 1995, recreational and commercial activities are permitted only when they do not significantly alter the environment (CARDER 1995, pp. 3-4). However, according to BirdLife International (2008a, p. 3), there has been little in the way of conservation planning, and the habitat within the protected area continues to undergo pressures from agricultural expansion, firewood collection, and selective cutting. Consequently, the threat from habitat destruction (Factor A) is not reduced or ameliorated.

(2) Reserva del Cañon del Quindío (Quindío Department) is managed by the Corporación Autónoma Regional del Quindío (2008, p. 1). According to the management plan for the Department of Quindío <*www.crq.gov.co/documentos/PAT_CRQ_2007_2009.pdf*>, between 2007 and 2009, forestry planning will commence for the entire Department with the goal of completing forest plans for four different areas within the Department by the end of 2009. There is no information to indicate which areas will be included in this initial planning development phase. Therefore, we are unable to determine what protections may exist for the brown-banded antpitta within this Reserve. Moreover, as discussed under Factor A, although this Reserve contains suitable habitat for the brown-banded antpitta (Beltrán and Kattan 2002, p. 328), there are no known populations of the brown-banded antpitta within this Reserve (Beltrán and Kattan 2002, p. 325; Collar *et al.* 1992, p. 698). Threfore, the threat from habitat destruction (Factor A) is not reduced or ameliorated within this area.

Summary of Factor D

Colombia has numerous laws and regulatory mechanisms to administer and manage wildlife and their habitats. The brown-banded antpitta is listed as endangered under Colombian law and lives within forested or protected areas that are regulated by law. However, on-the-ground enforcement of existing wildlife protection and forestry laws and oversight of the local jurisdictions implementing and regulating activities are ineffective at mitigating the primary threat to the brown-banded antpitta. As discussed for Factor A, habitat destruction, degradation, and fragmentation continue throughout the existing range of the brown-banded antpitta. Under Colombian law, there are two protected areas containing suitable habitat for the brown-banded antpitta. The species is known to occur in only one of these areas, wherein resources are managed for commercial and recreational uses. Conservation planning within both areas is lacking, so that the existence of these protected areas does not mitigate the threat of habitat loss. Therefore, we find that the existing regulatory mechanisms currently in place are inadequate to mitigate the primary threats to the brown-banded antpitta.

E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

Two additional factors affect the brown-banded antpitta: itslikelihood to disperse and their small population size.

Likelihood to Disperse: The brown-banded antpitta exhibits several characteristics indicative of its vulnerability to local extirpation and inability to recolonize previously inhabited locations, despite the presence of suitable habitat. This ground-dwelling species (Beltrán and Kattan 2002, p. 327) has a high territorial fidelity and, although dispersal capabilities are not well-known (Cuervo 2002, p. 327) except those in the banding study by Kattan and Beltrán (2002, p. 234), the farthest known distance traveled by any one individual bird was 0.041 km^2 (0.02 mi^2). This suggests that the brown-banded antpitta is unable to repopulate an isolated patch of suitable habitat following decline or local extirpation of that patch (Cuervo and Salaman 1999, p.

7; Hanski 1998, pp. 45-46). The local extirpation of this species from its type locality in Laguneta, Quindío (Beltrán and Kattan 2002, p. 327), and the lack of recolonization despite the existence of suitable habitat in the Cañon del Quindío Reserve, support the hypothesis that the species may be incapable of dispersing to suitable habitat fragments without human intervention. To the best of our knowledge, there are no recovery or reintroduction programs in place for this species.

Small Population Size: There have been few quantitative studies of brown-banded antpitta populations. A total of 48 individuals have been directly observed at two locations (Ucumarí Regional Park and Río Toche) (Cuervo in litt., as cited in Beltrán 2002 p. 326; Kattan and Beltrán 1997, pp. 367-369; Kattan and Beltrán 1999, p. 276; Kattan and Beltrán 2002, pp. 232-233), 30 have been inferred at one location (Río Blanco) (Beltrán and Kattan 2002, p. 326), and up to 106 have been predicted to occur in one subpopulation within the brown-banded antpitta's current range (Ucumarí Regional Park) (Kattan and Beltrán 1997, pp. 367-369; Kattan and Beltrán 1999, p. 276; Kattan and Beltrán 2002, pp. 232-233). From work at Ucumarí Regional Park, Kattan and Beltrán (1997, pp. 367-369; Kattan and Beltrán 1999, p. 276) predicted a population density of approximately 1.3 individuals per .01 km^2 (0.004 mi^2).

The IUCN has estimated the brown-banded antpitta's total population size to be more than 250 and fewer than 999 adult individuals in a 300-km^2 (116-mi^2) area (BLI 2007f, p. 1). However, this is a categorical approximation based on the following extrapolation: an expected average of 2.5 to 5.6 individuals per square kilometer multiplied by 45 percent of the extent of occurrence (300 km^2) (116 mi^2) (BLI 2007f, p. 1), leading to estimated population numbers between 338 and 756 individuals (BLI 2007f, p. 4). While this density is well within Kattan and Beltrán's (1997, pp. 367-369; Kattan and Beltrán 1999, p. 276) predicted population density of 1.3 individuals per .01 km^2 (116 mi^2), it should be noted that extrapolating population sizes based on the availability of suitable habitat may result in an overestimate for the brown-banded antpitta for several reasons: (1) the species may not be randomly distributed within the given habitat; (2) extrapolation does not take into account human-induced threats, such as disturbance or hunting; and (3) not all individuals within the population are breeding at any one time, so that the actual number of individuals contributing to population growth will be a smaller number than the total number of individuals. In a review by Jetz *et al.* (2008, p. 110) of 1,158 well-studied bird species in Australia, North America, and southern Africa, Jetz *et al.* (2008, p. 115) found that most species occurred in only 40-70 percent of the predicted range. They further noted that narrow-ranging species, such as the brown-banded antpitta, are particularly subject to population size overestimation, because they are unlikely to be randomly distributed within the habitat (Jetz *et al.* 2008, p. 116). Moreover, at-risk species, existing in declining, fragmented populations (as is the case for the brown-banded antpitta) are often absent from suitable but suboptimal habitat, thus exacerbating range overestimates (Jetz *et al.* 2008, p. 115). For instance, although suitable habitat exists in the species' type locality (Laguneta) in the Cañon del Quindío Reserve, the species has not been observed there since 1942 and is considered extirpated from this locality (Beltrán and Kattan 2002, p. 327; Collar *et al.* 1992, p. 698). Thus, the species appears to be incapable of repopulating suitable habitat on its own accord (Beltrán and Kattan 2002, p. 328; Jetz *et al.* 2008, p. 115) and the existence of suitable habitat does not connote the presence of the species. This conclusion is supported by Beltrán and Kattan (2002, p. 328), who noted that, out of a potential habitat of 855 km^2 (330 mi^2), the species did not occupy two of the seven historical localities, prompting them to reduce the estimated area of occupancy to no more than 500 km^2. Thus, ground-truthing is essential to accurate population-size estimations. The IUCN is reviewing this situation to improve upon conservation assessments (Jetz *et al.* 2008, p. 117), and although it may be an overestimate, the figure ranging from 338 to 756 individuals represents the best information on population size.

Based on genetic considerations, in the absence of quantitative studies specific to this species, a generally accepted approximation of minimum viable population size is described by the 50/500 rule (Shaffer 1981, p. 133; Soulé 1980, pp. 160-162). According to this rule, the minimum viable population size is defined as the minimum number of individuals that is sufficient to respond over time to unexpected environmental conditions within the species' habitat (Shaffer 1981, pp. 132-133; Soulé 1980, pp. 160-162). This rule states that an effective population size (N_e) of 50 individuals is the minimum size required to avoid imminent risks from inbreeding. N_e represents the number of animals in a population that actually contribute to reproduction, and is often much smaller than the census, or total number of individuals in the population (N). Furthermore, the rule states that the long-term fitness of a population requires an N_e of at least 500 individuals, so that it will not lose its genetic diversity over time and will maintain an enhanced capacity to adapt to changing conditions. Therefore, an analysis of the fitness of this population would be a good indicator of the species' overall survivability. The available information for 2007 indicates that the total global population of the brown-banded antpitta may range between 338 and 756 individuals (BLI 2007f, p. 4); 338 is above the minimum effective population size required to avoid risks from inbreeding ($N_e = 50$), and 756 is above the upper threshold for long-term fitness ($N_e = 500$).

Given that the global population size is a qualitative assessment that may be an overestimate, that the actual number of breeding pairs is unknown but smaller than this number, and that the species exists in subpopulations that are unlikely to disperse into other locations, it is beneficial to analyze the fitness of the subpopulations that have been quantitatively assessed. The best-studied subpopulation is located within the Ucumarí Regional Park. A total of 47 individuals have been directly observed, and researchers estimate that the area may support as many as 106 individuals (Kattan and Beltrán 1997, pp. 367-369; Kattan and Beltrán 1999, p. 276; Kattan and Beltrán 2002, pp. 232-233). Forty-seven is just below the minimum effective population size required to avoid risks from inbreeding ($N_e = 50$ individuals). Moreover, the upper estimate of 106 individuals (not all of which will be reproducing) is approximately one-fifth of the upper threshold ($N_e = 500$ individuals) required for long-term fitness of a population that will not lose its genetic diversity over time and will maintain an enhanced capacity to adapt to changing conditions. Therefore, we currently consider the species to be at risk due to the lack of near- and long-term viability.

Small population sizes render species vulnerable to genetic risks that can have individual or population-level consequences on the genetic level and can increase the species' susceptibility to demographic problems, as explained in more detail above for the blue-billed curassow (Factor E, Small Population Size) (Charlesworth and Charlesworth 1987, p. 238; Shaffer 1981, p. 131). Once a population is reduced below a certain

number of individuals, it tends to rapidly decline towards extinction (Franklin 1980, pp. 147-148; Gilpin and Soulé 1986, p. 25; Holsinger 2000, pp. 64-65; Soulé 1987, p. 181).

The brown-banded antpitta's restricted range, combined with its small population size (Cuervo and Salaman 1999, p. 7; Cuervo 2002, p. 138; del Hoyo 1994, p. 361) and low prospect for dispersal (Beltrán and Kattan 2002, p. 326; BLI 2004c, p. 2; Cuervo and Salaman 1999, p. 7; del Hoyo 1994, p. 361; Kattan and Beltrán 1997, pp. 369-370; Kattan and Beltrán 1999, p. 273; Kattan and Beltrán 2002, p. 238) makes the species particularly vulnerable to the threat of adverse natural (e.g., genetic, demographic, or stochastic) and manmade (e.g., habitat alteration and destruction) events that destroy individuals and their habitats (Brooks and Gonzalez-Garcia 2001, pp. 185-190; Holsinger 2000, pp. 64-65; Primack 1998, pp. 279-308; Young and Clarke 2000, pp. 361-366).

Summary of Factor E

The brown-banded antpitta's small population size increases its vulnerability to genetic risks associated with small population sizes that negatively impact the species' long-term viability and increase the possibility of localized extirpations of the remaining fragmented populations. Further, the species is unlikely to repopulate areas of suitable habitat from which it has been locally extirpated because it exhibits high territorial fidelity and has never repopulated suitable existing habitat within the Department of Quindío, where the species' type locality (Laguneta) is located and the species has not been observed since 1942. Consequently, we believe that, in combination with the risks to the species from habitat destruction (Factor A) and predation (Factor C), the brown-banded antpitta is vulnerable to localized extirpation or extinction from which the species would be unable to recover, due it its small population size and apparent inability to repopulate fragmented, isolated habitats such as that currently present within this species' range.

Status Determination for the Brown-Banded Antpitta

The four primary factors that threaten the survival of the brown-banded antpitta are: (1) habitat destruction, fragmentation, and degradation (Factor A); (2) predation (Factor C); (3) inadequacy of regulatory mechanisms to reduce the threats to the species (Factor D); and (4) small population size and isolation of remaining populations (Factor E).

The direct loss of habitat through widespread deforestation and conversion of primary forests to human settlement and agricultural uses has led to the fragmentation of habitat throughout the range of the brown-banded antpitta and isolation of the remaining populations. The species has been locally extirpated in its type locality and has experienced a 55 percent reduction of suitable habitat, and its range is estimated to be 300 km^2 (116 mi^2).

Brown-banded antpittas are vulnerable to predation by mountain coatis, tayras, squirrel cuckoos, and crimson-rumped toucanets (Factor C). Habitat fragmentation (Factor A) contributes to this vulnerability, because research indicates that predation increases with increased habitat fragmentation and smaller patch sizes. Predation leads to the direct removal of eggs, juveniles, and adults from the population, exacerbating risks associated with the species' small population size and the risk of local extirpation (Factor E). Brown-banded antpittas, as with other antpittas, produce a low clutch size (see Habitat and Life History) and predation can destroy pair bonds and remove potentially reproductive adults from the breeding pool.

The threats from habitat destruction (Factor A) and predation (Factor C) are compounded by the species' small population size (Factor E). The brown-banded antpitta has undergone a population decline that is closely associated with a reduction in range caused by habitat destruction (Factor A). The brown-banded antpitta's small population size of between 338 and 756 individuals is likely to be an overestimate based on the fact that population sizes for narrow-ranging species are typically overestimated when based on extent of occurrence. The species' subpopulations, one of which is estimated to include only 46 to 106 individuals, are isolated from each other. The species' confirmed absence from suitable habitat within its historic range, combined with the species' high territorial fidelity, suggests that the species is incapable of repopulating suitable habitat without human intervention. We are unaware of any reintroduction or recovery programs for this species. The species' small population size increases its vulnerability to natural and human factors (e.g., genetic isolation, agricultural development, increased human settlement, and road development) that could lead to local extirpation, which the species has already experienced in its type locality due to habitat destruction. Within the last three generations, or 10 years, the brown-banded antpitta has undergone up to a 9 percent reduction in population size and, at the current level of habitat destruction, this rate of decline is projected to continue over the next 10 years. Below a certain number, species are unable to recover and, given the small number and isolated nature of existing populations, such reductions in numbers could lead to extinction of the brown-banded antpitta.

Although Colombia has adopted numerous laws and regulatory mechanisms to administer and manage wildlife and their habitats, on-the-ground enforcement of these laws and oversight of the local jurisdictions implementing and regulating activities are inadequate to address the primary threat to this species, which is habitat loss (Factor A). Several populations of brown-banded antpitta are within sanctuaries or preserves; however, habitat destruction and hunting continues within the areas, and regulations are not uniformly enforced, monitoring is limited, and management plans are not developed or implemented, resulting in ineffective protective measures for conservation of the species.

We have carefully assessed the best available scientific and commercial information regarding the past, present, and potential future threats faced by the brown-banded antpitta. We consider the ongoing threats to the brown-banded antpitta, habitat destruction (Factor A) and predation (Factor C), exacerbated by the species' small population size and limited dispersal ability (Factor E), and compounded by inadequate regulatory mechanisms to mitigate these threats (Factor D), to be equally present and of the same magnitude throughout the species' entire current range. Based on this information, we conclude that the brown-banded antpitta is in danger of extinction throughout all of its range. Therefore, we are proposing to list the brown-banded antpitta as an endangered species.

III. Cauca Guan (*Penelope perspicax*)

Species Description

The Cauca guan, a member of the Cracid family, is endemic to the central and western slopes of the Andes of Colombia (Brooks and Strahl 2000, p. 13; Delacour and Amadon 2004, pp. 133-135; Hilty and Brown 1986, p. 125). It is a large bird, measuring approximately 76 cm (30 in) in length (Hilty and Brown 1986, p. 125). The

species is locally known as ''*Pava Caucana*'' (Renjifo 2002, p. 124; Rios *et al.* 2006, p. 17). The Cauca guan is described as a ''drab'' brown-gray, with a chestnut-colored rear part and tail, and a bright red dewlap (a flap of skin hanging beneath its lower jaw) (BLI 2007h, p. 1).

Taxonomy

The Cauca guan was first taxonomically described by Bangs in 1911 and placed in the Cracidae family (BLI 2007h, p. 1).

Habitat and Life History

The Cauca guan has been observed in mature tropical humid forests and in fragmented secondary forests, forest edges, and plantations of the exotic Chinese ash (*Fraxinus chinensis*) trees that are located within 1 km (0.62 mi) of primary forest (Kattan *et al.* 2006, p. 299; Renjifo 2002, p. 127; Rios *et al.* 2006, pp. 17-18). Older reports indicate that the species once inhabited dry forests in the Cauca, Patía, and Dagua River valleys (Renjifo 2002, p. 126). The Cauca guan requires large territories for foraging (Kattan 2004, p. 11), but today is relegated mostly to small forest fragments (Kattan *et al.* 2006, p. 301). This species, as with other guans, tends to aggregate within its habitat, generally based on resource availability. For instance, Cauca guans tend to congregate around fruit trees at certain times of year. Thus, depending on the time of year, improper sampling might tend to overestimate or underestimate the population (Kattan *et al.* 2006, p. 305). Cauca guans are reportedly timid in the presence of humans (Rios *et al.* 2006, p. 21).

Cauca guans feed mostly on fruit and leaves (including those of the non-native Chinese ash trees) and occasionally on invertebrates and flowers (Muñoz *et al.* 2006, p. 49; Renjifo 2002, p. 127; Rios *et al.* 2006, pp. 17-18). Although primarily terrestrial, the species is occasionally found in the upper stories of forests obtaining food. Because fruit availability within a forest is spatially and temporally variable, guans must undergo regional movements in pursuit of fruiting plants. The species is usually found singly, in pairs, or in groups of up to six individuals. The largest recorded gathering of Cauca guans was 30 individuals (Rios *et al.* 2006, p. 16). There are two breeding seasons coinciding with the rainy seasons, one at the beginning of the year and another in August (Rios *et al.* 2006, p. 17). Nests are circular cups made of leaves and small branches (Renjifo 2002, p. 127), and the typical clutch size is two eggs, which is considered low. Guans remain paired during the breeding period and until chicks are 1 year in age; this is considered a long fledging period (Rios *et al.* 2006, p. 17). Cracids are also slow to reproduce, with a replacement rate of at least 6 years (Silva and Strahl 1991, p. 50).

Historical Range and Distribution

The Cauca guan's historical distribution included the east slopes of the West Andes and the Cauca, Patía, and Dagua Valleys, in the Departments of Cauca, Quindío, Risaralda, and Valle de Cauca. The historic range is estimated to have been approximately 24,900 km^2 (9,614 mi^2) (Renjifo 2002, p. 128). In the early part of the 20th Century, the Cauca guan inhabited the dry forests of the Cauca, Dagua, and Patía Valleys (Renjifo 2002, p. 128). The Cauca Valley lies between the central and western Andes and spans the Departments of Cauca, Valle de Cauca, Quindío, and Risaralda (WWF 2001a, p. 1). The Dagua Valley lies on the Pacific side of the western Andes, in Valle de Cauca; it is described as an isolated valley of dry forest that changes in elevation from 400 to 2,000 m (1,312 to 6,562 ft) and is surrounded at upper elevations by humid forest to the west and cloud forest to the north, south, and east (Silva 2003, p. 4). The Patía Valley lies between the central and western Andes in the Department of Cauca, in southwestern Colombia; it has a mean altitude of 600-900 m (1,969-2,953 ft) (WWF 2001c, p. 1). This area was once covered in wetlands, humid forests, and dry forests. Today, most of the dry forests have been eliminated and highly fragmented, such that continuous forest exists only above 2,000 m (6,562 ft) (Renjifo 2002, p. 128).

From the beginning of the 20th Century through the 1950s, the species was considered common (BLI 2007h, p. 1; Renjifo 2002, p. 126). Between the 1970s and 1980s, there was extensive deforestation in the Cauca Valley, and the species went unobserved during this time, leading researchers to suspect that the Cauca guan was either extinct or on the verge of extinction (Brooks and Strahl 2000, p. 14; del Hoyo 1994, pp. 337, 349; Hilty 1985, p. 1004; Hilty and Brown 1986, p. 125). The species was rediscovered in 1987 (Renjifo 2002, p. 124).

Current Range and Distribution

Today, the Cauca guan inhabits the eastern and western slopes of the West and Central Andes Mountain ranges, in the Departments of Cauca, Quindío, Risaralda, and Valle de Cauca (BLI 2007h, p. 1; Kattan *et al.* 2006, pp. 299, 301; Renjifo 2002, pp. 124-126). Since 1987, most observations of this species have been at elevations ranging from 1,400 to 2,000 m (4,593 to 6,562 ft) (Renjifo 2002, pp. 124-125), with an occasional sighting at altitudes well below (i.e., 816 m (2,677 ft)) or well above (i.e., 2,690 m (8,825 ft)) this altitudinal range (Muñoz *et al.* 2006, p. 54; Renjifo 2002, pp. 124-125; Rios *et al.* 2006, p. 17). The Ucumarí Regional Park is considered the stronghold of the species (BLI 2007h, p. 1) (see Population Estimates).

The habitat consists primarily of forest fragments, and although continuous cover remains at elevations above 2,000 m (6,562 ft) (Kattan *et al.* 2006, p. 303), researchers have not ascertained whether the species inhabits these higher-altitude contiguous forest areas (Renjifo 2002, p. 129). The current range of the species totals less than 750 km^2 (290 mi^2), of which only 560 km^2 (216 mi^2) is considered suitable habitat (BLI 2007h, p. 1; Kattan *et al.* 2006, p. 299; Rios *et al.* 2006, p.17).

Population Estimates

Cauca guan populations are characterized as small, ranging from only tens of individuals or, in rare instances, hundreds (Renjifo 2002, p. 12). BirdLife International reported that the largest subpopulation contained an estimated 50 to 249 individuals; however, they do not specify to which population this refers, and these figures are not found in any of the other literature regarding population surveys of the Cauca guan. Ucumarí Regional Park has been considered the stronghold of the species (BLI 2007h, p. 1). Sixteen individuals were counted in 1990, and the species was characterized as ''common'' in plantations in 1994-1995 (Wege and Long 1995, p. 141). Since then, there have been scant sightings of Cauca guan there (Renjifo 2002, p. 125; Wege and Long 1995, p. 141), including the observation of one individual in the Park in 2004 (Scanlon 2004, pp. 1-3). There have been no population surveys within the Park to determine the species' current population size therein.

Munchique National Natural Park (Cauca) is considered to be the most important locality for this species in the southern portion of its range because of the extensive remaining forest habitat, although habitat destruction is ongoing there (see Factor A). The species was last recorded in Munchique in 1987, but has not been confirmed there since (Kattan *et al.* 2006, p. 305; Muñoz *et al.* 2006, p. 54; Salaman in litt. 1999, 2000, as cited in BLI 2007h, p. 2).

Kattan *et al.* (2006, p. 302) conducted the only two population surveys in 2000

and 2001 (Muñoz *et al.* 2006 p. 55). They estimated population densities at two locations, Otún-Quimbaya Flora and Fauna Sanctuary (Risaralda) and Reserva Forestal de Yotoco (Valle de Cauca), to be 144-264 individuals and 35-61 individuals, respectively (Kattan *et al.* 2006, p. 304). Kattan *et al.* (2006, p. 302) also examined 10 additional localities, based on locality data reported by Renjifo (2002, pp. 124-125). Visual confirmations were made at only 2 of the 10 localities (Reserva La Sirena and Chorro de Plata, both in the Department of Valle de Cauca), where the extent and occurrence of the populations have yet to be determined (Kattan *et al.* 2006, p. 303). Auditory confirmations were made at 5 of the 10 localities, including: La Zulia, Chicoral, Las Brisas, San Antonio, and Planes de San Rafael (Kattan *et al.* 2006, p. 302).

In 2006, Kattan (in litt., as cited in Muñoz *et al.* 2006 p. 55) estimated the global population to be between 196 and 342 individuals. The IUCN has placed the Cauca guan in the population category ranging from 250 to no more than 1,000 (BLI 2007h, pp. 1, 3). Overall, the population is considered to be in decline (BLI 2007h, p. 2; Kattan 2004, p. 6; Renjifo 2002, p. 129).

Conservation Status

The Cauca guan is listed as endangered under Colombian law (EcoLex 2002, p. 12). The IUCN categorizes the species as ''Endangered'' due to its small, contracted range composed of widely fragmented patches of habitat (BLI 2004e, p. 1).

Summary of Factors Affecting the Cauca Guan

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

Historically, Cauca guans were considered common (BLI 2007h, p. 1; Renjifo 2002, p. 126). They inhabited the eastern slopes of the west Andes and the dry forests of the Cauca, Dagua, and Patía Valleys, in the Departments of Cauca, Quindío, and Valle del Cauca (Renjifo 2002, p. 124) (see Historical Distribution, above), in a range extending over approximately 24,900 km² (9,614 mi²). Extensive habitat destruction and fragmentation since the 1950s has resulted in an estimated 95 percent range reduction (Chapman 1917, p. 195; Collar *et al.* 1992, p. 126; Kattan *et al.* 2006, p. 299; Renjifo 2002, pp. 126-127; Rios *et al.* 2006, p. 17). As a result, although it prefers mature tropical humid forests, the Cauca guan exists primarily in fragmented and isolated secondary forest remnants, forest edges, and in feral plantations of the exotic Chinese ash trees that are located within 1 km (0.62 mi) of primary forest (Kattan *et al.* 2006, p. 299; Renjifo 2002, p. 127; Rios *et al.* 2006, pp. 17-18). Its current range is estimated to be less than 750 km² (290 mi²), of which only 560 km² (216 mi²) is considered suitable habitat (BLI 2007h, p. 2; Kattan *et al.* 2006, p. 299; Rios *et al.* 2006, p. 17). It is estimated that more than 30 percent of this loss of habitat has occurred within the last three generations, or 30 years (Renjifo 2002, p. 129).

Deforestation rates and patterns: Colombia has experienced extensive deforestation in the last half of the 20th Century as a result of habitat conversion for human settlements, road building, agriculture, and timber extraction. A 23–year study, from 1973 to 1996, demonstrated that these activities reduced the amount of primary forest cover in Colombia by approximately 3,605 ha (8,908 ac) annually, representing a nearly one-third total loss of primary forest habitat (Viña *et al.* 2004, pp. 123-124). Beginning in the 1980s, habitat loss increased dramatically as a result of influxes of people settling in formerly pristine areas (Perz *et al.* 2005, pp. 26-28; Viña *et al.* 2004, p. 124). More recent studies indicate that the rate of habitat destruction is accelerating. During the period 1990-2005, Colombia lost approximately 52,800 ha (130,471 ac) of primary forest annually (Butler 2006a, pp. 1-3; FAO 2003a, p. 1). These studies and activities are described in greater detail above, as part of the Factor A analysis for the blue-billed curassow (Deforestation Rates and Patterns).

Human-induced deforestation and environmental degradation have caused the Cauca guan to shift its range and elevational distribution to the few remaining forest remnants. The Cauca guan was once considered to occur only on the eastern slopes of the West Andes and Cauca, Patía, and Dagua Valleys (Renjifo 2002, p. 128). Today, the species occurs on the western slopes of the central and western Andes of Colombia (BLI 2007h, p. 1; Delacour and Amadon 2004, p. 135; Kattan *et al.* 2006, p. 299; Renjifo 2002, p. 124). During the latter half of the 20th Century, much of the lower-elevation forests in the Río Cauca Valley, where the species was observed most often between 1937 and 1963 (Renjifo 2002, p. 124), were deforested. Habitat destruction and alteration in the sub-Andean slopes around the Cauca, Dagua and Patía Valleys has left only a few hundred hectares (100 hectares = 1 km² = 0.39 mi²) of isolated, small, fragmented forest remnants, and the Cauca guan is absent from most of these fragments (Renjifo 2002, p. 128). The species has been extirpated from the Cauca and Dagua Valleys, but may still exist in patches within the Patía Valley (Renjifo 2002, p. 128). Beginning in 1989, the species was observed several times in the Department of Risaralda, in an area and at elevations that were not part of the species' historic range, but represent the extreme fringe of its former range (Renjifo 2002, pp. 124-5).

Habitat destruction and alteration, in addition to shifting the species to the fringes of its former range, have caused the Cauca guan to shift in its altitudinal distribution (Cuervo and Salaman 1999, p. 8). Nearly all the forested habitat below 3,300 m (10,827 ft) in the Central Andes, where the Cauca guan occurs today, has been deforested and cleared for agricultural land use, such as pasture, coffee plantations, potatoes, and beans (BLI 2004c, p. 2). Approximately 85 percent of forested habitat at altitudes between 1,900 m (6,234 ft) and 3,200 m (10,499 ft) has been converted to other land uses (BLI 2004c, p. 2; Cuervo 2002, p. 327; Stattersfield *et al.* 1998, p. 205). By 1994, in Quindío, extensive deforestation at elevations between 1,800 and 2,600 m (5,905 and 8,530 ft) led to the destruction of much of the Cauca guan's preferred habitat of mature humid forests (Collar *et al.* 1994, p. 136). Prior to the species' rediscovery in 1987, its altitudinal range was between 1,300 and 2,100 m (4265 and 6890 ft) (del Hoyo 1994, p. 349; Hilty and Brown 1986, p. 125), with occasional sightings at lower elevations in the Patía Valley (between 642 and 650 m (2,106 and 2,133 ft) (Hilty and Brown 1986, p. 125; Renjifo 2002, pp. 124-125). Since 1987, the Cauca guan has been observed only in the remaining and much-restricted forest remnants of the following Departments: Cauca (in the years 1987, 1989, and 1992), Quindío (1995 – 1997), Risaralda (1989, 1995-1997, 2000, 2001), and Valle de Cauca (1988, 1999, 2000) (Delacour and Amadon 2004, p. 135; Kattan *et al.* 2006, p. 299; Renjifo 2002, pp. 124-125). Renjifo (2002, pp. 124-125) provided detailed observation records indicating that reports since 1987 ranged in altitude between one sighting at 900 m (2,953 ft) in the Patía Valley in 1992, and the rest between 1,350 and 2,690 m (4,429 and 8,825 ft). In 2006, Muñoz *et al.* (2006, p. 54) reported the species' range as being between 1,200 and 2,600 m (3,937 and 8,530 ft) and Rios *et al.* (2006, p. 17) reported the species' range as 1,000-2,500 m (3,281-8,202 ft). These ranges

are consistent with recent observations of the species. Kattan *et al.* (2006, pp. 299, 301) reported its range as 1,000-2,000 m (3,281-6,562 ft), noting that recent sightings at higher elevations demonstrated that the species has shifted its altitudinal range, as deforestation throughout much of Cauca, Dagua, and Patía Valley has left only isolated forest fragments remaining at elevations below 2,000 m (6,562 ft). Although continuous cover remains in some locations above 2,000 m (6,562 ft) (Kattan *et al.* 2006, p. 303), researchers are uncertain whether the species inhabits these areas (Renjifo 2002, p. 129). The mid-montane and cloud forests in the Department of Risaralda, where this species was observed as recently as the year 2000 (Renjifo 2002, p. 124), continue to undergo deforestation (Dolphijn 2005, p. 2). In Cauca, timber extraction and mining are ongoing (Urueña *et al.* 2006, p. 42). Deforestation and habitat alteration are ongoing throughout the Cauca guan's limited range of 560 km² (216 mi²).

Illegal drugs and their eradication: Cocaine and opium have been cultivated throughout the Cauca guan's range. The cultivation of illegal crops (including coca and opium) in Colombia destroys montane forests (Balslev 1993, p. 3). Coca production destroys the soil quality by causing the soil to become more acidic, which depletes the soil nutrients and ultimately impedes the regrowth of secondary forests in abandoned fields (Van Schoik and Schulberg 1993, p. 21). As of 2004, the estimated total amount of land under cultivation for cocaine equaled 80,000 ha (197,683 ac); 4,000 ha (9,884 ac) of land are under opium cultivation (UNODC *et al.* 2007, pp. 7-8). These figures include habitat within the Cauca guan's range. Between 2003 and 2004, cocaine cultivation areas decreased from 1,445 to 1,266 ha (3,571 to 3,128 ac) in Cauca, and increased 22 percent from 37 ha (91 ac) to 45 ha (111 ac) in Valle de Cauca (UNODC and GOC 2005, p. 15). At the same time, opium cultivation decreased in Cauca from 600 ha (1,483 ac) to 450 ha (1,112 ac) (UNODC 2005, p. 50).

Colombia continues to be the leading coca bush producer (UNODC *et al.* 2007, p. 7). However, since 2003, cocaine cultivation has remained stable at about 800 km² (309 mi²) of land under cultivation (UNODC *et al.* 2007, p. 8). This is attributed, in part, to the implementation of alternative development projects, which encourage people to pursue alternative vocations to planting illegal crops (UNODC *et al.* 2007, p. 77). In 2004, the United Nations Office on Drugs and Crime and the Government of Colombia reported that no coca had been cultivated in the Departments of Quindío and Risaralda since the year 2000 (UNODC and GOC 2005, p. 48). This was attributed to alternative development programs being implemented between 1999 and 2007, for which US$200,000 was provided to Quindío and US$800,000 to Risaralda (UNODC and GOC 2005, p. 48). During the same period, at least US$12.1 million (mill) was spent in alternative development programs in Cauca, where coca production decreased, and another 1.6 mill was spent in Valle de Cauca, where coca production increased (UNODC and GOC 2005, p. 48).

This stabilization of the amount of land under cultivation for illegal drugs is also attributed to heightened eradication efforts. Between 2002 and 2004, aerial spraying occurred over more than 1,300 km² (502 mi²) annually, peaking in 2004, when 1,360 km² (525 mi²) of illicit crops were sprayed (UNODC and GOC 2005, p. 11). In 2006, eradication efforts were undertaken on over 2,130 km² (822 mi²) of land, consisting of 1,720 km² (664 mi²) of land being sprayed and manual eradication being used on the remaining land. Eradication efforts undertaken in 2006 occurred over an area representing 2.7 times more land than the net cultivation area (UNODC *et al.* 2007, p. 8). In Cauca alone, 1,811 ha (4,475 ac) of coca fields and 435 ha (1,075 ac) of opium fields were sprayed or manually eradicated in 2004 (UNODC 2005, p. 66).

Drug eradication efforts in Colombia have further degraded and destroyed primary forest habitat by using nonspecific aerial herbicides to destroy illegal crops (Álvarez 2005, p. 2042; BLI 2007d, p. 3; Cárdenas and Rodríguez Becerra 2004, p. 355; Oldham and Massey 2002, pp. 9-12). Herbicide spraying has introduced harmful chemicals into Cauca guan habitat and has led to further destruction of the habitat by forcing illicit growers to move to new, previously untouched forested areas (Álvarez 2002, pp. 1088-1093; Álvarez 2005, p. 2042; Álvarez 2007, pp. 133-143; BLI 2007d, p. 3; Cárdenas and Rodríguez Becerra 2004, p. 355; Oldham and Massey 2002, pp. 9-12). Between 1998 and 2002, cultivation of illicit crops increased 21 percent each year, with a concomitant increase in deforestation of formerly pristine areas of approximately 60 percent (Álvarez 2002, pp. 1088-1093).

Effects of habitat fragmentation: The Cauca guan requires large territories for foraging (Kattan 2004, p. 11), but today is relegated mostly to small forest fragments (Kattan *et al.* 2006, p. 301), making it more susceptible to habitat disturbance, further fragmentation, and destruction from human activity (Brooks and Strahl 2000, p. 10; Silva and Strahl 1991, p. 38).

An analysis of the effects of habitat fragmentation on Andean birds within western Colombia established that 31 percent of the historical bird populations in western Colombia had become extinct or locally extirpated by 1990, largely as a result of habitat fragmentation from deforestation caused by human encroachment (Kattan and Álvarez-Lopez 1996, p. 5; Kattan *et al.* 1994, p. 141). Kattan and Álvarez-Lopez (1996, pp. 5-6) also identified two conditions that increase a species' vulnerability to extinction or local extirpation as a result of habitat fragmentation: (1) species at the upper or lower limit of their altitudinal distribution (which is the case for the Cauca guan) are more susceptible to local extirpation and extinction, and (2) large fruit-eating birds with limited distributions and narrow habitat preferences were most vulnerable to extinction (also the case for the Cauca guan). Deforestation has eradicated the Cauca guan from much of its historic range and has led to local extirpation (Collar *et al.* 1994, pp. 61-62; Kattan *et al.* 2006, p. 299) in the Cauca and Dagua Valleys (Renjifo 2002, p. 128), such as in San Antonio (Valle de Cauca), where the species has not been observed since 1917 (Renjifo 2002, p. 124). Moreover, in light of the species' characteristics, the Cauca guan is unlikely to repopulate an isolated patch of suitable habitat following decline or local extirpation (see Factor E, Likelihood to Disperse).

The Cauca guan, as with other cracids, is susceptible to indirect effects of habitat disturbance and fragmentation (Silva and Strahl 1991, p. 38; Brooks and Strahl 2000, p. 10). A study conducted in northwestern Colombia demonstrated that habitat destruction and fragmentation may increase a species' vulnerability to predation (Arango-Vélez and Kattan 1997, pp. 140-142) (Factor C). In addition, habitat fragmentation, combined with continuing human encroachment, increases the species' vulnerability to hunting (Factor B). Habitat fragmentation may affect population densities by shifting the availability of resources, such as food (Kattan *et al.* 2006, p. 305). Habitat fragmentation also compounds problems for species with small population sizes, such as the Cauca guan, which has an estimated population between 196 and 342 individuals (Kattan in litt., as cited in Muñoz *et al.* 2006 p. 55) (Factor E).

Refugia: The Cauca guan has recently been confirmed in the following locations: (1) Otún-Quimbaya Flora and Fauna Sanctuary; (2) Reserva La Sirena; (3) Reserva Forestal de Yotoco; (4) Chorro de Plata; and (5) Munchique National Natural Park (Delacour and Amadon 2004, p. 135; Kattan *et al.* 2006, p. 299, 305; Renjifo 2002, pp. 124-125). These locations are discussed below.

(1) Otún-Quimbaya Flora and Fauna Sanctuary (Department of Risaralda), a 4.9-km² (1.9-mi²) reserve in the Department of Risaralda, contains a habitat mosaic of old-growth fragments and regenerating secondary forests, including abandoned ash plantations that cover 0.18 km² (0.07 mi²) (CARDER 2000, p. 1; Kattan and Beltrán 1997, p. 369; Kattan *et al.* 2006, p. 303). Most of the forested habitat in the area was cleared in the 1960s for cattle ranching, leaving the remaining natural forests only on the steepest slopes (Kattan and Beltrán 1999, p. 273). In population surveys conducted by Kattan *et al.* (2006, p. 304) in 2000 and 2001, this subpopulation was estimated to include between 144 and 264 individuals. Kattan (2004, pp. 12-13) also advised that the Otún-Quimbaya Sanctuary was not large enough to provide the space and resources needed to sustain a viable Cauca guan population.

This Sanctuary is adjacent to the Ucumarí Regional Park (Kattan *et al.* 2006, p. 302), which covers an area of approximately 44 km² (17 mi²), with elevations ranging from 1,700 to 2,600 m (5,577 to 8,530 ft) (Kattan and Beltrán 1999, p. 273; Kattan *et al.* 2006, pp. 301-302). Ucumarí Regional Park has been considered the stronghold of the species since the late 1990s (BLI 2007h, p. 1) (see Population Estimates, above). The largest number of Cauca guan individuals observed at this site was 16 in 1990 (Wege and Long 1995, p. 141), and a single individual was sighted in 2004 (Scanlon 2004, pp. 1-3); however, there have been no population surveys within the Park to determine the current population size. Subsistence hunting was reportedly prevalent within the Park in the late 1990s (Collar *et al.* 1992, p. 60; del Hoyo 1994, p. 349; Strahl *et al.* 1995, p. 81) (Factors B and D).

(2) Reserva La Sirena (Valle de Cauca) is located above 2,000 m (6,562 ft) and consists of fragmented riparian forest in various stages of succession (Kattan *et al.* 2006, pp. 302-303). Reserva La Sirena has an environmental education center, around which are located some protected areas as well as continuous forest above 2,000 m (6,562 ft). Visual confirmation of the Cauca guan was made in this locality in surveys conducted in 2000 and 2001, but the extent and occurrence of the population have yet to be determined (Kattan *et al.* 2006, p. 303).

(3) Reserva Forestal de Yotoco (Valle de Cauca) is an isolated 5.6-km² (2.16-mi²) reserve on the eastern slopes of the Western Andes, ranging in altitude from 1,400 to 1,600 m (4,593 to 5,249 ft) (Kattan *et al.* 2006, p. 302). In population surveys conducted by Kattan *et al.* (2006, p. 304) in 2000 and 2001, this subpopulation was estimated to include between 35 and 61 individuals. One of the last remaining humid tropical forests in the Valle de Cauca, the forest is mostly wellconserved, but human impacts are evidenced by an asphalt highway running through the middle of the Reserve and numerous footpaths crossing the Reserve to connect to coffee plantations, which, along with pasturelands, surround the forest (BLI 2007h, p. 13).

(4) Chorro de Plata (Valle de Cauca) is a 2-km² (0.77-mi²) forest located at 1,200 m (3937 ft) (Kattan *et al.* 2006, p. 299; Renjifo 2002, p. 302). Visual confirmation of the Cauca guan was made in this locality in surveys conducted in 2000 and 2001, but the extent and occurrence of the population have yet to be determined (Kattan *et al.* 2006, p. 303).

(5) Munchique National Natural Park (Cauca) is considered an important locality in the southern portion of the species' range, because the species was historically seen there several times and because suitable habitat still exists there (Kattan *et al.* 2006, pp. 305-306). However, the Cauca guan has not been confirmed there since 1987 (Kattan *et al.* 2006, p. 305; Muñoz *et al.* 2006, p. 54; Salaman in litt. 1999, 2000, as cited in BLI 2007h, p. 2) (see Population Estimates, above). Moreover, the location of this Park within the Pacific Region makes it particularly accessible and vulnerable to exploitation because of the numerous rivers in this part of the country, which facilitate movement of people and products through the region (Ojeda *et al.* 2001, pp. 308-309). In the 1960s and 1970s, the harvest of native ''*naranjilla*'' or ''*lulo*'' fruits (*Solanum quitoense*) became an important part of the local economy, which deterred logging. However, logging resumed in the 1980s after a fungal pathogen—anthracnose (*Colletotrichum acutatum*) (Caicedo and Higuera 2007, p. 41)— and invasion by a lepidopteran pest—tomato fruit borer (*Neoleucinodes elegantalis*) (Eiras and Blackmer 2003, p. 1)—destroyed the crops (BLI 2006, p. 2). Human pressures in the Pacific Region include unsustainable logging, colonization, and cash crop cultivation (Ojeda *et al.* 2001, pp. 308-309). Efforts are underway to replant lulo fruit trees to encourage a sustainable local economy, enhance local involvement in conservation, and provide technical skills for integrated pest management. However, logging is ongoing within the Park, and human population pressures and associated deforestation, as well as dam construction, are ongoing in the area (BLI 2007h, p. 2).

There are several areas of suitable habitat in which the Cauca guan has not been observed, but that could serve as important potential habitat for the species (see Factor E, Likelihood to Disperse), including: (1) Bosques del Oriente del Risaralda, (2) Cañon del Río Barbas y Bremen, (3) Finca la Betulia Reserva la Patasola,and (4) Reserva Natural Cajibío. These areas are described below.

(1) Bosques del Oriente del Risaralda (Risaralda): This 23 km² (8.9 mi²) forest is located on the western slopes of the Central Andes, in eastern Risaralda. It ranges in altitude between 1,300 and 3,800 m (5,905 and 12,467 ft). This high-altitude forest is important for the hydrology in lower-elevation areas, including the Otún-Quimbaya Flora and Fauna Sanctuary (Department of Risaralda), where the Cauca guan has been observed. The forest has been recovering from deforestation for the past 30 years and includes a contiguous patch of montane and premontane forest over 85 percent of the area. About 15 percent of the land is zoned for grazing and agriculture, leading to ongoing degradation of these deforested areas, along with conversion for human settlements within the forest (BLI 2007h, p. 6).

(2) Cañon del Río Barbas y Bremen (Risaralda): This 51-km² (20-mi²) forest is located on the western slopes of the Central Andes. It ranges in altitude between 1,600 and 2,100 m (5,249 and 6890 ft). This area includes most of the Reserva Forestal Bremen (BLI 2007h, p. 9), where the Cauca guan was observed several times between 1995 and 1997 (Renjifo 2002, pp. 124-125). The Bremen Forest Reserve was established in the 1970s to protect important waterways and is protected within the regional system of protected areas in the coffee-growing region. Today, the Bremen forest is comprised of 3.4 km² (1.31 mi²) of natural forest and 4.2 km² (1.62 mi²) of exotic plantation forests, which are now being allowed to regenerate to natural forest. A sustainable forestry management plan was implemented in 1996, and plans are underway to connect the isolated forest patches within the Cañon. Currently, the forest patches within the Cañon del Río Barbas

y Bremen are surrounded by cattle ranches and tree plantations, primarily including eucalyptus (*Eucalyptus spp.*) and Mexican weeping pine (*Pinus patula*). There is no further information on the progress of this project. Currently, the forests located within the Cañon are isolated from each other, and urbanization, agricultural activities, and deforestation are ongoing within the area. The forest is also in close proximity to a main highway in the region—the highway between Armenia and Pereira. A survey of the Cañon in 2003 did not reconfirm the presence of the Cauca guan within this area (BLI 2007h, p. 9).

(3) Finca la Betulia Reserva la Patasola (Quindío): This 17-km² (7-mi²) forest is located on the western slopes of the Central Andes. It ranges in altitude between 2,050 and 2,600 m (6,726 and 8,530 ft). Most of this Reserve is covered by primary forest interspersed with scrub forest and streams. As of 2003, the Cauca guan has been reported but not confirmed within this Reserve. The western border of this Reserve abuts the Otún-Quimbaya Flora and Fauna Sanctuary (BLI 2007h, p. 12), where the population is estimated to be between 144 and 264 individuals (Kattan *et al.* 2006, p. 304).

(4) Reserva Natural Cajibío (Cauca): This 0.52-km² (0.2-mi²) reserve is located on the slopes of the West Andes. It ranges in altitude between 1,100 and 1,250 m (3,609 and 4,101 ft). The habitat is mainly secondary forest, interspersed with agricultural fields (sugarcane (*Saccharum officinarum*), coffee, bananas, and corn (*Zea mays*)) and cattle ranching. This Reserve has been altered by human encroachment and indiscriminate logging. The Cauca guan was not confirmed in this location in a 2003 survey (BLI 2007h, p. 15).

These refugia are limited in size, isolated from each other, and undergoing varying levels of human encroachment and deforestation (Brooks and Strahl 2000, pp. 13-14; Collar *et al.* 1994, pp. 61-62; del Hoyo 1994, pp. 337, 349; Kattan *et al.* 2006, p. 301; Renjifo 2002, p. 128). In addition, regulatory mechanisms within these areas are inadequate to protect the species from ongoing habitat destruction (Factor D).

Summary of Factor A

The habitat preferred by the Cauca guan—humid forests or secondary forests, forest edges, and plantations in proximity to humid forests—has been largely destroyed by cultivation, grazing, human settlements, road building, and other human activities. The species' range has been reduced from 24,900 km² (9,614 mi²) to approximately 560 km² (216 mi²), much of this within the past 30 years. Habitat fragmentation has isolated remaining populations, relegated the species to the edges of its former range, and led to a shift in the species' altitudinal range. Habitat destruction, alteration, conversion, and fragmentation have been factors in the Cauca guan's historical decline (which commenced in the second half of the 20th Century) and continue to be factors in the species' decline, even in areas designated as protected (see also Factor E). Therefore, we find that the present destruction, modification, and curtailment of habitat are a threat to the Cauca guan throughout all of its range.

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

Cracids are considered particularly vulnerable to hunting pressures and are among those species most rapidly depleted by hunting (Redford 1992, p. 419). Several factors contribute to the sensitivity of Cauca guans to hunting, including: their large size, ease of locating them during their breeding season, their trusting nature, their low productivity (1-2 eggs) relative to other Galliformes, their long generation time, their dependence upon specific habitat, and their poor dispersal qualities (Brooks 1999, p. 43; del Hoyo 1994, p. 336; Silva and Strahl 1991, p. 38). This species, as with other guans, tends to aggregate within its habitat, generally based on resource availability. For instance, Cauca guans tend to congregate around fruit trees at certain times of year (Kattan *et al.* 2006, p. 305). This aggregation of individuals may facilitate hunters in catching larger numbers of the species. Cracids are also slow to reproduce, with a replacement rate of at least 6 years (Silva and Strahl 1991, p. 50).

The Cauca guan, as well as other cracids (e.g., chachalacas (*Ortalis* sp.), serve as a major source of protein for indigenous people (Brooks and Strahl 2000, p. 8). The Cauca guan is hunted by local residents for sustenance, although this activity is illegal (del Hoyo 1994, p. 337; Muñoz *et al.* 2006, p. 50; Renjifo 2002, p. 128; Rios *et al.* 2006, pp. 22-23) (Factor D). The species is sought after by hunters because it is the largest bird in its area of distribution (Renjifo 2002, p. 128). Rios *et al.* (2006, pp. 22-23) interviewed local settlers near the Otún-Quimbaya Flora and Fauna Sanctuary (in Risaralda), where the population is estimated to be between 144 and 264 individuals (Kattan *et al.* 2006, p. 304), who admitted to hunting the Cauca guan within the Sanctuary, claiming to take between two and four birds per month. This equates to approximately 100 Cauca guans per year (Rios *et al.* 2006, p. 23).

Subsistence hunting may play a role in the decline or possible local extirpation of the species from at least two locations. In the late 1990s, subsistence hunting was widespread in the Ucumarí Regional Park and Munchique National Natural Park (Collar *et al.* 1992, p. 60; del Hoyo 1994, p. 349; Strahl *et al.* 1995, p. 81). The Cauca guan may have been locally extirpated from the Munchique National Natural Park (Cauca) (BLI 2007h, p. 2: Renjifo 2002, p. 124), where the species was last observed in 1987 (Renjifo 2002, p. 124). Despite subsequent searches of the area (Wege and Long 1995, p. 149), there have been no recent confirmations at this locality (Kattan *et al.* 2006, p. 305; Muñoz *et al.* 2006, p. 54; Salaman in litt. 1999, 2000, as cited in BLI 2007h, p. 2). Ucumarí Regional Park is considered the stronghold of the Cauca guan (BLI 2007h, p. 1). Although Renjifo (2002, p. 128) notes that the species has recuperated within this Park, there have only been scant reports of Cauca guan sightings there between 1994 and 2004 (Renjifo 2002, p. 125; Scanlon 2004, pp. 1-3; Wege and Long 1995, p. 141), and no population surveys have been undertaken there (see Population Estimates, above).

Habitat fragmentation and concomitant human encroachment (Factor A) have made the species' habitat more accessible and the species more vulnerable to hunting. A study conducted in French Guiana provided a quantitative estimate of the effect of hunting on a related cracid species, the black curassow (*Crax alector*) (del Hoyo 1994, p. 336). The black curassow has similar habitat requirements (undisturbed primary tropical to subtropical humid forest at 0-1,400 m (0-4,600 ft) elevation) as the Cauca guan (BLI 2007e). The estimated population density of black curassows in non-hunted areas was between 7 and 9 birds per 1 km² (0.4 mi²); in areas with intermittent hunting, the numbers fell to between 0.5 and 2.25 birds; and in areas where hunting was regular, numbers fell to between 0.5 and 0.73 birds (del Hoyo 1994, p. 336). We believe that the effects of hunting on the Cauca guan would result in similar population declines based on similarities of habitat and species characteristics.

Summary of Factor B

Cracids serve as a major food source in Colombia, and the Cauca guan, as the largest cracid living within its area of

distribution, is sought after by locals. Hunting results in the direct removal of eggs, juveniles, and adults from the population. Cauca guans are slow to reproduce, produce a low clutch size, require a long fledging period, and exhibit a poor replacement rate (see Habitat and Life History, above). Hunting can destroy pair bonds and remove potentially reproductive adults from the breeding pool. Hunting is facilitated by habitat fragmentation (Factor A), which increases access to the forest by hunters. The Cauca guan is hunted throughout its current range, including within protected areas, and hunting may be responsible for a decline or local extirpation of the species from at least two of these protected areas (Ucumarí Regional Park and Munchique National Natural Park). Therefore, we find that subsistence hunting for domestic consumption is a threat to the Cauca guan throughout its range.

C. Disease or Predation

Disease: We are unaware of any information regarding disease or the potential for significant disease outbreaks in the Cauca guan populations. As a result, we do not consider disease to be a threat to the species.

Predation: Predators of cracids include snakes, foxes, feral cats, feral dogs, and raptors (Delacour and Amadon 1973). Cauca guans are also slow to reproduce, with a long fledging period (up to 1 year) and a replacement rate of at least 6 years (Rios *et al.* 2006, p. 17; Silva and Strahl 1991, p. 50). Cauca guans require large territories for foraging (Kattan 2004, p. 11), but today are relegated mostly to small forest fragments (Kattan *et al.* 2006, p. 301). As discussed in detail above for the blue-billed curassow (Factor C, Predation), studies have shown that habitat fragmentation increases the potential predation pressure within habitat fragments by facilitating the predators' access throughout the fragment and because smaller fragments support smaller predators, which tend to depredate on the more vulnerable life-history stages of the Cauca guan, eggs and juveniles (Arango-Vélez and Kattan 1997, pp. 137-143; Gibbs 1991, p. 157; Hoover *et al.* 1995, p. 151; Keyser *et al.* 1998, p. 991; 2002, p. 186; Renjifo 1999, p. 1133; Wilcove 1985, p. 1214).

Summary of Factor C

Snakes, foxes, feral cats, feral dogs, and raptors are all predators of cracids. Predation results in the direct removal of eggs, juveniles, and adults from the population. Cauca guans are slow to reproduce, produce a low clutch size, require a long fledging period, and exhibit a poor replacement rate (see Habitat and Life History, above). Predation can destroy pair bonds and remove potentially reproductive adults from the breeding pool. Cauca guan habitat is fragmented and small (Factor A), and studies on similar species in similar Andean habitats indicate that vulnerability to predation by generalist predators increases with increased habitat fragmentation and smaller patch sizes. Predation exacerbates the genetic complications associated with the species' small population size (Factor E). Because of the species' small population size and inability to recolonize isolated habitat fragments (Factor E), predation renders the species vulnerable to local extirpation. Therefore, we find that predation, exacerbated by ongoing habitat destruction (Factor A) and hunting (Factor B), is a threat to the Cauca guan.

D. The Inadequacy of Existing Regulatory Mechanisms

Regulatory mechanisms may provide species-specific or habitat-specific protections. An evaluation of the adequacy of regulatory mechanisms within Colombia to mitigate or remove the threats to the Cauca guan is provided below, beginning with species-specific and followed by habitat-specific protection mechanisms.

Colombia has enacted numerous laws to protect species and their habitats (Matallana-T. 2005, p. 121). The Cauca guan is listed as an endangered species under Colombian Law 99 of 1993 (EcoLex 1993, p. 2) and Resolution No. 584 of 2002 (EcoLex 2002, pp. 10, 12). A full description of these laws and the categorization of threatened species in Colombia were provided above, as part of the Factor D analysis for the blue-billed curassow. This threat status confers protections upon the species, including protection from commercial take under Resolution No. 849 of 1973 and Resolution No. 787 of 1977 (EcoLex 1973, p.1; EcoLex 1977, p. 3). Neither Resolution prohibits subsistence hunting. As discussed under Factor B, commercial and sport hunting are not threats to this species, but subsistence hunting continues to threaten the species throughout its range, including within protected areas. Hunting may play a role in the decline or possible local extirpation of the species from two protected areas, Munchique National Natural Park and Ucumarí Regional Park, where subsistence hunting was widespread in the 1990s (Collar *et al.* 1992, p. 60; del Hoyo 1994, p. 349; Strahl *et al.* 1995, p. 81) (Factor B). Cauca guans have not been observed in Munchique National Natural Park since 1987 (BLI 2007h, p. 2: Renjifo 2002, p. 124), despite subsequent searches of the area (Wege and Long 1995, p. 149). Similarly, since 1994, there have been only scant sightings of Cauca guans in the Ucumarí Regional Park (Renjifo 2002, p. 125; Scanlon 2004, pp. 1-3; Wege and Long 1995, p. 141) (see Population Estimates, above). Researchers have indicated that local residents continue to hunt the Cauca guan despite the illegality of this activity (del Hoyo 1994, p. 337; Muñoz *et al.* 2006, p. 50; Renjifo 2002, p. 128; Rios *et al.* 2006, pp. 22-23), even within areas designated as ''protected'' under Colombian law (see also next paragraph). For instance, settlers in the Otún-Quimbaya Flora and Fauna Sanctuary admit to taking between 24 and 48 Cauca guans a year (Rios *et al.* 2006, pp. 22-23) (Factor B). Thus, these Resolutions are ineffective at reducing the existing threat of subsistence hunting to the Cauca guan.

Colombia has enacted numerous forestry laws and forestry management practices (Law No. 2 (EcoLex 1959); Decree No. 2,811 (Faolex 1974); Decree No. 1,791 (Faolex 1996); Law No. 1,021 (EcoLex 2006)). Weaknesses in the implementation of these laws and the decentralized nature of Colombian resource management are described in detail above for the blue-billed curassow (Factor D) (ITTO 2006, pp. 218-9, 222; Matallana-T. 2005, pp. 121-122). Experts consider these decentralized management mechanisms to be ineffective at protecting the Cauca guan from habitat destruction (Factor A) or hunting (Factor B) (Muñoz *et al.* 2006, p. 50). Habitat destruction and hunting are ongoing throughout the species' range, indicating that forestry regulations are ineffective at mitigating the threats to the Cauca guan from habitat destruction (Factor A) or hunting (Factor B).

Colombia has several categories of national habitat protection (Matallana-T. 2005, p. 121-122), which were described above, as part of the Factor D analysis for the blue-billed curassow (Matallana-T. 2005, p. 121-122). The Cauca guan occurs within national parks (including the Ucumarí Regional Park, last confirmed Cauca guan sighting in 2004 (Scanlon 2004, pp. 1-3), and Munchique National Natural Park, confirmed in 1987 (Kattan *et al.* 2006, p. 305; Muñoz *et al.* 2006, p. 54; Salaman in litt. 1999, 2000, as cited in BLI 2007h, p. 2)); reserves (Reserva Forestal de Bremen, confirmed in 1997 (Renjifo 2002, pp. 124-125), Reserva Forestal de Yotoco, confirmed in 2000-2001 (Renjifo 2002,

pp. 124-125), and Reserva La Sirena, confirmed in 2000-2001 (Kattan *et al.* 2006, p. 302)); and sanctuaries (Otún-Quimbaya Flora and Fauna Sanctuary, confirmed in 2000-2001 (Kattan *et al.* 2006, p. 302)). Within the last 20 years, the Cauca guan population may have declined or been extirpated from at least two Parks, the Munchique National Natural Park and the Ucumarí Regional Park, where the species has not been observed since 1987 (Renjifo 2002, pp. 124-125) and 2004 (Scanlon 2004, pp. 1-3), respectively. These Parks were subject to subsistence hunting in the late 1990s (Collar *et al.* 1992, p. 60; del Hoyo 1994, p. 349; Strahl *et al.* 1995, p. 81), and subsistence hunting of Cauca guan continues in these and other protected areas, such as Otún-Quimbaya Flora and Fauna Sanctuary (Rios *et al.* 2006, pp. 22-23) (Factor B). In addition, logging, population pressure and agriculture are ongoing within these Parks. Ucumarí Regional Park, considered the stronghold for the species (BLI 2007h, p. 2), continues to be managed for multiple uses (including pasture land and other commercial ventures) (Factor A). In light of the multiple land uses allowed within the Park, and the ongoing human-induced habitat destruction, the Park provides little or no protection to the species from the threat of habitat destruction (Factor A).

The Cauca guan ranges in multiple Departments (currently known in Cauca, Quindío, Risaralda, Valle de Cauca), each of which administers their own natural resources under different autonomous Corporaciónes (ITTO 2006, p. 219; Law 99 of 1993). We are unaware of any coordinated species management plan. Therefore, in view of the decentralized resource management structure, the absence of a conservation strategy for the species, the threats to the Cauca guan from habitat destruction (Factor A) and hunting (Factor B) are not mitigated.

Summary of Factor D

Colombia has numerous laws and regulatory mechanisms to administer and manage wildlife and their habitats. The Cauca guan is listed as endangered under Colombian law and occurs within several protected areas. However, on-the-ground enforcement of existing wildlife protection and forestry laws and oversight of the local jurisdictions implementing and regulating activities are ineffective at mitigating the primary threats to the Cauca guan. As discussed for Factor A, habitat destruction, degradation, and fragmentation continue throughout the existing range of the Cauca guan. As discussed for Factor B, uncontrolled subsistence hunting of the Cauca guan is ongoing and continues to negatively affect the continued existence of the species. Moreover, the lack of a species conservation strategy and the decentralized management of natural resources in Colombia provide no overall coordination in the conservation of species such as Cauca guans, which range in multiple jurisdictions. Therefore, we find that the existing regulatory mechanisms currently in place are inadequate to mitigate the primary threats to the Cauca guan.

E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

Two additional factors affect the Cauca guan: Its minimal likelihood for dispersal and the species' small population size.

Likelihood to Disperse: The Cauca guan exhibits characteristics indicative of an inability to disperse into isolated habitat fragments and recolonize patches of suitable habitat that have undergone a localized extirpation. The Cauca guan prefers habitat of mature humid forests (Collar *et al.* 1994, p. 136), has generally been found only in secondary habitats that are situated within 1 km (0.62 mi) of primary forest (Renjifo 2002, p. 127), and is reported as timid in the presence of humans (Rios *et al.* 2006, p. 21). The remaining suitable habitat available to the Cauca guan is limited to a few disjunct and isolated forest fragments only a few hundred hectares (100 hectares = 1 km^2 = 0.39 mi^2) in size (Kattan 2004, p. 6; Kattan *et al.* 2006, p. 301; Renjifo 2002, p. 128).

Existing habitat for the Cauca guan is fragmented, with large distances between the remaining primary forest fragments (Cuervo and Salaman 1999, p. 7; Hanski 1998, pp. 45-46) and an ever-growing human presence in and around the species' existing habitat (BLI 2004c, p. 2; Cuervo 2002, p. 327; Cuervo and Salaman 1999, p. 8; Renjifo 2002, pp. 124-128; Stattersfield *et al.* 1998, p. 205). Without human intervention, the Cauca guan is unlikely to repopulate an isolated patch of suitable habitat following decline or local extirpation. Evidence for the Cauca guan's inability to disperse across fragmented habitat patches is provided by the fact that there are several areas of suitable habitat, located near previously reported localities for the species, in which the Cauca guan has not been observed (see Factor A, Refugia).

Small Population Size: Habitat destruction (Factor A) and hunting (Factor B) have affected the current population size and distributional range of the Cauca guan (Collar *et al.* 1992, pp. 126-127; Collar *et al.* 1994, p. 60). By the 1980s, the species was believed extinct or on the verge of extinction (Brooks and Strahl 2000, p. 14; del Hoyo 1994, pp. 337, 349; Hilty 1985, p. 1004; Hilty and Brown 1986, p. 125). The Cauca guan is now confirmed only in several isolated locations. Overall, the population is considered to be in decline, with the current isolated populations ranging from tens of individuals to a few hundred individuals at best (BLI 2007h, p. 2; Kattan 2004, p. 6; Renjifo 2002, p. 129), but there have been few population surveys of the Cauca guan. In 2006, Kattan (in litt., as cited in Muñoz *et al.* 2006 p. 55) estimated the global population to be between 196 and 342 individuals. Kattan *et al.* (2006, p. 302) conducted the only two population surveys, in 2000 and 2001 (Muñoz *et al.* 2006 p. 55). They estimated population densities at two locations, Otún-Quimbaya Flora and Fauna Sanctuary (Risaralda) and Reserva Forestal de Yotoco (Valle de Cauca), to be between 144 and 264 individuals, and 35 to 61 individuals, respectively (Kattan *et al.* 2006, p. 304).

Small population sizes render species vulnerable to genetic risks that can have individual or population-level consequences on the genetic level and can increase the species' susceptibility to demographic problems, as explained in more detail above for the blue-billed curassow (Factor E, Small Population Size) (Charlesworth and Charlesworth 1987, p. 238; Shaffer 1981, p. 131). Once a population is reduced below a certain number of individuals, it tends to rapidly decline towards extinction (Franklin 1980, pp. 147-148; Gilpin and Soulé 1986, p. 25; Holsinger 2000, pp. 64-65; Soulé 1987, p. 181).

In the absence of quantitative studies specific to this species, a general approximation of minimum viable population size is the 50/500 rule, as described above as part of the Factor E analysis for the brown-banded antpitta (Shaffer 1981, pp. 132-133; Soulé 1980, pp. 160-162). The total population size of the Cauca guan is estimated to be between 196 and 342 individuals. While 196 individuals is above the minimum population size required to avoid short-term genetic consequences, 342 falls below the threshold minimum number of 500 individuals required for long-term fitness of a population.

Moreover, because the Cauca guan exists in isolated forest fragments and is unlikely or incapable of dispersing to disjunct patches, each disjunct locality likely acts as a subpopulation.

Therefore, the resiliency of each of these subpopulations will be lower than that of the global population. The largest reported subpopulation, in Otún-Quimbaya Flora and Fauna Sanctuary, contains between 144 and 264 individuals (Kattan *et al.* 2006, p. 304). The lower figure, 144 individuals, is above the minimum effective population size required to avoid imminent risks from inbreeding (N_e = 50). The upper limit of the subpopulation, 264 birds, represents the maximum number of individuals in the subpopulation, but does not take into account that not all members of the population will be reproductive. This figure is well below the upper threshold (N_e = 500 individuals) required for long-term fitness of a population to ensure that the species will not lose its genetic diversity over time and will maintain an enhanced capacity to adapt to changing conditions. The only other subpopulation figures are for Reserva Forestal de Yotoco, with an estimated 35 to 61 individuals (Kattan *et al.* 2006, p. 304). Both of these figures are well below the 50/500 threshold. Therefore, we currently consider these subpopulations (and the species as a whole) to be at risk from genetic complications due to the lack of short- and long-term viability.

The Cauca guan's small population size, combined with its restricted range and inability to repopulate suitable habitat following local extirpations (Cuervo and Salaman 1999, p. 7; del Hoyo 1994, p. 361; Renjifo 2002, p. 138), makes the species particularly vulnerable to the threat of adverse natural (e.g., genetic, demographic, or environmental) and manmade (e.g., hunting or deforestation) events that destroy individuals and their habitat (BLI 2007, pp. 1-2; Holsinger 2000, pp. 64-65; Renjifo 2002, p. 140; Young and Clarke 2000, pp. 361-366).

Summary of Factor E

The Cauca guan is now confirmed only in several isolated locations. The Cauca guan is unlikely or incapable of dispersing into suitable habitat that is isolated from extant populations, and the species' overall small population size makes it vulnerable to genetic and demographic risks that negatively impact the species' short- and long-term viability. The Cauca guan's small population size, restricted range, and inability to repopulate suitable habitat following local extirpations expose the species to threats associated with adverse natural (e.g., genetic, demographic, or environmental) and manmade (e.g., hunting or deforestation) events that destroy individuals and their habitat. Therefore, we believe that, in combination with the risks to the species from habitat destruction (Factor A), hunting (Factor B), and predation (Factor C), the Cauca guan is vulnerable to localized extirpation or extinction from which the species would be unable to recover, due it its small population size and apparent inability to repopulate fragmented, isolated habitats such as those currently present within this species' range.

Status Determination for the Cauca Guan

The five primary factors that threaten the survival of the Cauca guan are: (1) habitat destruction, fragmentation, and degradation; (2) overexploitation due to hunting; (3) predation (Factor C); (4) inadequacy of regulatory mechanisms to reduce the threats to the species (Factor D); and (5) small population size and isolation of remaining populations (Factor E). The Cauca guan, a large, primarily terrestrial bird, prefers humid forests or secondary forests, forest edges and plantations that are in close proximity (within 1 km (0.62 mi)) to humid forests.

Habitat destruction, alteration, conversion, and fragmentation were factors in the Cauca guan's historical decline. The species has experienced a 95 percent range reduction since the 1950s, such that the estimated suitable habitat available to the species is approximately 560 km² (216 mi²). Experts estimate that more than 30 percent of this loss of habitat has occurred within the last three generations, or 30 years. Fifty years ago, the species' historic range was estimated to have been an approximately 24,900-km² (9,614-mi²) area, encompassing humid forests on the eastern slopes of the West Andes and the dry forests of the Cauca, Patía, and Dagua Valleys, in the Departments of Cauca, Quindío, Risaralda, and Valle de Cauca. Today, the species has been locally extirpated from the Cauca and Dagua Valleys. The Cauca guan inhabits the western slopes of the central and western Andes in the few remaining upper-elevation forest remnants at altitudes exceeding those reported in the first half of the 20th Century. These shifts to the extremes of its range and shifts in elevational distribution have resulted from extensive habitat destruction throughout the species' range. The dry forests of the Cauca, Dauga, and Patía Valleys and the humid forests on the slopes of these valleys up to 2,000 m have been largely destroyed for cultivation, grazing, human settlements, road building, and other human-induced habitat alterations. Cultivation of illegal drug crops, such as cocaine, has led to further deforestation and altered soil compositions, hindering regeneration of abandoned fields. In addition, drug eradication programs involving the aerial spraying of non-specific herbicides have led to further environmental degradation and habitat destruction (Factor A).

Although the Cauca guan, which is listed in Colombia as endangered, occurs on lands designated by the Colombian government as ''protected areas,'' and it is illegal to commercially hunt the species, the existing laws and their enforcement are inadequate (Factor D) to mitigate the effects of ongoing habitat destruction (Factor A) and subsistence hunting (Factor B). Moreover, natural resource management within Colombia is highly decentralized, each district managing their resources autonomously. Thus, there is no overall coordination for the conservation and recovery of the Cauca guan, which ranges in several autonomous districts.

Widespread deforestation and conversion of primary forests has led to the fragmentation of habitat throughout the Cauca guan's range. The remaining suitable habitat is limited to a few disjunct and isolated forest fragments, only a few hundred hectares (100 hectares = 1 km² = 0.39 mi²) in size. Habitat fragmentation affects resource availability for the Cauca guan, which requires large territories for foraging on its preferred food source: seasonally available fruits. Experts believe that remaining refugia, such as the Otún-Quimbaya Sanctuary, may not be large enough to support viable populations, lacking sufficient space and resources needed for this large, terrestrial bird.

Habitat fragmentation also increases the species' susceptibility to hunting (Factor B). The Cauca guan is hunted throughout its current range. As the largest cracid living within its area of distribution, the Cauca guan is sought after by locals as a major food source. Despite being illegal (Factor D), subsistence hunting of Cauca guans continues throughout its range, including within protected areas. Hunting may be responsible for the species' local extirpation from the Ucumarí Regional Park, considered the stronghold for the species in the 1990s, and the Munchique National Natural Park.

Habitat fragmentation exposes the species to greater risk of extinction caused by adverse natural (e.g., genetic, demographic, or environmental) and manmade (e.g., hunting or deforestation) events (Factor E). At the beginning of the 20th Century through the 1950s, the

species was considered common. Habitat fragmentation has led to the isolation of remaining subpopulations, which are estimated to range from tens of individuals or a few hundred individuals at most, thus affecting the species' resiliency. The total population estimate of 196-342 individuals falls below the threshold minimum number of 500 individuals required for long-term fitness of a population. It is estimated that the species has lost up to 9 percent of its population in the last 10 years. Given that the Cauca guan is likely to act as subpopulations and its inability to disperse between fragmented habitat patches, the species' effective population size is actually much less than the global population estimate would imply. The fitness of the subpopulations is vital to understanding the viability of the species. The largest subpopulation, estimated to contain between 144 and 264 individuals, falls below the threshold for long-term viability. The other subpopulation for which there is an estimate contains between 35 and 61 individuals, which figures are below the thresholds for both short-term and long-term viability. Thus, the Cauca guan is at risk from both near-term genetic complications (such as inbreeding and demographic shifts) and the lack of long-term fitness (such as the ability to adapt to changing conditions). Because the species exists in isolated subpopulations, the risk from near-term genetic consequences, such as inbreeding and demographic shifts, is further magnified. These potential genetic problems are exacerbated by ongoing human-induced threats, such as habitat destruction (Factor A) and hunting (Factor B), factors which are not being mitigated by existing regulations (Factor D), and are further magnified by the species' inability to repopulate isolated, fragmented patches of suitable habitat, where Cauca guan populations have undergone decline or local extirpation (Factor E).

We have carefully assessed the best available scientific and commercial information regarding the past, present, and potential future threats faced by the Cauca guan. We consider the ongoing threats to the Cauca guan, habitat destruction (Factor A), hunting (Factor B), and predation (Factor C), exacerbated by the species' small population size and limited dispersal ability (Factor E), and compounded by inadequate regulatory mechanisms to mitigate these threats (Factor D), to be equally present and of the same magnitude throughout the species' entire current range. Based on this information, we determine that the Cauca guan is in danger of extinction throughout all of its range. Therefore, we are proposing to list the Cauca guan as an endangered species.

IV. Gorgeted Wood-Quail (*Odontophorus strophium*)

Species Description

The gorgeted wood-quail, endemic to Colombia and a member of the New World Quail Family (Odontophoridae), is approximately 25 cm (10 in) long (del Hoyo 1994, p. 431; Fjeldsä and Krabbe 1990, p. 141; Hilty and Brown 1986, p. 133). The species is locally known as ''*perdiz Santandereana*'' or ''*perdiz de monte*'' (Sarria and Álvarez 2002, p. 158), and may be referred to by the more general term ''forest partridge'' in English (BLI 2007g, p. 1). Mainly dark brown with black spots on upper parts, the male has a speckled black and white face, and a white collar on his throat surrounded on the upper and lower side by a band of black. Underparts are rufous-chestnut colored with white spotting. The female appears similar to the male; however, the female has a black collar surrounded by white bands on her throat (BLI 2007g, p. 1).

Taxonomy

The gorgeted wood-quail was first taxonomically described in 1844 by Gould, who placed the species in the Odontophoridae family, also known as the New World Quails (BLI 2007g, p. 1). The type specimen (the actual specimen that was first described by Gould) was obtained in the Colombian Department of Cundinamarca (Hilty and Brown 1986, p. 133), although details on the location were not provided with the description (Warren 1966, p. 318). Therefore, we will refer to the Department of Cundinamarca as the ''type locality.''

Habitat and Life History

The gorgeted wood-quail prefers montane temperate and humid subtropical forests dominated by roble, *Tabebuia rosea*, and secondary-growth forests in proximity to mature forests (Sarria and Álvarez 2002, p. 159), especially those dominated by oak (*Quercus humboldtii*). The species is most often found at elevations between 1,750 and 2,050 m (5,741 and 6,726 ft) (BLI 2007g, p. 2; Donegan and Huertas 2005, p. 29; Donegan *et al.* 2003, p. 27; Sarria and Álvarez 2002, pp. 158-159; Turner 2006, p. 22; Wege and Long 1995, pp. 143-144). Fuller *et al.* (2000, pp. 27-28) suggested that the species' range may be up to 2,500 m (8,202 ft) in elevation. However, Sarria and Álvarez (2002, p. 160) noted that, despite the availability of suitable habitat adjacent to the species' current locations, these areas are above the elevational range of the species and are not used. Moreover, in the most recent population surveys in the Yarguíes Mountains (Serranía de los Yarguíes), which range up to 3,200 m (10,498 ft), researchers heard the species vocalizing primarily at elevations between 1,800 and 1,900m (5,905 and 6,234 ft), and none were heard above 1,950-2,000 m (6,398-6,562 ft) (Donegan and Huertas 2005, p. 29; Donegan *et al.* 2003, p. 29; Donegan *et al.* 2004, p. 19). There are no recorded observations of this species at ranges above 2,050 m (6,726 ft) (BLI 2007g, p. 2; Donegan and Huertas 2005, p. 29; Donegan *et al.* 2003, p. 27; Sarria and Álvarez 2002, p. 160; Turner 2006, p. 22; Wege and Long 1995, pp. 143-144). Therefore, we conclude that the species' preferred range remains at elevations between 1,750 and 2,050 m (5,741 and 6,726 ft).

The gorgeted wood-quail is primarily terrestrial (Fuller *et al.* 2000, p. 2), living on the forest floor and feeding on fruit, seeds, and arthropods (Collar *et al.* 1992, pp. 171-172; del Hoyo 1994, p. 431; Fuller *et al.* 2000, pp. 27-28). There appear to be two breeding seasons per year, coinciding with the rainy seasons from March through May and September through November (BLI 2007g, p. 3). Gorgeted wood-quails are ground-nesting birds, laying their eggs in a small depression lined with vegetation and almost always covered with brush from the understory (Sarria and Álvarez 2002, p. 159). Similar to other wood-quails, gorgeted wood-quails associate in small groups and call to other groups by chorusing—singing together (Donegan *et al.* 2003, p. 29). Researchers consider this species to be dependent on primary forest for at least part of its life cycle (BLI 2007g, p. 3; Sarria and Álvarez 2002, p. 159).

Historical Range and Distribution

The gorgeted wood-quail historically occurred on the western slope of the East Andes, in the Departments of Santander and Cundinamarca in Colombia (del Hoyo 1994, p. 431; Fjeldsä and Krabbe 1990, p. 141; Hilty and Brown 1986, p. 133). Since the 17th Century, extensive logging and land conversion in Cundimarca to agricultural uses nearly denuded all the forests of this area below 2,500m (8,202 ft) (BLI 2007g, p. 3; Hilty and Brown 1986, p. 133). Habitat destruction is considered the primary factor that led to the historical decline and extirpation of this species from Cundinamarca (Fuller *et al.* 2000, pp. 4-5; Wege and Long 1995, p. 146).

For many years, the species was known only from two specimens collected in 1915 from its type locality in Cundinamarca (Hilty and Brown 1986, p. 133). Although the species was reported at this site again in 1923 and 1954, it has not been seen there since that time (Wege and Long 1995, p. 146). The species was believed extinct until a record of a male bird and chicks was reported in 1970 in Santander Department in the Cuchilla del Ramo forest (Collar *et al.* 1992, p. 171; Fuller *et al.* 2000, p. 27).

Current Range and Distribution

The gorgeted wood-quail is endemic to the west slope of the East Andes, in the Magdalena Valley (Donegan and Huertas 2005, p. 29), and is known only in the central Colombian Department of Santander (del Hoyo 1994, p. 431; Fjeldsä and Krabbe 1990, p. 141; Hilty and Brown 1986, p. 133). The current range of this species is between 10 km^2 (4 mi^2) (Sarria and Álvarez 2002, p. 160) and 27 km^2 (10.42 mi^2) (BLI 2007g, pp. 2, 5).

Since 1970, the species has only been reported in the central Colombian Department of Santandar, with fewer than 10 sightings. Visual observations of this species have been scant; most reports have been inferred from auditory detections (Sarria and Álvarez 2002, pp. 158-159). In 1970, the species was observed in Cuchilla del Ramo forest (Wege and Long 1995, p. 143), but has not been confirmed there since that time (BLI 2007g, p. 2) (see also Factor A). The species has been observed and most recently confirmed in three locations: (1) Guanentá-Alto Rio Fonce Flora and Fauna Sanctuary, (2) Cachalú Biological Reserve, and (3) Serranía de los Yarguíes. These confirmed sightings are briefly described below.

(1) Guanentá-Alto Rio Fonce Flora and Fauna Sanctuary (Santander Department): The gorgeted wood-quail was confirmed at this location in 1979 (BLI 2007g, p. 2) and again in 1988 (Sarria and Álvarez 2002, p. 160; Wege and Long 1995, p. 144). In 2004, the species was reported in the oak forests within the Province of Guanentá (BLI 2007g, p. 2), but it is unclear whether these observations occurred within the Sanctuary.

(2) Cachalú Biological Reserve (Santander Department): The gorgeted wood-quail was confirmed in this Reserve in 1999, 2000, and 2001 (BLI 2007g, p. 2; Fuller *et al.* 2000, p. 27; Sarria and Álvarez 2002, pp. 158-159).

(3) Serranía de los Yarguíes (Santander Department): The species has also been confirmed at this location in 2003 and 2004 (BLI 2007g, p. 2; Donegan and Huertas 2005, p. 29; Donegan *et al.* 2003, p. 27; Turner 2006, p. 22). The Serranía de los Yarguíes locale reportedly harbors the largest known population and is the stronghold for the species (Donegan and Huertas 2005, p. 29; Turner 2006, p. 22) (see Population Estimates, below).

Generally speaking, these localities are in two disjunct locations within the Department of Santander. Serranía de los Yarguíes is in northern Santander and the other two localities are adjacent to each other in southern Santander (Donegan and Huertas 2005, p. 30; Rainforest Alliance 2008, p. 2). These habitats are described more fully under Factor A (Refugia).

Population Estimates

To the best of our knowledge, there have been no quantitative studies to determine the species' population size. The population estimates for the gorgeted wood-quail are based on qualitative surveys and extrapolations using suitable habitat estimates (BLI 2007g, p. 2; Donegan and Huertas 2005, p. 29; Donegan *et al.* 2003, p. 27; Fuller *et al.* 2000, p. 27; Sarria and Álvarez 2002, pp. 158-159; Turner 2006, p. 22). As noted above (see Current Range), a total of 3 adults and 2 chicks were observed between 1923 and 1970 (Sarria and Álvarez 2002, p. 158; Wege and Long 1995, p. 143). The largest number of visual confirmations of individual birds has been reported in the Reserva Biológico Cachalú. In 1999, two groups of 7-9 individuals were observed. Between 2001 and 2002, six groups of 5-11 individuals were observed (Sarria in litt., as cited in Sarria and Álvarez 2002, p. 159). Based on these direct observations, the population in the Reserva Biológico Cachalú may consist of between 30 and 66 individuals.

All other population estimates have been inferred from auditory calls or suitable habitat extrapolations. It is not unusual to infer population estimates for elusive, ground-dwelling species, such as the gorgeted wood-quail, for which direct observation is difficult. However, extrapolating population estimates based on suitable habitat can lead to overestimations of population sizes, especially for narrow-ranging species, such as the gorgeted wood-quail. The potential for overestimation was discussed above, in the analysis of the brown-banded antpitta (Factor E, Small Population Size). For instance, researchers recently estimated that the Serranía de los Yarguíes population may hold a significantly greater number of birds than ever known. Given the inferred density of the species (based on auditory observation) and the extent of forest cover in the Serranía de los Yarguíes, researchers predicted that an excess of 250 individuals was present at the site (Donegan and Huertas 2005, p. 30; Donegan *et al.* 2004, p. 19). Turner (2006, p. 22) extrapolated the population size, based on satellite images of the area, which indicated that 30,000 ha (74,131 ac) of forest at elevations between 1,500 and 2,200 m (4,921 and 7,218 ft) on the western slope and 2,700 and 2,900 m (8,858 and 9,514 ft) on the eastern slope were available to the species. This yielded a predicted population size of between 1,800 and 3,300 individuals. However, we believe that this population estimate, based on the availability of suitable habitat, may be an overestimate for this species for two reasons: (1) the population may not be randomly distributed throughout the suitable habitat, as assumed by these researchers, and (2) the extrapolation does not take into account human-induced threats, such as hunting (Sarria and Álavarez 2002, pp. 160-161) (Factor B). Therefore, until Turner's (2006, p. 22) predictions have been ground-truthed, we are unable to consider the predicted population estimate of between 1,800 and 3,300 individuals to be a reliable reflection of the current population size. Consequently, we consider the population estimate of between 189 to 486 individuals (BLI 2007g, p. 1) to be the best available estimate of the gorgeted wood-quail.

Conservation Status

The gorgeted wood-quail is identified as a critically endangered species under Colombian law (EcoLex 2002, p. 12). The species is classified as 'Critically Endangered' on the IUCN Red List, due to its small and highly fragmented range, with recent population records from only two areas (BLI 2004d; BLI 2007g, pp. 1, 5).

Summary of Factors Affecting the Gorgeted Wood-Quail

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

In the early part of the 20th Century, the gorgeted wood-quail was known only in the oak forests in the Department of Cundinamarca. However, extensive deforestation and habitat conversion for agricultural use nearly denuded all the oak forests in Cundinamarca below 2,500 m (8,202 ft) (BLI 2007g, p. 3; Hilty and Brown 1986, p. 133). Deforestation left little remaining suitable habitat for the gorgeted wood-quail, which prefers primary forests and tolerates secondary-growth forests near primary forests (BLI

2007g, p. 3; Sarria and Álvarez 2002, p. 159) at altitudes from 1,500 to 2,500 m (4,921 to 8,202 ft) (del Hoyo 1994, p. 431; Fuller *et al.* 2000, pp. 27-28; Hilty and Brown 1986, p. 133). Subsequent surveys have not located the species in the Department of Cundinamarca since 1954 (Collar *et al.* 1992, p. 171; Fuller *et al.* 2000, p. 27; Sarria and Álvarez 2002, p. 158), and researchers consider the gorgeted wood-quail to be locally extirpated from Cundinamarca (BLI 2007g, p. 3; Fuller *et al.* 2000, pp. 4-5; Sarria and Álvarez 2002, p. 160-161; Wege and Long 1995, p. 146).

Deforestation, in combination with hunting (Factor B), may have led to the local extirpation of the gorgeted wood-quail from another location. After no confirmed reports of the species in nearly 20 years (Sarria and Álvarez 2002, pp. 158-159), the species was rediscovered in Cuchilla del Ramo forest (in the Department of Santander) in 1970 (Sarria and Álvarez 2002, pp. 158-159; Wege and Long 1995, p. 143) and last confirmed there in 1988 (Collar *et al.* 1992, p. 172). However the species has not been confirmed at that location since that time (BLI 2007g, p. 2; Sarria and Álvarez 2002, pp. 158-159). According to Wege and Long (1995, p. 143), Cuchilla del Ramo, an unprotected area on the western slopes of the East Andes, has been largely cleared of its forest such that only fragments remain. Thus, it is possible that deforestation within the past 30 years has led to the extirpation of the gorgeted wood-quail from this location.

Today, the gorgeted wood-quail is endemic to the western slopes of the East Andes in the Department of Santander, Colombia (Collar *et al.* 1994, p. 70; del Hoyo 1994, p. 431; Fjeldsä and Krabbe 1990, p. 141; Hilty and Brown 1986, p. 133). The gorgeted wood-quail is currently confirmed in three locations (see Refugia, below), and its current range is between 10 km^2 (4 mi^2) (Sarria and Álvarez 2002, p. 160) and 27 km^2 (10.42 mi^2) (BLI 2007g, pp. 2, 5). The species has lost 92 percent of its former habitat (Sarria and Álvarez 2002, p. 160), and habitat loss continues throughout its range (BLI 2007g, p. 2; Collar *et al.* 1992, p. 172; Collar *et al.* 1994, p. 70; Donegan *et al.* 2003, p. 26; Hilty and Brown 1986, p. 133; Sarria and Álvarez 2002, pp. 159-160).

Deforestation rates and patterns: Colombian forests have undergone extensive alteration during the 20th Century to establish human settlements, build roads, extract timber, and pursue agriculture. Between 1973 and 1996, these activities reduced the amount of primary forest cover in Colombia by approximately 3,605 ha (8,908 ac) annually, representing a nearly one-third total loss of primary forest habitat (Viña *et al.* 2004, pp. 123-124). Habitat loss accelerated dramatically in the 1980s as an influx of people settled in formerly pristine forests (Perz *et al.* 2005, pp. 26-28; Viña *et al.* 2004, p. 124). Recent studies indicate that the rate of habitat destruction is accelerating. Between the years 1990 and 2005, Colombia lost approximately 52,800 ha (130,471 ac) of primary forest annually (Butler 2006a, pp. 1-3; FAO 2003a, p. 1). These studies and activities were described in greater detail above, as part of the Factor A analysis for the blue-billed curassow (under Deforestation Rates and Patterns). Logging is especially common in the flat lower-elevation areas and areas below 2,500 m (8,202 ft), where deforestation is nearly complete. Logging continues in steeper-sloped areas, where commercially valuable trees are still being extracted, and forested areas are being cleared for agricultural purposes (Fuller *et al.* 2000, p. 4; Stattersfield *et al.* 1998, p. 192).

Human-induced deforestation and environmental degradation have caused the gorgeted wood-quail to shift its range from the Department of Cundinamarca to the Department of Santander. The species was first observed in Santander within Cuchilla del Ramo forest in 1970 (Wege and Long 1995, p. 143), but has not been confirmed there since then (BLI 2007g, p. 2). The presence of the species has been documented only about 10 times, and most documentations have been auditory. The species has been most recently confirmed in the following three locations: (1) Guanentá-Alto Rio Fonce Flora and Fauna Sanctuary (BLI 2007g, p. 2; Sarria and Álvarez 2002, p. 160; Wege and Long 1995, p. 144), (2) Cachalú Biological Reserve (BLI 2007g, p. 2; Fuller *et al.* 2000, p. 27; Sarria and Álvarez 2002, pp. 158-159), and (3) the Serranía de los Yarguíes (BLI 2007g, p. 2; Donegan and Huertas 2005, p. 29; Donegan *et al.* 2003, p. 27; Turner 2006, p. 22).

Illegal drugs and their eradication: Cocaine and opium has been cultivated throughout the gorgeted wood-quail's range. The cultivation of illegal crops (including coca and opium) in Colombia destroys montane forests (Balslev 1993, p. 3). Coca crops also destroy the soil quality by causing the soil to become more acidic, which depletes the soil nutrients and ultimately impedes the regrowth of secondary forests in abandoned fields (Van Schoik and Schulberg 1993, p. 21). As of 2004, an estimated 80,000 ha (197,683 ac) were under cocaine cultivation and 4,000 ha (9,884 ac) were under opium cultivation (UNODC *et al.* 2007, pp. 7-8). These figures include habitat within the gorgeted wood-quail's range. Between 2003 and 2004, cocaine cultivation areas increased 25 percent in Cundinamarca, from 57 to 71 ha (140 to 175 ac), and by 78 percent in Santander, from 632 to 1,124 ha (1562 to 2777 ac) (UNODC and GOC 2005, p. 15).

Colombia continues to be the leading coca bush producer (UNODC *et al.* 2007, p. 7). However, since 2003, cocaine cultivation has remained stable, with about 800 km^2 (309 mi^2) of land under cultivation (UNODC *et al.* 2007, p. 8). This stabilization of production is, in part, attributed to alternative development projects implemented between 1999 and 2004, to encourage pursuits other than illegal crop cultivation (UNODC *et al.* 2007, p. 77). This stabilization of production area is also attributed to heightened eradication efforts. Between 2002 and 2004, aerial spraying occurred over more than 1,300 km^2 (502 mi^2) of land annually, peaking in 2004, when 1,360 km^2 (525 mi^2) of illicit crops were sprayed (UNODC and GOC 2005, p. 11). In 2006, eradication efforts were undertaken on over 2,130 km^2 (822 mi^2) of land, consisting of 1,720 km^2 (664 mi^2) of land being sprayed and manual eradication being used on the remaining land. Eradication efforts undertaken in 2006 occurred over an area representing 2.7 times more land than the net cultivation area (UNODC *et al.* 2007, p. 8). In Santander alone, 1,855 ha (4,583 ac) of coca fields were sprayed or manually eradicated in 2004 (UNODC 2005, p. 66). Drug eradication efforts in Colombia have further degraded and destroyed primary forest habitat by using nonspecific aerial herbicides to destroy illegal crops (Álvarez 2005, p. 2042; BLI 2007d, p. 3; Cárdenas and Rodríguez Becerra 2004, p. 355; Oldham and Massey 2002, pp. 9-12). Herbicide spraying has introduced harmful chemicals into gorgeted wood-quail habitat and has led to further destruction of the habitat by forcing illicit growers to move to new, previously untouched forested areas (Álvarez 2002, pp. 1088-1093; Álvarez 2005, p. 2042; Álvarez 2007, pp. 133-143; BLI 2007d, p. 3; Cárdenas and Rodríguez Becerra 2004, p. 355; Oldham and Massey 2002, pp. 9-12). Between 1998 and 2002, cultivation of illicit crops increased by 21 percent each year, with a concomitant increase in deforestation of formerly pristine areas of approximately 60 percent (Álvarez 2002, pp. 1088-1093).

Effects of habitat fragmentation: An analysis of the effects of habitat fragmentation on Andean birds within

western Colombia determined that 31 percent of the historical bird populations have become extinct or were locally extirpated by 1990, largely as a result of habitat fragmentation from deforestation and human encroachment (Kattan and Álvarez-Lopez 1996, p. 5; Kattan *et al.* 1994, p. 141). The gorgeted wood-quail, which depends on primary forest for at least part of its life cycle (BLI 2007g, p. 3; Sarria and Álvarez 2002, p. 159), has been extirpated from its type locality in Cundinaramaca (Fuller *et al.* 2000, pp. 4-5; Wege and Long 1995, p. 146). The study also noted that species at the upper or lower limit of their altitudinal distribution are more susceptible to local extirpation and extinction (Kattan and Álvarez-Lopez 1996, pp. 5-6). This is the case for the gorgeted wood-quail; the species prefers habitat at 1,750-2,050 m (5,741-6,726 ft), most of which has been destroyed (BLI 2007g, p. 2; Donegan and Huertas 2005, p. 29; Donegan *et al.* 2003, p. 27; Sarria and Álvarez 2002, pp. 158-159; Turner 2006, p. 22; Wege and Long 1995, pp. 143-144), and it has not been documented at higher elevations, despite the availability of suitable habitat (BLI 2007g, p. 2; Donegan and Huertas 2005, p. 29; Donegan *et al.* 2003, p. 27; Sarria and Álvarez 2002, pp. 158-160; Turner 2006, p. 22; Wege and Long 1995, pp. 143-144). Another study on the effects of habitat fragmentation in Colombia found that habitat fragmentation facilitates predation and hunting pressure (Arango-Vélez and Kattan 1997, pp. 140-142) (Factors B and C).

Refugia: The gorgeted wood-quail has been observed, and most recently confirmed, in the following three locations: (1) Guanentá-Alto Rio Fonce Flora and Fauna Sanctuary, (2) Cachalú Biological Reserve, and (3) the Serranía de los Yarguíes.

(1) Guanentá-Alto Rio Fonce Flora and Fauna Sanctuary (Santander Department): This 10,420-ha (25,748-ac) humid subtropical and temperate oak forest on the western slope of the East Andes was declared a protected natural area in 1993 (Andrade and Repizzo 1994, p. 43; Rainforest Alliance, p. 2; The Nature Conservancy (TNC) 2008, p. 1). This area has long been considered the largest remaining sizeable oak forest tract remaining in the northern area of the East Andes, even as recently as the year 2005 (Donegan and Huertas 2005, p. 11; Sarria and Álvarez 2002, p. 160; Stattersfield *et al.* 1998, p. 193; Wege and Long 1995, p. 144). The gorgeted wood-quail was first observed in the Sanctuary in 1979 (BLI 2007g, p. 2) and again 1988 (Sarria and Álvarez 2002, p. 160; Wege and Long 1995, p. 144). In 2004, the species was reported in the oak forests within the Province of Guanentá (BLI 2007g, p. 2), but it is unclear whether these observations occurred within the Sanctuary.

Beginning in the 1960s, habitat conversion accelerated in the East Andes (Stattersfield *et al.* 1998, p. 192). The forests of the Colombian East Andes have been extensively degraded (Collar *et al.*, 1992, p. 172; Fjeldsä and Krabbe 1990; Hilty and Brown 1986, p. 133; Stattersfield *et al.* 1998, p. 192). The western slopes have been largely converted to agricultural use and to pastureland for cattle (Stattersfield *et al.* 1998, p. 192), and deforestation continues on the lower slopes of the East Andes (Wege and Long 1995, p. 143). Selective logging affects birds in the lower part of the Guanentá Alto Rio Fonce (Fuller *et al.* 2000, p. 28; Sarria and Álvarez 2002, p. 160), including the gorgeted wood-quail. Stattersfield *et al.* (1998, p. 192) reported that forest loss below 2,500 m (8,202 ft) has been almost complete, although Fuller *et al.* (2000, p. 28) noted that the forest was ''largely intact'' above 1,950–2,200 m (6,398-7,218 ft). However, elevations above this altitude would not serve the needs of the gorgeted wood-quail, because this species is found most often at 1,750-2,050 m (5,741-6,726 ft) in altitude (BLI 2007g, p. 2; Donegan and Huertas 2005, p. 29; Donegan *et al.* 2003, p. 27; Sarria and Álvarez 2002, pp. 158-159; Turner 2006, p. 22; Wege and Long 1995, pp. 143-144) (see discussion under Habitat and Life History for the gorgeted wood-quail).

(2) Cachalú Biological Reserve: This 1,300-ha (3,212-ac) Reserve (TNC 2008, p. 1) was established in 1997 adjacent to Guanentá Alto Rio Fonce Flora and Fauna Sanctuary (Rainforest Alliance 2008, p. 2). It encompasses primarily mature oak forests and secondary areas (regenerating pastureland) at altitudes between 1,850 and 2,750 m (6,070 and 9,022 ft). Most of the secondary areas within the Reserve have been regenerating for 20 years. About 4 percent of land formerly used for pastureland and slash-and-burn agriculture has been left to regenerate within the last 8 years (BLI 2007g, p. 10). The species was first observed at this location in 1999 and again in 2000 and 2001 (BLI 2007g, p. 2; Fuller *et al.* 2000, p. 27; Sarria and Álvarez 2002, pp. 158-159).

While human population pressures in northern Santander have not been as great as in other parts of the Andes, 70 percent of the subsistence population living locally has had a major influence on the upper montane forest system. Slash-and-burn agriculture (clearing small plots of land for agriculture and settlement) and subsistence extractive activities (such as harvesting wood, plant fibers, and animals) have turned the upper montane forests into extraction forests (Rainforest Alliance 2008, p. 2). Ongoing slashing and burning on the outskirts of the Reserve could further degrade the integrity of the habitat within the Reserve (BLI 2007g, p. 11).

(3) Serranía de los Yarguíes (Yarguíes Mountains): This 175,000-ha (432,425-ac) forest is located in southern Santander and ranges in altitude between 200 and 3200 m (656 and 10,499 ft) (BLI 2007g, p. 12; Donegan and Huertas 2005, p. 30). This area was previously unsurveyed for birds, due to political instability and occupation by revolutionary armed forces (Donegan and Huertas 2005, pp. 11, 29-30; Donegan *et al.* 2004, p. 19; Sarria and Álvarez 2002, p. 160). The gorgeted wood-quail was first observed in Yarguíes in 2003 and again in 2004 (BLI 2007g, p. 2; Donegan and Huertas 2005, p. 29; Donegan *et al.* 2003, p. 27; Turner 2006, p. 22). This site is now considered to be the stronghold for the species (Donegan and Huertas 2005, p. 29; Donegan *et al.* 2004, p. 19; Turner 2006, p. 22) (see Population Estimates, above). This forest does not have protected status (BLI 2007g, p. 13) and land clearing for slash-and-burn agriculture continues to be a problem within the Serranía de los Yarguíes (BLI 2007g, p. 13; Donegan and Huertas 2005, p. 29; Turner 2006, p. 22).

Summary of Factor A

Habitat destruction, alteration, conversion, and fragmentation were factors in the species' historical decline and continue to be factors affecting the gorgeted wood-quail. The direct loss of habitat through widespread deforestation and conversion of primary forests for agricultural uses has led to a 95 percent range reduction for the species, leading to extirpation of the species in its type locality (in Cundinamarca) and an apparent shift in the species' range (to Santander). The species is known only in three locations, where habitat conversion and poaching of the gorgeted wood-quail are ongoing. Deforestation, habitat conversion, and drug eradication efforts have reduced the amount of suitable habitat at elevations preferred by the species, such that its current range is between 10 and 27 km^2 (4 and 10 mi^2). The destruction and fragmentation of the remaining primary forested habitat are ongoing throughout the species' range and are expected to continue. Therefore, we find that the present

destruction, modification, and curtailment of habitat are threats to the gorgeted wood-quail throughout all of its range.

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

Galliformes such as the gorgeted wood-quail are chiefly terrestrial birds that are easily hunted or trapped, and they have been closely associated with humans throughout history as a source for food, ornamental collection, commercial trade, and recreational hunting (Fuller *et al.* 2000, p. 2). Hunting the gorgeted wood-quail is illegal in Colombia (Factor D) and is considered poaching. Poaching for subsistence use and for local food trade is ongoing throughout the species' range (BLI 2007g, pp. 7, 11-13; Donegan and Huertas 2005, p. 29; Turner 2006, p. 22) (BLI 2007g, p. 7). Hunting affects birds in the lower part of the Guanentá-Alto Rio Fonce Flora and Fauna Sanctuary (Fuller *et al.* 2000, p. 28; Sarria and Álvarez 2002, p. 160), including the gorgeted wood-quail. Illegal hunting is an ongoing problem on the outskirts of the Cachalú Biological Reserve, where the species has been observed within the past decade (BLI 2007g, p. 10; Sarria and Álvarez 2002, p. 158). Poaching of the gorgeted wood-quail continues to be a problem within the Serranía de los Yarguíes, considered the stronghold for the species (BLI 2007g, p. 13; Donegan and Huertas 2005, p. 29; Turner 2006, p. 22). The IUCN Partridge, Quail, and Francolin Specialist Group (PQF Specialist Group) considers unregulated hunting to be a factor affecting gorgeted wood-quail populations throughout the species' range (Fuller *et al.* 2000, p. 28).

Hunting, in combination with deforestation, may have led to the local extirpation of this species from Cuchilla del Ramo (Department of Santander), where the species was first observed in 1970 (Sarria and Álvarez 2002, pp. 158-159; Wege and Long 1995, p. 143) and last confirmed in 1988 (Collar *et al.* 1992, p. 172). The gorgeted wood-quail has not been confirmed at this location again (BLI 2007g, p. 2; Sarria and Álvarez 2002, pp. 158-159), which may be due to a combination of habitat destruction and hunting pressures. This unprotected area on the western slopes of the East Andes is severely fragmented due to deforestation (Factor A). In addition, active hunting was reported in this location in the late 1980s. Collar *et al.* (1992, p. 172) interpreted this level of hunting to imply that the species was capable of withstanding some hunting pressure. Andrade (in litt., Collar *et al.* 1992, p. 172) noted that this would be the case only where the species is capable of retreating into suitable adjacent habitat. However, little suitable habitat is located in this area. Thus, hunting, in combination with deforestation, may have led to the extirpation of the gorgeted wood-quail from Cuchilla del Ramo.

In addition, Arango-Vélez and Kattan (1997, pp. 140-142) conducted a study on the effect of habitat fragmentation on birds in Colombia and found that habitat fragmentation facilitates hunting because smaller habitat patches allow hunters to more easily penetrate the entire plot (Arango-Vélez and Kattan 1997, pp. 140-142).

Summary of Factor B

The gorgeted wood-quail is hunted (poached) throughout its current range for local consumption or local food trade. Hunting results in the direct removal of individuals from the population and can remove potentially reproductive adults from the breeding pool. This primarily terrestrial species is particularly vulnerable to hunting pressures due to its small population size (Factor E) and fragmented distribution (Factor A). Researchers believe that the gorgeted wood-quail is only capable of escaping hunting pressures when adjacent suitable habitat exists. There are continued reports of hunting pressures on the species; these pressures have been and continue to be exacerbated by ongoing human encroachment into previously undisturbed forests (Factor A). Hunting, combined with habitat fragmentation (Factor A), increases the possibility of local extirpation since the gorgeted wood-quail is unlikely to re-occupy an area that has been depleted through hunting (Factor E, Likelihood to Disperse). Hunting may have led to the local extirpation of the species in a portion of its range. Hunting pressures are ongoing and affect the entire population of gorgeted wood-quail. Therefore, we find that hunting is a threat to the gorgeted wood-quail throughout its range.

C. Disease or Predation

Disease: We are not aware of any information regarding disease or the potential for significant disease outbreaks in gorgeted wood-quail populations. As a result, we do not consider disease to be a threat to the species.

Predation: Potential quail predators include feral dogs, tayras, dwarf squirrels (*Microsciurus sp.*), tree squirrels (*Sciurus granatensis*), common opossums (*Didelphis marsupialis*), kinkajous (*Potos flavus*), Central American agoutis (*Dasyprocta punctata*), and South American coatis (*Nasua nasua*) (Arango-Vélez and Kattan 1997, p. 141). A predation study conducted in the Colombian Andes demonstrated that habitat fragmentation increased predation pressure on the eggs of the common quail (*Coturnix coturnix*) when situated within smaller, isolated habitat fragments (Arango-Vélez and Kattan 1997, pp. 137-143). Similar studies have found that nest predation is more prevalent in smaller, isolated forest patches because the small size of the patch facilitated predators' access to prey throughout the entire plot (Gibbs 1991, p. 157; Hoover *et al.* 1995, p. 151; Keyser *et al.* 1998, p. 991; 2002, p. 186; Renjifo 1999, p. 1133; Wilcove 1985, p. 1214). Arango-Vélez and Kattan (1997, pp. 140-142) also found that smaller fragments support smaller predators, which tend to depredate on eggs and juveniles, rendering understory nesting birds, such as the gorgeted wood-quail, particularly vulnerable to predation during these life-history stages (Arango-Vélez and Kattan 1997, pp. 140-142). These studies were described in more detail above, as part of the Factor C analysis for the blue-billed curassow.

Summary of Factor C

Feral dogs, tayras, dwarf squirrels, tree squirrels, common opossums, kinkajous, Central American agoutis, and South American coatis are potential gorgeted wood-quail predators. Predation results in the direct removal of individuals from the population and can remove potentially reproductive adults from the breeding pool. This primarily terrestrial species is particularly vulnerable to predation pressures due to its small population size (Factor E) and fragmented distribution (Factor A). Habitat fragmentation has occurred and is ongoing throughout the species' range. Studies on similar species in similar Andean habitats indicate that vulnerability to predation increases with increased habitat fragmentation and smaller patch sizes. Predation exacerbates the genetic complications associated with the species' small population size (Factor E). Because of the species' small population size and inability to recolonize isolated habitat fragments (Factor E), predation renders the species vulnerable to local extirpation. Therefore, we find that predation, exacerbated by ongoing habitat destruction (Factor A) and hunting (Factor B), is a threat to the gorgeted wood-quail.

D. The Inadequacy of Existing Regulatory Mechanisms

Regulatory mechanisms may provide species-specific or habitat-specific protections. An evaluation of the adequacy of regulatory mechanisms within Colombia to mitigate or remove the threats to the gorgeted wood-quail is provided below, beginning with species-specific and followed by habitat-specific protection mechanisms.

Colombia has enacted numerous laws to protect species and their habitats (Matallana-T. 2005, p. 121). The gorgeted wood-quail is listed as a critically endangered species under Colombian Law 99 of 1993 (EcoLex 1993, p. 2) and Resolution No. 584 of 2002 (EcoLex 2002, pp. 10, 12). A full description of these laws and the categorization of threatened species in Colombia were provided above, as part of the Factor D analysis for the blue-billed curassow. Because of its status as a critically endangered species, the Ministry of the Environment does not permit the gorgeted wood-quail to be hunted commercially or for sport under Resolution No. 849 of 1973 and Resolution No. 787 of 1977 (EcoLex 1973, p.1; EcoLex 1977, p. 3). Neither Resolution prohibits subsistence hunting, which is a threat to the species throughout its range (Factor B). Gorgeted wood-quail is hunted within the Serranía de los Yarguíes, which has no protected status (BLI 2007g, p. 13) despite being considered the stronghold for the species (Donegan and Huertas 2005, p. 29; Turner 2006, p. 22). Thus, these Resolutions are ineffective at reducing the existing threat of subsistence hunting to the gorgeted wood-quail (Factor B).

Colombia has enacted numerous forestry laws and forestry management practices (Law No. 2 (EcoLex 1959); Decree No. 2,811 (Faolex 1974); Decree No. 1,791 (Faolex 1996); Law No. 1,021 (EcoLex 2006)). Weaknesses in the implementation of these laws and the decentralized nature of Colombian resource management are described in detail above for the blue-billed curassow (Factor D) (ITTO 2006, pp. 218-9, 222; Matallana-T. 2005, pp. 121-122). These regulatory mechanisms are ineffective at protecting the gorgeted wood-quail (BLI 2007g, p. 13; ITTO 2006, p. 222). Habitat destruction continues to be a problem within the unprotected forests of Serranía de los Yarguíes (BLI 2007g, p. 13), considered the stronghold of the species (Donegan and Huertas 2005, p. 29; Turner 2006, p. 22), and on the outskirts of the Reserva Biológica Cachalú, where the species has also been observed (BLI 2007g, p. 10). Therefore, we determine that forestry regulations are not effective in mitigating the threats to the gorgeted wood-quail from habitat destruction (Factor A).

Colombia has several categories of national habitat protection (Matallana-T. 2005, p. 121-122), which were more fully described above, as part of the Factor D analysis for the blue-billed curassow (Matallana-T. 2005, p. 121-122). The gorgeted wood-quail occurs within two protected areas: the Guanentá-Alto Rio Fonce Flora and Fauna Sanctuary (Fuller *et al.* 2000, p. 28; Sarria and Álvarez 2002, p. 160) and the Cachalú Biological Reserve (BLI 2007g, p. 10; Sarria and Álvarez 2002, p. 158). Habitat destruction and subsistence hunting (poaching) are ongoing within these protected areas, despite being illegal (BLI 2007g, p. 10). Therefore, these sanctuaries and reserves provide little or no protection to the species from the threats of habitat destruction (Factor A) or poaching (Factor B).

Summary of Factor D

Colombia has adopted numerous laws and regulatory mechanisms to administer and manage wildlife and their habitats. The gorgeted wood-quail is considered critically endangered under Colombian law and lives within two protected areas. However, on-the-ground enforcement of existing wildlife protection and forestry laws and oversight of the local jurisdictions implementing and regulating activities are ineffective at mitigating the primary threats to the gorgeted wood-quail. As discussed for Factor A, habitat destruction, degradation, and fragmentation continue throughout the existing range of the gorgeted wood-quail. As discussed for Factor B, uncontrolled hunting of the gorgeted wood-quail is ongoing and negatively affects the continued existence of the species. Therefore, we find that the existing regulatory mechanisms currently in place are inadequate to mitigate the primary threats of habitat destruction (Factor A) and hunting (Factor B) to the gorgeted wood-quail.

E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

Two additional factors affect the gorgeted wood-quail: its minimal likelihood for dispersal and the species' small population size.

Likelihood to Disperse: The gorgeted wood-quail is currently known in three localities in two disjunct locations within the Department of Santander: Serranía de los Yarguíes, in northern Santander, and Cachalú Biological Reserve and Guanentá-Alto Rio Fonce Flora and Fauna Sanctuary, in southern Santander (Donegan and Huertas 2005, p. 30; Rainforest Alliance 2008, p. 2; TNC 2008, p. 1). Although there is little information on the species' dispersal capabilities, the isolated, fragmented nature of the remaining suitable habitat is considered by researchers to be a hindrance to its ability to disperse because: (1) gorgeted wood-quail is primarily a terrestrial species that is found at mid-to-upper-elevation forests (1,750-2,050 m (5,741-6,726 ft)) on the western slopes of the East Andes (BLI 2007g, p. 2; Donegan and Huertas 2005, p. 29; Donegan *et al.* 2003, p. 27; Collar *et al.* 1992, pp. 171-172; del Hoyo 1994, p. 431; Fuller *et al.* 2000, pp. 2, 27-28; Sarria and Álvarez 2002, pp. 158-159; Turner 2006, p. 22; Wege and Long 1995, p. 143-144); (2) the species is dependent on mature forest for at least part of its life cycle and is not found in secondary habitats that are not adjacent to primary forests (BLI 2007g, p. 3; Sarria and Álvarez 2002, p. 159); (3) researchers believe that the species is capable of escaping hunting pressures only when adjacent to suitable habitat (Andrade in litt., as cited in Collar *et al.* 1992, p. 172); (4) the species is currently located in two disjunct areas, one in northern Santander and the other in southern Santander; and (5) most of the habitat below 1,950-2,500 m (6,398-8,202 ft) in the East Andes has been destroyed, leaving only isolated, fragmented habitat patches (Fuller *et al.* 2000, p. 28; Stattersfield *et al.* 1998, p. 192). Because the species has not demonstrated an aptitude to disperse into secondary-growth areas that are not adjacent to primary forest, and given the isolated, disjunct nature of remaining forest fragments, the gorgeted wood-quail as with other narrow-ranging species found in fragmented habitat (Hanski 1998, pp. 45-46), is unlikely or incapable of dispersing to suitable habitat that is not adjacent to existing locales.

Small Population Size: Deforestation (Factor A) and overutilization (Factor B) have greatly affected the current population size and distributional range of the gorgeted wood-quail (Collar *et al.* 1992, pp. 126-127; Collar *et al.* 1994, p. 60). The species was thought to be extinct or on the verge of extinction until its rediscovery in 1970 (Collar *et al.* 1992, p. 171; Fuller *et al.* 2000, pp. 4-5, 27; Wege and Long 1995, p. 146). The gorgeted wood-quail is now confirmed in three isolated areas: the Sanctuary of Fauna and Flora Guanentá-Alto Rio Fonce, the Natural Reserve

Cachalú, and the Serranía de los Yariguíes (Donegan and Huertas 2005, pp. 11, 29-30; Donegan *et al.* 2004, p. 19; Sarria and Álvarez 2002, p. 160). The population of the gorgeted wood-quail is currently estimated to include 189 to 486 individuals, with a declining population trend (BLI 2007g, pp. 1, 5).

The gorgeted wood-quail's restricted range, combined with its small population size (Cuervo and Salaman 1999, p. 7; del Hoyo 1994, p. 361; Sarria and Álvarez 2002, p. 138), makes the species particularly vulnerable to the threat of adverse natural (e.g., genetic, demographic, or environmental) and manmade (e.g., hunting or deforestation) events that destroy individuals and their habitat (Holsinger 2000, pp. 64-65; Primack 1998, pp. 279-308; Young and Clarke 2000, pp. 361-366). Small population sizes render species vulnerable to genetic risks that can have individual or population-level consequences on the genetic level and can increase the species' susceptibility to demographic problems, as explained in more detail above for the blue-billed curassow (Factor E, Small Population Size) (Charlesworth and Charlesworth 1987, p. 238; Shaffer 1981, p. 131). Once a population is reduced below a certain number of individuals, it tends to rapidly decline towards extinction (Franklin 1980, pp. 147-148; Gilpin and Soulé 1986, p. 25; Holsinger 2000, pp. 64-65; Soulé 1987, p. 181).

In the absence of quantitative studies specific to this species, a general approximation of minimum viable population size is the 50/500 rule, as described above as part of the Factor E analysis for the brown-banded antpitta (Shaffer 1981, pp. 132-133; Soulé 1980, pp. 160-162). The total population size of the gorgeted wood-quail is estimated to be between 186 and 486 individuals. While 186 individuals is above the minimum population size required to avoid short-term genetic consequences, 486 falls just below the threshold minimum number of 500 individuals required for long-term fitness of a population and does not take into account that not all members of the population will be contributing to population growth at any one time.

Because the gorgeted wood-quail exists in two isolated, disjunct habitat fragments, between which they are unlikely to disperse, an examination of the fitness of each subpopulation is more appropriate. For the purposes of this analysis, although we have reservations about the precision of these estimates (see Population Estimates discussion above), we will use the following two population estimates: 250 individuals in Northern Santander and 30-66 individuals in southern Santander. Upon examination of these estimates, both populations are clearly below the threshold required for long-term fitness in a population. The lower limit of the population estimate for the southern Santander population is below the threshold required to avoid short-term risks such as inbreeding and demographic shifts, whereas the upper limit is barely above the 50-individual threshold. Therefore, we currently consider these subpopulations (and the species as a whole) to be at risk due to the lack of short- and long-term viability.

Summary of Factor E

The gorgeted wood-quail is unlikely or incapable of dispersing into suitable habitat that is isolated from extant populations, and the species' overall small population size makes it vulnerable to genetic and demographic risks that negatively impact the species' short- and long-term viability. Habitat destruction through deforestation (Factor A) and overutilization through hunting (Factor B) have greatly affected the species' current population size. Believed to be extinct or on the verge of extinction within the past 30 years, the species is now confirmed in 3 areas of 2 disjunct locations. The gorgeted wood-quail's small population size, combined with its restricted range and inability to repopulate disjunct suitable habitat following local extirpations, makes the species particularly vulnerable to the threat of adverse natural (e.g., genetic, demographic, or environmental) and manmade (e.g., hunting or deforestation) events that destroy individuals and their habitat.

Status Determination for the Gorgeted Wood-Quail

The five primary factors that threaten the survival of the gorgeted wood-quail are: (1) Habitat destruction, fragmentation, and degradation (Factor A); (2) overexploitation due to hunting (Factor B); (3) predation (Factor C); (4) inadequacy of regulatory mechanisms to reduce the threats to the species (Factor D); and (5) small population size and isolation of remaining populations (Factor E). The gorgeted wood-quail, a small terrestrial bird, prefers primary montane forests or adjacent secondary forests at altitudes between 1,750 and 2,050 m (5,741 and 6,726 ft). The species' historic range has been reduced by 92 percent, extirpating the species from its type locality in the Department of Cundinamarca and causing the species to shift to the extremes of its range and elevational distribution (Factor A). The estimated suitable habitat available to the species is approximately 10-27 km^2 (4-10 mi^2).

Within the past decade, the gorgeted wood-quail has been confirmed in only three locations: Serranía de los Yarguíes, in northern Santander, and adjacent localities in the Guanentá-Alto Rio Fonce Flora and Fauna Sanctuary and Cachalú Biological Reserve, in southern Santander. Much of the primary forest, mid-elevation habitat preferred by the species has been destroyed by human activities, such as slash-and-burn agriculture, grazing, and extractive industries (Factor A). Illegal crop production, which continues throughout the species' range, has altered soil compositions, hindering regeneration of abandoned fields. In addition, drug eradication programs involving the aerial spraying of non-specific herbicides have further degraded the environment and destroyed primary forest habitat.

In combination, these threats exacerbate the negative consequences to the species. For example, habitat fragmentation (Factor A) increases the species' vulnerability to hunting (Factor B). Poaching, in combination with habitat destruction, may have led to the local extirpation of the gorgeted wood-quail from Cuchilla del Ramo. This population was only discovered in 1970 and, amidst ongoing habitat destruction and hunting pressures, has not been observed there since 1988. Thus, deforestation and hunting within the past 30 years may have led to the extirpation of the gorgeted wood-quail from this location.

Habitat fragmentation also exposes the species to greater risk of extinction caused by adverse natural (e.g., genetic, demographic, or environmental) and manmade (e.g., hunting or deforestation) events (Factor E). The species' population has decreased by up to 9 percent in the past 10 years and has likely been extirpated from at least one location (Cundinamarca) due to habitat loss and from another locality (Cuchilla del Ramo) due to a combination of habitat loss and hunting. The global population of the gorgeted wood-quail is estimated to be between 187 and 486 individuals. Given that the gorgeted wood-quail is likely to interact as subpopulations and is unlikely to disperse between patches of fragmented habitat, the effective population size is actually much smaller. This small population size puts the gorgeted wood-quail at risk from both near-term genetic complications (such as inbreeding and demographic shifts) and lack of long-term fitness (such as the ability to adapt to changing conditions). These potential genetic problems are exacerbated by

ongoing human-induced threats, such as habitat destruction (Factor A) and hunting (Factor B), factors which are not being mitigated by existing regulations (Factor D) and are further magnified because the species is unlikely to repopulate isolated patches of suitable habitat where the species has undergone decline or local extirpation, increasing the likelihood of local extirpations (Factor E).

The gorgeted wood-quail is listed as critically endangered, making it illegal to hunt the species, and two of the three known localities are within protected areas. However, habitat destruction and poaching are ongoing throughout the species' range (Factor D). Thus, the regulations in place are ineffective in protecting the gorgeted wood-quail and its habitat.

We have carefully assessed the best available scientific and commercial information regarding the past, present, and potential future threats faced by the gorgeted wood-quail. We consider the ongoing threats to the gorgeted wood-quail, habitat destruction (Factor A), hunting (Factor B), and predation (Factor C), exacerbated by the species' small population size and limited dispersal ability (Factor E), and compounded by inadequate regulatory mechanisms to mitigate these threats (Factor D), to be equally present and of the same magnitude throughout the species' entire current range. Based on this information, we conclude that the gorgeted wood-quail is in danger of extinction throughout its range. Therefore, we are proposing to list the gorgeted wood-quail as an endangered species.

Ecuadorian Bird Species

V. Esmeraldas Woodstar (*Chaetocercus berlepschi*)

Species Description

Esmeraldas woodstar, a member of the hummingbird family (Trochilidae) and endemic to Ecuador, is approximately 6.5 cm (2.5 in.) in length (del Hoyo *et al.* 1999, p. 678; Ridgely and Greenfield 2001b, p. 295; Schuchmann 1999, p. 468; Williams and Tobias 1991, p. 39). The species is locally known as ''*Colibrí de Esmeraldas*'' or ''*Estrellita esmeraldeña*'' (UNEP-WCMC 2008b). Both sexes have striking violet, green, and white plumage. The male has a narrow band across its breast, whereas the female has a full white underbody (BLI 2007c, p. 1; Ridgely and Greenfield 2001b, plate 42).

Taxonomy

Esmeraldas woodstar was first taxonomically described by Simon in 1889 (BLI 2007e, p. 1). The type specimen (the actual specimen that was first described) of the Esmeraldas woodstar was obtained from the moist forest habitat near Esmeraldas City, in the Department of Esmeraldas (Collar *et al.* 1992, p. 533). Esmeraldas City is, therefore, referred to as the ''type locality.''

Simon placed the species in the Trochilidae family, under the name *Chaetocercus berlepschi*. The species is also known by the synonym *Acestrura berlepschi*. Both CITES and BirdLife International recognize the species as *Chaetocercus berlepschi* (BLI 2007e, p. 1; UNEP-WCMC 2008b, p. 1). Therefore, we accept the species as *Chaetocercus berlepschi*, which follows the Integrated Taxonomic Information System (ITIS 2008).

Habitat and Life History

Esmeraldas woodstar is a range-restricted, forest-dwelling species with highly localized populations (BLI 2007f, pp.1-3; Collar *et al.* 1992, p. 533; Schuchmann 1999, p. 532). Esmeraldas woodstar prefers primary forest and is usually found in lowland semi-evergreen forests (cloud or fog forests) and has occasionally been seen in secondary-growth semi-humid (moist) habitat during the breeding season (Best and Kessler, p. 141; BLI 2004, p. 2; BLI 2007c, p. 3; Collar *et al.* 1992, p. 533; del Hoyo *et al.* 1999, p. 678; Hummingbird Monitoring Network 2006, p. 1; Ridgely and Greenfield 2001b, p. 295; Schuchmann 1999, p. 468; Stattersfield *et al.* 1998, p. 211; Williams and Tobias 1991, p. 39). Esmeraldas woodstar has not been seen in secondary-growth forests at any other time of year, and researchers are not certain that the species can survive in secondary forests year-round (BLI 2007c, p. 3). The species has mostly been recorded at elevations between 50 and 150 m (164 and 492 ft) (Ridgely and Greenfield 2001a, p. 390; Ridgely and Greenfield 2001b, p. 295), but has occasionally been observed above 500 m (1,640 ft) (i.e., at Loma Alta; Factor A) (Best and Kessler, p. 141; del Hoyo *et al.* 1999, p. 678; Ridgely and Greenfield 2001b, p. 295; Schuchmann 1999, p. 468; Stattersfield *et al.* 1998, p. 211; Williams and Tobias 1991, p. 39).

Esmeraldas woodstar has been seen most often along forest borders, with females especially seen perching on dead twigs (Ridgely and Greenfield 2001b, p. 295). The species forages mainly in the canopy and has been recorded ''hawking'' insects from the air, as well as foraging nectar from flowers of the strawberry tree (*Muntingia calabura*), river koko (*Inga vera*), and mango tree (*Mangifera* spp.) (Becker *et al.* 2000, p. 55; del Hoyo *et al.* 1999, p. 678; Ridgely and Greenfield 2001b, p. 295). As recently as 1999, there were no known breeding sites for the Esmeraldas woodstar (del Hoyo *et al.* 1999, p. 678). Today, one breeding site has been located in the cloud forests of the Colonche Hills (Hummingbird Monitoring Network 2006, p. 1), in the Department of Guayas (Best and Kessler 1995, p. 54). The breeding season is from December to March (BLI 2007c, p. 3). Little else is known of the Esmeraldas woodstar's breeding habits or other activities during most of the year (Ridgely and Greenfield 2001a, pp. 389-390). The species seems to ''disappear'' from known locations during non-breeding months (BLI 2007c, p. 2; Becker *et al.* 2000, p. 55). In general, male hummingbirds breed with several females in one breeding season and the females take responsibility for all remaining reproductive responsibilities, including nest building, incubation, and rearing. Hummingbirds typically produce 2 eggs per clutch (Schuchmann 1999, pp. 506, 509).

Historical Range and Distribution

The type locality for the Esmeraldas woodstar (the location of its first discovery) was in Esmeraldas, near Esmeraldas City, and the last specimen was observed there and in the Department of Manabí in 1912 (Collar *et al.* 1992, p. 533). The species' historic range has been reduced by 99 percent (Dodson and Gentry 1991, p. 293). The area around its type locality (Esmeraldas City) has been replaced by pastureland and is nearly devoid of all trees (Collar *et al.* 1992, p. 533). After the species went unobserved following the 1912 sightings, it was thought to be extinct, until it was rediscovered in 1990 (Ridgely and Greenfield 2001a, pp. 389-390; Williams and Tobias 1991, p. 39).

Current Range and Distribution

Today, Esmeraldas woodstar ranges in northwestern Ecuador, in the Departments of Esmeraldas, Manabí, and Guayas, along the slopes of the coastal cordillera up to 500 m (1,640 ft) (del Hoyo *et al.* 1999, p. 678; Ridgely and Greenfield 2001b, p. 295; Schuchmann 1999, p. 468; Williams and Tobias 1991, p. 39). The current extent of the species' range is approximately 1,155 km^2 (446 mi^2), in three disjunct and isolated areas (BLI 2004, p. 2; Dodson and Gentry 1991, p. 293).

The species was rediscovered on ridges above the lower Río Ayampe (in northwest Guayas/Manabí) in March 1990, near the Machalilla National Park (Becker *et al.* 2000, p. 55; BLI 2007c, p.

2; Williams and Tobias 1991, p. 39), and again in January 1991 (Ridgely and Greenfield 2001a, p. 389). Subsequent attempts to relocate the species at Río Ayampe (in August 1991 and July 1993) were unsuccessful (Collar *et al.* 1992, p. 533; Ridgely and Greenfield 2001a, p. 389). Researchers subsequently determined that the species occupies this habitat only seasonally, frequenting the Park from December through the spring (March), but is absent from this location during non-breeding months (Becker *et al.* 2000, p. 55; BLI 2007c, p. 2; and Greenfield 2001a, p. 389).

Since then, the species has been observed at the following locations: *Esmeraldas*: Suá, in January 1993, and Muisne, in 1994 (month unknown); *Manabí*: Isla de La Plata (part of the Machalilla National Park), December-January 1998 (BLI 2007c, p. 2; Ridgely and Greenfield 2001a, p. 389; Williams and Tobias 1991, p. 39). The species was not observed on Isla de La Plata during a bird survey conducted in June 2000 (Cisneros-Heredia 2005, p. 24), reconfirming their absence from this habitat during non-breeding months.

Population Estimates

Esmeraldas woodstar is considered a rare, range-restricted species with highly localized populations in three general areas (BLI 2007c, pp. 1-3; Schuchmann 1999, p. 532). There have been no population surveys of this species. BirdLife International estimated that the population currently includes between 186 and 373 individuals, based on estimates using similar species of hummingbirds (BLI 2007c, p. 6).

Conservation Status

The Esmeraldas woodstar is identified as an endangered species under Ecuadorian law (EcoLex 2003b, p. 36, p. 36). This species is classified as 'Endangered' on the IUCN Red List, due to severe fragmentation within the woodstar's restricted range (IUCN 2006).

Summary of Factors Affecting the Esmeraldas Woodstar

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

The Esmeraldas woodstar is restricted to the semi-humid forests and woodlands from sealevel to 500 m (1,600 ft) along the Coastal Cordillera of western Ecuador (del Hoyo *et al.* 1999, p. 678; Ridgely and Greenfield 2001b, p. 295). The current extent of the species' range is approximately 1,155 km^2 (446 mi^2), in three disjunct and isolated areas (BLI 2004, p. 2).

Deforestation Rates and Patterns: The semi-humid, semi-evergreen forest environment preferred by the Esmeraldas woodstar is one of the most threatened forest habitats in the Neotropics (Collar *et al.* 1992, p. 533; Schuchmann 1999, p. 532). This region is also known as the Tumbesian region (which encompasses the coast and foothills beginning in southwestern Ecuador and into the mid-coastal area of northwestern Peru) (World Land Trust U.S. 2008, p. 1). This habitat type has been reduced by over 99 percent (Dodson and Gentry 1991, p. 293), making this region one of the most vulnerable endemic bird areas in South America (Stattersfield *et al.* 1998, p. 214). Deforestation, understory degradation, and limited habitat size are among the biggest impacts to resident birds in the Tumbesian region (Stattersfield *et al.* 1998, p. 214).

Forested habitat within western Ecuador, including that within the Esmeraldas woodstar's range, has diminished rapidly due to logging, clearing for agriculture, and road development (Dodson and Gentry 1991, pp. 283-293). The primary moist forest habitat at the species' type locality (Esmeraldas City) has been replaced with pastures and scattered trees (Collar *et al.* 1992, p. 533). Dodson and Gentry (1991, p. 293) indicated that rapid habitat loss is continuing and that extant forests will be eliminated in the near future if deforestation continues. Recent reports indicate that forest habitat loss continues in Ecuador. Between the years 1990 and 2005, Ecuador has lost a total of 2.96 million ha (7.31 million ac) of primary forest, which represents a 16.7 percent deforestation rate and a total loss of 21.5 percent of forested habitat since 1990 (Butler 2006b, pp. 1-3; FAO 2003b, p. 1). Very little suitable habitat remains for the species and remaining habitat is highly fragmented (BLI 2004a, p. 2).

Other Human Factors: Ongoing deforestation has transformed forested habitat within the region to a patchwork of cropland, with fewer than 5 percent of the forested areas remaining only on steep slopes that cannot be cultivated (Best and Kessler 1995, p. 35; Stattersfield *et al.* 1998, p. 214). Persistent grazing from goats and cattle has decimated the understory vegetation and any secondary forest growth (BLI 2004a, p. 2). Researchers have observed that road building and other infrastructure improvements in previously remote forested areas have increased accessibility and further facilitated habitat destruction, exploitation, and human settlement (Álvarez 2005, p. 2042; Cárdenas and Rodríguez Becerra 2004, pp. 125-130; Etter *et al.* 2006, p. 1; Hunter 1996, p. 158-159; Viña *et al.* 2004, pp. 118-119). Fragmented habitat also increases predator access to the forest, exposing the species to increased risk of predation (Factor C).

Refugia: The species is currently known in three localities: (1) Isla de la Plata, (2) Machalilla National Park, and (3) Loma Alta Communal Ecological Reserve.

(1) Isla de la Plata: This 1,420-ha (3,508-ac) island is approximately 27 km (17 mi) from the coast of the Department of Manabí and is actually part of the Machalilla National Park (see below). The species was last observed on the island in 1998 (Becker *et al.* 2000, p. 55; BLI 2007c, p. 2). The island is mostly uninhabited, but tourism for bird-watching occurs there year-round (BLI 2007c, p. 9), which occasionally disturbs the native birds. Non-native domestic animals, including goats (*Capra hircus*), were introduced to the island many years ago (Curry 1993, p. 24). Non-native predators, which have also been introduced to the island, are discussed below under Factor C. The grazing activity of the goats has destroyed understory habitat on the island. As of 2007, BirdLife International reports that an eradication program is underway to remove these feral animals from the island (BLI 2007c, p. 10). Despite a report, in 1991, that the goat population on the island had reportedly been reduced from an estimated 300 to 30 animals (Curry 1993, p. 24), the colony of goats apparently remains extant to this day (BLI 2007c, p. 10).

(2) Machalilla National Park: This 34,393-ha (84,985-ac) Park was established in 1979 (BLI 2007c, pp. 11, 13) and is designated as a Ramsar Wetland of International Importance (BLI 2007c, p. 13) (see Factor D). In addition to the male sighting on Isla de La Plata, a female was also observed within the Park in 1998 (Becker *et al.* 2000, p. 55). The Park encompasses a variety of habitats, including high-elevation humid and cloud forests and lower-elevation slopes covered with semi-deciduous and deciduous forests (BLI 2007c, pp. 11).

This park is populated, and residents subsist on farming and cattle-raising (BLI 2007c, pp. 11, 13; Lasso 1997, p. 3). Portions of land within the Park have been converted to pastures or cropland (Lasso 1997, p. 3). Some previously deforested areas have been left to regenerate (BLI 2007c, p. 13). However, ongoing grazing is hindering understory development in forest areas left to regenerate (BLI 2007c, pp. 10, 13, 17). Residents continue to selectively harvest trees and non-timber products;

this activity is not monitored and the extent of the impact is unknown (BLI 2007c, p. 13). The Park is surrounded by a matrix of altered habitat, dominated by agricultural crops such as bananas, corn, sugarcane, tomatoes (*Lycopersicon esculentum*), yucca (*Yucca* spp.), and pasturelands (BLI 2007c, p. 11; Lasso 1997, p. 3). A highway built around the outskirts of the park provides greater access to more areas within the Park (BLI 2007c, p. 13). Other activities in the area, including a fish meal processing plant, petroleum waste discharges into the sea, and accumulation of solid waste, are potential sources of pollution within the Park (Lasso 1997, p. 3).

(3) Loma Alta Communal Ecological Reserve: This 6,000-ha (14,826-ac) area was declared a Reserve in 1996 (BLI 2007c, p. 17). The Reserve was created to protect the watershed and to help preserve the land of four groups of indigenous inhabitants. The Reserve encompasses a variety of habitats from dry to cloud forests (BLI 2007c, p. 15). About 500 ha (1,235 ac) of the Reserve is dedicated to cultivation of the Panama hat plant (*Carludovica palmata*, locally known as ''*Paja Toquilla*''), which is processed and sold by the community. Cattle-raising has increased in recent years and the regenerating forests have again been decimated by overgrazing. Logging, agriculture, and slash-and-burn farming continue to impact this Reserve (BLI 2007c, p. 17).

Summary of Factor A

Esmeraldas woodstars are rare, range-restricted species with highly localized populations in three disjunct locations within an area of approximately 1,155 km^2 (446 mi^2) (BLI 2004, p. 2; Dodson and Gentry 1991, p. 293). The evergreen forests preferred by this species have undergone extensive deforestation, and remaining habitat is highly fragmented. Habitat alteration and human activities, such as slash-and-burn agriculture and cattle and goat grazing, are occurring throughout the species' range, including the protected areas in which the species occurs (Machalilla National Park, including Isla de la Plata, and Loma Alta Communal Ecological Reserve). Infrastructure development and economic activities (such as fish meal processing and non-timber forest product extraction) occur throughout the species' known breeding range. Logging, road development, and pollution from industrial activities occur within or near protected areas. Habitat destruction, alteration, and conversion have reduced the available habitat for this species by 99 percent. These activities are ongoing throughout the species' range, including within protected areas (Factor D), and are expected to continue.

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

Stattersfield *et al.* (1998, p. 214) reported that birds in the Tumbesian region are, in part, impacted by hunting and trade (Stattersfield *et al.* 1998, p. 214). However, we have no current information to suggest that hunting for domestic or international consumption or trade is impacting the Esmeraldas woodstar (including, Best and Kessler, pp. 124, 141; BLI 2007c, p. 3). Locally, the communities in Loma Alta, where this species occurs, are involved in conservation activities, including protecting native species in Loma Alta Communal Ecological Reserve against hunting, timber harvest and agricultural expansion.

In 1987, the Esmeraldas woodstar was listed in CITES Appendix II (UNEP-WCMC 2008b, p. 1), which includes species that are not necessarily threatened with extinction, but which require regulation of international trade to ensure that trade of the species is compatible with the species' survival. International trade in specimens of Appendix-II species is authorized through permits or certificates under certain circumstances, including verification that trade will not be detrimental to the survival of the species in the wild and that the specimens were legally acquired (UNEP-WCMC 2008a, p. 1). According to the World Conservation Monitoring Centre (WCMC), there has been one international transaction permitted by CITES since listing. In 1993, 100 ''bodies'' were imported to Mexico through the United States. According to the trade data, the specimens were being traded for commercial purposes and were seized by inspectors (UNEP-WCMC 2008d, p. 1). There has been no further CITES-recorded trade in this species since that time. Although we are no longer able to determine the exact details surrounding this seizure, we consider the seizure and lack of ensuing trade to be supportive that CITES has been effective in controlling commercial trade in this species. Therefore, we do not consider international trade for commercial purposes to be a threat to the species.

Tourism occurs year-round at Isla de la Plata and has been known to occasionally disturb the native birds (BLI 2007c, pp. 2, 9-10). There is no information regarding whether Esmeraldas woodstar is among the native species that is adversely affected by ecotourism or other human disturbance.

We are unaware of any other information currently available that addresses the occurrence of overutilization for commercial, recreation, scientific, or education purposes that may be affecting the Esmeraldas woodstar population. Consequently, we do not consider this factor to be a threat to the species.

C. Disease or Predation

Disease: We are unaware of information regarding disease or the potential for significant disease outbreaks in the Esmeraldas woodstar. As a result, we do not consider disease to be a threat to the species.

Predation: Hummingbird eggs and chicks are most vulnerable to predation. Known hummingbird predators that are found in cloud forest habitat in Ecuador include domestic cats (*Felis catus*), feral cats, hawks (family Accipitridae), owls (order Strigiformes), and snakes (suborder Serpentes) (Borchardt 2004, p. 5; The Hummingbird Society no date (n.d.), p 1; Rosso 2006, p. 35). Because of their small size, many insect-eating predators have been known to prey on hummingbirds, including, praying mantis (family Mantidae), spiders (class Arachnida), bees and wasps (order Hymenoptera), frogs (order Anura), and largemouth bass (*Micropterus salmoides*) (Borchardt 2004, p. 5; The Hummingbird Society no date (n.d.), p 1; Rosso 2006, p. 35). According to the FAO-Fisheries and Aquaculture Department (2000, p. 1), largemouth bass is a non-native invasive species that was introduced to Ecuador sometime prior to 1988. Many of these potential Esmeraldas woodstar predators are found within the Machalilla National Park (Emmons and Albuja 1992, pp. 120-121), both on the mainland and on Isla de La Plata (see Factor A).

On Isla de La Plata, non-native predators, including cats and spiny rats (*Proechimys decumanus*), were introduced to the island many years ago (BLI 2007c, p. 10; Curry 1993, p. 24). Cats are opportunistic predators and their diet is comprised of a variety of animals, including birds (Rosero 2006, p. 5). It was conjectured that the wild cats on Isla de La Plata would keep the rat population in check. However, Curry (1993, p. 24) examined the stomach contents of several cats on the Island and found that they contained egg shell fragments, not mammal hair, indicating that the cats were preying upon bird nests. Because Esmeraldas woodstar is only observed on Isla de La Plata during breeding season (BLI 2007c, p. 2; Becker

et al. 2000, p. 55; Cisneros-Heredia 2005, p. 24), this renders the woodstar especially vulnerable to egg predation by cats. Cats are also considered among the most common predators of non-nesting hummingbirds, especially during torpor, a resting state induced in hummingbirds when energy levels are low (BLI 2008b, p. 1; The Hummingbird Society n.d., p. 1; Schuchmann 1999, p. 485). During torpor, hummingbirds are slow to react to external stimuli (Schuchmann 1999, p. 485). Cats are responsible for endangering other island-dwelling hummingbirds, including the critically endangered Fernández firecrown (*Sephanoides fernandensis*) (native to the Juan Fernández Islands, Chile) (BLI 2008b, p. 1; The Hummingbird Society n.d., p. 1).

According to BirdLife International, an eradication program is underway to remove feral animals from the island (BLI 2007c, p. 10). One project to control the introduced cat population on Isla De La Plata, being supported by the World Conservation Foundation, would trap the feral cats, neuter them, and return them to the wild, with the eventual goal of preventing further reproduction of the feral population. This project will also help to better quantify the extent of the invasion on the island (Rosero 2006, p. 5). However, predation on the island continues to be a threat to native bird species, including the Esmeraladas woodstar, both on the Island and in Machalilla National Park (BLI 2007c, p. 10; Emmons and Albuja 1992, pp. 120-121; Rosero 2006, p. 5).

The Esmeraldas woodstar's historic range has been reduced by 99 percent (Dodson and Gentry 1991, p. 293) and remaining suitable habitat is highly fragmented (Best and Kessler 1995, p. 35; BLI 2004a, p. 2; Stattersfield *et al.* 1998, p. 214). Studies have shown that habitat fragmentation increases the potential predation pressure within habitat fragments by facilitating the predators' access throughout the fragment and because smaller fragments support smaller predators, which tend to prey upon the more vulnerable life-history stages of the Esmeraldas woodstar, eggs and juveniles (Arango-Vélez and Kattan 1997, pp. 137-143; Gibbs 1991, p. 157; Hoover *et al.* 1995, p. 151; Keyser *et al.* 1998, p. 991; 2002, p. 186; Renjifo 1999, p. 1133; Wilcove 1985, p. 1214). These studies were described in more detail above, as part of the Factor C analysis for the blue-billed curassow.

Summary of Factor C

Domestic and feral cats, rats, hawks, owls, snakes, praying mantis, spiders, bees, wasps, frogs, and largemouth bass are all predators of hummingbirds that are found in Esmeraldas woodstar habitat. Predation results in the direct removal of eggs, juveniles, and adults from the population. Esmeraldas woodstars produce a low clutch size and are particularly vulnerable to egg predation by cats on Isla de la Plata (see Habitat and Life History). Esmeraldas woodstar habitat is much reduced and highly fragmented (Factor A), and studies on similar species in similar Andean habitats indicate that vulnerability to predation by generalist predators increases with increased habitat fragmentation and smaller patch sizes. Predation can remove potentially reproductive adults from the breeding pool and exacerbates the genetic complications associated with the species' small population size (Factor E), increasing the species' vulnerability to local extirpation. Therefore, we find that predation, exacerbated by ongoing habitat destruction (Factor A), is a threat to the Esmeraldas woodstar.

D. The Inadequacy of Existing Regulatory Mechanisms

Regulatory mechanisms may provide species-specific or habitat-specific protections. An evaluation of the adequacy of regulatory mechanisms within Ecuador to mitigate or remove the threats to the Esmeraldas woodstar is provided below, beginning with species-specific and followed by habitat-specific protection mechanisms.

The Esmeraldas woodstar is protected under Ecuadorian law by Decree No. 3,516 of 2003 (Unified Text of the Secondary Legislation of the Ministry of Environment (EcoLex 2003b, pp. 1-2 and 36). Decree No. 3,516 summarizes the laws governing environmental policy in Ecuador and provides that the country's biodiversity be protected and used primarily in a sustainable manner. Appendix 1 of Decree No. 3,516 lists the Ecuadorian fauna and flora that are categorized as critically endangered (En peligro critico), endangered (En peligro), or vulnerable (Vulnerable) (EcoLex 2003b, p.17). Under this law, Esmeraldas woodstar is categorized as endangered, under the synonym *Acestrura berlepschi* (EcoLex 2003b, p. 36). This threat status confers protections upon the species, including protection from hunting or commercial take, under Resolution No. 105 of 2000 (Regulatory control of hunting seasons and wildlife species in the country) and Agreement No. 143 of 2003 (Standards for the control of hunting seasons and licenses for hunting of wildlife). Resolution No. 105 and Agreement No. 143 regulate and prohibit commercial and sport hunting of all wild bird species, except those specifically identified by the Ministry of the Environment or otherwise permitted (EcoLex 2000, p.1; EcoLex 2003a, p. 1). Under this law, the Ministry of the Environment does not permit commercial or sport hunting of the Esmeraldas woodstar because of its status as a critically endangered species (EcoLex 2002b, p. 17). However, we do not consider hunting (Factor B) to be a current threat to the Esmeraldas woodstar and these laws do not mitigate threats to the species from habitat destruction (Factor A), predation (Factor C), or its small population size (Factor E). Therefore, protection under these laws does not reduce any existing threats to the species.

Esmeraldas woodstar is listed in Appendix II of CITES, to which Ecuador became a Party in 1975 (UNEP-WCMC 2008a, p. 1; USFWS 2008, p. 1). CITES was described in more detail above, as part of the Factor E analysis for the blue-billed curassow. As discussed under Factor B for the Esmeraldas woodstar, we consider that this international treaty has minimized the potential threat to the species from international trade and do not consider international trade to be a threat impacting the Esmeraldas woodstar. However, this treaty does not mitigate threats to the species from habitat destruction (Factor A), predation (Factor C), or its small population size (Factor E). Therefore, protection under this Treaty does not reduce any existing threats to the species.

Ecuador has numerous laws and regulations pertaining to forests and forestry management, including: the Forestry Act (comprised of Law No. 74 of 1981 — Forest Act and conservation of natural areas and wildlife (Faolex 1981, pp. 1-54)—and Law No. 17 of 2004—Consolidation of the Forest Act and conservation of natural areas and wildlife (Faolex 2004, pp. 1-29); a Forestry Action Plan (1991-1995); the Ecuadorian Strategy for Forest Sustainable Development of 2000 (Estrategia para el Desarrollo Forestal Sostenible); and Decree 346, which recognizes that natural forests are highly vulnerable (ITTO 2006, p. 225). However, the International Tropical Timber Organization considers ecosystem management and conservation in Ecuador, including effective implementation of mechanisms that would protect the Esmeraldas woodstar and its habitat, to be lacking (ITTO 2006, p. 229). Habitat destruction is ongoing (Butler 2006b, pp. 1-3; FAO 2003b, p. 1) and extensive (Best and Kessler 1995, p. 35; BLI 2004a, p. 2; Stattersfield *et al.* 1998, p. 214)

throughout the species' range (Factor A). Thus, these laws are ineffective at protecting Esmeraldas woodstar habitat.

Extractive harvest practices may pose a threat to the Esmeraldas woodstar (BLI 2007c, p. 13) (Factor A). In 2004, Law No. 17 (Faolex 2004, pp. 1-29) amended the Forest Act of 1981 (Law No. 74) (Faolex 1981, pp. 1-54) to include five criteria for sustainable forest management: (i) sustainable timber production; (ii) the maintenance of forest cover; (iii) the conservation of biodiversity; (iv) co-responsibility in management; and (v) the reduction of negative social and environmental impacts (Aguilar and Vlosky 2005, pp. 9-10; ITTO 2006, p. 225). In 2001, the Ecuadorian government worked with the private sector to develop a system of monitoring and control of forest harvest practices. However, in 2003, the Supreme Court of Ecuador declared that the control system was unconstitutional, and new control systems are now being developed (ITTO 2006, p. 225). Approximately 70 percent of the forest products harvested are harvested illegally, are used as fuel wood, or are discarded as waste (Aguilar and Vlosky 2005, p. 4; ITTO 2006, p. 226). Because the extractive harvesting industry is not monitored, the extent of the impact is unknown (BLI 2007c, p. 13). However, we find this law is currently inadequate in monitoring the impacts of extractive harvesting on the Esmeraldas woodstar or to protect the species from potential impacts of extractive harvesting (Factor A).

The governmental institutions responsible for natural resource oversight in Ecuador appear to be under-resourced, and there is a lack of law enforcement on the ground. Despite the creation of a national forest plan, there appears to be a lack of capacity to implement this plan due to insufficient political support, unclear or unrealistic forestry standards, inconsistencies in application of regulations, discrepancies between actual harvesting practices and forestry regulations, the lack of management plans for protected areas, and high bureaucratic costs. These inadequacies have facilitated logging (Dodson and Gentry 1991, pp. 283-293); cattle-raising and persistent grazing from goats and cattle (BLI 2004a, p. 2; BLI 2007c, pp. 11, 13, 17; Curry 1993, p. 24; Lasso 1997, p. 3); clearing for agriculture, subsistence farming, and small local industries (BLI 2007c, pp. 11, 13, 17; Dodson and Gentry 1991, pp. 283-293; Lasso 1997, p. 3); selective harvest of trees for fuelwood and non-timber products (Aguilar and Vlosky 2005; BLI 2007c, p. 13); road development (BLI 2007c, p. 13; Dodson and Gentry 1991, pp. 283-293); and pollution from industrial activities occur within or near protected areas (Lasso 1997, p. 3). In addition, most of Ecuador's forests are privately owned or owned by communities (ITTO 2006, p. 224; Lasso 1997, pp. 2-3), and the management and administration of Ecuador's forest resources and forest harvest practices is insufficient and unable to protect against unauthorized forest harvesting, degradation, and conversion (ITTO 2006, p. 229). Habitat conversion and alteration are ongoing throughout the range of the Esmeraldas woodstar, including within protected areas (BLI 2007c, pp. 10, 13, 17; Butler 2006b, pp. 1-3; FAO 2003b, p. 1).Thus, Ecuadorian forestry regulations have not mitigated the threat of habitat destruction (Factor A).

The Ecuadorian government recognizes 31 different legal categories of protected lands (e.g., national parks, biological reserves, geo-botanical reserves, bird reserves, wildlife reserves, etc.). Currently, the amount of protected land (both forested and non-forested) in Ecuador totals approximately 4.67 million ha (11.5 million ac) (ITTO 2006, p. 228). However, only 38 percent of these lands have appropriate conservation measures in place to be considered protected areas according to international standards (i.e., areas that are managed for scientific study or wilderness protection, for ecosystem protection and recreation, for conservation of specific natural features, or for conservation through management intervention) (IUCN 1994, pp. 17-20). Moreover, only 11 percent have management plans, and fewer than 1 percent (13,000 ha (32,125 ac)) have implemented those management plans (ITTO 2006, p. 228).

The Esmeraldas woodstar has been recorded in or near two protected areas: (1) Machalilla National Park (Collar *et al.* 1992, p. 533) and (2) Loma Alta Communal Ecological Reserve. As described under Factor A, both of these protected areas are inhabited and, among other activities, deforestation, livestock grazing, and slash-and-burn agriculture are ongoing within these areas (BLI 2004, p. 2; Wege and Long 1995, p. 174). Thus, this protected area status does not mitigate the threats from habitat destruction (Factor A).

Esmeraldas woodstar occurs within the Machalilla National Park, which was included in the Ramsar List of Wetlands of International Importance in 1990 (BLI 2007c, p. 13). The Ramsar Convention, signed in Ramsar, Iran, in 1971, is an intergovernmental treaty that provides the framework for national action and international cooperation for the conservation and wise use of wetlands and their resources. There are presently 158 Contracting Parties to the Convention (including Ecuador, where the Esmeraldas woodstar occurs), with 1,828 wetland sites, totaling 169 million ha (418 million ac), designated for inclusion in the Ramsar List of Wetlands of International Importance (Ramsar Convention Secretariat 2008, p. 1). Experts consider Ramsar to provide only nominal protection of wetlands, noting that such a designation may increase international awareness of the site's ecological value (Jellison *et al.* 2004, p. 19). However, habitat alteration (Factor A) (BLI 2007c, pp. 10-11, 13; Lasso 1997, p. 3) and predation by feral animals (Factor C) (BLI 2007c, p. 10; Curry 1993, p. 24; Rosero 2006, p. 5), key threats to the Esmeraldas woodstar, are ongoing within the Park and predation has not been considered as part of the most recent Ramsar site review (Lasso 1997, pp. 1-4). Therefore, this designation as a Ramsar Wetland of International Importance does not mitigate the threats from habitat destruction (Factor A).

Summary of Factor D

Ecuador has adopted numerous laws and regulatory mechanisms to administer and manage wildlife and their habitats. The Esmeraldas woodstar is protected under CITES, which we consider has been effective in mitigating the potential threat to this species from commercial trade (Factor B). Esmeraldas woodstar is listed as endangered and ranges within at least two protected areas (Machalilla National Park and Loma Alta Communal Ecological Reserve). However, on-the-ground enforcement of these laws and oversight of the local jurisdictions implementing and regulating activities is insufficient for these measures to be effective in conserving the Esmeraldas woodstar or its habitat. As discussed for Factor A, habitat destruction, degradation, and fragmentation continue throughout the species' range, including lands within protected areas. Therefore, we find that the existing regulatory mechanisms, as implemented, are inadequate to mitigate the primary threats to the Esmeraldas woodstar from habitat destruction (Factor A), predation (Factor C), or its small population size (Factor E).

E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

Two additional factors affect the Esmeraldas woodstar: Its minimal likelihood for dispersal and the species' small population size.

Likelihood to Disperse: The Esmeraldas woodstar is confined to locations within the Departments of Esmeraldas, Manabí, and Guayas, in lowland moist forest patches that are disjunct and fragmented (BLI 2007f, pp. 1-3; del Hoyo *et al.* 1999, p. 678; Williams and Tobias 1991, p. 39). The distance between known occupied areas is between 125 and 200 km (78 and 124 mi), with minimal habitat between occupied sights (Best and Kessler 1995, p. 141). In light of the species' small overall population size and the distance between the remaining fragmented primary forested habitats, it is unlikely that the Esmeraldas woodstar would repopulate an isolated patch of suitable habitat following decline or extirpation of that patch (Hanski 1998, pp. 45-46).

Small Population Size: The Esmeraldas woodstar inhabits a very small and severely fragmented range, which is decreasing rapidly in size due to habitat destruction and various other human factors (Collar *et al.* 1992, p. 533; Ridgely and Greenfield 2001a, pp. 389-390). Ongoing declines in the bird's population are linked to persistent habitat destruction (BLI 2007c, p. 2). Before the species was rediscovered in 1991, it was thought to be extinct after not being seen since 1912 (Ridgely and Greenfield 2001a, pp. 389-390). Subsequent surveys of previously known occupied areas have not been successful in locating the species on a consistent basis, and little is known of breeding habits or other activities during most of the year (Ridgely and Greenfield 2001a, pp. 389-390). Experts estimate that the species has undergone a 50-79 percent reduction in population size within the past 10 years and predict that this trend will continue (BLI 2007c, p. 5). The current population estimate for this species is between 186 to 373 birds, with a decreasing population trend (BLI 2007, pp. 2, 6).

Small population sizes render species vulnerable to genetic risks that can have individual or population-level consequences on the genetic level and can increase the species' susceptibility to demographic problems, as explained in more detail above for the blue-billed curassow (Factor E, Small Population Size) (Charlesworth and Charlesworth 1987, p. 238; Shaffer 1981, p. 131). Once a population is reduced below a certain number of individuals, it tends to rapidly decline towards extinction (Franklin 1980, pp. 147-148; Gilpin and Soulé 1986, p. 25; Holsinger 2000, pp. 64-65; Soulé 1987, p. 181).

In the absence of quantitative studies specific to this species, a general approximation of minimum viable population size is the 50/500 rule, as described above, as part of the Factor E analysis for the brown-banded antpitta (Shaffer 1981, pp. 132-133; Soulé 1980, pp. 160-162). The total population size of the Esmeraldas woodstar is estimated to be between 186 and 373 individuals. The lower estimate of 186 individuals meets the theoretical threshold for the minimum effective population size required to avoid risks from inbreeding (N_e = 50 individuals). However, the upper limit of the population, 373 individuals, is below the minimum threshold (N_e = 500 individuals) required for long-term fitness of a population that will not lose its genetic diversity over time and will maintain an enhanced capacity to adapt to changing conditions.

The Esmeraldas woodstar's restricted range combined with its small population size (Cuervo 2002, p. 138; Cuervo and Salaman 1999, p. 7; del Hoyo 1994, p. 361) makes the species particularly vulnerable to the threat of adverse natural (e.g., genetic, demographic, or environmental) and manmade (e.g., deforestation, habitat alteration, wildfire) events that destroy individuals and their habitat (Holsinger 2000, pp. 64-65; Primack 1998, pp. 279-308; Young and Clarke 2000, pp. 361-366). Therefore, we currently consider the single Esmeraldas woodstar population to be at risk due to the lack of long-term viability.

Summary of Factor E

The Esmeraldas woodstar is currently limited to a few small populations within a limited habitat range, with a small estimated population size that leaves the species vulnerable to genetic and demographic risks that negatively impact its long-term viability. The species' population size is estimated to have declined considerably within the past 10 years (50-79 percent), and this rate of decline is expected to continue. Based on this information, we have determined that the species is particularly vulnerable to the threat of adverse natural (e.g., genetic, demographic, or predation) and manmade (e.g., slash-and-burn agriculture or infrastructural development) events that destroy individuals and their habitat, and that these genetic and demographic risks are exacerbated by ongoing habitat destruction (Factor A) and predation (Factor C).

Status Determination for the Esmeraldas Woodstar

The four primary factors that threaten the survival of the Esmeraldas woodstar are: (1) habitat destruction, fragmentation, and degradation (Factor A); (2) predation (Factor C); (3) inadequate regulatory mechanisms (Factor D); and (4) limited size and isolation of remaining populations (Factor E). The Esmeraldas woodstar is a tiny hummingbird endemic to Ecuador. Esmeraldas woodstars are a rare, range-restricted species with highly localized populations in three disjunct locations – in the Ecuadorean Departments of Esmeraldas, Guayas, and Manabí. The species occurs in lowland semi-humid or semi-evergreen forests and woodlands, from sealevel to 500 m (1,600 ft) along the Coastal Cordillera of western Ecuador. Preferring primary evergreen forests, the species is also known to occupy low-altitude secondary-growth areas during the breeding season (December-March). The current extent of the species' range is approximately 1,155 km² (446 mi²).

The primary threat to this species is habitat loss (Factor A), caused by widespread deforestation and conversion of primary forests for numerous human activities. The species' range has been reduced by 99 percent. The semi-humid and semi-evergreen forests preferred by this species have undergone extensive deforestation. Habitat-altering activities that have occurred include: logging; cattle-raising and persistent grazing from goats and cattle; forest clearing for agriculture, subsistence farming, and small local industries; selective harvest of trees for fuelwood and non-timber products; road development; and pollution from industrial activities (Factors A). These activities are ongoing and occurring throughout the species' range – including within protected areas where the species occurs (Machalilla National Park, Isla de La Plata, and Loma Alta Communal Ecological Reserve). Because regulatory mechanisms are ineffective at reducing these activities (Factor D), habitat destruction and alteration are expected to continue.

The species' population is estimated to have declined between 50 to 79 percent within the last 10 years, a decline which is attributed to habitat loss. The Esmeraldas woodstar has a small estimated population size (between 186 and 373 individuals), which renders the species vulnerable to the threat of adverse natural (e.g., genetic, demographic, or predation) and manmade (e.g., slash-and-burn agriculture or infrastructural development) events that destroy individuals and their habitat (Factor E). In addition, the direct loss of habitat through widespread deforestation and conversion for human activities has led to habitat fragmentation and isolation of

the remaining populations of the Esmeraldas woodstar. The Esmeraldas woodstar currently occupies three disjunct, isolated patches that are separated by large distances (between 125 and 200 km (78 and 124 mi)), with minimal suitable habitat between occupied sites. Given the species' small population size and the distance between the remaining fragmented primary forested habitats, the species is unlikely to repopulate an isolated patch of suitable habitat following decline or extirpation of the species within that patch (Factor E). This renders the species particularly vulnerable to local extirpation from ongoing habitat destruction (Factor A) and predation (Factor C).

Esmeraldas woodstars are vulnerable to predation by a variety of predators, including domestic and feral cats, rats, hawks, owls, snakes, praying mantis, spiders, bees, wasps, frogs, and largemouth bass (Factor C). Habitat fragmentation (Factor A) contributes to this vulnerability, because research indicates that predation increases with increased habitat fragmentation and smaller patch sizes. Predation leads to the direct removal of eggs, juveniles, and adults from the population, exacerbating risks associated with the species' small population size. Esmeraldas woodstars are particularly vulnerable to predation by wild cats during the breeding season on Isla de La Plata, where cats have been known to prey particularly upon bird eggs. Esmeraldas woodstars produce a low clutch size (see Habitat and Life History), and predation can remove potentially reproductive adults from the breeding pool.

The Esmeraldas woodstar is classified as an endangered species under Ecuadorian law, and part of the species' range is included within two protected areas. Despite numerous laws and regulatory mechanisns to administer and manage wildlife and their habitats, existing laws are inadequate (Factor D) to protect the species and its habitat from ongoing habitat loss (Factor A) and predation by non-native animals (Factor C), even within the protected areas.

We have carefully assessed the best available scientific and commercial information regarding the past, present, and potential future threats faced by the Esmeraldas woodstar. We consider the ongoing threats to the Esmeraldas woodstar, habitat loss (Factor A) and predation (Factor C), exacerbated by the species' small population size and limited dispersal ability (Factor E), and compounded by inadequate regulatory mechanisms (Factor D), to be equally present and of the same magnitude throughout the species' entire current range. Based on this information, we conclude that the Esmeraldas woodstar is endangered throughout its range. Therefore, we are proposing to list the Esmeraldas woodstar as an endangered species.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and encourages and results in conservation actions by national governments, private agencies and groups, and individuals.

Section 7(a) of the Act, as amended, and as implemented by regulations at 50 CFR part 402, requires Federal agencies to evaluate their actions within the United States or on the high seas with respect to any species that is proposed or listed as endangered or threatened, and with respect to its critical habitat, if any is being designated. However, given that the blue-billed curassow, the brown-banded antpitta, the Cauca guan, the gorgeted wood-quail, and the Esmeraldas woodstar are not native to the United States, no critical habitat is being proposed for designation with this rule.

Section 8(a) of the Act authorizes limited financial assistance for the development and management of programs that the Secretary of the Interior determines to be necessary or useful for the conservation of endangered and threatened species in foreign countries. Sections 8(b) and 8(c) of the Act authorize the Secretary to encourage conservation programs for foreign endangered species and to provide assistance for such programs in the form of personnel and the training of personnel.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered and threatened wildlife. Consequently, these prohibitions would be applicable to the blue-billed curassow, the brown-banded antpitta, the Cauca guan, the gorgeted wood-quail, and the Esmeraldas woodstar. These prohibitions, under 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to ''take'' (take includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or to attempt any of these) within the United States or upon the high seas, import or export, deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of a commercial activity or to sell or offer for sale in interstate or foreign commerce, any endangered wildlife species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken in violation of the Act. Certain exceptions apply to agents of the Service and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered and threatened wildlife species under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22 for endangered species, and at 17.32 for threatened species. With regard to endangered wildlife, a permit must be issued for the following purposes: for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities.

Peer Review

In accordance with our joint policy with the National Marine Fisheries Service, ''Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities,'' published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our final determination is based on scientifically sound data, assumptions, and analyses. We will send copies of this proposed rule to the peer reviewers immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment during the public comment period on our specific assumptions and conclusions regarding the proposal to list the blue-billed curassow, the Cauca guan, the gorgeted wood-quail, the brown-banded antpitta, and the Esmeraldas woodstar as endangered.

We will consider all comments and information we receive during the comment period on this proposed rule during our preparation of a final determination. Accordingly, our final decision may differ from this proposal.

Public Hearings

The Act provides for one or more public hearings on this proposal, if we receive any requests for hearings. We must receive your request for a public hearing within 45 days after the date of this **Federal Register** publication (see DATES). Such requests must be made in writing and be addressed to the Chief of the Branch of Listing at the address shown in the **FOR FURTHER INFORMATION CONTACT** section. We will schedule public hearings on this proposal, if any

are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** at least 15 days before the first hearing.

Required Determinations

National Environmental Policy Act (NEPA)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), need not be prepared in connection with regulations adopted under section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Clarity of the Rule

We are required by Executive Orders 12866 and 12988, and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) be logically organized;

(b) use the active voice to address readers directly;

(c) use clear language rather than jargon;

(d) be divided into short sections and sentences; and

(e) use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, or the sections where you feel lists or tables would be useful.

References Cited

The references cited in this proposed rule are available on the Internet at *http://www.regulations.gov* or upon request from the Branch of Listing, Endangered Species Program, U.S. Fish and Wildlife Service (see FOR MORE INFORMATION CONTACT).

Author(s)

The primary authors of this proposed rule are Arnold Roessler of the Endangered Species Program (Sacramento, California) and Dr. Patricia De Angelis of the Division of Scientific Authority U.S. Fish and Wildlife Service.

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. Amend § 17.11(h), by adding new entries for ''Curassow, blue-billed,'''Guan, Cauca,'''Wood-quail, Gorgeted,'''Antpitta, Brown-banded,'' and ''Woodstar, Esmeraldas'' in alphabetical order under BIRDS to the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) Birds.

* * * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
* * * * * * * BIRDS							
* * * * * * *							
Antpitta, brown-banded	*Grallaria milleri*	Columbia, South America	Entire	E		NA	NA
* * * * * * *							
Curassow, blue-billed	*Crax alberti*	Columbia, South America	Entire	E		NA	NA
* * * * * * *							
Guan, cauca	*Penelope perspicax*	Columbia, South America	Entire	E		NA	NA
* * * * * * *							
Wood-quail, gorgeted	*Odontophorus strophium*	Columbia, South America	Entire	E		NA	NA
* * * * * * *							
Woodstar, Esmeraldas	*Chaetocercus berlepschi*	Ecuador, South America	Entire	E		NA	NA
* * * * * * *							

Dated: May 28, 2009

Rowan W. Gould

Acting Director, U.S. Fish and Wildlife Service

[FR Doc. E9–15826 Filed 7–6– 09; 8:45 am]

BILLING CODE 4310-55-S

Federal Register

Tuesday,
July 7, 2009

Part V

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List a Distinct Population Segment of the Roundtail Chub (Gila robusta) in the Lower Colorado River Basin; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R2–ES–2009–0004; MO 92210530083–B2]

Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List a Distinct Population Segment of the Roundtail Chub (Gila robusta) in the Lower Colorado River Basin

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 12-month petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 12-month finding on a petition to list a distinct population segment (DPS) of the roundtail chub (*Gila robusta*) in the lower Colorado River basin as endangered or threatened under the Endangered Species Act of 1973, as amended (Act). The petition also asked the Service to designate critical habitat. After review of all available scientific and commercial information, we find that the petitioned listing action is warranted, but precluded by higher priority actions to amend the Lists of Endangered and Threatened Wildlife and Plants. Upon publication of this 12-month petition finding, this species will be added to our candidate species list. We will develop a proposed rule to list this population segment of the roundtail chub pursuant to our Listing Priority System. Any determinations on critical habitat will be made at that time.

DATES: The finding announced in this document was made on July 7, 2009.

ADDRESSES: This finding is available on the Internet at *http://www.regulations.gov* at Docket Number FWS–R2–ES–2009–0004. Supporting documentation we used in preparing this finding is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Arizona Ecological Services Office, 2321 West Royal Palm Road, Suite 103, Phoenix, AZ 85021–4951. Please submit any new information, materials, comments, or questions concerning this finding to the above address.

FOR FURTHER INFORMATION CONTACT: Steve Spangle, Field Supervisor, Arizona Ecological Services Office (see **ADDRESSES**), telephone 602–242–0210. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(B) of the Act (16 U.S.C. 1531 *et seq.*) requires that, for any petition to revise the Lists of Endangered and Threatened Wildlife and Plants that contains substantial scientific or commercial information that the action may be warranted, we make a finding within 12 months of the date of the receipt of the petition on whether the petitioned action is: (a) Not warranted, (b) warranted, or (c) warranted but the immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether species are threatened or endangered, and expeditious progress is being made to add or remove qualified species from the Lists of Endangered and Threatened Wildlife and Plants. Section 4(b)(3)(C) of the Act requires that we treat a petition for which the requested action is found to be warranted but precluded as though resubmitted on the date of such finding, that is, requiring a subsequent finding to be made within 12 months. We must publish these 12-month findings in the **Federal Register**.

Previous Federal Actions

In 1985, the roundtail chub (*Gila robusta*) was placed on the list of candidate species as a category 2 species (50 FR 37958). Category 2 species were those for which existing information indicated that listing was possibly appropriate, but for which substantial supporting biological data were lacking. Due to lack of funding to gather existing information on the roundtail chub, the species remained in category 2 through the 1989 (54 FR 554), 1991 (56 FR 58804) and 1994 (59 FR 58982) candidate notices of review. In the 1996 candidate notice of review (61 FR 7596), category 2 was eliminated, and roundtail chub no longer had formal status under the candidate identification system.

On April 14, 2003, we received a petition from the Center for Biological Diversity requesting that we list a DPS of the roundtail chub (*Gila robusta*) in the lower Colorado River basin (defined as all waters tributary to the Colorado River in Arizona and the portion of New Mexico in the Gila River and Zuni River basins) as endangered or threatened, that we list the headwater chub (*Gila nigra*) as endangered or threatened, and that we designate critical habitat concurrently with the listing for both species.

Following receipt of the 2003 petition, and pursuant to a stipulated settlement agreement, on July 12, 2005, we published our 90-day finding that the petition presented substantial scientific information indicating that listing the headwater chub and a DPS of the roundtail chub in the lower Colorado River basin may be warranted, and we initiated 12-month status reviews for these species (70 FR 39981).

On May 3, 2006, we published our 12-month finding that listing was warranted for the headwater chub, but precluded by higher priority listing actions, and that listing of a population segment of the roundtail chub in the lower Colorado River basin was not warranted because it did not meet our definition of a DPS (71 FR 26007).

On September 7, 2006, we received a complaint from the Center for Biological Diversity for declaratory and injunctive relief, challenging our decision not to list the lower Colorado River basin population of the roundtail chub as an endangered species under the Act. On November 5, 2007, in a stipulated settlement agreement, we agreed to commence a new status review of the lower Colorado River basin population segment of the roundtail chub and to submit a 12-month finding to the **Federal Register** by June 30, 2009. On March 3, 2009, we published a notice in the **Federal Register** that we were initiating a status review and soliciting new information for reevaluating the 2003 petition to list a lower Colorado River basin DPS of the roundtail chub (74 FR 9205).

Defining a Species Under the Act

Section 3(16) of the Act defines ''species'' to include ''any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature'' (16 U.S.C. 1532(16)). Our implementing regulations at 50 CFR 424.02 provide further guidance for determining whether a particular taxon or population is a species or subspecies for the purposes of the Act: ''[T]he Secretary shall rely on standard taxonomic distinctions and the biological expertise of the Department and the scientific community concerning the relevant taxonomic group'' (50 CFR 424.11(a)). As previously discussed, the population segment of roundtail chub in the lower Colorado River basin is classified as *Gila robusta,* the same as other roundtail chub populations, and as such we do not consider the population segment of roundtail chub in the lower Colorado River basin to constitute a distinct species or subspecies. Since the population segment of roundtail chub in the lower Colorado River basin is not a

distinct species or subspecies, we then evaluated whether it is a distinct population segment to determine whether it would constitute a listable entity under the Act.

To interpret and implement the DPS provisions of the Act and Congressional guidance, the Service and the National Marine Fisheries Service (now the National Oceanic and Atmospheric Administration—Fisheries), published the *Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act* (DPS Policy) in the **Federal Register** on February 7, 1996 (61 FR 4722). Under the DPS Policy, three elements are considered in the decision regarding the establishment and classification of a population of a vertebrate species as a possible DPS. These are applied similarly for additions to and removals from the Lists of Endangered and Threatened Species. These elements are (1) the discreteness of a population in relation to the remainder of the species to which it belongs, (2) the significance of the population segment to the species to which it belongs, and (3) the population segment's conservation status in relation to the Act's standards for listing, delisting, or reclassification (*i.e.,* is the population segment endangered or threatened?).

Distinct Vertebrate Population Segment Analysis

In the 2003 petition, we were asked to consider listing a DPS for the roundtail chub in the lower Colorado River basin (the Colorado River and its tributaries downstream of Glen Canyon Dam including the Gila and Zuni River basins in New Mexico). Per our November 5, 2007, stipulated settlement agreement, we are reevaluating our May 3, 2006, determination (71 FR 26007) that listing the roundtail chub population segment in the lower Colorado River basin was not warranted because it did not meet our definition of a DPS.

In accordance with our DPS Policy, this section details our analysis of the first two elements we consider in a decision regarding the status of a possible DPS as endangered or threatened under the Act. These elements are (1) the population segment's discreteness from the remainder of the species to which it belongs and (2) the significance of the population segment to the species to which it belongs.

Discreteness

The DPS policy's standard for discreteness requires an entity to be adequately defined and described in some way that distinguishes it from other representatives of its species. A population segment of a vertebrate species may be considered discrete if it satisfies either one of the following two conditions: (1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors (quantitative measures of genetic or morphological discontinuity may provide evidence of this separation); or (2) it is delimited by international governmental boundaries within which significant differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist.

The historical range of roundtail chub included both the upper and lower Colorado River basins in the States of Wyoming, Utah, Colorado, New Mexico, Arizona, and Nevada (Propst 1999, p. 23; Bezzerides and Bestgen 2002, p. 25; Voeltz 2002, pp. 19–23), but the roundtail chub was likely only a transient in Nevada. Currently roundtail chubs occur in both the upper and lower Colorado River basins in Wyoming, Utah, Colorado, New Mexico, and Arizona. Bezzerides and Bestgen (2002, p. 24) concluded that historically there were two discrete population centers, one in each of the lower and upper basins, and that these two population centers remain today. Numerous authors have noted that roundtail chub was very rare with few documented records in the mainstem Colorado River between the two basins (Minckley 1973, p. 102; Minckley 1979, p. 51; Valdez and Ryel 1994, pp. 5–10–5–11; Minckley 1996, p. 75; Bezzerides and Bestgen 2002, pp. 24–25; Voeltz 2002, pp. 19, 112), so we do not consider the mainstem to have been occupied historically, and have not considered the Colorado River in our estimates of historical range. Early surveyors also variably used the term ''bonytail'' to describe roundtail chub (Valdez and Ryel 1994, pp. 5–7), further clouding information on historical distribution, as some accounts of roundtail chub in the mainstem may have been bonytail (*Gila elegans*), which is a mainstem species in the Colorado River. Records from the mainstem Colorado River also may have been transients from nearby populations, such as some records from Grand Canyon, which may have been from the Little Colorado River (Voeltz 2002, p. 112). One record from between the two basins, a record of two roundtail chubs captured near Imperial Dam in 1973, illustrates this. Upon examining these specimens, Minckley (1979, p. 51) concluded that they were strays washed downstream from the Bill Williams River based on their heavily blotched coloration. This is a logical conclusion considering that roundtail chub from the Bill Williams River typically exhibit this blotched coloration (Rinne 1969, pp. 20–21; Rinne 1976, p. 78). Minckley (1979, p. 51), Minckley (1996, p. 75), and Mueller and Marsh (2002, p. 40) also considered roundtail chub rare or essentially absent in the Colorado River mainstem based on the paucity of records from numerous surveys of the Colorado River mainstem.

We conclude that historically, roundtail chub occurred in the Colorado River basin in two population centers, one each in the upper (largely in Utah and Colorado, and to a lesser extent, in Wyoming and New Mexico) and lower basins (Arizona and New Mexico), with apparently little, if any, mixing of the two populations. If there was one population, we would expect to find a large number of records in the mainstem Colorado River between the San Juan and Bill Williams Rivers, but very few records of roundtail chub exist from this reach of stream. Also, there is a substantial distance between these areas of roundtail chub occurrence in the two basins. The mouth of the Escalante River, which contains the southernmost population of roundtail chub in the upper basin, is approximately 275 river miles (mi) (443 kilometers (km)) upstream from Grand Falls on the Little Colorado River, the historical downstream limit of the most northern population of the lower Colorado River basin. The lower Colorado River basin roundtail chub population segment meets the element of discreteness because it was separate historically, and continues to be markedly separate today.

In more recent times, the upper and lower basin populations of the roundtail chub have been physically separated by Glen Canyon Dam, but that artificial separation is not the sole basis for our finding that the lower basin population is discrete from the upper basin. The historical information on collections suggests that there was limited contact even before the dam was built. Available molecular information for the species, although sparse, seems to support this; mitochondrial DNA markers (mtDNA; a type of genetic material) of roundtail chub in the Gila River basin are entirely absent from upper basin populations (Gerber *et al.* 2001, p. 2028; see *Significance* discussion below).

Significance

If we have determined that a vertebrate population segment is discrete under our DPS policy, we consider its biological and ecological significance to the taxon to which it belongs in light of Congressional guidance (see Senate Report 151, 96th Congress, 1st Session) that the authority to list DPSs be used ''sparingly'' while encouraging the conservation of genetic diversity. To evaluate whether a discrete vertebrate population may be significant to the taxon to which it belongs, we consider available scientific evidence of the discrete population segment's importance to the taxon to which it belongs. Since precise circumstances are likely to vary considerably from case to case, the DPS policy does not describe all the classes of information that might be used in determining the biological and ecological importance of a discrete population. However, the DPS policy describes four possible classes of information that provide evidence of a population segment's biological and ecological importance to the taxon to which it belongs. This consideration may include, but is not limited to: (1) Persistence of the discrete population segment in an ecological setting that is unusual or unique for the taxon; (2) evidence that loss of the discrete population segment would result in a significant gap in the range of the taxon; (3) evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historical range; or (4) evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

Ecological Setting. Based on our review of the available information, we found that there are some differences in various ecoregion variables between the upper and lower Colorado River basins. For example, McNabb and Avers (1994) and Bailey (1995) delineated ecoregions and sections of the United States based on a combination of climate, vegetation, geology, and other factors. Populations of roundtail chub in the lower basin are primarily found in the Tonto Transition and Painted Desert Sections of the Colorado Plateau Semi-Desert Province in the Dry Domain, and the White Mountain-San Francisco Peaks-Mogollon Rim Section of the Arizona-New Mexico Mountains Semi-Desert-Open Woodland-Coniferous Forest Province Dry Domain. Populations of roundtail chub in the upper basin are primarily found in the Northern Canyonlands and Uinta Basin Sections of the Intermountain Semi-Desert and Desert Province in the Dry Domain, and the Tavaputs Plateau and Utah High Plateaus and Mountains Sections of the Nevada-Utah Mountains Semi-Desert-Coniferous Forest Province in the Dry Domain (McNabb and Avers 1994; Bailey 1995). These ecoregions display differences in hydrograph, sediment, substrate, nutrient flow, cover, water chemistry, and other habitat variables of roundtail chub. Also, there are differences in type, timing, and amount of precipitation between the two basins, with the upper basin (3–65 inches (in) per year (8–165 centimeters (cm) per year)) (Jeppson 1968, p. 1) somewhat less arid than the lower basin (5–25 in per year (13–64 cm per year)) (Green and Sellers 1964, pp. 8–11).

The type (snow or rain) and timing of precipitation are major factors determining the pattern of annual streamflow. A hydrograph depicts the amount of runoff or discharge over time (Leopold 1997, pp. 49–50). The hydrograph of a stream is a major factor in determining habitat characteristics and their variability over space and time. Habitats of roundtail chub in the lower basin have a monsoon hydrograph or a mixed monsoon-snowmelt hydrograph. A monsoon hydrograph results from distinctly bimodal annual precipitation, which creates large, abrupt, and highly variable flow events in late summer and large, longer, and less variable flow events in the winter (Burkham 1970, pp. B3–B7; Green and Sellers 1964, pp. 8–11; Minckley and Rinne 1991, p.12). Monsoon hydrographs are characterized by high variability, including rapid rise and fall of flow levels with flood peaks of one or more orders of magnitude greater than base, or ''normal low'' flow (Burkham 1970, pp. B3–B7; Ray *et al.* 2007, p. 1617).

In the upper basin, roundtail chub habitats have strong snowmelt hydrographs, with some summer, fall, and winter precipitation, but with the majority of major flow events in spring and early summer (Bailey 1995, p. 341; Carlson and Muth 1989, p. 222; Woodhouse *et al.* 2003, p. 1551). Snowmelt hydrographs are characterized by low variability; long, slow rises and falls in flow; and peak flow events that are less than an order of magnitude greater than the base flow.

The lower basin has lower stream flows and warmer temperatures in late spring and early summer; in contrast, this is typically the wettest period in the upper basin (Carlson and Muth 1989, p. 222). Regarding the differences between the two basins, Carlson and Muth (1989), for example, conclude, ''The upper basin produced most of the river's discharge, and peak flows occurred after snowmelt in spring and early summer. Maximum runoff in the lower basin often followed winter rainstorms.'' Sediment loads vary substantially between streams in both basins, but are generally lesser in the upper basin than the lower, and patterning of sediment movement differs substantially because of the different hydrographs. In general, roundtail chub habitat in the lower Colorado River basin is of lower gradient, smaller average substrate size, higher water temperatures, higher salinity, smaller base flows, higher flood peaks, lesser channel stability and higher erosion, and substantially different hydrographs than the habitat in the upper Colorado River basin. Measurable hydrographic differences between the two basins are evident, as are differences in landscape-level roundtail chub habitats between the upper and lower basins.

Gap in the Range. Roundtail chub in the lower Colorado River basin can be considered significant under our DPS analysis because loss of the lower Colorado River populations of roundtail chub would result in a significant gap in the range of the taxon; this area constitutes over one third of the species' historical range (2 out of 6 States), including the species' entire current range in two States (Arizona and New Mexico) and all of several major river systems, including the Little Colorado, Bill Williams, and Gila River basins. Additionally there are 74 populations of roundtail chub remaining in the upper basin and 31 in the lower basin; thus, the lower basin populations also constitute approximately one third (30 percent) of the remaining populations of the species (Bezzerides and Bestgen 2002, pp. 28–29, Appendix C; Voeltz 2002, pp. 82–83). The populations in the lower basin also account for approximately 107,300 square mi (270,906 square km; 49 percent) of the 219,310 square mi (568,010 square km) of the Colorado River Basin (U.S. Geological Survey 2006, pp. 94–102). In addition, the roundtail chub historically occupied up to 2,796 mi (4,500 km) of stream in the lower basin and currently occupies between 497 mi (800 km) and 901 mi (1450 km) of stream habitat in the lower basin. These populations are not newly established, ephemeral, or migratory; the species has been well established in the lower Colorado River basin, and has represented a large portion of the species' range for a long period of time (Bezzerides and Bestgen 2002, pp. 20–29; Voeltz 2002, pp. 82–83).

Whether the Population Represents the Only Surviving Natural Occurrence of the Taxon. As part of a determination of significance, our DPS policy suggests that we consider whether there is evidence that the population represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historical range. The roundtail chub in the lower Colorado River basin is not the only surviving natural occurrence of the species. Consequently, this factor is not applicable to our determination regarding significance.

Marked Differences in Genetic Characteristics. Long-standing difficulties in morphological discrimination and taxonomic distinction among members from the lower Colorado *G. robusta* complex, and the genus *Gila* as a whole, due in part to the role hybridization has played in its evolution, have plagued conservation efforts. But it is important to consider variation throughout the entire Colorado River basin to place variation and divergence in the lower basin *Gila robusta* complex in appropriate context. Two isolated species of hybrid origin (involving *G. robusta* with *G. elegans* and *G. cypha*) can be found in the Virgin and White River drainages (*G. seminuda*—DeMarais *et al.* 1992, p. 2747; *G. jordani*—Gerber *et al.* 2001, p. 2033, respectively). *Gila robusta* is relatively abundant in the mainstem Colorado River and tributaries above the Glen Canyon Dam in the upper basin. All individuals from the headwaters of the Little Colorado River and the mainstem Colorado River and tributaries above Glen Canyon Dam in the upper basin possess *G. cypha* or *G. elegans* mtDNA (Dowling and DeMarais 1993, pp. 444–446; Gerber *et al.* 2001, p. 2028). However, populations of the *G. robusta* complex of the lower basin in the Bill Williams and Gila River basins (including *G. robusta, G. intermedia,* and *G. nigra*) possess a unique, divergent mtDNA lineage that has never been found outside the lower basin (Dowling and DeMarais 1993, pp. 444–446; Gerber *et al.* 2001, p. 2028). But as Gerber *et al.* (2001, p. 2037) noted, genetic information in *Gila* poorly accounts for species morphology, stating ''the decoupling of morphological and mtDNA variation in Colorado River *Gila* illustrates how hybridization and local adaptation can play important roles in evolution.'' Although individuals in the Little Colorado River illustrate some minor genetic uniqueness, the evidence, though limited (samples size in Gerber *et al.* 2001 was limited to 7 individuals) indicates these populations align more closely with the upper Colorado River basin populations. But discriminating between populations of *Gila* based on these data is difficult, and more data and analysis may help to place these populations in better perspective.

DPS Conclusion

We have reevaluated the lower Colorado River populations of the roundtail chub to determine whether they meet the definition of a DPS, addressing discreteness and significance as required by our policy. We have considered the extent of the range of the roundtail chub in the lower Colorado River basin relative to the rest of the species' range, the ecological setting of roundtail chub in the lower Colorado River basin, and available information on the genetics of the species. We conclude that the lower Colorado River populations are discrete from the upper Colorado River basin populations on the basis of their present and historical geographic separation of 275 river mi (444 km) and because few historical records have been detected in the mainstem Colorado River between the two population centers that would confirm significant connectivity historically. We also conclude that the lower Colorado River basin roundtail chub is significant because of its unique ecological setting compared to the upper basin, and because the loss of the species from the lower basin would result in a significant gap in the range of the species. Genetic information for this species has long been difficult to interpret, and additional data and analysis may help to clarify this.

In our 2006 finding, we made the determination that the roundtail chub in the lower Colorado River basin did not meet our definition of a DPS. We have reevaluated that determination and now find the best available information has demonstrated that these populations are discrete, persist in an ecological setting that is unique for the taxon, and, if lost, would result in a significant gap in the range of the taxon. Because this population segment meets both the discreteness and significance elements of our DPS policy, the lower Colorado River population segment of the roundtail chub qualifies as a DPS in accordance with our DPS policy, and as such, is a listable entity under the Act. Below we provide a summary of the biology, status, and distribution of the DPS, and an analysis of threats to the DPS, based on the five listing factors established by the Act.

Biology

The roundtail chub is a cyprinid fish (member of Cyprinidae, the minnow family) with a streamlined body shape. Color in roundtail chub is usually olive-gray to silvery, with the belly lighter, and sometimes with dark blotches on the sides. Roundtail chubs are generally 9 to 14 in. (25 to 35 cm) in length, but can reach 20 in. (50 cm) (Minckley 1973, pp. 101–103; Sublette *et al.* 1990, pp. 126–129; Propst 1999, pp. 23–25; Minckley and Demaris 2000, pp. 251–256; Voeltz 2002, pp. 8–11). Baird and Girard first described roundtail chub from specimens collected from the Zuni River in northeastern Arizona and northwestern New Mexico (Baird and Girard 1853, pp. 368–369). Roundtail chub has been recognized as a distinct species since the 1800s (Miller 1945, p. 104; Holden 1968, pp. 27–28; Rinne 1969, pp. 27–42; Holden and Stalnaker 1970, p. 409; Rinne 1976, pp. 87–91; Smith *et al.* 1979, p. 623; DeMarais 1986, p. iii; Douglas *et al.* 1989, p. 653; Rosenfeld and Wilkinson 1989, p. 232; DeMarais 1992, pp. 63–64; Dowling and DeMarais 1993, p. 444; Douglas *et al.* 1998, p. 169; Minckley and DeMarais 2000, p. 255; Gerber *et al.* 2001, p. 2028), and is currently recognized as a species by the American Fisheries Society (Nelson *et al.* 2004, p. 71). The chubs of the genus *Gila* in the lower Colorado River basin are all closely related and are often regarded as a species complex (Minckley 1973, p. 101; DeMarais 1992, p. 150; Dowling and DeMarais 1993, p. 444; Minckley and DeMarais 2000, p. 251; Gerber *et al.* 2001, p. 2028).

Roundtail chubs in the lower Colorado River basin are found in cool to warm waters of rivers and streams, and often occupy the deepest pools and eddies of large streams (Minckley 1973, p. 101; Brouder *et al.* 2000, pp. 6–8; Minckley and DeMarais 2000, p. 255; Bezzerides and Bestgen 2002, pp. 17–19). Although roundtail chubs are often associated with various cover features, such as boulders, vegetation, and undercut banks, they are less apt to use cover than other related species such as the headwater chub and Gila chub (*Gila intermedia*) (Minckley and DeMarais 2000, p. 2145). Water temperatures of habitats occupied by roundtail chub vary between 0 degrees and greater than 32 degrees Celsius (°C) (32 to 90 degrees Fahrenheit (°F)) (Bestgen 1985, p. 14). Carveth *et al.* (2006, p. 1435) reported the upper thermal tolerance of roundtail chub to be 36.6 °C (97.9 °F); spawning has been documented from 14 to 24 °C (57 to 75 °F) (Bestgen 1985, p. 14; Kaeding *et al.* 1990, p. 139; Brouder *et*

al. 2000, p. 13). Spawning occurs from February through June in pool, run, and riffle habitats, with slow to moderate water velocities (Neve 1976, p. 32; Bestgen 1985, pp. 56–67; Propst 1999, p. 24; Brouder *et al.* 2000, p. 12; Voeltz 2002, p. 16). Roundtail chubs live for 5 to 7 years and spawn from age 2 on (Bestgen 1985, p. 62; Brouder *et al.* 2000, p. 12). Roundtail chubs are omnivores, consuming foods proportional to their availability, including aquatic and terrestrial invertebrates, aquatic plants, detritus, and fish and other vertebrates; algae and aquatic insects can be major portions of the diet (Bestgen 1985, pp. 46–53; Schreiber and Minckley 1981, pp. 409, 415; Propst 1999, p. 24).

Status and Distribution of the Lower Colorado River DPS

The historical distribution of roundtail chub in the lower Colorado River basin is poorly documented because there were few early collections, and perhaps more importantly, because many populations of native fish, including roundtail chub, were likely lost prior to early comprehensive fish surveys because habitat-altering actions (*e.g.,* dewatering, livestock grazing, mining) were widespread, and had already severely altered aquatic habitats (Girmendonk and Young 1997, p. 50; Minckley 1999, p. 179; Voeltz, 2002, p. 19). Roundtail chub was historically considered common throughout its range (Minckley 1973, p. 101; Holden and Stalnaker 1975, p. 222; Propst 1999, p. 23). Voeltz (2002), estimating historical distribution based on museum collection records, agency database searches, literature searches, and discussion with biologists, found that roundtail chub in the lower Colorado River basin was historically found in the Gila and Zuni Rivers in New Mexico; the Black, Colorado (though likely only as a transient), Little Colorado, Bill Williams, Gila, San Francisco, San Carlos, San Pedro, Salt, Verde, White, and Zuni Rivers in Arizona: and numerous tributaries within those basins. Voeltz (2002, p. 83) estimated the lower Colorado River basin roundtail chub historically occupied approximately 2,796 mi (4,500 km) of rivers and streams in Arizona and New Mexico. Although roundtail chubs were never collected from the Colorado River or San Pedro River basin in Mexico, they may have occurred in these areas based on records near the international border in the lower Colorado River and upper San Pedro River and the occurrence of suitable habitat in these streams in Mexico (Voeltz 2002, p. 20).

Miller (1961) first comprehensively documented the decline of fishes of the southwestern United States in 1961, but interestingly, F.M. Chamberlain made similar observations in Arizona in 1904; roundtail chub was included in these assessments and in subsequent evaluations of imperiled fish species of the region (Miller 1961, pp. 373–379; Miller 1972, p. 242; Deacon *et al.* 1979, p. 34; Minckley 1999, pp. 215–218). The decline of the species has been documented both in the scientific peer-reviewed literature (Bestgen and Propst 1989, p. 402) and in State agency reports (Girmendonk and Young 1997, p. 49; Propst 1999, p. 23; Brouder *et al.* 2000, p. 1; Bezzerides and Bestgen 2002, pp. iii–iv; Voeltz 2002, p. 83). Roundtail chub is considered vulnerable by the American Fisheries Society (Jenks *et al.* 2008, p. 390).

Roundtail chub in the lower Colorado River basin in Arizona currently occurs in two tributaries of the Little Colorado River (Chevelon and East Clear Creeks); several tributaries of the Bill Williams River basin (Boulder, Burro, Conger, Francis, Kirkland, Sycamore, Trout, and Wilder Creeks); the Salt River and four of its tributaries (Ash Creek, Black River, Cherry Creek and Salome Creek); the Verde River and five of its tributaries (Fossil, Oak, Roundtree Canyon, West Clear, and Wet Beaver Creeks); Aravaipa Creek (a tributary of the San Pedro River); Eagle Creek (a tributary of the Gila River); and in New Mexico, in the upper Gila River (Voeltz 2002, pp. 82–83; the upper Gila River is used in this document to denote that portion of the Gila River basin in New Mexico). The Salt River and Verde River are occupied in several reaches that are fragmented and separated by two large dams and reservoirs on the Verde River, and four large dams and reservoirs on the Salt River. Roundtail chubs also occur in canals in Phoenix that are fed by the lower Salt and Verde Rivers. Roundtail chubs inhabit several streams in the Salt River drainage, although survey information on the San Carlos Apache Reservation and White Mountain Apache Reservation is proprietary and confidential, and their status is not currently known; these streams include Canyon, Carrizo, Cedar, Cibecue, and Corduroy Creeks, and the White River (Voeltz 2002, pp. 82–83).

The Arizona Game and Fish Department (AGFD) conducted a comprehensive status review of roundtail and headwater chub (Voeltz 2002) in the lower Colorado River basin that included a review of all available current and historical survey records and estimated historical and current range of roundtail chub using information from museum collections, agency databases, records found in literature, and consultation with experts. The report found that roundtail chub populations and distribution had declined significantly from historical levels. Based on Voeltz (2002), roundtail chub is known to occupy only 18 percent of its former range in the lower Colorado River basin; status in an additional 14 percent of its range is unknown. Based on the best available scientific information in Voeltz (2002), the roundtail chub in the lower Colorado River basin appears to occupy about 18 to 32 percent of its former range (approximately 497 mi (800 km) out of the 2,796 mi (4,500 km)) considered to be formerly occupied) in Arizona and New Mexico. We now consider the Colorado River in the lower Colorado River basin to be outside the historical range of the species (Voeltz considered it to have been occupied); given this, roundtail chub has been extirpated from 672 mi (965 km) of 2,197 mi (3,535 km; approximately 60 percent) of its formerly occupied range. Of the populations for which status and threat information is available, all but one of the remaining natural populations are considered threatened by both the presence of nonnative species and habitat-altering land uses.

In the report, Voeltz (2002) used a classification system to report status and threat information. Populations were defined as an occurrence at a stream-specific locality. A population was considered ''stable-secure,'' ''stable-threatened,'' or ''unstable-threatened,'' based on abundance, population trend, and threat information for the locality (see Table 1, Voeltz 2002, p. 5). Voeltz (2002, p. 5) considered a population ''extirpated'' if the species was no longer believed to occupy the site, and ''unknown'' if there are too few data to determine status. Note that the term ''threatened'' as used by Voeltz (2002, p. 5) is not the definition of ''threatened'' used in the Act in which a species is likely to become endangered in the foreseeable future, but rather is an estimate of the likelihood that a population is likely to become extirpated. Of 40 populations of roundtail chub in the lower Colorado River basin identified in the report, Voeltz (2002, pp. 82–87) found that none were ''stable-secure,'' 6 were ''stable-threatened,'' 13 were ''unstable-threatened,'' 10 were ''extirpated,'' and 11 were of ''unknown'' status. Populations with an ''unknown'' status in Voeltz (2002) included nine populations wholly or partly on Tribal lands. Tribes are sovereign nations and

survey data is proprietary and confidential, but existing survey information for these streams was provided and indicated occupancy. The remaining two populations with ''unknown'' status lacked sufficient information to assign a category.

TABLE 1—DEFINITIONS OF STATUS DESCRIPTION CATEGORIES USED TO DESCRIBE ROUNDTAIL CHUB POPULATIONS

[From Voeltz 2002]

Status	Definition
Stable-Secure (SS)	Chubs are abundant or common, data over the past 5–10 years shows a stable, reproducing population with successful recruitment (survival of young to Age 2, reproductive age); no impacts from nonnative aquatic species exist; and no current or future habitat altering land or water uses were identified.
Stable-Threatened (ST)	Chubs are abundant or common, data over the past 5–10 years shows a reproducing population, although recruitment may be limited; predatory or competitive threats from nonnative aquatic species exist; and/or some current or future habitat altering land or water uses were identified.
Unstable-Threatened (UT)	Chubs are uncommon or rare with a limited distribution; data over the past 5–10 years shows a declining population with limited recruitment; predatory or competitive threats from nonnative aquatic species exist; and/or serious current or future habitat altering land or water uses were identified.
Extirpated (E)	Chubs are no longer believed to occur in the system.
Unknown (UN)	Lack of data precludes determination of status.

We have updated this assessment with new data from various sources, particularly Cantrell (2009) as provided in Table 2 below. It is important to recognize that these status categories are qualitative, and based on very limited data in most instances. We have very little information on the population size, length of the stream reach, survivorship, recruitment (survival of young to Age 2, reproductive age), or age structure of these populations. These categories are also often based on only a few surveys conducted over decadal time scales. We now consider 1 population ''stable-secure,'' 8 populations ''stable-threatened,'' 13 populations ''unstable-threatened,'' and 9 populations ''unknown.'' Ten populations remain extirpated although we now consider what was called a population in the Colorado River to have been occupied only by transient individuals. In the nine populations with ''unknown'' status, two (Ash Creek and Roundtree Creek) are newly established via translocation and have not been extant long enough to determine successful establishment. Information on the Black River and Conger Creek provided since the 2002 report resulted in recategorization of both of those sites from ''unknown'' to ''stable-threatened'' and for recategorization of Eagle Creek from ''unknown'' to ''unstable-threatened.'' Improved status at Fossil Creek that allows that population to reach ''stable-secure'' is due to removal of the power plant and associated structures, construction of a new fish barrier, and chemical renovation to remove nonnative fish species. Recent surveys have confirmed some of the information in Voeltz's 2002 status review; in the upper Black River, Chevelon Creek, and East Clear Creek, the species persists in the presence of abundant nonnative predators, and apparently reproduces successfully, but distribution appears limited, abundance is unknown, and other signs, such as abundance of other native fish species, indicate these native fisheries are deteriorating (AGFD 2005a, p. 4; 2005b, pp. 4–5; Clarkson and Marsh 2005a, pp. 6–8; 2005b, pp. 6–7). Other roundtail chub populations in waters with abundant nonnative predators are less able to reproduce successfully and the particular circumstances at these three sites are worth further investigation. Roundtail chub in the lower Colorado River basin in New Mexico may now be extirpated. The species has long been considered extirpated in many Gila River tributaries in New Mexico, and has become very rare in the mainstem Gila River (Carman 2006, pp. 9, 18).

TABLE 2—SUMMARY OF ROUNDTAIL CHUB STATUS AND THREATS BY STREAM REACH

[Voeltz 2002, Cantrell 2009, service files]

Location	Current status	Regional historical or current threats
Management Area A—Gila River Basin		
Aravaipa Creek	ST	Factor A: Water diversions, groundwater pumping, recreation, mining, livestock grazing, road use. Factor C: Nonnative species.
Blue River	E	Factor A: Water diversions, groundwater pumping, logging and fuel wood cutting, recreation, livestock grazing, road use. Factor C: Nonnative species.
Eagle Creek	UT	Factor A: Dams, water diversions, groundwater pumping, recreation, mining, livestock grazing. Factor C: Nonnative species.
San Francisco River	E	Factor A: Dams, water diversions, groundwater pumping, dewatering, logging and fuel wood cutting, recreation, mining, urban and agricultural development, livestock grazing. Factor C: Nonnative species.
Upper Gila River	UT	Factor A: Dams, water diversions, groundwater pumping, dewatering, logging and fuel wood cutting, recreation, mining, urban and agricultural development, livestock grazing. Factor C: Nonnative species.
Lower Gila River	E	Factor A: Dams, water diversions, groundwater pumping, dewatering, logging and fuel wood cutting, recreation, mining, urban and agricultural development, livestock grazing. Factor C: Nonnative species.
San Pedro River	E	Factor A: Dams, water diversions, groundwater pumping, dewatering, logging and fuel wood cutting, recreation, mining, urban and agricultural development, livestock grazing.

TABLE 2—SUMMARY OF ROUNDTAIL CHUB STATUS AND THREATS BY STREAM REACH—Continued

[Voeltz 2002, Cantrell 2009, service files]

Location	Current status	Regional historical or current threats
		Factor C: Nonnative species.
Management Area A—Salt River Basin		
Ash Creek	UN	Factor A: Recreation, logging and fuel wood cutting, livestock grazing.
Black River	ST	Factor A: Water diversions, groundwater pumping, recreation, livestock grazing, mining, logging and fuel wood cutting, urban and agricultural development. Factor C: Nonnative species.
Canyon Creek	UN	Factor A: Livestock grazing, recreation, limited fuelwood harvest, limited agriculture, fisheries and wildlife management, and localized municipal, urban and rural development and associated water use. Factor C: Nonnative species.
Carrizo Creek	UN	Factor A: Livestock grazing, recreation, limited fuelwood harvest, limited agriculture, fisheries and wildlife management, and localized municipal, urban and rural development and associated water use. Factor C: Nonnative species.
Cedar Creek	UN	Factor A: Livestock grazing, recreation, limited fuelwood harvest, limited agriculture, fisheries and wildlife management, and localized municipal, urban and rural development and associated water use. Factor C: Nonnative species.
Cherry Creek	ST	Factor A: Water diversions, groundwater pumping, mining, recreation, livestock grazing, logging and fuel wood cutting, urban and agricultural development. Factor C: Nonnative species.
Cibecue Creek	UN	Factor A: Livestock grazing, recreation, limited fuelwood harvest, limited agriculture, fisheries and wildlife management, and localized municipal, urban and rural development and associated water use. Factor C: Nonnative species.
Corduroy Creek	UN	Factor A: Livestock grazing, recreation, limited fuelwood harvest, limited agriculture, fisheries and wildlife management, and localized municipal, urban and rural development and associated water use. Factor C: Nonnative species.
Salome Creek	UT	Factor A: Recreation, logging and fuel wood cutting, livestock grazing. Factor C: Nonnative species.
Salt River	UT	Factor A: Dams, water diversions, groundwater pumping, dewatering, logging and fuel wood cutting, recreation, mining, urban and agricultural development, livestock grazing. Factor C: Nonnative species.
White River	UN	Factor A: Water diversions, groundwater pumping, recreation, livestock grazing, mining, logging and fuel wood cutting, urban and agricultural development. Factor C: Nonnative species.
Management Area A—Verde River Basin		
Dry Beaver Creek	E	Factor A: Water diversions, dewatering, livestock grazing, logging and fuel wood cutting, recreation. Factor C: Nonnative species.
Fossil Creek	SS	Factor A: Water diversions, groundwater pumping, dewatering, mining, contaminants, urban and agricultural development, livestock grazing.
Oak Creek	UT	Factor A: Water diversions, groundwater pumping, dewatering, mining, contaminants, urban and agricultural development, livestock grazing. Factor C: Nonnative species.
Roundtree Canyon	UN	Factor A: Recreation, logging and fuel wood cutting, livestock grazing.
Verde River	ST	Factor A: Water diversions, groundwater pumping, dewatering, mining, contaminants, urban and agricultural development, livestock grazing. Factor C: Nonnative species.
West Clear Creek	ST	Factor A: Water diversions, dewatering, livestock grazing, logging and fuel wood cutting, recreation. Factor C: Nonnative species.
Wet Beaver Creek	UT	Factor A: Water diversions, dewatering, livestock grazing, logging and fuel wood cutting, recreation. Factor C: Nonnative species.
Management Area B—Bill Williams River Basin		
Big Sandy River	E	Factor A: Water diversions, groundwater pumping, recreation, mining, livestock grazing, residential development. Factor C: Nonnative species.
Bill Williams River	E	Factor A: Water diversions, groundwater pumping, recreation, mining, livestock grazing. Factor C: Nonnative species.
Boulder Creek	ST	Factor A: Groundwater pumping, recreation, livestock grazing. Factor C: Nonnative species.
Burro Creek	UT	Factor A: Water diversions, groundwater pumping, recreation, mining, livestock grazing, residential development, contaminants. Factor C: Nonnative species.
Conger Creek	ST	Factor A: Groundwater pumping, mining, livestock grazing, recreation. Factor C: Nonnative species.
Francis Creek	UT	Factor A: Groundwater pumping, mining, livestock grazing, recreation. Factor C: Nonnative species.

TABLE 2—SUMMARY OF ROUNDTAIL CHUB STATUS AND THREATS BY STREAM REACH—Continued

[Voeltz 2002, Cantrell 2009, service files]

Location	Current status	Regional historical or current threats
Kirkland Creek	UT	Factor A: Groundwater pumping, recreation, mining, livestock grazing, residential development, contaminants. Factor C: Nonnative species.
Santa Maria River	UT	Factor A: Groundwater pumping, recreation, mining, livestock grazing, residential development, contaminants. Factor C: Nonnative species.
Sycamore Creek	UT	Factor A: Water diversions, groundwater pumping, recreation, mining, livestock grazing, residential development, contaminants. Factor C: Nonnative species.
Trout Creek	ST	Factor A: Water diversions, groundwater pumping, recreation, residential development. Factor C: Nonnative species.
Wilder Creek	UN	Factor A: Groundwater pumping, mining, livestock grazing, recreation. Factor C: Nonnative species.
Management Area C—Little Colorado River Basin		
Chevelon Creek	UT	Factor A: Dams, water diversions, groundwater pumping, dewatering, logging and fuel wood cutting, recreation, mining, urban and agricultural development, livestock grazing, contaminants. Factor C: Nonnative species.
East Clear Creek	UT	Factor A: Logging and fuel wood cutting, recreation, mining, livestock grazing, contaminants. Factor C: Nonnative species.
Little Colorado River	E	Factor A: Dams, water diversions, groundwater pumping, dewatering, logging and fuel wood cutting, recreation, mining, urban and agricultural development, livestock grazing. Factor C: Nonnative species.
Zuni River	E	Factor A: Water diversions, groundwater pumping, dewatering, mining, contaminants, urban and agricultural development, livestock grazing. Factor C: Nonnative species.

SS—Stable-Secure; ST—Stable-Threatened; UT—Unstable-Threatened; E—Extirpated; UN—Unknown.

Populations of roundtail chub are found in five separate drainages that are isolated from one another (the Little Colorado River, Bill Williams River, Gila River, Salt River, and Verde River), and populations within the drainages have varying amounts of connectivity between them. Using large-scale watersheds, AGFD created ''management areas'' and ''significant conservation units'' based on currently occupied roundtail habitats. AGFD has utilized new genetic studies (Dowling *et al.* 2008; Schwemm 2006; See Table 2) to refine these management areas. Based on genetic similarity, the Verde, Salt, and Gila Rivers and their tributaries constitute Management Area A, the Bill Williams and its tributaries are Management Area B, and the Little Colorado River and its tributaries are Management Area C. Cantrell (2009, p. 9) also refined significant conservation units for management purposes based on genetic information (Dowling *et al.* 2008; Schwemm 2006); however the mechanism for selecting these units and determination of stability versus instability of a management area or significant conservation units was not clearly described.

Summary of Factors Affecting the Species

Section 4 of the Act (16 U.S.C. 1533), and implementing regulations at 50 CFR 424, set forth procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. In making this finding, information regarding the status and threats to the Lower Colorado River Basin DPS of roundtail chub in relation to the five factors provided in section 4(a)(1) of the Act is summarized below.

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

Roundtail chub has been eliminated from much of its historical range because many formerly occupied areas are now unsuitable due to dewatering, impoundment, channelization, and channel changes caused by alteration of riparian vegetation and watershed degradation (Miller 1961, pp. 367–371; Miller 1972, pp. 240, 242; Deacon *et al.* 1979, pp. 32, 34; Bestgen and Propst 1989, p. 409; Girmendonk and Young 1997, p. 16–44; Bezzerides and Bestgen 2002, pp. 6–9, 24–33; Voeltz 2002, pp. 87–89). In addition, areas where roundtail chub still occurs have been significantly altered or are currently being altered by the same and additional factors, including mining, improper livestock grazing, wood cutting, recreation, urban and suburban development, groundwater pumping, dewatering, dams and dam operation, contaminants, and other human actions (Minckley 1973, p. 101; Minckley 1985, pp. 12–15, 65–67; Bestgen and Propst 1989, p. 409; Bezzerides and Bestgen 2002, pp. 24–33; Tellman *et al.* 1997, pp. 159–170; Voeltz 2002, pp. 87–89; McKinnon 2006a, 2006b, 2006c, 2006d, 2006e). These activities and their effects on the roundtail chub are discussed in further detail below. It is important to recognize that in most areas where roundtail chub historically occurred or currently occur, two or more threats may be acting in combination in their influence on the roundtail chub or on suitability of habitat to support the species (Voeltz 2002, pp. 23–81; Cantrell 2009, p. 15).

The modification and destruction of aquatic and riparian communities in the post-settlement arid southwestern United States from anthropogenic (human-caused) land uses is well documented (Miller 1961, pp. 367–371; Sullivan and Richardson 1993, pp. 35–42; Girmendonk and Young 1997, pp. 45–52; Tellman *et al.* 1997; Webb and Leake 2005, pp. 305–310; Ouren *et al.* 2007, pp. 16–22). Significant loss of habitat and species range has also been well documented (Miller 1961, p. 365; Minckley 1985, pp. 4–15; Minckley and Deacon 1991, pp. 7–18), and has been reported specifically for the roundtail chub in the lower Colorado River basin (Voeltz 2002). An estimated one-third of Arizona's pre-settlement wetlands have dried or have been rendered ecologically dysfunctional (Yuhas 1996). Although many of these habitat changes, and the greatest loss and degradation of riparian and aquatic communities in Arizona, occurred during the period from 1850 to 1940, (Miller 1961, pp. 365–371; Minckley 1985, pp. 4–15; Webb and Leake 2005, pp. 305–310), many of these land activities continue today and are discussed in detail below.

Dams, Diversions, and Groundwater Withdrawal

Major dams have been constructed throughout the historical and current range of the roundtail chub in the lower Colorado River basin, including four dams on the Gila River, four on the Salt River, and two on the Verde River, and have been a substantial cause in the decline of the species (Minckley 1985, pp. 12–14; Tellman *et al.* 1997, pp. 159–170; Voeltz 2002, pp. 19–22, 44–45). Although roundtail chubs survive, reproduce, and can even be cultured in small ponds, they do not appear to be able to persist in reservoirs. Much of the lower Salt River and portions of the lower Verde River are now reservoirs where roundtail chub formerly occurred (Voeltz 2002, pp. 20, 84–85). In addition to the loss of flowing river habitats through inundation, dams also modify sediment dynamics, timing and magnitude of downstream flow, and temperature characteristics of habitats (Gloss *et al.* 2005, pp. 17–32, 69–85). Such changes can negatively affect the distribution and survival of warm-water adapted native fishes like roundtail chub. Tailwaters of large dams are often too cold for successful reproduction by native warmwater fishes. Cooler water temperatures can also reduce the growth rates and survival of embryos and juvenile warm-water fish. Larvae grow more slowly, which increases their risk of predation and decreases accumulation of energetic reserves needed for overwinter survival. Cold water temperatures may slow growth and reduce reproductive success (Marsh 1985, p. 129; Valdez and Ryel 1994, pp. 4–16; Muth *et al.* 2000, pp. 5–1–5–39). Reservoirs also capture sediment and discharge sediment-poor water downstream that alters channel characteristics (Collier *et al.* 1996, pp. 63–85; Gloss *et al.* 2005, pp. 17–32; Wright *et al.* 2008, p. 4). Alteration of the magnitude and timing of flow and capture of sediment in reservoirs can increase water clarity and channel scour downstream from the dam (Collier *et al.* 1996, pp. 63–85). Changes in discharge timing and magnitude may shift environmental cues needed by fish for proper timing of migration and spawning, thereby preventing successful reproduction (Muth *et al.* 2000, pp. 5–1–5–39). Dams also prevent upstream, and to a lesser degree downstream, movement of all age classes to historical spawning, rearing, and overwintering habitat (Martinez *et al.* 1994, pp. 227–239; Schuman 1995, pp. 249–261).

Within the range of roundtail chub in the lower Colorado River basin, water for human uses is supplied by reservoirs created by dams, surface water diversions, and groundwater pumping. The hydrologic connection between groundwater and surface flow of intermittent and perennial streams is becoming better understood. Groundwater pumping creates a cone of depression within the affected aquifer that slowly radiates outward from the well site. When the cone of depression intersects the hyporheic zone of a stream (the active transition zone between surface water and groundwater that contributes water to the stream itself), the surface water flow may decrease. Continued groundwater pumping can draw down the aquifer sufficiently to create a water-level gradient away from the stream and floodplain (Webb and Leake 2005, p. 309). Finally, complete disconnection of the aquifer and the stream results in dewatering of the stream (Webb and Leake 2005, p. 309).

Roundtail chub has been eliminated from much of its historical range because many formerly occupied areas are now unsuitable due to dewatering (Miller 1961, pp. 367–371; Miller 1972, pp. 240, 242; Deacon *et al.* 1979, pp. 32, 34; Bestgen and Propst 1989, p. 409; Girmendonk and Young 1997, pp. 16–44; Bezzerides and Bestgen 2002, pp. 6–9, 24–33; Voeltz 2002, pp. 87–89). Dams, diversions, and groundwater pumping have effectively eliminated much of the riverine habitat in Arizona that roundtail chub once occupied simply by eliminating downstream flow and drying much of the historical river courses (Tellman *et al.* 1997, pp. 164, 169; Voeltz 2002, pp. 19–22, 44–45). In 1904, Chamberlin noted that a primary cause of fish extinctions in the lower Colorado River basin was irrigation operations including water use, preclusion of migration due to dams, and destruction of fish in ditches (Minckley 1999, p. 215). Groundwater pumping and water diversions continue to pose a significant threat to the continued existence of the roundtail chub by reducing the quantity and quality of habitat (Girmendonk and Young 1997, p. 56), and by altering streamflow and reducing the frequency and magnitude of floods. Diversions also impact fish populations by creating barriers to fish movement and by entraining drifting larvae and fish into irrigation canals where they may later perish (Martinez *et al.* 1994, pp. 227–239). Chamberlin found that all of the flow of the San Pedro River was diverted at two dams near Fairbanks in 1904 (Minckley 1999, pp. 200–201). Reaches of the Verde River near Tapco and the urban areas in the Verde Valley contain numerous, significant diversion dams, and dead fishes have been reported in surrounding pastures following irrigation (Girmendonk and Young 1997, p. 56). Roundtail chubs are also diverted from the lower Salt River into canals in the Phoenix area, where they likely perish as a result of annual dewatering for canal maintenance, although some fish are salvaged and returned to the Salt River.

The Service found that, in lotic systems (flowing water), roundtail chub habitat is essentially eliminated when flow consistently drops below 10 cubic feet per second (0.3 cubic meters per second) (Service 1989, pp. 32–33). In the Verde River, the lowered water level during the summer irrigation season alters physical characteristics of the river, changing stream width and depth (Girmendonk and Young 1997, p. 55–56), with much of the stream in the summer dry season reduced to isolated pools, especially in the urbanized Verde Valley area. The upper Gila River, in the vicinities of Cliff, Redrock, and Virden, New Mexico, has been entirely dewatered on occasion by diversions for agriculture (Bestgen 1985, p. 13). Water withdrawal alters stream flow regime, in part by reducing flooding (Brouder 2001, p. 302; Freeman 2005, p. 1). Brouder (2001, p. 302) hypothesized that periodic flooding in the Verde River is needed to maintain roundtail chub habitat, and further that reductions in periodic flooding due to continued

water withdrawal and extended drought could lead to roundtail chub recruitment failure and significant population declines.

To accommodate the needs of rapidly growing rural and urban populations (see the ''Urban and Rural Development'' section), surface water is commonly diverted to serve many industrial and municipal uses. These water diversions have dewatered large reaches of once perennial or intermittent streams, adversely affecting roundtail chub habitat throughout its range in Arizona and New Mexico. Many tributaries of the Verde River are permanently or seasonally dewatered by water diversions for agriculture (Paradzick *et al.* 2006, pp. 104–110). Water withdrawal (dams, diversions, and groundwater pumping) is a threat to most extant populations of roundtail chub in the lower Colorado River basin (Bestgen and Propst 1989, p. 409; Girmendonk and Young 1997, p. 56; Propst 1999, p. 25; Voeltz 2002, pp. 23–81; Cantrell 2009, p. 15).

Increased urbanization and population growth results in an increase in the demand for water and, therefore, water development projects. Municipal water use in central Arizona has increased by 39 percent in the last 8 years (American Rivers 2006, pp. 2–3). Areas of the Verde River basin continue to experience explosive population growth and concomitant demand for water. Traditionally rural portions of Arizona are also predicted to experience significant growth. The populations of developing cities and towns of the Verde watershed are expected to more than double in the next 50 years, which may pose exceptional threats to riparian and aquatic communities of the Verde Valley (Girmendonk and Young 1993, p. 47; American Rivers 2006; Paradzick *et al.* 2006, p. 89). Communities in Yavapai and Gila counties such as the Prescott-Chino Valley and the City of Payson have seen rapid population growth in recent years. For example, the population in the town of Chino Valley, at the headwaters of the Verde River, grew by 22 percent between 2000 and 2004; Gila County, which includes reaches of Tonto Creek and the Salt, White, and Black Rivers, grew by 20 percent between 2000 and 2003 (U.S. Census Bureau 2005). Voeltz (2002, p. 35) also considered groundwater pumping from new development a serious threat for all streams of the Burro Creek drainage in the Bill Williams River basin.

In the Verde River basin, water demands of increasing population density and associated development have reduced the flow of the Verde River, and seem likely to continue to do so. A number of researchers have reported that groundwater in the Big Chino aquifer is connected to the Verde River and that groundwater pumping of this aquifer affects stream flow in the mainstem Verde River (Wirt and Hjalmarson 2000, pp. 44–47; Ford 2002, p. 1; Woodhouse *et al.* 2002, pp. 1–4). The relationship between groundwater pumping in the lower Big Chino aquifer and Verde River flow has been apparent since at least the early 1960s when a surge of pumping due to new development caused Verde River flows to drop significantly (Wirt and Hjalmarson 2000, p. 27). The Big Chino aquifer is estimated to supply approximately 80 percent of the base flow of the Upper Verde River (Wirt and Hjalmarson 2000, p. 44, Wirt *et al.* 2004, p. G7; Blasch *et al.* 2006, updated 2007, pp. 1–2). Woodhouse *et al.* (2004, pp. 1–4) also reported that numerous groundwater wells throughout the upper Verde River watershed have reduced the water table of the Verde River (Woodhouse *et al.* 2002, pp. 1–4). A proposed water project in the area, the Big Chino Water Ranch Project, will include infrastructure to pump groundwater in the Chino Valley and pipe it to nearby communities. It will include a 30 mi (48 km), 36 in. (91 cm) diameter pipeline that will deliver up to 2.8 billion gallons (gal) (12,400 acre-feet (ac-ft)) of groundwater annually from the Big Chino sub-basin aquifer to the rapidly growing area of Prescott Valley for municipal use (McKinnon 2006c; Davis 2007, pp. 1–2). This potential reduction or loss of baseflow in the Verde River could seasonally dry up large reaches of the stream.

Roundtail chub habitat in Clear Creek and Chevelon Creek in the Little Colorado River watershed appears severely threatened by dewatering. Recent studies and assessments of the Little Colorado River watershed and its underlying groundwater resources indicate that these water resources are under increasing pressure from development (Bills *et al.* 2005). The North Central Arizona Water Supply Study Report of Findings (U.S. Bureau of Reclamation 2006) predicts that by the year 2050, the human demand for water will not be met in north-central Arizona. Plans are underway to determine how additional water resources can be developed to provide for this unmet demand. Protecting water resources for environmental needs is included in these plans. However, it is likely that, with the need for additional demand and use of water for human uses, there will be additional stress on these aquatic ecosystems. In addition, there is high potential that extended drought, perhaps exacerbated through global climate change (see the ''Climate Change'' section below), will further stress water resources. Two hydrologic models developed to evaluate the impacts of additional pumping on groundwater in the C-aquifer in Arizona support these findings. The C-aquifer is located on the Colorado Plateau of northeastern Arizona, western New Mexico, and southern Colorado and is the aquifer that underlies the lower Colorado River Basin. Two groundwater models, one developed by the U.S. Geological Survey (Leake *et al.* 2005), and a second full-flow groundwater model developed to evaluate cumulative effects to surface water flow (Papadopulos and Associates 2005), have been developed for the area encompassing the C-aquifer. Both models predicted depletion in baseflow from current and proposed groundwater withdrawals in lower Chevelon and Clear Creeks over the next 50 to 100 years. The flow model (Papadopulos and Associates 2005) predicted that, based on current regional pumping, the base flow of Lower Chevelon Creek would be zero in 60 years.

Water use from rapidly growing communities and agricultural and mining interests have altered flows or dewatered significant reaches during the spring and summer months in some of the Verde River's larger, formerly perennial tributaries such as Wet Beaver Creek, West Clear Creek, and the East Verde River (Girmendonk and Young 1993, pp. 45–47; Sullivan and Richardson 1993, pp. 38–39; Paradzick *et al.* 2006, pp. 104–110). The upper Gila River is also threatened by water diversions and water allocations. In New Mexico, a water settlement in 2004 allows New Mexico the right to withhold 4.5 billion gal (13,800 ac-ft) of surface water every year from the Gila and San Francisco Rivers (McKinnon 2006d). Project details are still under development, so the impact of this project on aquatic resources cannot yet be evaluated.

The Arizona Department of Water Resources manages water supplies in Arizona and has established five Active Management Areas across the State (Arizona Department of Water Resources 2006). An Active Management Area is established by the Arizona Department of Water Resources when an area's water demand has exceeded the groundwater supply and an overdraft has occurred. In these areas, groundwater use has exceeded the rate that precipitation can recharge the aquifer. Geographically, all five Active

Management Areas overlap the historical distribution of the roundtail chub in Arizona. The declaration of these Active Management Areas further illustrates the current and future threats to aquatic habitat in these areas and is a cause of concern for the long-term maintenance of historical and occupied roundtail chub habitat. Such overdrafts reduce surface water flow of streams that are hydrologically connected to the aquifer under stress, and this stress can be further exacerbated by the surface water diversions.

Livestock Grazing

Historical accounts of livestock grazing and its effects in Arizona are consistent: widespread overgrazing throughout the State in the mid- to late-1880s denuded rangelands and so altered watersheds that the landscape was changed forever. In fact, in 1906, F.M. Chamberlain conjectured that the alteration of landscapes was so profound that it had actually resulted in climate change to a more arid climate in the region (as cited in Minckley 1999). Similarly, Croxen (1926) describes changes to the Tonto National Forest resulting from poorly managed livestock grazing as largely running their course by the late 1880s. Between 1880 and 1890, the widespread improper grazing regimes that had denuded the landscape for 10 to 20 years or so throughout the State was followed by severe flooding. The end result was a rapid transition for many aquatic habitats from permanent, meandering streams to intermittent ''flashy'' arroyos (intermittent streams with higher peak flows and lower base flows) (Minckley and Hendrickson 1984, pp. 131–132; Cheney *et al.* 1990, pp. 5, 10).

Poorly managed livestock grazing has damaged approximately 80 percent of stream, cienega (marsh), and riparian ecosystems in the western United States (Kauffman and Krueger 1984, pp. 433–435; Weltz and Wood 1986, pp. 367–368; Waters 1995, pp. 22–24; Pearce *et al.* 1998, p. 307; Belsky *et al.* 1999, p. 1) and severely altered many of the habitats formerly and currently occupied by roundtail chub. Livestock grazing today is much more strictly managed by Federal agencies and Tribes because the effects of grazing and mismanagement are now better understood and have been well documented. For example, Stromberg and Chew (2002, p. 198) and Trimble and Mendel (1995, p. 243) discuss the propensity for poorly managed cattle to remain within or adjacent to riparian communities, a behavior that is more pronounced in arid regions (Trimble and Mendel 1995, p. 243). In one rangeland study, it was concluded that 81 percent of the vegetation that was consumed, trampled, or otherwise removed was from a riparian area, which amounted to only 2 percent of the total grazing space (Trimble and Mendel 1995, p. 243). Additionally, grazing rates can be 5 to 30 times higher in riparian areas (Trimble and Mendel 1995, p. 244). But as a direct result of this research, management agencies now exclude livestock grazing from many riparian areas and streams, or only permit light and seasonal grazing in these areas. We summarize here the effects of livestock grazing, but it is important to note that these effects only become tangible if livestock grazing is poorly managed. If properly managed, there is some evidence that affects to wildlife habitat can be positive. In this respect, livestock grazing is largely a threat of the past, and if properly managed, is not likely a threat. Although more research is needed, livestock grazing strategies can be developed that are compatible and even complementary with fisheries management (Platts 1989, p. 103; Vavra 2005, p. 128). The American Fisheries Society Policy Statement on livestock grazing concludes that ''it is our strong contention that when properly implemented and supervised, grazing could become an important management tool benefiting fish and wildlife riparian habitats'' (American Fisheries Society 2009).

Livestock grazing occurs throughout the range of roundtail chub in the lower Colorado River basin in all drainages in which the species occurs (Tellman *et al.* 1997, p. 167; Propst 1999, p. 25; Voeltz 2002, pp. 23–88), and has resulted in the degradation of roundtail chub habitat from a number of mechanisms. Livestock directly affect roundtail chub habitat through removal of riparian vegetation (Clary and Webster 1989, p. 1; Clary and Medin 1990, p. 1; Schulz and Leininger 1990, p. 295; Armour *et al.* 1991, pp. 8–10; Fleishner 1994, pp. 630–631), which can result in reduced bank stability, fewer pools, and higher water temperatures (Kauffman and Krueger 1984, p. 432; Minckley and Rinne 1985, p. 150; Schulz and Leininger 1990, p. 295; Fleishner 1994, pp. 630–631; Belsky *et al.* 1999, pp. 8–12). Livestock grazing can also cause increased sediment in the stream channel, due to streambank trampling and riparian vegetation loss (Weltz and Wood 1986, pp. 367–368; Waters 1995, pp. 22–24; Pearce *et al.* 1998, p. 307). Livestock physically alter streambanks through trampling and shearing, leading to bank erosion (Trimble and Mendel 1995, p. 244; Clary and Webster 1989, pp. 7–8). In combination, loss of riparian vegetation and bank erosion can alter channel morphology, including increased erosion and deposition, downcutting, and an increased width/depth ratio, all of which can lead to a loss of pool habitats and loss of shallow side and backwater habitats (Trimble and Mendel 1995, pp. 243–250; Belsky *et al.* 1999, pp. 1–2). Pool habitats are required by the roundtail chub, and shallow side and backwater habitats are used by larval chubs for sheltering from larger bodied predators and for feeding (Minckley 1973, p. 100; Brouder *et al.* 2000, pp. 6–7; Minckley and DeMarais 2000, p. 255).

Although livestock grazing is unlikely to be a threat if properly managed, physical developments necessary to support livestock grazing can also have direct effects on roundtail chub. Water sources are essential to livestock operations, and numerous stock tanks, stream diversions, and various types of groundwater pumps are utilized to provide water for livestock (Valentine 1989, pp. 413–431). This diverts water from natural surface waters, including streams supporting roundtail chub (see ''Dams, Diversions, and Groundwater Withdrawal'' section above). In addition to livestock developments, thousands of miles of fencing are needed to partition cattle into pastures or rotation-type grazing systems (Valentine 1989, pp. 435–449). Maintaining this infrastructure requires a substantial network of roads. Road use and maintenance have been a major factor in altering the morphology and habitat of streams in the Southwest (see ''Road Construction, Use, and Maintenance'' section below).

Livestock can indirectly impact aquatic and riparian habitats at a watershed level though soil compaction, altered soil chemistry, and reductions in upland vegetation cover; these changes lead to an increased severity of floods and sediment loading, lower water tables, and altered channel morphology (Rich and Reynolds 1963, p. 222; Orodho *et al.* 1990, p. 9; Schlesinger *et al.* 1990, p. 1043; Belsky *et al.* 1999, p. 1). One consequence of these changes in watershed function is a reduction in the quantity and quality of pool habitat. Lowered water tables result in the direct loss of pool habitats, simply because water is not available to form pools. Increased erosion and sedimentation results in filling of pools with sediments. Channel incision and increased flood severity eliminate pools through bed scour, and reduce habitat complexity by creating shallow, uniform streambeds (see Trimble and Mendel

1995, pp. 245–251; Belsky *et al.* 1999, pp. 25–35). Much of Arizona's rivers and streams were modified by livestock grazing in this way by the mid 1900s (Miller 1961, pp. 394–395; Minckley 1999, p. 215), and the effects to aquatic habitat from that historical modification remain today.

Livestock use has been shown to alter the composition and community structure of the aquatic fauna (regional animal life), which can also indirectly impact roundtail chub by reducing the quantity and quality of food sources. Altered stream channel characteristics, sediment deposition, changes in substrate size, and nutrient cycle changes are all potential effects of livestock grazing that can alter aquatic invertebrate communities (Li *et al.* 1994, pp. 638–639; Hoorman and McCutcheon 2005, p. 3), resulting in changes to the food base for aquatic vertebrates, particularly fish. Few detailed studies of changes in aquatic faunal communities have been completed on streams in the range of the roundtail chub, but given the widespread occurrence of ongoing and historical livestock grazing, changes in aquatic faunal community has likely occurred in many streams within historical range of roundtail chub.

Livestock grazing results in loss of aquatic habitat complexity, thus reducing diversity of habitat types available and altering fish communities (Li *et al.* 1987, pp. 627, 638–639). In the arid west, loss of habitat complexity has been a major contributing factor in declines of native fishes and amphibians and in the displacement of native fish species by nonnative species (Bestgen and Propst 1986, p. 209; Minckley and Rinne 1991, pp. 2–5; Baltz and Moyle 1993, p. 246; Lawler *et al.* 1999, p. 621). Livestock grazing has also contributed significantly to the introduction and spread of nonnative aquatic species through the proliferation of stock tanks (manmade ponds that are water sources for livestock) which serve as created habitat for nonnative species (Rosen *et al.* 2001, p. 24; Hedwall and Sponholtz 2005, pp. 1–5; Service 2008, pp. 46–51). The spread of nonnative species is a threat to roundtail chub because these nonnative species prey on and compete with roundtail chub (see ''Nonnative Species'' section below for more discussion).

Another direct effect of livestock grazing in intermittent aquatic habitats is the potential for livestock to drink occupied roundtail chub habitat dry under certain conditions, completely eliminating all habitat and killing any roundtail chub present. Vallentine (1989, pp. 413–431) states that cattle need an average of 12 to 15 gal (45 to 57 liters (L)) of water per day per animal, and that this varies seasonally because of the moisture content of forage, ambient temperature and humidity, and other factors. Griffith (1999, p. 1) states that at 10 °C (50 °F), a cow may consume about 5 to 7 gal (19 to 26 L) per day, but the amount increases by 0.4 gal (1.5 L) per day for every one-degree increase in air temperature; thus at 35 °C (95 °F) the same cow will drink an average of 24 gal (91 L) per day. Roundtail chub can be limited to small isolated pool habitats during the driest times of the year that can be as little as several hundred gal (1–2000 L) in volume, and have flow so low that inflow is essentially equal to or less than evaporation; several cows could completely dry such habitats in a matter of days, especially in times of drought. Gila chub, a related species, and its habitat, is believed to have been eliminated in this manner from portions of Indian Creek in 2002–2003 (Service 2006, p. 10).

Livestock grazing also contributed to shrub invasion of grasslands (Brown and Archer 1999, p. 2385). Shrub invasions decrease biodiversity and create ecosystem instability in desert ecosystems (Baez and Collins 2008). Shrub invasion also can lead to a greater amount of water loss through plants, which contributes to desertification (Knapp *et al.* 2008, p. 621). Fire regimes are also altered by shrub invasion (Richburg *et al.* 2001, p. 104), and altered fire regimes pose a threat to roundtail chub due to the effects of wildfire on watersheds and direct effects of ash and sediment flows following wildfires (see ''High-Intensity Wildfires'' section below).

All extant populations of roundtail chub are subject to some level of livestock grazing in the watershed, but specific problems associated with livestock grazing have only been noted in four streams (Chevelon, East Clear, Burro, and Salome Creeks) (Voeltz 2002; Cantrell 2009, p. 15). In Chevelon Creek, Arizona Department of Environmental Quality water quality standards for sediment and turbidity (muddiness of water) were not met due to grazing and high channel erosion, habitat modification, and unsatisfactory watershed condition for the watershed (Voeltz 2002, p. 27). In the Verde River, Girmendonk and Young (1997, p. 53) noted cattle grazing had a major impact on both upland and aquatic communities due to trampled banks and heavily grazed vegetation from Sullivan Lake downstream to Cottonwood. However, we note that in most streams currently occupied by roundtail chub, grazing has been removed from the riparian area. For example, livestock grazing has since been removed from that portion of the Verde River discussed by Girmendonk and Young (1997).

The above discussion illustrates that poorly managed livestock grazing can adversely affect roundtail chub in several ways, from direct loss due to livestock water and vegetation consumption and trampling, to indirect habitat alteration from changes in the watershed. In general, properly managed livestock grazing utilizes rest-rotation grazing systems that exclude riparian areas or limit their use to the winter season, and utilize monitoring systems to ensure that use of uplands and riparian areas are not overgrazed. When livestock grazing is well managed in this manner it is not likely a threat to the roundtail chub. The capability exists to create livestock grazing strategies that are compatible and even complementary to maintaining fisheries habitat, although more research is needed in this regard (Platts 1989, p. 103; Vavra 2005, p. 128).

Urban and Rural Development

Urban and rural development are considered a threat in every stream currently occupied by roundtail chub (Cantrell 2009, p. 18). Development can affect roundtail chub and its habitat through direct alteration of streambanks and floodplains from construction of homes and businesses, as well as from numerous related impacts. Tellman *et al.* (1997, pp. 92–93) listed the following impacts to rivers in Arizona from urban and rural development: increased use of floodplain for homes and businesses, sand and gravel mining in the floodplain for construction materials, pollution from trash and wastewater in river bed, depletion of water supplies, increased land covered by impervious surfaces with greater surface runoff and less infiltration, building of flood control structures, and increased recreational impacts. On a broader scale, development alters the watershed with consequent changes in the hydrology, sediment regimes, and pollution input (Leopold 1997, pp. 97–102; Horak 1989, p. 42; Medina 1990, p. 351; Reid 1993, pp. 48–51; Waters 1995, pp. 42–44; Wheeler *et al.* 2005, p. 141).

Development changes watersheds from land surfaces where precipitation can infiltrate the soil and reach a stream slowly as subsurface flow, to one with impervious surfaces such as rooftops, asphalt, and compacted soils (Schueler 1994, p. 100; 1995, p. 233; Wheeler *et al.* 2005, p. 151). These impervious surfaces capture precipitation and route it quickly and directly into gutters,

storm drains, overland flow, and streams (Hollis 1975, p. 431; Wheeler *et al.* 2005, p. 151). Similarly, precipitation falling on impervious surfaces without direct hydraulic connections to streams may reach streams quickly as overland flow (Horton 1945, p. 275; Leopold 1973, p. 1845; Wheeler *et al.* 2005, p. 151). Thus, urbanization fundamentally alters the delivery of water to streams (Environmental Protection Agency 2008, p. 1). These changes in precipitation delivery alter stream flow regimes. Peak flow volume from precipitation events increases (Hollis 1975, p. 431; Neller 1988, p. 1; Booth 1990, pp. 407–417; Clark and Wilcock 2000, p. 1763; Rose and Peters 2001, p. 246; Wheeler *et al.* 2005, p. 151). These changes increase the frequency and magnitude of floods (Hollis 1975, p. 431; Wheeler *et al.* 2005, p. 151), which cause a stream to increase its channel capacity by eroding its banks, downcutting its channel, or both (Hammer 1972, p. 1530; Leopold 1973, p. 1845; Booth 1990, p. 1752; Pizzuto *et al.* 2000, p. 79; Brown and Caraco 2001, pp. 16–19; Wheeler *et al.* 2005, p. 151). Because natural surfaces in a watershed transmit water slowly to the stream as subsurface flow, base flow in a stream is often from subsurface flow and groundwater that steadily contributes flow between precipitation events. The impervious surfaces caused by development alter this process, preventing precipitation from infiltrating, and resulting in a reduction in base flow of the stream (Simmons and Reynolds 1982, p. 1752; Wang *et al.* 2001, p. 255; 2003, p. 825; Wheeler *et al.* 2005, p. 151). Development within and adjacent to riparian areas has proven to be a significant threat to riparian and aquatic biological communities (Medina 1990, p. 351), with even low levels of development causing adverse impacts within a watershed (Wheeler *et al.* 2005, p. 142). Development can alter the nature of stream flow dramatically, changing streams from perennial to ephemeral, which can have direct consequences to stream fauna (Medina 1990, pp. 358–359). Medina (1990, pp. 358–359) found that development reduced vegetation in streams and changed flow regimes, which resulted in a decrease in abundance of fish.

Development in and near stream courses usually results in removal of riparian vegetation, which leads to a number of changes to streams (Wheeler *et al.* 2005, p. 151). Riparian vegetation stabilizes streambanks and reduces bank erosion (Beeson and Doyle 1995, p. 983; Wynn and Mostaghimi 2006, p. 400), and helps moderate urban stream temperatures (LeBlanc *et al.* 1997, p. 445). Because riparian vegetation contributes leaves, wood, organic debris, and terrestrial invertebrates to streams, vegetation removal can often drastically alter food webs in streams (Vannote *et al.* 1980, p. 130; Hawkins and Sedell 1981, p. 387; Reid 1993, p. 74). Also, large woody debris can be an important component of stream channels because the debris stabilizes stream banks (Keller and Swanson 1979, p. 361), creates pools (Keller and Swanson 1979, p. 361; Rinne and Minckley 1985, p. 150), and provides habitat for macroinvertebrates (Benke *et al.* 1985, pp. 8–13; Rinne and Minckley 1985, p. 150) and fishes (Angermeier and Karr 1984, p. 716; Flebbe and Dolloff 1995, p. 579). Riparian vegetation also moderates stream temperatures (LeBlanc *et al.* 1997, p. 445). In small and medium-sized streams, riparian vegetation shades and cools the stream; loss of riparian vegetation contributes to warming of the stream (Barton *et al.* 1985, p. 365; LeBlanc *et al.* 1997, p. 445). Wang *et al.* (2003, p. 825) found that the maximum daily water temperature of streams in urbanized settings in Wisconsin and Minnesota increased by 0.25 °C (0.5 °F) with every 1 percent increase in the impervious area of the watershed.

Urban streams enlarge their channels by eroding their banks; this erosion, together with runoff from urban construction activities, adds fine sediment to the stream (Waters 1995, p. 43; Trimble 1997, p. 1442; Wheeler *et al.* 2005, p. 151), increasing turbidity, which can alter stream habitat productivity, adversely affect the food base for fish, eliminate rearing habitats, and fill in pool habitat (Waters 1995, p. 43). Because urbanization typically results in loss of riparian vegetation as areas near streams are cleared, riparian areas can lose the natural ability to absorb and filter out metals, fine sediment, and nutrients from overland runoff (McNaught *et al.* 2003, p. 7).

Development can affect water quality in a number of ways. Urban runoff contains a variety of chemical pollutants including petroleum, metals, and nutrients from a variety of sources such as automobiles and building materials (Wheeler *et al.* 2005, p. 153). Some pollutants contain the nutrients nitrogen and phosphorus, which can cause a body of water to become nutrient-enriched and stimulate the growth of aquatic plant life resulting in the depletion of dissolved oxygen. This can adversely affect fish by reducing dissolved oxygen to lethal levels (Hassler 1947, pp. 383–384; Cantrell 2009, p. 15). Development also leads to increases in the number of dumps and landfills that leach contaminants into ground and surface water, reducing water quality and thereby degrading roundtail chub habitat. Similarly, wastewater treatment plants that accompany development also can contaminate ground and surface water (Winter *et al.* 1998, p. 66). Pharmaceuticals and personal care products also may contain hormones, which are present in wastewater, and can have significant adverse effects to fishes, particularly fish reproduction (Kime 1995, p. 52; Rosen *et al.* 2007, pp. 1–4). The use of pesticides is also a source of water quality contamination from agricultural and residential use, which can have lethal and sublethal effects to fish (Ongley 1996). The use of pesticides occurs adjacent to 9 populations of roundtail chub in Arizona (Cantrell 2009, p. 12).

The physical and chemical alterations of stream systems due to urbanization cause significant changes to the stream biological community (Wheeler et al. 2005, p. 153). Urbanized streams have fewer numbers and species of macroinvertebrates (Richards and Host 1994, p. 195; Kemp and Spotila 1997, p. 55; Kennen 1998, p. 3), and exhibit reduced biological health (Kennen 1998, p. 3). Urban streams also have lower overall abundance and diversity of fishes (Tramer and Rogers 1973, p. 366; Scott *et al.* 1986, p. 555; Medina 1990, p. 351; Weaver and Garman 1994, p. 162; Wang *et al.* 2000, p. 255; 2003, p. 825). Little is known about how urban development and the corresponding physical and chemical changes in streams result in changes in the stream ecosystem, although the physical changes appear more important in this process than the chemical changes (Wheeler *et al.* 2005, p. 154).

The net result of urbanization for roundtail chub is a decrease in habitat suitability, most significantly through a reduction in stream flow, although also through an increase in the probability of the presence of nonnative aquatic species that prey on and compete with roundtail chub (see ''Nonnative Species'' section below). As described above, development typically involves increased water use in the form of diversions of water from both surface flows and connected groundwater (Glennon 1995, pp. 133–139). The physical changes associated with development also result in a more ''flashy'' system, as described above, where runoff from precipitation rapidly exits the watershed, increasing flood flows, and decreasing base flow. These hydrologic changes can lead to streams

changing from perennial to intermittent, and result in a corresponding decrease in fish abundance (Medina 1990, p. 351).

The effects of urban and rural development are expected to increase as human populations increase. Development has continually been increasing in the southwestern United States. Arizona increased its population by 394 percent from 1960 to 2000, and is second only to Nevada as the fastest growing State in terms of human population (Social Science Data Analysis Network 2000, p. 1). Growth rates in Arizona counties with historical or extant roundtail chub populations are also significant and increasing: Maricopa (463 percent); Cochise (214 percent); Yavapai (579 percent); Gila (199 percent); Graham (238 percent); Apache (228 percent); Navajo (257 percent); Yuma (346 percent); LaPaz (142 percent); and Mohave (1,904 percent) (Social Science Data Analysis Network 2000). Population growth trends in Arizona are expected to continue into the future. The Phoenix metropolitan area, founded in part due to its location near the junction of the Salt and Gila Rivers, is a population center of 3.6 million people. The Phoenix metropolitan area is the sixth largest in the United States and is located in the fastest growing county in the United States since the 2000 census (McKinnon 2006a). Traditionally rural portions of Arizona are also predicted to see huge increases in human population. Developing cities and towns of the Verde watershed are expected to more than double in the next 50 years, which, as described above, is expected to threaten riparian and aquatic communities of the Verde Valley where roundtail chubs occur (Girmendonk and Young 1993, p. 47; American Rivers 2006; Paradzick *et al.* 2006, p. 89). Chino Valley, at the headwaters of the Verde River, grew by 22 percent between 2000 and 2004. Gila County, which includes reaches of Tonto Creek and the Salt, White, and Black Rivers, grew by 20 percent between 2000 and 2003 (U.S. Census Bureau 2005). In New Mexico, a water settlement in 2004 allows New Mexico the right to withhold 4.5 billion gal (13,800 ac-ft) of surface water every year from the Gila and San Francisco Rivers (McKinnon 2006d). Project details are still under development, so the impact of this project on aquatic resources has not yet been evaluated; however, the project represents another potential withdrawal of water from occupied habitat.

Given the arid nature of the Southwest, the predictions of further growth in an already large population center, and the adverse impacts to aquatic habitats that are associated with development, development will continue to be a threat to the roundtail chub. Urban and rural development are considered a threat in every stream currently occupied by roundtail chub (Cantrell 2009, p. 15).

Road Construction, Use, and Maintenance

Roads are a threat to roundtail chub and its habitat due to a variety of factors including fragmentation, modification, and destruction of habitat; increase in genetic isolation; facilitation of the spread of nonnative species via human vectors; increases in recreational access and the likelihood of subsequent, decentralized urbanization; and contributions of contaminants to aquatic communities (Burns 1972, p. 1; Barrett *et al.* 1992, p. 437; Eaglin and Hubert 1993, p. 884; Warren and Pardew 1998, p. 637; Waters 1995, p. 42; Jones *et al.* 2000, pp. 82–84; Angermeier *et al.* 2004, pp. 19–24; Wheeler *et al.* 2005, pp. 145, 148–149).

Construction and maintenance of roads and highways near riparian areas can be a source of sediment and pollutants (Waters 1995, p. 42; Wheeler *et al.* 2005, pp. 145, 148–149). Sediment can adversely affect fish populations by interfering with respiration; reducing the effectiveness of fish's visually-based hunting behaviors; and filling in interstitial spaces of the substrate, which reduces reproduction and foraging success of fish (Wheeler *et al.* 2005, p. 145). Excessive sediment also fills in intermittent pools that roundtail chub utilize as habitat. Fine sediment pollution in streams impacted by highway construction without the use of sediment control structures was 5 to 12 times greater than control streams (Wheeler *et al.* 2005, p. 144). Excessive sediment can also affect the ability of roundtail chubs to forage. Sedimentation can alter the aquatic macroinvertebrate community, thereby reducing the food base for roundtail chubs. Increased turbidity may impede the ability of roundtail chubs to forage by reducing underwater visibility (Barrett *et al.* 1992, p. 437; Waters 1995, pp. 173–175).

Contaminants (hydrocarbons such as petroleum based products, and metals, including iron, zinc, lead, cadmium, nickel, copper, and chromium) are associated with highway construction and use (Foreman and Alexander 1998, p. 220; Wheeler *et al.* 2005, pp. 146–149). Many of these contaminants are suspected toxicants to aquatic organisms. Few studies have addressed the toxicity of highway runoff, but some comparisons of macroinvertebrate communities above and below highway crossings indicate that there are reductions in diversity and pollution-sensitive species below highway crossings, especially where small streams receive runoff from large highway sections (Wheeler *et al.* 2005, p. 148). In areas with cold winter weather conditions, deicing is common to clear snow and ice from roadways. Deicing can contribute sodium chloride and other chemical contaminants to water ways, reducing water quality, which can cause fish stress or mortality (Wheeler *et al.* 2005, p. 147). Roads also inevitably contribute to contaminant spills from vehicle accidents. Most hazardous chemicals are transported by trucks, and such spills are common and can contaminate water bodies and cause fish kills (Wheeler *et al.* 2005, pp. 147–148).

Road construction can also impact roundtail chub through physical changes to the stream channel. Channelization, often a necessary component of urban road construction, can have numerous effects on the natural structure and ecosystem function of stream systems (Poff *et al.* 1997, p. 773; Poole 2002, p. 641). As discussed in the ''Logging, Fuel Wood Cutting, Mining, and Channelization'' section, channelization can affect roundtail chub habitat by reducing its complexity, eliminating cover, reducing nutrient input, improving habitat for nonnative species, changing sediment transport, altering substrate size, and reducing the length of the stream and therefore the amount of aquatic habitat available (Gorman and Karr 1978, p. 507; Simpson *et al.* 1982, pp. 122–132; Propst 1999, p. 25; Schmetterling *et al.* 2001, p. 6).

Roads can restrict the movement of stream fishes, resulting in populations becoming more isolated and fragmented. Culverts, a common feature of road stream crossings, are a well-known barrier to fish movement. Culverts themselves provide poor fish habitat due to low-bottom complexity and uniformly high-flow velocities (Slawski and Ehlinger 1998, p. 676). Fish movement is inhibited or prevented by high current velocities and shallow depths inside culverts, along with vertical drops commonly associated with the culvert outflow (U.S. Department of Transportation 2007, pp. 3–9). Warren and Pardew (1998, p. 637) found that overall fish movement was an order of magnitude lower through culverts than through other crossing types or natural channels in small streams. Such barriers can isolate fish populations, resulting in reduced

genetic diversity and increased probability of extinction due to demographic instability and impeded recolonization. Fragmentation of roundtail chub habitat increases the probability of local extirpation (Fagan *et al.* 2002, p. 3250).

By definition, roads create access to otherwise inaccessible areas or increase access to previously remote areas. This increased access results in increased human visitation, thereby increasing the frequency and significance of anthropogenic threats to aquatic ecosystems and further fragmenting the landscape. Further, increased access often leads to increased urban and agricultural development. Urbanization is the most significant of these development activities; it alters a watershed, such as through building construction, which changes rural areas from such uses as farming and grazing to residential and industrial areas. Wheeler *et al.* (2005; pp. 149–150) concluded that ''new highways clearly and purposely provide impetus for urban development'' although they noted that few studies, if any, have specifically documented this. Roads nonetheless do clearly have a relationship to urban and rural development, which can alter physical and chemical characteristics of streams due to increases in contaminants and changes to the watershed that alter stream flow, as discussed in the ''Urban and Rural Development'' section above.

Recreation

As discussed above, population growth trends are expected to continue into the future throughout the range of the roundtail chub in the lower Colorado River basin, dramatically increasing human populations. Expanding population growth leads to higher demand for recreational opportunities and recreational use. In the arid Southwest, the human desire to recreate in or near water, and the relative scarcity of such recreational opportunities, tends to focus impacts on riparian areas. Recreation-related impacts to aquatic ecosystems are particularly evident along stream reaches of the Salt and Verde River watersheds near the Phoenix metropolitan area, which are visibly degraded by ongoing use. Impacts of recreation are highly dependent on the type of activity, with activities such as hiking having little impact and activities such as off-highway vehicle (OHV) use potentially having severe impacts on aquatic habitats.

An example of a recreation use impacted area within the existing distribution of the roundtail chub is the Verde Valley. The reach of the Verde River that winds through the Verde Valley receives a high amount of recreational use from people living in central Arizona (Paradzick *et al.* 2006, pp. 107–108). Increased human use results in trampling of nearshore vegetation and reduced water quality. Recreational impacts in Fossil Creek illustrate that such damage can be quite severe. Fossil Creek is a tributary of the Verde River and an extant locality of roundtail chub. A number of environmental groups recently sent a letter to the Coconino National Forest requesting emergency action to address the effects of ongoing recreational use in Fossil Creek. The authors cited excessive and damaging impacts of recreational uses on the creek and riparian habitat, including vehicles crushing vegetation, proliferation of social trails, kayak impacts, severe sanitation deficiencies, and an exceptional amount of trash (American Rivers *et al.* 2007, pp. 1–4). The effects to roundtail chub from these actions are unknown, but potentially adverse.

OHV use has grown considerably in Arizona, and is a recreational use that can have severe adverse impacts to natural areas. As of 2007, 385,000 OHVs were registered in Arizona (a 350 percent increase since 1998) and 1.7 million people (29 percent of the Arizona's public) engaged in off-road activity from 2005–2007. Over half of OHV users reported that driving off-road was their primary activity, versus using the OHV for the purpose of access or transportation to hunting, fishing, or hiking. Ouren *et al.* (2007, pp. 16–22) provide additional data on the effects of OHV use on wildlife. OHV trails often travel through undeveloped habitat and cross directly through water bodies. OHV use may also reduce vegetation cover and plant species diversity, reducing infiltration rates, increasing erosion, and reducing habitat connectivity (Ouren *et al.* 2007, pp. 6–7, 11, 16). As discussed above, reducing vegetative cover and increasing sedimentation is a result of other land uses as well, such as livestock grazing and urbanization, and can have numerous adverse effects to roundtail chub. Voeltz (2002) noted specific OHV use-related problems with recreation in two streams with known populations of roundtail chub, the upper Gila River and Oak Creek. Recreation occurs in every stream occupied by roundtail chub in the lower Colorado River basin (Cantrell 2009, p. 15).

Logging, Fuel Wood Cutting, Mining, and Channelization

Logging and mining were more widespread historically and likely were responsible for alteration of much of the roundtail chub's historical habitat. Chamberlain in 1904 listed mining as one of three primary causes of ''extinction'' of fishes in the lower Colorado River basin (along with vegetation removal from grazing, logging and other activities, and water use) (Minckley 1999, p. 215). The current mining of sand, gravel, iron, gold, copper, or other materials remains a potential threat to the habitat of roundtail chub for many of these same reasons. Drilling for fuels such as oil and natural gas has very similar effects (Hartman 2007, p. 1) and is occurring within the range of the roundtail chub in Arizona (Cantrell 2009, p. 12). The effects of mining activities on populations include adverse effects to water quality and lowered flow rates due to dewatering of nearby streams needed for mining operations (Arizona Department of Environmental Quality 1993, pp. 61–63). Sand and gravel mining removes riparian vegetation and destabilizes streambanks, resulting in habitat loss for the roundtail chub (Brown *et al.* 1998, p. 979). Voeltz (2002, pp. 34–35, 42) identified mining as a significant threat in Boulder, Burro, and Eagle Creeks due to the release of toxic effluents into aquatic systems from mining operations, and water depletion for use in mining operations, and noted that contaminants in the form of acidified flows originating from mining operations in Cananea, Mexico, have been documented in the past in the San Pedro River, a stream in which the roundtail chub no longer occurs. Girmendonk and Young (1997, p. 35) noted that sand and gravel mining on West Clear Creek may have limited the suitability of that stream to support roundtail chub near the mouth of the Verde River. Mining is a land use in the basins of 24 out of 31 currently extant roundtail chub populations (Voeltz 2002; Cantrell 2009).

Logging and fuel wood cutting is largely a threat of the past (resulting from previous management practices no longer in place), although these activities resulted in profound changes in many streams of the Southwest including those in which the roundtail chub occurs (Minckley and Rinne 1985, pp. 150–151; Minckley 1999, p. 216). The alteration of watersheds resulting from logging is deleterious to fish and other aquatic life forms (e.g., Burns 1972, p. 1; Eaglin and Hubert 1993, p. 844), largely due to increases in surface

runoff, sedimentation, and mudslides, and the destruction of riparian vegetation (Lewis 1998, p. 55; Jones *et al.* 2000, p. 81). All of these effects negatively impact fish (Burns 1972, p. 15; Eaglin and Hubert 1993, p. 844; Barrett *et al.* 1992, p. 437; Warren and Pardew 1998, p. 637) by lowering water quality and reducing the quality and quantity of pools, either by filling them with sediment, reducing the quantity of large woody debris necessary to form pools, or imposing barriers to movement. Logging is a land use in the watersheds of 17 of the remaining 31 streams known to contain roundtail chub populations (Voeltz 2002).

Channelization of streams is also a major factor in loss of habitat for roundtail chub. The U.S. Environmental Protection Agency defines channelization as: ''any activity that moves, straightens, shortens, cuts off, diverts, or fills a stream channel, whether natural or previously altered. Such activities include the widening, narrowing, straightening, or lining of a stream channel that alters the amount and speed of the water flowing through the channel. Examples of channelization are: lining channels with concrete; pushing gravel from the stream bed and placing it along the banks; and placing streams into culverts'' (U.S. Environmental Protection Agency 2005, p. 1). Channelization has occurred or is occurring in roundtail chub habitats to drain marshes and reclaim bottomlands for agriculture or roads (Hendrickson and Minckley 1984, p. 131; Propst 1999, p. 25); to create irrigation diversions; to control mosquitoes; to reduce evapotranspiration and speed water delivery to downstream metropolitan and agricultural areas (U.S. Soil Conservation Service 1949, p. 3; Burkham 1970, p. B1); and as flood control to protect fields, buildings, or structures such as bridges (Pearthree and Baker 1987, p. 49). Channelization can affect roundtail chub habitat by reducing its complexity, eliminating cover, reducing nutrient input, improving habitat for nonnative species, changing sediment transport, altering substrate size (usually from coarse sediments like gravel and sand to a finer silt substrate), and reducing the length of the stream and therefore the amount of aquatic habitat available (Gorman and Karr 1978, p. 513; Simpson *et al.* 1982, pp. 122–132; Propst 1999, p. 25; Schmetterling *et al.* 2001, p. 6; U.S. Environmental Protection Agency 2005, pp. 1–4). Moyle (1976, p. 179) compared channelized and unchannelized sections of a California stream and found a two-thirds reduction in the biomass of fish and invertebrates in channelized locations compared to unchannelized reaches, as well as differences in fish and macroinvertebrate (animals lacking a vertebral column, such as aquatic insects) species composition. Channelization may reduce the recruitment of fishes by eliminating nursery habitat through the removal of gradually sloping streambanks, reducing the extent of nearshore habitats with low water velocity (Scheidegger and Bain 1995, p. 125; Mérigoux and Ponton 1999, p. 177; Meng and Matern 2001, p. 750).

High-Intensity Wildfires

Low-intensity fire has been a natural disturbance factor in forested landscapes for centuries, and low-intensity fires were common in southwestern forests and grasslands prior to European settlement (Rinne and Neary 1996, pp. 135–136). Rinne and Neary (1996, p. 143) discuss the current effects of fire management policies on aquatic communities in Madrean Oak Woodland biotic communities, a community type that comprises large portions of some watersheds occupied by roundtail chub. They concluded that existing wildfire suppression policies intended to protect the expanding number of human structures on forested public lands have altered the fuel loads in these ecosystems and increased the probability of devastating wildfires. Other researchers have also found that fire suppression policies in combination with other land uses have increased the probability of high-intensity fire due to past land use, fire suppression, and unnaturally high fuel loadings (Cooper 1960, pp. 161–162; Covington and Moore 1994, pp. 45–46; Swetnam and Baison 1994, pp. 12–13; Touchan *et al.* 1995, pp. 268–272; White 1985, p. 589). Not surprisingly, the intensity (size and severity) of forest fires has increased in recent times (Covington and Moore 1994, p. 40; Westerling *et al.* 2006, p. 940).

The effects of these catastrophic wildfires include the removal of vegetation, the degradation of watershed condition, altered stream behavior, and increased sediment and ash flows into streams. These effects can harm fish communities, as observed in the 1990 Dude Fire, when corresponding ash flows drastically reduced some fish populations in Dude Creek and the East Verde River (Voeltz 2002, p. 77). Fire has become an increasingly significant threat in lower-elevation communities as well. Esque and Schwalbe (2002, pp. 180–190) discuss the effect of wildfires in the upper and lower subdivisions of Sonoran desertscrub. The widespread invasion of nonnative annual grasses, such as brome (*Bromus* sp.) and Mediterranean grasses (*Schismus* sp.), appear to be largely responsible for altered fire regimes that have been observed in these communities, which are not adapted to fire (Esque and Schwalbe 2002, p. 165). African buffelgrass (*Pennisetum ciliare*) is recognized as another invading nonnative plant species throughout the lower elevations of northern Mexico and Arizona. Nijhuis (2007, pp. 1–7) discusses the spread of nonnative buffelgrass within the Sonoran Desert of Arizona and adjoining Mexico, citing its ability to out-compete native vegetation and present significant risks of fire in an ecosystem that is not adapted to fire. In areas comprised entirely of native plant species, ground vegetation density is mediated by barren spaces that do not allow fire to carry itself across the landscape. However, in areas where nonnative grasses have become established, the fine fuel load is continuous, and fire is capable of spreading quickly and efficiently (Esque and Schwalbe 2002, p. 175). These nonnative grasses thus increase the potential for catastrophic wildfire.

After disturbances such as fire, nonnative grasses may exhibit dramatic population explosions, which hasten their effect on native vegetative communities. Additionally, with increased fire frequency, these population explosions ultimately lead to a type-conversion of the vegetative community from desertscrub to grassland (Esque and Schwalbe 2002, pp. 175–176). Fires carried by the fine fuel loads created by nonnative grasses often burn at unnaturally high temperatures, which may result in soils becoming hydrophobic (water repelling), exacerbate sheet erosion, and contribute large amounts of sediment to receiving water bodies, thereby affecting the health of the riparian community (Esque and Schwalbe 2002, pp. 177–178). The siltation of isolated, remnant pools in intermittent streams significantly affects lower-elevation species by increasing the water temperature, reducing dissolved oxygen, and reducing or eliminating the permanency of pools, as observed in pools occupied by lowland leopard frogs (*Rana yavapaiensis*) and native fish (Esque and Schwalbe 2002, p. 190).

Fires in the Southwest frequently occur during the summer monsoon season. As a result, fires are often followed by rain that washes ash-laden debris into streams. Rinne (2004, p. 151) found significant reductions in fish abundance as a result of these ash flows,

with reductions in fish abundance ranging from 70 to 100 percent. Extreme summer fires, such as the 1990 Dude Fire, and corresponding ash flows, have drastically reduced some fish populations. Some recent examples of extreme summer fires that have reduced native fish populations include the 2002 Rodeo-Chedeski Fire, the 2003 Aspen Fire, and the 2004 Willow Fire, all of which burned parts of watersheds occupied by roundtail chub. Carter and Rinne (unpubl. data) found that the Picture Fire both benefited and eliminated headwater chub, a closely related species that occurs in similar habitat, from portions of Spring Creek. The fire eliminated chubs from Turkey Creek, a tributary to Spring Creek. In other parts of Spring Creek, however, chubs initially declined but later thrived after the fire, presumably because most of the nonnative fishes were eliminated.

Dunham *et al.* (2003, pp. 189–190) examined how fire affects nonnative species invasions; although habitat alteration over time can facilitate nonnative species with wider habitat tolerances, native species may be better able to withstand ash flows and flooding. Thus immediately post-fire, nonnatives may be completely eliminated and the few natives present can take advantage of the reduction in predators. But such events, at a minimum, represent a genetic bottleneck (drastic reduction in population size) for the species that could adversely impact populations via genetic threats, such as inbreeding depression (reduced health due to elevated levels of inbreeding) and genetic drift (a reduction in gene flow within the species that can increase the probability of unhealthy traits) (Meffe and Carrol 1994, pp. 156–167). Many roundtail chub populations are fragmented and isolated. Fagan *et al* (2002, p. 3254) found that, as a result of this fragmentation and isolation, roundtail chub has moderately high risk of local extirpation. Dunham *et al.* (2003, pp. 188–189) found that the threat of fire to fish populations is much greater for highly fragmented and isolated populations of fishes.

Undocumented Immigration and International Border Enforcement and Management

Cantrell (2009, p. 12) indicated that undocumented immigration and international border enforcement and management could be a threat in nine areas occupied by roundtail chub. Because the roundtail chub is extirpated from most of the southern portions of its range, such as the San Pedro River, this threat is more likely to affect potential recovery areas than currently occupied habitats, but is a possible threat in some occupied streams. Undocumented immigrants and smugglers attempt to cross the International border from Mexico into the United States in areas historically and currently occupied by the roundtail chub. These illegal border crossings and the corresponding efforts to enforce U.S. border laws and policies have been occurring for many decades with increasing intensity and have resulted in unintended adverse effects to biotic communities in the border region. During the warmest months of the year, many attempted border crossings occur in riparian areas that serve to provide shade, water, and cover. Increased U.S. border enforcement efforts that began in the early 1990s in California and Texas have resulted in a shift in crossing patterns and increasingly concentrated levels of attempted illegal border crossings into Arizona (Segee and Neeley 2006, p. 6).

Traffic on new roads and trails from illegal border crossing and enforcement activities, as well as the construction, use, and maintenance of enforcement infrastructure (*e.g.,* fences, walls, and lighting systems), leads to compaction of streamside soils, and the destruction and removal of riparian vegetation. Current border infrastructure projects, including vehicle barriers and pedestrian fences, are located specifically in valley bottoms and have resulted in direct impacts to water courses and altered drainage patterns (Service 2008, p. 4). These activities also produce sediment in streams, which affects their suitability as habitat for roundtail chub by reducing their permanency and altering their physical and chemical parameters. Riparian areas along the upper San Pedro River have been impacted by abandoned fires that undocumented immigrants started to keep warm or prepare food (Segee and Neeley 2006, p. 23).

Undocumented immigrants use wetlands for bathing, drinking, and other uses (Segee and Neeley 2006, pp. 21–22). These activities can contaminate the water quality of the wetlands and lead to reductions in habitat quality for roundtail chub (Rosen and Schwalbe 1988, p. 43; Segee and Neeley 2006, pp. 21–22). In addition, numerous observations of littering and destruction of vegetation and wildlife occur annually throughout the border region, which can adversely affect the quality of habitat for the roundtail chub (Service 2006, p. 95).

Conservation Actions Relevant to Factor A

There are several existing conservation agreements for native fish species that include roundtail chub (discussed in detail in Factor E below): the Utah Department of Natural Resources' ''Range-wide conservation agreement and strategy for roundtail chub (*Gila robusta*), bluehead sucker (*Catostomus discobolus*), and flannelmouth sucker (*Catostomus latipinnis*)'' (Range-wide Agreement; Utah Department of Natural Resources 2002); the New Mexico Department of Game and Fish's (NMDGF) ''Colorado River Basin Chubs Recovery Plan'' (New Mexico Plan; Carman 2006), which includes the headwater and Gila chubs; and the AGFD's ''Arizona Statewide Conservation Agreement for Roundtail Chub (*Gila robusta*), Headwater Chub (*Gila nigra*), Flannelmouth Sucker (*Catostomus latipinnis*), Little Colorado River Sucker (*Catostomus* spp.), Bluehead Sucker (*Catostomus discobolus*), and Zuni Bluehead Sucker (*Catostomus discobolus yarrowi*)'' (Arizona Agreement; AGFD 2006).

The Range-wide Agreement, Arizona Agreement, and New Mexico Plan all include actions intended to reduce the threat of habitat loss. The Range-wide Agreement recommends enhancing and maintaining habitat for roundtail chub, including: Enhance and/or restore connectedness and opportunities for migration of the subject species to disjunct populations where possible; restore altered channel and habitat features to suitable conditions; provide flows needed for all life stages; maintain and evaluate fish habitat improvements; and install regulatory mechanisms for the long-term protection of habitat (*e.g.,* conservation easements, water rights). The Arizona Agreement identifies the need to secure, enhance, and create habitat as one of its conservation strategy tasks and includes these subtasks:

(1) Maintain instream flow;

(2) Manage detrimental nonnative fish and other aquatic species;

(3) Evaluate effectiveness of nonnative management efforts;

(4) Restore natural fire regimes;

(5) Manage the spread of infectious diseases and parasites to habitats of the subject species;

(6) Enhance and/or restore connectedness;

(7) Develop appropriate flow recommendations for areas where existing flow regimes are inadequate;

(8) Implement flow recommendations;

(9) Restore altered channel and habitat features;

(10) Create, maintain, and evaluate fish refugia throughout historic range; and

(11) Maintain habitat quality.

The New Mexico Plan identifies the need to address habitat loss, including:

(1) Identify and determine habitat requirements for all life history stages of roundtail chub in the San Juan and Gila River basins;

(2) Support efforts within existing programs to enable habitat restoration and protection for recovery;

(3) Identify and secure resources to promote habitat restoration and protection;

(4) Rehabilitate, restore, and secure historical habitats where chub restoration is possible;

(5) Inform private and public landowners about practices that promote diverse, functional aquatic and riparian habitats;

(6) Inform private and public landowners about how to protect chub habitat;

(7) Identify and secure funding to promote habitat restoration and protection; and

(8) Establish formal agreements with willing participants to enhance habitat and/or populations for recovery of roundtail chub.

Several actions are planned or have been implemented as a result of the conservation agreements that address the threat of habitat loss. They are discussed below.

The Nature Conservancy (Conservancy) is a signatory to the Arizona Agreement. In Arizona, the Conservancy has launched its Nature Matters fundraising campaign. This program raises private donations to support cooperative land and water protection projects. The Conservancy contacts landowners to explore their interest in placing their property in a permanently protected status, then works cooperatively with its agency partners to negotiate purchase and sale agreements and to develop fundraising proposals and project financing. Properties are identified and prioritized based on the quality of their riparian and aquatic habitat as well as opportunities to secure surface water rights or to file for new water rights to maintain instream flow.

In 2007, the Conservancy purchased the Upper Verde River Wildlife Area, a 313-acre (ac) (127-hectare (ha)) parcel downstream from the Verde River confluence with Granite Creek near Paulden, Arizona. The Conservancy later received the donation of an additional 160 ac (65 ha). In total, the acquisition secured the largest remaining portion of the Verde River headwaters still in private ownership and protects roughly 1 mi (1.6 km) of high quality riparian and aquatic habitat from development and improper livestock grazing. In 2008, the Conservancy conveyed 293 ac (119 ha) of this property to the AGFD to be added to the Upper Verde River Wildlife Area. In July of 2008, the Conservancy and AGFD each filed for instream flow water rights with the Arizona Department of Water Resources for the properties.

In 2008, the Conservancy completed two land acquisitions on the middle Verde River within the 33-mi (53-km) stretch that Arizona State Parks has designated for acquisition as the Verde River Greenway: a 20-ac (8-ha) parcel upstream of Camp Verde that is adjacent to U.S. Forest Service frontage on the river; and the 209-ac (85-ha) Rockin' River Ranch property purchased with Arizona State Parks. The Rockin' River property, located at the confluence of the Verde River and West Clear Creek, includes 55 ac (22 ha) under irrigation with surface water rights dating back to 1889. Protection of the property provides an opportunity to retire and dedicate water rights to instream flow for the benefit of wildlife including roundtail chub. The Conservancy continues to meet with landowners on a willing-seller basis to explore opportunities to protect additional lands along the river and in the Big Chino Valley, which overlays the aquifer that is the primary groundwater source for the upper Verde River, and to pursue private and public funding to support land and water protection in the Verde watershed. These actions could help secure instream flow and protect riparian areas from harmful land uses, benefitting roundtail chub.

In 2006, the Conservancy received as a donation the Cobra Ranch property at the headwaters of Aravaipa Creek near Klondyke, Arizona. The addition of this property to the Conservancy's Aravaipa Canyon Preserve protects over 1 mi (1.6 km) of stream channel and presents significant habitat restoration opportunities. The Conservancy plans to restore native vegetation on 100 ac (40 ha) of farm ground, and retire irrigation, which will reduce draw-down of the aquifer and create improved infiltration patterns on the farm. They will also strategically plant native vegetation along the active channel to restore the natural river channel. Fencing is being installed to remove grazing from riparian areas, and planning is ongoing to restore a natural fire regime. These actions will serve to restore a historical cienega that once existed in the headwaters of Aravaipa Creek, and will reduce overgrazing, dewatering, and sedimentation effects to the roundtail chub in Aravaipa Creek.

The U.S. Forest Service is also a signatory to the Arizona Agreement. The Tonto National Forest is working to establish an instream flow water right on approximately 36 mi (58 km) of U.S. Forest Service lands along Cherry Creek from its headwaters to the confluence with the Salt River. Once in place, the water right should protect enough flow to provide for roundtail chub habitat in perpetuity. Similarly, through the Horseshoe and Bartlett Habitat Conservation Plan, Salt River Project (SRP), a large water and electricity provider for portions of Arizona, is implementing watershed management efforts to maintain or improve stream flows in the Verde River, including funding of stream gages and scientific studies, in-kind support for watershed improvements, and administrative and legal efforts to curtail stream flow reductions from illegal surface water diversions and groundwater pumping.

The Arizona Agreement also includes provisions for addressing the threat of catastrophic wildfire. A conservation strategy task is to restore natural fire regimes in the watersheds of extant populations of roundtail chub, including securing habitat through the use of prescribed fire and noncommercial understory thinning to restore natural fire regimes. Controlled prescribed fires reduce the risk of catastrophic wild fires by reducing fuel loads. The New Mexico Plan also identifies the need to support research to determine the tolerance of roundtail chub to water quality parameters, particularly those that may be altered during and after forest fires.

Summary of Factor A

Rivers, streams, and riparian habitats that are essential for the survival of the roundtail chub are being adversely affected and eliminated throughout the range of the species. Threats, including water diversions, groundwater pumping, dams, channelization, and erosion-related effects, are occurring that impact both the amount of water available for habitat, as well as the water's suitability for roundtail chub. Threats from flood control, development, roads, water withdrawal, improper livestock grazing, recreation, and high-intensity wildfire dry up, silt in, physically alter, and chemically pollute habitats of the roundtail chub such that habitats become permanently unsuitable. These threats have been documented historically and are either occurring or likely to occur throughout the range of the roundtail chub. These

threats reduce the habitat's suitability as cover for protection from predators, as a foraging area, and as spawning and nursery areas. Despite the conservation actions discussed above, the dewatering of aquatic habitats in the arid lower Colorado River basin poses a significant threat to all native fish of the region, including roundtail chub. All of these threats are anthropogenic and can be expected to continue, if not increase, given the predictions for increases in human population expansion in the region. Efforts to ameliorate these threats through established conservation agreements have met with some success, but are in the early stages of implementation.

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

Overutilization of roundtail chub for commercial, recreational, scientific, or educational purposes is not considered a significant threat to the roundtail chub in the lower Colorado River basin. Roundtail chub is a permitted sport fish in Arizona (AGFD 2008). One roundtail chub greater than 13 in. (33 cm) is allowed via angling per day. The AGFD has also established a catch-and-release only, artificial fly and lure only, single barbless hook, 7-month fishing season for roundtail chub in Fossil Creek. A 4.5-mi (7.2-km) middle reach segment of Fossil Creek will be open to catch-and-release fishing for roundtail chub from Oct 3, 2009, through April 30, 2010. The remainder of the year, the area is closed to all fishing. But angler use of roundtail chub is light (C. Cantrell, AGFD, pers. comm. 2009), and we do not believe that overutilization from current levels of angling is a threat to the species in Arizona. In the upper Gila River in New Mexico, where the species is not a legal sport fish (NMDGF 2008), there are reports of anglers purposefully discarding chub species, which may be having a negative effect on populations of roundtail chub locally (Voeltz 2002).

Several studies of fish species closely related to roundtail chub indicate that handling for scientific purposes (research and monitoring) may have some adverse effects on individual fish. Ruppert and Muth (1997, p. 314) found that electrofishing caused spinal hemorrhages in some juvenile humpback chub (*Gila cypha*), a closely related species to roundtail chub, but did not affect short-term growth or survival. Paukert *et al.* (2005, p. 649) found that use of hoop nets affected fish growth and condition of bonytail; fish captured multiple times grew less in length and weight than fish not recaptured. Fish recaptured up to five times grew only 12.8 percent of their initial weight compared to fish not recaptured, which grew 29.7 percent of their initial weight. Ward *et al.* (in press) also found some mortality from use of passive integrated transponder tags in related Gila chub (*G. intermedia*) and bonytail, although mortality rate was low. We believe the level of handling of roundtail chubs for scientific purposes is low, and the results of these studies suggest that handling roundtail chubs for scientific purposes is not a significant threat to the species.

Conservation Actions Relevant to Factor B

Overutilization of roundtail chub is not believed to be a threat to the species and is therefore not addressed in conservation planning efforts. All three conservation agreements include action items to identify threats; thus, if there is some unidentified threat from overutilization or the degree of the threat has been underestimated, the conservation agreements should serve to help identify this in the future.

Summary of Factor B

Although roundtail chub is a legal sport fish in Arizona, available information indicates that the species is not threatened by overutilization as a game species from current levels of angling. There is some information that collection for scientific purposes has some adverse effects on individual fish; however, we do not believe that handling roundtail chubs for scientific purposes is a significant threat to the species.

Factor C. Disease or Predation

Nonnative Species

Nonnative species that compete with or prey on roundtail chub are a serious and persistent threat to the continued existence of the roundtail chub. Nonnative aquatic species include fishes, aquatic and semi-aquatic mammals, reptiles, amphibians, crustaceans, mollusks (snails and clams), insects, zooplankton, phytoplankton, parasites, disease organisms, algae, and aquatic and riparian vascular plants. The introduction and spread of nonnative species has long been identified as one of the major factors in the continuing decline of native fishes throughout North America and particularly in the Southwest (Miller 1961, p. 365; Lachner *et al.* 1970, pp. 1–4; Ono *et al.* 1983, p. 90; Minckley and Deacon 1991; Carlson and Muth 1989, p. 220; Cohen and Carlton 1995, p.1; Fuller *et al.* 1999, pp. 1–3; Clarkson *et al.* 2005, p. 20; Mueller 2005, pp. 10–12; Olden and Poff 2005, p. 75). Nonnative species may affect native fish and other aquatic fauna through numerous means, including (all of which may be applicable to the roundtail chub): Predation (Meffe *et al.* 1983, p. 316; Meffe 1985, p. 173; Marsh and Brooks 1989, p. 188; Propst *et al.* 1992, p. 177; Blinn *et al.* 1993, p. 139; Rosen *et al.* 1995, p. 251), competition (Lydeard and Belk 1993, p. 370; Baltz and Moyle 1993, p. 246; Scoppotone 1993, p. 139; Douglas *et al.* 1994, pp. 15–17), aggression (Meffe 1984, p. 1525; Karp and Tyus 1990, p. 25), habitat disruption (Hurlbert *et al.* 1972, p. 639; Fernandez and Rosen 1996, p. 3), introduction of diseases and parasites (Clarkson *et al.* 1997, p. 66; Robinson *et al.* 1998, p. 599), and hybridization (Dowling and Childs 1992, p. 355; Echelle and Echelle 1997, p. 153). Because the impacts of competition with and predation by nonnative species are often interrelated and difficult to discuss separately, we will discuss all impacts of nonnative species in this section.

In an evolutionary context, the native fish community of the lower Colorado River basin, including roundtail chub, evolved with low species diversity and with few predators and competitors and thus co-evolved with few predatory fish species. In contrast, many of the nonnative species co-evolved with high species diversity and many predatory species (Clarkson *et al.* 2005, p. 21). A contributing factor to the decline of native fish species cited by Clarkson *et al.* (2005, p. 21) is that most of the nonnative species evolved behaviors, such as nest guarding, to protect their offspring from these many predators, while native species are generally broadcast spawners that provide no parental care. In the presence of nonnative species, the reproductive behaviors of native fish fail to allow them to compete effectively with the nonnative species, and, as a result, the viability of native fish populations is reduced.

In the Southwest, Miller *et al.* (1989, p. 22) concluded that introduced nonnatives were a causal factor in 68 percent of the fish extinctions in North America in the last 100 years. For 70 percent of those fish still extant, but considered to be endangered or threatened, introduced nonnative species are a primary cause of the decline (Aquatic Nuisance Species Task Force 1994; Lassuy 1995, p. 391). The widespread decline of native fish species from the arid southwestern United States and Mexico from interactions with nonnative species has

been manifested in the listing rules of nine native species listed under the Act whose historical ranges overlap with the historical and current distribution of the roundtail chub: Bonytail (*Gila elegans*) (45 FR 27710; April 23, 1980), humpback chub (*Gila cypha*) (32 FR 4001; March 11, 1967), Gila chub (*Gila intermedia*) (70 FR 66663; November 2, 2005), Colorado pikeminnow (*Ptychocheilus lucius*) (32 FR 4001; March 11, 1967), spikedace (*Meda fulgida*) (51 FR 23769; July 1, 1986), loach minnow (*Tiaroga cobitis*) (51 FR 39468; October 28, 1986), razorback sucker (*Xyrauchen texanus*) (56 FR 54957; October 23, 1991), desert pupfish (*Cyprinodon macularius*) (51 FR 10842; March 31, 1986), and Gila topminnow (*Poeciliopsis occidentalis*) (32 FR 4001; March 11, 1967). In total within Arizona, 19 of 31 (61 percent) native fish species are listed under the Act. Arizona ranks the highest of all 50 States in the percentage of native fish species with declining trends (85.7 percent, Stein 2002, p. 21; Warren and Burr 1994, pp. 6–18). In the Gila River basin, introduction of nonnatives is considered a major factor in the decline of all native fish species (Miller 1961, pp. 377–379; Williams *et al.* 1985, p. 1; Minckley and Deacon 1991). In Arizona, release or dispersal of new nonnative aquatic organisms is a continuing phenomenon (Rosen *et al.* 1995, p. 259; Service 2008, p. 264).

Aquatic nonnative species are introduced and spread into new areas through a variety of mechanisms, both intentional and accidental, and authorized and unauthorized. Mechanisms for nonnative dispersal in the southwestern United States include inter-basin water transfer (Service 2008, p. 1), sport fish stocking (Clarkson *et al.* 2005, p. 20), aquaculture and aquarium releases (Courtenay 1993, pp. 35–62; Crossman 1991, p. 46; Crossman and Cudmore 2000, pp. 129–134; Mackie 2000, pp. 135–150), bait-bucket release (release of fish used as bait by anglers) (Crossman 1991, p. 50; Litvak and Mandrak 1993, p. 6), and to control other species (such as the introduction of herbivorous fish to control aquatic plants) (Bailey 1978, p. 181; Courtney 1993, p. 37).

In the Verde River system alone, Rinne *et al.* (1998, p. 3) estimated that over 5,300 independent stocking actions occurred that involved 12 different species of nonnative fish species since the 1930s and 1940s. If we extrapolate that effort over the same timeframe for other historically occupied, larger-order systems known as recreational fisheries (such as the Salt, upper Gila, Bill Williams, and San Pedro Rivers, and Oak Creek and other tributaries with significant flow throughout central and southern Arizona), in addition to the other private stockings of stock tanks and other isolated habitat, the magnitude of the nonnative species invasion over this timeframe becomes clear. Subsequent to these efforts, but to a lesser extent, the spread of bullfrogs and crayfish, both purposefully and incidentally, commenced during the 1970s and 1980s (Tellman 2002, p. 43). We estimate that nearly 100 percent of the habitat that historically supported roundtail chub has been invaded over time, either purposefully or indirectly through dispersal, by nonnative fishes and other aquatic species.

Nonnative fishes known from within the historical range of roundtail chub in the lower Colorado River basin include channel catfish (*Ictalurus punctatus*), flathead catfish (*Pylodictis olivaris*), red shiner (*Cyprinella lutrensis*), fathead minnow (*Pimephales promelas*), green sunfish (*Lepomis cyanellus*), warmouth (*L. gulosus*), bluegill (*L. macrochiris*), largemouth bass (*Micropterus salmoides*), smallmouth bass (*M. dolomieui*), rainbow trout (*Oncorynchus mykiss*), western mosquitofish (*Gambusia affinis*), carp (*Cyprinus carpo*), yellow bullhead (*Ameiurus natalis*), black bullhead (*A. melas*), and goldfish (*Carassius auratus*) (Bestgen and Propst 1989, pp. 409–410; Marsh and Minckley 1990, p. 265; Sublette *et al.* 1990, pp. 112, 243, 246, 304, 313, 318; Abarca and Weedman 1993, pp. 6–12; Stefferud and Stefferud 1994, p. 364; Weedman and Young 1997, p. 1, Appendices B, C; Rinne *et al.* 1998, pp. 3–6; Voeltz 2002, p. 88; Bonar *et al.* 2004, pp. 1–108; Fagan *et al.* 2005, pp. 34, 38–39, 41). The fastest expanding nonnative species are red shiner, fathead minnow, green sunfish, largemouth bass, western mosquitofish, and channel catfish. These species are considered to be the most invasive in terms of their negative impacts on native fish communities (Olden and Poff 2005, p. 75).

Smaller size classes (juvenile and subadult fish) are more vulnerable to predation because the size of a fish that a predatory fish can consume is limited by the predator's gape size. Brouder *et al.* (2000, p. 13) found that size class of native fishes consumed (including roundtail chub) by predatory nonnative fishes in the Verde River was 1.3 to 3.5 in (34 to 90 millimeters (mm)). This winnowing effect results in a population of only large adult fish, which eventually crashes. A spectacular example of this is the case of the razorback sucker in Lake Mohave in Arizona and Nevada. For decades, no recruitment was documented within the population, although large adults (razorback sucker is a large species, with adults up to 20 in. (500 mm) or longer in total length) remained common. This situation was possible because razorback sucker are very long-lived, living 40 years or more (McCarthy and Minckley 1987, p. 87). The population eventually crashed in the 1990s because of a total lack of recruitment due to predation by nonnative fish species on smaller, younger fish, although conservation efforts have resulted in maintenance of a much smaller stocked population (Service 2002a, pp. 9, 11; Mueller 2005, p. 11). A similar population crash likely happened to bonytail, a species closely related to roundtail chub, in Lake Mohave, with the crash happening sooner because bonytail likely have a shorter life span (Service 2002b, p. 11, A–6).

The introduction of more aggressive and competitive nonnative fish has likely led to losses of roundtail chub (Voeltz 2002, p. 88). Dudley and Matter (2000, p. 24) found that nonnative green sunfish prey on, compete with, and virtually eliminate recruitment of Gila chub (a closely related species to roundtail chub) in Sabino Creek in Arizona. Similar effects of green sunfish on Gila chub have been documented in Silver Creek in Arizona (Unmack *et al.* 2004, pp. 86–87), with recruitment of Gila chub effectively eliminated by nonnative green sunfish. In the Verde River mainstem, Bonar *et al.* (2004, p. 57) found that nonnative fishes were approximately 2.6 times more dense per unit volume of river than native fishes, and their populations were approximately 2.8 times that of native fishes per unit volume of river. Bonar *et al.* (2004, pp. 6–7) found that largemouth bass, smallmouth bass, bluegill, green sunfish, channel catfish, flathead catfish, and yellow bullhead all consumed native fish; although roundtail chub was not detected in the diet of any nonnative fishes, this is likely only due to the relative rarity of the species compared with other native fish, as well as the short time necessary for a fish to be digested. Roundtail chubs have been found in stomachs of largemouth bass in the lower Salt River (P. Unmack, Arizona State University, pers. comm. 2008). Bestgen and Propst (1989, p. 406) reported that, of nonnatives present in New Mexico, smallmouth bass, flathead catfish, and channel catfish most impacted roundtail chub via predation. Native fishes, including roundtail chub, have experienced significant declines in the Salt River above Roosevelt Lake,

concurrent with a significant increase in flathead and channel catfish numbers (Creef and Clarkson 1992, p. 5; Jahrke and Clark 1999 p. 9). Brouder *et al.* (2000, p. 9), based on population estimates, determined that nonnative species were likely suppressing roundtail chub populations in two areas of the upper Verde River. Yard *et al.* (2008) found that rainbow trout predation on humpback chub in Grand Canyon likely resulted in significant levels of humpback chub mortality (Yard *et al.* 2008, p. 53).

In some areas, the presence of nonnative species appears to be limiting recruitment of roundtail chub, with only large adults encountered during surveys (Cantrell 2009, p. 10). Red shiner is known to compete with native southwestern cyprinids (Minckley and Deacon 1968, pp. 1427–1428; Minckley 1973, p. 138; Douglas *et al.* 1994, p. 9), and prey on larval fishes (Ruppert *et al.* 1993, p. 397). In a study of the roundtail chub population in the lower Salt and Verde Rivers, Bryan and Hyatt (2004, p. 3) estimated adult population size of roundtail chub to be 1,657, and found that this was a 74 percent decrease from just 3 years earlier. Bryan and Hyatt (2004, pp. 12–13) concluded that the roundtail chub population in the lower Salt and Verde Rivers was declining rapidly due to low recruitment and high natural mortality, and identified the ''negative impacts of competition and predation [from the] introduction of nonnative fishes into roundtail chub habitat'' as the likely cause of recruitment failure. They recommended that stocking nonnative sport fish ''be carefully evaluated and probably suspended, especially with regards to predatory species'' and that stocking rainbow trout ''be thoroughly evaluated to determine its economic impact and the specific impacts to the [roundtail] chub population.''

Few if any studies of roundtail chub have effectively demonstrated competition with nonnative fishes, although numerous authors have considered it a threat (Bestgen and Propst 1989; Brouder *et al.* 2000; Voeltz 2002; AGFD 2006, p. 5). Bestgen (1985, p. 53) found that diets between rainbow trout and roundtail chub differed to an extent that suggested interactive segregation of habitat and competition for food resources, and although the health of the chub population indicated competition was not severe, in higher densities, trout competition could impact roundtail chub. Dudley and Matter (2000, p. 24) found that green sunfish utilized the same habitats as Gila chub, a closely related species to roundtail chub, and appeared to competitively exclude them from preferred habitats. In the Colorado River in Grand Canyon, Arizona, diet studies of humpback chub and rainbow trout show strong overlap for aquatic invertebrates such as blackfly larvae (Simuliidae) and *Gammarus* (Valdez and Ryel 1995; Yard *et al.* 2008), and removal of nonnative trout is one factor suspected to be responsible for a recent increase in humpback chub numbers in Grand Canyon (U.S. Geological Survey 2006, p. 2). But because rainbow and brown trout (*Salmo trutta*) have also been shown to prey on humpback chub in the Grand Canyon (Yard *et al.* 2008), either a reduction in predation of humpback chub, or a reduction in competition with humpback chub, or both, may be responsible. Intuitively, both scenarios seem likely, and this is the conventional wisdom of many researchers studying the effects of nonnative fishes on natives in the southwest United States (Marsh and Douglas 1997; Brouder *et al.* 2000; Voeltz *et al.* 2002; AGFD 2006, p. 5). Interestingly, Bestgen (1985, p. 53) noted that any competition between rainbow trout and roundtail chub would likely be significant only if rainbow trout occurred in high densities, and in Grand Canyon, high densities of rainbow trout appear to be impacting the humpback chub population (Yard *et al.* 2008; U.S. Geological Survey 2006). Marks *et al.* (in press) found that when nonnative fish species were removed, roundtail chub numbers and recruitment increased dramatically. Again, whether this is because nonnative species were preying on or competing with roundtail chub is still a question, but perhaps one that is not necessary to answer, for as Marks *et al.* (2008) illustrate, the remedy for this threat is obvious.

Aquatic habitat alterations due to land use practices such as livestock grazing and dams and dam operation may facilitate the spread and persistence of nonnative fishes. Dams by their very purpose and nature serve to reduce flood flows and increase base flows. Floods have been identified as a potential means to disadvantage nonnative fishes and thereby advantage native fishes (Meffe 1984, p. 1525). Haney *et al.* (2008, p. 61) suggested that diminished river flow due to diversion may be an important factor in loss of native fish from the Verde River. Variation in river flows may provide both advantages and disadvantages to aquatic species. The timing, duration, intensity, and frequency of flood events has been altered to varying degrees by the presence of dams along many stream courses within the range of the roundtail chub, which affects fish communities. Flood pulses may help to reduce populations of nonnative species because, unlike native fish that are adapted to dramatic fluctuations in water conditions and flow regimes (including random high-intensity events, such as flooding, extreme water temperatures, and excessive turbidity), nonnative fishes appear to be less well-adapted to such events. Dams, through their amelioration of flood flows and increased base flows, may provide more suitable habitat for nonnative fishes (Meffe 1984, p. 1525; Haney *et al.* 2008, p. 61).

Livestock tanks also may facilitate the persistence and spread of nonnative species of fish, amphibians, and crayfish that are intentionally or unintentionally stocked by anglers and private landowners (Rosen *et al.* 2001, p. 24). The management of stock tanks is an important consideration for native fish restoration. Stock tanks associated with livestock grazing can be intermediary ''stepping stones'' in the dispersal of nonnative species from larger source populations to new areas, and serve as source populations themselves (Rosen *et al.* 2001, p. 24; Stone *et al.* 2007, p. 133).

Recent assessments of the fish fauna of the lower Colorado River basin have provided additional insight into the importance of nonnative fishes as a threat to native fish including the roundtail chub. The Desert Fishes Team is an ''independent group of biologists and parties interested in protecting and conserving native fishes of the Colorado River basin'' and includes personnel from the U.S. Forest Service, U.S. Bureau of Reclamation, Bureau of Land Management (BLM), University of Arizona, Arizona State University, the Conservancy, and independent experts (Desert Fishes Team 2003, p. 1). Desert Fishes Team (2003, p. 1) declared the native fish fauna of the Gila River basin to be critically imperiled, citing habitat destruction and nonnative species as the primary factors for the declines. The Desert Fishes Team recommended control and removal of nonnative fish as an overriding need to prevent the decline and ultimate extinction of native fish species within the basin. Clarkson *et al.* (2005) discuss management conflicts as a primary factor in the decline of native fish species in the southwestern United States and declare the entire native fauna as imperiled. The investigators cite nonnative species as the most consequential factor leading to range-wide declines that prevent or negate recovery efforts from being implemented or being successful

(Clarkson *et al.* 2005, p. 20). Clarkson *et al.* (2005, p. 20) note that over 50 nonnative species have been introduced into the Southwest as either sport fish or bait fish and are still being actively stocked, managed for, and promoted by both Federal and State agencies as nonnative recreational fisheries. To help resolve the conflicting management mandates of native fish recovery and the promotion of recreational fisheries, Clarkson *et al.* (2005, pp. 22–25) propose the designation of entire watersheds as having either native or nonnative fisheries and the management of watersheds to aggressively meet these goals. Clarkson *et al.* (2005, p. 25) suggest that current management of fisheries within the southwestern United States as status quo will have serious adverse effects on native fish species and affect the long-term viability of these species.

Mash and Pacey (2005, p. 59) concluded, ''The presence of nonnative fishes alone precludes life-cycle completion by the natives. In the absence of nonnatives, however, the natives thrive even in severely altered habitats.'' This statement appears to apply well to roundtail chub, and the best evidence is provided by the response of the species when nonnative fishes are removed. Marks *et al.* (in press) examined the effect of the removal of nonnative species on native species by measuring fish abundance before and after a restoration project to restore flow and chemically remove nonnative fishes (using the chemical rotenone, a fish pesticide) to benefit native fish species including the roundtail chub. They found that roundtail chub abundance increased dramatically after restoration, and attributed most of this response to the removal of nonnative fish species. Marks *et al.* (in press) suggested that nonnative fish removal may be a more cost effective method to restore native fish populations than flow restoration, because the cost of chemical renovation was one-tenth the cost of flow restoration at Fossil Creek. Roundtail chub is a stream species that appears to require flow (Service 1987; Marks *et al.* in press). However, AGFD has found that roundtail chub can thrive in pond habitats that are free from nonnative species (AGFD 2009). Similarly, Mueller (2008, p. 2) examined the creation and performance of various nonnative fish-free habitats for bonytail chub, a species closely related to the roundtail chub, and found that recruitment occurred in hatchery-style holding ponds, seemingly a less than optimal habitat for a species that occurs in large rivers. Mueller (2008) concluded, ''In all cases, the common denominator was not physical habitat conditions; it was simply the absence of nonnative predators.'' As these findings illustrate, habitat may not be the biggest concern for roundtail chub because the species can thrive even in habitats that are seemingly less than ideal, as long as nonnative species are not present. Despite some lack of direct evidence of the effect of predation and recruitment on roundtail chub, the results of removal of nonnative fish clearly demonstrate that either predation or competition is occurring and is a serious threat to the species.

Nonnative species predation may be having an effect on roundtail chub that is known as the ''predator pit'' hypothesis (Messier 1994, p. 480). This hypothesis proposes that as a population of a species decreases, especially when this happens rapidly, the predators of the species will have an increasing impact on its survival due to the relatively constant consumption amount, and thus increased consumption rate. In situations where predator populations also increase, the effect can be substantial. Given the variety of habitat-altering activities that appear to be affecting roundtail chub throughout the lower Colorado River basin, activities such as dewatering and urbanization are likely reducing roundtail populations. With these reductions, predation by nonnative species create a ''predator pit'' scenario.

At least two species of crayfish, the red swamp crayfish (*Procambaris clarki*) and the northern or virile crayfish (*Orconectes virilis*), have been introduced into Arizona aquatic ecosystems and are now widely distributed and locally abundant in a broad array of natural and artificial free-flowing and still-water habitats throughout the State, including numerous streams within the historical and current range of the roundtail chub (Inman *et al.* 1998, p. 3; Voeltz 2002, pp. 15–88). Crayfish appear to negatively impact native fishes and aquatic habitats through habitat alteration by burrowing into stream banks and removing aquatic vegetation, resulting in decreases in vegetative cover and increases in turbidity (Lodge *et al.* 1994, p. 1270; Fernandez and Rosen 1996, pp. 10–12). Carpenter (2005, pp. 338–340) documented that crayfish may reduce the growth rates of native fish through competition for food and noted that the significance of this impact may vary between species. Crayfish also prey on fish eggs and larvae (Inman *et al.* 1998, p. 17). Crayfish alter the abundance and structure of aquatic vegetation by grazing on aquatic and semiaquatic vegetation, which reduces the cover for fish (Fernandez and Rosen 1996, pp. 10–12). Creed (1994, p. 2098) found that filamentous alga (*Cladophora glomerata*) was at least 10-fold greater in aquatic habitat absent crayfish. Filamentous alga is an important component of aquatic vegetation that provides cover and food for fish, including roundtail chub.

Diseases and Parasites

Diseases, specifically parasite infestations, are a threat to the roundtail chub. Asian tapeworm (*Bothriocephalus acheilognathi*) was introduced into the United States via imported grass carp (*Ctenopharyngodon idella*) in the early 1970s. Asian tapeworm has since become well-established in the Southeast and mid-South and has been recently found in the Southwest. The definitive host in the life cycle of *B. acheilognathi* is cyprinid fishes, and, therefore, it is a potential threat to the roundtail chub as well as to the other native fishes in Arizona. The Asian tapeworm affects fish health in several ways. Two direct impacts are by (1) impeding the digestion of food as it passes through the intestinal track, and (2) causing emaciation and starvation when large numbers of worms feed off of the fish. The Asian tapeworm is present in the Colorado River basin in the Virgin River (Heckman *et al.* 1986, p. 662) and the Little Colorado River (Clarkson *et al.* 1997, p. 66). It has recently invaded the Gila River basin and was found in 1998 in the Gila River near Ashurst-Hayden Dam. Research and monitoring of the effects of Asian tapeworm on a related species, the humpback chub, indicate that this parasite may be a significant cause of mortality because large numbers of Asian tapeworm have been detected in wild humpback chub, and laboratory studies indicate that such infestations cause mortality in *Gila* species (U.S. Geological Survey 2004, p. 1; 2005, pp. 2–3).

Anchor worm (*Lernaea cyprinacea,* Copepoda), an external parasite, is unusual in that it has little host specificity, infecting a wide range of fishes and amphibians. Severe *Lernaea* sp. infections have been noted in a number of chub populations. Infections of *Lernaea* sp. may have increased in recent years. James (1968, pp. 21–29) found that *Lernaea* sp. was very rare in museum specimens collected prior to the 1930s, but increased in intensity from the 1930s to the 1960s, with roundtail chubs exhibiting the greatest increase (10.8 percent). Hendrickson (1993, pp. 45–46) noted very high infections of *Lernaea* sp. during warm

periods in the Verde River, and Voeltz (2002, p. 69) reported that headwater chubs found in Gun Creek in 2000, when surface flow was almost totally lacking, ''showed signs of stress, and many had *Lernaea,* black grub, lesions and an unidentified fungus.'' Girmendonk and Young (1997, p. 55) concluded that ''parasitic infestations may greatly affect the health and thus population size of native fishes.'' A die-off of fish including roundtail chub in Trout Creek was likely due to heavy infestations of black grub (*Neascus* sp.), an internal parasite, which may have weakened the fish sufficiently to cause bacteria hemorrhagic septicemia or blood poisoning (Voeltz 2002, p. 33).

The parasite *Ichthyophthirius multifiliis,* or ''Ich'', is a potential threat to roundtail chub. ''Ich'' has occurred in some Arizona streams, probably favored by high temperatures and crowding as a result of drought (Mpoame 1982, p. 45). This protozoan becomes embedded under the skin and within the gill tissues of infected fish. When the ''Ich'' matures, it leaves the fish, causing fluid loss, physiological stress, and sites that are susceptible to infection by other pathogens. If the ''Ich'' are present in large enough numbers, they can also impact respiration because of damaged gill tissue.

Conservation Actions Relevant to Factor C

All three of the conservation agreements have various provisions to address the threat of nonnative species. The Range-wide Agreement recommends that State conservation agreements include provisions to control (as feasible and where possible) threats posed by nonnative species that compete with, prey upon, or hybridize with roundtail chub. The Arizona Agreement addresses the threat of predation and competition from nonnative species, as well as the threat of disease and parasites, in its provisions for habitat protection. These provisions include: managing detrimental nonnative aquatic species in streams designated for conservation of the subject species; evaluating effectiveness of nonnative management efforts; and managing the spread of infectious diseases and parasites to habitats of the subject species. The Arizona Agreement also includes an indentified deliverable of a native fish management plan that would also serve to address this threat.

The New Mexico Plan includes the following provisions to address the threat of nonnative species:

(1) Determine the distribution and abundance of nonnative species in the San Juan and Gila River watersheds and the physical barriers to their expansion;

(2) Investigate the impacts, particularly competition, habitat modification, and predation, of nonnative species on roundtail chub;

(3) Determine areas of the San Juan and Gila River watersheds where limited nonnative species distribution and abundance may provide opportunities for chub restoration;

(4) Work with sport fish managers to coordinate native and nonnative fish management and identify stream areas expressly for recovery of native species;

(5) When appropriate and feasible, remove nonnative species that present a threat to roundtail, Gila, and headwater chubs;

(6) Prevent the introduction of nonnative species into the watersheds utilizing existing information and programs when possible;

(7) Support efforts to re-establish the historical native aquatic community in ecologically appropriate habitats in the San Juan and Gila River basins utilizing existing programs when possible; and

(8) Inform local resource users about the impacts of nonnative species on roundtail chub.

Specific actions implemented through the conservation agreements to address the threats under Factor C include fisheries management planning efforts and creation of new chub populations in nonnative-fish-free habitats. AGFD convened a Statewide Fish Management Team in 2008, which developed a process to delineate fish management strategies Statewide to address the dual mandates of providing native fish habitat and sport fish angling opportunities for the public. AGDF intends that this process will serve as the deliverable management plan for the Arizona Agreement, and will facilitate sport fish and native fish management decisions throughout Arizona. As discussed in the Status and Distribution of the Lower Colorado River DPS section above, AGFD and NMDGF have created four new populations of roundtail chub, two in streams (Ash Creek and Roundtree Canyon) and two in pond refuges (the Southwest Academy and Gila River Ranch Preserve refuge ponds). These efforts are too new to evaluate their success, but such projects will be essential to reversing the decline of the roundtail chub.

Summary of Factor C

Predation and competition with nonnative aquatic species, and in particular fish, are, along with dewatering of habitat, the most significant threats to the roundtail chub in the lower Colorado River basin. Nonnative aquatic species are a threat to every population of roundtail chub with the possible exception of recent transplants into Roundtree Canyon and Ash Creek, and perhaps Fossil Creek and Aravaipa Creek, based on long-term low levels of occurrence of nonnatives in these streams and presence of natural or manmade fish barriers (Voeltz 2002, p. 47; U.S. Forest Service 2004, p. 1). No attempt has been made to quantify the amount of range of these species affected by parasites, however, parasites have been documented in numerous populations and likely occur throughout the range of these species (Voeltz 2002, pp. 18–19). Although some actions have been implemented through conservation agreements for roundtail chub to address this threat, these actions are either not yet complete or too recently completed to evaluate their success and contribution to the status of the roundtail chub.

Factor D. The Inadequacy of Existing Regulatory Mechanisms

Existing Regulatory Mechanisms

There are currently no specific Federal protections for roundtail chub, and generalized Federal protections found in forest plans, Clean Water Act dredge and fill regulations for streams, and other statutory, regulatory, or policy provisions have been inadequate to ameliorate the threats to roundtail chub in the lower Colorado River basin. Existing Federal and State regulations and planning have not achieved significant conservation of roundtail chub and its habitat. Although we are aware that roundtail chub occurs on Tribal lands, we do not have sufficient information to evaluate the effectiveness of Tribal management.

As described in Factor C, introductions of nonnative fish are likely a significant threat to roundtail chub. Fish introductions are illegal unless approved by the respective States. However, enforcement is difficult. Many nonnative fish populations are established through illegal introductions. Nine species of fish, crayfish, and waterdogs or tiger salamanders (*Ambystoma pigrimum*) may be legally used as bait in Arizona, all of which are nonnative to the State of Arizona, and several of which are known to have serious adverse effects on native species. The portion of the State in which use of live bait is permitted is limited. The use of live bait is restricted in some of the Gila River system in Arizona (AGFD 2008, p. 28), but the use of live bait species (such as green sunfish) is still permitted in areas such as the Verde River that currently

have roundtail chub populations. New Mexico only allows the use of fathead minnow as a live bait-fish in the Gila River drainage in New Mexico, which covers the extent of the range of roundtail chub in the lower Colorado River basin in New Mexico (NMDGF 2008, p. 8). Arizona and New Mexico also continue to stock nonnative sport fishes, including such likely predators and competitors as largemouth bass, channel catfish, rainbow trout, and brown trout, for recreational angling within areas that are connected to habitat of roundtail chub.

Although restrictions on use of live bait help reduce the input of nonnative species into roundtail chub habitat, this does little to reduce unauthorized bait use or other forms of ''bait-bucket'' transfer (*e.g.,* illegal stock of sport fish, dumping of unwanted aquarium fish) not directly related to bait use. Such ''bait-bucket'' transfers can be expected to increase as the human population of Arizona increases and as nonnative species remain available to the public through aquaculture and the aquarium trade.

AGFD also regulates nonnative species that can be legally brought into the State. Prohibited nonnative species are put onto the Restricted Live Wildlife List (Commission Order 12–4–406). However, species are allowed unless they are prohibited by placement on the list, rather than the more conservative approach of being prohibited unless specifically allowed. This allows the opportunity for many noxious nonnatives to be legally imported and introduced into Arizona. New Mexico has adopted a more stringent approach; no live animal (except domesticated animals or domesticated fowl or fish from government hatcheries) is allowed to be imported without a permit (NMS 17–3– 32). However, the majority of the roundtail chub's range in the lower Colorado River basin occurs within Arizona.

Existing water laws in Arizona and New Mexico are inadequate to protect wildlife. The presence of water is clearly a requirement for the roundtail chub. Gelt (2008, pp. 1–12) highlighted the fact that, because existing water laws are old, they reflect a legislative interpretation of the resource that is not consistent with what is known today about hydrology. For example, over 100 years ago when Arizona's water laws were written, the important connection between groundwater and surface water was not known (Gelt 2008, pp. 1–12). Gelt (2008, pp. 8–9) suggested that preserving stream flows and riparian areas may be better accomplished by curtailing surface water uses rather than groundwater uses, and that the prior appropriation doctrine (appropriation of water rights based upon the water law concept of ''first in use, first in rights'') may be outdated and impractical for arid areas like Arizona.

The Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 *et seq.*) and the National Forest Management Act of 1976 (16 U.S.C. 1600 *et seq.*) direct the Secretary of the Interior, through BLM, and Forest Service, respectively, to prepare programmatic-level management plans to guide long-term resource management decisions. In addition, the U.S. Forest Service is required to manage habitat to provide appropriate ecological conditions to support a diversity of native plant and animal species (36 CFR 219.10). The Forest Service is the largest landowner and manager of roundtail chub habitat and lists the roundtail chub as a sensitive species in the lower Colorado River basin in the southwestern region (Arizona and New Mexico). The BLM is updating its sensitive species list for Arizona and has indicated they will add roundtail chub. However, a sensitive species designation provides little protection to the roundtail chub because it only requires the Forest Service and BLM to analyze the effects of their actions on sensitive species, but does not require that they choose environmentally benign actions. Most of these areas where the majority of extant populations of roundtail chub occur are managed by the Forest Service or BLM; thus ongoing management by these agencies has not prevented adverse impacts to roundtail chub habitat. Although both agencies have riparian protection goals, neither agency has specific management plans for the roundtail chub.

Wetland values and water quality of aquatic sites inhabited by the roundtail chub are afforded varying protection under the Federal Water Pollution Control Act of 1948 (Clean Water Act; 33 U.S.C. 1251–1376), as amended; Federal Executive Orders 11988 (Floodplain Management) and 11990 (Protection of Wetlands); and section 404 of the Clean Water Act, which regulates dredging and filling activities in waterways. Water quality in the range of the roundtail chub has declined despite these laws. The Arizona Department of Environmental Quality (2008) has identified several streams with water quality problems occupied by roundtail chub. Oak Creek exceeds the total maximum daily load for *Escherichia coli* (*E. coli*) contamination, due to a combination of recreation, septic systems, urban runoff, and livestock grazing. Boulder Creek exceeds the total maximum daily load for benzene, manganese, mercury, pH, arsenic, copper, and zinc as a result of mining activities. The Verde River exceeds the total maximum daily load for turbidity/sediment due to livestock grazing, urban development, and road use and maintenance. The Arizona Department of Environmental Quality is implementing actions through drainage water quality plans to correct these problems, but they are ongoing and not likely to be resolved in the near future. Our information indicates that the status of the roundtail chub in these areas has declined, although it is unclear whether this is due to these water quality issues (Voeltz 2002, pp. 35, 72).

The NMDGF has adopted a wetland protection policy whereby they do not endorse any project that would result in a net decrease in either wetland acreage or wetland habitat values. This policy may afford some protection to roundtail chub habitat, although it is advisory only and destruction or alteration of wetlands is not regulated by State law. The State of Arizona Executive Order Number 89–16 (Streams and Riparian Resources), signed on June 10, 1989, directs State agencies to evaluate their actions and implement changes, as appropriate, to allow for restoration of riparian resources. Implementation of this regulation may have reduced adverse effects of some State actions on the habitat of the roundtail chub; however, we have no monitoring information on the effects of this State Executive Order, nor do we have information indicating that actions taken under it have been effective in reducing adverse effects to the roundtail chub.

The National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) requires Federal agencies to consider the environmental impacts of their actions. Most actions taken by the Forest Service, BLM, and other Federal agencies that affect the roundtail are subject to NEPA. NEPA requires Federal agencies to describe the proposed action, consider alternatives, identify and disclose potential environmental impacts of each alternative, and involve the public in the decision-making process. However, Federal agencies are not required to select the alternative having the least significant environmental impacts. A Federal action agency may select an action that will adversely affect sensitive species provided that these effects were known and identified in a NEPA document.

The status of roundtail chub on Tribal lands is not well known. Any regulatory or other protective measures for the

species on Tribal lands would be at the discretion of the individual Tribe, and non-Tribal entities often have little information with which to evaluate effectiveness. The San Carlos Apache Tribe has developed a fisheries management plan that provides protection to roundtail chub, although there are only two populations that potentially occur on San Carlos Apache lands, representing a very small percentage of the overall range of the species in the lower Colorado River basin. We have limited information on threats to populations of roundtail chub on Tribal lands, but land uses on Tribal lands include livestock grazing, recreation, limited fuel wood harvest, limited agriculture, fisheries and wildlife management, and localized municipal, urban, and rural development and associated water use. The White Mountain Apache Tribe is preparing a fisheries management plan that, when completed, could benefit roundtail chub because 8 of the 31 populations occur wholly or in part on White Mountain Apache Tribal lands.

The State of New Mexico lists the roundtail chub as ''State Endangered'' under its Wildlife Conservation Act, which prohibits take (New Mexico Wildlife Conservation Act 17–2–41(B)). In the State of New Mexico, an ''Endangered Species'' is defined as ''any species of fish or wildlife whose prospects of survival or recruitment within the State are in jeopardy due to any of the following factors: (1) The present or threatened destruction, modification, or curtailment of its habitat; (2) overutilization for scientific, commercial or sporting purposes; (3) the effect of disease or predation; (4) other natural or manmade factors affecting its prospects of survival or recruitment within the State; or (5) any combination of the foregoing factors'' as per New Mexico Statutory Authority 17–2–38.D. ''Take,'' defined as ''to harass, hunt, capture or kill any wildlife or attempt to do so'' by New Mexico Statutory Authority 17–2–38.L., is prohibited without a scientific collecting permit issued by the NMDGF as per New Mexico Statutory Authority 17–2–41.C and New Mexico Administrative Code 19.33.6. However, while the NMDGF can issue monetary penalties for illegal take of roundtail chub, the same provisions are not in place for actions that result in loss or modification of habitat (New Mexico Statutory Authority 17–2–41.C and New Mexico Administrative Code 19.33.6).

The roundtail chub is identified on the AGFD draft document (never finalized), Wildlife of Special Concern (AGFD 2006b, p. 5). The purpose of the Wildlife of Special Concern list is to provide guidance in habitat management implemented by land management agencies. Additionally, the roundtail chub is considered a ''Tier 1b Species of Greatest Conservation Need'' in the AGFD draft document, Arizona's Comprehensive Wildlife Conservation Strategy (AGFD 2006c, p. 371). The purpose for the Comprehensive Wildlife Conservation Strategy is to ''provide an essential foundation for the future of wildlife conservation and a stimulus to engage the States, federal agencies, and other conservation partners to strategically think about their individual and coordinated roles in prioritizing conservation efforts'' (AGFD 2006c, p. 2). A ''Tier 1b Species of Greatest Conservation Need'' is one that requires immediate conservation actions aimed at improving conditions through intervention at the population or habitat level (AGFD 2006c, p. 32).

As discussed in Factor B, up to one roundtail chub may be taken and possessed per day via angling Statewide in Arizona, with the exception of Fossil Creek, which is catch and release only, from Oct 3, 2009, through April 30, 2010. Take of roundtail chub is also permitted in Arizona via issuance of a scientific collecting permit (Ariz. Admin. Code R12–4–401 *et seq.*). While the AGFD can seek criminal or civil penalties for illegal take of roundtail chub, the same provisions are not in place for actions that result in destruction or modification of roundtail chub habitat.

SRP has completed two habitat conservation plans (HCPs) for its operation of Roosevelt Dam and Lake and its operation of Horseshoe and Bartlett reservoirs (SRP 2006, 2008, 2009). Through implementation of the Roosevelt Habitat Conservation Plan, SRP has permanently protected and will manage land and water rights for more than 2,000 ac (809 ha) of riparian and aquatic habitat along Tonto Creek and the middle Gila, lower San Pedro, and Verde Rivers. Conservation measures on these properties, such as increasing instream flows, excluding livestock, improving channel integrity, excluding vehicle and off-road vehicle traffic, abating wildfires, and promoting riparian ecosystem health, will continue in perpetuity and will directly benefit native fishes, including the roundtail chub. For example, one such SRP-owned and maintained property is the Camp Verde Riparian Preserve near Camp Verde, Arizona, on the Verde River, which contains a portion of the Verde River occupied by roundtail chub (SRP 2006, pp. 26–28).

The HCP for Horseshoe and Bartlett Reservoirs specifically covers the roundtail chub and includes numerous minimization and mitigation measures that will benefit the species, including: rapid drawdown of Horseshoe Lake annually to disadvantage nonnative fish species by adversely affecting the recruitment and growth of these species; providing funding to AGFD for creation and maintenance of fish rearing facilities at its Bubbling Ponds State Fish Hatchery; providing funding and support for native fish stocking, including stocking of roundtail chub; watershed management efforts that serve to maintain quality and quantity of instream flows; native fish monitoring; and public outreach (SRP 2008, pp. 193–201). SRP is also a signatory to the Arizona Agreement, and in this capacity, has funded roundtail chub genetics research and development of roundtail chub broodstock. SRP also works with AGFD to salvage roundtail chub from its canals (SRP 2009, pp. 6–7).

Roundtail chub derives some conservation benefit from its co-occurrence with other listed species and critical habitat in the lower Colorado River basin. As an example, Bureau of Reclamation's interagency consultation (section 7 compliance) on the operation and maintenance of the Central Arizona Project (CAP), a water delivery system designed to bring water from the Colorado River to portions of Pima, Pinal, and Maricopa counties in Arizona, has greatly benefited the species. Biological opinions on the CAP addressed the spread of nonnative aquatic species through the project canals from the Colorado River into the Gila and Santa Cruz River basins (Service 2001, 2008). Conservation measures included in these biological opinions to benefit listed fish and amphibian species (including the spikedace, loach minnow, Gila topminnow, desert pupfish, Gila chub, and Chiricahua leopard frog (*Rana chiricahuensis*)) have benefitted the roundtail chub and likely will into the future. In 2004, nonnative fish were removed from Fossil Creek through chemical renovation to benefit native fish species including the roundtail chub. The Bureau of Reclamation, in cooperation with AGFD, the Service, and the Forest Service, also installed a fish barrier in lower Fossil Creek to prevent reinvasion of nonnative fish. The Fossil Creek restoration project was a conservation measure included in the CAP biological opinion issued to the Bureau of Reclamation, and it resulted in the creation of the only stable-secure

population of roundtail chub currently in existence in the lower Colorado River basin.

Conservation Actions Relevant to Factor D

The Range-wide Agreement recommends that the State plans include provisions to assure adequate regulatory protection for the roundtail chub, flannelmouth sucker, and bluehead sucker within the signatory States, and to install regulatory mechanisms for the long-term protection of habitat (*e.g.,* conservation easements, water rights). The Range-wide Agreement also recommends that States develop multi-State nonnative stocking procedure agreements that protect all three species and potential reestablishment sites from the threat of nonnative species. The Arizona Agreement includes the provision to maintain instream flow by securing habitat through acquisition of water rights or agreements with water rights holders to maintain instream flow. Implementation of these provisions so far has resulted in the U.S. Forest Service application for an instream flow right on Cherry Creek, which contains roundtail chub, and SRP and Conservancy applications to the Arizona Department of Water Resources for instream flow rights on the Verde River. These measures and actions may result in further regulatory protection for roundtail chub by legally protecting flows for the species.

Summary of Factor D

Existing regulations within the range of the roundtail chub address the direct take of individuals without a permit, and unpermitted take is not thought to be a threat to roundtail chub. However, Arizona and New Mexico statutes do not provide protection of habitat and ecosystems. Currently, there are no regulatory mechanisms in place that specifically target the conservation of roundtail chub or its habitat. General regulatory mechanisms protecting the quantity and quality of water in riparian and aquatic communities are inadequate to protect water resources for the roundtail chub, particularly in the face of the significant human population growth expected within the historical range of the chub discussed under Factor A. Conservation actions defined in existing conservation agreements may provide some additional regulatory protection, in particular through development of instream flow rights to protect habitat for the roundtail chub, but no instream flow rights have yet been acquired, although several applications for specific waters have been submitted.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

Fragmented Populations and Stochastic Events

The rarity of roundtail chub increases the possible extinction risk associated with stochastic events such as drought, flood, and wildfire. Roundtail chub populations have been fragmented and isolated to smaller stream segments and may be vulnerable to natural or manmade factors (*e.g.,* drought, groundwater pumping) that might further reduce their population sizes. Maintaining several populations with relatively independent susceptibility to threats is an important consideration in the long-term viability of a species (Shaffer 1987; Goodman 1987). Redundant populations provide security from catastrophic events or repeated recruitment failure. For example, consider that a single hypothetical population has a probability of extinction from a catastrophic event of 10 percent in 200 years. If two populations are independent, the probability of both going extinct is 1 percent (0.12). For three populations, the probability reduces to 0.1 percent (0.13). Even with an extinction probability of 25 percent for one population, the probability of extinction for two and three populations is 6.3 percent and 1.6 percent, respectively (Casagrandi and Gatto 1999). Fagan *et al.* (2002) determined that individual roundtail chub populations have a 0.41 percent probability of extirpation given current status and levels of fragmentation and isolation. Providing for multiple populations that are secure and stable (as defined above in Table 1, a population that is recruiting with multiple age classes and that is free from threats) in a single drainage basin will provide increased redundancy and reduce the likelihood of extirpation. We consider a particular basin or management area to be at risk of extirpation if there are fewer than a minimum of two stable-secure populations because any single population can be eliminated by stochastic events or catastrophic disturbance, such as fire. We only consider roundtail chub to be stable-secure in one stream, Fossil Creek.

In general, Arizona is an arid State; about one-half of Arizona receives less than 10 in. (25 cm) of rain a year. Dewatering and other forms of habitat loss have resulted in fragmentation of roundtail chub populations. We anticipate that water demands from a rapidly increasing human population may further reduce habitat available to this species, and could further fragment populations. In examining the relationship between species distribution and extinction risk in southwestern fishes, Fagan *et al.* (2002, p. 3250) found that the number of occurrences or populations of a species is less significant a factor in determining extinction risk than is habitat fragmentation. Fragmentation of habitat may also cause the roundtail chub to be vulnerable to extinction from threats of further habitat loss and competition from nonnative fish because immigration and recolonization from adjacent populations is less likely. The risk of extirpation of individual populations of this species appears to be quite high given the degree of fragmentation (Fagan *et al.* 2002, p. 3254), that only one population is considered stable and secure, and that many threats are predicted to increase in severity in the future.

Climate Change

Several recent studies predict continued drought in the southwestern United States, including the lower Colorado River basin, due to global climate change. Seager *et al.* (2007, pp. 1181–1184) analyzed 19 different computer models of differing variables to estimate the future climatology of the southwestern United States and northern Mexico in response to predictions of changing climatic patterns. All but one of the 19 models predicted a drying trend within the Southwest (Seager *et al.* 2007, p. 1181). A total of 49 projections were created using the 19 models, and all but 3 predicted a shift to increasing aridity (dryness) in the Southwest as early as 2021–2040 (Seager *et al.* 2007, p. 1181). Recently published projections of potential reductions in natural flow in the Colorado River basin by the mid-21st century range from approximately 45 percent by Hoerling and Eischeid (2006, p. 3989) to approximately 6 percent by Christensen and Lettenmaier (2006, pp. 3727–3729). The U.S. Climate Change Science Program recently completed a report entitled ''Abrupt Climate Change, A report by the U.S. Climate Change Science Program and the Subcommittee on Global Change Research'' (U.S. Climate Change Science Program 2008a). Regarding the southwest United States, the summary and findings concluded: ''Climate model studies over North America and the global subtropics indicate that subtropical drying will likely intensify and persist in the future due to

greenhouse warming. This drying is predicted to move northward into the southwestern United States. If the model results are correct, then the southwestern United States may be beginning an abrupt period of increased drought'' (U.S. Climate Change Science Program 2008b, p. 2).

If predicted effects of climate change result in persistent drought conditions in the Colorado River basin similar or worse than those seen in recent years, water resources will become increasingly taxed as supplies dwindle and demand stays the same or increases. Likewise, there would be increased demand on surface and groundwater supplies in Arizona. Clearly, permanent water is crucial for the continued survival of native fish in the region, including roundtail chub. Essentially the entire range of the roundtail chub in the lower Colorado River basin is predicted to be at risk of becoming more arid (Seager *et al.* 2007, pp. 1183–1184), which has severe implications to the integrity of aquatic and riparian ecosystems and the water that supports them. Perennial streams in the region may become intermittent and streams that are currently intermittent may become unsuitable or dry completely.

Changes to climatic patterns may warm water temperatures, alter stream flow events, and increase demand for water storage and conveyance systems (Rahel and Olden 2008, pp. 521–522). Warmer water temperatures across temperate regions are predicted to expand the distribution of existing aquatic nonnative species by providing 31 percent more suitable habitat for aquatic nonnative species. This conclusion is based upon studies that compared the thermal tolerances of 57 fish species with predictions made from climate change temperature models (Mohseni *et al.* 2003, p. 389). Eaton and Scheller (1996, p. 1111) reported that while several cold-water fish species in North America are expected to have reductions in their distribution from effects of climate change, several warmwater fish species are expected to increase their distribution. In the southwestern United States, this situation may occur where water persists but water temperature warms to a level suitable for nonnative species that were previously physiologically precluded from occupation of these areas. Species that are particularly harmful to roundtail chub populations such as the green sunfish, channel catfish, largemouth bass, and bluegill are expected to increase their distribution by 7.4 percent, 25.2 percent, 30.4 percent, and 33.3 percent, respectively (Eaton and Scheller 1996, p. 1111). Rahel and Olden (2008, p. 526) expect that increases in water temperatures in drier climates such as the southwestern United States will result in periods of prolonged low flows and stream drying. These effects from changing climatic conditions may have profound effects on the amount, permanency, and quality of habitat for the roundtail chub. Warmwater nonnative species such as red shiner, common carp, mosquitofish, and largemouth bass are expected to benefit from prolonged periods of low flow (Rahel and Olden 2008, p. 527).

Rahel *et al.* (2008, p. 551) examined climate change models, nonnative species biology, and ecological observations, and concluded that climate change could foster the expansion of nonnative aquatic species into new areas, magnify the effects of existing aquatic nonnative species where they currently occur, increase nonnative predation rates, and heighten the virulence of disease outbreaks in North America. Many of the nonnative species have similar, basic ecological requirements as our native species, such as the need of nonnative fish species for permanent or nearly permanent water. Rahel *et al.* (2008, pp. 554–555; and from Carveth *et al.* 2006, p. 1435) found that climate change will likely favor nonnative fish species such as largemouth bass, yellow bullhead, and green sunfish over roundtail chub, in part because they have higher temperature tolerances. Also, drying of stream channels will create less habitat and greater competition due to limited space and habitat. Thus climate change can eliminate roundtail chub habitat through at least two mechanisms: directly, by drying up aquatic habitats due to decreases in precipitation and stable or increasing human demand for water resources; and indirectly by improving conditions for nonnative species, increasing their proliferation, and thereby increasing the threat from nonnative fish predation and competition.

Rahel *et al.* (2008, p. 555) also noted that climate change could facilitate expansion of nonnative parasites. This could be an important threat to roundtail chub. Optimal Asian tapeworm development occurs at 25–30 °C (77–86 °F) (Granath and Esch 1983, p. 1116), and optimal anchorworm temperatures are 23–30 °C (73–86 °F) (Bulow *et al.* 1979, p. 102). Cold water temperatures in parts of the range of the roundtail chub may have prevented these parasites from completing their life cycles and limited their distribution. Warmer climate trends could result in warmer overall water temperatures, increasing the prevalence of these parasites.

The effects of the water withdrawals discussed above may be exacerbated by the current, long-term drought facing the arid southwestern United States. Philips and Thomas (2005, pp. 1–4) provided streamflow records that indicate that the drought Arizona experienced between 1999 and 2004 was the worst drought since the early 1940s and possibly earlier. The Arizona Drought Preparedness Plan Monitoring Technical Committee (2008) assessed Arizona's drought status through June of 2008 in watersheds where the roundtail chub occurs or historically occurred. They found that the Verde and San Pedro watersheds continue to experience moderate drought (Arizona Drought Preparedness Plan Monitoring Technical Committee 2008), and the Salt, Upper Gila, Lower Gila, and Lower Colorado watersheds were abnormally dry (Arizona Drought Preparedness Plan Monitoring Technical Committee 2008). Ongoing drought conditions have depleted recharge of aquifers and decreased baseflows in the region. While drought periods have been relatively numerous in the arid Southwest from the mid-1800s to the present, the effects of human-caused impacts on riparian and aquatic communities may compromise the ability of these communities to function under the additional stress of prolonged drought conditions.

Conservation Agreements

As discussed in the ''Conservation Actions Relevant to Factor A'' section above, there are three wide-ranging plans that address the ongoing conservation of the roundtail chub. The Utah Department of Natural Resources' Range-wide Agreement was finalized and signed by all the Colorado River basin States in 2004. The Range-wide Agreement depends heavily on individual State plans for its implementation. The objectives of the Range-wide Agreement are to:

(A) Establish or maintain populations sufficient to ensure the conservation of each species within the State;

(B) Establish or maintain sufficient connectivity between populations so that viable metapopulations are established or maintained;

(C) As feasible, identify, significantly reduce or eliminate threats to the conservation of these species.

To meet its obligations under the Range-wide Agreement, New Mexico completed a recovery plan for the roundtail chub in November of 2006, the ''Colorado River Basin Chubs Recovery Plan'' (New Mexico Plan)

(Carman 2006, p. 39). The New Mexico Plan includes a management strategy with the goal of establishing roundtail chub populations that are secure and self-sustaining throughout their historical ranges in New Mexico, and the objective for at least one sufficient, self-sustaining, secure population of roundtail chub in the mainstem of the Gila River in New Mexico (Carman 2006, p. 49). The New Mexico Plan management strategy also includes specific and comprehensive management issues and strategies with corresponding implementation tasks and a timeline for completion. The implementation tasks provide a comprehensive list of conservation measures including: compiling information on status and potential habitat; improving knowledge of historical and current population dynamics; creating refuge populations of chub lineages; restoring and securing habitats; if necessary, augmenting populations; if possible, establishing additional populations; restricting angling take of headwater chub; controlling nonnative species; identifying and reducing information gaps; and establishing agreements and partnerships to implement the plan (Carman 2006, pp. 55–57). Actions taken to date in implementation of the New Mexico Plan include the creation of a new refuge population of roundtail chub at the Conservancy's Gila River Preserve farm pond in 2008 using offspring of wild-caught Verde River fish from the AGFD Bubbling Ponds Fish Hatchery. The NMDGF plans to complete health and genetic studies on these fish, and if appropriate, their offspring will be stocked into the mainstem Gila River in New Mexico. The NMDGF has also been working with partners to secure habitat through purchases and land management. In 2007, the Department and the Conservancy purchased 168 ac (68 ha) of riparian and river habitat in the Gila-Cliff Valley.

The goal of the Arizona Agreement is to ensure the conservation of roundtail chub, headwater chub, flannelmouth sucker, Little Colorado River sucker, bluehead sucker, and Zuni bluehead sucker populations throughout Arizona. The Arizona Agreement's objective is to address and ameliorate the five listing factors in accordance with section 4(a)(1) of the Act; the Arizona Agreement objectives also correspond to those in the Range-wide Agreement (see above). The Arizona Agreement includes a strategy that is comprehensive and includes numerous conservation strategy tasks. Key tasks include: create a management plan; create a Statewide management team; conduct status assessments; identify threats; conduct research; secure, enhance, maintain, and create habitat; manage detrimental nonnative fish/aquatic species; manage the spread of infectious diseases and parasites; enhance or restore connectedness and opportunities for migration; create, maintain and evaluate fish refugia; establish and enhance populations; monitoring; and outreach (AGFD 2006a, pp. 45–52). The Arizona Agreement also includes success criteria, including: population stability criteria for sizes and numbers of populations to maintain roundtail chub; threat reduction success criteria, to determine if threats have been adequately mitigated or eliminated, and monitoring to evaluate status and trend of populations, and determine if habitat is being adequately maintained.

AGFD has established a Statewide Management Team to implement the Arizona Agreement; signatories include the Bureau of Reclamation, the Hualapai Tribe; SRP; BLM; the Arizona State Lands Department; the Arizona Department of Water Resources; the Conservancy; the Forest Service; and the Fish and Wildlife Service. Under the Arizona Agreement, AGFD and its partners have implemented several conservation actions that have benefited the roundtail chub, including stocking roundtail chub into two new habitats that are free from nonnative fishes, Roundtree Canyon and Ash Creek. These stockings are too new to evaluate whether roundtail chub has become established, but if successful, these efforts will help conserve the species by creating two new populations that are largely free from significant threats. AGFD plans to establish another new population of roundtail chub in Houston Creek in 2009. AGFD is also working with various partners to develop operating criteria for Alamo Dam on the Bill Williams River to conserve roundtail chub, and is finalizing broodstock and fishery management plans, which will guide the maintenance and propagation of different stocks for use in restoration of populations throughout the range of the DPS and management of individual population units, management areas, and conservation units.

The Range-wide Agreement and the Arizona Agreement depend on good-faith efforts from signatories for their implementation, and identify the need to develop funding sources for their implementation. Likewise, the New Mexico Plan commits to using existing resources and funding sources, to the extent possible, to implement the plan, and also identifies the need for additional sources for full implementation. No funding agreements are in place to support these efforts. Although a few conservation actions have been implemented to benefit roundtail chub, as discussed above, the Range-wide Agreement, the Arizona Agreement, and the New Mexico Plan, and their comprehensive lists of tasks, which if fully implemented would significantly aid in the conservation of roundtail chub, are in the early stages of implementation at this point in time. Specific actions identified in these plans, either planned or implemented, that address individual threats are identified in Factors A to E as appropriate.

The Arizona Agreement has resulted in two new populations of roundtail chub, one in a 1.2-mi (2-km) tributary to the Verde River, Roundtree Canyon, and one in a 0.6-mi (1-km) tributary of the Salt River, Ash Creek. These translocations are too new to evaluate their success, having been completed in 2008 and 2007 respectively, but they could potentially benefit the species. AGFD is also planning to execute a translocation into a second tributary of the Verde River, Houston Creek, on the Tonto National Forest, in 2009. Another conservation measure being undertaken as a result of the conservation agreements is the establishment of refuge populations and broodstock. Refuge or sanctuary populations have proven to be important in the conservation of native fish in the Southwest by creating predator-free habitats (Mueller 2008), and use of broodstock populations has prevented the extinction of bonytail (Hedrick *et al.* 2000). AGFD has developed broodstock management plans for the Verde River and Chevelon Creek (Cantrell 2009, p. 5). Refuge populations provide both broodstock and a secure population to preserve the genetic integrity of a population. AGFD and the NMDGF recently created a refuge population in New Mexico at the Conservancy Gila River Preserve refuge pond near the Gila River. AGFD has also created a refuge at the Southwest Academy on Wet Beaver Creek near Camp Verde, Arizona. Both of these refuges were created with Verde River broodstock from a broodstock population at the AGFD Bubbling Ponds fish hatchery. AGFD plans to create additional refuge/broodstock populations for other conservation management units, with a minimum of one for each management area (Cantrell 2009, p. 5).

Conservation Actions Relevant to Factor E

The Arizona Agreement includes provisions to address the threat of population fragmentation, identifying the need to maintain connectivity, or at least gene flow, even by artificial means, between populations. If connectivity between occupied habitats cannot be maintained via natural connection, the Arizona Agreement recommends considering the practice of moving individuals of the subject species between fragmented populations. Further, reducing existing stressors by implementing the conservation agreements will give existing populations additional resiliency to face the stresses presented by climate change.

Summary of Factor E

Threats to roundtail chub are magnified by the fragmentation of existing populations. All but one model evaluating changing climatic patterns for the southwestern United States and northern Mexico predict a drying trend for the region (Seagar *et al.* 2007, pp. 1181–1184). We acknowledge that drought and the loss of surface water in riparian and aquatic communities are related to changing climatic conditions (Seagar *et al.* 2007, pp. 1181–1184). The extent to which changing climate patterns will affect the roundtail chub is not known with certainty at this time. However, threats to the roundtail chub identified in Factors A and C will likely be exacerbated by changes to climatic patterns in the southwestern United States due to increasing drought and reduction of surface waters if the predicted patterns are realized. Conservation agreements and associated plans have been developed for roundtail chub in the lower Colorado River basin, and some actions have been implemented as a result that benefit and help conserve the roundtail chub, such as the establishment of new populations in nonnative fish-free habitats and the development of broodstock for use in establishing and augmenting populations. These plans also include numerous actions to help reduce the threats to the roundtail chub. While we recognize the importance of working with our partners in conserving the roundtail chub through the implementation of these plans, and recognize that if implemented, they will greatly assist in the conservation of roundtail chub, these agreements have only recently been completed and are in the early stages of implementation.

Summary of Status and Threats

The following discussion illustrates how the threats to the species have affected and are affecting the roundtail chub across the DPS. Based on museum records documented in Voeltz (2002, Appendices), we suspect that the roundtail chub retained much of its historical distribution in the lower Colorado River basin within the United States up to and likely through the 1920s. Activities such as the construction of dams and water diversions that occurred throughout the early to mid-1900s for agriculture and regional economic development likely eliminated surface flow throughout stream reaches with occupied habitat, which led to widespread extirpations of roundtail chub populations in areas such as the lower Gila and Salt Rivers in Arizona. After the period of dam construction and the subsequent creation of reservoirs, widespread nonnative fish stocking efforts ensued throughout Arizona beginning in mid 1900s. The effects from this influx of nonnative species throughout the Southwest resulted in significant declines in native fish and ranid frog distribution and abundance, and the subsequent listing of 19 of Arizona's 31 native fish species throughout the last 35 years (see discussion in the ''Nonnative Species'' section above).

Currently, there are three specific Management Areas of the DPS. Management Area A contains three river basins with the same lineage of roundtail chub: The Gila, Salt, and Verde Rivers (Dowling *et al.* 2008). However, these three basins have very limited connectivity between them today, and the status of each basin may best be described separately. We will therefore discuss each of these river basins separately to better understand the status of the Management Area.

The roundtail chub populations in the Verde River basin have the best hydrological connectivity between populations of any basin and the only ''stable-secure'' population, in Fossil Creek (Table 2). However, the Verde River is fragmented due to the presence of Horseshoe and Bartlett reservoirs. Fossil Creek was restored in 2004, and has been stocked with native fishes including roundtail chub. Of the other five natural populations in the Verde River, one is extirpated, two are ''stable-threatened'' and two are ''unstable-threatened.'' Reproduction and recruitment is documented in the two ''stable-threatened'' populations, but even in these, appears sporadic over time (Brouder *et al.* 2001, p. 9). As discussed above (see the Summary of Factors Affecting the Species section), the Verde River is experiencing threats from numerous land uses, especially water withdrawal with increasing demand for the Big Chino aquifer, the source of the Verde River. Nonnative species are present in all populations with the exception of Fossil Creek. Throughout the Verde River basin, populations seem at risk of not achieving long-term persistence due to threats, as only sporadic recruitment documented.

The Salt River populations are difficult to assess due to land ownership. The success of Tribal fisheries management plans is uncertain. The San Carlos Apache Tribe Fisheries Management Plan is complete, but the species has limited occurrence on that reservation. The White Mountain Apache Tribe has begun work on a fisheries management plan, which is not yet complete. Tribal management affects all but two populations in the Salt River basin. Of the two completely non-Tribal populations, one is ''stable-threatened'' and one is ''unstable-threatened.'' Cherry Creek, the lone ''stable-threatened'' population, is disconnected from other populations in the Management Area, and a single stochastic event, such as wildfire, which has recently affected nearby populations, could eliminate the population.

The roundtail chub populations in the Gila River are almost completely extirpated, with the only ''stable-threatened'' population in Aravaipa Creek. Aravaipa Creek is protected by fish barriers, erected by the Bureau of Reclamation as a result of the CAP biological opinions (Service 2001, 2008). Thus the roundtail chub in Aravaipa Creek has also benefited from its co-occurrence with the Federally listed spikedace and loach minnow. Aravaipa Creek has also benefitted from other conservation actions, including those undertaken through conservation agreements, such as actions of the Conservancy taken for its protection, discussed above (see Conservation Actions Relevant to Factor A). But nonnative fish species do occur above the barrier in Aravaipa Creek and could conceivably spread. The only other populations in the Management Area are Eagle Creek and the upper Gila River in New Mexico. Roundtail chub in both of these locations has become very rare in recent years (Carman 2006, p. 7; Cantrel 2009, p. 9). Both of these populations are subject to numerous threats, including abundant nonnative species and dewatering due to ongoing mining operations and potential water

projects resulting from recent water rights settlements.

Management Area A is thus at a high risk of extirpation for several reasons. The management area is made up of fractured basins, the Gila, Salt, and Verde Rivers. Many populations have been extirpated, and roundtail chub in Eagle Creek and the Upper Gila River has become very rare. A number of populations are on Tribal lands and are difficult to evaluate in terms of status and future management. Two populations are fairly well protected and have a stable status, Fossil and Aravaipa Creeks. However, these two locations are no longer connected, and we find that their current status is largely due to special management resulting from their co-occurrence with already listed fish species. All of the other populations apart from Fossil and Aravaipa Creeks in Management Area A are likely at significant risk from Factors A and C, and in particular, predation from nonnative fish species and dewatering.

Management Area B is the Bill Williams River Basin. Streams in the Bill Williams Management Area are highly fragmented and subject to summer drying, even under normal conditions, because the area is in the driest part of the DPS (Green and Sellers 1964, Figs. 3–5). It is likely that all populations in Management Area B are fragmented and isolated during the dry season. Remaining populations face increasing groundwater development particularly in the Boulder Creek sub-basin, and in Kirkland Creek in particular. Only four of the nine extant populations are ''stable-threatened'' and those are in isolated portions of the drainage. Trout Creek is completely isolated, and the Big Sandy River is extirpated. The Burro Creek drainage, which includes Boulder and Conger Creeks, has some redundancy, but effluent from mining operations and the presence of green sunfish, red shiner, and yellow bullhead in Boulder Creek pose a threat to these populations. The Santa Maria sub-basin contains three populations, including Kirkland and Sycamore Creeks, all of which are considered ''unstable-threatened'' and at risk from increased groundwater pumping and the presence of nonnative fish species. According to AGFD, these streams may dry completely in drought and are more vulnerable to the effects of climate change (A. Clark, AGFD, pers. comm. 2009). Thus, Management Area B is a collection of highly isolated, threatened populations, in a very dry region of the DPS.

Management Area C is the Little Colorado River Basin. Only two populations remain: Clear Creek (East Clear Creek) and Chevelon Creek. Both are ''unstable-threatened.'' Recent surveyors have commented with surprise that these populations persist. For example, Clarkson and Marsh (2005b, p. 9) remarked that the occurrence of roundtail chub and juvenile roundtail chub in Clear Creek was shocking given the lack of occurrence in surveys a year before, and especially given the co-occurrence and dominance of nonnative fish species in the area. The authors would not even speculate on why this rare situation existed, but noted that in similar situations in the Southwest, ''natives eventually decline and succumb in the presence of nonnative fish populations (Marsh and Pacey 2005).'' Further, they found that other natives including speckled dace (*Rhinichthys osculus*), bluehead sucker, and Little Colorado spinedace (*Lepidomeda vittata*) were absent from Clear Creek, which Clarkson and Marsh (2005b, p. 9) state ''is likely testament to the continuing deterioration of the native fish fauna in this area.'' Threats to these two populations include both nonnative species and water use. The aquifer that feeds these streams in their lower reaches has recently been the subject of study for its use as a water supply for nearby mining operations and future development in towns of the region such as Flagstaff, Winslow, and Holbrook. Therefore, further strain on these systems from increased surface and groundwater diversions is likely. Of the three management areas, Management Area C appears to be the most threatened and has the poorest status. Given the lack of redundancy and resiliency in these populations, the loss of the two populations seems very likely in the near future without aggressive conservation to reduce threats.

Foreseeable Future

The Act does not define the term ''foreseeable future.'' However, in a January 16, 2009, memorandum addressed to the Acting Director of the U.S. Fish and Wildlife Service, the Office of the Solicitor, Department of the Interior, concluded, ''* * * as used in the [Act], Congress intended the term 'foreseeable future' to describe the extent to which the Secretary can reasonably rely on predictions about the future in making determinations about the future conservation status of the species.'' In discussing the concept of foreseeable future for the lower Colorado River basin DPS of the roundtail chub, we considered: (1) The biological and demographic characteristics of the species (such as generation times, population genetics, trends in evidence of recruitment within current populations, *etc.*); (2) our ability to predict or extrapolate the effects of threats facing the DPS into the future; and (3) the relative permanency or irreversibility of these threats.

Of the threats to the roundtail chub described in our analysis, the threats of habitat loss and nonnative species are the most significant. Habitat loss has resulted in the loss of large sections of the species' former range in the lower Colorado River basin because suitable habitat is now gone or so altered as to be permanently unsuitable, and the same land use practices that have led to this habitat loss are still occurring throughout the range of the DPS and therefore continue to constitute a significant threat. The threat of habitat loss is likely to not only continue in the future but increase in severity given the environmental changes resulting from climate change and increasing human populations. The widespread, imminent, and serious threat to the long-term sustainability of roundtail chub in the lower Colorado River basin from the presence of nonnative aquatic species, especially nonnative fishes, compounds the threat of habitat loss. The elimination of the single threat of nonnative species, especially fishes, may lessen the severity of all other threats. We find that because of the potential for habitat loss due to various land uses, in particular dewatering, the presence of significant levels of nonnative fish in all but one population, and the extent of threats and lack of stability to populations throughout the lower Colorado River basin, the viability of the DPS is in question into the foreseeable future.

In response to the impacts to the roundtail chub discussed above and in our analysis of threats, the roundtail chub in the lower Colorado River basin has been eliminated from approximately 68 to 82 percent of its historical range over the last 80 years (Voeltz 2002, p. 83). The most significant period of declines and subsequent extirpations of entire populations of roundtail chub likely coincided with the proliferation of nonnative species beginning in the 1940s and 1950s, most notably with the widespread introduction and expansion of nonnative fish such as common carp, largemouth bass, green sunfish, and channel and flathead catfish. In some areas, the presence of these nonnative species appears to be limiting recruitment of roundtail chub, with only large adults encountered during surveys (Cantrell 2009, p. 10).

Voeltz (2002, p. 5) defined ''unstable-threatened'' populations of roundtail chub as those which exhibited over the past 5–10 years a declining population with limited recruitment, and noted 13 such populations. Specific instances of apparent recruitment failure have been noted in the Verde and Salt Rivers, and in Wet Beaver Creek (Girmendonk and Young 1997, pp. 21, 25, 34; Voeltz 2002, p. 71; Bryan and Hyatt 2004, p. 3). Based on the best available information, we consider 13 populations to be lacking recruitment, and are thus ''unstable-threatened.'' Also, there are nine populations for which we have limited status information and must consider ''unknown.'' Since roundtail chubs appear to live 5 to 7 years (Bestgen 1985, pp. 72–75; Brouder *et al.* 2000, p. 10; Brouder 2005, p. 866), total recruitment failure over a 10-year timeframe could extirpate a population. Because this is a relatively short period of time (compared to longer-lived species like the razorback sucker or bonytail), recruitment failure may be difficult to detect without significant monitoring efforts. Recruitment failure is particularly apparent in areas where habitat remains structurally intact, but where nonnative species maintain stable populations and native species persist at low levels. In Fossil Creek, a restoration effort in 2004 created a nonnative fish barrier and renovated 9.5 mi (15.3 km) of stream (U.S. Forest Service 2004, p. 9), which removed all nonnative fish species, which were previously abundant, from Fossil Creek. Roundtail chub abundance increased dramatically after the restoration effort, illustrating clearly the significance of predation by and competition from nonnative fish species on limiting recruitment and abundance of the chub populations (Marks *et al.* in press, pp. 22–24). The observed effects of nonnative species on age-class distribution and recruitment are an important influence on the maintenance of current populations to be considered in our evaluation of the foreseeable future for this species.

Predicting how current populations will fare over time is confounded by a lack of monitoring data and population and survivorship estimates. Although roundtail chub has persisted in many currently occupied locations for some time, there is little information on status over time, with often only one or two surveys to determine status. There is no status information available for one third of the populations. Of the remainder, many appear to be in a downward trend. Voeltz (2002) found that roundtail chub was extirpated from the Little Colorado River, Bill Williams River, Big Sandy River, Lower Gila River, San Pedro River, San Francisco River, Dry Beaver Creek, Zuni River, and Blue River (Voeltz 2002; see Table 2). All of these extirpated populations experienced reductions in flow, and many of the remaining populations are subjected to this threat. All of the remaining established populations are also subject to the threat of nonnative species with the exception of Fossil Creek, Ash Creak, and Roundtree Canyon. Generally, population trends appear to be declining throughout the lower Colorado River basin (Voeltz 2002, p. 85; Cantrell 2009, pp. 10–11). Few efforts specifically examining trend have been conducted; two population estimate studies conducted for the species in the lower Colorado River basin indicated a declining trend (Brouder *et al.* 2000, p. 8–9; Bryan and Hyatt 2004, p. 3). For the lone ''stable-secure'' population, a recently completed study of Fossil Creek indicates a significant increase in abundance of roundtail chub as a result of flow increases and nonnative species removal (Marks *et al.* in press).

We conclude that remaining populations are subject to a high risk of extirpation, given that: (1) Roundtail chub have a relatively high risk of localized extirpation due to habitat fragmentation (Fagan *et al.* 2002, p. 3254); (2) remaining populations are highly vulnerable to the effects of threats discussed in detail in Factors A through E above; (3) the significant threat of predation from nonnative fish species; (4) nonnative species show an alarming trend of eventually completely overtaking native species where they co-occur (Marsh and Pacey 2005, p. 59); (5) all but three existing established population of roundtail chub is believed to contain nonnative fish species (Voeltz 2002); (6) the few existing studies of population trend and overall status assessments indicate a continuing decline in abundance, likely due to low recruitment as a result of predation from nonnative fishes (Voeltz 2002, pp. 83–88; Bryan and Hyatt, 2004, pp. 3, 12–13); and (7) many threats are projected to increase over time, including those most detrimental to the long-term viability of the DPS, such as the continued proliferation of nonnative species, and projected increases in human population and water use, both of which are likely to be exacerbated by the environmental effects resulting from climate change.

Finding

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by the lower Colorado River basin roundtail chub. We reviewed the petition, information available in our files, and other published and unpublished information submitted to us by the public following our 90-day petition finding, and consulted with recognized roundtail chub experts and other Federal and State resource agencies. On the basis of the best scientific and commercial information available, we find that the population segment satisfies the discreteness and significance elements of the DPS policy, and therefore qualifies as a DPS under our policy. We further find that listing the lower Colorado River basin DPS of roundtail chub is warranted. However, listing the lower Colorado River basin DPS of roundtail chub is precluded by higher priority listing actions at this time, as discussed in the Preclusion and Expeditious Progress section below.

In making this finding, we recognize that there have been declines in the distribution and abundance of the roundtail chub, primarily attributed to the introduction of and subsequent predation by nonnative fishes, as documented in the body of scientific research on the distributions and impact of introduced fishes in relation to the roundtail chub. Direct predation by nonnative fishes on this species has resulted in rangewide population declines and local extirpations. Because nonnative species are present in all but one of the remaining established populations of this species, we conclude that remaining populations are at risk of declines and extirpation as a result of predation by nonnative species. Furthermore, the result of the past effects of these threats is that many of the remaining populations are fragmented and isolated, making them vulnerable to further declines and local extirpations from other factors (Fagan *et al.* 2002, p. 3250). Populations that go extinct following habitat fragmentation and population isolation are unlikely to be naturally recolonized due to both the isolation from, and lack of connectivity to, potential source populations.

The isolation of remaining roundtail chub populations and habitat fragmentation as a result of nonnative fish introductions and habitat alteration has made remaining populations vulnerable to extinction from stochastic events. Stochastic events such as fire have only recently been recognized as an important factor in the decline of this species (Dunham *et al.* 2003, p. 183; Rinne 2004, p. 151). Other factors include parasitism and the inadequacy of existing regulatory mechanisms. These factors may contribute to declines

or extirpations of roundtail chub. In addition, these factors are exacerbated by the effects that have been caused by nonnative fishes. Also, a significant new threat appears to be environmental changes that result from climate change, which may have the potential to drastically reduce existing habitat through further stream dewatering, as well as result in habitat change by, for example, increasing water temperatures that will aid the spread and establishment of nonnative predators and parasites.

A number of habitat altering land uses further threaten remaining populations of roundtail chub. These include dams, diversions, and groundwater withdrawal; livestock grazing; logging, fuel wood cutting, mining, and channelization; road construction, use, and maintenance; urban and rural development; recreation; and high-intensity wildfires. These threats negatively impact the rivers, streams, and riparian habitats that are essential for the survival of the roundtail chub. These threats have been documented historically, are either ongoing or likely to occur throughout the range of the roundtail chub in the lower Colorado River basin, and will reduce the suitability of roundtail chub habitat as cover for protection from predators, as a foraging area, and as spawning and nursery areas. Despite the conservation actions discussed above, the dewatering of aquatic habitats in the arid lower Colorado River basin poses a significant threat to all native fish of the region, including roundtail chub. All of these threats are anthropogenic and can be expected to continue, if not increase, given the predictions for increases in human population in the region.

Efforts to improve the status of the roundtail chub in the lower Colorado River basin began in earnest in 2006. These conservation efforts, notably the Arizona Agreement and New Mexico Plan, include many actions to stabilize populations, establish new populations, increase the range of the species, and ameliorate threats. The conservation agreements have met with some success in this regard. Two populations have been created, as have two refuge populations and a refuge-broodstock population at a hatchery. Efforts to purchase land and water rights to reduce threats to habitat have met with some limited success. These conservation efforts can conserve the roundtail chub if fully implemented. Currently, however, they are in the early stages of implementation.

Preclusion and Expeditious Progress

Preclusion is a function of the listing priority of a species in relation to the resources that are available and competing demands for those resources. Thus, in any given fiscal year (FY), multiple factors dictate whether it will be possible to undertake work on a proposed listing regulation or whether promulgation of such a proposal is warranted but precluded by higher-priority listing actions.

The resources available for listing actions are determined through the annual Congressional appropriations process. The appropriation for the Listing Program is available to support work involving the following listing actions: proposed and final listing rules; 90-day and 12-month findings on petitions to add species to the Lists of Endangered and Threatened Wildlife and Plants (Lists) or to change the status of a species from threatened to endangered; annual determinations on prior ''warranted but precluded'' petition findings as required under section 4(b)(3)(C)(i) of the Act; proposed and final rules designating critical habitat; and litigation-related, administrative, and program management functions (including preparing and allocating budgets, responding to Congressional and public inquiries, and conducting public outreach regarding listing and critical habitat). The work involved in preparing various listing documents can be extensive and may include, but is not limited to: gathering and assessing the best scientific and commercial data available and conducting analyses used as the basis for our decisions; writing and publishing documents; and obtaining, reviewing, and evaluating public comments and peer review comments on proposed rules and incorporating relevant information into final rules. The number of listing actions that we can undertake in a given year also is influenced by the complexity of those listing actions; that is, more complex actions generally are more costly. For example, during the past several years, the cost (excluding publication costs) for preparing a 12-month finding, without a proposed rule, has ranged from approximately $11,000 for one species with a restricted range and involving a relatively uncomplicated analysis to $305,000 for another species that is wide-ranging and involving a complex analysis.

We cannot spend more than is appropriated for the Listing Program without violating the Anti-Deficiency Act (see 31 U.S.C. 1341(a)(1)(A)). In addition, in FY 1998 and for each fiscal year since then, Congress has placed a statutory cap on funds which may be expended for the Listing Program, equal to the amount expressly appropriated for that purpose in that fiscal year. This cap was designed to prevent funds appropriated for other functions under the Act (for example, recovery funds for removing species from the Lists), or for other Service programs, from being used for Listing Program actions (see House Report 105–163, 105th Congress, 1st Session, July 1, 1997).

Recognizing that designation of critical habitat for species already listed would consume most of the overall Listing Program appropriation, Congress also put a critical habitat subcap in place in FY 2002 and has retained it each subsequent year to ensure that some funds are available for other work in the Listing Program: ''The critical habitat designation subcap will ensure that some funding is available to address other listing activities'' (House Report No. 107–103, 107th Congress, 1st Session, June 19, 2001). In FY 2002 and each year until FY 2006, the Service has had to use virtually the entire critical habitat subcap to address court-mandated designations of critical habitat, and consequently none of the critical habitat subcap funds have been available for other listing activities. In FY 2007, we were able to use some of the critical habitat subcap funds to fund proposed listing determinations for high-priority candidate species. In FY 2008, while we were unable to use any of the critical habitat subcap funds to fund proposed listing determinations, we did use some of this money to fund the critical habitat portion of some proposed listing determinations, so that the proposed listing determination and proposed critical habitat designation could be combined into one rule, thereby being more efficient in our work. In FY 2009, we anticipate being able to do the same.

Thus, through the listing cap, the critical habitat subcap, and the amount of funds needed to address court-mandated critical habitat designations, Congress and the courts have in effect determined the amount of money available for other listing activities. Therefore, the funds in the listing cap, other than those needed to address court-mandated critical habitat for already listed species, set the limits on our determinations of preclusion and expeditious progress.

Congress also recognized that the availability of resources was the key element in deciding whether, when making a 12-month petition finding, we would prepare and issue a listing proposal or instead make a ''warranted

but precluded'' finding for a given species. The Conference Report accompanying Public Law 97–304, which established the current statutory deadlines and the warranted-but-precluded finding, states (in a discussion on 90-day petition findings that by its own terms also covers 12-month findings) that the deadlines were ''not intended to allow the Secretary to delay commencing the rulemaking process for any reason other than that the existence of pending or imminent proposals to list species subject to a greater degree of threat would make allocation of resources to such a petition [that is, for a lower-ranking species] unwise.''

In FY 2009, expeditious progress is that amount of work that can be achieved with $8,808,000, which is the amount of money that Congress appropriated for the Listing Program (that is, the portion of the Listing Program funding not related to critical habitat designations for species that are already listed). Our process is to make our determinations of preclusion on a nationwide basis to ensure that the species most in need of listing will be addressed first and also because we allocate our listing budget on a nationwide basis. The $8,808,000 is being used to fund work in the following categories: compliance with court orders and court-approved settlement agreements requiring that petition findings or listing determinations be completed by a specific date; section 4 (of the Act) listing actions with absolute statutory deadlines; essential litigation-related, administrative, and listing program management functions; and high-priority listing actions for some of our candidate species. The allocations for each specific listing action are identified in the Service's FY 2009 Allocation Table (part of our administrative record).

In FY 2007, we had more than 120 species with an LPN of 2, based on our September 21, 1983, guidance for assigning an LPN for each candidate species (48 FR 43098). Using this guidance, we assign each candidate an LPN of 1 to 12, depending on the magnitude of threats (high vs. moderate to low), immediacy of threats (imminent or nonimminent), and taxonomic status of the species (in order of priority: monotypic genus (a species that is the sole member of a genus); species; or part of a species (subspecies, distinct population segment, or significant portion of the range)). The lower the listing priority number, the higher the listing priority (that is, a species with an LPN of 1 would have the highest listing priority). Because of the large number of high-priority species, we further ranked the candidate species with an LPN of 2 by using the following extinction-risk type criteria: International Union for the Conservation of Nature and Natural Resources (IUCN) Red list status/rank, Heritage rank (provided by NatureServe), Heritage threat rank (provided by NatureServe), and species currently with fewer than 50 individuals, or 4 or fewer populations. Those species with the highest IUCN rank (critically endangered), the highest Heritage rank (G1), the highest Heritage threat rank (substantial, imminent threats), and currently with fewer than 50 individuals, or fewer than 4 populations, comprised a list of approximately 40 candidate species (''Top 40''). These 40 candidate species have had the highest priority to receive funding to work on a proposed listing determination. As we work on proposed and final listing rules for these 40 candidates, we are applying the ranking criteria to the next group of candidates with LPN of 2 and 3 to determine the next set of highest priority candidate species.

To be more efficient in our listing process, as we work on proposed rules for these species in the next several years, we are preparing multi-species proposals when appropriate, and these may include species with lower priority if they overlap geographically or have the same threats as a species with an LPN of 2. In addition, available staff resources are also a factor in determining high-priority species provided with funding. Finally, proposed rules for reclassification of threatened species to endangered are lower priority, because as listed species, they are already afforded the protection of the Act and implementing regulations.

We assigned the lower Colorado River basin DPS of the roundtail chub an LPN of 9, based on our finding that the subspecies faces threats that are imminent and of moderate magnitude, including the present or threatened destruction, modification or curtailment of its habitat; the impacts of nonnative species; and the inadequacy of existing regulatory mechanisms. We consider the threat magnitude moderate because, while all populations are experiencing threats, the populations occur in multiple watersheds, and the threats acting on the DPS are not occurring uniformly throughout the range of the species; therefore not all populations are likely to be impacted simultaneously by any of the known threats. Additionally, the existence of conservation agreements has resulted in the implementation of actions to improve the status of the DPS and reduce the severity of threats. We anticipate that these conservation agreements will continue to benefit the species with additional actions to improve status and reduce or eliminate threats. Although implemented too recently to assess, recent efforts to create new populations of the DPS in relatively threat-free habitats may prove to be successful, and additional restoration efforts are being planned.

We consider the threats imminent because they are currently occurring in all of the existing populations. Under the 1983 Guidelines (48 FR 43098), a subspecies or DPS receives a lower priority than a full species and a full species receives a lower priority than a monotypic genus, thus a DPS facing imminent moderate-magnitude threats is assigned an LPN of 9. Therefore, work on a proposed listing determination for the lower Colorado River basin DPS of roundtail chub is precluded by work on higher priority candidate species (*i.e.,* entities with LPN of 8 or lower); listing actions with absolute statutory, court ordered, or court-approved deadlines; and final listing determinations for those species that were proposed for listing with funds from FY 2008. This work includes all the actions listed in the tables below under expeditious progress.

As explained above, a determination that listing is warranted but precluded must also demonstrate that expeditious progress is being made to add or remove qualified species to and from the Lists of Endangered and Threatened Wildlife and Plants. (Although we do not discuss it in detail here, we are also making expeditious progress in removing species from the list under the Recovery program, which is funded by a separate line item in the budget of the Endangered Species Program. As explained above in our description of the statutory cap on Listing Program funds, the Recovery Program funds and actions supported by them cannot be considered in determining expeditious progress made in the Listing Program.) As with our ''precluded'' finding, expeditious progress in adding qualified species to the Lists is a function of the resources available and the competing demands for those funds. Given that limitation, we find that we are making progress in FY 2009 in the Listing Program. This progress included preparing and publishing the following determinations:

FY 2009 COMPLETED LISTING ACTIONS

Publication date	Title	Actions	FR pages
10/15/2008	90-Day Finding on a Petition To List the Least Chub	Notice of 90-day Petition Finding, Substantial	73 FR 61007–61015
10/21/2008	Listing 48 Species on Kauai as Endangered and Designating Critical Habitat	Proposed Listing, Endangered; Proposed Critical Habitat.	73 FR 62591–62742
10/24/2008	90-Day Finding on a Petition to List the Sacramento Valley Tiger Beetle as Endangered	Notice of 90-day Petition Finding, Not substantial	73 FR 63421–63424
10/28/2008	90-Day Finding on a Petition To List the Dusky Tree Vole as Threatened or Endangered	Notice of 90-day Petition Finding, Substantial	73 FR 63919–63926
11/25/2008	12-Month Finding on a Petition To List the Northern Mexican Gartersnake as Threatened or Endangered With Critical Habitat; Proposed Rule	Notice of 12-month petition finding, Warranted but precluded.	73 FR 71787–71826
12/02/2008	90-Day Finding on a Petition To List the Black-tailed Prairie Dog as Threatened or Endangered	Notice of 90-day Petition Finding, Substantial	73 FR 73211–73219
12/05/2008	90-Day Finding on a Petition To List the Sacramento Mountains Checkerspot Butterfly as Endangered with Critical Habitat	Notice of 90-day Petition Finding, Substantial	73 FR 74123–74129
12/18/2008	90-Day Finding on a Petition to Change the Listing Status of the Canada Lynx	Notice of 90-day Petition Finding, Substantial	73 FR 76990–76994
1/06/2009	Partial 90-Day Finding on a Petition To List 475 Species in the Southwestern United States as Threatened or Endangered With Critical Habitat	Notice of 90-day Petition Finding, Not substantial	74 FR 419–427
2/05/2009	Partial 90-Day Finding on a Petition To List 206 Species in the in the Midwest and Western United States as Threatened or Endangered With Critical Habitat	Notice of 90-day Petition Finding, Not substantial	74 FR 6122–6128
2/10/2009	90-Day Finding on a Petition To List the Wyoming Pocket Gopher as Threatened or Endangered With Critical Habitat	Notice of 90-day Petition Finding, Substantial	74 FR 6558–6563
3/17/2009	Listing *Phyllostegia hispida* as Endangered Throughout Its Range	Final Listing Endangered	74 FR 11319–11327
3/25/2009	12-Month Finding on a Petition to List the Yellow-Billed Loon as Threatened or Endangered	Notice of 12-month petition finding, Warranted but precluded.	74 FR 12931–12968
4/09/2009	12-Month Finding on a Petition to List the San Francisco Bay-Delta Population of the Longfin Smelt as Endangered	Notice of 12-month petition finding, Not warranted.	74 FR 16169–16175
4/22/2009	90-Day Finding on a Petition To List the Tehachapi Slender Salamander as Threatened or Endangered	Notice of 90-day Petition Finding, Substantial	74 FR 18336–18341
5/07/2009	90-Day Finding on a Petition To List the American Pika as Threatened or Endangered with Critical Habitat	Notice of 90-day Petition Finding, Substantial	74 FR 21301–21310
5/-/2009	12-Month Finding on a Petition to List the Coaster Brook Trout as Endangered	Notice of 12-month petition finding, Not warranted.	74 FR 23376 23376–23388
6/09/2009	90-Day Finding on a Petition to List *Oenothera acutissima* as Threatened or Endangered	Notice of 90-day Petition Finding, Not substantial	74 FR 27266–27271

Our expeditious progress also included work on listing actions, which we funded in FY 2009 but have not yet been completed to date. These actions are listed below. Actions in the top section of the table are being conducted under a deadline set by a court. Actions in the middle section of the table are being conducted to meet statutory timelines, that is, timelines required under the Act. Actions in the bottom section of the table are high priority listing actions. These actions include work primarily on species with an LPN of 2, and selection of these species is partially based on available staff resources, and when appropriate, include species with a lower priority if they overlap geographically or have the same threats as the species with the high priority. Including these species together in the same proposed rule results in considerable savings in time and funding, when compared to preparing separate proposed rules for each of them in the future.

ACTIONS FUNDED IN FY 2009 BUT NOT YET COMPLETED

Species	Action
Actions Subject to Court Order/Settlement Agreement	
Slickspot peppergrass	Final listing determination.
Coastal cutthroat trout	Final listing determination.
Mono basin sage-grouse	12-month petition finding.
Sacramento Mtns. checkerspot butterfly	12-month petition finding.

ACTIONS FUNDED IN FY 2009 BUT NOT YET COMPLETED—Continued

Species	Action
SW Bald eagle population	12-month petition finding.
Black-tailed prairie dog	12-month petition finding.
Lynx (include New Mexico in listing.)	12-month petition finding.
White-tailed prairie dog	12-month petition finding.
Big Lost River whitefish	12-month petition finding.
Hermes copper butterfly	90-day petition finding.
Thorne's hairstreak butterfly	90-day petition finding.
Actions With Statutory Deadlines	
48 Kauai species	Final listing determination.
Black-footed albatross	12-month petition finding.
Mount Charleston blue butterfly	12-month petition finding.
Goose Creek milk-vetch	12-month petition finding.
Mojave fringe-toed lizard [1]	12-month petition finding.
Pygmy rabbit (rangewide) [1]	12-month petition finding.
Kokanee—Lake Sammamish population [1]	12-month petition finding.
Ashy storm petrel	12-month petition finding.
Delta smelt (uplisting)	12-month petition finding.
Cactus ferruginous pygmy owl [1]	12-month petition finding.
Tucson shovel-nosed snake [1]	12-month petition finding.
Northern leopard frog	12-month petition finding.
Tehachapi slender salamander	12-month petition finding.
Northern leopard frog	90-day petition finding.
4 subspecies of *Pseudocopaeodes enunus*	90-day petition finding.
Southeastern pop snowy plover & wintering pop. of piping plover	90-day petition finding.
Berry Cave salamander [1]	90-day petition finding.
Ozark chinquapin [1]	90-day petition finding.
Smooth-billed ani	90-day petition finding.
Bay Springs salamander [1]	90-day petition finding.
Mojave ground squirrel [1]	90-day petition finding.
Llanero coqui	90-day petition finding.
Gopher tortoise—eastern population	90-day petition finding.
Mojave ground squirrel	90-day petition finding.
Pacific walrus	90-day petition finding.
32 species of snails and slugs	90-day petition finding.
Calopogon oklahomensis	90-day petition finding.
Susan's purse-making caddisfly	90-day petition finding.
Striped newt	90-day petition finding.
American dipper—Black Hills population	90-day petition finding.
Sprague's pipit	90-day petition finding.
Southern hickorynut	90-day petition finding.
5 Southwest mussel species	90-day petition finding.
Sonoran desert tortoise	90-day petition finding.
Chihuahua scarfpea	90-day petition finding.
Jemez Mtns. salamander	90-day petition finding.
White-sided jackrabbit	90-day petition finding.
Wrights marsh thistle	90-day petition finding.
White-bark pine	90-day petition finding.
Puerto Rico harlequin	90-day petition finding.
Fisher—Northern Rocky Mtns. population	90-day petition finding.
42 snail species (Nevada & Utah)	90-day petition finding.
HI yellow-faced bees	90-day petition finding.
206 species (partially completed)	90-day petition finding.
475 Southwestern species (partially completed)	90-day petition finding.
High Priority Listing Actions [3]	
19 Oahu candidate species (16 plants, 3 damselflies) (15 with LPN = 2, 3 with LPN = 3, 1 with LPN = 9)	Proposed listing.
2 HI damselflies (LPN = 2)	Proposed listing.
17 Maui-Nui candidate species (14 plants, 3 tree snails) (12 with LPN = 2, 3 with LPN = 3, 3 with LPN = 8)	Proposed listing.
Sand dune lizard (LPN = 2)	Proposed listing.
2 Arizona springsnails (*Pyrgulopsis bernadina* (LPN = 2), *Pyrgulopsis trivialis* (LPN = 2))	Proposed listing.
2 New Mexico springsnails (*Pyrgulopsis chupaderae* (LPN = 2), *Pyrgulopsis thermalis* (LPN = 11))	Proposed listing.
2 mussels (rayed bean (LPN = 2), snuffbox No LPN)	Proposed listing.
2 mussels (sheepnose (LPN = 2), spectaclecase (LPN = 4),)	Proposed listing.
Ozark hellbender [2] (LPN = 3)	Proposed listing.
3 southeast aquatic species [1] (Georgia pigtoe, interrupted rocksnail, rough hornsnail) (all with LPN = 2)	Proposed listing.
Altamaha spinymussel (LPN = 2)	Proposed listing.
5 southeast fish (rush darter (LPN = 2), chucky madtom (LPN = 2), yellowcheek darter (LPN = 2), Cumberland darter (LPN = 5), laurel dace (LPN = 5)).	Proposed listing.

ACTIONS FUNDED IN FY 2009 BUT NOT YET COMPLETED—Continued

Species	Action
8 southeast mussels (southern kidneyshell (LPN = 2), round ebonyshell (LPN = 2), Alabama pearshell (LPN = 2), southern sandshell (LPN = 5), fuzzy pigtoe (LPN = 5), Choctaw bean (LPN = 5), narrow pigtoe (LPN = 11), and tapered pigtoe (LPN = 11)).	Proposed listing.
3 Colorado plants (Pagosa skyrocket (*Ipomopsis polyantha*) (LPN = 2), Parchute beardtongue (*Penstemon debilis*) (LPN = 2), Debeque phacelia (*Phacelia submutica*) (LPN = 8)).	Proposed listing.
Casey's june beetle (LPN = 2)	Proposed listing.

[1] Funds for listing actions for these species were provided in previous FYs.
[2] We funded a proposed rule for this subspecies with an LPN of 3 ahead of other species with LPN of 2, because the threats to the species were so imminent and of a high magnitude that we considered emergency listing if we were unable to fund work on a proposed listing rule in FY 2008.
[3] Funds for these high priority listing actions were provided in FY 2008 and 2009.

We have endeavored to make our listing actions as efficient and timely as possible, given the requirements of the relevant law and regulations, and constraints relating to workload and personnel. We are continually considering ways to streamline processes or achieve economies of scale, such as by batching related actions together. Given our limited budget for implementing section 4 of the Act, these actions described above collectively constitute expeditious progress.

The lower Colorado River basin DPS of roundtail chub will be added to the list of candidate species upon publication of this 12-month finding. We will continue to monitor the status of this species as new information becomes available. This review will determine if a change in status is warranted, including the need to make prompt use of emergency listing procedures.

We intend that any proposed listing action for the lower Colorado River basin DPS of roundtail chub will be as accurate as possible. Therefore, we will continue to accept additional information and comments from all concerned governmental agencies, the scientific community, industry, or any other interested party concerning this finding.

References Cited

A complete list of all references cited in this document is available upon request from the Field Supervisor at the Arizona Ecological Services Office (see **ADDRESSES** section).

Author

The primary authors of this document are the staff members of the Arizona Ecological Services Office (see **ADDRESSES** section).

Authority

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

Dated: June 24, 2009.

Marvin E. Moriarty,

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

[FR Doc. E9–15828 Filed 7–6–09; 8:45 am]

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S. 614/P.L. 111–40
To award a Congressional Gold Medal to the Women Airforce Service Pilots ("WASP"). (July 1, 2009; 123 Stat. 1958)

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