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FEDERAL RESERVE SYSTEM

12 CFR Part 229

[Regulation CC; Docket No. R–1382]

Availability of Funds and Collection of Checks

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board of Governors (Board) is amending the routing number guide to next-day availability checks and local checks in Regulation CC to delete the reference to the head office of the Federal Reserve Bank of Atlanta and to reassign the Federal Reserve routing symbols currently listed under that office to the head office of the Federal Reserve Bank of Cleveland. These amendments reflect the restructuring of check-processing operations within the Federal Reserve System. Subsequent to these amendments, there will only be a single check-processing region for purposes of Regulation CC and there will no longer be any checks that are nonlocal.

DATES: The final rule will become effective on February 27, 2010.

FOR FURTHER INFORMATION CONTACT: Jeffrey S. H. Yeganeh, Financial Services Manager (202/728–5801), or Joseph P. Baressi, Financial Services Project Leader (202/452–3959), Division of Reserve Bank Operations and Payment Systems; or Dena L. Milligan, Attorney (202/452–3900), Legal Division. For users of Telecommunications Devices for the Deaf (TDD) only, contact 202/263–4869.

SUPPLEMENTARY INFORMATION: Regulation CC establishes the maximum period a depositary bank may wait between receiving a deposit and making the deposited funds available for withdrawal.[1] A depositary bank generally must provide faster availability for funds deposited by a ''local check'' than by a ''nonlocal check.'' A check is considered local if it is payable by or at or through a bank located in the same Federal Reserve check-processing region as the depositary bank.

Appendix A to Regulation CC contains a routing number guide that assists banks in identifying local and nonlocal banks and thereby determining the maximum permissible hold periods for most deposited checks. The appendix includes a list of each Federal Reserve check-processing office and the first four digits of the routing number, known as the Federal Reserve routing symbol, of each bank that is served by that office for check-processing purposes. Banks whose Federal Reserve routing symbols are grouped under the same office are in the same check-processing region and thus are local to one another.

On February 27, 2010, the Reserve Banks will transfer the check-processing operations of the head office of the Federal Reserve Bank of Atlanta to the head office of the Federal Reserve Bank of Cleveland. As a result of this change, some checks that are drawn on and deposited at banks located in the Atlanta and Cleveland check-processing regions and that currently are nonlocal checks will become local checks subject to faster availability schedules. To assist banks in identifying local and nonlocal checks and making funds availability decisions, the Board is amending the lists of routing symbols in appendix A associated with the Federal Reserve Banks of Atlanta and Cleveland to reflect the transfer of check-processing operations from the head office of the Federal Reserve Bank of Atlanta to the head office of the Federal Reserve Bank of Cleveland. To coincide with the effective date of the underlying check-processing changes, the amendments to appendix A are effective February 27, 2010. At that time, there will only be a single check-processing region for purposes of Regulation CC and there will no longer be any checks that are nonlocal. The Board is providing notice of the amendments at this time to give affected banks ample time to make any needed processing changes. Early notice also will enable affected banks to amend their availability schedules and related disclosures if necessary and provide their customers with notice of these changes.[2]

Administrative Procedure Act

The public comment requirements of section 553(b) of the Administrative Procedure Act do not apply to these amendments to Appendix A of Regulation CC because the amendments involve matters of agency organization. The Monetary Control Act requires cost recovery for Federal Reserve Bank priced services over the long term, which from time to time necessitates changes in the internal organization of Reserve Bank services in order to meet the statutory mandate. The rapid decline in paper check volumes, generally, and the decline in paper checks sent to the Reserve Banks for collection have significantly reduced the need for Federal Reserve check-processing locations and the ability of Reserve Banks to recover the costs of maintaining those locations. In order to achieve the Monetary Control Act requirement of long-run full cost recovery, the Reserve Banks have adjusted their check service infrastructure to reduce the number of check-processing regions. In light of the fact that the Reserve Banks are receiving a high percentage of checks electronically, the consolidation of check-processing centers is required in order to meet the mandate of the Monetary Control Act. As a result of the consolidation of Federal Reserve check-processing offices, amendments to Appendix A are necessary because the statutory and regulatory terms ''local'' and ''nonlocal'' are defined in terms of ''check-processing regions''—the geographic areas served by a Federal Reserve check-processing office.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR part 1320, appendix A.1), the Board has reviewed the final rule under authority delegated to the Board by the Office of Management and Budget. The

[1] For purposes of Regulation CC, the term ''bank'' refers to any depository institution, including commercial banks, savings institutions, and credit unions.

[2] Section 229.18(e) of Regulation CC requires that banks notify account holders who are consumers within 30 days after implementing a change that improves the availability of funds.

amendments to appendix A of Regulation CC will delete the reference to the head office of the Federal Reserve Bank of Atlanta and reassign the routing symbols listed under that office to the head office of the Federal Reserve Bank of Cleveland. The depository institutions that are located in the affected check-processing regions and that include the routing numbers in their disclosure statements would be required to notify customers of the resulting change in availability under § 229.18(e). However, all paperwork collection procedures associated with Regulation CC already are in place, and the Board accordingly anticipates that no additional burden will be imposed as a result of this rulemaking.

List of Subjects in 12 CFR Part 229

Banks, Banking, Reporting and recordkeeping requirements.

Authority and Issuance

■ For the reasons set forth in the preamble, the Board is amending 12 CFR part 229 to read as follows:

PART 229—AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS (REGULATION CC)

■ 1. The authority citation for part 229 continues to read as follows:

Authority: 12 U.S.C. 4001–4010, 12 U.S.C. 5001–5018.

■ 2. In appendix A, the Fourth and Sixth District routing symbol lists are amended by removing the headings and listings for the Sixth Federal Reserve District and revising the listings for the Fourth Federal Reserve District to read as follows:

Appendix A to Part 229—Routing Number Guide to Next-Day Availability Checks and Local Checks

* * * * *

Fourth Federal Reserve District

[Federal Reserve Bank of Cleveland]

Head Office

0110 [1]	2110
0111	2111
0112	2112
0113	2113
0114	2114
0115	2115
0116	2116
0117	2117
0118	2118
0119	2119
0210	2210
0211	2211
0212	2212
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0214	2214
0215	2215
0216	2216
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0610	2610
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0641	2641
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0650	2650
0651	2651
0652	2652
0653	2653
0654	2654
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0660	2660
0670	2670
0710	2710
0711	2711
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0719	2719
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0724	2724
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0739	2739
0740	2740
0749	2749
0750	2750
0759	2759
0810	2810
0812	2812
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0815	2815
0819	2819
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0841	2841
0842	2842
0843	2843
0863	2863
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0910	2910
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0929	2929
0960	2960
1010	3010
1011	3011
1012	3012
1019	3019
1020	3020
1021	3021
1022	3022
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1040	3040
1041	3041
1049	3049
1070	3070
1110	3110
1111	3111
1113	3113
1119	3119
1120	3120
1122	3122
1123	3123
1130	3130
1131	3131
1140	3140
1149	3149
1163	3163
1210	3210
1211	3211
1212	3212
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1232	3232
1233	3233
1240	3240
1241	3241
1242	3242
1243	3243
1250	3250
1251	3251

1252	3252

[1] The first two digits identify the bank's Federal Reserve District. For example, 01 identifies the First Federal Reserve District (Boston), and l2 identifies the Twelfth District (San Francisco). Adding 2 to the first digit denotes a thrift institution. For example, 21 identifies a thrift in the First District, and 32 denotes a thrift in the Twelfth District.

* * * * *

By order of the Board of Governors of the Federal Reserve System, acting through the Secretary of the Board under delegated authority, December 30, 2009.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. E9–31254 Filed 1–4–10; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–1225; Directorate Identifier 2009–NM–257–AD; Amendment 39–16159; AD 2010–01–03]

RIN 2120–AA64

Airworthiness Directives; Fire Fighting Enterprises Limited Portable Halon 1211 Fire Extinguishers as Installed on Various Transport Airplanes, Small Airplanes, and Rotorcraft

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

The Civil Aviation Authority of the United Kingdom (UK) has informed EASA [European Aviation Safety Agency] that significant quantities of Halon 1211 gas, determined to be outside the required specification, have been supplied to the aviation industry for use in fire extinguishing equipment. * * *

* * * * *

* * * This Halon 1211 has subsequently been used to fill certain FFE [Fire Fighting Enterprises] portable cabin and toilet compartment fire extinguishers that are now likely to be installed in or carried on board aircraft.

The contaminated nature of this gas, when used against a fire, may provide reduced fire suppression, endangering the safety of the aircraft and its occupants. In addition, extinguisher activation may lead to release of toxic fumes, possibly causing injury to aircraft occupants.

* * * * *

This AD requires actions that are intended to address the unsafe condition described in the MCAI.

DATES: This AD becomes effective January 20, 2010.

We must receive comments on this AD by February 19, 2010.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued Emergency Airworthiness Directive 2009–0251–E, dated November 25, 2009, and Airworthiness Directive 2009–0262, dated December 15, 2009 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. EASA AD 2009–0251–E states:

The Civil Aviation Authority of the United Kingdom (UK) has informed EASA that significant quantities of Halon 1211 gas, determined to be outside the required specification, have been supplied to the aviation industry for use in fire extinguishing equipment. Halon 1211 (BCF) is used in handheld fire extinguishers, usually fitted or stowed in aircraft cabins.

EASA published Safety Information Bulletin (SIB) 2009–39 on 23 October 2009 to make the aviation community aware of this safety concern.

The results of the ongoing investigation now show that LyonTech Engineering Ltd, a UK-based company, has supplied a quantity of heavily contaminated Halon 1211 (BCF) to Fire Fighting Enterprises (FFE). This Halon 1211 has subsequently been used to fill certain FFE portable fire extinguishers that are now likely to be installed in or carried on board aircraft.

The contaminated nature of this gas, when used against a fire, may lead to release of toxic fumes, possibly causing injury to aircraft occupants.

For the reason described above, this EASA AD requires the identification and removal from service of all affected fire extinguishers and replacement with serviceable units.

EASA AD 2009–0262 adds the following:

* * * On 25 November 2009, EASA Emergency AD 2009–0251E was published to address an earlier batch of extinguishers with contaminated Halon 1211.

The results of the ongoing investigation have now established that LyonTech Engineering Ltd, a UK-based company, has supplied further consignments of Halon 1211 (BCF) to Fire Fighting Enterprises (FFE) that do not meet the required specification. This Halon 1211 has subsequently been used to fill certain FFE portable cabin and toilet compartment fire extinguishers that are now likely to be installed in or carried on board aircraft.

The contaminated nature of this gas, when used against a fire, may provide reduced fire suppression, endangering the safety of the aircraft and its occupants. In addition, extinguisher activation may lead to release of toxic fumes, possibly causing injury to aircraft occupants.

* * * * *

You may obtain further information by examining the MCAI in the AD docket.

FAA's Determination and Requirements of This AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are issuing this AD because we evaluated all pertinent information and determined the unsafe condition exists and is likely to exist or

develop on other products of the same type design.

Differences Between the AD and the MCAI

We have reviewed the MCAI and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have required different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a Note within the AD.

FAA's Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because contaminated Halon 1211 gas has been used to fill certain portable cabin and toilet compartment fire extinguishers that are now likely to be installed in or carried on board aircraft. The contaminated nature of this gas, when used against a fire, may provide reduced fire suppression, endangering the safety of the aircraft and its occupants. In addition, extinguisher activation may lead to release of toxic fumes, possibly causing injury to aircraft occupants. Therefore, we determined that notice and opportunity for public comment before issuing this AD are impracticable and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2009–1225; Directorate Identifier 2009–NM–257–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this AD.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

1. Is not a "significant regulatory action" under Executive Order 12866;

2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2010–01–03 Fire Fighting Enterprises Limited: Amendment 39–16159. Docket No. FAA–2009–1225; Directorate Identifier 2009–NM–257–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective January 20, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to portable Halon 1211 (BCF) fire extinguishers manufactured by Fire Fighting Enterprises Limited. These fire extinguishers may be installed on (or carried or stowed on board) various transport airplanes, small airplanes, and rotorcraft, certificated in any category, identified in but not limited to the airplanes and rotorcraft of the manufacturers included in Table 1 of this AD, all type-certificated models.

TABLE 1—AFFECTED AIRPLANES AND ROTORCRAFT

Manufacturer	Product subtype
328 Support Services GmbH (Type Certificate previously held by AvCraft Aerospace GmbH; Fairchild Dornier GmbH; Dornier Luftfahrt GmbH).	Transport Airplane.
Aermacchi S.p.A	Small Airplane.
Agusta S.p.A	Rotorcraft.
AgustaWestland	Rotorcraft.
Airbus (Type Certificate previously held by Airbus Industrie)	Transport Airplane.
Aircraft Industries a.s. (Type Certificate previously held by LETECKÉ ZÁVODY a.s.; LET Aeronautical Works)	Small Airplane.
Alenia Aeronautica	Transport Airplane.

TABLE 1—AFFECTED AIRPLANES AND ROTORCRAFT—Continued

Manufacturer	Product subtype
B–N Group Ltd (Type Certificate previously held by Pilatus Britten-Norman Limited; Britten-Norman (Bembridge) Limited).	Small Airplane.
BAE Systems (Operations) Limited (Type Certificate previously held by British Aerospace Regional Aircraft; British Aerospace (Commercial Aircraft) Limited; Jetstream Aircraft Limited; British Aerospace, PLC; Avro International Aerospace Division; British Aerospace).	Transport Airplane.
The Boeing Company	Transport Airplane.
Empresa Brasileira de Aeronautica S.A. (EMBRAER)	Transport Airplane.
Eurocopter Deutschland GMBH (ECD) (Type Certificate previously held by Messerschmitt-Bolkow-Blohm-Gmbh)	Rotorcraft.
Eurocopter France	Rotorcraft.
Fokker Services B.V	Transport Airplane.
Hawker Beechcraft (Type Certificate previously held by Raytheon Aircraft Company; Beech Aircraft Corporation)	Small Airplane.
Pilatus Aircraft Ltd	Small Airplane.
Saab AB, Saab Aerosystems (Type Certificate previously held by SAAB AIRCRAFT AB; SAAB-Fairchild)	Transport Airplane.
Short Brothers PLC (Type Certificate previously held by Short Brothers, Ltd.)	Transport Airplane.
Triton America LLC (Type Certificate previously held by AAI Acquisition, Inc; Adam Aircraft)	Small Airplane.
Vulcanair S.p.A. (Type Certificate previously held by Partenavia Costruzioni Aeronautiche S.p.A)	Small Airplane.

Subject

(d) Air Transport Association (ATA) of America Code 26: Fire Protection.

Reason

(e) The mandatory continuing airworthiness information (MCAI) consists of two European Aviation Safety Agency (EASA) ADs: 2009–0251–E, dated November 25, 2009, and 2009–0262, dated December 15, 2009. EASA AD 2009–0251–E states:

The Civil Aviation Authority of the United Kingdom (UK) has informed EASA that significant quantities of Halon 1211 gas, determined to be outside the required specification, have been supplied to the aviation industry for use in fire extinguishing equipment. Halon 1211 (BCF) is used in handheld fire extinguishers, usually fitted or stowed in aircraft cabins.

EASA published Safety Information Bulletin (SIB) 2009–39 on 23 October 2009 to make the aviation community aware of this safety concern.

The results of the ongoing investigation now show that LyonTech Engineering Ltd, a UK-based company, has supplied a quantity of heavily contaminated Halon 1211 (BCF) to Fire Fighting Enterprises (FFE). This Halon 1211 has subsequently been used to fill certain FFE portable fire extinguishers that are now likely to be installed in or carried on board aircraft.

The contaminated nature of this gas, when used against a fire, may lead to release of toxic fumes, possibly causing injury to aircraft occupants.

For the reason described above, this EASA AD requires the identification and removal from service of all affected fire extinguishers and replacement with serviceable units.

EASA AD 2009–0262 adds the following:

* * * * *

* * * On 25 November 2009, EASA Emergency AD 2009–0251E was published to address an earlier batch of extinguishers with contaminated Halon 1211.

The results of the ongoing investigation have now established that LyonTech Engineering Ltd, a UK-based company, has supplied further consignments of Halon 1211 (BCF) to Fire Fighting Enterprises (FFE) that do not meet the required specification. This Halon 1211 has subsequently been used to fill certain FFE portable cabin and toilet compartment fire extinguishers that are now likely to be installed in or carried on board aircraft.

The contaminated nature of this gas, when used against a fire, may provide reduced fire suppression, endangering the safety of the aircraft and its occupants. In addition, extinguisher activation may lead to release of toxic fumes, possibly causing injury to aircraft occupants.

* * * * *

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Actions

(g) Do the following actions.

(1) Within 90 days after the effective date of this AD, replace portable Halon 1211 (BCF) fire extinguishers manufactured by Fire Fighting Enterprises Limited with serviceable fire extinguishers; except as provided by paragraph (g)(2) of this AD.

(2) Fire extinguishers identified in paragraphs (g)(2)(i) and (g)(2)(ii) of this AD are not required to be replaced.

(i) Fire extinguishers conclusively determined to have been most recently filled with Halon 1211 supplied by a company other than LyonTech Engineering Limited.

(ii) Fire extinguishers that have been most recently filled by LyonTech Engineering Limited and that are conclusively determined by Fire Fighting Enterprises Limited to be filled with Halon 1211 that meets their design specification for Halon purity.

(3) As of the effective date of this AD, do not install any portable fire extinguisher manufactured by Fire Fighting Enterprises Limited unless it has been conclusively determined that the last time it was filled, it was filled with Halon 1211 supplied by a company other than LyonTech Engineering Limited; or it has been conclusively determined by Fire Fighting Enterprises Limited that the last time it was filled, it was filled with Halon 1211 that meets their design specification for Halon purity.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows:

(1) EASA ADs 2009–0251–E and 2009–0262 specify to inspect for certain fire extinguishers manufactured by Fire Fighting Enterprises Limited and replace if necessary. This AD requires replacing all fire extinguishers manufactured by Fire Fighting Enterprises Limited except as provided in paragraph (g)(2) of this AD.

(2) EASA AD 2009–0251–E specifies a time of 2 days to do the actions and EASA AD 2009–0262 specifies a time of 30 days to do the actions. This AD requires that the actions be done within 90 days. We have determined that a 90-day compliance time will ensure an acceptable level of safety.

Other FAA AD Provisions

(h) The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The manager of the office having certificate responsibility for the affected product has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, will coordinate requests for approval of AMOCs with the manager of the appropriate office for the affected product. Send information to ATTN: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(2) Airworthy Product: For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated

agent). You are required to assure the product is airworthy before it is returned to service.

(3) Reporting Requirements: For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(i) Refer to MCAI EASA Emergency Airworthiness Directive 2009–0251–E, dated November 25, 2009; and EASA Airworthiness Directive 2009–0262, dated December 15, 2009; for related information.

Material Incorporated by Reference

(j) None.

Issued in Washington, DC, on December 28, 2009.

Kalene C. Yanamura,

Acting Director, Aircraft Certification Service.

[FR Doc. E9–31134 Filed 1–4–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0785; Directorate Identifier 2009–NM–125–AD; Amendment 39–16163; AD 2010–01–06]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. (Type Certificate Previously Held by de Havilland, Inc.) Model DHC–8–400 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are superseding an existing airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

There has been one case reported of failure of a shaft (tailstock) on an elevator Power Control Unit (PCU), Part Number (P/N) 390600–1007. Continued actuation of the affected PCU caused damage to the surrounding structure. * * *

Each elevator surface has three PCUs, powered by separate independent hydraulic systems, and a single elevator PCU shaft failure may remain dormant. Such a dormant loss of redundancy, coupled with the potential for a failed shaft to produce collateral damage, including damage to hydraulic lines, could possibly affect the controllability of the aircraft.

* * * * *

We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective February 9, 2010.

On June 26, 2009 (74 FR 27686, June 11, 2009), the Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Cesar Gomez, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7318; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on September 4, 2009 (74 FR 45787), and proposed to supersede AD 2009–12–13, Amendment 39–15936 (74 FR 27686, June 11, 2009). That NPRM proposed to correct an unsafe condition for the specified products.

When we issued AD 2009–12–13, the eventual replacement of all elevator power control units identified in paragraph (f)(1) of that AD was not required. We have now determined that further rulemaking is necessary for this action, and this AD follows from that determination. We are mandating the optional terminating action in paragraph (f)(3) of AD 2009–12–13 in this AD. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Explanation of Change to Alternative Method of Compliance Paragraph

We have updated paragraph (h)(1) of this AD to provide the appropriate contact information to use when submitting requests for approval of an alternative method of compliance (AMOC).

Explanation of Changes Made to This AD

We have revised this AD to identify the legal name of the manufacturer as published in the most recent type certificate data sheet for the affected airplane models.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD with the changes described previously. We determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have required different actions in this AD from those in the MCAI in order to follow our FAA policies. Any such differences are highlighted in a Note within the AD.

Costs of Compliance

We estimate that this AD will affect about 61 products of U.S. registry.

The actions that are required by AD 2009–12–13 and retained in this AD take about 3 work-hours per product, at an average labor rate of $80 per work hour. Based on these figures, the estimated cost of the currently required actions is $240 per product.

We estimate that it will take about 13 work-hours per product to comply with the new basic requirements of this AD. The average labor rate is $80 per work-hour. Required parts will cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $63,440, or $1,040 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Amendment 39–15936 (74 FR 27686, June 11, 2009) and adding the following new AD:

2010–01–06 Bombardier, Inc. (Type Certificate Previously Held by de Havilland, Inc.): Amendment 39–16163. Docket No. FAA–2009–0785; Directorate Identifier 2009–NM–125–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective February 9, 2010.

Affected ADs

(b) This AD supersedes AD 2009–12–13, Amendment 39–15936.

Applicability

(c) This AD applies to Bombardier, Inc. (Type Certificate previously held by de Havilland, Inc.) Model DHC–8–400, DHC–8–401, and DHC–8–402 airplanes, certificated in any category, serial numbers 4135 through 4149 inclusive.

Subject

(d) Air Transport Association (ATA) of America Code 27: Flight Controls.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

There has been one case reported of failure of a shaft (tailstock) on an elevator Power Control Unit (PCU), Part Number (P/N) 390600–1007. Continued actuation of the affected PCU caused damage to the surrounding structure. Subsequent investigation determined that the failure was the result of a material defect and that the shafts installed on a total of 88 suspect PCUs * * * may contain a similar defect.

Each elevator surface has three PCUs, powered by separate independent hydraulic systems, and a single elevator PCU shaft failure may remain dormant. Such a dormant loss of redundancy, coupled with the potential for a failed shaft to produce collateral damage, including damage to hydraulic lines, could possibly affect the controllability of the aircraft.

This directive mandates an identification check for elevator PCU serial numbers, a daily check for correct operation of all suspect PCUs and, finally, replacement of all suspect PCUs.

Restatement of Requirements of AD 2009–12–13, Without Optional Terminating Action:

(f) Unless already done, do the following actions.

(1) Within 30 days after June 26, 2009 (the effective date of AD 2009–12–13), inspect the serial number of each of the six installed elevator PCUs having P/N 390600–1007. If one or more of the six installed elevator PCUs, P/N 390600–1007, have any of the PCU serial numbers 238, 698, 783 through 788 inclusive, 790, 793, 795, 802, 806, 807, 810, 820 through 823 inclusive, 826 through 828 inclusive, 831, 835, 838, 840, 886 through 889 inclusive, or 898 through 955 inclusive; without a suffix ''A'' after the serial number: Within 30 days after June 26, 2009, perform a check for the correct operation of all installed elevator PCUs in accordance with the procedures detailed in Appendix A, B, or C of Bombardier Q400 All Operator Message 217B, dated April 26, 2007. Repeat the check thereafter before the first flight of each day until the replacement specified in paragraph (g) of this AD is done. The checks in Appendices A and B of Bombardier Q400 All Operator Message 217B, dated April 26, 2007, must be performed by the flight crew, while the check specified in Appendix C of the all operator message must be performed by certificated maintenance personnel.

Note 1: Suffix ''A'' after the serial number indicates that the PCU has already passed a magnetic particle inspection and is cleared for continued use.

(2) If incorrect operation of any elevator PCU is found during any check required by paragraph (f)(1) of this AD, before further flight, replace the elevator PCU with a PCU, P/N 390600–1007, having a serial number not specified in paragraph (f)(1) of this AD; or with a PCU, P/N 390600–1007, having the suffix ''A'' after the serial number; in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 84–27–32, Revision A, dated January 18, 2008.

(3) Actions accomplished before June 26, 2009, according to Bombardier Service Bulletin 84–27–32, dated May 1, 2007, are considered acceptable for compliance with the corresponding action specified in this AD.

New Requirements of This AD

Actions and Compliance

(g) Unless already done, within 2,000 flight hours or 12 months after the effective date of this AD, whichever occurs later, replace all PCUs, P/N 390600–1007, having a serial number specified in paragraph (f)(1) of this AD, and not having suffix ''A'' after the serial number, with PCUs, P/N 390600–1007, having a serial number not specified in paragraph (f)(1) of this AD; or with PCUs, P/N 390600–1007, having the suffix ''A'' after the serial number; in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 84–27–32, Revision A, dated January 18, 2008. This action terminates the requirements of paragraph (f)(1) of this AD.

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(h) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office, ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Program Manager, Continuing Operational Safety, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone 516–228–7300; fax 516–794–5531. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to ensure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(i) Refer to MCAI Canadian Airworthiness Directive CF–2009–16, dated April 20, 2009; Bombardier Service Bulletin 84–27–32, Revision A, dated January 18, 2008; and Bombardier Q400 All Operator Message 217B, dated April 26, 2007; for related information.

Material Incorporated by Reference

(j) You must use Bombardier Service Bulletin 84–27–32, Revision A, dated January 18, 2008; and Bombardier Q400 All Operator Message 217B, dated April 26, 2007; as applicable; to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register previously approved the incorporation by reference of Bombardier Service Bulletin 84–27–32, Revision A, dated January 18, 2008; and Bombardier Q400 All Operator Message 217B, dated April 26, 2007; on June 26, 2009 (74 FR 27686, June 11, 2009).

(2) For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; e-mail thd.qseries@aero.bombardier.com; Internet *http://www.bombardier.com.*

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

(4) You may also review copies of the service information that is incorporated by reference 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.*

Issued in Renton, Washington, on December 23, 2009.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–31136 Filed 1–4–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2009–0690; Airspace Docket No. 09–AWP–6]

Establishment of Class E Airspace; Riverside/Rubidoux Flabob Airport, Riverside, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action will establish Class E airspace at Riverside/Rubidoux Flabob Airport, Riverside, CA, to accommodate aircraft using a new VHF Omni-Directional Radio Range (VOR) Standard Instrument Approach Procedure (SIAP) at Riverside/Rubidoux Flabob Airport. This will improve the safety of Instrument Flight Rules (IFR) aircraft executing the new VOR SIAPs at the airport. This action also makes an adjustment to the geographic coordinates of the airport.

DATES: Effective 0901 UTC, April 8, 2010. 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 October 14, 2009, the FAA published in the **Federal Register** a notice of proposed rulemaking to establish controlled airspace at Riverside/Rubidoux Flabob Airport, Riverside, CA (74 FR 52704). 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 7400.9T signed August 27, 2009, and effective September 15, 2009, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in that Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by establishing Class E airspace at Riverside/Rubidoux Flabob Airport, Riverside, CA. Controlled airspace extending upward from 700 feet above the surface is necessary to accommodate IFR aircraft executing new VOR SIAPs at Riverside/Rubidoux Flabob Airport. This action also adjusts the geographic coordinates of the airport to coincide with the FAA's National Aeronautical Charting Office.

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 controlled

airspace at Riverside/Rubidoux Flabob Airport, Riverside, CA.

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 7400.9T, Airspace Designations and Reporting Points, signed August 27, 2009, and effective September 15, 2009 is amended as follows:

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

* * * * *

AWP CA E5 Riverside/Rubidoux Flabob Airport, CA [New]

Flabob Airport, CA
(Lat. 33°59′20″ N., long. 117°24′36″ W.)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of Flabob Airport.

* * * * *

Issued in Seattle, Washington, on December 10, 2009.

H. Steve Karnes,

Acting Manager, Operations Support Group, Western Service Center.

[FR Doc. E9–30319 Filed 1–4–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[USCG–2008–0456]

RIN 1625–AA09

Drawbridge Operation Regulations; Harlem River, New York, NY

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard has changed the drawbridge operation regulations that govern the operation of the bridges across the Harlem River at New York City, New York. This final rule revises the drawbridge operation regulations by expanding the bridge opening periods and also removes redundant language and requirements that are no longer necessary.

DATES: This rule is effective February 4, 2010.

ADDRESSES: Comments and related material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket (USCG–2008–0456) and are available online at *http://www.regulations.gov*, inserting USCG–2008–0456 in the ''Keyword'' box, then clicking ''Search.'' This material is 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 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call Ms. Judy Leung-Yee, Project Officer, First Coast Guard District, telephone 212–668–7165. If you have questions on viewing the docket call Ms. Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On August 7, 2008, we published a notice of proposed rulemaking (NPRM) entitled ''Drawbridge Operation Regulations''; Harlem River, New York, in the **Federal Register** (73 FR 45922). We received two letters commenting on the proposed rule. No public meeting was requested, and none was held.

On November 10, 2008, we published a supplemental notice of proposed rulemaking (SNPRM) entitled ''Drawbridge Operation Regulations'', Harlem River, New York, in the **Federal Register** (73 FR 66571). We received one comment letter in response to our (SNPRM). No public meeting was requested, and none was held.

Background and Purpose

The drawbridge operation regulations for the Harlem River are listed at 33 CFR 117.789, and require all the moveable bridges across the Harlem River, except the Spuyten Duyvil Bridge, to open on signal from 10 a.m. to 5 p.m. after a four-hour notice is given. From 5 p.m. through 10 a.m., all the bridges, except the Spuyten Duyvil Bridge, are not required to open for vessel traffic.

The eleven moveable bridges across the Harlem River provide the following vertical clearances in the closed position:

The 103rd Street Bridge has a vertical clearance of 55 feet at mean high water, and 60 feet at mean low water in the closed position.

The 125th Street Bridge has a vertical clearance of 54 feet at mean high water and 59 feet at mean low water in the closed position.

The Willis Avenue Bridge has a vertical clearance of 24 feet at mean high water and 30 feet at mean low water in the closed position.

The Third Avenue Bridge has a vertical clearance of 25 feet at mean high water and 30 feet at mean low water in the closed position.

The Metro North Park Avenue Bridge has a vertical clearance of 25 feet at mean high water and 30 feet at mean low water in the closed position.

The Madison Avenue Bridge has a vertical clearance of 25 feet at mean high water and 29 feet at mean low water in the closed position.

The 145th Street Bridge has a vertical clearance of 25 feet at mean high water and 30 feet at mean low water in the closed position.

The Macombs Dam Bridge has a vertical clearance of 27 feet at mean high water and 32 feet at mean low water in the closed position.

The 207th Street Bridge has a vertical clearance of 26 feet at mean high water and 30 feet at mean low water in the closed position.

The Broadway Bridge has a vertical clearance of 24 feet at mean high water and 29 feet at mean low water in the closed position.

The Spuyten Duyvil Bridge has a vertical clearance of 5 feet at mean high water and 9 feet at mean low water in the closed position.

The bridges across the Harlem River, except the Spuyten Duyvil Bridge, have a minimum of 24 feet at mean high water. The Spuyten Duyvil Bridge is much lower in vertical clearance, and as a result, is required under the existing regulations to open on signal at all times for the passage of vessel traffic.

Most vessel operators that normally frequent the Harlem River utilize vessels that fit under the existing bridges in the closed position and do not require bridge openings.

Coast Guard policy is that all bridges over navigable waterways should open for vessel traffic at any time, either on signal, or after some reasonable advance notice is given.

As a result the Coast Guard is changing the drawbridge operation

regulations for the Harlem River to require all the bridges that formerly did not open for the passage of vessel traffic from 5 p.m. to 10 a.m. to open after at least a four-hour advance notice is given at all times, except during the morning and evening commuter rush hours.

The Coast Guard is adding a requirement that all bridges, except the Spuyten Duyvil Bridge, need not open for the passage of vessel traffic during the morning and afternoon commuter rush hours, Monday through Friday, except federal holidays, to help reduce both vehicular traffic delays and delays to commuter trains during the work week. The Spuyten Duyvil Bridge was not included in the closed periods for the morning and afternoon rush hours because it is so low in vertical clearance. The vessel traffic that can fit under the other bridges without a bridge opening can not transit under the Spuyten Duyvil Bridge without a bridge opening.

The Coast Guard is also adding a requirement that the maximum time the railroad bridges across the Harlem River may delay bridge openings for the passage of rail traffic be clearly defined as ten minutes in order to avoid lengthy delays that could hazard a vessel waiting for a bridge opening.

The Coast Guard is removing obsolete language in the existing regulation that allows public vessels of the United States to be passed through each bridge as soon as possible because that provision is now required under 33 CFR 117.31, as part of the General Requirements for bridges.

Discussion of Comments and Changes

The Coast Guard received two comment letters in response to our notice of proposed rulemaking (73 FR 45922) published on August 7, 2008. The New York City Department of Transportation (NYCDOT), the owner of eight of the eleven bridges, objected to the proposal in our notice of proposed rulemaking that would require their bridges to open from 5 p.m. to 10 a.m. after a four-hour advance notice was given. NYCDOT stated that opening their bridges between 5 p.m. and 10 a.m. would cause an undue hardship to the city, resulting in traffic delays, and maintenance issues.

The Coast Guard received a second letter in response to our notice of proposed rulemaking from Metro North Railroad (Metro North), an agency of the State of New York Metropolitan Transportation Authority, which stated that opening their bridge between 5 p.m. and 10 a.m. could cause major delays to their rail operations as a result of bridge openings occurring during peak commuter hours, and that it would also be a financial hardship to open their bridges from 5 p.m. to 10 a.m. due to the need to station additional work crews to address potential mechanical problems dictated by the condition of the bridge lift mechanism at their bridge.

The Coast Guard policy regarding the promulgation of drawbridge operation regulations requires that no regulation shall be implemented for the sole purpose of saving the bridge owner the cost to operate a bridge, nor to save wear and tear mechanically on a bridge. It is the bridge owner's statutory and regulatory responsibility to provide the necessary draw tenders for the safe and prompt opening of a bridge and to maintain drawbridges in good operating condition. In that regard the additional expense to safely operate drawbridges either for the passage of normal vessel traffic or in case there may be a mechanical failure at the bridge is not a valid reason to not allow the bridges on the Harlem River to open for the passage of vessel traffic between 5 p.m. and 10 a.m. daily.

In order to help provide additional relief and reduce delays to motorists and rail commuters the Coast Guard revised the supplemental notice of proposed rulemaking (73 FR 66571) published on November 10, 2008, by providing peak commuter hour bridge closure periods.

The Coast Guard received one comment letter in response to our supplementary notice of proposed rulemaking from Metropolitan Transportation Authority for the State of New York (NYS MTA). Their comment letter stated that the morning and evening rush hour closures the Coast Guard added to the supplemental notice of proposed rulemaking at the two Broadway Bridges between 6 a.m. and 9 a.m., and 5 p.m. to 7 p.m., were more restrictive than the rush hour closures from 5 a.m. to 10 a.m. and from 4 p.m. to 8 p.m. at the Park Avenue Bridge. They requested that the operating hours for the Broadway Bridge and the operating hours for the Park Avenue Bridge have the same closed periods for commuter hours to better facilitate rail traffic. If that was not operationally feasible, then Metro North requested that the restricted hours for the Broadway Bridge be 7 a.m. to 10 a.m. and 4 p.m. to 7 p.m. The Coast Guard initially based the rush hour closures at the Broadway Bridge on the vehicular traffic rush hours since both vehicular and rail traffic use the Broadway Bridges.

The Coast Guard reviewed the drawbridge opening logs for the above bridges which indicated very few requests to open each bridge. This was expected since the normal waterway users utilize vessels that can fit under the bridges without bridge openings. However, the Coast Guard determined that based on the type of navigation and industry around the Broadway Bridge, the 7 a.m. to 10 a.m. and 4 p.m. to 7 p.m. closure periods would better balance the needs of both land and marine traffic.

A second minor change was made to this final rule in the regulatory text in paragraph (b)(1) to correct the advance notice contact for the Triborough 125 Street Bridge at mile 1.3, which was incorrectly listed as the New York City Highway Radio (Hotline) Room and should be the Triborough Bridge and Tunnel Authority (TBTA).

Regulatory Analysis

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analysis 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. This conclusion is based on the drawbridge opening logs that show very few requests for openings because most regular waterway users utilize vessels that can transit under the bridges without an opening. Based on the industry along the river and the vessels used on the waterway, the Coast Guard does not anticipate any significant increase in opening requests during the evening/early morning hours that would cause an undue burden to the bridge owner because of the promulgation of this rule.

Through policy and regulation, the Coast Guard considers maintenance of a bridge an essential and unavoidable part of bridge ownership that has to be accepted for the safety of land and waterway traffic as well as the needs of navigation. Further, it is the bridge owner's responsibility to provide the necessary draw tenders for the safe and prompt opening of a bridge and to maintain drawbridges in good operating condition. It is also Coast Guard policy that no drawbridge operating regulation will be changed or implemented for the sole purpose of reducing the cost to operate or to save wear and tear on the operating mechanism of a drawbridge.

Additionally, the Coast Guard believes that the activity along the Harlem River will not increase; rather openings that may have been requested during the limited 10 a.m. to 5 p.m. time window will now have the entire 24 hour day (minus the commuter hours) to transit through the bridges and therefore, maintenance costs to the bridgeowners will be no greater.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b), that this rule will not have a significant economic impact on a substantial number of small entities. This conclusion is based on the fact that none of the affected bridgeowners/commenters (NYCDOT, MetroNorth, SNY MTA) qualify as a small entity. While some vessel owners/operators might qualify as small entities, the revised schedule will provide for bridge openings on a 24-hour basis, as opposed to the existing 7-hour window, and thus will not have a significant economic impact on the vessel owner/operators.

Assistance for Small Entities

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

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

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). 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 since the direct effect on State or local governments is small it does not have implications for federalism.

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

This 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 M16475.1D, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (32)(e), of the Instruction, from further environmental documentation considering that it relates to the promulgation of operating regulations or procedures for drawbridges.

Under figure 2–1, paragraph (32)(e), of the instruction, an environmental

analysis checklist and a categorical exclusion determination are not required for this rule.

List of Subjects in 33 CFR Part 117

Bridges.

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

PART 117—DRAWBRIDGE OPERATION REGULATIONS

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

Authority: 33 U.S.C. 499; 33 CFR 1.05–1(g); Department of Homeland Security Delegation No. 0170.1.

■ 2. Section 117.789 is revised to read as follows:

§ 117.789 Harlem River.

(a) The draws of all railroad bridges across the Harlem River may remain in the closed position from the time a train scheduled to cross the bridge is within five minutes from the bridge, and until that train has fully crossed the bridge. The maximum time permitted for delay shall not exceed ten (10) minutes. Land and water traffic should pass over or through the draw as soon as possible to prevent unnecessary delays in the opening and closure of the draw.

(b)(1) The draws of the bridges at 103 Street, mile 0.0, 125 Street (Triborough), mile 1.3, Willis Avenue, mile 1.5, Third Avenue, mile 1.9, Madison Avenue, mile 2.3, 145 Street, mile 2.8, Macombs Dam, mile 3.2, 207 Street, mile 6.0, and the Broadway Bridge, mile 6.8, shall open on signal if at least a four-hour advance notice is given to the New York City Highway Radio (Hotline) Room and the Triborough Bridge and Tunnel Authority (TBTA) for the 125 Street (Triborough), mile 1.3. The draws of the above bridges, except the Broadway Bridge, need not open for the passage of vessel traffic from 6 a.m. to 9 a.m. and 5 p.m. to 7 p.m., Monday through Friday, except federal holidays. The draw of the Broadway Bridge need not open for the passage of vessel traffic from 7 a.m. to 10 a.m. and 4 p.m. to 7 p.m., Monday through Friday, except federal holidays.

(2) The draws of the Willis Avenue Bridge, mile 1.5, Third Avenue Bridge, mile 1.9, and the Madison Avenue Bridge, mile 2.3, need not open for the passage of vessel traffic at various times between 8 a.m. and 5 p.m. on the first Sunday in May and November. The exact time and date of each bridge closure will be published in the Local Notice to Mariners several weeks prior to each closure.

(c) The draw of the Metro North (Park Avenue) Bridge, mile 2.1, shall open on signal, except, as provided in paragraph (a) of this section, if at least a four-hour advance notice is given. The draw need not open for the passage of vessel traffic from 5 a.m. to 10 a.m. and 4 p.m. to 8 p.m., Monday through Friday, except Federal holidays.

(d) The draw of the Spuyten Duyvil railroad bridge, mile 7.9, shall open on signal at all times, except as provided in paragraph (a) of this section.

Dated: July 6, 2009.

Dale G. Gabel,

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

[FR Doc. E9–31228 Filed 1–4–10; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2009–0751–200928; FRL–9098–9]

Approval and Promulgation of Implementation Plans and Designations of Areas for Air Quality Planning Purposes; North Carolina: Hickory-Morganton-Lenoir; Determination of Attaining Data for the 1997 Fine Particulate Matter Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is determining that the Hickory-Morganton-Lenoir, North Carolina, (hereafter referred to as ''Hickory, North Carolina'') nonattainment area for the 1997 fine particulate matter ($PM_{2.5}$) National Ambient Air Quality Standard (NAAQS) has attaining data for the 1997 $PM_{2.5}$ NAAQS.

DATES: *Effective Date:* This final rule is effective on January 5, 2010.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R04–OAR–2009–0751. All documents in the docket are listed in the *http://www.regulations.gov* Web site. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy for public inspection during normal business hours at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW,, Atlanta, Georgia 30303–8960.

FOR FURTHER INFORMATION CONTACT: Joel Huey, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Mr. Huey may be reached by phone at (404) 562–9104 or via electronic mail at *huey.joel@epa.gov.* For information relating to the North Carolina State Implementation Plan (SIP), please contact Nacosta Ward at (404) 562–9140. Ms. Ward can also be reached at *ward.nacosta@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. What Action Is EPA Taking?
II. What Is the Effect of This Action?
III. When Is This Action Effective?
IV. What Is EPA's Final Action?
V. What Are the Statutory and Executive Order Reviews?

I. What Action Is EPA Taking?

EPA is determining that the Hickory, North Carolina, nonattainment area has attaining data for the 1997 $PM_{2.5}$ NAAQS. This determination is based upon quality assured, quality controlled and certified ambient air monitoring data that show the area has monitored attainment of the 1997 $PM_{2.5}$ NAAQS based on the 2006–2008 data. In addition, quality controlled and quality assured monitoring data submitted during the calendar year 2009, which are available in the EPA Air Quality System database, but not yet certified, indicate that this area continues to meet the 1997 $PM_{2.5}$ NAAQS.

Other specific requirements of the determination and the rationale for EPA's proposed action are explained in the notice of proposed rulemaking (NPR) published on October 6, 2009 (74 FR 48863) and will not be restated here. The comment period closed on November 5, 2009. No public comments were received in response to the NPR.

II. What Is the Effect of This Action?

This final action, in accordance with 40 CFR 51.1004(c), suspends the requirements for this area to submit attainment demonstrations, associated reasonably available control measures, reasonable further progress plans, contingency measures, and other planning SIPs related to attainment of the 1997 $PM_{2.5}$ NAAQS as long as this

area continues to meet the 1997 $PM_{2.5}$ NAAQS.

III. When Is the Action Effective?

EPA finds that there is good cause for this approval to become effective on the date of publication of this action in the **Federal Register**, because a delayed effective date is unnecessary due to the nature of the approval. The expedited effective date for this action is authorized under both 5 U.S.C. 553(d)(1), which provides that rule actions may become effective less than 30 days after publication if the rule ''grants or recognizes an exemption or relieves a restriction'' and 5 U.S.C. 553(d)(3), which allows an effective date less than 30 days after publication ''as otherwise provided by the agency for good cause found and published with the rule.'' As noted above, this determination of attainment suspends the requirements for the Hickory, North Carolina, $PM_{2.5}$ nonattainment area to submit an attainment demonstration, associated reasonably available control measures, a reasonable further progress plan, contingency measures, and any other planning SIPs related to attainment of the standard as long as this area continues to meet the 1997 $PM_{2.5}$ NAAQS. The suspension of these requirements is sufficient reason to allow an expedited effective date of this rule under 5 U.S.C. 553(d)(1). In addition, this nonattainment area's suspension from these requirements provide good cause to make this rule effective on the date of publication of this action in the **Federal Register**, pursuant to 5 U.S.C. 553(d)(3). The purpose of the 30-day waiting period prescribed in 5 U.S.C. 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Where, as here, the final rule suspends requirements rather than imposing obligations, affected parties, such as the State of North Carolina, do not need time to adjust and prepare before the rule takes effect.

IV. What Is EPA's Final Action?

EPA is determining that the Hickory, North Carolina, nonattainment area has attaining data for the 1997 $PM_{2.5}$ NAAQS. This determination is based upon quality assured, quality controlled, and certified ambient air monitoring data showing that this area has monitored attainment of the 1997 $PM_{2.5}$ NAAQS during the period 2006–2008. This final action, in accordance with 40 CFR 51.1004(c), will suspend the requirements for this area to submit attainment demonstrations, associated reasonably available control measures, reasonable further progress plans, contingency measures, and other planning SIPs related to attainment of the 1997 $PM_{2.5}$ NAAQS as long as the Area continues to meet the 1997 $PM_{2.5}$ NAAQS.

V. What Are Statutory and Executive Order Reviews?

A. General Requirements

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 8, 2010. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action, pertaining to the determination of attaining data for the 1997 fine particulate matter standard for the Hickory, North Carolina, $PM_{2.5}$ nonattainment area, may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Particulate matter.

Dated: December 15, 2009.

J. Scott Gordon,

Acting Regional Administrator, Region 4.

■ Accordingly, 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart II—North Carolina

■ 2. Section § 52.1781 is amended by adding paragraph (f) to read as follows:

§ 52.1781 Control strategy: Sulfur oxides and particulate matter.

* * * * *

(f) *Determination of Attaining Data.* EPA has determined, as of January 5, 2010, the Hickory-Morganton-Lenoir, North Carolina, nonattainment area has attaining data for the 1997 $PM_{2.5}$ NAAQS. This determination, in accordance with 40 CFR 52.1004(c), suspends the requirements for this area to submit an attainment demonstration, associated reasonably available control measures, a reasonable further progress plan, contingency measures, and other planning SIPs related to attainment of the standard for as long as this area continues to meet the 1997 $PM_{2.5}$ NAAQS.

[FR Doc. E9–31084 Filed 1–4–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–HQ–OAR–2009–0898; FRL–9099–7]

Finding of Failure To Submit Certain State Implementation Plans Required for the 1-Hour Ozone NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is taking a final action finding that the State of California has failed to submit revisions to its State Implementation Plans (SIPs) for three ozone nonattainment areas to satisfy certain requirements of the Clean Air Act (CAA) for the 1-hour ozone National Ambient Air Quality Standards (NAAQS). To accompany this action we are issuing additional guidance to states on developing the required SIP revisions. Under the CAA and EPA's implementing regulations, states with 1-hour ozone nonattainment areas classified as Severe or Extreme were required by the provisions of CAA sections 181(b)(4) and 182(d)(1)(3) to submit by December 31, 2000, SIPs to satisfy CAA section 185. By this action, EPA is making a finding of failure to submit the required SIPs for the State of California for three 1-hour ozone nonattainment areas. With the issuance of additional EPA guidance to states on developing section 185 fee program SIPs, California will be able to complete development and promulgation of these programs. According to the CAA, for each area subject to this finding, EPA must affirmatively find that California has submitted the required plan revision within 18 months of the effective date of this finding, or the offset sanction must apply in that area. Additionally, according to the CAA, if EPA has still not affirmatively determined that a state has submitted the required plan for an area within 6 additional months, the highway funding sanction must apply in that area. Lastly, the CAA requires that no later than 2 years after the effective date of this finding, EPA must promulgate a Federal Implementation Plan (FIP) if the state has not submitted and EPA has not approved the required SIP.

DATES: *Effective Date.* This action is effective on January 5, 2010.

FOR FURTHER INFORMATION CONTACT: Questions concerning this notice should be addressed to: Ms. Denise Gerth, Office of Air Quality Planning and Standards, Air Quality Policy Division, Mail Code: C504–02, 109 TW Alexander Drive, Research Triangle Park, NC 27709, telephone (919) 541–5550, or by E-mail at *gerth.denise@epa.gov;* or Mr. Andrew Steckel, Air Rulemaking Office, EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105, telephone (415) 947–4115, or by e-mail at *steckel.andrew@epa.gov.*

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K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
L. National Technology Transfer and Advancement Act
M. Congressional Review Act
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I. Background

The CAA requires states with Severe and Extreme ozone nonattainment areas to develop a SIP program that provides for collecting fees from each major stationary source of volatile organic compounds (VOC) and nitrogen oxides (NO_X) for each calendar year following a failure to attain the ozone standard by the applicable attainment date. Section 185 fee program SIPs are required for any area that was designated as not attaining the 1997 8-hour ozone NAAQS in June 2004 and that was also classified as a Severe or Extreme nonattainment area for the 1-hour standard at that time. In a decision by the Circuit Court of Appeals for the District of Columbia, the Court determined that these fee program SIPs were required to prevent backsliding in the transition from implementing the revoked 1-hour NAAQS to implementing the 1997 8-hour NAAQS (*South Coast AQMD* v. *EPA,* December 22, 2006). Although EPA has not determined through notice-and-comment rulemaking that the areas identified in this notice have failed to attain the 1-hour ozone NAAQS by their statutory attainment dates, current air quality data for these areas indicate they are violating the 1-hour NAAQS and the 1997 8-hour NAAQS.[1]

EPA has been working with states and other stakeholders on EPA guidance for developing required fee program SIPs, including the convening of a group of diverse stakeholders through the Clean Air Act Advisory Committee (CAAAC). On May 15, 2009, CAAAC submitted its report to EPA with suggestions and issues for consideration in creating guidance that would provide flexibility to states to develop programs that will meet the requirements of section 185 of the CAA. In conjunction with this action EPA has issued additional guidance that will assist California with development of its section 185 fee SIPs for the affected areas.

A. Statutory Requirements

Section 185 of the CAA requires each Severe and Extreme ozone

[1] Although EPA has not in all cases completed determinations through notice-and-comment rulemaking, current air quality data indicate that a number of nonattainment areas classified as Severe or Extreme for the 1-hour NAAQS and also designated in June 2004 nonattainment for the 1997 8-hour NAAQS appear to have attained the 1-hour NAAQS and/or the 1997 8-hour NAAQS. In this notice EPA is not making findings that states failed to submit SIP revisions for these areas. These areas are: Chicago-Gary-Lake County, IL-IN; Milwaukee-Racine, WI; Philadelphia-Trenton-Wilmington, MD-DE-PA-NJ; Ventura County, CA; Metropolitan Washington, DC-VA-MD; Baton Rouge, LA; New York, NY-NJ-CT; Houston, TX; and Baltimore, MD.

nonattainment area to have a plan implementing the program specified in that section. The fee program applies if an area fails to attain the ozone NAAQS by its applicable attainment date. For each such area, section 185 requires each major stationary source of VOC and NO_X to pay an annual fee for emissions in excess of 80 percent of the emissions baseline.[2] The fee is $5,000 (as adjusted for inflation) per ton of VOC and NO_X emissions that are in excess of the baseline. The CAA states that the computation of a source's ''baseline amount'' must be the lower of the amount of actual or allowable emissions under the permit applicable to the source (or if no permit has been issued for the attainment year, the amount of VOC and NO_X emissions allowed under the applicable implementation plan) during the attainment year. No source is required to pay any fee for emissions during a year for which the area receives an extension of their attainment date under section 181(a)(5).

B. Consequences of Findings of Failure To Submit a SIP

The CAA establishes specific consequences that apply until an area remedies the identified deficiency if EPA finds that a state has failed to submit a SIP or, with regard to a submitted SIP, EPA determines it is incomplete or disapproves it. *See,* CAA section 179(a)(1). Additionally, any of these findings also triggers an obligation for EPA to promulgate a FIP if the state has not submitted and EPA has not approved the required SIP within 2 years of the finding. *See,* CAA section 110(c). The first finding, that a state has failed to submit a plan or one or more elements of a plan required under the CAA, is the finding relevant to this action.

EPA is finding that the State of California has failed to make required section 185 fee program SIP submissions for all or a portion of three 1-hour ozone nonattainment areas. We note that the state has been working to establish its required fee program SIP revisions, and has been awaiting issuance of additional guidance from EPA before proceeding. EPA has now issued additional guidance, and we will continue to work with the state on developing approvable and appropriate fee programs.

If EPA has not affirmatively determined that the state has made the required complete submittal for the three areas within 18 months of the effective date of this rulemaking, pursuant to CAA section 179(a) and (b) and 40 CFR 52.31, the offset sanction identified in CAA section 179(b)(2) and 40 CFR 52.31 will apply in each area that remains subject to the finding. If EPA has not affirmatively determined that the state has made a complete submission for the areas within 6 months after the offset sanction is imposed, then the highway funding sanction will apply to each area that remains subject to the finding, in accordance with CAA section 179(b)(1) and 40 CFR 52.31. The 18- and 24-month clocks for any area will stop and the sanctions will not take effect if, within 18 or 24 months, respectively, after the date of the finding, EPA finds that the state has made a complete submittal. In addition, where EPA has made a finding, EPA is required to promulgate a FIP for an area if the state has not made the required SIP submittal and EPA has not taken final action to approve the submittal as fully meeting the section 185 fee obligation for the 1-hour ozone standard within 2 years of EPA's finding.

At approximately the same time as the signing of this action, the EPA Regional Administrator is sending a letter to the State of California informing the state that EPA is determining that the state has failed to submit a SIP addressing the section 185 fee program for the 1-hour ozone NAAQS for all or a portion of the three areas identified below. This letter has been included in docket number EPA–HQ–OAR–2009–0898.

II. This Action: Areas Receiving a Finding of Failure To Submit SIPs

In this action, EPA is making a finding that the State of California has failed to submit section 185 fee program SIPs for all or a portion of three 1-hour ozone nonattainment areas. California submitted a section 185 fee program SIP for the Sacramento Metropolitan Air Quality Management District (AQMD) portion of the Sacramento Metro Area and EPA approved that submission on August 26, 2003, at 68 FR 51184. Therefore, the Sacramento Metropolitan AQMD is not subject to this action. This finding starts the 18-month emission offset sanctions clock, the 24-month highway funding sanctions clock, and a 24-month clock for the promulgation by EPA of a FIP. This action will be effective on January 5, 2010. EPA is making findings of failure to submit section 185 fee program SIPs for the nonattainment areas identified below.

State	Nonattainment area
California	Sacramento Metro Area, CA (severe 15)—Yolo/Solano Air Quality Management District portion; Feather River Air Quality Management District portion; Placer County Air Pollution Control District portion; El Dorado County Air Quality Management District portion.
California	Southeast Desert Modified Air Quality Management Association (severe 17) includes Coachella Valley.
California	Los Angeles-South Coast Air Basin (extreme).

III. Statutory and Executive Order Reviews

A. Notice and Comment Under the Administrative Procedure Act

This is a final EPA action, but is not subject to notice-and-comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. 553(b). EPA believes that because of the limited time provided to make findings of failure to submit regarding SIP submissions, Congress did not intend such findings to be subject to notice-and-comment rulemaking. However, to the extent such findings are subject to notice-and-comment rulemaking, EPA invokes the good cause exception pursuant to the APA, 5 U.S.C. 553(b)(3)(B). Notice and comment are unnecessary because no EPA judgment is involved in making a nonsubstantive finding of failure to submit elements of SIP submissions required by the CAA. Furthermore, providing notice and comment would be impracticable because of the limited time provided under the statute for making such determinations. Finally, notice and comment would be contrary to the

[2] While section 185 expressly mentions VOC, section 182(f) extends the application of this provision to NO_X, by providing that ''plan provisions required under [subpart D)] for major stationary sources of [VOC] shall also apply to major stationary sources of [NO_X].''

public interest because it would divert agency resources from the critical substantive review of complete SIPs. *See* 58 FR 51270, 51272, n.17 (Oct. 1, 1993); 59 FR 39832, 39853 (Aug. 4, 1994).

B. Effective Date Under the Administrative Procedure Act

This action will be effective on January 5, 2010. Under the APA, 5 U.S.C. 553(d)(3), agency rulemaking may take effect before 30 days after the date of publication in the **Federal Register** if the agency has good cause to specify an earlier effective date. This action concerns SIP submissions that are already overdue. In addition, this action simply starts a ''clock'' that will not result in sanctions against the states for 18 months, and that the state may ''turn off'' through the submission of complete SIP submittals. These reasons support an effective date prior to 30 days after the date of publication.

C. Executive Order 12866: Regulatory Planning and Review

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review by the Office of Management and Budget under the Executive Order.

D. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). This rule relates to the requirement in the CAA for states to submit SIPs under section Part D of title I of the CAA to satisfy elements required for the 1-hour ozone NAAQS. The present final rule does not establish any new information collection requirement.

E. Regulatory Flexibility Act (RFA)

This final rule is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act (APA) or any other statute. Although the rule is subject to the APA, the Agency has invoked the ''good cause'' exemption under 5 U.S.C. 553(b); therefore it is not subject to the notice-and-comment requirement. Thus Executive Order 13132 does not apply to this action.

F. Unfunded Mandates Reform Act

This action contains no federal mandate under the provisions of Title II of the Unfunded Mandates Reform Act of 1998 (UMAR), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. This action imposes no enforceable duty on any state, local, or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 and 205 of the UMRA.

This action is also not subject to the requirements of section 203 UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action does not impose any new obligations or enforceable duties on any small governments.

G. Executive Order 13132: Federalism

This final rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The CAA establishes the scheme whereby states take the lead in developing plans to meet the NAAQS and the federal government acts as a backstop where states fail to take the required actions. This rule will not modify the relationship of the states and EPA for purposes of developing programs to implement the NAAQS. Thus, Executive Order 13132 does not apply to this rule.

H. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000.) This rule responds to the requirement in the CAA for states to submit SIPs to satisfy the nonattainment area requirements of the CAA for the ozone NAAQS. The CAA requires states with areas that are designated nonattainment for the NAAQS to develop a SIP describing how the state will attain and maintain the NAAQS. There are tribal governments within certain nonattainment areas for which this rule initiates a sanctions clock. However, this rule does not have tribal implications because it does not impose any compliance costs on tribal governments nor does it pre-empt tribal law. The rule will not have a substantial direct effect on one or more Indian Tribes, on the relationship between the federal government and Indian Tribes, or on the distribution of power and responsibilities between the federal government and Indian Tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). Thus, Executive Order 13175 does not apply to this action.

I. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This final rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This action does not directly affect the level of protection provided to human health or the environment.

J. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. In this action, EPA is finding that a state has failed to submit SIPs to satisfy the section 185 program fee requirement of the CAA for the 1-hour ozone NAAQS.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not directly affect the level of protection provided to human health or the environment. This notice finds that the state has not met the requirement to submit section 185 fee program SIPs and begins a clock that could result in the imposition of sanctions if the state

continues to not meet this statutory obligation. If the state fails to submit the required SIPs or if they submit SIPs that EPA cannot approve, then EPA will be required to develop the plans in lieu of the state.

L. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology and Transfer Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impracticable. VCS are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations of when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any VCS.

M. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register.** A ''major rule'' cannot take effect until 60 days after it is published in the **Federal Register.** This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective January 5, 2010.

N. Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit within 60 days from the date the final action is published in the **Federal Register.** Filing a petition for reconsideration by the EPA Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review must be filed, and shall not postpone the effectiveness of such rule or action.

Thus, any petitions for review of this action making findings of failure to submit section 185 fee program SIPs for the nonattainment areas identified in section II above must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date that the final action is published in the **Federal Register.**

List of Subjects in 40 CFR Part 52

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: December 20, 2009.

Gina McCarthy,

Assistant Administrator, Office of Air and Radiation.

[FR Doc. E9–31173 Filed 1–4–10; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R9–ES–2009–0086;90100–1660–1FLA]

RIN 1018–AW70

Endangered and Threatened Wildlife and Plants; Final Rule To List the Galapagos Petrel and Heinroth's Shearwater as Threatened Throughout Their Ranges

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine threatened status for the Galapagos petrel (*Pterodroma phaeopygia*) previously referred to as (*Pterodroma phaeopygia phaeopygia*); and the Heinroth's shearwater (*Puffinus heinrothi*) under the Endangered Species Act of 1973, as amended (Act). This rule implements the Federal protections provided by the Act for these two foreign seabird species.

DATES: This final rule becomes effective February 4, 2010.

ADDRESSES: This final rule is available on the Internet at *http://www.regulations.gov* and comments and materials received, as well as supporting documentation used in the preparation of this rule, will be available for public inspection, by appointment, during normal business hours at: U.S. Fish and Wildlife Service, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Suite 400, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Nicole Alt, Chief, Division of Conservation and Classification, Endangered Species Program, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 420, Arlington, VA 22203; telephone 703–358–2171; facsimile 703–358–1735. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Act (16 U.S.C. 1531 *et seq.*) requires us to make a finding (known as a ''90-day finding'') on whether a petition to add a species to, remove a species from, or reclassify a species on the Federal Lists of Endangered and Threatened Wildlife and Plants has presented substantial information indicating that the requested action may be warranted. To the maximum extent practicable, the finding must be made within 90 days following receipt of the petition and must be 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 (''12-month finding'') on whether the requested action is warranted, not warranted, or warranted but precluded by higher priority listing. 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. A warranted-but-precluded finding 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 28, 1980, we received a petition (1980 petition) from Dr.

Warren B. King, Chairman, United States Section 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), including two species (Galapagos petrel, and Heinroth's shearwater) that are the subject of this rule. Two of the foreign species identified in the petition were already listed under the Act; therefore, in response to the 1980 petition, we published a substantial 90-day finding on May 12, 1981 (46 FR 26464), for 58 foreign species and initiated a status review. 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 pending petition findings. In this notice, we found that listing all 58 foreign bird species on the 1980 petition was 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 on the 1980 petition was warranted but precluded by higher-priority listing actions. We published additional annual notices on the 58 species included in the 1980 petition on January 9, 1986 (51 FR 996), July 7, 1988 (53 FR 25511), December 29, 1988 (53 FR 52746), April 25, 1990 (55 FR 17475), November 21, 1991 (56 FR 58664), and May 21, 2004 (69 FR 29354). These notices indicated that the Galapagos petrel and Heinroth's shearwater, along with the remaining species in the 1980 petition, continued to be warranted but precluded.

Per the Service's listing priority guidelines (September 21, 1983; 48 FR 43098), in our April 23, 2007, Annual Notice on Resubmitted Petition Findings for Foreign Species (72 FR 20184), we determined that listing the six seabird species of family Procellariidae, including the two species that are the subject of this final rule, was warranted. In selecting these six species from the list of warranted-but-precluded species, we took into consideration the magnitude and immediacy of the threats to the species consistent with the Service's listing priority guidelines.

On December 17, 2007 (72 FR 71298), we published in the **Federal Register** a proposal to list the Chatham petrel, Fiji petrel and the magenta petrel as endangered species under the Act, and the Cook's petrel (native to New Zealand), Galapagos petrel (native to the Galapagos Islands, Ecuador), and the Heinroth's shearwater (native to Papua New Guinea and the Solomon Islands) as threatened under the Act. We implemented the Service's peer review process and opened a 60-day comment period to solicit scientific and commercial information on the species from all interested parties following publication of the proposed rule.

On December 30, 2008, the Service received a 60-day notice of intent to sue from the Center for Biological Diversity (CBD) over violations of section 4 of the Act and the Administrative Procedure Act (APA) for the Service's failure to issue a final determination regarding the listing of these six foreign birds. Under a settlement agreement approved by the U.S. District Court for the Northern District of California on June 15, 2009 (*CBD* v. *Salazar,* 09–cv–02578–CRB), the Service was required to submit to the **Federal Register** final determinations on the proposed listings of the Chatham petrel, Fiji petrel, and magenta petrel by September 30, 2009, and final determinations on the proposed listings of the Cook's petrel, Galapagos petrel, and Heinroth's shearwater by December 29, 2009.

The Chatham petrel (*Pterodroma axillaris*), Fiji petrel (*Pseudobulweria macgillivrayi*), and the magenta petrel (*Pterodroma magentae*) were listed as endangered on September 14, 2009 (74 FR 46914). This rule addresses two of the remaining three foreign seabird species: the Galapagos petrel, and Heinroth's shearwater. Cook's petrel will be addressed in a separate rule.

Summary of Comments and Recommendations

In the proposed rule published on December 17, 2007 (72 FR 71298), we requested that all interested parties submit information that might contribute to development of a final rule. We received nine comments: Six from members of the public, one from an international conservation organization, one from the U.S. National Marine Fisheries Service (NMFS), and one from the New Zealand Department of Conservation (NZDOC). In all, three commenters supported the proposed listings. Six commenters provided information but did not express support for or opposition to the proposed listings. We reviewed all comments we received from the public and peer reviewers for substantive issues and new information regarding the proposed listing of the two species, and we address those comments below.

Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from 14 knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occur, and conservation biology principles. We received responses from six of the peer reviewers from whom we requested comments. The peer reviewers generally agreed that the description of the biology and habitat for each species was accurate and based on the best available information. New or additional information on the current population numbers of each of the two species and their threats was provided and incorporated into the rulemaking as appropriate (as indicated in the citations by ''in litt.'').

Peer Reviewer General Comments

Comment 1: While it is generally true that ''once a population is reduced below a certain number of individuals it tends to rapidly decline towards extinction'' without details on what the ''certain'' number of individuals is, this statement is superfluous for these species. For these species the issue is not so much reaching certain low numbers, as whether or not catastrophic threats impacting these species are still ongoing.

Our Response: We concur and have amended this statement in this final rule.

Comment 2: Provide the taxonomic list(s) of birds used to identify the six species.

Our Response: We have added information on taxonomy of each species to this final rule.

Peer Reviewer Species-specific Comments

Galapagos Petrel

Comment 3: The greater threat to this species and its habitat is not goats but rather introduced invasive plants which have caused drastic habitat changes over the last few years.

Our Response: Based on this new information regarding the significance of the threats to the habitat of the Galapagos petrel by nonnative, invasive plants, we have amended our discussion under Factor A (the present or threatened destruction, modification, or curtailment of the habitat or range) for this species in this final rule.

Comment 4: A significant and fairly new threat to the Galapagos petrel is the threat of collisions with structures such as power lines, cellular telephone and other radio towers, and, on Santa Cruz Island, wind power generation systems (particularly large windmills and power transmission lines). Construction of these structures in and near petrel nesting areas and areas where they make their nocturnal courtship flights increases the risk of collision.

Our Response: We have incorporated this new information regarding the threat of collisions with power lines, radio towers, and structures associated with windmills in our Factor E (other natural or manmade factors affecting the continued existence of the species) discussion for this species.

Comment 5: One peer reviewer indicated skepticism of the often cited drastic decreases in Galapagos petrel numbers in the 1980s. The peer reviewer added that there was no known event in that period that could have caused the decline, and that all of the purported causes (agricultural expansion, introduction of predators) had occurred decades before. The peer reviewer believes that most likely the early estimates of pre-1980 petrel populations were overly optimistic (too large) and that starting in the 1980s, the estimates of the number of petrels were more accurate and closer to the actual number of birds (likely due to more surveys and better methods of estimating population numbers). The peer reviewer stated that current estimates of Galapagos petrel numbers are not significantly lower than the estimates of the mid-1980s. If there were a drastic population decline starting in the 1980s it is unlikely it would have suddenly halted, especially with respect to predation, because although the agriculture expansion has not continued, it has not decreased, and the predators have not disappeared from the nesting habitat.

Our Response: We have incorporated this information regarding the population estimates for the Galapagos petrel over the past 28 years in this final rule.

Comment 6: The Galapagos petrel is threatened by predation by introduced rats, cats, pigs, and dogs (in order of significance of impact). The main predator is rats that kill chicks. Cats prey upon all life stages of the species while dogs sometimes prey upon the species during all life stages. Pigs may kill incubating adults by digging up nests, but this is probably less common than predation by other animals.

Our Response: In this final rule, we have amended our discussion under Factor C (disease or predation) regarding the significant predators on the Galapagos petrel, in this final rule.

Comment 7: San Cristóbal Island has a long-standing rat control program in the Galapagos petrel colony.

Our Response: We were not previously aware of this program and have amended our discussion under Factor C (disease or predation) to reflect this new information in this final rule.

Heinroth's Shearwater

Comment 8: The forests of Kolombanagara and Rendova are the potential breeding habitat of Heinroth's shearwater but deforestation is not a threat in the high-altitude forests because logging is commercially unviable in these small-stature forests that are found on steep slopes. Deforestation is a threat to this bird only if it nests at low or mid altitudes.

Our Response: The breeding habitat for Heinroth's shearwater is unknown but is believed to be inland forests. Therefore, we have incorporated this new information regarding the threat from deforestation only in low or mid altitude forests in our discussion under Factor A (present or threatened destruction, modification, or curtailment of the habitat or range) in this final rule.

Other Comments

Comment 9: Listing under the Act provides substantial benefits to foreign species.

Our Response: We agree that listing a foreign species under the Act provides benefits to the species in the form of conservation measures such as recognition, requirements for Federal protection, and prohibitions against certain practices (see Available Conservation Measures). In addition, once a foreign species is listed as endangered under the Act, a section 7 consultation and an enhancement finding are usually required for the issuance of a permit to conduct certain activities. Through various enhancement findings under section 10(a)(1)(A) of the Act, the permit process can be used to create incentives for conservation, through cooperation and consultation with range countries and users of the resource.

Comment 10: Listing under the Act can only help these birds by drawing attention to their needs and providing much needed funding and expertise to address the significant threats they face.

Our Response: We agree with the commenter. Listing the species under the Act that are the subject of this final rule can provide several benefits to the species in the form of conservation measures, such as recognition, requirements for Federal protection, and prohibitions against certain practices (see Available Conservation Measures).

Comment 11: We would encourage the U.S. Fish and Wildlife Service to carefully consider how listing these species under the Act will benefit their conservation. Would listing under the Act prompt U.S.-based actions that the species would otherwise not receive?

Our Response: As part of the conservation measures provided to foreign species listed under the Act (see Available Conservation Measures), recognition through listing results in public awareness and encourages and results in conservation actions by Federal and State governments, private agencies and groups, and individuals. In addition, section 8(a) of the Act authorizes the provision of 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 and threatened species and to provide assistance for such programs in the form of personnel and the training of personnel.

Comment 12: The general statement that the ''long-line fishery * * * is the single greatest threat to all seabirds'' erroneously indicates long-line fishing as a threat to *all* seabirds. The main species of seabirds killed in long-line fisheries are albatrosses and other species of petrels (not *Pterodroma* species). The characteristics of a petrel species vulnerable to long-line fishing (seabird that is aggressive and good at seizing prey (or baited hooks) at the water's surface, or is a proficient diver) do not describe the five *Pterodroma* species or the Heinroth's shearwater that were proposed for listing under the Act. Fisheries bycatch has not been identified as a key threat for any of these species; thus it is inaccurate to characterize long-line fishing as a threat to these species or to all seabird species.

Our Response: We received several comments disputing our statement that long-line fisheries threaten all seabirds, and Galapagos petrel and the Heinroth's shearwater in particular. We have amended our final rule accordingly (see Summary of Factors Affecting the Galapagos Petrel and Summary of Factors Affecting the Heinroth's Shearwater).

Comment 13: The serious threats to the species are impacts due to extremely small populations, limited breeding locations or foraging ranges, loss and degradation of nesting habitat, invasive alien species, introduced predators, and hunting.

Our Response: We agree that the Galapagos petrel and the Heinroth's shearwater are threatened by extremely small populations, limited breeding sites, degradation and destruction of nesting habitat, or nonnative species and have incorporated this information

into this final rule. However, we are unaware of any information that indicates the Galapagos petrel or Heinroth's shearwater currently face threats from human hunting or overcollection.

Comment 14: The primary threat to these species is predation by introduced predators particularly at breeding colonies.

Our Response: We agree that predation by nonnative predators is a significant threat to one or more life stages of the Galapagos petrel and the Heinroth's shearwater and we have incorporated this information into this final rule.

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. Listing actions may be warranted based on any of the above threat factors, singly or in combination.

Both species are considered pelagic, occurring on the open sea generally out of sight of land, where they feed year round. They return to nesting sites on islands during the breeding season where they nest in colonies (Pettingill 1970, p. 206).

Foreseeable Future

Although section 3 of the Act uses the term ''foreseeable future'' in the definition of a threatened species, it does not define the term. For purpose of this rule, we define foreseeable future to be the extent to which, given the amount and quality of available data, we can anticipate events or effects, or extrapolate trends of a threat, such that reliable predictions can be made concerning the future of the species. In the analyses of the five factors below, we consider and describe how the foreseeable future relates to the status and threats to these species.

Below is a analysis of the five factors by species.

I. Galapagos Petrel (Pterodroma phaeopygia)

Species Information

The Galapagos petrel (*Pterodroma phaeopygia*), previously referred to as (*Pterodroma phaeopygia phaeopygia*), is a large, long-winged gadfly petrel that is endemic to the Galapagos Islands, Ecuador (BLI 2009, unpaginated). They have variable amounts of black markings on a white forehead. The species was first taxonomically described by Salvin in 1876 (Sibley and Monroe 1990, p. 323).

Habitat, Range, and Life History

The Galapagos petrel is endemic to the Galapagos Islands and breeds on Santa Cruz, Floreana, Santiago, San Cristóbal, Isabela, and possibly other islands in the archipelago covering a total land area of 2,680 mi^2 (6,942 km^2) (Cruz and Cruz 1987, pp. 304–305; Vargas and Cruz *in litt.* 2000, as cited in BLI 2009; Harris 1970, pp. 76–77). The species breeds in the humid and thickly vegetated uplands of these islands (Harris 1970, p. 76) at elevations between 984 and 2,953 ft (300 and 900 m) (Baker 1980, as cited in BLI 2000; Cruz and Cruz 1987, pp. 304–305; 1996, p. 27). The species prefers to nest under thick vegetation in sufficient soil for burrowing (Harris 1970, pp. 78, 82). The species is known to nest within burrows or natural cavities on slopes, in craters, in sinkholes, in lava tunnels, and in gullies (Baker 1980, as cited in BLI 2000; Cruz and Cruz 1987, pp. 304–305; 1996, p. 27).

Birds have been observed foraging near the Galapagos Islands, as well as east and north of the islands towards South America up to 1,243 mi (2,000 km) south (Spear *et al.* 1995, p. 627).

Population Estimates

In our December 17, 2007, proposal (72 FR 71298), we reported that the total population of Galapagos petrels was estimated to be between 20,000 and 60,000 birds (BLI 2007, unpaginated). However, in 2009 BLI updated the estimate, and now estimates the total population to be between 10,000 and 19,999 birds with a decreasing population trend (BLI 2009, unpaginated).

Conservation Status

The IUCN classifies the Galapagos petrel as ''Critically Endangered'' with a decreasing population trend (BLI 2009, unpaginated). The species is not listed on any CITES Appendices (*http://www.cites.org*).

Summary of Factors Affecting the Galapagos Petrel

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

Similar to other Procellariid species, the range of the Galapagos petrel changes intra-annually based on an established breeding cycle. During the breeding season, breeding birds return to breeding colonies to breed and nest. During the nonbreeding season, birds migrate far from their breeding range where they remain at sea until returning to breed. Therefore, our analysis of Factor A is separated into analyses of: (1) The species' breeding habitat and range, and (2) The species' non-breeding habitat and range.

BLI (2009, unpaginated) estimates the range of the Galapagos petrel to be 5,483,000 mi^2 (14,200,000 km^2); however, BLI (2000) defines ''range'' as the ''Extent of Occurrence, the area contained within the shortest continuous imaginary boundary which can be drawn to encompass all the known, inferred, or projected sites of present occurrence of a species, excluding cases of vagrancy.'' Because this reported range includes a large area of non-breeding habitat (i.e., the sea), our analysis of Factor A with respect to the Galapagos petrel's breeding range focuses on the islands where the species breeds.

The primary threats to the Galapagos petrel's breeding habitat are degradation and destruction of breeding habitat by introduced invasive plants, clearing of land for agricultural expansion, and nonnative feral mammals, such as domesticated goats (*Capra hircus*), pigs (*Sus scrofa*), donkeys (*Equus asinus*), and cattle (*Bos taurus*). Nonnative invasive plants on some islands create dense thickets that the petrel is not able to penetrate. Nonnative ungulates (goats, pigs, donkeys, and cattle) trample and destroy Galapagos petrel nest-sites and reduce breeding habitat by overgrazing (e.g., goats) and uprooting the vegetation (e.g., pigs) (Cruz and Cruz 1987, pp. 304–305, 1996, p. 25; Eckhardt 1972, p. 588; Wiedenfeld, in litt. 2008, unpaginated).

Clearing of Land for Agricultural Expansion

In 1959, Ecuador designated 97 percent of the Galapagos land area as a National Park, leaving 3 percent of the remaining land area distributed between Santa Cruz, San Cristóbal, Isabela, and Floreana Islands. The park land area is divided into various zones signifying the level of human use (Parque Nacional Galapagos Ecuador N.D., unpaginated).

Although the islands where the Galapagos petrel is known to breed include a large ''conservation and restoration'' zone, all of these islands, except Santiago, include a significant-sized 'farming' zone (Parque Nacional Galapagos Ecuador N.D. unpaginated), where agricultural and grazing activities continue to threaten some petrel nesting sites (Wiedenfeld, *in litt.* 2008, unpaginated). According to Baker (1980, as cited in BLI 2000), at least half of the Galapagos petrel's current breeding range on Santa Cruz Island is farmed. The rationale for maintaining farming zones within the Galapagos National Park is to sustain the economy of island inhabitants, encourage local consumption of traditional products (e.g., vegetables, fruits, and grazing animals), and decrease the amount of imported food, thereby reducing the threat of inadvertent introduction of nonnative species (Parque Nacional Galapagos Ecuador N.D. Plan de Control Total N.D. cited in Wiedenfeld, *in litt.* 2008, unpaginated).

On the island of Santa Cruz, the Galapagos petrel historically bred at lower elevations, down to 591 ft (180 m). However, habitat modification of these lower elevations for agricultural purposes has restricted the Galapagos petrel's use of these lower elevation areas for breeding although some areas are still used for nesting (Valarezo 2006 cited in Wiedenfeld, *in litt.* 2008, unpaginated). On San Cristóbal Island, historical clearance of vegetation in highland areas for intensive grazing purposes drastically reduced the species' breeding habitat on the island (Harris 1970, p. 82).

Introduced Invasive Plants

Nonnative invasive plants are a significant threat to the Galapagos petrel through habitat modification and destruction. Nonnative plants adversely impact petrel breeding habitat by modifying or altering several microhabitat conditions such as availability of light, soil-water regimes, and nutrient cycling leading to competition with native plants or direct inhibition of native plants; and ultimately converting plant communities dominated by native species to nonnative plant communities (Tye, N.D., p. 4). *Rubus niveus* (hill raspberry), a species of raspberry native from India to southeastern Asia, the Philippines, and Indonesia, is the worst invader of the nonnative species of *Rubus* in the Galapagos Islands (Charles Darwin Foundation (CDF), N.D.a, unpaginated), and is classified as a noxious weed in Hawaii (Hawaii Administrative Rules 1992). In the Galapagos Islands, hill raspberry grows in nesting areas in thick mats that are impenetrable by Galapagos petrels (Wiedenfeld, *in litt.* 2008, unpaginated). This nonnative plant is found on all of the islands (Floreana, Isabela, San Cristóbal, and Santa Cruz) used by the Galapagos petrel for breeding except Santiago Island (Wiedenfeld, *in litt.* 2008, unpaginated). Eradication of hill raspberry on San Cristóbal and Santa Cruz is not possible because hill raspberry is well-established and widespread on these islands (CDF, N.D.a, unpaginated) and thus eradication is cost prohibitive. It is not known if there are control or eradication programs for this species on Floreana or Isabela Islands.

There are two other noteworthy nonnative plant threats, Cinchona pubescens (red quinine tree) and two species of *Lantana* (lantana). Red quinine tree is native from Andean South America north to Costa Rica, and is characterized by vigorous growth, reproduction, and extremely rapid invasion (CDF N.D.b, unpaginated). Introduced in 1946 in the agricultural zone of Santa Cruz Island, red quinine tree has spread into all of the highland vegetation zones and covers more than 29,652 ac (12,000 ha) (CDF N.D.b, unpaginated). This nonnative invader is significantly changing native plant communities in the highlands of Santa Cruz from low open scrub and grasslands to closed forest canopy (Buddenhagen *et al.* 2004, p. 1195; CDF, N.D.b, unpaginated), and has been identified as a threat to the highland habitat of the Galapagos petrel (Wiedenfeld, *in litt.* 2008, unpaginated). According to Tye (N.D., p. 12) there is strong support by both conservationists and farmers to eradicate red quinine tree (Tye N.D., p. 12).

Beginning in 1998, the Charles Darwin Foundation has supported research studies on red quinine tree's ecology and invasion dynamics, its impacts on native vegetation, and potential control methods (Buddenhagen *et al.* 2004, pp. 1198, 1200–1201; CDF N.D.b, unpaginated). An effective combination of control techniques was identified in 2003, and a long-term management plan is being developed for its possible eradication on Santa Cruz (Buddenhagen *et al.* 2004, p. 1201; CDF N.D.b, unpaginated). Lantana (*Lantana camara* and *L. montevidensis* (CDF N.D.c, unpaginated)), probably native to the West Indies (Wagner *et al.* 1999, p. 1320), was introduced to Floreana about 70 years ago, and has been identified as the single worst invasive species on the island (Tye N.D., p. 6). More recently, *L. camara* has been introduced to other islands, including Santa Cruz in 1985, where repeated control efforts have limited its spread on those islands (Tye N.D., p. 6). Lantana is a shrub that forms dense, impenetrable thickets and prevents the growth of other herbaceous or woody species (Tye N.D., p. 5; Wagner *et al.* 1999, p. 1320). It is unknown if there are control or eradication programs for this species on Floreana. In addition, there are a number of nonnative plants on Santiago, which was formerly inhabited, however, no information is available to identify whether these species impact Galapagos petrel nesting sites on this island (Tye N.D., p. 3).

Introduced Feral Mammals

In 1997, the Galapagos National Park Service (GNPS) and the CDF initiated ''Project Isabela,'' an ecological restoration program that required removal of all feral goats from Santiago and northern Isabela. In 2006, the program was found to be successful. The GNPS announced that no feral goats could be found in these areas, noting that monitoring efforts would continue to ensure successful eradication (Charles Darwin Research Station (CDRS) 2006, unpaginated). Concurrent with the goat eradication program, feral donkeys were removed from Santiago Island and Alcedo Volcano on northern Isabela Island (Carrion *et al.* 2007, p. 440). After a 30-year eradication program, feral pigs were successfully removed from Santiago Island; the last pig was shot in April 2000 (Cruz *et al.* 2005, p. 476).

Despite the success of these eradication efforts, introduced ungulates continue to threaten Galapagos petrel habitat on the human populated islands of Santa Cruz, Floreana, San Cristóbal, and southern Isabela, particularly in areas bordering farmland. Eradication programs for feral livestock in areas containing human populations is difficult (CDRS 2006, unpaginated). However, according to the Galapagos Conservancy (N.D., unpaginated), funding has been sought for eradication of feral goats on Floreana and San Cristóbal Islands and for a goat control program on Santa Cruz Island beginning in 2008 or 2009.

Summary of Factor A

In summary, nonnative invasive plants have been identified as significantly impacting the breeding habitat of the Galapagos petrel primarily by altering the habitat and overgrowing the nesting sites, or by creating dense, impenetrable thickets (hill raspberry and lantana). The most significant nonnative plant threats to the Galapagos

petrel are hill raspberry, red quinine tree and lantana. Galapagos petrel habitat is threatened on Floreana by hill raspberry and lantana; on Isabela by hill raspberry; on San Cristóbal by hill raspberry; and, on Santa Cruz by hill raspberry, red quinine tree, and lantana (Wiedenfeld, *in litt.* 2008, unpaginated). Although nonnative plants occur on Santiago Island, there is no information identifying nonnative plant threats to Galapagos petrel habitat there. Agricultural expansion and nonnative feral ungulates on the human populated islands of Floreana, San Cristóbal, Santa Cruz, and southern Isabela also destroy habitat of the Galapagos petrel.

Therefore, we find that the present or threatened destruction, modification, or curtailment of this species' breeding habitat by agricultural expansion, nonnative plants, and feral ungulates is a threat to the species on the islands of Santa Cruz, Floreana, San Cristóbal, and Isabela now and in the foreseeable future. On Santiago Island, based on the best available scientific and commercial information, we find that the present or threatened destruction, modification, or curtailment of this species' breeding habitat by agricultural expansion, and feral ungulates is a threat to the species now and in the foreseeable future.

The Galapagos petrel's range at sea is poorly known; however, research has documented foraging behavior near the Galapagos Islands, as well as east and north of the islands. We are unaware of any present or threatened destruction, modification, or curtailment of this species' current sea habitat or range now or in the foreseeable future.

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

We are unaware of any commercial, recreational, scientific, or educational purpose for which the Galapagos petrel is currently being utilized. Therefore, we find that overutilization for commercial, recreational, scientific, or educational purposes is not a threat to the Galapagos petrel in any portion of its range now and in the foreseeable future.

C. Disease or Predation

The threat of predation on the Galapagos petrel is exemplified by the rapid decline of populations of this species in the early 1980s as a result of predation by introduced species, such as black and brown rats, cats, pigs, and to a lesser extent, dogs (*Canis lupus familiaris*) (BLI 2009, unpaginated; Cruz and Cruz 1996, p. 23). In some cases, these population declines were as high as 81 percent over 4 years (BLI 2009, unpaginated). Between 1980 and 1985, the population on Santa Cruz Island declined from an estimated 9,000 pairs to 1,000 pairs (Baker 1980, as cited in BLI 2009, unpaginated; Cruz and Cruz 1987, p. 9). During the same time period, the Santiago Island population declined from 11,250 pairs to less than 500 pairs (Cruz and Cruz 1987, p. 12; Tomkins 1985, as cited in BLI 2000), and the number of birds breeding on Floreana Islands was estimated to have been reduced by up to 33 percent annually for 4 years (Coulter *et al.* 1981, as cited in BLI 2009, unpaginated).

While the above-cited sources report drastic decreases in Galapagos petrel numbers in the 1980s, one peer reviewer of our December 17, 2007, proposed rule (72 FR 71298) questioned the reported population declines. According to the reviewer, there was no known event during that decade that could have caused the declines. Agricultural expansion and the introduction and expansion of predators had occurred decades previously, and while Galapagos petrels are long-lived and a factor from decades before might have shown up as a collapse in the adult population much later, the reviewer thought it was unlikely. According to the peer review, pre-1980 population estimates were overly optimistic and that estimates starting in the 1980s were more accurate (Wiedenfeld, *in litt.* 2008, unpaginated). According to the reviewer, current estimates are not much lower than the numbers from the mid-1980s, and it is unlikely that the ''drastic declines'' seen in the 1980s would have halted 20 years later, considering the ongoing threats to the petrel from predation and habitat degradation and destruction (Wiedenfeld, *in litt.* 2008, unpaginated).

Rats (both black and brown) are the most significant predator of the Galapagos petrel; they eat both the eggs and chicks (Wiedenfeld, *in litt.* 2008, unpaginated). Introduced feral cats, pigs, and dogs all prey on one or more life stages (eggs, chicks, fledglings, and adults) of the Galapagos petrel (Cruz and Cruz 1987, p. 304; 1996, pp. 23–24). Predation of adult Galapagos petrels by the Galapagos hawk (*Buteo galapagoensis*) was reported by Tompkins (1985, p. 12) and later cited in Cruz and Cruz (1987, p. 305; 1996, p. 24) and BLI (2009). However, because Galapagos hawks are diurnal predators and Galapagos petrels fly at night, this information is questionable (Wiedenfeld, *in litt.* 2008, unpaginated). The short-eared owl (*Asio flammeus*) and the common barn owl (*Tyto alba*) may hunt Galapagos petrels more commonly than the Galapagos hawk because both predators are nocturnal and both occur in the Galapagos Islands (Wiedenfeld, *in litt.* 2008, unpaginated).

Predator control programs geared towards nonnative species and petrel monitoring programs are currently in place on Floreana, Santa Cruz, and Santiago Islands (Vargus and Cruz 2000, as cited in BLI 2009, unpaginated; Guo 2006, p. 1597). Eradication efforts to remove feral pigs, which eat nestlings, juvenile, and adult petrels on Santiago Island, succeeded by the end of 2000 (Cruz *et al.* 2005, pp. 476–477; Galapagos National Park N.D., unpaginated). Recolonization of pigs on Santiago Island is not likely since the island is not inhabited by humans, and there are no farming zones on the island where pigs could be placed. In addition, complete ecological recovery of Santiago Island is a primary objective of Galapagos National Park, so monitoring and maintaining a pig-free island is of high priority (Galapagos National Park N.D., unpaginated). However, predation by introduced rats and cats continues to pose a threat to Galapagos petrels on Santiago Island, where efforts are underway to remove introduced rats, but there is no information to indicate that eradication has been achieved (Galapagos National Park N.D., unpaginated). On Isabela, National Park rangers have set out traps and poison for rats, and, as of 2006, were planning rat control on Floreana Island (Guo 2006, p. 2); BLI (2009) reports that there is a program of rat baiting around known petrel colonies on Floreana (Vargas and Cruz, *in litt.* 2000 cited in BLI 2009). In addition, Guo (2006, p. 2) reported that control of feral cats would begin in 2007, although no island was specified. According to Wiedendfeld (in litt. 2008, unpaginated), there is a long-term rat control program in Galapagos petrel colonies on San Cristóbal Island (Cruz cited in Wiedenfeld, *in litt.* 2008, unpaginated).

Although pigs were removed from Santiago Island, they continue to threaten the Galapagos petrel on the other 4 islands where the petrel is known to breed. Predation, primarily by rats and cats, continues to threaten the Galapagos petrel on Floreana and Santa Cruz Islands. Predator control efforts have been initiated on these two islands and are beginning to show some success in reducing the threat to Galapagos petrels. For example, prior to predator control efforts on Floreana Island, only 33 percent of the banded Cerro Pajas colony of the Galapagos petrel population returned to breed and nest as adults (Coulter *et al.* 1982, as cited in Cruz and Cruz 1990a, p. 323). In 1982, predator control was initiated on this

island (Cruz and Cruz 1990a, p. 317), and by 1985, return rates for banded birds was 80 to 90 percent due to the predator control program (Cruz and Cruz 1990a, p. 323). To emphasize the significance of such a reduction in predation on adults with respect to petrel population growth, the Hawaiian dark-rumped petrel (*Pterodroma sandwichensis*), a species related to the Galapagos petrel, exhibited a 5 percent annual decline in its population size when adult survival rates were reduced as low as 10 percent (Simons 1984, p. 1073).

There is no information to indicate that predator control efforts have been successfully implemented on San Cristóbal Island or Isabela Island where rats, cats, and pigs continue to threaten the species; and these threats are likely to continue in the foreseeable future.

Summary of Factor C

In summary, while several diseases have been documented in other species of petrels, disease has not been documented in the Galapagos petrel. Therefore, for the reasons described above, we do not find that disease is a threat to this species currently or in the foreseeable future.

While the species is at sea during the nonbreeding season, we are unaware of any threats due to predation on Galapagos petrels. However, predation by introduced mammalian species causes mortalities at all life stages of the Galapagos petrel while on land. Rats are a significant threat because they eat eggs and chicks. Feral cats, in particular, and to a lesser extent dogs also threaten Galapagos petrels by eating eggs and killing chicks, juveniles, and adult birds. Pigs may kill nestlings, juveniles, and some adult birds by digging up a nest while the adult is incubating but this is much less common than predation by rats and cats (Wiedenfeld, *in litt.* 2008, unpaginated). There are predator control programs for rats on Isabela, San Cristóbal, and Santiago Islands and, as of 2006, a program was planned on Floreana Island. However, there is no information to indicate that rat eradication has been achieved on any of these islands, and there is no information to indicate that there is a rat control program on Santa Cruz. According to Guo (2006, p. 2), a control program for feral cats was planned for 2007. There is no information to indicate that feral cats have been eradicated on any of the islands or in any of the petrel breeding sites. Pigs have been removed from Santiago and northern Isabela Islands but are still a threat to Galapagos petrels on Floreana, Santa Cruz, southern Isabela, and San Cristóbal Islands (Wildlife Extra 2006, unpaginated). There is no information on predator control efforts for dogs on any of the islands where Galapagos petrels breed. The threat of predation has been shown to result in rapid population declines in the past and this threat is likely to continue in the foreseeable future due to the inability of predator control efforts to adequately eradicate these predators. Therefore, we find that predation is a threat to the Galapagos petrel throughout all or a significant portion of its range now and in the foreseeable future.

D. The Inadequacy of Existing Regulatory Mechanisms

As previously mentioned, several commenters disputed our statement in the proposed rule that long-line fisheries threaten all seabirds and in particular, the Galapagos petrel, and Heinroth's shearwater. According to the U.S. National Marine Fisheries Service (NMFS) and BirdLife International (BLI 2009, unpaginated), the seabirds killed in long-line fisheries are predominantly albatrosses and other species of petrels (not *Pterodroma* species). The characteristics of a petrel species vulnerable to long-line fishing (seabird that is aggressive and good at seizing prey (or baited hooks) at the water's surface, or is a proficient diver) do not describe the *Pterodroma* species. Although we are unaware of any documented cases of incidental take of Galapagos petrels by commercial long-line fishing operations or entanglement in marine debris, long-line fishing operations in the eastern Pacific Ocean have been identified as a potential threat to the Galapagos petrel (BLI 2009, unpaginated). In particular, long-line fishing in the Galapagos Marine Reserve was suggested as a factor in affecting foraging birds (BLI 2009, unpaginated). In 2004, fishermen seized Galapagos National Park headquarters and a scientific research station to demand, among other things, permission to use long-line fishing in the Galapagos Marine Reserve. To end the standoff, the government of Ecuador agreed to review the rules regarding the Galapagos Marine Reserve (New York Times 2004, unpaginated). A separate report published in the same year described the illegal long-lines as ''crisscross[ing]'' the reserve ''like spider webs'' (Hile 2004, unpaginated). However, there is no information indicating that, subsequent to 2004, commercial long-line fishing is permitted in the Galapagos Marine Reserve or that Galapagos petrels have been injured or killed by long-line fishing operations in the Marine Reserve or elsewhere in the eastern Pacific Ocean. Therefore, based on the best available information regarding the threat of long-line fishing on the Galapagos petrel, we are not able to determine the significance of this threat to this bird.

The first legislation to specifically protect the Galapagos Islands and its wildlife and plants was enacted in 1934 and further supplemented in 1936, but effective legislation was not passed until 1959, when the Ecuadorian government passed new legislation declaring the islands a National Park (Fitter *et al.* 2000, p. 216; Jackson 1985, pp. 7, 230; Stewart 2006, p. 164).

The Galapagos Islands were declared a World Heritage Site (WHS) under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1978 (UNESCO World Heritage Centre n.d.(a)), as they were recognized to be ''cultural and natural heritage of outstanding universal value that needs to be protected and preserved'' (UNESCO World Heritage Centre n.d.(b)). The aim of establishment as a WHS is conservation of the site for future generations (UNESCO World Heritage Centre 2008). However, in June 2007, due to threats to this site posed by introduced invasive species, increasing tourism, and immigration, the World Heritage Committee placed the Galapagos on the ''List of World Heritage in Danger.'' This is intended to increase support for their conservation (UNESCO World Heritage Centre News 2007a). In March 2008, the UNESCO World Heritage Centre/United Nations Foundation project for invasive species management provided funding of $2.19 million U.S. (USD) to the Ecuadorian National Environmental Fund's ''Galapagos Invasive Species'' account to support invasive species control and eradication activities on the islands (UNESCO World Heritage Centre News 2008). In addition, the Ecuador government previously had contributed $1 million USD to this fund (UNESCO World Heritage Centre News 2008), demonstrating the government of Ecuador's commitment to reducing the threat of invasive species to the islands.

Ecuador designated the Galapagos Islands as a National Park and the islands were declared a World Heritage Site in 1979 (BLI 2009, unpaginated). In the 1990s, overall fishing pressure in the waters around the Galapagos Islands increased rapidly and led in 1998 to establishment of the Galapagos Marine Reserve (Bustamante *et al.* 2000, p. 3), which is a legally protected area. The reserve boundaries are 40 nautical mi from the outermost points of land of the archipelago, and protected within those

boundaries are almost all of the ecologically important nutrient-rich areas for wide-ranging species, including seabirds (Bustamante *et al.* 2000, p. 3). The Law of the Special Regimen for the Conservation and Sustainable Development of the Province of the Galapagos, has given the islands some legislative support to establish regulations related to the transport of introduced species and implement a quarantine and inspection system (Causton *et al.* 2000, p. 10; Instituto Nacional Galápagos n.d.; Smith 2005, p. 304). Large-scale industrial fishing is banned in the marine reserve, although local or artisanal fishing is permitted (Charles Darwin Foundation N.D.d, unpaginated).

In 1999, the Inspection and Quarantine System for Galapagos (SICGAL) was implemented (Causton *et al.* 2006, p. 121) with the aim of preventing introduced species from reaching the islands (Causton *et al.* 2000, p. 10; Charles Darwin Foundation n.d.d, unpaginated). Inspectors are stationed at points of entry and exit in the Galapagos Islands and Continental Ecuador, where they check freight and luggage for permitted and prohibited items (Charles Darwin Foundation n.d.d, unpaginated). The goal is to rapidly contain and eliminate newly arrived species (detected by SICGAL and early warning monitoring programs) that are considered threats for the Galapagos Islands (Causton *et al.* 2006, p. 121). However, a scarcity of information on alien insect species currently in the Galapagos Islands prevents officials from knowing whether or not a newly detected insect is in fact a recent introduction (Causton *et al.* 2006, p. 121). Without the necessary information to make this determination, they cannot afford to spend the time and resources on a rapid response when the ''new introduction'' is actually a species that already occurs elsewhere in the Galapagos Islands (Causton *et al.* 2006, p. 121).

The April 2007 World Heritage Centre—IUCN monitoring mission report assessed, based on information gathered during their monitoring mission and multiple meetings, the state of conservation in the Galapagos Islands and found continuing problems (UNESCO World Heritage Centre 2007). The UNESCO World Heritage Centre indicated that there is a continuing lack of political will, leadership, and authority, and it is a limiting factor in the full application and enforcement of the Special Law for Galapagos (2007). They also reported that there appears to be a general lack of effective enforcement (UNESCO World Heritage Centre 2007).

At the same time, the risk from invasive species is rapidly increasing, while the Agricultural Health Service of Ecuador (SESA) and SICGAL have inadequate staff and capacity to deal with the nature and scale of the problem (UNESCO World Heritage Centre 2007). SICGAL estimates that 779 invertebrates [interpreted as 779 individuals] entered the Galapagos Islands via aircraft in 2006 (UNESCO World Heritage Centre 2007). In addition, the staff of the Galapagos National Park lacks the capacity and facilities for effective law enforcement (UNESCO World Heritage Centre 2007).

Previous UNESCO–IUCN Galapagos mission reports (in 2005 and 2006) to the World Heritage Committee have consistently outlined major threats to the long-term conservation of the Galapagos Islands, including the introduction of nonnative plant and animal species, and the inability to apply laws (UNESCO World Heritage Centre News 2007b). UNESCO World Heritage Centre reports that despite an excellent legal framework, national government institutions encounter difficulties in ensuring its full application (UNESCO World Heritage Centre News 2007b).

Summary of Factor D

In summary, Ecuador has developed numerous laws and regulatory mechanisms to administer and manage wildlife in the Galapagos Islands. Additional regulations have created an inspection and quarantine system in order to prevent the introduction of non-native species. However, this program does little to eradicate nonnative species already introduced to the Galapagos Islands. The impacts to the species are likely to increase in the foreseeable future due to the lack of effective laws and regulatory mechanisms that are implemented in the Galapagos Islands. Therefore, we find that the existing regulatory mechanisms currently in place are inadequate to address the threats from loss of habitat and predation due to nonnative species throughout all or a significant portion of its range now and in the foreseeable future.

E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

Oil and chemical spills can have direct effects on Galapagos petrel populations, and based on previous incidents, although rare incidences, we consider these to be a significant threat to the species. For example, on January 16, 2001, a tanker ran aground at Schiavoni Reef, about 2625 ft (800 m) from Puerto Baquerizo Moreno on San Cristóbal Island (Woram 2007, unpaginated). By January 28, 2001, the slick reached the islands of Isabela and Floreana. Only one Galapagos petrel from Cristóbal Island is documented to have died; however, 370 large animals were reported to be contaminated by oil and 62 percent of the marine iguanas on Santa Fe Island died within a year of after the oil spill occurred (Wikelski, 2002, p. 607). The total effect of the oil spill on Galapagos petrels and other species is difficult to quantify for a variety of reasons. However, due to the behavior of ocean-dependent species and the high toxicity of diesel, many affected petrels might have died and sunk undetected. In addition, the effects of oiling may be highly localized, and given the vastness of the Galapagos coastline, this could make detection unlikely. Because the long-term effects of oiling were not monitored, the total mortality from this event is likely underestimated (Lougheed *et al.* 2002, unpaginated). Oil and chemical spill events are likely to occur again in this species' habitat. Therefore, we find that oil and chemical spills are a threat to the Galapagos petrel in its nonbreeding (marine) habitat now and in the foreseeable future.

A recent but potentially significant threat to the Galapagos petrel is the threat of collisions with structures such as power lines, and cellular telephone and other radio towers (Cruz Delgado and Wiedenfeld 2005, cited in BLI 2009; Wiedenfeld, *in litt.* 2008, unpaginated). Rapid growth of the human population on Floreana, San Cristóbal, Santa Cruz, and southern Isabela Islands may lead to the proliferation of new power lines and cellular telephone structures. Many bird species, including seabirds such as the Newell's shearwater on Kauai in the Hawaiian Islands, are known to strike objects such as antennas, guy wires, light poles, transmission lines, wind turbines, communication towers, and other tall objects. Bird kills caused by towers and related structures have been documented for over 50 years (Kerlinger 2000, pp. 4, 26; Manville 2005, pp. 1051–1061; Podolsky *et al.* 1998 abstract only; Shire *et al.* 2000, p. 3). A proposed project to construct wind generators on Baltra Island and extend power lines across Santa Cruz Island to the town of Puerto Ayora may significantly increase adult petrel mortality from collisions with transmission lines and associated structures (e.g., posts) (Wiedenfeld, *in litt.* 2008, unpaginated). Therefore, we consider collisions with power lines,

cellular telephone and other radio towers, and large wind turbines to be a significant threat to the species throughout all of its range now and in the foreseeable future.

Barbed wire fences on agricultural lands cause mortality in adult Galapagos petrels (BLI 2009a). With the exception of Santiago Island, agricultural lands are present throughout the species' breeding range. Although there is no information available regarding the numbers and trends of mortality due to fences, this source of mortality in combination with other threats from collisions with structures and chemical and oil spills poses a significant risk to the survival of the species on all islands in its breeding range except Santiago.

There is evidence that the productivity of Galapagos petrel populations is indirectly affected by fluctuations in ocean temperatures and currents, which impact the Galapagos petrel's prey base. During the El Niño-Southern Oscillation (ENSO) of 1982–1983, Cruz and Cruz (1990b, p. 160) found that the growth rate of Galapagos petrel chicks was lower and fledging occurred later than in other years. These so-called ''ENSO chicks'' reached a lower peak mass at a later age than non-ENSO chicks. The extended nestling period and reduced growth rates of ENSO chicks are believed to reflect a decline in the availability of food resources because of diminishing ocean productivity during the ENSO. Limited to no information is available on the long-term effect on petrel population productivity due to the change in ocean temperatures and currents. Based on the best available scientific and commercial information available, we determine that this is not a threat to the Galapagos petrel.

Summary of Factor E

Rapid growth of the human population on Floreana, San Cristóbal, Santa Cruz, and southern Isabela Islands has lead to an increase in manmade threats such as oil and chemical spills, collisions with communications and energy-related structures (such as transmission lines and cellular telephone and radio towers), and collisions with barbed wire fences on agricultural lands. These threats are continuing to impact the Galapagos petrel; there is no indication that they are likely to decrease in the foreseeable future. Therefore, we find that the other natural or manmade factors discussed above threaten the Galapagos petrel throughout all or a significant portion of its range now and in the foreseeable future.

Conclusion and Determination for the Galapagos Petrel

Section 3 of the Act defines an endangered species as ''any species which is in danger of extinction throughout all or a significant portion of its range'' and a threatened species as ''any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The Galapagos petrel is currently affected by a variety of threats across its entire geographic range. As we have not yet observed the extirpation of local populations or recent steep declines in the abundance of the species, we do not believe the status of the species is such that it is presently in danger of extinction throughout all or a significant portion of its range. Therefore, we do not believe this species meets the definition of an endangered species. We can, however, reasonably anticipate the impacts of the threats on this species rangewide, and we believe those threats acting in combination are likely to result in the species becoming endangered within the foreseeable future.

We have carefully assessed the best available scientific and commercial information regarding the past, present, and potential future threats faced by the Galapagos petrel. In the 1980s, the Galapagos petrel was reported to have declined as much as 81 percent in 4 years due primarily to predation by introduced predators. However, as discussed above (see Factor C) there is some question regarding the accuracy of the drastic decreases in Galapagos petrel numbers reported in the 1980s (Wiedenfeld, *in litt.* 2008). According to BLI (2009a), conservation efforts have slowed but not halted the population decline. Regardless, the population is currently estimated to be between 10,000 and 19,999 birds with a decreasing population trend (BLI 2009a).

Threats to this species include predators such as rats, cats, and goats, clearing for agriculture, and invasive plants such as *Cinchona pubescens* (particularly on Santa Cruz island), *Lantana* sp. (particularly on Floreana island), and *Rubus niveus* on Santa Cruz, Floreana, San Cristóbal, and Isabela Islands. The Galapagos petrel's breeding habitat is threatened by introduced species, by feral mammals on the islands of Floreana, San Cristóbal, Santa Cruz, and southern Isabela by invasive plants on all islands within its range; and by agricultural expansion (Factor A). Despite predator control efforts, the Galapagos petrel continues to be threatened by one or more predators on all of the islands within the species' breeding range (Factor C). Collisions with communications and energy-related transmission lines and structures by Galapagos petrels as they fly between their nesting colonies and the ocean are a significant threat to this species throughout its range (Factor E). Barbed wire fences are reported to pose a threat to Galapagos petrels in agricultural lands on the islands of Floreana, San Cristóbal, Santa Cruz, and southern Isabela (Factor E). In addition, we have determined that the inadequacy of existing regulatory mechanisms to reduce or remove these threats is a contributory factor to the risks that threaten this species' continued existence (Factor D). These factors are likely to continue into the foreseeable future.

The threats within the species' breeding range are compounded by the threats to the species within its range at sea. Oil spills can have direct effects on Galapagos petrel populations, and based on the occurrence of a previous incident within the species' range at sea, we consider this a significant threat to the species (Factor E). Because the survival of this species is dependent on recruitment of chicks from its breeding range, the threats to this species within its breeding range puts the species at risk.

The overall population number of the Galapagos petrel is estimated at 10,000 to fewer than 19,999 birds (BLI 2009). As a result, the species does not currently appear to be in danger of extinction throughout all or a significant portion of its range. However, based on the best scientific and commercial data available, we find that the Galapagos petrel is likely to become in danger of extinction within the foreseeable future throughout all or a significant portion of its range. Therefore, we have determined that the Galapagos petrel meets the definition of a threatened species throughout all of its range under the Act.

Significant Portion of the Range Analysis

Having determined that the Galapagos petrel is likely to become in danger of extinction within the foreseeable future throughout all of its range, we also considered whether there are any significant portions of its range where the species is currently in danger of extinction.

The Act defines an endangered species as one ''in danger of extinction throughout all or a significant portion of its range,'' and a threatened species as one ''likely to become an endangered

species within the foreseeable future throughout all or a significant portion of its range.'' The term ''significant portion of its range'' is not defined by statute. For purposes of this finding, a significant portion of a species' range is an area that is important to the conservation of the species because it contributes meaningfully to the representation, resiliency, or redundancy of the species. The contribution must be at a level such that its loss would result in a decrease in the ability to conserve the species.

The first step in determining whether a species is endangered in a significant portion of its range is to identify any portions of the range of the species that warrant further consideration. The range of a species can theoretically be divided into portions in an infinite number of ways. However, there is no purpose to analyzing portions of the range that are not reasonably likely to be significant and where the species is not in danger of extinction. To identify those portions that warrant further consideration, we determine whether there is substantial information indicating that (i) the portions may be significant and (ii) the species may be in danger of extinction there. In practice, a key part of this analysis is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats applies only to portions of the range that are unimportant to the conservation of the species, such portions will not warrant further consideration.

If we identify any portions that warrant further consideration, we then determine whether in fact the species is threatened or endangered in any significant portion of its range. Depending on the biology of the species, its range, and the threats it faces, it may be more efficient for the Service to address the significance question first, or the status question first. Thus, if the Service determines that a portion of the range is not significant, the Service need not determine whether the species is threatened or endangered there. If the Service determines that the species is not threatened or endangered in a portion of its range, the Service need not determine if that portion is significant. If the Service determines that both a portion of the range of a species is significant and the species is threatened or endangered there, the Service will specify that portion of the range where the species is in danger of extinction pursuant to section 4(c)(1) of the Act.

The terms ''resiliency,'' ''redundancy,'' and ''representation'' are intended to be indicators of the conservation value of portions of the range. Resiliency of a species allows the species to recover from periodic disturbance. A species will likely be more resilient if large populations exist in high-quality habitat that is distributed throughout the range of the species in such a way as to capture the environmental variability found within the range of the species. In addition, the portion may contribute to resiliency for other reasons—for instance, it may contain an important concentration of certain types of habitat that are necessary for the species to carry out its life-history functions, such as breeding, feeding, migration, dispersal, or wintering. Redundancy of populations may be needed to provide a margin of safety for the species to withstand catastrophic events. This does not mean that any portion that provides redundancy is a significant portion of the range of a species. The idea is to conserve enough areas of the range such that random perturbations in the system act on only a few populations. Therefore, each area must be examined based on whether that area provides an increment of redundancy is important to the conservation of the species. Adequate representation ensures that the species' adaptive capabilities are conserved. Specifically, the portion should be evaluated to see how it contributes to the genetic diversity of the species. The loss of genetically based diversity may substantially reduce the ability of the species to respond and adapt to future environmental changes. A peripheral population may contribute meaningfully to representation if there is evidence that it provides genetic diversity due to its location on the margin of the species' habitat requirements.

To determine whether any portion of the range of the Galapagos petrel warrants further consideration as possibly endangered, we reviewed the supporting record for this final listing determination with respect to the geographic concentration of threats and the significance of portions of the range to the conservation of the species. As previously mentioned, we evaluated whether substantial information indicated that (i) the portions may be significant and (ii) the species in that portion may be currently in danger of extinction.

We found that while the occurrence of some threats (e.g., agricultural expansion and the presence of goats and pigs on four of the five islands (Floreana, San Cristóbal, Santa Cruz, and southern Isabela) on which the petrel breeds) is uneven across the range of the Galapagos petrel, the best available information does not indicate that these portions of the range of the Galapagos petrel warrant further consideration as endangered. Although a recent paper by Friesen *et al.* (2006) suggested that the loss of any island population would result in a loss of genetic variability, the best available information does not provide evidence of significantly higher threats to a single population, it indicates that all populations generally face equivalent threats. Friesen recommended that conservation of this species should include preservation of viable breeding populations on all five islands on which Galapagos petrels occur, to prevent the loss of adaptive diversity. According to Friesen *et al.* (2006, p. 113), the populations of Galapagos petrels on Floreana, Santa Cruz, and Santiago Islands are genetically distinct. The authors recommended highest conservation priority for these three populations to preserve the maximum amount of genetic variability. The population on San Cristóbal Island appears to represent a mixture of birds from other islands and the birds on Isabela are genetically similar to birds on Santiago Islands. These authors, however, did not specify whether one or more island population(s) faced a significantly higher risk of threats than any other population.

The best scientific and commercial data available regarding the extent, location, and trend of agricultural expansion on Floreana, San Cristóbal, Santa Cruz, and southern Isabela Islands does not reflect the current and historical trend of habitat loss due to agricultural expansion on these islands. There is also no information available regarding the extent, locations, and population trends of feral goats and pigs on Floreana, San Cristóbal, Santa Cruz, and southern Isabela Islands, and the historic and current trends of direct impacts to Galapagos petrels and their habitat due to ungulate activity on these islands. Essentially, no disproportionate threats were found to the species on any of the islands. The best available data show that there are no portions of the range in which the threats are so concentrated as to place the species currently in danger of extinction.

As a result, while the best scientific and commercial data available allows us to make a determination as to the rangewide status of the Galapagos petrel, there is no available information that would allow us to determine whether the population on Floreana, San Cristóbal, Santa Cruz, or southern

Isabela Islands faces a significantly higher risk of threats than any other population, and thus whether one or more of these populations are significant portions of the range in which the species is currently in danger of extinction. Therefore, for the reasons discussed above, we have determined threatened status for the Galapagos petrel throughout all of its range under the Act.

II. Heinroth's Shearwater (Puffinus heinrothi)

Species Information

The Heinroth's shearwater (*Puffinus heinrothi*) is a small, dark brown shearwater that is known from the Bismarck Archipelago and the seas around Bougainville Island to the east of Papua New Guinea, and the island of Kolombangara in the Solomon Islands, an independent country (Buckingham *et al.* 1995, Coates 1985, 1990, as cited in BLI 2009b). The plumage of the species is often entirely sooty-brown except for the narrow, silvery underwing bar and sometimes white bellies (BLI 2009b). The species was first taxonomically described by Reichenow in 1919 (Brooke 2004, as cited in BLI 2009b; Sibley and Monroe 1990, 1993, p. 327).

Habitat and Life History

Very little information is available on the Heinroth's shearwater and its life history. The Bismarck Archipelago includes mostly volcanic islands with rugged terrains and a total land area of 49,700 km² (19,189 mi²) (CIA 2007). Kolombangara is in the New Georgia Islands group of the Solomon Islands. It is almost perfectly round and about 9 mi (15 km) across (CIA 2007). Birds have been seen from inshore boat journeys around the islands of Kolombangara and Bougainville, often in mixed-species fishing flocks (BLI 2009b). The species is thought to be a burrow-nester (Buckingham et al. 1995, as cited in BLI 2009b).

Range and Distribution

The species' nesting grounds have not been located, but observations of the species indicate that the species breeds on Bougainville Island in Papua New Guinea, and Kolombangara and Rendova Islands in the Solomon Islands (Buckingham *et al.* 1995, Coates 1985, 1990, as cited in BLI 2000). BLI (2009b) estimates the range of the Heinroth's shearwater to be 154,440 mi² (400,000 km²). However, BLI (2000, pp. 22, 27) defines ''range'' as the ''Extent of Occurrence, the area contained with the shortest continuous imaginary boundary which can be drawn to encompass all the known, inferred, or projected sites of present occurrence of a species, excluding cases of vagrancy.'' Therefore, this reported range includes a large area of nonbreeding habitat (i.e., the sea).

Population Estimates

The population for Heinroth's shearwater is estimated to be approximately 250 to 999 individuals, with an unknown population trend (BLI 2009b). The only suggestion of any decline is the absence of recent records around Watom near New Britain (BLI 2009b), the largest island in the Bismarck Archipelago of Papua New Guinea, where the species had been recorded in the past.

Conservation Status

The IUCN categorizes this species as ''Vulnerable'' (BLI 2009b), with an unknown population trend. The species is not listed on any CITES Appendices (*http://www.cites.org*).

Summary of Factors Affecting the Heinroth's shearwater

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

Although little is known about Heinroth's shearwater and its life history, based on general information common to all other Procellariid species, we conclude that the range of the species changes intra-annually based on an established breeding cycle. During the breeding season, breeding birds return to breeding colonies to breed and nest. During the non-breeding season, birds migrate far from their breeding range where they remain at sea until returning to breed. Therefore, our analysis of Factor A is separated into analyses of the species' breeding habitat and range and the species' nonbreeding habitat and range.

BLI (2009b) estimates the breeding range of Heinroth's shearwater to be 154,400 mi² (400,000 km²); however, BLI (2000) defines ''range'' as the ''Extent of Occurrence, the area contained within the shortest continuous imaginary boundary which can be drawn to encompass all the known, inferred, or projected sites of present occurrence of a species, excluding cases of vagrancy.'' Because this reported range includes a large area of non-breeding habitat (i.e., the sea), our analysis of Factor A with respect to the Heinroth's shearwater's breeding range focuses on the islands where the species is most likely to breed.

Although the nesting area of this species has not been located, the information available indicates that the species breeds on Bougainville Island in Papua New Guinea and the islands of Kolombangara and Rendova in the Solomon Islands, where the few recorded sightings of this species have occurred (Buckingham *et al.* 1995; Coates 1985 and 1990, Gibbs 1996, Iles 1998, as cited in BLI 2000; Onley and Scofield 2007, p. 215; P. Scofield, *in litt.* 1994 cited in BLI 2009b, unpaginated). The species was originally known from a few historic specimens on Watom, Papua New Guinea, suggesting historical breeding there, but there have been no recent records from this island.

More recently, two birds were captured inland on Bougainville Island. One of these birds was described as being recently fledged; so it is reasonable to believe that its nest was in the vicinity (Hadden 1981, as cited in BLI 2000 and BLI 2009b, unpaginated). The conclusion that the species breeds on Bougainville Island is further supported by recent observations in the seas around this island, including one flock of 250 birds (Coates 1985, 1990, as cited in BLI 2000 and BLI 2009b, unpaginated). It is also reasonable to conclude that breeding occurs on Kolombangara Island, because up to nine birds were recorded recently off this island where all timed records were in the afternoon or evening, when breeding birds of this species typically return to their nest sites from foraging excursions (Buckingham *et al.* 1995, Gibbs 1996, Scofield 1994 as cited in BLI 2000). Although not as conclusive as the other two sites due to only one observation, the species is also likely to breed on nearby Rendova Island, where one bird was seen flying out of the mountains at dawn (Ives 1998 as cited in BLI 2009b, unpaginated). Since Procellariids occupy land only to breed, it is reasonable to conclude that this bird was leaving its nest site.

Heinroth's shearwater is believed to be relatively sedentary (BLI 2009b, unpaginated) and may breed throughout the year (Onley and Scofield 2007, p. 215). Based on the locations of inland sightings of the Heinroth's shearwater and a comparison to closely related species, it is believed this species breeds in high mountains (Buckingham *et al.* 1995, as cited in BLI 2000 and BLI 2009b, unpaginated). The three islands where this species is likely to breed are all mountainous, volcanic islands in a wet tropical climate (BLI 2009b, unpaginated).

Bougainville Island is 3,598 mi² (9,317.8 km²) in size (United Nations System-Wide Earthwatch 1998a, unpaginated), is thickly vegetated, and is rugged. There are extensive areas of undisturbed lowland and montane

rainforest. Most of the 175,160 people who live on this island travel by foot or small boat, and live by subsistence agriculture and fishing (Central Intelligence Agency (CIA) 2007a, unpaginated; United Nations System-Wide Earthwatch 1998a, unpaginated; CIA 2007a, unpaginated). Exploitation of Papua New Guinea's natural resources has been somewhat hindered due to the islands' rugged terrain and the high cost of developing infrastructure (CIA 2007a, unpaginated). It is however rich in copper and gold (Bougainville Copper, Ltd 2009, unpaginated) and surface mining occurred until 1989. A copper mine on the island was one of the world's largest open pit mines, and caused environmental damage due to tailings to the surrounding forest and river areas. Although the mine is closed, there is likely to be pressure to mine natural resources such as copper and gold in the future. On Bougainville Island, we are unaware of any present or threatened destruction, modification, or curtailment of the Heinroth's shearwater's current breeding habitat; however, as resources (timber or otherwise) decline in other areas, the likelihood that the resources on Bougainville Island will be sought increases. Therefore, due to the presence of valuable resources such as copper and gold, based on the evidence before us, we believe it is reasonable to anticipate that deforestation and habitat destruction may be a threat in the foreseeable future.

On the islands of Kolombangara and Rendova, the forests, with land areas of 265.6 mi^2 (687.8 km^2) and 158.8 mi^2 (411.3 km^2), respectively, (United Nations System-Wide Earthwatch 1998b,c, unpaginated), are threatened by deforestation at mid to low elevations (Dutson, *in litt.* 2008, unpaginated). High-altitude forests are not threatened by deforestation because logging is commercially unviable in small-stature forests on steep slopes (Dutson, *in litt.* 2008, unpaginated). Timber is the Solomon Islands' most important export commodity. Unsustainable forestry practices, combined with clearing of land for agricultural and grazing purposes and overexploitation of wood products for use as fuel, results in the destruction of vast areas of forest throughout the Solomon Islands (CIA 2007b, unpaginated). All the lower slopes on Kolombangara Island have been logged except for one 1,640 ft (500 m) strip (United Nations System-Wide Earthwatch 1998b).

In 2003, the World Resources Institute reported that none of the Solomon Island's total land area is protected to such an extent that it is preserved in its natural condition (Earth Trends 2003b, unpaginated). Based on the locations of inland sightings of the Heinroth's shearwater and a comparison to closely related species, it is believed this species breeds in high mountains (Buckingham *et al.* 1995, as cited in BLI 2000 and BLI 2009b, unpaginated). By inference of analogous species, high-elevation forests on the islands of Kolombangara and Rendova are the likely breeding habitat of the Heinroth's shearwater, although breeding sites have never been located. While low and mid-elevation forests are being reduced through deforestation, deforestation is not currently considered to be a threat to the purported breeding habitat in forests at high elevations. Therefore, based on the best available information, deforestation to Heinroth's shearwater is not considered to be a threat to the species now and in the foreseeable future.

The Heinroth's shearwater's range at sea is poorly known. Up to 20 birds have been reported in the Bismarck seas, ranging to the Madang Province on the north coast of Papua New Guinea (Bailey 1992, Clay 1994, Coates 1985, 1990, Hornbuckle 1999, as cited in BLI 2000). Observations have also been reported in the seas around Bougainville Island, including a flock of 250 birds (Coates 1985, 1990, as cited in BLI 2000 and BLI 2009b, unpaginated). We are unaware of any present or threatened destruction, modification, or curtailment of this species' current sea habitat or range now and in the foreseeable future.

Summary of Factor A

On Kolombangara and Rendova Islands, although the low- to mid-elevation forests are being reduced by deforestation, we do not believe deforestation is a threat to the breeding habitat of Heinroth's shearwater now and in the foreseeable future. However on Bougainville Island, we find that the present or threatened destruction, modification, or curtailment of this species' breeding habitat is a threat now and in the foreseeable future due to the presence of valuable natural resources in the area where the species is believed to nest. Therefore, based on the best available scientific and commercial information, we find that the present or threatened destruction, modification, or curtailment of this species' breeding habitat is a threat to the species now and in the foreseeable future.

The Heinroth's shearwater's range at sea is poorly known. We are unaware of any present or threatened destruction, modification, or curtailment of this species' current sea habitat or range now or in the foreseeable future.

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

We are unaware of any commercial, recreational, scientific, or educational purpose for which the Heinroth's shearwater is currently being used. Therefore, we find that overutilization for commercial, recreational, scientific, or educational purposes is not a threat to the Heinroth's shearwater in any portion of its range now and in the foreseeable future.

C. Disease or Predation

We are not aware of any disease concerns that may have led to the decline of the Heinroth's shearwater.

Although the Heinroth's shearwater's nest sites have not been located, all three islands where the species is most likely to breed have introduced rats, cats, and dogs (Buckingham *et al.* 1995, as cited in BLI 2000 and BLI 2009b). Rats and feral cats contributed to drastic declines to other species such as the Galapagos petrel (see the discussion of Factor C for the Galapagos petrel), and introduced cats and rats are known to have caused many local extirpations of other petrel species (Moors and Atkinson 1984, as cited in Priddel *et al.* draft). Furthermore, the Heinroth's shearwater is believed to breed in high, inaccessible mountains and rats have been observed at 2,953 ft (900 m) on Kolombangara Island and consequently are believed to be a threat to this burrow-nesting species (Buckingham *et al.* 1995, as cited in BLI 2009b, unpaginated). In addition, pigs are reported to threaten Heinroth's shearwater (Dutson, *in litt.* 2008, unpaginated). However, it is unclear if pigs kill nestlings, juveniles, and adult birds by digging up nests, or by degrading shearwater habitat through trampling and rooting vegetation.

There have been no attempts to eradicate introduced predators from these islands; such eradication would be difficult due to the permanent human habitation on the islands and the customary ownership of the land (Dutson, *in litt.* 2008, unpaginated). Even if the predators were eradicated, there is still a high potential for rats and cats to be transported to the islands in boats transporting humans or other shipments.

Summary of Factor C

Although several diseases have been documented in other procellarid species, disease has not been documented in the Heinroth's

shearwater. While the species is at sea during the nonbreeding season, we are unaware of any threats due to predation on Heinroth's shearwaters. Therefore, we find that the disease does not affect the continued existence of the species threaten the species throughout all or a significant portion of its range now and in the foreseeable future.

Because the threat of predation (primarily by introduced rats and feral cats) has severely impacted other closely related procellarid species, and there are records of these introduced predators on the three islands where the Heinroth's shearwater is most likely to breed, it is reasonable to assume that this species is similarly affected while on its breeding grounds. Therefore, we find that predation is a significant threat to this species throughout all of its range now and in the foreseeable future.

D. The Inadequacy of Existing Regulatory Mechanisms

The regulatory mechanisms of Papua New Guinea (PNG) are complex in some respects. In 1975, environmental issues were added to the government's constitution under its National Goal and Directive Principals. The Environmental Management for Sustainable Development (EMSD) Program was established; however, as of 2001, there was a shortage of government funding for the Program (Aka, 2001). The PNG Constitution encourages ''traditional villages and communities to remain as viable units of Papua New Guinean society'' (Pacific Islands Legal Information Institute, 2006). In this same vein of governing, PNG is essentially divided into autonomous regions which govern themselves.

Bougainville Island, on which Heinroth's shearwater is believed to nest, is considered an autonomous region by PNG. Bougainville's government was established in 2000; it has its own constitution and its own president and house of representatives. Due to the structure of PNG's governing mechanisms, PNG's resources are difficult to manage and regulate through this autonomous governing system. Although PNG's Forestry Act of 1991 states that the forests resources and environment will be managed, developed, and protected in such a way as to conserve and renew them as an asset for the succeeding generations, much of PNG's land is logged, farmed for palm oil, and unsustainably managed. Only in 2009 did Papua New Guinea create its first national conservation area, the YUS Conservation Area, covering 76,000 ha (187,000 ac) on the island of Papua New Guinea. The main conservation efforts appear to predominantly be carried out by nongovernmental organizations, such as the Research and Conservation Foundation of Papua New Guinea, which works with the local communities to create viable economic alternatives to unsustainable clear cutting and mining.

On Bougainville Island due to the lack of well-established regulatory mechanisms governing land ownership, particularly with respect to introduced predators, mining, and habitat loss due to unsustainable timber harvest practices, no regulatory mechanisms are known that reduce or remove threats to this species. Additionally, none of the Solomon Island's total land area is protected to such an extent that it is preserved in its natural condition (Earth Trends 2003b). The lack of any regulatory mechanisms may be exacerbating the threats from habitat loss (Factor A) and predation by introduced species (Factor C), even though the species is suspected to nest in remote, forested areas. Therefore, we find that the regulatory mechanisms in place are inadequate to ameliorate the threats to the Heinroth's shearwater throughout all of its range now and in the foreseeable future.

E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

As previously mentioned, several commenters disputed our statement in the proposed rule that long-line fisheries threaten all seabirds and in particular, the Heinroth's shearwater. According to the U.S. National Marine Fisheries Service (NMFS) and BirdLife International (BLI 2009b), the seabirds killed in long-line fisheries are predominantly albatrosses and some species of petrels (not *Pterodroma* species). According to the commenters, fisheries by-catch has not been identified as a key threat for this species (NZDOC 2008, pp. 2–3). The characteristics of a seabird species vulnerable to long-line fishing include being an aggressive seabird good at seizing prey or baited hooks at the water's surface, or is a proficient diver and these characteristics do not describe the Heinroth's shearwater. Therefore, due to the absence of conclusive information regarding the threat of long-line fishing on the Heinroth's shearwater, we find that this factor does not affect the continued existence of the species throughout all or a significant portion of its range.

The population of the Heinroth's shearwater is estimated at 250 to fewer than 1,000 individuals, which is considered to be small (BLI 2009b). Species with such small population sizes are at greater risk of extinction. In general, the fewer the number of populations and the smaller the size of each population, the higher the probability of extinction (Franklin 1980, p. 7; Gilpin and Soule 1986, p. 12; Meffe and Carroll 1996, pp. 218–219; Pimm *et al.* 1998, pp. 757–785; Raup 1991, pp. 124–127; Soule 1987, p. 5).

The Heinroth's shearwater's small population size combined with its colonial nesting habits, as is typical of all Procellariid species, makes this species particularly vulnerable to the threat of adverse random, naturally occurring events (e.g., volcanic eruptions, cyclones, and earthquakes) that destroy breeding individuals and their breeding habitat. All three of the islands where the Heinroth's shearwater is most likely to breed are in a geologically active area resulting in a significant risk of catastrophic natural events. These islands are subject to frequent earthquakes, tremors, volcanic activity, typhoons, tsunamis, and mudslides (CIA 2007a, b, unpaginated). Of these three islands, the species' habitat on Bougainville is at most risk from volcanic activity. There are seven volcanoes on Bougainville that have been active in the last 10,000 years. Bagana is an active volcano that has had 22 eruptions since 1842, with most being explosive. Some of these explosive eruptions have produced extremely hot, gas-charged ash, which is expelled with explosive force, moving with hurricane speed down the mountainside. Bagana has been erupting since 1972, creating slow-moving lava flows (Bagana 2005, unpaginated). These volcanic explosions and lava flows have great potential to destroy Heinroth's shearwaters and their breeding habitat in the mountainous areas where they are most likely to breed.

Landslides in mountainous areas are associated with severe storms that are common in this geographic region (World Meteorological Organization 2004, unpaginated), and would be particularly threatening to breeding Heinroth's shearwaters and their breeding habitat during these extreme weather events.

While species with more extensive breeding ranges or higher population numbers could recover from adverse random, naturally occurring events such as earthquakes, tremors, volcanic activity, typhoons, tsunamis, and mudslides, this species does not have such resiliency. Its small population size and restricted breeding range puts the species at higher risk for experiencing the irreversible adverse

effects of random, naturally occurring events.

Summary of Factor E

While species with more extensive breeding ranges or higher population numbers could recover from adverse random, naturally occurring events such as volcanic eruptions or typhoons, the Heinroth's shearwater does not have such resiliency. Its small population size and restricted breeding range puts the species at higher risk for experiencing the irreversible adverse effects of random, naturally occurring events. Therefore, we find that the combination of factors—the species' small population size, its restricted breeding range, and the likelihood of adverse random, naturally occurring events—to be a significant threat to the species throughout all of its range now and in the foreseeable future.

Conclusion and Determination for the Heinroth's Shearwater

We have carefully assessed the best available scientific and commercial information regarding the past, present, and potential future threats faced by the Heinroth's shearwater. We have determined that the species is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The best available information indicates that the Heinroth's shearwater is threatened by predation by introduced rats and feral cats within the species' breeding range (Factor C). The probability of these introduced predators preying on this species is high given that all these introduced species are on the islands where the species is likely to breed, and rats have been found in some of the high mountainous areas where the Heinroth's shearwater is most likely to nest. Furthermore, the devastating impact of predation by these introduced species has been documented in several closely related species. Finally, there is no available information that indicates that efforts have been initiated to eradicate introduced predators from the three islands where the species is most likely to breed. This threat is magnified by the fact that these predators likely threaten the species throughout its breeding range.

On Bougainville Island, although we are unaware of any present or threatened destruction, modification, or curtailment of the Heinroth's shearwater's current breeding habitat (Factor A), due to the presence of valuable resources such as copper and gold, based on the evidence before us, we believe it is reasonable to anticipate that mining may be a threat in the foreseeable future. The species' low population size of 250 to fewer than 1,000 individuals further increases this species' risk of extinction. Its colonial nesting habits also makes the species particularly vulnerable to the threat of catastrophic, naturally occurring events (e.g., volcanic activities) that are known to frequently occur in the species' breeding range (Factor E). In addition, we have determined that the inadequacy of existing regulatory mechanisms to reduce or remove these threats is a contributory factor to the risks that threaten this species' continued existence (Factor D). Because the survival of this species is dependent on recruitment of chicks from its breeding range, the threats to this species within its breeding range put the species at risk throughout all of its range.

While the threats themselves may be different, the suite of threats acting on the species and its habitats appear to be affecting the species in a comparable manner. No disproportionate threats to the species were found on any of the islands or areas where it is believed to exist; the severity of the threats on each island appear to be comparable. The best available data show that there are no portions of the range in which the threats are so concentrated as to place the species currently in danger of extinction. Despite the lack of population trend information, due to the species' small population size, the lack of conservation measures and regulatory protections for this species, and the identified threats that have caused declines in closely related species, we determine threatened status for the Heinroth's shearwater because it is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. Therefore, based on the best scientific and commercial data available, we find that the Heinroth's shearwater is threatened throughout its range.

Significant Portion of the Range Analysis

Having determined that the Heinroth's shearwater is likely to become an endangered species within the foreseeable future throughout all of its range, we also considered whether there are any significant portions of its range where the species is currently in danger of extinction. See our discussion above for the Galapagos petrel regarding how we make this determination.

To determine whether any portion of the range of the Heinroth's shearwater warrants further consideration as possibly endangered, we reviewed the supporting record for this listing determination with respect to the geographic concentration of threats acting on the species and the significance of portions of the range to the conservation of the species. As previously mentioned, we evaluated whether the best scientific and commercial information available indicated that (i) portions may be significant and (ii) the species in that portion may be currently in danger of extinction. The Heinroth's shearwater is found on three small, neighboring islands. Heinroth's shearwater is thought to occur in remaining natural forests in the more remote regions of these islands, and as a consequence very limited information is available on the status of the species on these islands. The status of the species is essentially unknown other than the observations indicated above. Under our five-factor analysis above, we determined that Heinroth's shearwater is a threatened species throughout its entire range.

While the best scientific and commercial data available allows us to make a determination as to the range wide status of the Heinroth's shearwater, the available information does not suggest that the populations on Bougainville, Kolombangara, or Rendova Islands face a significantly higher risk of threats than any other population, or that one or more of these populations is currently in danger of extinction. Following a review of the threats acting on the species and the geographic scope of these threats, we found that the threats such as predation, inadequate regulatory mechanisms, small population size, restricted breeding range, and the likelihood of adverse, random, naturally occurring events affect the species consistently and relatively equitably throughout its range. Therefore, following a review of the Solicitor's Opinion on Significant Portion of the Range and recommendations on how to implement the Opinion, we have determined that because the data do not indicate that any portion of the range of the Heinroth's shearwater is disproportionately threatened, no portion warrants further consideration as a significant portion of the species.

In conclusion, although we do not believe that the species is currently in danger of extinction now, we believe it is likely that it will become endangered throughout its range in the foreseeable future. Therefore, for the reasons discussed above, we determine that the Heinroth's shearwater meets the definition of a threatened species throughout all of its range under the Act.

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 Federal and State 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 Galapagos petrel and Heinroth's shearwater are not native to the United States, we are not designating critical habitat in this final rule.

Section 8(a) of the Act authorizes the provision of 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. As such, these prohibitions would be applicable to the Galapagos petrel, and Heinroth's shearwater. These prohibitions, under 50 CFR 17.21 and 17.31, in part, 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 commercial activity; or sell or offer for sale in interstate or foreign commerce any endangered or threatened 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.

Permits may be issued to carry out otherwise prohibited activities involving endangered and threatened wildlife species under certain circumstances. Regulations governing permits for threatened species are codified at 50 CFR 17.32.

Required Determinations

National Environmental Policy Act

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. A notice outlining our reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of all references cited in this rule is available on the Internet at *http://www.regulations.gov* or upon request from the Branch of Listing, Endangered Species, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

Author

The primary authors of this final rule are staff members of the Branch of Listing, Endangered Species, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

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

Regulation Promulgation

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 17—[AMENDED]

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

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

■ 2. Amend § 17.11(h) by adding new entries for ''Petrel, Galapagos'' and ''Shearwater, Heinroth's'' in alphabetical order under BIRDS to the List of Endangered and Threatened Wildlife as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	
BIRDS							
*	*	*	*	*	*	*	
Petrel, Galapagos	*Pterodroma phaeopygia*	Pacific Ocean—Ecuador (Galapagos Islands).	Entire	T	766	NA	NA
*	*	*	*	*	*	*	
Shearwater, Heinroth's	*Puffinus heinrothi*	Pacific Ocean—Papua New Guinea (Bougainville Island), Solomon Islands (Kolom-bangara and Rendova).	Entire	T	766	NA	NA
*	*	*	*	*	*	*	

* * * * *

Dated: December 28, 2009.

Robyn Thorson,

Director, Fish and Wildlife Service.

[FR Doc. E9–31308 Filed 1–4–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 0906221072–91425–02]

RIN 0648–AX95

Atlantic Highly Migratory Species; Atlantic Commercial Shark Management Measures

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

ACTION: Final rule; fishing season notification.

SUMMARY: This final rule establishes the annual quotas and opening dates for the 2010 fishing season for sandbar sharks, non-sandbar large coastal sharks (LCS), small coastal sharks (SCS), and pelagic sharks based on any over- and/or underharvests experienced during the 2008 and 2009 Atlantic commercial shark fishing seasons. NMFS needs to take this action to establish the 2010 adjusted fishing quotas and to open the commercial fishing seasons for the Atlantic sandbar shark, non-sandbar LCS, SCS, and pelagic shark fishery based on over- and underharvests from the 2009 fishing season. This action is expected to affect commercial shark fishermen in the Atlantic and Gulf of Mexico regions.

DATES: The 2010 Atlantic commercial shark fishing season for the shark research, blue sharks, porbeagle sharks, and pelagic sharks (other than porbeagle and blue sharks) in the northwestern Atlantic Ocean, including the Gulf of Mexico and the Caribbean Sea, will open on January 5, 2010. The non-sandbar LCS in the Gulf of Mexico region will open on February 4, 2010. NMFS will keep the SCS fishery closed until the effective date of the final rule for Amendment 3. NMFS will open the non-sandbar LCS fishery in the Atlantic region on July 15, 2010. The 2009 Atlantic commercial shark fishing season and quotas are provided in Table 1 under **SUPPLEMENTARY INFORMATION**.

ADDRESSES: Highly Migratory Species Management Division, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Karyl Brewster-Geisz or Guý DuBeck by phone: 301–713–2347, or by fax: 301–713–1917.

SUPPLEMENTARY INFORMATION:

Background

The Atlantic shark fishery is managed under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The 2006 Consolidated Highly Migratory Species (HMS) Fishery Management Plan (FMP) and its amendments under the Magnuson-Stevens Act are implemented via regulations at 50 CFR part 635.

On October 28, 2009, NMFS published a proposed rule (74 FR 55526) announcing the fishing season for 2010 and the 2010 proposed quotas based on shark landings information as of September 15, 2009. The proposed rule contained details regarding the alternatives considered and a brief summary of the recent management history. Those details are not repeated here. Several comments from the public were received on the proposed rule. Those comments along with the Agency's responses are provided below. This final rule serves as notification of the 2010 fishing season and 2010 quotas, based on shark landings updates as of October 31, 2009, pursuant to 50 CFR 635.27(b)(1)(vii). This action does not change the annual base and adjusted base annual commercial quotas as established under Amendment 2 to the 2006 Consolidated HMS FMP and its June 24, 2008 final rule (73 FR 35778, corrected at 73 FR 40658, July 15, 2008). Any such changes would be performed through an amendment. Rather, this action adjusts the commercial quotas based on overharvests in 2008 and 2009.

Response to Comments

During the proposed rule stage, NMFS received over a dozen written comments from fishermen, dealers, environmental groups, and other interested parties. NMFS also heard numerous comments from the fishermen and dealers who attended the three public hearings. The significant comments on the October 28, 2009, proposed rule (74 FR 55526) received during the public comment period are summarized below, together with NMFS responses.

SCS Alternatives

Comment 1: NMFS received many comments supporting alternative A1, the no action alternative. Commenters stated that since the current SCS quota of 454 metric tons (mt) dressed weight (dw) has not been taken and is still available, NMFS should open the fishery on or about January 1. Commenters also felt that the SCS quota should not be reduced because they believe that blacknose shark data is not based on the best available science and because NMFS did not consider the Turtle Excluder Devices (TEDs) or the reduction in shrimp effort from Maine to Texas in the stock assessment.

Response: NMFS is currently in the proposed rule stage of Amendment 3 to the Consolidated Highly Migratory Species (HMS) Fishery Management Plan (FMP) (73 FR 36392, July 24, 2009). Amendment 3 considered, among other things, measures that would significantly reduce the non-blacknose SCS and blacknose shark quotas in order to rebuild blacknose shark stocks and prevent overfishing of blacknose sharks. Amendment 3 would also establish annual catch limits (ACLs) and accountability measures (AMs), which must be set at levels consistent with the plan for ending overfishing and rebuilding blacknose sharks. NMFS will not select final alternatives for implementation until it finalizes the Environmental Impact Statement (FEIS) for Amendment 3, prepares a Record of Decision (ROD) and publishes a final rule implementing the amendment. Should NMFS select the preferred alternatives to reduce quotas for blacknose and non-blacknose SCS under proposed Amendment 3 there may be no non-blacknose SCS and/or blacknose shark quotas available, if NMFS opened the SCS fishery on or about January 1, depending on the level of harvest occurring prior to selection and implementation of Amendment 3. Any subsequent overharvest of potential reduced blacknose and non-blacknose SCS quotas that may be implemented under Amendment 3 would lower quotas for the 2011 fishing season. Additionally, under the Magnuson-Stevens Act, any fishery that was declared to be overfished by 2009 must establish a mechanism for specifying ACLs and establish ACLs and AMs effective for the 2010 fishing season. Delaying the 2010 SCS fishing season would allow the SCS fishing to open under the potentially reduced quotas implemented in Amendment 3 consistent with ACLs.

NMFS used the best available science and a rigorous Southeast Data Assessment and Review (SEDAR) stock assessment process to make the determination that blacknose sharks are overfished with overfishing occurring. The independent review panel determined that the data used in the SCS stock assessment were considered the best available at the time. They also determined that appropriate standard

assessment methods based on general production models and on age-structured modeling were used to derive management benchmarks given the data available. Therefore, NMFS believes that the 2007 SCS stock assessment represents the best available science consistent with National Standard 2 of the MSA, 16 U.S.C. 1851(a)(2). The next blacknose shark stock assessment is scheduled for 2010, and NMFS will re-visit shrimp bycatch and effort along with SCS quotas, as appropriate, once the assessment is complete.

Comment 2: The North Carolina Division of Marine Fisheries (NCDMF) supports alternative A2 only if NMFS plans on implementing a small SCS quota (56.9 mt) from Amendment 3. If a larger SCS quota is implemented, then NCDMF supports A1.

Response: NMFS is currently reviewing all the comments received on draft Amendment 3, the Draft Environmental Impact Statement (DEIS) and proposed implementing regulations. Based on public comment and resulting analyses, it is possible that the proposed quotas in Amendment 3 could change. NMFS expects to implement Amendment 3 in mid- to late spring. Thus, NMFS would not know which blacknose shark quota will be finalized before the 2010 shark specifications, which need to be implemented in early January to start the 2010 shark fishing season. Additionally, as described above, under the Magnuson-Stevens Act, any fishery that was declared to be overfished by 2009 must have ACLs implemented by the 2010 fishing season. Delaying the 2010 SCS fishing season would allow the SCS fishing to open under the new quotas for ending overfishing and rebuilding blacknose sharks and consistent with the ACLs implemented in Amendment 3.

Non-Sandbar LCS Alternatives

Comment 3: Florida fishermen and related industries did not support a July 15 opening for the non-sandbar LCS fishery in the Atlantic region since those fishermen do not have other fisheries to fish early in the year, unlike fishermen in the mid- and north Atlantic. These commenters supported the no action alternative (B1). These commenters felt that there are more shark fishermen in Florida and that NMFS should not give preference to other states. These commenters also felt that a delay would not provide an equal opportunity for Florida fishermen to harvest the quota, since the sharks migrate north or into state waters in July. North Carolina fishermen, NCDMF, and ASMFC supported the July 15 opening (alternative B2) because it offers mid- and north Atlantic fishermen an opportunity to harvest the quota, which these fishermen could not do in 2009.

Response: In the Atlantic region, the non-sandbar LCS fishery closed on July 1 (74 FR 30479, June 26, 2009), which did not allow fishery participants in the North Atlantic to have a fishing season as the quota was taken before the sharks moved northward into their waters. Assuming fishing effort remains the same in 2010 as in 2009, given the reduced 2010 non-sandbar LCS quota in the Atlantic region because of the overharvest in 2009, fishermen in the North Atlantic would most likely not have a non-sandbar LCS fishery in 2010 if it again opens on January 1.

During the comment period on Amendment 2 to the Consolidated HMS FMP, NMFS received comments from the Atlantic States Marine Fisheries Commission (ASMFC) and the State of Florida stating that NMFS should open the non-sandbar LCS fishery season in July instead of January 1, in order to provide an equal opportunity to harvest the quota for all fishermen in the Atlantic region. They stated that this July opening would allow the season to be open when sharks are present in all areas and to prevent fishing mortality during shark pupping season. NMFS believes that delaying the non-sandbar LCS fishery in the Atlantic region would allow the mid- and north Atlantic fishermen an opportunity to fully participate in the LCS fishery in 2010. The fishermen in these regions did not have that opportunity in 2009 due to the federal mid-Atlantic shark closure off North Carolina, various new state water closures, and the lack of sharks because the sharks had not yet migrated northward by the time the fishery was closed. Florida and south Atlantic fishermen harvested the majority of the non-sandbar LCS quota in 2009. While sharks may not be as plentiful in the south Atlantic area in July as they are in January, historical landings indicate that fishermen in that area still have opportunities to catch sharks in July. Additionally, assuming the fishery remains open for most of the remainder of the year, fishermen in the south Atlantic area, unlike fishermen in the mid- and north Atlantic areas, would continue to have an opportunity to fish for sharks later in the year as the sharks migrate south into warmer waters.

However, NMFS recognizes that the delay may have negative impacts on fishermen in the south Atlantic area that may not be felt by fishermen in other areas. As such, NMFS is currently exploring causes of last year's early closures of the non-sandbar LCS fisheries and may take additional measures in a future rulemaking to help ensure the non-sandbar LCS shark seasons continue year-round while continuing to ensure that all fishermen in all regions have an equal opportunity to harvest the quota.

Comment 4: Fishermen and related industries in all areas affected by this rule disagreed with the proposed non-sandbar LCS delay in the Gulf of Mexico region (alternative B3). Reasons stated by the commenters in support of opening on or about January 1, included: increased economic stability for Gulf of Mexico fishermen, increased market prices for all fishermen with a split season, increased safety, increased food quality as they would not be unpacking fish in warm weather, and equal fishing opportunities.

Response: NMFS agrees with the comments regarding the proposed delay in opening the non-sandbar LCS fishery in the Gulf of Mexico. Based on the concerns and comments from Gulf of Mexico fishermen, NMFS changed the preferred alternative to B2, which would open the non-sandbar LCS fishery in the Gulf of Mexico region upon the effective date of the 2010 shark specifications. While NMFS thought the state water closures disadvantaged Louisiana fishermen in 2009, Louisiana fishermen did not express concern over the state water closure during the shark fishing season. Indeed, Louisiana reported significant landings for the 2009 non-sandbar LCS fishery from January until April.

Comment 5: Some fishermen expressed a concern that the shark meat will spoil during fishing trips if there is a July opening. The commenters noted that many fishermen do not have coolers on their small boats.

Response: The Food and Drug Administration (FDA) published regulations (December 18, 1995; 60 FR 65092) that mandate the application of the Hazard Analysis Critical Control Point (HACCP) principles to ensure the safe and sanitary processing of seafood products. Although these regulations do not apply to fishing vessels or transporters, the processors of domestic seafood must take responsibility for the incoming product. Dealers should consult the FDA Center for Food Safety and Applied Nutrition Fish and Fisheries Products Hazards and Controls Guidance, for further information.

General Comments

Comment 6: NMFS received many comments requesting that NMFS manage the shark fisheries as it had before Amendment 2. For example, some commenters requested splitting the quota by region and by season in

order to keep the market viable, achieve equitable fishing opportunities among all participants, and protect pupping females. NMFS also received comments to increase the trip limit back to 4,000 lb dw to decrease the volume of dead discarded sharks.

Response: NMFS continually reviews the management practices in HMS fisheries to improve the manageability of the fishery while also meeting the requirements of the Magnuson-Stevens Act, the National Standard Guidelines, and the 2006 Consolidated HMS FMP and its amendments. NMFS will examine these commenters' proposals and related specific issues and may propose them in future actions, if appropriate.

Comment 7: NMFS received a comment regarding the early closure of the LCS fishery in 2009. The commenter suggested that total allowable catch (TAC) is lower than maximum sustainable yield (MSY) and that is why the quotas are being caught with less effort.

Response: The 2005/2006 LCS complex, blacktip and sandbar shark stock assessments represent the best available science for the establishing the TAC in the LCS fishery. This stock assessment found that the status of sandbar sharks is overfished with overfishing occurring, the status of blacktip sharks in the Atlantic region is unknown, and the status of blacktip sharks in the Gulf of Mexico region is healthy. Furthermore, the stock assessment provided a TAC for sandbar sharks that would have a 70 percent chance of rebuilding sandbar sharks by the year 2070 and that was substantially lower than the previous landings of sandbar sharks. As described in Amendment 2 to the Consolidated HMS FMP, NMFS split this TAC to provide for dead discards from commercial and recreational fishermen and a commercial quota, which is used in the shark research fishery. NMFS also needed to balance the amount of sandbar sharks that would be caught when fishing for other LCS in this multi-species fishery. Additionally, because of the ''unknown'' status of blacktip sharks in the Atlantic, NMFS aimed to not increase the blacktip shark landings. For these and other reasons, as described in Amendment 2, NMFS established the resulting quotas for the sandbar and non-sandbar LCS fisheries. These quotas are designed to rebuild sandbar, dusky and porbeagle sharks while providing an opportunity for the sustainable harvest of blacktip sharks and other sharks in the LCS complex. As described in both Amendment 2 and draft Amendment 3, for sharks in general, NMFS considers the TAC to be equivalent to the annual catch limit (ACL) required in the Magnuson-Stevens Act and described in the guidelines to National Standard 1 (50 CFR 600.310). Also, as described in both Amendment 2 and draft Amendment 3, because the commercial landings quotas are only a portion of both the TAC (or ACL) and the MSY, these quotas are intentionally lower than both the TAC (or ACL) and the MSY provided in the 2006/2007 stock assessment. Thus, NMFS does not believe that the quota was taken early in 2009 just because the quotas are set below the TAC and MSY.

Comment 8: NMFS should stop all shark fishing.

Response: The purpose of this rulemaking is to adjust quotas based on over- and underharvests from the previous year and opening dates for the 2010 shark season. The final rule is not reanalyzing the overall management measures for sharks, which was done in Amendment 2 to the Consolidated HMS FMP. Accordingly, this comment is outside the scope of this rulemaking.

Comment 9: NMFS received comments from environmental constituents regarding the quotas of certain overfished species. Commenters indicated that the 2010 quota proposed for porbeagle sharks was actually a quota increase from 1.4 mt to 1.5 mt, despite the fact that NMFS has no justification for apparently increasing the quota for a species that is so substantially reduced that fishermen were unable to land the 2009 quota. NMFS does not list mako sharks among species that are overfished with overfishing occurring, even though the findings by NMFS state that shortfin mako sharks are subjected to overfishing and approaching an overfished condition.

Response: The stocks and status of the porbeagle and shortfin mako sharks are closely monitored by NMFS to ensure the quotas are not exceeded. As a result of the 2005 Canadian stock assessment for the North Atlantic porbeagle shark, NMFS has determined that porbeagle sharks are overfished, but overfishing is not occurring. While the United States is not responsible for a large proportion of the porbeagle sharks landed in the Northwest Atlantic, NMFS established a total allowable catch (TAC) for porbeagle sharks of 11.3 mt dw. From this TAC, NMFS established a commercial quota of 1.7 mt dw. The quota finalized in this rule of 1.5 mt dw is lower than the baseline quota due to an overharvest of porbeagle sharks in 2008 that occurred after the 2009 quotas had been finalized. NMFS understands this is an increase from 2009, but the 2010 commercial quota is still below the 1.7 mt dw commercial baseline quota for porbeagle sharks. Currently, NMFS is in the draft stage for Amendment 3 and has published a proposed implementing rule, which includes measures to end overfishing of shortfin mako sharks on an international level. Based on the 2008 SCRS stock assessment on the North Atlantic shortfin mako shark population, NMFS determined that the species in the U.S. is experiencing overfishing and approaching an overfished status. Since U.S. commercial harvest of Atlantic shortfin mako sharks has historically been less than ten percent of the total international landings, domestic reductions of shortfin mako shark mortality alone would not end overfishing of the entire North Atlantic stock. Therefore, NMFS believes that ending overfishing and preventing an overfished status would be better accomplished through international efforts where other countries that have large takes of shortfin mako sharks could participate in mortality reduction discussions.

Comment 10: Some commenters did not agree with the idea that the shark quota should last year-round. They asked which other fisheries are year-round fisheries and why does the shark fishery have to be open year-round.

Response: The HMS fisheries that are open year-round are pelagic sharks, swordfish, and 'BAYS' tunas (bigeye, albacore, yellowfin, and skipjack). The intent of Amendment 2 was to have a single year-round non-sandbar LCS shark season. The January 1 opening date could overlap with open seasons for other BLL and gillnet fisheries, and also provides fishermen a full calendar year to harvest available quota. NMFS believes that having a commercial season that opens January 1 and remains open most of the year, until 80-percent of the quota is achieved, would prevent fishermen from engaging in derby fishing and reduce resulting safety concerns. Furthermore, NMFS has heard comments for many years that fishermen and dealers cannot build a market for shark meat because the fishery is not open long enough (many dealers do not accept any shark meat after the LCS fishery is closed) and is unstable. Having the fishery open most of the year should alleviate the concerns and could increase the marketability of shark. Also, during many public hearings this year, NMFS has heard from HMS fishermen that any amount of fish coming in is helpful given the current economic situation in the country. Having the shark fishery open year round, even at incidental levels,

could benefit fishermen who are financially struggling and do not have other opportunities to fish.

Comment 11: Commenters stated that the fishery needs to be declared a disaster because that is the only way to get compensation.

Response: Section 312(a) of the Magnuson-Stevens Act provides the mechanism through which a fishery resource disaster may be declared. It states: ''At the discretion of the Secretary or at the request of the Governor of an affected State or a fishing community, the Secretary shall determine whether there is a commercial fishery failure due to a fishery resource disaster as a result of natural causes, man-made causes beyond the control of fishery managers to mitigate through conservation and management measures, including regulatory restrictions (including those imposed as a result of judicial action) imposed to protect human health or the marine environment, or undetermined causes.'' Any issues related to this disaster declaration process are outside the scope of this rulemaking and would be handled through separate agency processes.

Comment 12: NMFS needs to implement individual fishing quotas (IFQs) in every fishery.

Response: While NMFS agrees that IFQs may be beneficial in many fisheries, it would take NMFS several years to implement an IFQ system for the shark fishery. NMFS would need to work with all stakeholders to devise the best allocation scheme possible, which would take considerable time. However, as described in the advance notice of proposed rulemaking (ANPR) published in (74 FR 26174, June 1, 2009), NMFS is considering changes in the permitting system for HMS, including sharks.

Changes From the Proposed Rule

NMFS is changing the preferred alternative for the non-sandbar LCS fishery from the proposed rule based on public comment. In the proposed rule, the preferred alternative was alternative B3, which would open the non-sandbar LCS in the Atlantic and Gulf of Mexico regions on July 15. The preferred alternative in the final rule would be alternative B2, which would open the non-sandbar LCS fishery in the Atlantic region on July 15 and open the non-sandbar LCS fishery in the Gulf of Mexico region upon the effective date of the final rule. NMFS received public comment from fishermen and dealers in all regions indicating that a delay in the start of the shark fishing season in the Gulf of Mexico would be detrimental to the fishermen. Comments stated that fishermen in the Gulf of Mexico would not be able to fish for anything else in the area, since other fisheries are closed in January. Also, shark dealers indicated that they would ideally prefer shipping shark products in January, along with any other fish products, to other markets for economic reasons. Commenters also noted that a split opening for the Gulf of Mexico and Atlantic regions would not cause a market glut of shark products and the fishermen might receive better prices for the products in 2010. In the proposed rule, NMFS believed that the state water closure in Louisiana would affect the distribution of the non-sandbar LCS quota in the region. This was not the case in 2009. Louisiana reported significant landings for the 2009 non-sandbar LCS fishery from January until April. As result of the comments received by the agency and the factors discussed, NMFS chose to change the preferred alternative from B3 to B2.

At the time the proposed rule published, shark landings updates (through September 15, 2009) indicated that the commercial Atlantic shark quota had been exceeded by 13 mt dw during the 2009 commercial shark fishing season. Since then, additional landings have been reported which have the effect of reducing the proposed quota by a total of 18.1 mt dw. As stated in the proposed rule, NMFS is adjusting the quota accordingly. Specifically, based on reports received by October 31, 2009, 205.9 mt dw of non-sandbar LCS in the Atlantic region were landed, which exceeds the 187.8 mt dw (414,024 lb dw) annual base quota by 18.1 mt dw. Therefore, the 2010 annual commercial non-sandbar LCS in the Atlantic region quota will be reduced by this amount to account for this overharvest (187.8 mt dw annual base quota − 205.9 mt dw of 2009 landings = − 18.1 mt dw overharvest). The 2010 adjusted annual commercial non-sandbar LCS in the Atlantic region quota will be 169.7 mt dw (374,121 lb dw) (187.8 mt dw annual base quota − 18.1 mt dw 2008 overage = 169.7 mt dw 2010 adjusted annual quota).

2010 Annual Quotas

This final rule adjusts the commercial quotas due to overharvests in 2008 and 2009. The 2010 annual quotas by species and species group are summarized in Table 1. All dealer reports that are received by NMFS after October 31, 2009, were used to adjust the 2011 quotas, as appropriate.

TABLE 1—2010 ANNUAL QUOTAS AND OPENING DATES FOR NON-SANDBAR LCS AND SANDBAR SHARKS. ALL QUOTAS AND LANDINGS ARE DRESSED WEIGHT (DW), IN METRIC TONS (MT), UNLESS SPECIFIED OTHERWISE

Species group	Region	2009 Annual quota (A)	Preliminary 2009 landings [1] (B)	Overharvest (C)	2010 Base Annual quota [2] (D)	2010 Final quota (D–C)	Season opening dates [3]
Non-Sandbar Large Coastal Sharks.	Gulf of Mexico ..	390.5 (860,896 lb dw).	319.2 (703,784 lb dw).	.....	390.5 (860,896 lb dw).	390.5 (860,896 lb dw).	February 4, 2010.
	Atlantic	187.8 (414,024 lb dw).	205.9 (453,988 lb dw).	18.1	187.8 (414,024 lb dw).	169.7 (374,121 lb dw).	July 15, 2010.
Non-Sandbar LCS Research Quota.	No regional quotas.	37.5 (82,673 lb dw).	37 (81,572 lb dw).	.....	37.5 (82,673 lb dw).	37.5 (82,673 lb dw).	January 5, 2010.
Sandbar Research Quota.	.....	87.9 (193,784 lb dw).	79.9 (176,058 lb dw).	.....	87.9 (193,784 lb dw).	87.9 (193,784 lb dw).	January 5, 2010.
Small Coastal Sharks [4].	.....	454 (1,000,888 lb dw).	235.8 (519,754 lb dw).	.....	454 (1,000,888 lb dw).	454 (1,000,888 lb dw).	On or about April 30, 2010.
Blue Sharks	.....	273 (601,856 lb dw).	2.2 (4,793 lb dw).	.....	273 (601,856 lb dw).	273 (601,856 lb dw).	January 5, 2010.
Porbeagle Sharks.	.....	1.4 (3,086 lb dw).	0.8 (1,733 lb dw).	[5] 0.2	1.7 (3,748 lb dw).	1.5 (3,307 lb dw).	January 5, 2010.

TABLE 1—2010 ANNUAL QUOTAS AND OPENING DATES FOR NON-SANDBAR LCS AND SANDBAR SHARKS. ALL QUOTAS AND LANDINGS ARE DRESSED WEIGHT (DW), IN METRIC TONS (MT), UNLESS SPECIFIED OTHERWISE—Continued

Species group	Region	2009 Annual quota (A)	Preliminary 2009 landings [1] (B)	Overharvest (C)	2010 Base Annual quota [2] (D)	2010 Final quota (D–C)	Season opening dates [3]
Pelagic Sharks Other Than Porbeagle or Blue.	.....	488 (1,075,856 lb dw).	86.4 (190,532 lb dw).	.....	488 (1,075,856 lb dw).	488 (1,075,856 lb dw).	January 5, 2010.

[1] Landings are from January 23, 2009, until October 31, 2009, and are subject to change.
[2] 2010 annual base quotas for sandbar and non-sandbar LCS are the annual adjusted base quotas that are effective from July 24, 2008, until December 31, 2012 (50 CFR 635.27(b)(1)(iii) and (iv)).
[3] The opening dates for the shark research, blue sharks, porbeagle sharks, pelagic sharks other than porbegle or blue fisheries, and non-sandbar LCS in the Gulf of Mexico region is dependent upon the publication date of this final rule. The on or about April 30 proposed opening date for SCS is dependent on the effective date for the final rule implementing Amendment 3. The non-sandbar LCS fishery in the Atlantic region will open on July 15, 2010.
[4] The quota in the table is based on current SCS quota regulations. NMFS is in the draft amendment and proposed rule stage of Amendment 3 to the Consolidated HMS FMP that proposes new non-blacknose SCS and blacknose shark quotas starting in the 2010 SCS fishing season.
[5] NMFS intends to adjust the 2010 quota for porbeagle sharks to account for the 0.2 mt dw overharvest that happened in 2008 after the 0.3 mt dw overharvest was accounted for in the final rule establishing the 2009 quota.

1. 2010 Quotas for Non-Sandbar LCS and Sandbar Sharks Within the Shark Research Fishery

Since no overharvests of the non-sandbar LCS and sandbar shark quotas within the shark research fishery occurred during the 2009 fishing year, pursuant to Amendment 2 to the 2006 Consolidated HMS FMP, the 2010 adjusted base annual quotas within the shark research fishery will be 37.5 mt dw (82,673 lb dw) for non-sandbar LCS and 87.9 mt dw (193,784 lb dw) for sandbar sharks.

2. 2010 Quotas for the Non-Sandbar LCS in the Gulf of Mexico Region

Since no overharvests of the non-sandbar LCS quota for the Gulf of Mexico region occurred during the 2009 fishing year, pursuant to Amendment 2 to the 2006 Consolidated HMS FMP, the 2010 adjusted base annual quota for non-sandbar LCS in the Gulf of Mexico region will be 390.5 mt dw (860,896 lb dw).

3. 2010 Quotas for the Non-Sandbar LCS in the Atlantic Region

Since an overharvest of 18.1 mt dw for the non-sandbar LCS quota for the Atlantic region occurred during the 2009 fishing year, pursuant to Amendment 2 to the 2006 Consolidated HMS FMP, the 2010 adjusted base annual quota for non-sandbar LCS in the Atlantic region will be 169.7 mt dw (374,121 lb dw).

4. 2010 Quotas for SCS and Pelagic Sharks

Since no overharvests of small coastal sharks, blue sharks, and pelagic sharks other than porbeagle or blue sharks occurred during the 2009 fishing year, pursuant to Amendment 2 to the 2006 Consolidated HMS FMP, the 2010 annual base quotas for small coastal sharks, blue sharks, and pelagic sharks other than porbeagle or blue sharks will be 454 mt dw (1,000,888 lb dw), 273 mt dw (601,856 lb dw), and 488 mt dw (1,075,856 lb dw), respectively. This final rule would not change the overall annual commercial quotas for porbeagle sharks and SCS. However, NMFS has proposed changes to the SCS quota in Amendment 3 (73 FR 36392, July 24, 2009). The quotas established by the preferred alternative in Amendment 3 would, if selected, supersede the quotas established in this rule. The change for the 2010 porbeagle shark quota, which accounts for the additional overharvest experienced during the 2008 fishing season, would be 1.5 mt dw (3,307 lb dw).

As of December 31, 2008, the final reported landings of porbeagle sharks were 2.2 mt dw (4,471 lb dw) (127 percent of the 2008 1.7 mt dw (3,748 lb dw) annual base quota). In the final rule establishing the 2009 quotas (73 FR 79005, December 29, 2008), NMFS accounted for an overharvest of porbeagle sharks of 0.3 mt dw (601 lb dw). That final rule used data that was reported as of November 15, 2008. Between that date and December 31, 2008, an additional 0.2 mt dw was reported landed. As such, this additional overharvest of 0.2 mt dw (441 lb dw) is proposed to be deducted from the 2010 porbeagle shark quota. Per 50 CFR 635.27(b)(1)(vii)(A), if the available quota is exceeded in any fishing season, NMFS will deduct an amount equivalent to the overharvest(s) from the following fishing season or, depending on the level of overharvest(s), NMFS may deduct an amount equivalent to the overharvest(s) spread over a number of subsequent fishing seasons to a maximum of five years. Given that the additional small overharvest of 0.2 mt dw (441 lb dw) was not accounted for in the 2009 quota (12 percent of the annual base porbeagle quota), NMFS will deduct the additional 2008 overharvest from the 2010 annual base commercial porbeagle quota. The 2010 adjusted annual commercial porbeagle quota would be 1.5 mt dw (3,307 lb dw) (1.7 mt dw annual base quota − 0.2 mt dw 2008 overage = 1.5 mt dw 2010 adjusted annual quota).

Fishing Season Notification for the 2010 Atlantic Commercial Shark Fishing Season

The 2010 Atlantic commercial shark fishing season for the shark research, blue sharks, porbeagle sharks, and pelagic sharks (other than porbeagle and blue sharks) in the northwestern Atlantic Ocean, including the Gulf of Mexico and the Caribbean Sea, will open on January 5, 2010. The non-sandbar LCS in the Gulf of Mexico region will open on February 4, 2010. NMFS will have different opening dates for the SCS and the Atlantic region non-sandbar LCS seasons. NMFS will keep the SCS fishery closed until the effective date of the final rule for Amendment 3. NMFS will open the non-sandbar LCS fishery in the Atlantic region on July 15, 2010.

All of the shark fisheries will remain open until December 31, 2010, unless NMFS determines that the fishing season landings for sandbar shark, non-sandbar LCS, blacknose, non-blacknose SCS, blue sharks, porbeagle sharks, or pelagic sharks (other than porbeagle or blue sharks) has reached, or is projected to reach, 80 percent of the available quota. At that time, consistent with 50

CFR 635.27(b)(1), NMFS will file for publication with the Office of the Federal Register a notice of closure for that shark species group and/or region that will be effective no fewer than 5 days from date of filing. From the effective date and time of the closure until NMFS announces, via a notice in the **Federal Register**, that additional quota, if any, is available, the fishery for the shark species group and, for non-sandbar LCS, region will remain closed, even across fishing years, consistent with 50 CFR 635.28(b)(2).

Classification

NMFS has determined that this action is consistent with the Magnuson-Stevens Act, including the national standards, and other applicable law.

Pursuant to 5 U.S.C. 553(d)(3), the Assistant Administrator for Fisheries has determined that good cause exists to waive the 30-day delay in effective date for the pelagic shark and shark research fisheries as such a delay would be contrary to the public interest. Providing a 30-day delay in effectiveness for the opening of the pelagic shark and shark research fisheries would be contrary to the public interest due to the negative economic impact on fishermen and on the fishery resource, and the diminished opportunity for collection of scientific data needed to manage the fisheries. In the case of the pelagic shark fishery (which includes blue, shortfin mako, porbeagle, common thresher, and oceanic whitetip sharks), this fishery is conducted as a bycatch fishery by those fishermen targeting other species such as swordfish, yellowfin tuna, and bigeye tuna. This incidental fishery continues throughout the year with no closure date anticipated in the FMP. Providing a 30-day delay in effectiveness would break the continuity of this fishery, forcing the fishermen to discard, dead or alive, any pelagic sharks that are caught. Such discards would not be counted against the commercial quota. Such a break in continuity occurred in 2009 when the shark fishery did not open until January 23 (73 FR 79005, December 24, 2008). In 2009, NMFS did not propose a good cause waiver and subsequently received concerns from pelagic fishermen, dealers, and other interested parties stating that the delay in the fishery caused economic loss and waste from the fish that were discarded dead rather than being landed.

For the 2010 fishing season, NMFS intended to complete this action in time for the fishery to open January 1, 2010, as appropriate, with no delay. However, due to the unexpectedly short LCS season in 2009 and the subsequent public comments (particularly those received during the HMS Advisory Panel meeting in September 2009) that requested NMFS to address the issues with the LCS season, NMFS determined it was necessary to consider alternatives regarding the LCS season in this action. During that time, NMFS also determined it was necessary to consider alternatives regarding SCS and ACLs. The analyses required for those alternatives, the need to collect public comment on those alternatives, and consideration of the public comments caused a delay in implementation of this action.

Porbeagle sharks have a limited quota that is closely monitored to ensure it is not exceeded. Under the rebuilding plan for porbeagle sharks, NMFS established a total allowable catch (TAC) of 11.3 mt dw based on current commercial landings of 1.7 mt dw, current commercial discards of 9.5 mt dw, and current recreational landings of 0.1 mt dw. As described in previous documents, estimating dead discards accurately is more difficult than accounting for landings. Landing fish, rather than discarding them dead, helps NMFS monitor the TAC properly in order to rebuild the porbeagle shark. Opening the fishery would ensure that any mortality associated with landings would be counted against the quota. Additionally, blue sharks and the other pelagic sharks are not considered overfished and their quotas have never been reached. Closing these fisheries from January 1, 2010, until the effective date of this rule could be detrimental to our management of these species as many of these fish would be discarded dead. Such a delay and required discards would also result in economic harm to the fishermen who normally catch and land them. A delay would mean fishermen could not retain the sharks caught as bycatch or sell the shark on the market.

Regarding the shark research fishery, NMFS selects a small number of fishermen to participate in the shark research fishery each year for the purpose of providing NMFS biological and catch data to better manage the Atlantic shark fisheries. All the trips and catches in this fishery are monitored with 100 percent observer coverage. Specifically, the shark research fishery allows for the collection of fishery-dependent data for future stock assessments, including specific biological and other data that are priorities for improving future stock assessments, and allows NMFS and commercial fishermen to conduct cooperative research to meet the shark research objectives for NMFS. Some of the shark research objectives include collecting reproductive and age data, monitoring size distribution, and tagging studies. The information collected in early January could be used in verifying data in the upcoming stock assessment for sandbar, dusky, and blacknose sharks in 2010, and will be used in other future stock assessments. While NMFS hopes to collect this data throughout the year, delaying the opening of the shark research fishery would not allow NMFS the ability to maintain the time-series of abundance for shark species or collect vital biological and regional data. Because of the biology and migratory patterns of sharks, for the data to be viable in future stock assessments and studies, it must be collected during the same time periods each year. Preventing NMFS from conducting any research trips deemed necessary could hinder the collection of scientific data and limit the ability of NMFS to manage the shark fisheries, which would be contrary to the public good.

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

In compliance with section 603 of the Regulatory Flexibility Act (RFA), NMFS has prepared a Final Regulatory Flexibility Analysis (FRFA) for this final rule to analyze the impacts of delaying the 2010 SCS and Atlantic region non-sandbar LCS fishing seasons and adjustments to the non-sandbar LCS and porbeagle quotas based on overharvests from the previous fishing season. These actions have already been analyzed in Amendment 2 to the 2006 Consolidated HMS FMP. The FRFA analyzes the anticipated economic impacts of the final actions and any significant economic impacts on small entities. A summary of the FRFA is below. The full FRFA and analysis of social and economic impacts are available from NMFS (*see* **ADDRESSES**).

In compliance with section 604(a)(1) of the Regulatory Flexibility Act, the purpose of this final rulemaking is, consistent with the Magnuson-Stevens Act, to adjust the 2010 proposed quotas for non-sandbar LCS, sandbar sharks, SCS, blue sharks, porbeagle sharks, or pelagic sharks (other than porbeagle or blue sharks) based on overharvests from the previous fishing year. These adjustments are being implemented according to the regulations implemented in the final rule for Amendment 2 to the 2006 Consolidated HMS FMP. Thus, NMFS would expect few, if any, economic impacts to fishermen other than those already analyzed in Amendment 2 to the 2006 Consolidated HMS FMP based on the

quota adjustments. In addition, NMFS is delaying the 2010 non-sandbar LCS shark fishery season in the Atlantic regions to allow for a more equitable distribution of the available quotas among constituents as well as delay the opening of the 2010 SCS fishing season to allow for the implementation of Amendment 3, which could implement new blacknose and non-blacknose SCS quotas consistent with ACLs to rebuild the blacknose shark stock and end overfishing of this species. While there are direct negative economic impacts associated with the proposed measures, delaying the opening of the 2010 SCS, and non-sandbar LCS fishing seasons could ensure that North Atlantic fishermen have access to the 2010 quotas and will allow for more equitable access to the quotas by all fishery participants.

Section 604(a)(2) of the Regulatory Flexibility Act requires NMFS to summarize significant issues raised by the public in response to the Initial Regulatory Flexibility Analysis (IRFA), a summary of the NMFS's assessment of such issues, and a statement of any changes made as a result of the comments. The IRFA was done as part of the draft EA for the 2010 Atlantic Commercial Shark Season Specifications. NMFS did not receive any comments specific to the IRFA. However, NMFS did receive comments related to the overall economic impacts of the proposed rule. Those comments and NMFS's responses to them are mentioned above in the preamble for this rule. Almost all of the comments and responses relate to the economic issues in the fishery, particularly comments 1 through 6, 10, 11, and 12.

Section 604(a)(3) requires Federal agencies to provide an estimate of the number of small entities to which the rule would apply. NMFS considers all HMS permit holders to be small entities because they either had average annual receipts less than $4.0 million for fish-harvesting, average annual receipts less than $6.5 million for charter/party boats, 100 or fewer employees for wholesale dealers, or 500 or fewer employees for seafood processors. These are the Small Business Administration (SBA) size standards for defining a small versus large business entity in this industry.

The commercial shark fishery is comprised of fishermen who hold a shark directed or incidental limited access permits (LAP) and the related industries including processors, bait houses, and equipment suppliers, all of which NMFS considers to be small entities according to the size standards set by the SBA. The final rule would apply to the approximately 223 directed commercial shark permit holders, 279 incidental commercial shark permit holders, and 100 commercial shark dealers as of March 18, 2009. Based on the 2008 ex-vessel price, the 2010 Atlantic shark commercial baseline quota could result in revenues of $6,215,208. The adjustment due to the overharvests would result in a $775 loss in revenues in the porbeagle fishery and a $51,792 loss in revenue in the Atlantic non-sandbar LCS fishery. These revenues are similar to the gross revenues analyzed in Amendment 2 to the 2006 Consolidated HMS FMP.

Section 604(a)(4) of the Regulatory Flexibility Act requires NMFS to describe the projected reporting, recordkeeping, and other compliance requirements of the final rule, including an estimate of the classes of small entities which would be subject to the requirements of the report or record. None of the alternatives considered for this final rule would result in additional reporting, recordkeeping, and compliance requirements.

Section 604(a)(5) of the Regulatory Flexibility Act requires NMFS to describe the steps taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes. Additionally, the Regulatory Flexibility Act (5 U.S.C. 603(c)(1)–(4)) lists four general categories of ''significant'' alternatives that would assist an agency in the development of significant alternatives. These categories of alternatives are: (1) Establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) use of performance rather than design standards; and (4) exemptions from coverage of the rule for small entities.

In order to meet the objectives of this final rule, consistent with Magnuson-Stevens Act and the Endangered Species Act (ESA), NMFS cannot exempt small entities or change the reporting requirements only for small entities because all the entities affected are considered small entities. NMFS does not know of any performance or design standards that would satisfy the aforementioned objectives of this rulemaking while, concurrently, complying with the Magnuson-Stevens Act. As described in the proposed rule (74 FR 55526, October 28, 2009), NMFS analyzed several different alternatives in this rulemaking and provides the rationale for identifying the preferred alternative to achieve the desired objective below.

The alternatives considered and analyzed have been grouped into two major categories. These categories include SCS and non-sandbar LCS. Under the SCS category, the alternatives include: (A1) Allow the 2010 SCS fishing season to open upon the effective date of the final rule for the 2010 Atlantic shark specifications; and, (A2) open the 2010 SCS fishing season on the effective date of the final rule for Amendment 3 to the Consolidated HMS FMP. Under the non-sandbar LCS category, the alternatives include: (B1) Allow the 2010 non-sandbar LCS fishery in the Atlantic and Gulf of Mexico regions to open upon the effective date of the final rule for the 2010 Atlantic shark specifications; (B2) open the 2010 non-sandbar LCS fishery in the Atlantic region on July 15, 2009 and open the 2010 non-sandbar LCS fishery in the Gulf of Mexico region upon the effective date of the final rule for the 2010 Atlantic shark specifications; and, (B3) Open the 2010 non-sandbar LCS fishery in the Atlantic and Gulf of Mexico regions on July 15, 2009.

The potential impacts these preferred alternatives may have on small entities have been analyzed and are discussed below. The preferred alternatives include A2 and B2. A summary of the analyses follows. The economic impacts that would occur under these preferred alternatives were compared with the other alternatives to determine if economic impacts to small entities could be minimized while still accomplishing the stated objectives of this rule.

The proposed changes to the opening dates for the SCS and non-sandbar LCS were analyzed. Under alternative A2, NMFS would delay the start of the 2010 SCS fishing season until implementation of the final rule for Amendment 3. There may be economic losses associated with the delay in the start of the fishing season, especially for fishermen in the southeast Atlantic and Gulf of Mexico that would have access to SCS at the beginning of 2010 and rely on SCS gross revenues at the beginning of the season. Depending on the quotas implemented under Amendment 3 for blacknose shark and non-blacknose SCS, the economic losses for SCS fishermen could range from $126,174 to $172,197 for blacknose sharks and $502,145 to $661,513 for non-blacknose SCS. In addition, depending on the final measures implemented under Amendment 3, gillnet fishermen could lose gross revenues from lost SCS fishing opportunities in 2010. Estimated losses for shark gillnet fishermen could

be between $90,059 to $90,501 for blacknose sharks and $275,008 to $287,427 for non-blacknose SCS. However, these losses are independent of this action and were fully analyzed in the DEIS for draft Amendment 3. In addition, shark dealers and other entities that deal with shark products could experience negative economic impacts as SCS products would not be available at the beginning of the season. This would be most prevalent in areas of the southeast Atlantic and Gulf of Mexico where SCS are available early in the fishing season.

The delay in the SCS fishing seasons could cause changes in ex-vessel prices. From 2004 through 2008, the average ex-vessel price of SCS meat in January was approximately $0.58, whereas the average ex-vessel price in mid- to late-Spring was $0.69. Fin prices are not reported by species. As such, the average ex-vessel price from 2004 through 2008 for shark fins is the same for LCS and SCS. The average price for fins in January is $16.36 per lb. When the SCS fishery opens in mid- to late-Spring, the average price for fins has been $7.35.

Delaying the 2010 SCS fishing season until the implementation of Amendment 3 would allow the blacknose shark stock to rebuild as quickly as possible, and would translate into higher SCS quotas with higher associated gross revenues in the shortest time period possible. In addition, since both blacknose sharks and non-blacknose SCS are present in waters off the North Atlantic later in the year, delaying the opening of the 2010 SCS fishing season could help ensure that North Atlantic fishermen have access to the non-blacknose SCS and blacknose shark quotas implemented under Amendment 3, allowing for more equitable access to the quotas by all constituents. Thus, while there are some direct negative economic impacts associated with alternative A2, NMFS prefers this alternative at this time.

Under alternative B2, NMFS would delay the opening of the non-sandbar LCS fishery in the Atlantic region until July 15, 2010, and would open the non-sandbar LCS fishery in the Gulf of Mexico region upon the effective date of the final rule for the 2010 Atlantic shark specifications. Alternative B2 could result in additional negative economic impacts relative to those analyzed in Amendment 2 for fishermen in the southeast Atlantic, since these fishermen would not be able to land non-sandbar LCS when non-sandbar LCS would be present in their waters off the southeast Atlantic. In addition, alternative B2 could result in additional negative economic impacts relative to those analyzed in Amendment 2 for gillnet fishermen in the Atlantic region who would not be able to harvest non-sandbar LCS with gillnets during 2010, depending on final management measures implemented under Amendment 3. However, under alternative B2, fishermen in the North Atlantic would be able to have a fishing opportunity for non-sandbar LCS in 2010, as was the intent of Amendment 2. In the Atlantic region, the non-sandbar LCS quota and its associated gross revenues of an estimated $485,509 based on 2008 ex-vessel prices would be more equitably distributed among different states of the Atlantic by delaying the opening of the non-sandbar LCS fishery until July 15, 2010, under alternative B2.

The economic impacts of alternative B2 in the Gulf of Mexico region would be the same as analyzed under Amendment 2. In addition, gillnet fishermen in the Gulf of Mexico region could harvest non-sandbar LCS with gillnets prior to the implementation of Amendment 3, which may prohibit the landing of sharks with gillnet gear. State waters off Louisiana are closed to large coastal shark fishing from April 1 through June 30 of each year. During 2009, the non-sandbar LCS fishery closed on June 6, 2009. Thus, allowing the federal non-sandbar LCS fishery in the Gulf of Mexico to be open at the beginning of 2010 may result in negative economic impacts for Louisiana state fishermen if the non-sandbar LCS quota is harvested before the re-opening of Louisiana state waters in 2010. However, delaying the start of the shark fishing season in the Gulf of Mexico would be detrimental to the fishermen. Many fishermen in the Gulf of Mexico would not be able to fish for other species, since other Gulf of Mexico fisheries are closed in January. Also, shark dealers would need shark products in January to ship to other markets. Comments noted that if NMFS implemented alternative B3 and opened both the Gulf of Mexico and Atlantic regions in July, then a market glut of shark products would cause prices to fall. In addition, the state water closure in Louisiana did not affect the distribution of the non-sandbar LCS quota in the region. Louisiana reported significant landings for the 2009 non-sandbar LCS fishery from January until April. Therefore, NMFS prefers alternative B2 at this time.

Dated: December 29, 2009.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

[FR Doc. E9–31296 Filed 1–4–10; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 75, No. 2
Tuesday, January 5, 2010

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–1229; Directorate Identifier 2009–NM–106–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. (Type Certificate Previously Held by Bombardier Aerospace, Inc.; Canadair) Model CL–600–2B19 (Regional Jet Series 100 & 440) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

A specific batch of nose landing gear (NLG) and NLG door selector valves, part number (P/N) 601R75146–1 (Kaiser Fluid Technologies P/N 750006000), may have had their end caps incorrectly lock-wired and/or incorrectly torqued during assembly. This condition can lead to the end cap backing off, with consequent damage to a seal and internal leakage within the valve. Subsequently, if electrical power is transferred or removed from the aircraft before the NLG safety pin is installed, any pressure, including residual pressure, in the No. 3 hydraulic system can result in an uncommanded NLG retraction and/or uncommanded opening of the NLG doors. There have been six cases reported on CL600–2B19 aircraft, one of which resulted in the collapse of the NLG at the departure gate.

* * * * *

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by February 19, 2010.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; e-mail *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Cesar Gomez, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7318; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2009–1229; Directorate Identifier 2009–NM–106–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We have lengthened the 30-day comment period for proposed ADs that address MCAI originated by aviation authorities of other countries to provide adequate time for interested parties to submit comments. The comment period for these proposed ADs is now typically 45 days, which is consistent with the comment period for domestic transport ADs.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

Transport Canada Civil Aviation, which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2009–19, dated April 29, 2009 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

A specific batch of nose landing gear (NLG) and NLG door selector valves, part number (P/N) 601R75146–1 (Kaiser Fluid Technologies P/N 750006000), may have had their end caps incorrectly lock-wired and/or incorrectly torqued during assembly. This condition can lead to the end cap backing off, with consequent damage to a seal and internal leakage within the valve. Subsequently, if electrical power is transferred or removed from the aircraft before the NLG safety pin is installed, any pressure, including residual pressure, in the No. 3 hydraulic system can result in an uncommanded NLG retraction and/or uncommanded opening of the NLG doors. There have been six cases reported on CL600–2B19 aircraft, one of which resulted in the collapse of the NLG at the departure gate.

This directive mandates [an inspection of the NLG and NLG selector valves to

determine the serial number and marking of the part and] a check [to determine the torque value and correct lockwire installation] of the [affected] NLG and NLG door selector valves installed on all aircraft in the Applicability section * * *. Depending on the results, replacement, rework and/or additional identification of the valves may be required.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Bombardier has issued Service Bulletin 601R–32–104, dated March 3, 2009. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a Note within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 652 products of U.S. registry. We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Required parts would cost about $40 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $78,240, or $120 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Bombardier, Inc. (Type Certificate Previously Held by Bombardier Aerospace, Inc.; Canadair): Docket No. FAA–2009–1229; Directorate Identifier 2009–NM–106–AD.

Comments Due Date

(a) We must receive comments by February 19, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Bombardier, Inc. (Type Certificate previously held by Bombardier Aerospace, Inc.; Canadair) Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, serial numbers 7003 and subsequent; certificated in any category.

Subject

(d) Air Transport Association (ATA) of America Code 32: Landing Gear.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

A specific batch of nose landing gear (NLG) and NLG door selector valves, part number (P/N) 601R75146–1 (Kaiser Fluid Technologies P/N 750006000), may have had their end caps incorrectly lock-wired and/or incorrectly torqued during assembly. This condition can lead to the end cap backing off, with consequent damage to a seal and internal leakage within the valve. Subsequently, if electrical power is transferred or removed from the aircraft before the NLG safety pin is installed, any pressure, including residual pressure, in the No. 3 hydraulic system can result in an uncommanded NLG retraction and/or uncommanded opening of the NLG doors. There have been six cases reported on CL600–2B19 aircraft, one of which resulted in the collapse of the NLG at the departure gate.

This directive mandates [an inspection of the NLG and NLG selector valves to determine the serial number and marking of the part and] a check [to determine the torque value and correct lockwire installation] of the [affected] NLG and NLG door selector valves installed on all aircraft in the Applicability section * * *. Depending on the results, replacement, rework and/or additional identification of the valves may be required.

Actions and Compliance

(f) Unless already done, do the following actions.

(1) Within 1,600 flight hours or 18 months after the effective date of this AD, whichever occurs first: Do an inspection to determine the serial number and identification markings on the selector valve of the NLG and the door selector valve of the NLG, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 601R–32–104, dated March 3, 2009.

(2) For any airplane having both the selector valve of the NLG and the door selector valve of the NLG that have a serial number outside the range 0001 through 2126 inclusive, suffix ''T'' identification, or ''SB750006000–1'' marking, no further action is required for that valve.

(3) For any selector valve of the NLG or any door selector valve of the NLG that does not have any serial number or identification marking specified in paragraph (f)(2) of this AD: Before further flight, after doing the inspection required by paragraph (f)(1) of this AD, inspect to determine the torque value and correct lockwire installation of the valve, and modify (replace, rework, or re-identify) the valve, as applicable, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 601R–32–104, dated March 3, 2009.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, New York Aircraft Certification Office (ACO), ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7300; fax (516) 794–5531. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(2) Airworthy Product: For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) Reporting Requirements: For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI Canadian Airworthiness Directive CF–2009–19, dated April 29, 2009; and Bombardier Service Bulletin 601R–32–104, dated March 3, 2009; for related information.

Issued in Renton, Washington, on December 23, 2009.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–31290 Filed 1–4–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–1231; Directorate Identifier 2009–NM–212–AD]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model ERJ 170 Airplanes; and Model ERJ 190–100 STD, –100 LR, –100 IGW, –200 STD, –200 LR, and –200 IGW Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as: It has been found the possibility of missing points of sealant application on the vapor barrier assembly in the wing stub rear box. In the event of fuel tank leak in this region associated with an unsealed vapor barrier assembly, migration of flammable vapors and fluids to middle electronic bay may occur, which then could lead to an uncontained fire event if the flammable vapors finds an ignition source. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by February 19, 2010.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Empresa Brasileira de Aeronautica S.A. (EMBRAER), Technical Publications Section (PC 060), Av. Brigadeiro Faria Lima, 2170—Putim—12227–901 São Jose dos Campos—SP—BRASIL; telephone: +55 12 3927–5852 or +55 12 3309–0732; fax: +55 12 3927–7546; e-mail: *distrib@embraer.com.br;* Internet: *http://www.flyembraer.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Kenny Kaulia, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2848; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2009–1231; Directorate Identifier 2009–NM–212–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the

closing date and may amend this proposed AD based on those comments.

We have lengthened the 30-day comment period for proposed ADs that address MCAI originated by aviation authorities of other countries to provide adequate time for interested parties to submit comments. The comment period for these proposed ADs is now typically 45 days, which is consistent with the comment period for domestic transport ADs.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The Agência Nacional de Aviação Civil (ANAC), which is the aviation authority for Brazil, has issued Brazilian Airworthiness Directives 2009–07–01 and 2009–07–02, both effective July 13, 2009 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> It has been found the possibility of missing points of sealant application on the vapor barrier assembly in the wing stub rear box. In the event of fuel tank leak in this region associated with an unsealed vapor barrier assembly, migration of flammable vapors and fluids to middle electronic bay may occur, which then could lead to an uncontained fire event if the flammable vapors finds an ignition source.
>
> * * * * *

The required actions include a detailed inspection for gaps, voids, or holes in the sealant. Corrective actions include applying sealant in any gaps, voids, or holes. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Embraer has issued Service Bulletin 170–57–0036, dated March 13, 2009; and Service Bulletin 190–57–0027, dated March 18, 2009. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a Note within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 197 products of U.S. registry. We also estimate that it would take about 5 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $78,800, or $400 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Empresa Brasileira de Aeronautica S.A. (EMBRAER): Docket No. FAA–2009–1231; Directorate Identifier 2009–NM–212–AD.

Comments Due Date

(a) We must receive comments by February 19, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to the airplanes identified in paragraphs (c)(1) and (c)(2) of this AD; certificated in any category.

(1) Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model ERJ 170–100 LR, –100 STD, –100 SE, –100 SU, –200 LR, –200 STD, and –200 SU airplanes, serial numbers 17000002, 17000004 through 17000013 inclusive, and 17000015 through 17000235 inclusive.

(2) Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model ERJ 190–100 STD, –100 LR, –100 IGW, –200 STD, –200 LR, and –200 IGW airplanes, serial numbers 19000002, 19000004, 19000006 through 19000108

inclusive, 19000110 through 19000139 inclusive, 19000141 through 19000158 inclusive, 19000160 through 19000176 inclusive, 19000178 through 19000202 inclusive, 19000204 through 19000213 inclusive, and 19000215.

Subject

(d) Air Transport Association (ATA) of America Code 57: Wings.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states: It has been found the possibility of missing points of sealant application on the vapor barrier assembly in the wing stub rear box. In the event of fuel tank leak in this region associated with an unsealed vapor barrier assembly, migration of flammable vapors and fluids to middle electronic bay may occur, which then could lead to an uncontained fire event if the flammable vapors finds an ignition source. The required actions include a detailed inspection for gaps, voids, or holes in the sealant. Corrective actions include applying sealant into any gaps, voids, or holes.

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Actions

(g) Unless already done, do the following actions.

(1) Within 6,000 flight hours or 24 months after the effective date of this AD, whichever occurs first, do a detailed inspection of the vapor barrier assembly in the wing stub rear box for missing sealant which forms gaps, voids or holes, in accordance with the Accomplishment Instructions of Embraer Service Bulletin 170–57–0036, dated March 13, 2009 (for Model ERJ 170–100 LR, –100 STD, –100 SE, –100 SU, –200 LR, –200 STD, and –200 SU airplanes); or Embraer Service Bulletin 190–57–0027, dated March 18, 2009 (for Model ERJ 190–100 STD, –100 LR, –100 IGW, –200 STD, –200 LR, and –200 IGW airplanes).

Note 1: For the purposes of this AD, a detailed inspection is: ''An intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at an intensity deemed appropriate. Inspection aids such as mirror, magnifying lenses, etc., may be necessary. Surface cleaning and elaborate access procedures may be required.''

(2) If the vapor barrier sealant is found to be correctly applied in accordance with the Accomplishment Instructions of Embraer Service Bulletin 170–57–0036, dated March 13, 2009 (for Model ERJ 170–100 LR, –100 STD, –100 SE, –100 SU, –200 LR, –200 STD, and –200 SU airplanes); or Embraer Service Bulletin 190–57–0027, dated March 18, 2009 (for Model ERJ 190–100 STD, –100 LR, –100 IGW, –200 STD, –200 LR, and –200 IGW airplanes); no further action is required by this AD.

(3) If any vapor barrier sealant is found missing (gaps, voids or holes) during the inspection required by paragraph (f)(1) of this AD, before further flight apply sealant into the applicable gaps, voids, and holes, in accordance with the Accomplishment Instructions of Embraer Service Bulletin 170–57–0036, dated March 13, 2009 (for Model ERJ 170–100 LR, –100 STD, –100 SE, –100 SU, –200 LR, –200 STD, and –200 SU airplanes); or Embraer Service Bulletin 190–57–0027, dated March 18, 2009 (for Model ERJ 190–100 STD, –100 LR, –100 IGW, –200 STD, –200 LR, and –200 IGW airplanes).

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(h) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Kenny Kaulia, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2848; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(i) Refer to MCAI Brazilian Airworthiness Directives 2009–07–01 and 2009–07–02, both effective July 13, 2009; Embraer Service Bulletin 170–57–0036, dated March 13, 2009; and Embraer Service Bulletin 190–57–0027, dated March 18, 2009; for related information.

Issued in Renton, Washington, on December 28, 2009.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–31276 Filed 1–4–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–1228; Directorate Identifier 2009–NM–015–AD]

RIN 2120–AA64

Airworthiness Directives; Lockheed Martin Corporation/Lockheed Martin Aeronautics Company Model 382, 382B, 382E, 382F, and 382G Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Lockheed Martin Corporation/Lockheed Martin Aeronautics Company Model 382, 382B, 382E, 382F, and 382G airplanes. This proposed AD would require repetitive inspections for any damage of the lower surface of the center wing box, and corrective actions if necessary. This proposed AD results from reports of fatigue cracks of the lower surface of the center wing box. We are proposing this AD to detect and correct such cracks, which could result in the structural failure of the wings.

DATES: We must receive comments on this proposed AD by February 19, 2010.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Lockheed Martin Corporation/Lockheed Martin Aeronautics Company, Airworthiness Office, Dept. 6A0M, Zone 0252, Column

P–58, 86 S. Cobb Drive, Marietta, Georgia 30063; telephone 770–494–5444; fax 770–494–5445; e-mail *ams.portal@lmco.com;* Internet *http://www.lockheedmartin.com/ams/tools/TechPubs.html.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Carl Gray, Aerospace Engineer, Airframe Branch, ACE–117A, FAA, Atlanta Aircraft Certification Office, 1701 Columbia Avenue, College Park, Georgia 30337; telephone (404) 474–5554; fax (404) 474–5606.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2009–1228; Directorate Identifier 2009–NM–015–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

We have received reports of fatigue cracks of the lower surface of the center wing box. Large fatigue cracks, some with multiple origins indicating link-up of smaller fatigue cracks, and generalized small fatigue cracks have been found during wing durability testing and in-service operations. This condition, if not corrected, could result in reduced wing residual strength below the design limit load capacity, which could result in the structural failure of the wings.

Relevant Service Information

We have reviewed Lockheed Service Bulletin 382–57–85 (82–790), Revision 2, dated August 23, 2007, including Appendices A, B, C, D, E, F, and G, Revision 1, dated March 8, 2007. The service bulletin describes procedures for doing repetitive nondestructive inspections of the lower surface of the center wing box (including the panel, stringers, beam caps, panel repairs, fittings, and cold-work holes) for any damage (including cracking, corrosion, structural deformation, and dents), and corrective action, if necessary. The corrective action includes contacting Lockheed for repair instructions.

FAA's Determination and Requirements of This Proposed AD

We are proposing this AD because we evaluated all relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design. This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between the Proposed AD and Relevant Service Information.''

Differences Between the Proposed AD and Relevant Service Information

Although the service bulletin specifies that operators may contact the manufacturer for disposition of certain repair conditions, this proposed AD would require operators to repair those conditions using a method approved by the FAA.

Although the service bulletin specifies that operators can adjust thresholds and intervals, use alternate repetitive inspection intervals, and use alternate inspection methods if applicable, this proposed AD would require any alternate methods to be approved by the Manager, Atlanta ACO.

Although the service bulletin provides a longer compliance time of 22,000 flight hours to inspect cold-worked holes, this AD would require all holes to be inspected within 10,000 flight hours, as reports indicate that fatigue cracks are of sufficient size and density, requiring a shorter compliance time.

Operators should note that, although the Accomplishment Instructions of Lockheed Service Bulletin 382–57–85 (82–790), Revision 2, dated August 23, 2007, including Appendixes A, B, C, D, E, F, and G, Revision 1, dated March 8, 2007, describe procedures for submitting a report of any damages, this proposed AD would not require such action.

Costs of Compliance

We estimate that this proposed AD would affect 15 airplanes of U.S. registry. We also estimate that it would take about 2,000 work-hours per product to comply with this proposed AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of this proposed AD to the U.S. operators to be $2,400,000, or $160,000 per airplane.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866,

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979), and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

You can find our regulatory evaluation and the estimated costs of compliance in the AD Docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Lockheed Martin Corporation/Lockheed Martin Aeronautics Company: Docket No. FAA–2009–1228; Directorate Identifier 2009–NM–015–AD.

Comments Due Date

(a) We must receive comments by February 19, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Lockheed Martin Corporation/Lockheed Martin Aeronautics Company Model 382, 382B, 382E, 382F, and 382G series airplanes, certificated in any category.

Subject

(d) Air Transport Association (ATA) of America Code 57: Wings.

Unsafe Condition

(e) This AD results from reports of fatigue cracks of the lower surface of the center wing box. The Federal Aviation Administration is issuing this AD to detect and correct such cracks, which could result in the structural failure of the wings.

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Inspection

(g) At the times specified in paragraphs (g)(1), (g)(2), and (g)(3) of this AD, whichever occurs latest: Do a nondestructive inspection of the lower surface of the center wing box for any damage, in accordance with Lockheed Service Bulletin 382–57–85 (82–790), Revision 2, dated August 23, 2007, including Appendixes A, B, C, D, E, F, and G, Revision 1, dated March 8, 2007. Repeat the inspections thereafter at intervals not to exceed 10,000 flight hours.

(1) Prior to the accumulation of 40,000 total flight hours on the center wing.

(2) Within 365 days after the effective date of this AD.

(3) Within 10,000 flight hours on the center wing box after the accomplishment of the service bulletin if done before the effective date of this AD.

Note 1: These inspection procedures supplement the existing Hercules Air Freighter progressive inspection procedures and previously issued Lockheed Martin service bulletins. After the effective date of this AD, there are no inspection procedures in those documents that fully meet the requirements of this AD.

Corrective Action

(h) If any damage is found during any inspection required by this AD: Before further flight, repair any damage using a method approved by the Manager, Atlanta Aircraft Certification Office (ACO), FAA. For a repair method to be approved by the Manager, Atlanta ACO, as required by this paragraph, the Manager's approval letter must specifically refer to this AD.

Exceptions to the Service Bulletin

(i) Lockheed Service Bulletin 382–57–85 (82–790), Revision 2, dated August 23, 2007, including Appendixes A, B, C, D, E, F, and G, Revision 1, dated March 8, 2007, specifies that operators may adjust thresholds and intervals, use alternative repetitive inspection intervals, and use alternative inspection methods, if applicable. However, this AD requires that any alternative methods or intervals be approved by the Manager, Atlanta ACO. For any alternative methods or intervals to be approved by the Manager, Atlanta ACO, as required by this paragraph, the Manager's approval letter must specifically refer to this AD.

(j) Where Lockheed Service Bulletin 382–57–85 (82–790), Revision 2, dated August 23, 2007, including Appendixes A, B, C, D, E, F, and G, Revision 1, dated March 8, 2007, specifies that alternative repetitive inspections intervals may be used for cold-worked holes, this AD does not allow the longer interval. This AD requires that all cold-worked and non-cold worked holes be re-inspected at 10,000-flight-hour intervals.

(k) Where Lockheed Service Bulletin 382–57–85 (82–790), Revision 2, dated August 23, 2007, including Appendixes A, B, C, D, E, F, and G, Revision 1, dated March 8, 2007, describes procedures for submitting a report of any damages, this AD does not require such action.

Inspections Accomplished in Accordance With Lockheed Service Bulletin 382–57–83 (82–783)

(l) Inspections accomplished before the effective date of this AD, in accordance with Lockheed Service Bulletin 382–57–83 (82–783), Revision 1, dated August 22, 2006, including Appendix B, dated March 18, 2005, are considered acceptable for compliance with the corresponding action specified in paragraph (g) of this AD.

Alternative Methods of Compliance (AMOCs)

(m)(1) The Manager, Atlanta Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Carl Gray, Aerospace Engineer, Airframe Branch, ACE–117A, FAA, Atlanta Aircraft Certification Office, 1701 Columbia Avenue, College Park, GA 30337; telephone (404) 474–5554; fax (404) 474–5606.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

Issued in Renton, Washington, on December 23, 2009.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–31289 Filed 1–4–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–1004; Directorate Identifier 2009–NE–36–AD]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc RB211–Trent 800 Series Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

During 2004, an incident was reported involving uncontained multiple intermediate-pressure (IP) turbine blade release on a Trent 700 engine. The blade release was the result of an overspeed of the IP turbine rotor that was initiated by an internal fire in the high-pressure/intermediate-pressure (HP/IP) bearing chamber. Post-incident analysis and investigation has established that blockage of the HP/IP turbine bearing oil vent tube due

to carbon deposits was a significant factor in the failure sequence. The Trent 800 has a similar type design standard to that of the Trent 700 and has also been found in service to be susceptible to carbon deposits in the oil vent tube.

We are proposing this AD to prevent internal oil fires due to coking and carbon buildup in the HP/IP turbine bearing oil vent tube that could cause uncontained engine failure and damage to the airplane.

DATES: We must receive comments on this proposed AD by February 4, 2010.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Contact Rolls-Royce plc, P.O. Box 31, Derby, England; telephone: 011–44–1332–249428; fax: 011–44–1332–249223, for the service information identified in this proposed AD.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is the same as the Mail address provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: James Lawrence, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *james.lawrence@faa.gov;* telephone (781) 238–7176; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2009–1004; Directorate Identifier 2009–NE–36–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of the Web site, anyone can find and read the comments in any of our dockets, including, if provided, the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, *etc.*). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, notified us that an unsafe condition may exist on Rolls-Royce plc RB211 Trent 800 series turbofan engines. The MCAI states:

> During 2004, an incident was reported involving uncontained multiple IP turbine blade release on a Trent 700 engine. The blade release was the result of an overspeed of the IP turbine rotor that was initiated by an internal fire in the HP/IP bearing chamber. Post-incident analysis and investigation has established that blockage of the HP/IP turbine bearing oil vent tube due to carbon deposits was a significant factor in the failure sequence. The Trent 800 has a similar type design standard to that of the Trent 700 and has also been found in service to be susceptible to carbon deposits in the oil vent tube.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Rolls-Royce plc has issued Alert Service Bulletin (ASB) No. RB.211–72–AE362, Revision 1, dated April 3, 2009. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of the United Kingdom (U.K.) and is approved for operation in the United States. Pursuant to our bilateral agreement with the U.K., EASA has notified us of the unsafe condition described in the MCAI. We are proposing this AD because we evaluated all information provided by EASA and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design. This proposed AD would require inspection of the HP/IP turbine vent tube and bearing chamber during each shop visit of the engine for coking and carbon buildup in the HP/IP turbine bearing oil vent tube.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 138 RB211 Trent 800 series turbofan engines installed on airplanes of U.S. registry. We also estimate that it would take about one work-hour per engine to comply with this proposed AD. The average labor rate is $80 per work-hour. Required parts would cost about $2,000 per engine. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $287,040.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Rolls-Royce plc: Docket No. FAA–2009–1004; Directorate Identifier 2009–NE–36–AD.

Comments Due Date

(a) We must receive comments by February 4, 2010.

Affected Airworthiness Directives (ADs)

(b) None.

Applicability

(c) This AD applies to Rolls-Royce plc RB211–Trent 875–17, Trent 877–17, Trent 884–17, Trent 884B–17, Trent 892–17, Trent 892B–17, and Trent 895–17 turbofan engines. These engines are installed on, but not limited to, Boeing 777 series airplanes.

Reason

(d) During 2004, an incident was reported involving uncontained multiple intermediate-pressure (IP) turbine blade release on a Trent 700 engine. The blade release was the result of an overspeed of the IP turbine rotor that was initiated by an internal fire in the high-pressure/intermediate-pressure (HP/IP) bearing chamber. Post-incident analysis and investigation has established that blockage of the HP/IP turbine bearing oil vent tube due to carbon deposits was a significant factor in the failure sequence. The Trent 800 has a similar type design standard to that of the Trent 700 and has also been found in service to be susceptible to carbon deposits in the oil vent tube.

This AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. We are issuing this AD to prevent internal oil fires due to coking and carbon buildup in the HP/IP turbine bearing oil vent tube that could cause uncontained engine failure and damage to the airplane.

Actions and Compliance

(e) Unless already done, do the following actions.

(1) At the next engine shop visit after the effective date of this AD and thereafter at each engine shop visit, using the Accomplishment Instructions of Rolls-Royce plc Alert Service Bulletin No. RB.211–72–AE362, Revision 1, dated April 3, 2009:

(i) Inspect the HP/IP turbine bearing internal and external oil vent tubes and bearing chamber for carbon buildup.

(ii) Clean and flush the tubes and bearing chamber as required.

(iii) Reject any oil vent tubes that do not meet inspection requirements after cleaning.

(2) This AD does not require reporting of inspection results, as does paragraphs 3.B.(4)(g) and 3.C.(9) of Rolls-Royce plc Alert Service Bulletin No. RB.211–72–AE362, Revision 1, dated April 3, 2009.

FAA AD Differences

(f) None.

Alternative Methods of Compliance (AMOCs)

(g) The Manager, Engine Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

Related Information

(h) Refer to MCAI European Aviation Safety Agency AD 2009–0071 (corrected April 14, 2009), and Rolls-Royce plc Alert Service Bulletin No. RB.211–72–AE362, Revision 1, dated April 3, 2009, for related information. Contact Rolls-Royce plc, P.O. Box 31, Derby, England; telephone: 011–44–1332–249428; fax: 011–44–1332–249223, for a copy of this service information.

(i) Contact James Lawrence, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *james.lawrence@faa.gov;* telephone (781) 238–7176; fax (781) 238–7199, for more information about this AD.

Issued in Burlington, Massachusetts, on December 29, 2009.

Francis A. Favara,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. E9–31275 Filed 1–4–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR Parts 101, 113, and 133

[Docket No. USCBP–2006–0013]

RIN 1505–AB54

Customs and Border Protection's Bond Program

AGENCIES: Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes amendments to title 19 of the Code of Federal Regulations to reflect the centralization of the continuous bond program at Customs and Border Protection's (CBP's) Revenue Division, Office of Finance. Pursuant to this centralization, continuous bonds must be filed at the Revenue Division via mail, fax, or in an electronic format, and the Revenue Division will assume the bond functions previously performed at the port level. The authority to approve single transaction bonds will remain with port directors. The changes proposed in this document support CBP's bond program by ensuring an efficient and uniform approach to the approval, maintenance, and periodic review of continuous bonds. Additionally, the proposed changes update provisions to accommodate the use of information technology and modern business practices.

DATES: Comments must be received on or before March 8, 2010.

ADDRESSES: You may submit comments, identified by Docket No. USCBP–2006–0013, by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments via Docket No. USCBP–2006–0013.
- *Mail:* Trade and Commercial Regulations Branch, Regulations and Rulings, Customs and Border Protection, 799 9th St., NW. (Mint Annex), Washington, DC 20229–1179.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, *see* the

''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Submitted comments may also be inspected during regular business days between the hours of 9 a.m. and 4:30 p.m. at the Trade and Commercial Regulations Branch, Customs and Border Protection, 799 9th Street, NW., 5th Floor, Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark at (202) 325–0118.

FOR FURTHER INFORMATION CONTACT: Bruce Ingalls, Chief, Debt Management Branch, Revenue Division, Customs and Border Protection, Tel. (317) 298–1307.

SUPPLEMENTARY INFORMATION:

Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the proposed rule. Customs and Border Protection (CBP) also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. If appropriate to a specific comment, the commenter should reference the specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Background

This document proposes amendments to title 19 of the Code of Federal Regulations (19 CFR) to reflect the centralization of the continuous bond program at CBP's Revenue Division (RD), Office of Finance, in Indianapolis, Indiana. Pursuant to this centralization, continuous bonds must be filed, reviewed and, if approved, maintained at the RD. It is proposed that the documentation for these types of bonds, including CBP Form 301, applications, riders, terminations, power of attorney forms, and Importer ID Input Records (CBP Form 5106), must be filed at the RD via mail, fax, or in an electronic format as prescribed by CBP. The RD will assume the bond functions previously performed at the port level, with the noted exception that the authority to approve single transaction bonds will remain with port directors.

It is noted that most continuous basic importation bonds are no longer processed and retained on file at the ports, and the majority of bond sufficiency matters concerning these bonds are currently processed at the RD. In 2003, CBP port directors delegated the authority to review and process these types of bonds to the RD. Consequently, under existing procedures, any person who is required to post a continuous basic importation bond to secure a CBP transaction or multiple transactions has the option of filing the bond directly with the port director (as per 19 CFR 113.11), or indirectly to the RD. In fact, continuous basic importation bonds that are submitted directly to the port are subsequently referred to the RD by the port director. Also in 2003, the Director of the International Trade Compliance Division authorized, per 19 CFR 113.15, port directors to allow the retention of approved continuous bonds at the RD.

Many of the changes to 19 CFR part 113 proposed in this document are intended to facilitate the use of electronic submission of continuous bond documentation. The requirements for the electronic submission of bond documentation will be available on the CBP Web site, *http://www.cbp.gov.* The Web site will feature a direct link to CBP bond program directives.

The changes proposed in this document implement recommendations set forth in a review of the continuous bond program commissioned by CBP. *See* ''Grant Thornton Review of Customs Continuous Transaction (Entry) Bonds,'' dated April 3, 2003. The study found that centralization of the continuous bond program would strengthen the effectiveness of the program by enhancing efficiency and uniformity. Arrangements for public inspection of the document may be made by calling Joseph Clark at (202) 572–8768.

This document also proposes non-substantive amendments to 19 CFR to reflect the nomenclature changes made necessary by the transfer of the legacy U.S. Customs Service of the Department of the Treasury to the Department of Homeland Security (DHS) and DHS' subsequent renaming of the agency as U.S. Customs and Border Protection on March 31, 2007 (*see* 72 FR 20131, dated April 23, 2007). As a consequence of these changes, this document proposes certain non-substantive nomenclature changes to reflect the realities just described, and the issuance of new definitions in the regulations whereby the term ''Customs'' means ''Customs and Border Protection,'' the terms ''Commissioner'' and ''Commissioner of Customs'' mean ''Commissioner of Customs and Border Protection,'' the acronym ''CBP'' means ''Customs and Border Protection,'' and the acronym ''RD'' means ''Revenue Division.''

Explanation of Amendments

It is proposed to amend title 19 of the CFR to reflect the consolidation of the continuous bond program at the Revenue Division (RD), the use of electronic filing for the submission of continuous bonds and related documentation, and the transfer of Customs and Border Protection (CBP) to the Department of Homeland Security (DHS). A more detailed explanation of the proposed amendments, other than those involving technical corrections or minor wording and editorial changes, is set forth below.

Section 101.1 Definitions

Section 101.1 of title 19 of the CFR (19 CFR 101.1) sets forth the meaning of certain terms as used throughout Chapter 1 of title 19. To reflect certain nomenclature changes made necessary by the transfer of the U.S. Customs Service from the Department of the Treasury to DHS and the subsequent renaming of the agency as the U.S. Customs and Border Protection (CBP), it is proposed to add new definitions to § 101.1 whereby:

- The terms ''Customs'' and ''Customs Service'' mean ''Customs and Border Protection.''
- The terms ''Customs Regulations'' and ''CBP Regulations'' mean ''title 19 of the Code of Federal Regulations (19 CFR).''
- The terms ''Commissioner'' and ''Commissioner of Customs'' mean ''Commissioner of Customs and Border Protection.''
- The acronym ''CBP'' means ''Customs and Border Protection.''
- The acronym ''RD'' means ''Revenue Division, Office of Finance, Customs and Border Protection.''

Section 113.1 Authority To Require Security or Execution of Bond

Section 113.1 of title 19 of the CFR (19 CFR 113.1) provides that where a bond or other security is not specifically required by law, the Commissioner of Customs, pursuant to Treasury Department Order No. 165 Revised, as amended (T.D. 53654, 19 FR 7241, November 6, 1954), may by regulation or specific instruction require, or authorize the port director to require, such bonds or other security as may be considered necessary to protect the revenue or to assure compliance with the law.

It is proposed to amend § 113.1 to reflect:

- The transfer of authority over certain functions from the Secretary of the Treasury to the Secretary of Homeland Security effected by the Homeland Security Act of 2002;

• The delegation of the authority to approve certain customs revenue functions from the Secretary of the Treasury Department to the Secretary of Homeland Security pursuant to Treasury Department Order No. 100–16, dated May 15, 2003, Appendix to part 0 of title 19 of the CFR (19 CFR part 0); and

• The subsequent delegation of authority from the Secretary of Homeland Security to the Commissioner of CBP pursuant to DHS Delegation Order 7010.3, dated May, 2006.

Accordingly, it is proposed to remove from § 113.1 the references to Treasury Department Order No. 165 and T.D. 53654 and replace them with citations to the DHS Delegation Order. Also, language regarding the authority of the Commissioner to require bonds or other security by regulation is proposed to be removed from this section as unnecessary because any regulation requiring a bond will clearly state the authority under which the requirement is imposed. Lastly, it is proposed to amend this section by adding ''Director, Revenue Division'' as among those the Commissioner of CBP may authorize to require bonds or other security to reflect that continuous bonds will now be processed at the RD.

Section 113.11 Bond Approval; § 113.12 Bond Application

Section 113.11 of title 19 of the CFR (19 CFR 113.11) provides, in pertinent part, that bonds must be submitted on CBP Form 301 to the appropriate port director where they will undergo review for sufficiency. Section 113.12 of title 19 (19 CFR 113.12) sets forth the required elements of an application for both single transaction and continuous bonds.

This document proposes reversing the order of these provisions so that the section pertaining to bond applications (existing § 113.12) will appear first in the regulations at § 113.11, and the section pertaining to bond approval (existing § 113.11) will appear at § 113.12. It is also proposed to revise these provisions to more accurately reflect the sequence of events and current procedures that comprise the bond application and approval process.

To that end, it is proposed to amend newly designated § 113.11 (existing § 113.12) to more specifically identify the information required in a bond application, and to state that continuous bond applications must be submitted to the RD via mail, fax, or in an electronic format as prescribed by CBP. This section will provide that mail, fax, and electronic (e-mail) submissions must be sent to the addresses/fax number listed on the CBP Web site located at *http://www.cbp.gov.*

It is also proposed to amend the certification requirements set forth in newly designated § 113.11(e) (existing § 113.12(c)), to provide for and facilitate electronic filing on the bond application. As noted above, this document proposes amendments to the continuous bond application process that would permit certain documentation to be submitted to the RD in an electronic format. Such electronic submissions will not contain a written signature or seal, as is required by various bond provisions throughout part 113. It is therefore proposed to add alternative certification language that states that bonds submitted electronically are legally binding to the same extent as if signed and under seal. Accordingly, it is proposed to divide newly designated § 113.11(e) (existing § 113.12(c)) into separate subparagraphs. Paragraph (e)(1) will set forth the existing certification language applicable to paper bond submissions and require that a bond be affixed with a corporate seal if required by § 113.33. New paragraph (e)(2) will state that electronic bond documentation containing the requisite certification language will be legally binding to the same extent as if signed and submitted under seal. New paragraph (e)(3) will state that CBP is entitled to presume, without verification, that submitted bond applications and related documentation, which include the bond, are properly executed, complete, accurate, and in full compliance with all applicable laws.

The changes proposed to newly designated § 113.12 involve separating the approval procedures applicable to single transaction and continuous bonds. It is proposed to add language stating that when CBP approves a bond, it will notify filers, sureties and principals by sending them a CBP-assigned bond number. It is also proposed to add a new paragraph (c) that states that CBP may refuse to accept any new obligations under a previously approved bond that requires modification, or where there has been a failure to comply with § 113.11(d) (failure to provide application updates) or § 113.24(d) (failure to provide rider).

Lastly, in order to accurately reflect the agency's name, it is proposed to change the name ''Customs Form 301'' where it appears in this section and elsewhere in part 113, to ''CBP Form 301.''

Section 113.13 Amount of Bond

Section 113.13 of title 19 of the CFR (19 CFR 113.13) sets forth the guidelines for determining bond amounts. Specifically, this section addresses minimum bond amounts, guidelines for determining the sufficiency of bond amounts, and the procedures by which CBP will periodically review bond sufficiency and request additional security.

As noted above, most continuous basic importation bonds are no longer reviewed and approved at the port level. The vast majority of bond sufficiency matters concerning continuous bonds are processed at the RD. To reflect this centralization, it is proposed to amend § 113.13 (b), (c), and (d) by replacing the references to ''port director'' and ''drawback office'' with a more generalized reference to ''CBP.'' Also, it is proposed to remove the language in paragraph (c) that permits a principal 30 days from the date of notification to remedy a deficiency. If a deficiency is identified, CBP believes that in some instances 30 days is too long to permit the condition to continue. Accordingly, in recognition of the importance of bond sufficiency and to ensure compliance with all applicable laws and regulations in a more timely fashion, it is proposed to amend this provision to state that if a deficiency is identified, CBP may require additional securities for any and all of the principal's transactions until the deficiency is remedied. Similarly, it is proposed to amend paragraph (d) to state that CBP may immediately require additional security.

Section 113.14 Approved Form of Bond Inadequate

Section 113.14 of title 19 of the CFR (19 CFR 113.14) states that if none of the conditions contained in subpart G of part 113 is applicable to a transaction sought to be secured, the port director may draft conditions to cover the transaction and the bond may be executed upon approval by the Director, Border Security and Trade Compliance Division at CBP Headquarters.

As a result of the centralization of the bond program, continuous bonds will no longer be approved at the port level. The issuance of single transaction bonds, however, will remain under the authority of port directors. It is therefore proposed to amend § 113.14 to reflect that either the Director, Revenue Division or the port director, as appropriate, will draft conditions to secure a transaction when the conditions contained in subpart G of part 113 do not apply. It also proposed to remove the reference to ''Director, Border Security and Trade Compliance Division'' and provide, instead, that additional bond conditions to secure a transaction, where the conditions

contained in subpart G of part 113 do not adequately secure the transaction, must be approved by the Executive Director, Regulations and Rulings, Office of International Trade.

Section 113.15 Retention of Approved Bonds

Section 113.15 of title 19 of the CFR (19 CFR 113.15) provides, in pertinent part, that all bonds approved by the port director, except the bond containing the agreement to pay court costs (condemned goods), shall remain on file in the port office unless the port director is directed in writing as to other disposition.

It is proposed to amend this section to provide that approved continuous bonds will be retained on file at the RD or approved CBP back-up sites and approved single transaction bonds will remain on file at the port office.

Section 113.21 Information Required on the Bond

Section 113.21 of title 19 of the CFR (19 CFR 113.21) prescribes the information required on the bond.

This document revises paragraph (e) by removing the requirement that lines must be drawn through all blank spaces and blocks on the bond and adds language stating that CBP is entitled to presume, without verification, that submitted bond applications and related documentation, which include the bond, are properly executed, complete, accurate, and in full compliance with all applicable laws.

Section 113.22 Witnesses Required

Section 113.22 of title 19 of the CFR (19 CFR 113.22) sets forth the witness requirements applicable to bonds. The witness requirement originated during a time when bonds were approved at the district level. If a party unknown to the Customs district office sought to execute a bond, witnesses were required to verify the party's identity. It is proposed to remove this section. CBP recognizes that the witness requirement is unnecessary inasmuch as a party who makes entry under a bond is obligated by that bond.

Section 113.23 Changes Made on the Bond

Section 113.23 of title 19 of the CFR (19 CFR 113.23) describes the types of changes that may be made to a bond and the process by which to effect such changes. Paragraph (c) describes the type of changes that are permitted to a bond after it is signed, but prior to approval by CBP. Paragraph (d) provides that, except in limited circumstances, the port director will not permit changes to a bond after it has been approved and if changes are desired, a new bond is required.

This document proposes to amend § 113.23(c) to provide that CBP will not permit substantive changes to be made to a bond after it has been signed. In such circumstances the existing bond will be cancelled and a new bond must be executed. To reflect the centralization of the continuous bond program at the RD, this document also proposes to amend paragraph (d) by replacing the reference to ''port director'' with a more general reference to ''CBP.''

Section 113.24 Riders

Section 113.24 of title 19 of the CFR (19 CFR 113.24) sets forth the terms pertaining to when riders may be attached to a bond and prescribes their appropriate formats. Paragraph (a) describes the types of riders that port directors may accept. Paragraph (b) describes where riders must be filed. Paragraph (c) requires that riders be attached to their related bond. Paragraph (d) prescribes the format of the rider and requires that riders be signed, sealed, witnessed and executed.

Although the riders listed in § 113.24(a) are the most common types of riders, they are not intended to represent an exhaustive list. For this reason, it is proposed to revise the first sentence of paragraph (a) so as to make clear that the list of enumerated riders is not comprehensive. Also, as a result of the centralization of the continuous bond program, it is proposed to state, in paragraph (b), that riders must be filed at the RD. Due to the fact that riders may be in an electronic format, it is proposed to amend paragraph (c) to state that riders submitted in this manner must contain a reference to the related bond's CBP-issued bond number. As this rulemaking proposes to remove the witness requirement set forth in § 113.22 from the regulations, it is similarly proposed to remove this requirement from paragraph (d) and to require that riders submitted in an electronic format contain the certification language set forth in newly designated § 113.11(e)(2). Lastly, to encourage the submission of complete and correct bonds, it is proposed to add a new paragraph that states that CBP may refuse to accept new conditions under a previously approved bond where there has been a failure to provide CBP with a required rider.

Section 113.25 Seals

Section 113.25 of title 19 of the CFR (19 CFR 113.25) sets forth the requirements for bonds under seal. This section provides that seals must be affixed adjoining the signatures of the principal and surety and that bonds under seal must meet the requirements of the law of the State in which the bond was executed.

As this document proposes to permit bonds to be submitted to the RD electronically, the seal requirements set forth in § 113.25 require modification to accommodate electronic filing. It is proposed to separately describe the certification requirements applicable to paper bond submissions, and those applicable to bonds submitted in an electronic format. To that end, it is proposed that continuous bonds submitted electronically do not have to be affixed with a seal; however, where the law of the State in which the bond is executed requires a seal, the party executing the bond must include electronic certification language (set forth in newly designated § 113.11(e)(2) of this chapter, discussed *supra*), whereby the applicant certifies that he or she is acting under authority of the corporation and the certification constitutes legally binding evidence of the corporate seal. Additionally, it is proposed to require that where the law of the State in which the bond is executed requires a seal, the party executing the electronic bond must retain a copy of the paper seal and make such seal available to CBP for inspection upon request. This section also includes language stating that CBP is entitled to presume, without verification, that submitted bond applications and related documentation, which include the bond, are properly executed, complete, accurate, and in full compliance with all applicable laws.

Section 113.26 Effective Dates of Bonds and Riders

Section 113.26 of title 19 of the CFR (19 CFR 113.26) prescribes the effective dates of bonds and riders for both single transaction and continuous bonds. Paragraph (a) of this section provides that bonds and riders may be filed up to 30 days before the effective date in order to provide CBP with adequate time for administrative review and processing. Paragraph (e) states that a rider to delete trade names and unincorporated divisions of a corporate principal will be effective on the date identified in the rider if the date is at least 10 business days after the date the port receives the rider.

In an effort to permit both bond filers and CBP additional time for the filing and processing of bonds in advance of their effective date, it is proposed to extend the 30-day time period to 60 days. It is also proposed to require that

the effective date of a rider is the date stated, so long as that date is at least 15 business days from the date CBP receives the rider.

Section 113.27 Effective Dates of Termination of Bond

Section 113.27 of title 19 of the CFR (19 CFR 113.27) sets forth the effective dates of bond terminations made by the principal or surety, and describes the effect of such termination.

It is proposed to make changes to paragraph (a), which provides for bond termination by the principal, and to paragraph (b), which provides for bond termination by the surety, to ensure that the terms of these provisions conform to one another. To that end, it is proposed to amend paragraph (a) to require that a principal's request to terminate a continuous bond be sent to the RD and that the termination will take effect on the date requested if that date is at least 15 business days from the date the termination request was received by the RD. Otherwise, the termination will be effective on the close of business 15 business days from the date the termination request was received by the RD. It is proposed to amend paragraph (b) to require that a surety's notice of bond termination be sent to the RD, as well as to the principal. The surety's obligation under a bond will terminate on the date requested by the surety in the written notice of termination so long as that date is at least 15 business days from the date a request meeting all requirements was received by CBP. It is proposed to add language to both paragraphs (a) and (b) stating that once the RD has received a bond termination request, the termination cannot be withdrawn. Lastly, it is proposed to add language to paragraph (c) that provides that when a principal intends to continue to engage in the same activity as that secured by a bond to be terminated pursuant to this section, and the principal has submitted a replacement bond to secure that continued activity, no termination requested by a principal or surety will take effect until CBP has reviewed and approved the replacement bond.

Section 113.32 Partnerships as Principals

Section 113.32 describes the various partnership requirements and liabilities as they pertain to bonds.

It is proposed to revise paragraph (a) of this section by removing the bond requirements that pertain specifically to limited partnerships. As CBP's importer records in the automated systems make no distinction between limited partnerships and other partnerships, it is not necessary to collect this information from limited partnerships. It is also proposed to replace the more specific reference to ''port director or drawback office'' in paragraph (a) with a more general reference to ''CBP.''

Section 113.33 Corporations as Principals

Section 113.33 of title 19 of the CFR (19 CFR 113.33) sets forth the requirements pertaining to corporations that execute a bond as principal. This section also describes when a power of attorney is necessary for either a corporate officer or attorney, and states that the provisions of this section apply to a corporate subsidiary that joins its parent corporation by signing the bond as co-principal.

As the proposals in this document would permit continuous bonds to be submitted to the RD in an electronic format, this document proposes to amend § 113.33 to reflect the use of this technology. It is also proposed to clarify within this section that a Limited Liability Corporation (LLC) is included within the concept of corporation.

In paragraph (a), it is proposed to remove the signature requirement as this requirement is discussed in paragraph (b). In paragraph (b), it is proposed to add language stating that where the bond of a corporate principal is submitted in an electronic format, the bond must contain the certification language set forth in newly designated § 113.11(e)(2) and the party executing the bond may be required to retain a copy of the seal, as per § 113.25 as it is proposed to be amended. Also, it is proposed to add language stating that CBP is entitled to presume, without verification, that submitted bond applications and related documentation, which include the bond, are properly executed, complete, accurate, and in full compliance with all applicable laws. It is proposed to amend paragraph (c) by removing the language that states that a power of attorney will not be required if the person signing the bond on behalf of the corporation is known to the port director or drawback office to be the president, vice-president, treasurer, or secretary of the corporation. Due to the fact that most bonds will now be sent to a centralized location at the RD, personal knowledge of an individual's position within a company is an unrealistic concept upon which to base the need for a power of attorney. It is also proposed to add in paragraph (c) that CBP is entitled to presume, without verification, that submitted bond applications and related documentation, which include the bond, are properly executed, complete, accurate, and in full compliance with all applicable laws. Lastly, it is proposed to amend paragraph (d) by replacing the reference to ''port director'' with ''RD.''

Section 113.35 Individual Sureties

Section 113.35 of title 19 of the CFR (19 CFR 113.35) prescribes the criteria applicable to individuals who sign as sureties on a bond.

The types of changes proposed to this section are the same as those discussed above (*i.e.,* references to ''port director'' and ''Customs'' are replaced with references to ''CBP''). Regarding the surety qualifications set forth in § 113.35(b), it is proposed to remove the requirement in paragraph (b)(2) that states that a married woman may be accepted as a surety, unless the State in which the bond is executed prohibits her from acting in that capacity. Similarly, it is proposed to remove the reference to married women in paragraph (b)(3). CBP will permit individuals who are legally authorized to act as sureties to do so. Also, it is proposed to amend paragraph (b)(4) which currently provides that each individual surety must have property available as security within the limits of the port where the contract of suretyship is to be approved. The local property requirement is no longer relevant and it is therefore proposed to amend the regulations to provide that individuals who sign as sureties on any type of bond must possess property within the customs territory of the United States. Lastly, it is proposed to amend paragraph (d) to remove the reference to ''special agent-in-charge'' and replace it with a reference to ''Immigration and Customs Enforcement (ICE).'' This change is necessary to reflect the fact that the former Customs Service special agents-in-charge are now part of ICE as a result of the transfer of the U.S. Customs Service to DHS and the subsequent division of the Customs Service into CBP and ICE.

Section 113.37 Corporate Sureties

Section 113.37 of title 19 of the CFR (19 CFR 113.37) sets forth the rules pertaining to corporations executing a bond as surety.

This document proposes to amend paragraph (e) to state that where a corporate surety submits a continuous bond to the RD in an electronic format the bond must contain the certification language prescribed by newly designated § 113.11(e)(2) and the party executing the bond must retain a copy of the seal in accordance with § 113.25(b). It is proposed to add to paragraph (e) that CBP is entitled to presume, without verification, that

submitted bond applications and related documentation, which include the bond, are properly executed, complete, accurate, and in full compliance with all applicable laws.

In § 113.37(f), it is proposed to amend the last paragraph in the ''Corporate Sureties Agreement for Limitation of Liability,'' in the signature block, to require that an authorized CBP officer, and not specifically the Port Director or Director of the Drawback Office, sign the Agreement.

Section 113.37(g) prescribes how corporations may execute powers of attorney to act on their behalf. Paragraphs (g)(1)(iii) and (g)(5)(iii) within this section pertain to the identification of specific ports on the CBP Form 5297 where an agent or attorney is authorized to act. As centralization of the bond program requires that all continuous bonds and the accompanying CBP Form 5297 be filed and processed at the RD, the identification of specific ports in this regard is no longer necessary, and it is proposed to remove these provisions from the regulations.

Sections 113.37(g)(1)(v) and (vi) provide that the corporate surety power of attorney must contain the signatures of two principal officers of the corporation and be under seal. If the CBP Form 5297 is submitted to the RD in an electronic format, it is proposed to require that the document contain the certification language prescribed in newly designated § 113.11(e)(2) and the corporate surety retain a copy of the seal as per § 113.25(b).

As noted above, as a result of the centralization of the bond program, it is proposed to amend § 113.37(g)(2) to provide that a corporate surety power of attorney executed on a CBP Form 5297 in conjunction with a continuous bond must be filed at the RD via mail, fax, or in an electronic format. The RD will retain a copy of the CBP Form 5297 and return a RD-validated copy to the grantee.

Section 113.37(g)(3) provides that if a grantee desires to use a power of attorney at a port covered by the power of attorney, other than the port where the power of attorney was filed, but before the first computer printout reflecting this power of attorney is received, the CBP Form 5297 must be filed in triplicate (original and two copies), rather than duplicate. As notice of approval of a power of attorney is electronically transmitted to the ports, it is proposed to remove this provision from the regulations.

It is proposed to add a new paragraph (g)(5) to § 113.37 that provides that CBP is entitled to presume, without verification, that submitted bond applications and related documentation, which include the bond, are properly executed, complete, accurate, and in full compliance with all applicable laws.

Section 113.38 Delinquent Sureties

Section 113.38 of title 19 of the CFR (19 CFR 113.38) prescribes the extent to which a principal or surety on a CBP bond which is in default will be accepted on another CBP bond.

It is proposed to amend § 113.38(c)(1) to state that an internal advice request made pursuant to § 177.11 should be directed to the Executive Director, Regulations and Rulings, Office of International Trade. It is proposed to amend paragraph (c)(2) to reflect the centralization of the continuous bond program at the RD by adding that the Director, Revenue Division, in addition to the Commissioner, may instruct CBP officers to not accept a bond secured by a corporate surety for the reasons specified. It is also proposed to require in § 113.38(c)(4) that a copy of the notice of CBP's refusal to accept a surety's bonds, if not originating from the RD, must be sent to the Director, Revenue Division.

Section 113.39 Procedure To Remove a Surety From Treasury Department Circular 570

Section 113.39 of title 19 of the CFR (19 CFR 113.39) sets forth the procedures by which CBP may seek to remove a surety company from Treasury Department Circular 570, which sets forth the list of approved surety companies.

The changes proposed in this document would amend this section by removing references to port director and Fines, Penalties, and Forfeitures Officers and replacing them with a more general reference to ''appropriate CBP officer.'' This change is to reflect the fact that CBP personnel from the RD may also initiate the surety removal process.

Section 113.40 Acceptance of Cash Deposits or Obligations of the United States in Lieu of Sureties on Bonds

Section 113.40 of title 19 of the CFR (19 CFR 113.40) prescribes the terms by which cash deposits or other types of U.S. obligations (*i.e.,* certificates of indebtedness, Treasury notes, Treasury bills) may be accepted by CBP in lieu of sureties on bonds.

To reflect the delegation of authority discussed earlier in this document, it is proposed to amend paragraph (a) of this section to include the Secretary of Homeland Security as among those who may authorize the enforcement of bond laws and regulations. To reflect the centralization of the continuous bond program at the RD, it is also proposed to amend this paragraph by stating that the Director, Revenue Division, and not the Port Director, is authorized to accept cash deposits in lieu of sureties on bonds. It is also proposed to add clarifying language that provides that cash deposits or other types of U.S. obligations accepted by CBP in lieu of sureties on bonds must be in an amount equal to the face amount of the bond that would be required if CBP were to elect to accept a bond. It is also proposed to amend the language to make clear that the option to deposit cash or U.S. obligations is at the option of the importer.

Paragraph (b) is amended to reflect that the Director, Revenue Division, and not the port director, is authorized to sell U.S. obligations in case of any default in the performance of any of the conditions of the bond.

In § 113.40(c), it is proposed to amend the heading and text to reflect that the provision pertains to United States obligations, as well as cash deposited in lieu of sureties on the bond.

Lastly, it is proposed to add new paragraphs (d) through (g) to clarify CBP's requirements with regards to these alternatives to surety bonds.

Section 113.43 Extension of Time Period

Section 113.43 of title 19 of the CFR (19 CFR 113.43) provides that the port director, in certain circumstances, may extend the 120 day time period within which a document for which a bond or stipulation is given must be produced (*see* 19 CFR 113.42). The port director may extend this period for an additional period of 2 months.

To lend more specificity to the time frames cited in this provision, it is proposed to state in paragraph (a) that the port director may extend the time period to produce documents for a period ''not to exceed 60 days.'' It is also proposed to use the more specific 60-day time frame in paragraph (b) that provides for late applications for bond extensions.

Section 113.62 Basic Importation and Entry Bond Conditions

Section 113.62 of title 19 of the CFR (19 CFR 113.62) prescribes the conditions applicable to basic importation and entry bonds.

The proposed changes to this section are predominantly editorial in nature, with the exception of a change proposed to paragraph (a) which clarifies that the bond covers payments of duties, taxes and other charges made via periodic monthly statement, and to paragraph

(a)(3) which would remove the reference to port director and replace it with a reference to ''CBP'' to reflect the fact that pursuant to the consolidation of the bond program at the RD, most bonds will no longer be filed with the port director.

Section 113.64 International Carrier Bond Conditions

Section 113.64 of title 19 of the CFR (19 CFR 113.64) pertains to international carrier bond conditions. Paragraph (a) describes a principal's and surety's agreement to pay penalties, duties, taxes, and other charges. The last sentence of paragraph (a) prescribes the penalties (liquidated damages) applicable to principals who fail to timely pay passenger processing fees to CBP.

In an effort to more clearly describe when an obligor will be subject to liquidated damages for failure to timely pay certain fees, it is proposed to restructure this section so as to create a new paragraph (b) that specifically addresses situations where an obligor must pay liquidated damages for failure to timely submit passenger user fees, railroad car processing fees, and express courier consignment fees. It is also proposed to clarify that this section applies not only to collected fees, but to fees that were required to be collected but not timely remitted to CBP.

Sections 133.21, 133.25, 133.42 Bonds Related to Allegations of Counterfeit Trademarks

Sections 133.21, 133.25 and 133.42 concern bonds relating to allegations of counterfeit trademarks. It is proposed to amend these provisions to allow these bonds to be continuous bonds.

Executive Order 12866

Executive Order 12866 requires Federal agencies to conduct economic analyses of significant regulatory actions as a means to improve regulatory decision making. Significant regulatory actions include those that may: ''(1) [h]ave an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (2) [c]reate a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) [m]aterially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) [r]aise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.'' These proposed amendments do not meet the criteria for a ''significant regulatory action'' as specified in Executive Order 12866.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires Federal agencies to examine the impact a rule would have on small entities. A small entity may be: A small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people).

The entities affected by this proposed rule are importers and various other parties who file continuous bonds with CBP as required by CBP regulations. ''Importers'' are not defined as a ''major industry'' by the Small Business Administration (SBA) and do not have a unique North American Industry Classification System (NAICS) code; rather, virtually all industries classified by SBA include entities that import goods and services into the United States. Thus, entities affected by this proposed rule would likely consist of the broad range of large, medium, and small businesses operating under the customs laws and other laws that CBP administers and enforces. These entities include, but are not limited to, importers, brokers, and freight forwarders, as well as other businesses that conduct various activities under continuous bonds.

The proposed amendments, if adopted as final, would align regulations with current common practice and improve efficiency by explicitly requiring importers to file continuous bonds at the Revenue Division via mail, fax, or in an electronic format. The changes proposed in this document support CBP's bond program by ensuring an efficient and uniform approach to the approval, maintenance, and periodic review of continuous bonds. Additionally, the proposed changes update provisions to accommodate the use of information technology and modern business practices by removing requirements for signatures and seals on electronic submissions.

Because these amendments to the regulations affect such a wide-ranging group of entities involved in the importation of goods to the United States, the number of entities subject to this proposed rule would be considered ''substantial.'' It is not anticipated that there will be additional costs associated with filing continuous bonds with the Revenue Division instead of the local port, and many importers already file continuous bonds directly with the Revenue Division. Additionally, these changes to the regulations would confer a benefit to the entities as a result of the removal of the requirement for signatures and seals on electronic submissions. The effects of these amendments, however, would not rise to the level of being considered a ''significant'' economic impact. We welcome comments on this conclusion. If we do not receive any comments contradicting our findings, we may certify that this rule will not have a significant economic impact on a substantial number of small entities at the final rule stage.

Paperwork Reduction Act

The collection of information contained in this proposed rulemaking was previously reviewed and approved by the Office of Management and Budget (OMB) in accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) under control number 1651–0050. There are no new collections of information proposed in this document.

Signing Authority

This document is being issued in accordance with 19 CFR 0.1(a)(1).

List of Subjects

19 CFR Part 101

Administrative practice and procedure, Customs duties and inspections, Organization and functions (Government agencies).

19 CFR Part 113

Bonds, Customs duties and inspection, Imports, Reporting and recordkeeping requirements, Surety bonds.

19 CFR Part 133

Bonds, Copyrights, Counterfeit goods, Customs duties and inspection, Imports, Reporting and recordkeeping requirements, Restricted merchandise, Seizures and forfeitures.

Proposed Amendments to the Regulations

For the reasons stated above, it is proposed to amend parts 101 and 113 of title 19 of the Code of Federal Regulations (19 CFR parts 101 and 113) as follows:

PART 101—GENERAL PROVISIONS

1. The general authority citation for part 101 is revised to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 101, *et seq.;* 19 U.S.C. 2, 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1623, 1624, 1646a.

* * * * *

2. Section 101.1 is amended by adding five new definitions, in alphabetical order, to read as follows:

§ 101.1 Definitions.

* * * * *

CBP. The term ''CBP'' means Customs and Border Protection.

Commissioner or Commissioner of Customs. The terms ''Commissioner'' or ''Commissioner of Customs'' mean Commissioner of Customs and Border Protection.

Customs or Customs Service. The terms ''Customs'' or ''Customs Service'' mean Customs and Border Protection.

Customs Regulations or CBP Regulations. The terms ''Customs Regulations'' or ''CBP Regulations'' mean Chapter 1 of title 19 of the Code of Federal Regulations (19 CFR Chapter 1).

* * * * *

RD. ''RD'' means Revenue Division, Office of Finance, Customs and Border Protection.

* * * * *

PART 113—CBP BONDS

3. The general authority citation for part 113 is revised to read as follows:

Authority: 6 U.S.C. 101, *et seq.;* 19 U.S.C. 66, 1623, 1624.

* * * * *

4. The part 113 heading is revised to read as set forth above.

§ 113.0 [Amended]

5. Section 113.0 is amended by removing the word ''Customs'' and adding in its place the term ''CBP''.

6. Section 113.1 is revised to read as follows:

§ 113.1 Authority to require security or execution of bond.

Where a bond or other security is not specifically required by law or regulation, the Commissioner of CBP, pursuant to DHS Delegation Number 7010.3, or any successive order, may by specific instruction require, or authorize the Director, Revenue Division or the port director to require, such bonds or other security considered necessary for the protection of the revenue or to assure compliance with any pertinent law, regulation, or instruction.

7. In § 113.2:

a. The heading text is amended by removing the word ''Customs'' and adding in its place the term ''CBP'';

b. The introductory text is amended by removing the word ''Customs'' and adding in its place the term ''CBP'';

c. Paragraph (c) is amended by removing the word ''shall'' and adding in its place the word ''will'', and by adding the word ''as'' before the word ''he''; and

d. In paragraph (d), the first sentence is amended by removing the word ''entry'' and adding in its place the word ''transaction''; the second sentence is amended by removing the word ''shall'' and adding in its place the word ''will''; and the third sentence is amended by removing the word ''Customs'' and adding in its place the term ''CBP''.

8. Section 113.4 is amended by revising paragraph (a) and amending paragraph (b) by removing the words ''Customs laws or regulations'' and adding in their place the words ''customs laws or CBP regulations''.

The revision of § 113.4(a) reads as follows:

§ 113.4 Bonds and carnets.

(a) *Bonds.* All bonds required to be given under the customs laws or CBP regulations will be known as CBP bonds.

* * * * *

9. Section 113.11 is revised to read as follows:

§ 113.11 Bond application.

Each person who is required by law, regulation, or specific instruction to post a bond to secure a single or continuous (multiple) CBP transaction must submit a bond application in addition to the CBP Form 301, as follows:

(a) *Single transaction bond application.* A port director may require a person who will be engaged in a single customs transaction to file a written bond application. The application for a single transaction bond may be in the form of a letter. The application must contain the information set forth in paragraph (c) of this section, where applicable, and must be filed at the port where the transaction will occur. When the proper bond in a sufficient amount is filed with the entry summary or with the entry, or when the entry summary is filed at the time of entry, an application will not be required.

(b) *Continuous bond application.* To secure continuous (multiple) transactions, a bond application containing the applicable information set forth in paragraph (c) of this section must be submitted to the CBP Revenue Division (RD). The application may be in the form of a letter, and must be submitted to the RD via mail, fax, or in an electronic format (as prescribed by CBP) to the addresses/fax number listed on the CBP Internet Web site located at *http://www.cbp.gov* (*see* direct link to CBP bond program directives).

(c) *Required bond application information.* (1) Applications for both the single and continuous transaction bonds described in paragraphs (a) and (b) of this section must contain the following information numerically identified in the following order:

(i) Importer name;

(ii) Importer number;

(iii) Importer's physical address;

(iv) Name, number, and address of any co-principals or unincorporated divisions/trade names that will use this bond (if applicable);

(v) Description of the nature of the relationship between principal, co-principals, or unincorporated divisions/trade names that will use this bond (if applicable);

(vi) A listing of any other importer numbers or bond numbers associated with the principal and all co-principals or unincorporated divisions/trade names;

(vii) A description of the merchandise to be entered, including country of origin designations and applicable Harmonized Tariff Schedule of the United States (HTSUS) numbers;

(viii) A description of the merchandise to be imported during the subsequent 12 months (if applicable), including country of origin designations and applicable HTSUS numbers. This will include imports of all the business entities that will be listed on the bond. If it is anticipated that the nature of the merchandise to be imported will change in any material respect during the subsequent 12 months, the change must be identified;

(ix) For continuous bonds, the total entered value and total amount of all duties, taxes, and fees paid to CBP for the previous 12 months, plus the total estimated entered value and total estimated amount of all duties, taxes, and fees that will be paid to CBP during the subsequent 12 months. The total amount of duties, taxes and fees is the amount that would have been required to be deposited had the merchandise been entered for consumption even though some or all of the merchandise may have been entered under bond. If no imports were made during the 12 months prior to the application, the application letter should indicate ''zero'' and provide a statement of all duties, taxes, and fees it is estimated will accrue on all importations during the subsequent 12 months. If it is anticipated that the value of the merchandise to be imported will change in any material respect during the

subsequent 12 months, the change must be identified. These estimations will include the import activity of all business entities that will be listed on the bond;

(x) The type of bond applied for, including the proposed bond amount, activity code, and effective date;

(xi) The printed name, title, phone, and fax numbers of a company officer or attorney-in-fact signing on behalf of principal;

(xii) A certification statement (*see* paragraph (e) of this section); and

(xiii) Signature of applicant and date. Electronic applications that contain the certification statement prescribed in paragraph (e)(2) of this section will be considered legally binding to the same extent as if signed and submitted under seal.

(2) In addition to the data elements set forth in paragraph (c)(1) of this section, CBP may require the bond applicant to submit additional information as is deemed necessary for CBP to evaluate the application. Such information may be commodity-specific or company-specific.

(d) *Application updates.* If CBP approves a bond based upon the application, the principal on the bond must submit a new application to the issuing office (to the CBP Revenue Division in the case of continuous bonds) containing an update of the information required by paragraph (c) of this section whenever there is a material change in such information.

(e) *Signature and Certification*—(1) *Paper bonds.* Paper bonds must be signed by the applicant, affixed with the corporate seal where required (*see* § 113.33), and contain the following certification:

I, _____, certify that the factual information contained in this submission is true and accurate, that the corporate seal (if applicable) complies with § 113.25 of this chapter, and any information provided that is based upon estimates is based upon the best information available on the date of this document.

(2) *Bonds submitted in an electronic format.* Bond applications submitted in an electronic format must contain the following certification and are legally binding to the same extent as if signed and submitted under seal:

I, _____, certify that the factual information contained in this submission is true and accurate and any information provided which is based upon estimates is based upon the best information available on the date of this document. I also certify that I am acting under authority of _____ corporation and this certification constitutes evidence of the corporate seal and complies with § 113.25 of this chapter.

(3) *Presumption of proper execution.* CBP is entitled to presume, without verification, that submitted bond applications and related documentation, which include the bond, are properly executed, complete, accurate, and in full compliance with all applicable laws.

10. Section 113.12 is revised to read as follows:

§ 113.12 Bond approval.

(a) *Single transaction bonds.* The director of the CBP port where a single transaction bond is filed will approve a bond that is in proper form and that provides adequate security for the transaction. CBP is entitled to presume, without verification, that submitted bond applications and related documentation, which include the bond, are properly executed, complete, accurate, and in full compliance with all applicable laws.

(b) *Continuous bonds.* Continuous bonds must be filed with the Revenue Division (RD). The RD bond team will determine whether the continuous bond is in proper form and provides adequate security. CBP is entitled to presume, without verification, that submitted bond applications and related documentation, which include the bond, are properly executed, complete, accurate, and in full compliance with all applicable laws. If approved, the RD will notify the filer, surety, and principal by issuing a CBP-assigned bond number. Only one continuous bond for a particular activity will be authorized for each principal.

(c) *Previously approved bond.* CBP may refuse to accept any new obligations under a previously approved bond that requires modification, including where the principal or surety has failed to comply with § 113.11(d) or § 113.24(d), or where the principal has failed to deposit the required financial instruments as described in § 113.40(a) for cash-in-lieu of surety bonds.

11. In § 113.13:

a. The first sentence in paragraph (a) is amended by removing the words ''Customs bond shall'' and adding in their place the words ''CBP bond must'', and the second and third sentences in paragraph (a) are amended by removing the word ''shall'' each place that it appears and adding the word ''will'';

b. The introductory text of paragraph (b) is amended by removing the words ''the port director or drawback office in the case of a bond relating to repayment of erroneous drawback payment (*see* § 113.11) should at least'' and adding in their place the words ''CBP will''; paragraph (b)(2) is revised; and paragraph (b)(4) is amended by removing the word ''Customs'' and adding in its place the term ''CBP'';

c. Paragraph (c) is revised; and

d. Paragraph (d) is amended by removing the words ''a port director or drawback office'' and adding in their place the term ''CBP''; by removing the word ''Customs'' and adding in its place the words ''all applicable''; and by removing the words ''he shall'' and adding in their place the words ''CBP may immediately''.

The revision of § 113.13(b)(2) and (c) reads as follows:

§ 113.13 Amount of bond.

* * * * *

(b) * * *

(2) The prior record of the principal in complying with CBP demands for redelivery, the obligation to hold unexamined merchandise intact, and other requirements relating to enforcement and administration of customs and other laws and CBP regulations;

* * * * *

(c) *Periodic review of bond sufficiency.* CBP will periodically review each bond on file to determine whether the bond is adequate to protect the revenue and ensure compliance with applicable law and regulations. If CBP determines that a bond is inadequate, the principal will be promptly notified in writing. Additional securities for any and all of the principal's transactions may be required until the deficiency is remedied.

* * * * *

12. Section 113.14 is revised to read as follows:

§ 113.14 Approved form of bond inadequate.

If CBP determines that none of the conditions contained in subpart G of this part is applicable to a transaction sought to be secured, the Director, Revenue Division or, in the case of a single transaction bond, the port director, will draft conditions that cover the transaction. Before execution of the bond, the conditions must be submitted to Headquarters, Attention: Executive Director, Regulations and Rulings, Office of International Trade, for approval.

13. In § 113.15:

a. The first sentence is revised; and

b. The second and third sentences are amended by removing the word ''shall'' each place that it appears and adding the word ''will''.

The revision reads as follows:

§ 113.15 Retention of approved bonds.

Except for bonds containing the agreement to pay court costs

(condemned goods—*see* § 113.72), single transaction bonds that are approved by the port director will remain on file at the port office and approved continuous bonds (including bonds relating to repayment of erroneous drawback payments containing the conditions set forth in § 113.65) will remain on file at the RD.

* * *

14. In § 113.21:

a. Paragraph (a)(1) is revised;

b. Paragraphs (b) and (c) are amended by removing the word ''shall'' each place that it appears and adding the word ''must'';

c. Paragraph (d) is amended by removing the word ''shall'' and adding in its place the word ''may''; and

d. Paragraph (e) is revised.

The revision of § 113.21(a)(1) and (e) reads as follows:

§ 113.21 Information required on the bond.

(a)(1) *Identification of principal, co-principal, and sureties.* The names of the principal, co-principal, and sureties, and their respective places of residence, must appear in the bond. In the case of a corporate principal, co-principal or surety, its legal designation and the address of its principal place of business must appear.

* * * * *

(e) *Presumption of proper execution.* CBP is entitled to presume, without verification, that submitted bond applications and related documentation, which include the bond, are properly executed, complete, accurate, and in full compliance with all applicable laws.

§ 113.22 [Removed and Reserved]

15. Section 113.22 is removed and reserved.

16. In § 113.23:

a. The heading and text of paragraph (a)(2) are amended by removing the words ''or erasures'';

b. Paragraph (b) is amended by removing the word ''erasures,'' and by removing the word ''shall'' and adding in its place the word ''must''; and

c. Paragraphs (c) and (d) are revised.

The revisions of § 113.23(c) and (d) read as follows:

§ 113.23 Changes made on the bond.

* * * * *

(c) *After signing, prior to approval.* If minor alterations, other than modifications or interlineations (*i.e.,* changes that go to the substance of the bond), are made to the bond after it is signed, but prior to its approval by CBP, the consent of all the parties must be indicated on the bond. When a modification or interlineation is desired, the existing bond will be cancelled and a new bond will be executed.

(d) *After approval.* Except in cases where a change in the bond is expressly authorized by regulations or instructions from the Commissioner of CBP, CBP will not permit a change as defined in paragraph (a) of this section after the bond has been approved. When changes are desired, the existing bond will be cancelled and a new bond is required which, when approved, will supersede the cancelled bond.

17. Section 113.24 is revised to read as follows:

§ 113.24 Riders.

(a) *Types of riders.* The Revenue Division (RD) may accept bond riders,including the following types:

(1) *Name change of principal/trade name/unincorporated division.* A bond rider to change the name of a principal/trade name/unincorporated division on a bond may be used only when the change in name does not change the legal identity or status of the entity. If a new corporation is created as a result of a merger, reorganization or similar action, a bond rider cannot be used and a new bond will be required.

(2) *Address change.* A bond rider may be used to change the address on a bond.

(3) *Addition and deletion of trade names and unincorporated divisions of a corporate principal.* A bond rider may be used to add to or delete from a bond trade names and the names of unincorporated divisions of a corporate principal that do not have a separate and distinct legal status.

(b) *Where filed.* A bond rider must be filed at the RD.

(c) *Attachment of rider and, where applicable, CBP Form 5106 to bond.* All riders expressly authorized by the Commissioner of CBP must be filed with the related bond and must reference the related bond's CBP-issued bond number. Where applicable, a completed CBP Form 5106 must be submitted with the bond rider.

(d) *Failure to provide rider.* CBP may refuse to accept any new conditions under a previously approved bond where a rider that is expressly authorized by the Commissioner of CBP has not been submitted to CBP.

(e) *Format of rider.* A rider submitted to the RD on paper must be signed by both the principal (including all co-principals) and surety, sealed, executed, include a certificate as to corporate principal, if applicable, and otherwise comply with the requirements of this part. A rider submitted to the RD in an electronic format must contain the certification set forth in § 113.11(e)(2) and the filer must retain a copy of the seal as per § 113.25(b). CBP is entitled to presume, without verification, that submitted riders are properly executed, complete, accurate, and in full compliance with all applicable laws. A rider must contain one or more of the following formats, as applicable:

(1) *Name change of principal/trade name/unincorporated division.*

By this rider to CBP Form 301 (or other form as designated by regulation), _____ (bond number), executed on _____ (date), by _____ (former name), as principal _____ (importer number), the _____ (new name), hereby certifies that it is the same entity formerly known as _____ (former name), and the principal and surety agree that they are responsible for any act secured by this bond done under the aforementioned new name of the principal/trade name/unincorporated division. This rider is effective on _____ (date).

(2) *Address change.*

By this rider to CBP Form 301 (or other form as designated by regulation), _____ (bond number), executed on _____ (date), by _____ (name of principal/trade name/unincorporated division), as principal, _____ (importer number), and _____ (surety's name and code), as surety, which is effective on _____ (date), the principal, surety, or both, intend that the bond be amended to show _____ (new address) as their address. The principal, surety, or both, as may be appropriate, agree to be bound as though this bond has been executed with the new address shown.

(3) *Addition or deletion of trade names and unincorporated divisions of a corporate official—(i) Addition rider.*

By this rider to CBP Form 301 (or other form as designated by regulation), _____ (bond number), executed on _____ (date), by _____ (name of principal/co-principal/trade name/unincorporated division), as principal _____ (importer number), and _____ (surety's name and code), as surety, which is effective on _____ (date), the principal, co-principal and surety agree that the below listed names are unincorporated units of the principal or are trade or business names used by the principal in its business and that this bond covers its business and that this bond covers any act done in those names to the same extent as though done in the name of the principal. The principal and surety agree that any such act will be considered to be the act of the principal.

(ii) *Deletion rider.*

By this rider to CBP Form 301 (or other form as designated by regulation), _____ (bond number), executed on _____ (date), by _____ (name of principal/trade name/unincorporated division), as principal _____ (importer number), and _____ (surety's name and code), as surety, which is effective on _____ (date), the principal and surety agree that the below listed names of unincorporated units of the principal or trade or business names used by the principal in its business are deleted from the bond effective upon the date of approval of the rider by the appropriate CBP official.

18. Section 113.25 is revised to read as follows:

§ 113.25 Seals.

(a) *Paper bonds.* When a seal is required, the seal must be affixed adjoining the signatures of the principal and corporate surety, and the corporate seal must be affixed close to the signatures of persons signing on behalf of a corporation. Bonds must be under seal in accordance with the law of the State in which executed. When the charter or governing statute of a corporation requires its acts to be evidenced by its corporate seal, such seal is required.

(b) *Bonds submitted electronically.* Continuous bonds submitted in an electronic format do not have to be affixed with a seal; however, electronic bonds must include the certification language required by § 113.11(e)(2) which states that the applicant is acting under authority of the [named] corporation and the certification constitutes legally binding evidence of the corporate seal. Additionally, where either the law of the State in which the bond is executed or the CBP regulations require a seal, the party executing the electronic bond must retain a copy of the paper seal and make such seal available to CBP for inspection upon request.

(c) *Presumption of proper execution.* CBP is entitled to presume, without verification, that submitted bond applications and related documentation, which include the bond, are properly executed, complete, accurate, and in full compliance with all applicable laws.

19. In § 113.26:

a. Paragraph (a) is amended by removing the word ''Bonds'' and adding in its place the words ''Continuous bonds''; removing the number ''30'' and adding in its place ''60'', and; removing the word ''Customs'' and adding in its place the term ''CBP'';

b. Paragraph (b) is amended by removing the words ''Customs Bond, Customs'' and adding in their place the term ''CBP'';

c. Paragraph (c) is amended by removing the words ''Customs Bond, Customs'' and adding in their place the term ''CBP''; and

d. Paragraph (e) is revised.

The revision to § 113.26(e) reads as follows:

§ 113.26 Effective dates of bonds and riders.

(e) *Rider to delete trade names and unincorporated divisions of a corporate principal.* A rider to delete trade names and unincorporated divisions of a corporate principal is effective on the effective date identified on the rider if the date is at least 15 days after the date CBP receives the rider. If the rider is not received 15 days before the identified effective date or no effective date is identified on the rider, it will be effective on the close of business of the fifteenth business day after it is received by CBP.

20. Section 113.27 is revised to read as follows:

§ 113.27 Effective dates of termination of bond.

(a) *Termination by principal/co-principal.* A written request by a principal or co-principal to terminate a continuous bond must be addressed to the Revenue Division (RD) and must state the date the termination will take effect. Once the RD has received a valid bond termination request, the termination cannot be withdrawn. The termination will take effect on the date requested if that date is at least 15 business days after the date the request is received by CBP. Where the requested date of termination is less than 15 business days from the date CBP received the request, or where no termination date has been requested, the termination will take effect on the close of business on the fifteenth business day after the request is received by CBP.

(b) *Termination by surety.* A surety may, with or without the consent of the principal, terminate a CBP bond on which it is obligated. Written notice of the termination must be sent to the principal and the RD and must state the date the termination will take effect. Once the RD has received a valid bond termination request, the termination cannot be withdrawn. The termination will take effect on the date requested if that date is at least 15 business days after the date the notice is received by CBP. Where the requested date of termination is less than 15 business days from the date CBP received the notice, or where no termination date has been requested, the termination will take effect on the close of business on the fifteenth business day after the notice is received by CBP.

(c) *Effect of termination.* (1) After a bond is terminated, no new CBP transactions will be charged against the bond. A new bond in an appropriate amount on CBP Form 301 (or other form as designated by regulation), containing the appropriate bond conditions set forth in subpart G of this part, must be filed before further CBP activity may be transacted.

(2) Notwithstanding the above, when a principal intends to continue to engage in the same activity as that secured by a bond to be terminated pursuant to this section, and the principal has submitted a replacement bond to secure that continued activity, no termination requested by a principal or surety will take effect or be effective until CBP has reviewed and approved the replacement bond.

§ 113.32 [Amended]

21. In § 113.32:

a. New introductory text is added to read as follows, ''A partnership, including a limited partnership, means any business association recognized as such under the laws of the State where the association is organized.'';

b. Paragraph (a) is removed;

c. Existing paragraph (b) is redesignated as paragraph (a) and is amended by removing the word ''shall'' and adding in its place the word ''must''; and

d. Existing paragraph (c) is redesignated as paragraph (b) and is amended, in the first sentence, by removing the word ''shall '' and adding in its place the word ''will'', and by removing the second sentence.

22. Section 113.33 is amended by:

a. Revising the heading and paragraphs (a), (b), and (c);

b. In paragraph (d), removing the words ''port director'' and adding in their place the term ''RD'', and removing the word ''shall'' each place that it appears and adding the word ''must''; and

c. In paragraph (e), removing the words ''shall be'' and adding in their place the word ''are''.

The revisions to § 113.33 read as follows:

§ 113.33 Corporations (including Limited Liability Corporations) as principals.

(a) *Name of corporation (including Limited Liability Corporation (LLC)) on bond.* The name of a corporation or LLC executing a CBP bond as a principal must be indicated on the bond.

(b) *Signature and seal of corporation (including Limited Liability Corporation (LLC)) on the bond.* Where the bond of a corporate or LLC principal is submitted to CBP on paper, it must be signed by an authorized officer or attorney of the corporation or LLC and the seal must be affixed immediately adjoining the signature of the person executing the bond, as provided for in § 113.25(a). Where the continuous bond of a corporate or LLC principal is submitted to the RD in an electronic format, the bond must contain the certification language set forth in § 113.11(e)(2) and, where applicable, the party executing the bond must retain a copy of the paper seal in accordance with § 113.25(b). CBP is entitled to presume, without verification, that submitted bond applications and related documentation, which include the

bond, are properly executed, complete, accurate, and in full compliance with all applicable laws.

(c) *Bond executed by an officer of corporation (including Limited Liability Corporation (LLC)).* When a bond is executed by an officer of a corporation or LLC, the officer's signature constitutes *prima facie* evidence of that officer's authority to bind the corporation or LLC. CBP is entitled to presume, without verification, that submitted bond applications and related documentation, which include the bond, are properly executed, complete, accurate, and in full compliance with all applicable laws.

* * * * *

§ 113.34 [Amended]

23. Section 113.34 is amended by removing the word ''shall'' in the second sentence and adding in its place the word ''may''.

24. Section 113.35 is revised to read as follows:

§ 113.35 Individual sureties.

(a) *Number required.* If individuals sign as sureties, there must be two sureties on the bond unless CBP is satisfied that one surety is sufficient to protect the revenue and insure compliance with the law and regulations.

(b) *Qualifications to act as surety*—(1) *Residency and citizenship.* Each individual surety on a CBP bond must be both a resident and citizen of the United States.

(2) *Granting of power of attorney.* Any individual, unless prohibited by law, may grant a power of attorney to sign as surety on CBP bonds. Unless the power is unlimited, all persons to whom the power relates must be named.

(3) *Property requirements.* For both single transaction and continuous bonds, each individual surety must have property available as security within the customs territory of the United States. The current market value of the property less any encumbrance must be equal to or greater than the amount of the bond. If one individual surety is accepted, the individual surety must have property the value of which, less any encumbrance, is equal to or greater than twice the amount of the bond.

(c) *Oath and evidence of solvency.* Before being accepted as a surety, theindividual must:

(1) Take an oath on CBP Form 3579, setting forth:

(i) The amount of assets over and above all debts and liabilities and such exemptions as may be allowed by law; and

(ii) The general description and location of one or more pieces of real estate owned within the customs territory of the United States, and the value thereof less any encumbrance.

(2) Produce such evidence of solvency and financial responsibility as CBP may require.

(d) *Determination of financial responsibility.* An individual surety will not be accepted on a bond until CBP is satisfied as to the financial responsibility of the individual. CBP may request Immigration and Customs Enforcement (ICE) to conduct an immediate investigation to verify a surety's financial responsibility.

(e) *Continuancy of financial responsibility.* In order to follow the continued solvency and financial responsibility of individual sureties, CBP will require a new oath and determine the financial responsibility of each individual surety as prescribed in paragraphs (c) and (d) of this section at least once every 6 months, and more often if deemed advisable.

§ 113.36 [Amended]

25. Section 113.36 is amended by removing the word ''shall'' and adding in its place the word ''will''.

26. In § 113.37:

a. The second sentence in paragraph (a) is amended by removing the word ''Customs'' and adding in its place the term ''CBP''; by removing the word ''shall'' where it appears after the word ''corporation'' and adding in its place the word ''will''; and by removing the words ''shall be for a greater amount than'' and adding in their place the words ''may exceed'';

b. Paragraph (b) is revised;

c. Paragraph (c) is revised;

d. Paragraph (d) is amended by removing the word ''shall'' and adding in its place the word ''must'';

e. Paragraph (e) is revised;

f. Paragraph (f) is amended: by removing the word ''shall'' and adding in its place the word ''must''; by removing the words ''Bureau of Government Financial Operations'' and adding in their place the words, ''Financial Management Service''; by removing in the last paragraph of the ''Corporate Sureties Agreement for Limitation of Liability'' set forth under paragraph (f) the number ''19__'' and adding in its place ''20__''; and by removing in the signature block the words ''Port Director (Drawback Office)'' and adding in their place the words ''Authorized CBP officer''; and

g. Paragraph (g) is revised.

The revisions of § 113.37 read as follows:

§ 113.37 Corporate sureties.

* * * * *

(b) *Name of corporation on the bond.* The name of a corporation executing a CBP bond as a surety must be indicated on the bond.

(c) *Name of agent or attorney on the bond.* The full name of the agent or attorney acting for a corporate surety, as it appears on the bond, must be indicated on the bond.

* * * * *

(e) *Signature and seal of the corporation on the bond.* Except where submitted in an electronic format, a bond executed by a corporate surety must be signed by an authorized officer or attorney of the corporation and the corporate seal must be affixed immediately adjoining the signature of the person executing the bond, as provided in § 113.25(a). Where a corporate surety submits a bond to the RD in an electronic format, the bond must contain the certification language prescribed by § 113.11(e)(2) and the corporate surety must retain a copy of the seal in accordance with § 113.25(b). CBP is entitled to presume, without verification, that submitted bond applications and related documentation, which include the bond, are properly executed, complete, accurate, and in full compliance with all applicable laws.

* * * * *

(g) *Power of attorney for the agent or attorney of the surety.* Corporations may execute powers of attorney to act on their behalf in the following manner:

(1) *Execution and contents.* The corporate surety power of attorney must be executed on CBP Form 5297 and must contain the following information:

(i) Corporate surety name and number;

(ii) Name, address and Social Security number of agent or attorney;

(iii) Date of execution of power of attorney;

(iv) Seal of the corporate surety, either affixed to the CBP Form 5297 or, if submitted in an electronic format, the corporate surety must retain a copy of the seal in accordance with § 113.25(b).

(v) Signature of any two principal officers of corporation or, where the corporate surety power of attorney is submitted in an electronic format, the principal officers must submit the certification language prescribed in § 113.11(e)(2); and

(vi) Dollar amount of authorization.

(2) *Filing.* A corporate surety power of attorney executed on CBP Form 5297 must be filed at the RD via mail, fax, or in an electronic format pursuant to the terms prescribed by CBP (*see* the CBP Internet Web site located at *http://*

www.cbp.gov.) The RD will retain a copy of the original CBP Form 5297 and return a validated copy to the grantee.

(3) *Term and revocation.* Corporate surety powers of attorney will continue in force and effect until revoked. Any surety desiring that a designated agent or attorney be divested of a power of attorney must execute a revocation on CBP Form 5297 and submit this form to the RD. The revocation will take effect on the close of business on the date requested provided the CBP Form 5297 is received at least 5 business days before the date requested; otherwise, the revocation will take effect at the close of business 5 days after the request is received by the RD.

(4) *Change on the power of attorney.* The only changes permitted on the CBP Form 5297 after it has been approved by CBP are changes to the grantee's name and address. To make any other change to the power of attorney requires the submission of two separate CBP Form 5297s: The first revoking the previous power of attorney and the second containing a new grant of authority.

(5) *Presumption of proper execution.* CBP is entitled to presume, without verification, that submitted bond applications and related documentation, which include the bond, are properly executed, complete, accurate, and in full compliance with all applicable laws.

27. In § 113.38:

a. The heading and text of paragraph (a) are amended by removing the word ''Customs'' each place it appears and adding the term ''CBP'';

b. The heading and text of paragraph (b) are amended by removing the word ''Customs'' each place it appears and adding the term ''CBP'';

c. The heading and text of paragraph (c)(1) are amended by adding the words ''single transaction'' before the word ''bond'', and by removing the language, ''Director, Border Security and Trade Compliance Division'' and adding in its place, ''Executive Director, Regulations and Rulings, Office of International Trade, CBP'';

d. Paragraph (c)(2) is revised;

e. Paragraph (c)(3) is amended by removing the word ''Customs'' and adding in its place the term ''CBP''; and

f. Paragraph (c)(4) is revised.

The revisions to § 113.38(c)(2) and (c)(4) read as follows:

§ 113.38 Delinquent sureties.

* * * * *

(c) * * *

(2) *Nonacceptance of bond upon instruction by Commissioner of CBP or Director, Revenue Division.* The Commissioner of CBP, or the Director, Revenue Division (RD), may issue instructions to CBP officers not to accept a bond secured by an individual or corporate surety who, without just cause, is significantly delinquent either in the number of outstanding bills or dollar amounts thereof.

* * * * *

(4) *Review and final decision.* After a review of any submission made by the surety under paragraph (c)(3) of this section, if the Commissioner of CBP, the Director, RD, or a port director is still of the opinion bonds secured by the surety should not be accepted, written notice of the decision will be provided to the surety in person or by certified mail, return receipt requested, at least five days before the date that CBP will no longer accept the bonds of the surety. Copies of the notice will also be provided to the Executive Director, Regulations and Rulings, Office of International Trade and, if the notice does not originate from the RD, to the Director, RD. Notice will be given to the importing public by publishing the decision in the Customs Bulletin.

* * * * *

§ 113.39 [Amended]

28. In § 113.39:

a. The introductory text is amended by removing the words ''a port director or Fines, Penalties, and Forfeitures Officer is unsatisfied'' and adding in their place the words ''CBP is dissatisfied''; and by removing the words ''port director may'' and adding in their place the words ''an authorized CBP officer may'';

b. The introductory text to paragraph (a) is amended by removing the words ''A port director or Fines, Penalties, and Forfeitures Officer shall'' and adding in their place the words ''An authorized CBP officer will'';

c. Paragraph (a)(5) is amended by removing the words the ''port director or Fines, Penalties, and Forfeitures Officer'' and adding in their place the words ''authorized CBP officer''; and

d. Paragraph (b) is amended: In the first sentence, by removing the words ''The Director, Border Security and Trade Compliance Division, shall'' and adding in their place the words ''CBP Headquarters will''; in the second sentence, by removing the words ''Bureau of Government Financial Operations'' and adding in their place the words, ''Financial Management Service''; and, in the last sentence, by removing the words ''port director and Fines, Penalties, and Forfeitures Officer'' and adding in their place the words ''appropriate CBP officer and the Director, RD''.

29. In § 113.40:

a. Paragraph (a) is revised;

b. Paragraph (b) introductory text is revised and the ''Power of Attorney and Agreement (For Corporation)'' form is amended by removing the designation ''19__'' each place that it appears and adding ''20__'' in its place;

c. Paragraph (c) is revised;

d. New paragraphs (d) through (g) are added in alphabetical order.

The revisions to § 113.40 read as follows:

§ 113.40 Acceptance of cash deposits or obligations of the United States in lieu of sureties on bonds.

(a) *General provisions.* In lieu of sureties on any bond required or authorized by any law, regulation, or instruction which the Secretary of Homeland Security, the Secretary of the Treasury, or the Commissioner of CBP are authorized to enforce, the Director, Revenue Division (RD) may accept United States money, United States bonds (except for savings bonds), United States certificates of indebtedness, Treasury notes, or Treasury bills in an amount equal to the face amount of the bond that would be required. The option to deposit cash or U.S. obligations in lieu of sureties is at the option of the importer. A CBP Form 301 designating the appropriate activity for the cash deposits or obligations in lieu of surety must also be filed. When cash or obligations in lieu of surety are accepted, it must be for a term of no more than one year. Additional cash deposits or obligations in lieu of surety may be required.

(b) *Authority to sell United States obligations on default.* At the time of deposit with the Director, Revenue Division (RD), of any obligation of the United States, other than United States money, the obligor must deliver a duly executed power of attorney and agreement authorizing the Director, RD, in the case of any default in the performance of any of the conditions of the bond, to sell the obligation so deposited and to apply the proceeds of the sale, in whole or in part, to the satisfaction of any damages, demands, or deficiency arising by reason of default. The format of the power of attorney and agreement, when the obligor is a corporation, will be modified as appropriate when the obligor is either an individual or a partnership and reads as follows:

* * * * *

(c) *Application of United States money or obligations on default.* If U.S. cash or obligations are deposited in lieu of surety on any bond, the appropriate CBP officer is authorized to apply the cash or money received from the

deposited obligation to satisfy any damages, demand, or deficiency arising from a default under the bond.

(d) *Application to the satisfaction of damages, demands or deficiencies*—(1) *Matters subject to protest.* When the time to protest duties, fees, taxes, charges or exactions as set forth in 19 U.S.C. 1514 expires and no timely protest has been filed, or when a timely protest is filed and is denied in whole or in part, CBP may collect against the cash deposit or obligation in lieu of surety and take any and all necessary steps to accomplish such collection.

(2) *User fees.* When the user fees required to be collected are not remitted to CBP in the time period prescribed by law or regulation, CBP may collect against the cash deposit or obligation in lieu of surety and take any and all necessary steps to accomplish such collection.

(3) *Matters subject to administrative petition*—(i) *No timely petition.* If no petition has been filed by the day after the expiration of the petitioning period provided by regulation or specific notice, CBP may collect against the cash deposit or obligation in lieu of surety and take any and all necessary steps to accomplish such collection. CBP may entertain untimely petitions and supplemental petitions and, if relief is granted and collection has been made, CBP will return to the established cash account the difference between the amount collected and the amount ultimately applied.

(ii) *Timely petition.* If CBP denies a petition, CBP may collect immediately against the cash deposit or obligation in lieu of surety and take any and all necessary steps to accomplish such collection. If CBP grants relief, CBP will return to the established cash account the difference between the amount posted and the amount ultimately applied after petitioning, taking all steps necessary to accomplish such collection.

(4) *No waiver of rights.* Forbearance or delay on the part of CBP in collection after it acquires the right to do so pursuant to the terms set forth in this section will not constitute a waiver of the Government's right to collect from the cash deposits or obligations in lieu of surety.

(e) *Additional security.* If, at any point prior to the expiration of the one-year maximum term for cash or obligations in lieu of a bond, CBP determines that the cash or obligations are not sufficient security, CBP possesses the right to require new, additional cash or obligations to be posted in lieu of surety. If new, additional cash or obligations are not timely posted, CBP may as a matter of right take action to prevent the party from continuing the activity for which the initial cash or obligations was posted. CBP will continue to hold the initial cash or obligations as a matter of right subject to the provisions found in paragraph (f) of this section.

(f) *Return of cash or obligations and setoff*—(1) *Tenure of holding.* CBP will hold cash and obligations until such time as CBP is reasonably certain that no circumstances will arise where CBP will need to collect against it. When CBP determines that it is reasonably certain that no circumstances may arise where it would need to collect against the cash or obligations and that the cash or obligations can be returned, CBP will, pursuant to § 24.72 of this chapter, set off the cash or obligations against debt owed to CBP.

(2) *No interest to accrue on cash in lieu of surety.* Cash in lieu of surety does not earn interest while CBP holds it, and it may not be placed in an interest-bearing account, not even a low-interest, low-risk account, under any circumstances.

(g) *No limitation on an importer's liability for duty and no effect on the duration of that liability.* An importer is personally liable for duties, taxes, and charges found due in connection with an entry of merchandise. Furthermore, there is no statute of limitations governing an importer's liability for such duties, taxes, and charges. The fact that an importer posts cash or obligations in lieu of a bond does not alter or affect the two legal facts just described.

§ 113.41 [Amended]

30. Section 113.41 is amended by: removing the word ''shall'' and adding in its place the word ''must''; and removing the word ''Customs'' and adding in its place the term ''CBP''.

§ 113.42 [Amended]

31. Section 113.42 is amended by: removing from the first sentence the word ''shall'' and adding in its place the word ''must''; removing the word ''Customs'' and adding in its place the term ''CBP''; removing the reference to ''§ 133.43(a)'' and adding in its place a reference to ''§ 113.43(a)''; and removing in the second sentence the word ''shall'' and adding in its place the word ''will''.

§ 113.43 [Amended]

32. In § 113.43:

a. Paragraph (a) is amended by removing the words ''of 2 months'' and adding in their place the words ''not to exceed 60 days'';

b. Paragraph (b) is amended by: removing the word ''shall'' each place that it appears and adding the word ''will''; and removing the words ''2 months'' each place that they appear and adding the words ''60 days''; and

c. Paragraph (c) is amended by removing the word ''shall'' each place that it appears and adding the word ''will''.

§ 113.44 [Amended]

33. In § 113.44, paragraph (b) is amended by removing the word ''shall'' and adding in its place the word ''must''.

§ 113.45 [Amended]

34. Section 113.45 is amended by: removing the word ''shall'' and adding in its place the word ''must''; and removing the word ''entry'' each place that it appears and adding the word ''transaction''.

§ 113.51 [Amended]

35. Section 113.51 is amended by removing the word ''Customs'' and adding in its place the term ''CBP''.

§ 113.52 [Amended]

36. Section 113.52 is amended by: removing the word ''Customs'' and adding in its place the term ''CBP''; removing the symbols ''§§ '' and adding in their place the symbol ''§ ''; removing the words ''is unsatisfied'' and adding in their place the words ''has not been satisfied''; and removing the word ''shall'' and adding in its place the word ''will''.

§ 113.53 [Amended]

37. In § 113.53:

a. The section heading is amended by removing the word ''Customs'' and adding in its place the term ''CBP'';

b. Paragraph (a) is amended by: removing in the paragraph heading the word ''Customs'' and adding in its place the term ''CBP''; removing in the introductory text the word ''Customs'' each place that it appears and adding the term ''CBP''; and adding in paragraph (a)(3) after the word ''Commissioner'' the words ''of CBP''; and

c. Paragraph (b) is amended by: adding in the paragraph heading, after the word ''director'', the words ''or other authorized CBP officer''; removing, in the text, the word ''Customs'' and adding in its place the term ''CBP''; adding after the word ''director'' the words ''or other authorized CBP officer''; and removing the word ''shall'' and adding in its place the word ''will''.

§ 113.55 [Amended]

38. In § 113.55:

a. Paragraph (c) is amended by: removing in the introductory text the

word ''shall'' each place that it appears and adding the word ''must''; removing the word ''Customs'' and adding in its place the word ''customs''; removing in paragraph (c)(1) the word ''shall'' and adding in its place the word ''will''; and removing in paragraph (c)(3) the word ''Customs'' and adding in its place the term ''CBP''; and

b. Paragraph (d) is removed.

Subpart G—CBP Bond Conditions

39. The subpart G heading is revised to read as set forth above.

§ 113.61 [Amended]

40. Section 113.61 is amended, in the first sentence, by removing the upper case word ''Customs'' and adding in its place the lower case word ''customs''; and in the second sentence, by removing the word ''Customs'' and adding in its place the term ''CBP''.

41. In § 113.62:

a. The introductory text is amended by: removing the word ''shall'' and adding in its place the word ''must''; and by removing the words ''single entry'' and adding in their place the words ''single transaction'';

b. Paragraphs (a)(1), (a)(1)(ii), and (a)(2) are amended by: removing the word ''Customs'' each place that it appears and adding the term ''CBP''; and in paragraph (a)(1)(i), by adding after the word ''regulation'' the words ''and including payments made via periodic monthly statement'';

c. Paragraph (a)(3) is amended by removing the words ''the port director'' and adding in their place the term ''CBP'';

d. The introductory text to paragraph (b) and paragraph (b)(1) are amended by removing the word ''Customs'' each place that it appears and adding the term ''CBP'';

e. Paragraph (c) is amended by removing the word ''Customs'' and adding in its place the term ''CBP'';

f. Paragraph (d) introductory text is amended by removing the word ''Customs'' wherever it appears and adding in each place the term ''CBP'';

g. Paragraph (f) introductory text and paragraph (f)(2) are amended by removing the word ''Customs'' wherever it appears and adding in each place the term ''CBP'';

h. Paragraph (f)(3) is revised;

i. Paragraph (g)(1) is amended by removing the word ''Customs'' and adding in its place the term ''CBP'';

j. Paragraph (h)(2) is revised;

k. Paragraphs (h)(3) and (h)(4) are amended by removing the word ''Customs'' each place that it appears and adding the term ''CBP'';

l. The heading and text of paragraph (i) are amended by removing the words ''Customs Regulations'' each place that they appear and adding the words ''CBP regulations''; and by removing the words ''Customs security'' each place that they appear and adding the words ''CBP security'';

m. Paragraphs (m)(2) and (m)(4) are amended by removing the word ''Customs'' each place that it appears and adding the term ''CBP''; and by removing the word ''shall'' each place that it appears and adding the word ''will''.

The revisions to § 113.62 read as follows:

§ 113.62 Basic importation and entry bond conditions.

* * * * *

(f) * * *

(3) Keep any customs seal or cording on the merchandise intact until the merchandise is examined by CBP.

* * * * *

(h) * * *

(2) If a fishing vessel, to present the original approved application to CBP within 24 hours on each arrival of the vessel in the customs territory of the United States from a fishing voyage;

* * * * *

42. In § 113.63:

a. The introductory paragraph is amended by removing the word ''shall'' each place that it appears and adding the word ''must'';

b. Paragraphs (a)(2) and (a)(3) are amended by removing the word ''Customs'' each place that it appears and adding the term ''CBP''; and paragraph (a)(3) is further amended by adding the term ''CBP'' immediately before the word ''regulations'';

c. Paragraph (a)(5) is amended by removing the word ''Customs'' each place that it appears and adding the term ''CBP'';

d. Paragraphs (b)(2) and (b)(3) are amended by removing the word ''Customs'' each place that it appears and adding the term ''CBP'';

e. Paragraphs (c)(1), (c)(2), (c)(3) and (c)(4) are amended by removing the word ''Customs'' each place that it appears and adding the term ''CBP'';

f. Paragraph (d) is amended by removing in the paragraph heading and text the word ''Customs'' each place that it appears and adding the term ''CBP'';

g. Paragraph (e) is amended by removing the words ''Customs laws and regulations'' and adding in their place the words ''customs laws and CBP regulations'';

h. The heading and text of paragraph (f) are amended by removing the words ''Customs Regulations'' each place that they appear and adding the words ''CBP regulations'', and by removing the words ''Customs security'' each place that they appear and adding the words ''CBP security'';

i. Paragraphs (h)(1), (h)(2) and (h)(5) are amended by removing the word ''Customs'' each place that it appears and adding the term ''CBP'';

j. Paragraph (i)(2) is amended by removing the word ''shall'' and adding in its place the word ''will''; and by removing the word ''Customs'' and adding in its place the term ''CBP''; and

k. Paragraph (i)(3) is amended by removing the word ''Customs'' and adding in its place the term ''CBP''.

43. In § 113.64:

a. The introductory paragraph is amended by: removing the word ''shall'' and adding in its place the word ''must''; and by removing the word ''entry'' and adding in its place the word ''transaction'';

b. Paragraph (a) is amended by removing the second sentence;

c. Existing paragraphs (b) through (k) are redesignated as paragraphs (c) through (l);

d. A new paragraph (b) is added;

e. Newly redesignated paragraph (c) is amended by removing the word ''Customs'' each place that it appears and adding the term ''CBP''; and in the third sentence by removing the word ''shall'' and adding in its place the word ''will'';

f. The heading and text of newly redesignated (j) are amended by removing the words ''Customs Regulations'' each place that they appear and adding the words ''CBP regulations''; and by removing the words ''Customs security'' each place that they appear and adding the words ''CBP security''; and

g. Newly redesignated paragraphs (l)(1) and (l)(2) are amended by removing the word ''Customs'' each place that it appears and adding the term ''CBP''.

The revisions to § 113.64 read as follows:

§ 113.64 International carrier bond conditions.

* * * * *

(b) *Agreement to pay liquidated damages*—(1) *Passenger processing fees:* If the principal (carrier) fails to pay passenger processing fees to CBP no later than 31 days after the close of the calendar quarter in which they were required to be collected pursuant to § 24.22(g) of this chapter, the obligors (principal and surety, jointly and severally) agree to pay liquidated damages equal to two times the passenger processing fees which were

required to be collected but not timely remitted to CBP, regardless of whether such fees were in fact collected from passengers, as prescribed by regulation.

(2) *Railroad car processing fees:* If the principal (carrier) fails to pay railroad car processing fees to CBP no later than 60 days after the close of the calendar month in which they were collected pursuant to § 24.22(d) of this chapter, the obligors (principal and surety, jointly and severally) agree to pay liquidated damages equal to two times the railroad car processing fees which have not been timely paid to CBP as prescribed by regulation.

(3) *Reimbursement fees payable by express consignment carrier and centralized hub facilities.* If the principal (carrier) fails to timely pay the reimbursement fees payable to CBP by express consignment carrier facilities and centralized carrier facilities pursuant to the terms set forth in § 24.23(b)(4) of this chapter, the obligors (principal and surety, jointly and severally) agree to pay liquidated damages equal to two times the fees which have not been timely paid to CBP as prescribed by that section.

* * * * *

§ 113.65 [Amended]

44. In § 113.65:

a. The introductory paragraph is amended by: removing the word ''shall'' and adding in its place the word ''must''; and by removing the word ''entry'' and adding in its place the word ''transaction''; and

b. Paragraphs (a)(3) and (a)(4) are amended by removing the word ''Customs'' each place that it appears and adding the term ''CBP''.

45. In § 113.66:

a. The introductory paragraph is amended by removing the word ''shall'' each place that it appears and adding the word ''must'';

b. Paragraph (a) introductory text and paragraph (a)(1) are revised;

c. Paragraph (b)(3) is amended by removing the word ''Customs'' and adding in its place the term ''CBP'';

d. Paragraph (c)(2) is amended by removing the word ''Customs'' and adding in its place the term ''CBP'';

e. Paragraph (d)(2) is amended by: removing the word ''shall'' and adding in its place the word ''will''; and by removing the word ''Customs'' and adding in its place the term ''CBP''; and

f. Paragraph (d)(3) is amended by removing the word ''Customs'' and adding in its place the term ''CBP''.

The revisions to § 113.66(a) read as follows:

§ 113.66 Control of containers and instruments of international traffic bond conditions.

(a) *Agreement to Enter Any Diverted Instrument of International Traffic.* If the principal brings in and takes out of the customs territory of the United States an instrument of international traffic without entry and without payment of duty, as provided by the CBP regulations and section 322(a), Tariff Act of 1930, as amended (19 U.S.C. 1322(a)), the principal agrees to:

(1) Report promptly to CBP when the instrument is diverted to point-to-point local traffic in the customs territory of the United States or when the instrument is otherwise withdrawn in the customs territory of the United States from its use as an instrument of international traffic.

* * * * *

§ 113.67 [Amended]

46. In § 113.67:

a. The introductory text to paragraph (a) is amended by removing the word ''shall'' each place that it appears and adding the word ''must'';

b. Paragraphs (a)(1) introductory text, (a)(1)(i), and (a)(1)(iii) are amended by removing the word ''Customs'' each place that it appears and adding the term ''CBP'';

c. Paragraph (a)(2)(iii) is amended by: removing the word ''shall'' and adding in its place the word ''will''; and by removing the word ''Customs'' where it appears and adding in each place the term ''CBP''.

d. The introductory text to paragraph (b) is amended by removing the word ''shall'' each place that it appears and adding the word ''must''; and

e. Paragraphs (b)(1), (b)(1)(i), (b)(1)(iii), and (b)(2)(iii) are amended by removing the word ''Customs'' each place that it appears and adding the term ''CBP''.

§ 113.68 [Amended]

47. In § 113.68:

a. The introductory text is amended by: removing the word ''shall'' each place that it appears and adding the word ''must''; and by removing the word ''entry'' and adding in its place the word ''transaction'';

b. Paragraph (a) is amended by removing the word ''Customs'' and adding in its place the term ''CBP''; and

c. The second sentence of paragraph (b) is amended by removing the word ''shall'' and adding in its place the word ''will''; and by removing the word ''Customs'' and adding in its place the term ''CBP''.

§ 113.69 [Amended]

48. In § 113.69:

a. The introductory text is amended by: removing the word ''shall'' each place that it appears and adding the word ''must''; and by removing the word ''entry'' and adding in its place the word ''transaction''; and

b. The introductory paragraph in the ''Production of Bill of Lading Bond Conditions'' is amended by removing the word ''Customs'' and adding in its place the term ''CBP''.

§ 113.70 [Amended]

49. In § 113.70:

a. The introductory paragraph is amended by: removing the word ''shall'' each place that it appears and adding the word ''must''; and by removing the word ''entry'' and adding in its place the word ''transaction''; and

b. The first sentence in the ''Bond Condition to Indemnify United States for Detention of Copyrighted Material'' is amended by removing the word ''Customs'' and adding in its place the term ''CBP''.

§ 113.71 [Amended]

50. In § 113.71, the introductory text is amended by: removing the word ''shall'' each place that it appears and adding the word ''must''; and by removing the word ''entry'' and adding in its place the word ''transaction''.

§ 113.72 [Amended]

51. In § 113.72, the introductory text is amended by: removing the word ''shall'' each place that it appears and adding the word ''must''; and by removing the word ''entry'' and adding in its place the word ''transaction''.

§ 113.73 [Amended]

52. In § 113.73:

a. The introductory text is amended by removing the word ''shall'' each place that it appears and adding the word ''must'';

b. Paragraph (a)(1) is amended by removing the word ''Customs'' and adding in its place the term ''CBP'';

c. Paragraph (a)(2) is amended by: removing the word ''Customs'' each place that it appears and adding the term ''CBP''; and by removing the word ''shall'' in the third sentence and adding in its place the word ''will'';

d. Paragraph (b) is amended by: removing the word ''shall'' and adding in its place the word ''will''; and by removing the word ''Customs'' and adding in its place the term ''CBP'';

e. Paragraph (d)(2) is amended by removing the phrase ''Customs officer'' and adding in its place the term ''CBP Officer''; and

f. Paragraph (e) is amended by removing the word ''Customs'' and adding in its place the term ''CBP''.

§ 113.74 [Amended]

53. Section 113.74 is amended by removing the word ''entry'' and adding in its place the word ''transaction''.

Appendix A to Part 113—[Amended]

54. Appendix A to Part 113 is amended by removing:

a. In the Appendix heading, the title of the bond, and the text of the bond, the words ''Customs security'' each place that they appear and adding the words ''CBP security''; and

b. In the text of the bond, the number ''19'' where it appears and adding the number ''20''; the words ''Customs airports'' and adding the words ''CBP airports''; and the words ''Customs Regulations'' and adding the words ''CBP regulations''.

Appendix B to Part 113—[Amended]

55. Appendix B to Part 113 is amended by removing the word ''Customs'' each place that it appears and adding the term ''CBP''.

Appendix C to Part 113—[Amended]

56. Appendix C to Part 113 is amended by removing the word ''Customs'' each place that it appears and adding the term ''CBP''.

PART 133—TRADEMARKS, TRADE NAMES, AND COPYRIGHTS

57. The general and specific authority citations for part 133 continue to read as follows:

Authority: 17 U.S.C. 101, 601, 602, 603; 19 U.S.C. 66, 1624; 31 U.S.C. 9701.

* * * * *

Sections 133.21 through 133.25 also issued under 15 U.S.C. 1124, 19 U.S.C. 1526.

* * * * *

58. Section 133.21(d) is revised to read as follows:

§ 133.21 Articles bearing counterfeit trademarks.

* * * * *

(d) *Samples available to the trademark owner.* At any time following seizure of the merchandise, CBP may provide a sample of the subject merchandise to the owner of the trademark for examination, testing, or other use in pursuit of a related private civil remedy for trademark infringement. To obtain a sample under this section, the trademark/trade name owner must furnish CBP with a single transaction bond in the form and amount specified by the port director or a continuous bond in the form and amount specified by the Director, Revenue Division. CBP may demand the return of the sample at any time. The owner must return the sample to CBP upon demand or at the conclusion of the examination, testing or other use in pursuit of a related private civil remedy for trademark infringement. In the event that the sample is damaged, destroyed, or lost while in the possession of the trademark owner, the owner must, in lieu of return of the sample, certify to CBP that: ''The sample described as [insert description] and provided pursuant to 19 CFR 133.21(d) was (damaged/destroyed/lost) during examination, testing or other use.''

* * * * *

59. Section 133.25(c) is revised to read as follows:

§ 133.25 Procedure on detention of articles subject to restriction.

* * * * *

(c) *Samples available to the trademark or trade name owner.* At any time following presentation of the merchandise for CBP's examination, but prior to seizure, CBP may provide a sample of the suspect merchandise to the owner of the trademark or trade name for examination or testing to assist in determining whether the article imported bears an infringing trademark or trade name. To obtain a sample under this section, the trademark/trade name owner must furnish CBP with a single transaction bond in the form and amount specified by the port director or a continuous bond in the form and amount specified by the Director, Revenue Division. CBP may demand the return of the sample at any time. The owner must return the sample to CBP upon demand or at the conclusion of the examination or testing. In the event that the sample is damaged, destroyed, or lost while in the possession of the trademark or trade name owner, the owner must, in lieu of return of the sample, certify to CBP that: ''The sample described as [insert description] and provided pursuant to 19 CFR 133.25(c) was (damaged/destroyed/lost) during examination or testing for trademark infringement.''

* * * * *

60. In § 133.42, paragraph (e) is amended by: revising the second sentence; removing the word ''Customs'' where it appears and adding in each place the term ''CBP''; and, in the last sentence, removing the word ''shall'' and adding in its place the word ''must''.

The revision to § 133.42(e) reads as follows:

§ 133.42 Infringing copies or phonorecords.

* * * * *

(e) *Samples available to the copyright owner.* * * * To obtain a sample under this section, the copyright owner must furnish to CBP a single transaction bond in the form and amount specified by the port director or a continuous bond in the form and amount specified by the Director, Revenue Division. * * *

* * * * *

Approved: December 14, 2009.

Jayson P. Ahern,

Acting Commissioner, U.S. Customs and Border Protection.

Timothy E. Skud,

Deputy Assistant Secretary of the Treasury.

[FR Doc. E9–30920 Filed 1–4–10; 8:45 am]

BILLING CODE 9111–14–P

POSTAL SERVICE

39 CFR Part 111

Restricting the Mailing of Replica or Inert Explosive Devices

AGENCY: Postal Service™.

ACTION: Proposed rule; revised.

SUMMARY: The Postal Service proposes to revise Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM®) to clarify that a proposed new standard to allow for the mailing of replica or inert explosive devices, such as grenades, be sent by Registered Mail™ only.

DATES: Submit comments on or before February 4, 2010.

ADDRESSES: Mail or deliver written comments to the Manager, Mailing Standards, U.S. Postal Service, 475 L'Enfant Plaza SW., Room 3436, Washington, DC 20260–3436. You may inspect and photocopy all written comments at USPS Headquarters Library, 475 L'Enfant Plaza SW., 11th Floor N, Washington, DC between 9 a.m. and 4 p.m., Monday through Friday. E-mail comments, containing the name and address of the commenter, may be sent to: *MailingStandards@usps.gov*, with a subject line of ''Inert Munitions'' Faxed comments are not accepted.

FOR FURTHER INFORMATION CONTACT: Mary J. Collins 202–268–5440 or Evans King, 202–268–4982.

SUPPLEMENTARY INFORMATION: The Postal Service published a **Federal Register** proposed rule (73 FR 12321) on March 7, 2008 to prohibit replica and inert munitions from the mail. Upon further review and in consideration of respondents' comments, we are revising our proposal to:

1. More specifically identify these items as ''replica or inert explosive devices'' rather than ''replica or inert munitions'' and,

2. Identify a process for mailing such items rather than prohibiting them from the mail altogether.

In the past, postal operations have been disrupted and facilities have been evacuated when replica or inert explosive devices have been discovered in the mail. Such evacuations result in unnecessary expense and loss of productivity to the Postal Service and can jeopardize USPS® service commitments. We believe this revised proposed rule will minimize the chances of operational disruptions caused by replica or inert explosive devices and at the same time allow mailers to continue to use the mail for shipping these items.

Comments Received

All comments received in response to the original proposed rule were in opposition to the proposal, falling into four major categories. Comments are summarized and presented below followed by our responses:

Comment: The Postal Service proposal is vague and overly broad when identifying all replica or inert ''munitions'' as being prohibited from mailing.

The Postal Service agrees that the language in the rule could be more descriptive. We have, therefore, termed these articles as ''inert or replica explosive devices'' to distinguish them from inert munitions, such as empty shell casings and the like. In the revised proposed rule, replica or inert items that clearly look like a bomb or an explosive device, to an untrained observer, must be presented for mailing in accordance with the proposed standards in this document. This proposed rule is intended to discourage indiscriminate mailing of articles that appear to be explosive devices.

Comment: Respondents dispute whether there really is a problem of inert munitions in the mail.

In the past three years, the Postal Service has recorded numerous incidents involving the discovery of mail that exhibited characteristics of possible explosives. Postal facilities have been evacuated due to these occurrences. Postal Inspectors or local emergency first responders were contacted and required to respond to each of these occurrences.

Comment: The proposal is in violation of the Second Amendment.

We no longer propose to prohibit the mailing of items currently allowed by law to be mailed. In this revised proposed rule we are limiting the mailing of articles that have the appearance of real explosive devices. This revised proposed rule requires customers to present packages containing replica or inert explosive devices at a retail counter and that they be sent via Registered Mail. This process will ensure that packages containing these items remain separate and easily identifiable during the mailing process.

Comment: The Postal Service lacks the authority to ban mailing of this matter.

While the Postal Service does not necessarily agree with the legal arguments presented by certain respondents in response to its prior proposed rule, in reconsideration, we believe we can achieve the goal of reducing operational interruptions and maintaining the safety of the mail and postal employees by limiting the mailing process of replica or inert explosive devices rather than prohibiting them from being mailed.

Although we are exempt from the notice and comment requirements of the Administrative Procedure Act (5 U.S.C. of 553 (b), (c)] regarding proposed rulemaking by 39 U.S.C. 410(a), we invite public comments on the following proposed revisions to *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), incorporated by reference in the Code of Federal Regulations. See 39 CFR 111.1.

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

Accordingly, 39 CFR part 111 is proposed to be amended as follows:

PART 111—[AMENDED]

1. The authority citation for 39 CFR part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3622, 3626, 3632, 3633, and 5001.

2. Revise the following sections of *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM) as follows:

* * * * *

600 Basic Standards for All Mailing Services

601 Mailability

* * * * *

11.0 Other Restricted and Nonmailable Matter

* * * * *

11.5 Replica or Inert Explosive Devices

[Renumber current 11.5 through 11.20 as 11.6 through 11.21. Insert new 11.5 to read as follows:]

Replica or inert devices that bear a realistic appearance to explosive devices such as simulated grenades, but that are not dangerous, are permitted in the mail when all of the following conditions are met:

a. The package is presented by the mailer at a retail counter.

b. Registered Mail is used. Registered Mail service is only available for items mailed as either First-Class Mail or Priority Mail.

c. The address side of the package is labeled with ''REPLICA EXPLOSIVE'' using at least 20 point type or letters at least ¼″ high.

* * * * *

We will publish an appropriate amendment to 39 CFR part 111 to reflect these changes if our proposal is adopted.

Neva R. Watson,

Attorney, Legislative.

[FR Doc. E9–31218 Filed 1–4–10; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2009–0804; FRL–9100–3]

Approval and Promulgation of Air Quality Implementation Plans; Delaware; Amendment to Electric Generating Unit Multi-Pollutant Regulation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the State of Delaware. The revision is an amendment to the Electric Generating Unit Multi-Pollutant Regulation of Delaware's Administrative Code, and it modifies the sulfur dioxide (SO_2) mass emissions limit associated with Conectiv Edge Moor Unit 5 beginning in calendar year 2009. This action is being taken under the Clean Air Act (CAA or the Act).

DATES: Written comments must be received on or before February 4, 2010.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2009–0804 by one of the following methods:

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

B. *E-mail: fernandez.cristina@epa.gov.*

C. *Mail:* EPA–R03–OAR–2009–0804, Cristina Fernandez, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2009–0804. 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* website 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 electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Delaware Department of Natural Resources & Environmental Control, 89 Kings Highway, P.O. Box 1401, Dover, Delaware 19901.

FOR FURTHER INFORMATION CONTACT: Irene Shandruk, (215) 814–2166, or by e-mail at *shandruk.irene@epa.gov.*

SUPPLEMENTARY INFORMATION: On October 7, 2009, the Delaware Department of Natural Resources and Environmental Control (DNREC) submitted a revision to its SIP for an amendment to Regulation No. 1146—Electric Generating Unit Multi-Pollutant Regulation.

I. Background

On November 16, 2006, DNREC submitted a revision to the Delaware SIP. This SIP revision pertained to a new regulation, Regulation No. 1146—Electric Generating Unit (EGU) Multi-Pollutant Regulation. The regulation was adopted in order to impose lower emissions limits of nitrogen oxides (NOx), SO_2 and mercury in order to help Delaware attain and maintain the national ambient air quality standards (NAAQS) for ozone and fine particulate matter ($PM_{2.5}$), as well as to assist Delaware in achieving the emissions reductions needed to support the State's 8-hour ozone reasonable further progress plan (RFP). EPA approved the SIP revision on August 28, 2008 (73 FR 50723).

II. Summary of SIP Revision

On October 7, 2009, EPA received a SIP revision to amend to Regulation No. 1146. This SIP revision was the result of a settlement agreement between Conectiv Delmarva Generating, Inc. and DNREC in December 2008. Conectiv had filed an appeal challenging the regulation for their Edge Moor 5 facility. The emissions limit of 2,427 tons per year limited the facility from operating in extreme circumstances in the event that failure at other production units would require them to exceed that limit in order to supply the needed electricity. The limit of 4,600 tons per year was determined to be an adequate limit after an analysis of the facility's history of operation and the estimate of future operations using the low sulfur (0.5%) residual fuel to generate electricity at the 446 megawatt oil-fired steam generating unit. Currently, the facility operates at a 10% capacity factor. If so required, the new emissions limit would allow the facility to operate at a 45% capacity factor.

This amendment to Regulation No. 1146 is a reasonable compromise between Conectiv and DNREC, which prevented a potential overturning of the regulation. Analysis supports that the increase in the SO_2 emissions limit for the Edge Moor 5 facility will not lead to increased SO_2 emissions on an annual basis, but will enable the facility to operate at a higher capacity if in the unusual circumstance it should be needed. Given that an increase in SO_2 emissions is not expected from what they currently are at the facility, this revision will continue to help Delaware attain and maintain NAAQS for $PM_{2.5}$.

III. Proposed Action

EPA is proposing to approve the Delaware SIP revision for the amendment to Regulation No. 1146—Electric Generating Unit Multi-Pollutant Regulation submitted on October 7, 2009. This revision pertains to a modification of the SO_2 emissions limit for the Conectiv Edge Moor Unit 5 from 2,427 tons per year to 4,600 tons per year. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

IV. Statutory and Executive Order Reviews

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive

Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule, pertaining to Delaware's amendment to Regulation 1146, the Electric Generating Unit Multi-Pollutant Regulation, does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides.

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

Dated: December 17, 2009.

James W. Newsom,

Acting Regional Administrator, Region III.

[FR Doc. E9–31278 Filed 1–4–10; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 395

[Docket No. FMCSA–2004–19608]

RIN 2126–AB26

Hours of Service

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of public listening sessions.

SUMMARY: FMCSA announces that it will hold three public listening sessions to solicit comments and information on potential hours-of-service (HOS) regulations. Specifically, the Agency wants to know what factors, issues, and data it should be aware of as it prepares to issue a notice of proposed rulemaking (NPRM) on HOS requirements for property-carrying commercial motor vehicle (CMV) drivers. The sessions will be held in the Washington, DC area, Los Angeles, and Dallas. The listening sessions will allow interested persons to present comments, views, and relevant research on revisions FMCSA should consider in its forthcoming rulemaking. All comments will be transcribed and placed in the rulemaking docket for the FMCSA's consideration.

DATES: The first listening session will be January 19, 2010, in Arlington, VA (near Washington, DC). Subsequent listening sessions will be January 22, 2010, in Dallas Fort Worth Airport, TX; and January 25, 2010, in Los Angeles, CA. All listening sessions will begin at 9 a.m. local time and end at 5 p.m., or earlier, if all participants wishing to express their views have done so.

ADDRESSES: The January 19th meeting will be held at the Doubletree Hotel Crystal City National Airport (Commonwealth Ballroom), 300 Army Navy Drive, Arlington, VA 22202–2891 (1–703–416–4100).

The January 22th meeting will be held in Dallas at the Hyatt Regency DFW, International Parkway, P.O. Box 619014, DFW Airport, Texas, USA 75261 (1–972–453–1234).

The January 25th meeting will be held in Los Angeles at the Doubletree LAX (Pacific Ballroom), 1985 East Grand Ave., El Segundo, California, USA 90245–5015 (1–310–322–0999).

You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA–2004–19608 using any of the following methods.

• *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

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

• *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

• *Fax:* 1–202–493–2251.

Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The on-line Federal document management system is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the Federal Docket Management System published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

FOR FURTHER INFORMATION CONTACT: For special accommodations for any of these HOS listening sessions, such as sign language interpretation, contact Mr. David Miller, Regulatory Development Division, (202) 366–5370 or at *FMCSAregs@dot.gov,* by Monday, January 11, 2010, to allow us to arrange for such services. There is no guarantee that interpreter services requested on short notice can be provided.

For information concerning the hours-of-service rules, contact Mr. Tom Yager, Chief, Driver and Carrier Operations Division, (202) 366–4325, *mcpsd@dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On October 26, 2009, Public Citizen, *et al.* (Petitioners) and FMCSA entered into a settlement agreement under which Petitioners' petition for judicial review of the November 19, 2008 Final Rule on drivers' hours of service will be held in abeyance pending the publication of an NPRM. The settlement agreement states that FMCSA will submit the draft NPRM to the Office of Management and Budget (OMB) within nine months, and publish a Final Rule within 21 months, of the date of the

settlement agreement. The current rule will remain in effect during the rulemaking proceedings.

As described above, FMCSA is holding three public listening sessions across the country to solicit comments and information on potential revisions to the HOS rule. The Agency will provide further opportunity for public comment when the NPRM is published.

II. Meeting Participation

The listening sessions are open to the public. Speakers' remarks will be limited to 10 minutes each. The public may submit material to the FMCSA staff at each session for inclusion in the public docket, FMCSA–2004–19608.

III. Questions for Discussion During the Listening Sessions

In preparing their comments, meeting participants should consider the following questions about possible alternatives to the current HOS requirements. These scenarios are merely set forth for discussion; FMCSA will not necessarily include them in an NPRM but would request similar information and data in an NPRM. Answers to these questions should be based upon the experience of the participants and any data or information they can share with FMCSA.

A. Rest and On-Duty Time

1. Would mandatory short rest periods during the work day improve driver alertness in the operation of a CMV? How long should these rest periods be? At what point in the duty cycle or drive-time would short rest periods provide the greatest benefit? What are the unintended consequences if these short rest periods are mandatory? Should the on-duty period be extended to allow for mandatory rest periods?

2. If rest or other breaks from driving improve alertness, could a driver who chooses to take specified minimum breaks be given scheduling flexibility—the ability to borrow an hour from another driving day once a week, for example—if that flexibility would not increase safety risks or adversely impact driver health?

3. How many hours per day and per week would be safe and healthy for a truck driver to work?

4. Would an hours-of-service rule that allows drivers to drive an hour less when driving overnight improve driver alertness and improve safety? Are there any adverse consequences that could arise from the implementation of a separate night time hours of service regulation?

B. Restart to the 60- and 70-Hour Rule

1. Is a 34-consecutive-hour off-duty period long enough to provide restorative sleep regardless of the number of hours worked prior to the restart? Is the answer different for a driver working a night or irregular schedule?

2. What would be the impact of mandating two overnight off-duty periods, e.g., from midnight to 6 a.m., as a component of a restart period? Would such a rule present additional enforcement challenges?

3. How is the current restart provision being used by drivers? Do drivers restart their calculations after 34 consecutive hours or do drivers take longer periods of time for the restart?

C. Sleeper Berth Use

1. If sleeper-berth time were split into two periods, what is the minimum time in each period necessary to provide restorative sleep?

2. Could the 14-hour on-duty limitation be extended by the amount of some additional sleeper-berth time without detrimental effect on highway safety? What would be the appropriate length of such a limited sleeper-berth rest period?

D. Loading and Unloading Time

1. What effect has the fixed 14-hour driving ''window'' had on the time drivers spend waiting to load or unload? Have shippers and receivers changed their practices to reduce the amount of time drivers spend waiting to load or unload?

E. General

1. Are there aspects of the current rule that do not increase safety risks or adversely impact driver health and that should be preserved?

Issued on: December 29, 2009.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E9–31194 Filed 1–4–10; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS-R9-ES-2009-0084]

[90100-1660-1FLA B6]

[RIN 1018-AW39]

Endangered and Threatened Wildlife and Plants; Listing Six Foreign Birds as Endangered Throughout Their Range

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, propose to list the following six foreign species found on islands in French Polynesia and in Europe, Southeast Asia, and Africa: Cantabrian capercaillie (*Tetrao urogallus cantabricus*); Marquesan Imperial Pigeon (*Ducula galeata*); the Eiao Polynesian warbler (*Acrocephalus percernis aquilonis*), previously referred to as (*Acrocephalus mendanae aquilonis*); greater adjutant (*Leptoptilos dubius*); Jerdon's courser (*Rhinoptilus bitorquatus*); and slender-billed curlew (*Numenius tenuirostris*) as endangered, pursuant to the Endangered Species Act of 1973, as amended. This proposal, if made final, would extend the Act's protection to these species. We seek data and comments from the public on this proposed rule.

DATES: To ensure that we are able to consider your comment on this proposed rulemaking action, we will accept comments received or postmarked on or before March 8, 2010. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by February 19, 2010.

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

* *Electronically:* Go to the *Federal eRulemaking Portal*: *http://www.regulations.gov*. In the Keyword box, enter Docket No. **FWS-R9-ES-2009-0084,** which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen under the **Document Type** heading, click on the **Proposed Rules** link to locate this document. You may submit a comment by clicking on ''**Send a Comment or Submission**.''

* *By hard copy*: Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: **FWS-R9-ES-2009-0084**; 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 Comment Procedures** section below under **SUPPLEMENTARY INFORMATION** 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 703-358-2171; facsimile 703-358-1735. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We intend 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 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.

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species must be made ''solely on the basis of the best scientific and commercial data available.''

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by e-mail or fax or to an address not listed in **ADDRESSES**. If you submit a comment via *http://www.regulations.gov*, your entire comment—including any personal identifying information—will be posted on the Web site. Please note that comments submitted to this Web site are not immediately viewable. When you submit a comment, the system receives it immediately. However, the comment will not be publicly viewable until we post it, which might not occur until several days after submission.

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. To ensure that the electronic docket for this rulemaking is complete and all comments we receive are publicly available, 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 in two ways:

(1) You can view them on *http://www.regulations.gov*. In the Search Documents box, enter FWS-R9-ES-2009-0084, which is the docket number for this action. Then in the Search panel on the left side of the screen, select the type of documents you want to view under the Document Type heading.

(2) You can make an appointment, during normal business hours, to view the comments and materials in person at 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 Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), requires us to make a finding (known as a ''90–day finding'') on whether a petition to add a species to, remove a species from, or reclassify a species on the Federal Lists of Endangered and Threatened Wildlife and Plants has presented substantial information indicating that the requested action may be warranted. To the maximum extent practicable, we must make the finding within 90 days following receipt of the petition and must publish it 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 we have not already initiated one 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 (''12–month finding'') on whether the requested action is warranted, not warranted, or warranted but precluded by higher priority actions. Section 4(b)(3)(C) of the Act requires that when we make a warranted but precluded finding on a petition, we are to treat such a petition as one that is resubmitted on the date of such finding. Thus, we are required to publish new 12–month findings on these ''resubmitted'' petitions on an annual basis. We publish an annual notice of resubmitted petition findings (annual notice) for all foreign species for which we previously found listings to be warranted but precluded.

In this proposed rule, we propose to list six foreign bird species as endangered, under the Act. These species are: Cantabrian capercaillie (*Tetrao urogallus cantabricus*); Marquesan Imperial Pigeon (*Ducula galeata*); Eiao Polynesian warbler (*Acrocephalus percernis aquilonis*), previously referred to as (*Acrocephalus mendanae aquilonis*); greater adjutant (*Leptoptilos dubius*); Jerdon's courser (*Rhinoptilus bitorquatus*); and slender-billed curlew (*Numenius tenuirostris*). These species range widely from islands in French Polynesia to Europe, Southeast Asia, and Africa, and all are considered terrestrial species, with one exception, the slender-billed curlew. The slender-billed curlew is a water bird that undertakes a long annual migration.

Previous Federal Actions

On November 28, 1980, we received a petition (1980 petition) from Dr. Warren B. King, Chairman, U.S. Section of the International Council for Bird Preservation (ICBP), to add 70 native and foreign bird species to the list of Threatened and Endangered Wildlife (50 CFR 17.11), including three species (Cantabrian capercaillie, Marquesan Imperial Pigeon, and Eiao Polynesian warbler) that are the subject of this proposed rule. Two of the foreign species identified in the petition were already listed under the Act. In response to the 1980 petition, we published a substantial 90–day finding on May 12, 1981 (46 FR 26464), for 58 foreign species and initiated a status review. 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 pending petition findings. In this notice, we found that listing all 58 foreign bird species in the 1980 petition was 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 in the 1980 petition warranted but precluded by higher priority listing actions. We published additional annual notices on the 58 foreign bird species on January 9, 1986 (51 FR 996); July 7, 1988 (53 FR 25511); December 29, 1988 (53 FR 52746); April 25, 1990 (55 FR 17475); November 21, 1991 (56 FR 58664); and May 21, 2004 (69 FR 29354). These notices indicated that listing of the Cantabrian capercaillie, Marquesan imperial pigeon, and Eiao Polynesian warbler, 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 list 53 additional foreign birds under the Act, including the three remaining bird species (greater adjutant, Jerdon's courser, and slender-billed curlew) that are the subject of this proposed rule. On December 16, 1991, we published a positive 90–day finding and announced the initiation of a status review of the 53 foreign birds listed in the 1991 petition (56 FR 65207). On March 28, 1994 (59 FR 14496), we published a proposed rule to list 30 African bird species from both the 1980 and 1991 petitions. In the same **Federal Register** document, we included a notice of findings in which we announced our determination that listing the 38 remaining species from the 1991 petition was warranted but precluded; this group included greater adjutant, Jerdon's courser, and slender-billed curlew. On July 29, 2008 (73 FR 44062), we published an annual notice of findings on resubmitted petitions for foreign species and annual description of progress on listing actions within which we ranked species for listing by assigning each a Listing Priority Number per our listing priority guidelines, published on September 21, 1983 (48 FR 43098). Based on this ranking and priorities, we determined that listing the six previously petitioned species that are the subject of this proposed rule—Cantabrian capercaillie, Marquesan imperial pigeon, Eiao Polynesian warbler, greater adjutant, Jerdon's courser, and slender-billed curlew—was warranted.

On September 8, 2008, we received a 60–day notice of intent to sue from the Center for Biological Diversity (CBD) over violations of section 4 of the Act for failure to promptly publish listing proposals for the 30 warranted species identified in our 2008 Annual Notice of Review. Under a settlement agreement approved by the U.S. District Court for the Northern District of California on June 15, 2009 (*CDB* v. *Salazar*, 09-cv-02578-CRB), we must submit to the **Federal Register** proposed listing rules for the Cantabrian capercaillie, Marquesan imperial pigeon, Eiao Polynesian warbler, greater adjutant, Jerdon's courser, and slender-billed curlew by December 29, 2009.

These six species were selected from the list of warranted-but-precluded species because of the significance and similarity of the threats to the species. We assigned all six of these species a listing priority ranking number of 2 or 3. Combining species that face similar threats into one proposed rule allows us to maximize our limited staff resources and thus increases 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. Under section 4(a)(1) of the Act, we may list a species based on any of the following five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination.

Despite the fact that global climate changes are occurring and affecting habitat, the climate change models that are currently available do not yet enable us to make meaningful predictions of climate change for specific, local areas (Parmesan and Matthews 2005, p. 354). In addition, we do not have models to predict how the climate in the range of these Eurasian and Asian bird species will change, and we do not know how any change that may occur would affect these species. Nor do we have information on past and future weather patterns within the specific range of these species. Therefore, based on the current lack of information, we did not evaluate climate change as a threat to these species. We are, however, seeking additional information on this subject (see **Public Comment Procedures** section) that can be used in preparing the final rule.

Below is a species-by-species description and analysis of the five factors. The species are considered in alphabetical order, beginning with the Cantabrian capercaillie, followed by the Eiao Polynesian warbler, greater adjutant, Jerdon's courser, Marquesan Imperial Pigeon, and the slender-billed curlew.

I. Cantabrian capercaillie (*Tetrao urogallus cantabricus*)

Species Description

The Cantabrian capercaillie (*Tetrao urogallus cantabricus*) is a subspecies of the western capercaillie (*T. urogallus*) in the family Tetraonidae. The species in general is a large grouse, of 80 to 115 centimeters (cm) in length (31 to 45 inches (in)), and the female is much smaller than the male. The species is characterized by having dark gray plumage with fine blackish vermiculation (wavelike pattern) around the head and neck. The breast is glossy greenish-black. This bird has a long, rounded tail, an ivory white bill, and a scarlet crest (World Association of Zoos and Aquaria 2009, unpaginated).

The Cantabrian capercaillie once existed along the whole of the Cantabrian mountain range from northern Portugal through Galicia, Astruias, and Leon, to Santander in northern Spain (IUCN Redbook 1979, p. 1). Currently its range is restricted to the Cantabrian mountains in northwest Spain. The subspecies inhabits an area of 1,700 square kilometers (km2) (656 square miles (mi2)), and its range is separated from its nearest neighboring subspecies of capercaillie (*T. u. aquitanus*) in the Pyrenees mountains by a distance of more than 300 km (186 mi) (Quevedo *et al.* 2006b, p. 268).

The Cantabrian capercaillie occurs in mature beech (*Fagus sylvatica*) forest and mixed forests of beech and oaks (*Quercus robur, Q. petraea*, and *Q. pyrenaica*) at elevations ranging from 800 to 1,800 m (2,600 to 5,900 ft). The Cantabrian capercaillie also uses other microhabitat types (broom (*Genista* spp.), meadow, and heath (*Erica* spp.)) selectively throughout the year (Quevedo *et al.* 2006b, p. 271).

The species feeds on beech buds, catkins of birch (*Betrula alba*), and holly leaves (*Ilex aquifolium*). It also feeds on bilberry (*Vaccinium myrtillus*), a commonly eaten component of its diet (Rodriguez and Obeso 2000 as reported in Pollo *et al.* 2005, p. 398).

Storch *et al.* estimates the population to be 627 birds, of which approximately 500 are adults, according to the most recent population data collected from 2000 through 2003 (2006, p. 654). Population estimates for species of grouse are commonly assessed by counting males that gather during the

breeding season to sing and display at leks (traditional places where males assemble during the mating season and engage in competitive displays that attract females). Pollo *et al.* (2005, p. 397) estimated a 60-to-70 percent decline in the number of male leks since 1981. This is equivalent to an average decline of 3 percent per year, or 22 percent over 8 years. There is also evidence of a 30-percent decline in lek occupancy in the northern watershed of the species' range between 2000 and 2005 (Banuelos and Quevedo, unpublished data, as reported in Storch *et al.* 2006, p. 654).

Based on data collected between 2000 and 2003 by Pollo *et al.* (2005, p. 401), the distribution of Cantabrian capercaillie on the southern slope of the Cantabrian Mountains is fragmented into 13 small subpopulations: four in the western area and 9 in the eastern. Six subpopulations (5 in the eastern and 1 in the western) contained only one singing male, which indicates a very small subpopulation, since presence of singing males is a direct correlate to population numbers.

The area occupied by Cantabrian capercaillie in 1981–1982 covered up to approximately 2,070 km2 (799 mi2) of the southern slope 972 km2 (375 mi2) in the west and 1,098 km2 (424 mi2) in the east). Between 2000 and 2003, the area of occupancy had declined to 693 km2 (268 mi2), specifically 413 km2 (159 mi2) in the west and 280 km2 (108 mi2) in the east. Thus, over a 22–year period, there was a 66-percent reduction in the areas occupied by this subspecies on the southern slope of the Cantabrian Mountains (Pollo *et al.* 2005, p. 401). Based on this data, the subpopulation in the eastern portion of the range appears to be declining at a faster rate than the subpopulation in the western portion of the range.

Conservation Status

Although Storch, *et al.* 2006 (p. 653) noted that the Cantabrian capercaillie meets the criteria to be listed as ''Endangered'' on the IUCN Redlist due to ''rapid population declines, small population size, and severely fragmented range,'' it is currently not classified as such by the IUCN. The species is classified as ''vulnerable'' in Spain under the National Catalog of Endangered Species. The species has not been formally considered for listing in the CITES Appendices (*http://www.cites.org*).

Summary of Factors Affecting the Cantabrian Capercaillie

A. Present or threatened destruction, modification, or curtailment of habitat or range

Numerous limiting factors influence the population dynamics of the capercaillie throughout its range, including habitat degradation, loss, and fragmentation (Storch 2000, p. 83; 2007, p. 96). Forest structure plays an important role in determining habitat suitability and occupancy. Quevedo *et al.* (2006b, p. 274) found that open forest structure with well-distributed bilberry shrubs were the preferred habitat type of Cantabrian capercaillie. Management of forest resources for timber production has caused and continues to cause significant changes in forest structure such as: species composition, density and height of tress, forest patch size, and understory vegetation (Pollo *et al.* 2005, p. 406).

The historic range occupied by this subspecies (3,500 km2 (1,350 mi2)) has declined by more than 50 percent (Quevedo *et al.* 2006b, p. 268). The current range is severely fragmented, with low forest habitat cover (22 percent of the landscape) and most of the suitable habitat remaining in small patches less than 10 hectares (ha) (25 acres (ac)) in size (Garcia *et al.* 2005, p. 34). Patches of good-quality habitat are scarce and discontinuous, particularly in the central parts of the range (Quevedo *et al.* 2006b, p. 269), and leks in the smaller forest patches have been abandoned during the last few decades. The leks that remain occupied are now located farther from forest edges than those occupied in the 1980s (Quevedo *et al.* 2006b, p. 271).

Based on population surveys, forest fragments containing occupied leks in 2000 were significantly larger than fragments containing leks in the 1980s that have since been abandoned (Quevedo *et al.* 2006b, p. 271). The forest fragments from which the Cantabrian capercaillie has disappeared since the 1980s are small in size, and are the most isolated from other forest patches. In addition, the Cantabrian capercaillie have disappeared from forest patches located closest to the edge of the range in both the eastern and western subpopulations of the south slope of the Cantabrian Mountains, suggesting that forest fragmentation is playing an important role in the population dynamics of this subspecies (Quevedo *et al.* 2006b, p. 271). Research conducted on other subspecies of capercaillie indicate that the size of forest patches is correlated to the number of males that gather in leks to display, and that below a certain forest patch size, leks are abandoned (Quevedo *et al.* 2006b, p. 273).

In highly fragmented landscapes, forest patches are embedded in a matrix of other habitats, and forest dwellers like capercaillies frequently encounter open areas within their home range. Quevedo *et al.* (2006a, p. 197) developed a habitat suitability model for the Cantarian capercaillie that assessed the relationship between forest patch size and occupancy. He determined that the subspecies still remains in habitat units that show habitat suitability indices below the cut-off values of the two best predictive models (decline and general), which may indicate a high risk of local extinction. Other researchers suggested that, should further habitat or connectivity loss occur, the Cantabrian capercaillie population may become so disaggregated that the few isolated subpopulations will be too small to ensure their own long-term persistence (Grimm and Storch 2000, p. 224).

A demographic model based on Bavarian alpine populations of capercaillie suggest a minimum viable population size of the order of 500 birds (Grimm and Storch 2000, p. 222). However, genetic data show clear signs of reduced variability in populations with numbers of individuals in the range of fewer than 1,000 birds, which indicates that a demographic minimum population of 500 birds may be too small to maintain high genetic variability (Segelbacher *et al.* 2003, p. 1779). Genetic consequences of habitat fragmentation exist for this species in the form of increased genetic differentiation due to increased isolation of populations (Segelbacher *et al.* 2003, p. 1779). Therefore, anthropogenic habitat deterioration and fragmentation not only leads to range contractions and extinctions, but may also have significant genetic, and thus, evolutionary consequences for the surviving populations (Segelbacher *et al.* 2003, p. 1779).

Summary of Factor A

Recent population surveys show this subspecies is continuing to decline throughout its current range, and subpopulations may be isolated from one another due to range contractions in the eastern and western portions of its range, leaving the central portion of the subspecies range abandoned (Pollo *et al.* 2005, p. 401). Some remaining populations may already have a high risk of local extinction (Quevedo *et al.* 2006a, p. 197). Management of forest resources for timber production continues to negatively affect forest structure, thereby affecting the quality,

quantity, and distribution of suitable habitat available for this subspecies. In addition, the structure of the matrix of habitats located between forest patches is likely affecting the ability of capercaillies to disperse between subpopulations. Therefore, we find that present or threatened destruction, modification, or curtailment of the habitat or range is a threat to the continued existence of the Cantabrian capercaillie throughout its range.

B. Overutilization for commercial, recreational, scientific, or educational purposes

Currently hunting of the Cantabrian capercaillie is illegal in Spain; however, illegal hunting still occurs (Storch 2000, p. 83; 2007, p. 96). Because this species congregates in leks, individuals are particularly easy targets, and poaching of protected grouse is considered common (Storch 2000, p. 15). It is unknown what the incidence of poaching is or what impact it is having on this subspecies; however, given the limited number of birds remaining and the reduced genetic variability already evident at current population levels, the further loss of breeding adults could have substantial impact on the subspecies. Therefore, we find that overutilization for recreational purposes is a threat to the continued existence of the Cantabrian capercaillie throughout its range.

C. Disease or predation

Diseases and parasites have been proposed as factors associated with the decline of populations of other species within the same family of birds as the capercaillie (Tetraonidae) (Obeso *et al.* 2000, p. 191). In an attempt to determine if parasites were contributing to the decline of the Cantabrian capercaillie, researchers collected and analyzed fecal samples in 1998 from various localities across the range of this subspecies. The prevalence of common parasites (*Eimeria* sp. and *Capillaria* sp.) was present in 58 percent and 25 percent of the samples collected, respectively. However, both the intensity and average intensity of these parasites were very low compared to other populations of species of birds in the Tetraonidae family. Other parasites were found infrequently. The researchers concluded that it was unlikely that intestinal parasites were causing the decline of the Cantebrian capercaillie.

Based on the information above, we do not believe that parasite infestations are a significant factor in the decline of this subspecies. We are not aware of any species-specific information currently available that indicates that predation poses a threat to the species. Therefore, we are not considering disease or predation to be contributing threats to the continued existence of the Cantabrian capercaillie throughout its range.

D. Inadequacy of existing regulatory mechanisms

Although it meets the qualifications, the Cantabrian capercaillie is currently not classified as endangered by the IUCN. Nor is the species listed under any Appendix of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

This subspecies is currently classified as ''vulnerable'' in Spain under the National Catalog of Endangered Species, which affords it special protection (e.g., additional regulation of activities in the forests of its range, regulation of trails and roads in the area, elimination of poaching, and protection of areas important to young). Although it is classified as vulnerable, as mentioned above (see Factor B), illegal hunting still occurs.

The European Union (EU) Habitat Directive 92/43/EEC addresses the protection of habitat and species listed as endangered at the European scale (European Union 2008). Several habitat types valuable to capercaillie have been included in this Directive, such as in Appendix I, Section 9, Forests. The EU Bird Directive (79/407/EEC) lists the capercaillie in Annex I as a ''species that shall be subject to special habitat conservation measures in order to ensure their survival.'' Under this Directive, a network of Special Protected Areas (SPAs) comprising suitable habitat for Annex I species is to be designated. This network of SPAs and other protected sites are collectively referred to as Natura 2000. Several countries in Europe, including Spain, are in the process of establishing the network of SPAs. The remaining Cantabrian capercaillie populations occur primarily in recently established Natural Reserves in Spain that are part of the Natura 2000 network (Muniellos Biosphere Reserve). Management of natural resources by local communities is still allowed in areas designated as an SPA; however, the development of management plans to meet the various objectives of the Reserve network is required.

This subspecies is also afforded special protection under the Bern Convention (Convention on the Conservation of European Wildlife and Natural Habitats; European Treaty Series/104; Council of Europe 1979). The Cantabrian capercaillie is listed as ''strictly protected'' under Appendix II, which requires member states to ensure the conservation of the listed taxa and their habitats. Under this Convention, protections of Appendix-II species include the prohibition of: The deliberate capture, keeping and killing of the species; deliberate damage or destruction of breeding sites; deliberate disturbance during the breeding season; deliberate taking or destruction of eggs; and the possession or trade of any individual of the species. We were unable to find information on the effectiveness of this designation in preventing further loss of Cantabrian capercaillie or its habitat.

In November 2003, Spain enacted the ''Forest Law,'' which addresses the preservation and improvement of the forest and rangelands in Spain. This law requires development of plans for the management of forest resources, which are to include plans for fighting forest fires, establishment of danger zones based on fire risk, formulation of a defense plan in each established danger zone, the mandatory restoration of burned area, and the prohibition of changing forest use of a burned area into other uses for a period of 30 years. In addition, this law provides economic incentives for sustainable forest management by private landowners and local entities. We do not have information on the effectiveness of this law with regard to its ability to prevent negative impacts to Cantabrian capercaillie habitat.

Summary of Factor D

Despite recent advances in protection of this subspecies and its habitat through EU Directives and protection under Spanish law and regulation, illegal poaching still occurs (Storch 2000, p. 83; 2007, p. 96). Further, we were unable to find information on the effectiveness of many of these measures at reducing threats to the species. Therefore, we find that existing regulatory mechanisms are inadequate to ameliorate the current threats to the Cantabrian capercaillie throughout its range.

E. Other natural or manmade factors affecting the species' continued existence

Suarez-Seoane and Roves (2004, pp. 395, 401) assessed the potential impacts of human disturbances in core populations of Cantabrian capercaillie in Natural Reserves in Spain. They found that locations selected as leks were located at the core of larger patches of forest and were less subject to human disturbance. They also found

that Cantabrian capercaillie disappeared from leks situated in rolling hills at lower altitudes closer to houses, hunting sites, and repeatedly burned areas.

Recurring fires have also been implicated as a factor in the decline of the subspecies. An average of 85,652 ha (211,650 ac) of forested area per year over a 10–year period (1995–2005) has been consumed by fire in Spain (Lloyd 2007a, p. 1). On average, 80 percent of all fires in Spain are set intentionally by humans (Lloyd 2007a, p. 1). Suarez-Seoane and Garcia-Roves (2004, p. 405) found that the stability of Cantabrian capercaillie breeding areas throughout a 20–year period was mainly related to low fire recurrence in the surrounding area and few houses nearby. In addition, the species avoids areas that are recurrently burned because the areas lose their ability to regenerate and cannot produce the habitat the species requires (Suarez-Seoane and Garcia-Roves 2004, p. 406). We were unable to find information as to how many hectares of suitable Cantabrian capercaillie habitat is consumed by fire each year. However, since the species requires a low recurrence of fire, and both disturbance and fire frequency are likely to increase with human presence, this could be a potential threat to both habitat and individual birds where there is a high prevalence of disturbance and fire frequency.

In summary, disturbance from humans appears to impact the species; birds are typically found in areas of less anthropogenic disturbance and further from homes. Natural Protected Areas in Spain have seen an increase in human use for recreation and hunting. As human population centers expand and move closer to occupied habitat areas, increased disturbance to important breeding, feeding, and sheltering behaviors of this species is expected to occur. Additionally, as human presence increases, it is likely that both fires and disturbances will increase. Either or both of these factors have the potential to impact both individuals and their habitat. Therefore, we conclude that other natural or manmade factors affecting the continued existence of the species, in the form of forest fires and disturbance, are threats to the continued existence of the Cantabrian capercaillie throughout its range.

Status Determination for the Cantabrian Capercaillie

We have carefully assessed the best available scientific and commercial information regarding the past, present, and potential future threats faced by the Cantabrian capercaillie. The species is currently at risk throughout all of its range due to ongoing threats of habitat destruction and modification (Factor A), inadequacy of existing regulatory mechanisms (Factor D), and other natural or manmade factors affecting its continued existence in the form of forest fires and disturbance (Factor E).

Section 3 of the Act defines an ''endangered species'' as ''any species which is in danger of extinction throughout all or a significant portion of its range'' and a ''threatened species'' as ''any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' Based on the magnitude of the ongoing threats to the Cantabrian capercaillie throughout its entire range, as described above, we determine that this subspecies is in danger of extinction throughout all of its range. Therefore, on the basis of the best available scientific and commercial information, we propose to list the Cantabrian capercaillie as an endangered species throughout all of its range. Because we find that the Cantabrian capercaillie is endangered throughout all of its range, there is no reason to consider its status in a significant portion of its range.

II. Eiao Polynesian warbler (*Acrocephalus percernis aquilonis*), previously referred to as *Acrocephalus mendanae aquilonis* and Acrocephalus caffer aquilonis

Species Description

Due to the similarity of the reed-warblers of Polynesia, all of these warblers were once considered a single, widespread species known as the long-billed reed-warbler (*Acrocephalus caffer*). The 1980 petition from Dr. Warren B. King included the Eiao Polynesian warbler (*Acrocephalus caffer aquilonis*), a subspecies of reed-warbler. The subspecies *aquilonis* denoted those warblers found on Eiao Island. The species was later split into three separate species: those of the Society Islands (*Acrocephalus caffer*), Tuamotu (*A. atyphus*), and Marquesas (*A. mendanae*) (Cibois *et al.* 2007, p. 1151). This subspecies then became known as *A. mendanae aquilonis*. Recent genetic research on Marquesan reed-warblers found two independent lineages: warblers found in the northern islands of the Marquesas Archipelago (Nuku Hiva, Eiao, Hatuta'a, and Ua Huka) and those found on the southern islands (Hiva Oa, Tahuata, Ua Pou, and Fatu Iva). As a result, the Marquesas species was split into two separate species; those of the four most northern islands (*A. percernis*) and those in the southern islands (*A. mendanae*). The reed-warblers found on Eiao are now classified as a subspecies of Northern Marquesan reed-warblers (*A. percernis aquilonis*) (Cibois *et al.* 2007, pp. 1155, 1160).

The Eiao Polynesian warbler (Eiao warbler) is a large, insectivorous reed-warbler of the family Acrocephalidae. It is characterized by brown plumage with bright yellow underparts (Cibois *et al.* 2007, p. 1151). The Eiao warbler is endemic to the island of Eiao in the French Polynesian Marquesas Archipelago in the Pacific Ocean. The Marquesas Archipelago is a territory of France located approximately 1,600 km (994 mi) northeast of Tahiti. Eiao Island is one of the northernmost islands in the Archipelago and encompasses 40 km2 (15 mi).

Population densities of the Eiao warbler are thought to be high within the remaining suitable habitat; one singing bird was found nearly every 40–50 m (131–164 ft). The total population is estimated at more than 2,000 birds (Raust 2007, pers. comm.). This population estimate is much larger than the 100–200 individuals last reported in 1987 by Thibault (as reported in USFWS 2007). It is unknown if the population actually increased from 1987 to 2007, or if the differences in the population estimates are a result of using different survey methodologies. We have no reliable information on the population trend of this subspecies.

Reed-warblers of the Polynesian islands utilize various habitats, ranging from shrubby vegetation in dry, lowland areas to humid forest in wet montane areas (Cibois *et al.* 2007, pp. 1151, 1153). Reed-warblers in general display strong territorial behavior (Cibois *et al.* 2007, p. 1152). The Eiao warbler is a subspecies of Northern Marquesan reed-warblers, which at one time were all considered one species, the Marquesan reed-warbler. Like other reed-warblers, the female reed-warbler builds the nest with little or no help from the male. Vines, coconut fiber, and grasses are the most common nesting material (Mosher and Fancy 2002, p. 8). Warbler nests are found in the tops of trees and on vertical branches (Thibault *et al.* 2002, pp. 166, 169). Eggs of Pacific island reed-warblers range from blue to olive, containing black or brown spots, and the clutch size for Marquesan reed-warblers is up to five eggs (Mosher and Fancy 2002, p. 9).

Conservation Status

Marquesan reed-warblers (*A. mendanae*) are classified as ''of least concern'' by the IUCN (IUCN 2009a, unpaginated). However, it appears that the recent split of the Marquesan reed-

warblers into the Northern and Southern Marquesan reed-warblers is not yet reflected in the IUCN assessment. Northern Marquesan reed-warblers (*A. percernis*) are protected under Law Number 95-257 in French Polynesia. The species has not been formally considered for listing in the CITES Appendices (*http://www.cites.org*).

Summary of Factors Affecting the Species

A. Present or threatened destruction, modification, or curtailment of habitat or range

Eiao Island was declared a Nature Reserve in 1971 and is not currently inhabited by humans. However, the entire island has been heavily impacted by introduced domestic livestock that have become feral (Manu 2009, unpaginated). Feral sheep have been identified as the main threat to the forest on the island (Thibault *et al.* 2002, p. 167). Sheep and pigs have devastated much of the vegetation and soil on Eiao, and native plant species have been largely replaced by introduced species (Merlin and Juvik 1992, pp. 604–606). Sheep have overgrazed the island, leaving areas completely denuded of vegetation. The exposed soil erodes from rainfall, further preventing native plants from regenerating (WWF 2001, unpaginated). Currently, only 10–20 percent of the island contains suitable habitat for the Eiao warbler (Raust 2007, pers. comm.). These areas of suitable habitat are likely restricted to small refugia inaccessible to the feral livestock. We are not aware of any current efforts or future plans to reduce the number of feral domestic livestock on the island.

In summary, the ongoing habitat degradation from overgrazing livestock continues to have significant and ongoing impacts to the natural habitat for this subspecies. The current level of grazing on the island prevents recovery of native vegetation. Without active management of the feral livestock population on the island, the population of Eiao warblers will continue to be restricted to small portions of the island which are inaccessible to the feral livestock. Furthermore, although the current estimated population is 2,000 individuals, the subspecies will not be able to expand to the rest of the island and recover beyond this current population level due to habitat loss. Because the Eiao warbler is limited to one small island, the continuing loss of habitat makes this subspecies extremely vulnerable to extinction. Therefore, we find that present or threatened destruction, modification, or curtailment of the habitat or range are threats to the continued existence of the Eiao warbler throughout its range.

B. Overutilization for commercial, recreational, scientific, or educational purposes

We are unaware of any information currently available that indicates the use of this subspecies for any commercial, recreational, scientific, or educational purpose. As a result, we are not considering overutilization for commercial, recreational, scientific, or educational purposes to be a contributing factor to the continued existence of the Eiao warbler throughout its range.

C. Disease or predation

Avian diseases are a concern for species with restricted ranges and small populations, especially if the species is restricted to an island. Hawaii's avian malaria is a limiting factor for many species of native passerines and is dominant on other remote oceanic islands, including French Polynesia (Beadell *et al.* 2006, p. 2935). This strain was found in 9 out of 11 Marquesan reed-warblers collected on Nuku Hiva in 1987. However, because these birds were thought to be more robust (all Marquesan reed-warblers were considered *A. mendanae*), avian malaria was not thought to pose a threat to the species (Beadell *et al.* 2006, p. 2940). We have no data on whether Hawaii's avian malaria is present on Eiao or what effects it may have on the population of reed-warblers.

Black rats (*Rattus rattus*) were introduced to Eiao, Nuku Hiva, Ua Pou, Hiva Oa, Tahuata, and Fatu Iva of the Marquesas Archipelago in the early 20th century (Cibois *et al.* 2007, p. 1159); although Thibault *et al.* (2002, p. 169) state that the presence of black rats on Eiao is only suspected. A connection between the presence of rats and the decline and extirpation of birds has been well documented (Blanvillain *et al.* 2002, p. 146; Thibault *et al.* 2002, p 162; Meyer and Butaud 2009, pp. 1169–1170). Specifically, predation on eggs, nestlings, or adults by rats has been implicated as an important factor in the extinction of Pacific island birds (Thibault *et al.* 2002, p. 162). However, Thibault *et al.* (2002, pp. 165, 169) did not find a significant effect of rats on the abundance of Polynesian warblers. It is thought that the position of warbler nests on vertical branches close to the tops of trees makes them less accessible to rats (Thibault *et al.* 2002, p. 169), even though rats are known to be good climbers.

The common myna (*Acridotheres tristis*), an introduced bird species, may contribute to the spread of invasive plant species by consuming their fruit and may also prey on the eggs and nestlings of native birds species or out-compete native bird species for nesting sites. The myna is thought to have contributed to the decline of another reed-warbler endemic to the Marquesas (*A. caffer mendanae*) (Global Invasive Species Database 2009, unpaginated). Mynas do not currently occur on Eiao Island. Furthermore, Thibault *et al.* (2002, p. 165) found no significant effect of mynas on Polynesian warblers in Marquesas. If the myna expands its range and colonizes Eiao Island, it is unknown to what extent predation would affect the Eiao warbler.

In summary, although the presence of avian malaria has been documented on Eiao and the presence of introduced rats is suspected, there is no data indicating that either is affecting the warbler population on Eiao. Nest location appears to be high enough in the trees to avoid significant predation from the introduced rat. Mynas are not known to inhabit Eiao Island, and it is not clear that they would negatively impact the warbler population if they were to colonize Eiao. Therefore, we find that disease and predation are not a threat to the continued existence of the Eiao warbler throughout its range.

D. Inadequacy of existing regulatory mechanisms

The Eiao warbler is a protected species in French Polynesia. Northern Marquesan reed-warblers (*A. percernis*) are classified as a Category A species under Law Number 95-257. Article 16 of this law prohibits the collection and exportation of species listed under Category A. In addition, under part 23 of Law 95-257, the introduced myna bird species, which is commonly known to outcompete other bird species, is considered a danger to the local avifauna and is listed as ''threatening biodiversity.'' Part 23 also prohibits importation of all new specimens of species listed as ''threatening biodiversity,'' and translocation from one island to another is prohibited.

The French Environmental Code, Article L411-1, prohibits the destruction or poaching of eggs or nests; mutilation, destruction, capture or poaching, intentional disturbance, the practice of taxidermy, transport, peddling, use, possession, offer for sale, and the sale or the purchase of nondomestic species in need of conservation. It also prohibits the destruction, alteration, or degradation of habitat for these species.

Hunting and destruction of all species of birds in French Polynesia were prohibited by a 1967 decree (Villard *et al.* 2003, p. 193); however, destruction of birds which have been listed as ''threatening biodiversity'' is legal. Furthermore, restrictions on possession of firearms in Marquesas are in place (Thorsen *et al.* 2002, p. 10). Hunting is not known to be a threat to the survival of this subspecies.

In addition, the entire island Eiao Island was declared an officially protected area in 1971. It is classified as Category IV, an area managed for habitat or species. However, of the nine protected areas in French Polynesia, only one (Vaikivi on Ua Huka) is actively managed (Manu 2009, unpaginated).

In summary, regulations exist that protect the subspecies and its habitat. However, as described under Factor A, habitat destruction continues to threaten this subspecies. Although legal protections are in place, there are none effectively protecting the suitable habitat on the island from damage from overgrazing sheep as described in Factor A. Therefore, we find that the existing regulatory mechanisms are inadequate to ameliorate the current threats to the Eiao warbler throughout its range.

E. Other natural or manmade factors affecting the species' continued existence

Island populations have a higher risk of extinction than mainland populations. Ninety percent of bird species that have been driven to extinction were island species (as cited in Frankham 1997, p. 311). Based on genetics alone, endemic island species are predicted to have higher extinction rates than nonendemic island populations (Frankham 2007, p. 321). Small, isolated populations may experience decreased demographic viability (population birth and death rates, immigration and emigration rates, and sex ratios), increased susceptibility of extinction from stochastic environmental factors (e.g., weather events, disease), and an increased threat of extinction from genetic isolation and subsequent inbreeding depression and genetic drift.

Although the population of Eiao warblers appears to be stable, the subspecies is found on only one island and is vulnerable to stochastic events. Furthermore, the warblers are limited to the fraction of the island's area that contains suitable habitat. Eradication of feral livestock is needed to allow recovery of native vegetation and provide additional suitable habitat throughout the island. Expansion and recovery of native vegetation will permit the subspecies to recover beyond the current population of 2,000 individuals and buffer the subspecies against impacts from stochastic events.

In summary, the limited range of the Eiao warbler makes this subspecies extremely vulnerable to stochastic events and, therefore, extinction. Additional habitat is needed to expand the population and buffer the subspecies from the detrimental effects typical of small island populations. Therefore, we find that other natural or manmade factors threaten the continued existence of the Eiao warbler throughout its range.

Status Determination for the Eiao Polynesian Warbler

We have carefully assessed the best available scientific and commercial information regarding the past, present, and potential future threats faced by the Eiao Polynesian warbler. The subspecies is currently at risk on Eiao Island due to ongoing threats of habitat destruction and modification (Factor A) and stochastic events associated with the subspecies' restricted range (Factor E). Furthermore, we have determined that the existing regulatory mechanisms (Factor D) are not adequate to ameliorate the current threats to the subspecies.

Section 3 of the Act defines an ''endangered species'' as ''any species which is in danger of extinction throughout all or a significant portion of its range,'' and a ''threatened species'' as ''any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' Based on the magnitude of the ongoing threats to the Eiao Polynesian warbler throughout its entire range, as described above, we determine that this subspecies is in danger of extinction throughout all of its range. Therefore, on the basis of the best available scientific and commercial information, we propose to list the Eiao Polynesian warbler as an endangered subspecies throughout all of its range. Because we find that the Eiao Polynesian warbler is endangered throughout all of its range, there is no reason to consider its status in a significant portion of its range.

III. Greater Adjutant (*Leptoptilos dubiu*)

Species Description

The greater adjutant (*Leptoptilos dubius*) is a very large (145 to 150 cm long (4.7 to 4.9 ft)) species of stork in the family Ciconiidae. This species is characterized by a naked pink head and a low-hanging neck pouch. Its bill is very thick and yellow in color. The plumage ruff of the neck is white, and other than a pale grey leading edge on each wing, the rest of the greater adjutant's body is dark grey (Birdlife International (BLI) 2009a, unpaginated).

This species of bird once was common across much of Southeast Asia, occurring in India, Bangladesh, Burma, Thailand, Cambodia, Malaysia, Myanmar, Vietnam, Sumatra, Java, and Borneo. Large breeding colonies occurred in Myanmar; however, this colony collapsed in the mid-1900s (Singha and Rahmani 2006, p. 264).

The current distribution of this species consists of two breeding populations, one in India and the other in Cambodia. Recent sighting records of this species from the neighboring countries of Nepal, Bangladesh, Vietnam, and Thailand are presumed to be wandering birds from one of the two populations in India and Cambodia (BLI 2009a, unpaginated).

India: The most recent range-wide population estimate for this species in India (600 to 800 birds) comes from data collected in 1995 through 1996 (Singha *et al.* 2003, p. 146). Approximately 11 breeding sites are located in the Brahmaputra Valley in the State of Assam (Singha *et al.* 2003, p.147). Recent information indicates that populations of this species continue to decline in India. At two breeding sites near the city of Guwahati in the State of Assam, the most recent survey data show that the number of breeding birds has declined from 247 birds in 2005 to 118 birds in 2007 (Hindu 2007, unpaginated).

In India, much of the greater adjutant's native habitat has been lost. The greater adjutant uses habitat in three national parks in India; however, almost all nesting colonies in India are found outside of the national parks. The greater adjutant often occurs close to urban areas; the species feeds in and around wetlands in the breeding season, and disperses to scavenge at trash dumps, burial grounds, and slaughter houses at other times of the year. The natural diet of the greater adjutant consists primarily of fish, frogs, reptiles, small mammals and birds, crustaceans, and carrion (Singha and Rahmani 2006, p. 266).

This species breeds in colonies during the dry season (winter) in stands of tall trees near water sources. In India, the greater adjutant prefers to nest in large, widely branched trees in a tightly spaced colony with little foliage cover and food sources nearby (Singha *et al.* 2002, p. 214). The breeding sites are also commonly associated with bamboo forests which provide protection from

heavy rain during the pre-monsoon season (Singha *et al.* 2002, p. 218). Each adult female greater adjutant commonly lays two eggs each year (Singha and Rahmani 2006, p. 266).

Cambodia: Currently there are two known breeding populations in Cambodia. The larger of these two populations occurs in the Tonle Sap Biosphere Reserve (TSBR) near Tonle Sap Lake and has recently been estimated at 77 breeding pairs (Clements *et al.* 2007, p. 7). The Tonle Sap floodplain (and associated rivers) is considered one of the few remaining remnants of freshwater swamp forest in the region. Approximately 5,490 km2 (2,120 mi2) of the freshwater swamp forest ecoregion is protected in Cambodia. Of this amount, the Tonle Sap Great Lake Protected Area (which includes the Tonle Sap floodplain) makes up 5,420 km2 (2,092 mi2) of that protected habitat (WWF 2007, p. 3).

A smaller population of greater adjutants was recently discovered in the Kulen Promtep Wildlife Sanctuary in the Northern Plains of Cambodia. This population has been estimated at 40 birds (Clements 2008, pers. comm.; BLI 2009, unpaginated). Although other breeding sites have not yet been found in Cambodia, researchers expect that the greater adjutant may nest along the Mekong River in the eastern provinces of Mondulkiri, Ratanakiri, Stung Treng, and Kratie in Cambodia (Clement 2008, pers. comm.).

In Cambodia, the greater adjutant breeds in freshwater flooded forest, and disperses to seasonally inundated forest, tall wet grasslands, mangroves, and intertidal flats to forage. These forests are characterized by deciduous tropical hardwoods (Dipterocarpaceae family) and semi-evergreen forest (containing a mix of deciduous and evergreen trees) interspersed with meadows, ponds, and other wetlands (WWF 2006b, p. 1).

Conservation Status

The IUCN classifies the greater adjutant as critically endangered. In India, the greater adjutant is listed under Schedule I of the Indian Wildlife Protection Act of 1972. The species is not listed in the Appendices of CITES (*http://www.cites.org*).

Summary of Factors Affecting the Greater Adjutant

A. Present or threatened destruction, modification, or curtailment of habitat or range

India: The greater adjutant occurs in Kaziranga, Manas, and Diburu-Saikhowa National Parks. However, nearly all breeding sites for this species are located outside of protected areas (Singha *et al.* 2003, p. 148). The ongoing loss of habitat through habitat conversion for development and agriculture is a primary threat to the greater adjutant. The clearing of trees that are suitable for breeding sites is a serious threat to this species. The recent decline in the population at the breeding colonies near Guwahai, India, is believed to be caused by tree removal at the breeding site and filling of wetlands in an area near the city that had been used by the greater adjutant as feeding areas (Hindu 2007, unpaginated). These activities were undertaken for the purpose of expanding residential developments in the city. The species is also seasonally dependent on wetlands for forage. These sites are impacted in India by drainage, encroachment, and overfishing. For instance, some sites have reportedly experienced encroachment from rice cultivation (BLI 2001, p. 284).

Singha *et al.* 2002 (pp. 218–219) found that preferred nest trees were significantly larger and different in structure to non-nest trees near Nagaon in central Assam. The nest trees were large and widely branched with thin foliage cover (Singha *et al.* 2002, p. 214). Researchers believe that removal of preferred nesting trees at breeding may result in adjutants nesting in suboptimal trees at existing nest sites or relocating to other suboptimal nest sites. The trees and their limbs at suboptimal breeding sites are smaller in diameter, and the structure of the limbs does not always support the combined weight of the nest, adults, and chicks. As chicks grow older, nest limbs often break, sending the half grown chicks tumbling from the nest. Approximately 15 percent of chicks die after falling from their nests, for a variety of causes, including injuries and abandonment (Singha *et al.* 2006, p. 315). Some efforts have been made to reduce chick mortality, like those employed at two breeding sites near Nagaon from 2001 to 2003 (Singha *et al.* 2006, pp. 315–320). Safety nets are placed under the canopy of nest trees to catch falling chicks. Chicks are either replaced in their nest, if on-site monitors can determine which nest the chick came from, or raised in captivity and later released. Juvenile birds were monitored after their release, and the program is considered a success (Singha and Rahmani 2006, p. 268; Singha *et al.* 2006, pp. 315–320). Though some efforts have been undertaken to reduce chick mortality due to falls from nests, loss of chicks based on nesting in sub-optimal breeding sites is likely still occurring at other breeding sites.

Cambodia: The largest breeding colonies are located in the Tonle Sap Biosphere Reserve, which consists primarily of the Tonle Sap Lake and its floodplain. A second breeding population occurs in the Kulen Promtep Wildlife Sanctuary in the Northern Plains. Poole (2002, p. 35) reported that large nesting trees around Cambodia's Tonle Sap floodplain, particularly crucial to greater adjutants for nesting, are under increasing pressure by felling for firewood and building material. Poole (2002, p. 35) concluded that a lack of nesting trees, both at Tonle Sap and in the Northern Plains, may be the most serious threat in the future to large water bird colonies.

The Mekong River Basin flows through several countries in Southeast Asia, including Tibet, China, Myanmar, Vietnam, Thailand, Cambodia, and Laos, traveling over 4,800 km (2,980 mi) from start to finish. In Cambodia, the Mekong River flows into the Tonle Sap floodplain. Tonle Sap Lake expands and contracts throughout the year as a result of rainfall from monsoons and the flow of the Mekong River. The lake acts as a storage reservoir at different times of the year to regulate flooding in the Mekong Delta (Davidson 2005, p. 3). This flooding also results in flooded forests and shrublands, which provides seasonal habitat to several species. The Tonle Sap Biosphere Reserve is one of Southeast Asia's most important wetlands for biodiversity and is particularly crucial for birds, reptiles, and plant assemblages (Davidson 2005, p. 6).

Upstream developments in the Mekong have already led to significant trapping of sediments and nutrients in upstream reservoirs, which could lead to increased bed and bank erosion downstream, as well as decreased productivity (Kummu and Varis 2007, pp. 289, 291). According to the Asian Development Bank (ADB 2005, p. 2), 13 dams have been built, are being built, or are proposed to be built along the Mekong River. Proposed hydroelectric dams along the Mekong River in countries upstream from Cambodia have the potential to adversely affect the habitat of the greater adjutant by affecting the hydrology of the basin and reducing the overall foraging habitat and the abundance of prey species during the breeding season (Clements *et al.* 2007, p. 59). In addition, decline in productivity of the habitat, and thereby prey species abundance, may increase competition for food, and increased releases from upstream dams during the dry season could result in permanent flooding of these forests that will eventually kill the trees in these areas

(Clements *et al.* 2007, p. 59). Under some scenarios, up to half of the core area (21,342 ha (52,737 ac)) of the Prek Toal area in the Tonle Sap Biosphere Reserve could be affected.

Summary of Factor A

This species continues to face significant ongoing threats to its breeding and foraging habitat in both India and Cambodia. In India, activities such as the draining and filling of wetlands (Hindu 2007, unpaginated), removal of nest trees, and encroachment on habitat significantly impact this species (BLI 2001, p. 284). In Cambodia, threats include tree removal (Poole 2002, p. 35) and large-scale hydrologic changes due to existing dams and proposed dam construction (Clements *et al.* 2007, p. 59; Kummu and Varis, pp. 287-288). The latter threat could potentially eliminate habitat in protected areas such as the Tonle Sap Biosphere Reserve, and it could additionally reduce productivity of these areas, which would further impact the species by affecting the foraging base and potentially increasing competition with other species (Clements *et al.* 2007, p. 59). Therefore, we find that the present or threatened destruction, modification, or curtailment of the habitat or range is a threat to the continued existence of the greater adjutant throughout its range.

B. Overutilization for commercial, recreational, scientific, or educational purposes

Local communities collect bird eggs and chicks for consumption and for trade in both India and Cambodia. This is considered a primary threat to the birds in Cambodia, where fledglings are also taken (Clements 2008, pers. comm.). Due to their rarity, greater adjutants are believed to have a high market value, which increases the likelihood this type of activity will continue. The implementation of bird nest protection programs has been developed by the Wildlife Conservation Society, working with local villages such as the program at Kulen Promtep Wildlife Sanctuary (ACCB 2009, unpaginated). Although the impacts from large-scale collection of bird eggs and chicks has been reduced through these programs, collection still remains a threat to the species.

Accounts of poisoning, netting, trapping, and shooting of adult birds were also reported at various locations in both India and Cambodia during the 1990s (BLI 2001, pp. 285–286). In India, some birds were shot because of perceived impact on fish stocks, others in hunts (BLI 2001, p. 285). In Cambodia, some birds were captured to be sold as food and for use as pets, and some were also hunted (BLI 2001, p. 286). Birds are also likely inadvertently injured or killed as a result of destructive fishing techniques in Cambodia such as electro-fishing and the use of poisons (Clements 2008, pers. comm.). In a 1999 article, the *Phnom Penh Post* (as reported in Environmental Justice Foundation 2002, p. 25) reported that pesticides are used to kill both fish and wildlife species at Tonle Sap.

In summary, although we are unaware of any scientific or educational purpose for which the adjutant is used, local communities are known to collect bird eggs, chicks, and adults for consumption and other purposes (e.g., pet trade and perceived threat to fish stocks) in either or both India or Cambodia (BLI 2001, pp. 285–286). Further, even though nest protection programs are being implemented, these programs are insufficient to adequately protect the species. Therefore, we find that overutilization due to commercial and recreational purposes is a threat to the continued existence of the greater adjutant throughout its range.

C. Disease or predation

Highly pathogenic avian influenza (HPAI) H5N1 continues to be a serious problem for this species. This strain of avian influenza first appeared in Asia in 1996, and spread from country to country with rapid succession as found by Peterson *et al.* (2007, p. 1). By 2006, the virus was detected across most of Europe and in several African countries. Influenza A viruses, to which group strain H5N1 belongs, infects domestic animals and humans, but wildfowl and shorebirds are considered the primary source of this virus in nature (Olsen *et al.* 2006, p. 384). Though it is still unclear if the greater adjutant is a carrier, lack of an avian influenza wild bird surveillance program in Cambodia will make it difficult to resolve this question.

Until recently, there was no information on predation affecting the greater adjutant. However, recent research on other waterbirds suggests that predation may impact the greater adjutant in Cambodia. For example, nesting surveys for several waterbirds were conducted between 2004 and 2007 at the Prek Toal area in Tonle Sap Biosphere Reserve. These surveys included monitoring of nest sites. Human disturbances at nest sites due to illegal collection of chicks and eggs resulted in an increase of predation by crows (*Corvus* spp.) on spot-billed pelicans in the 2001-2002 breeding season, causing up to 100 percent loss of reproduction, and again in the 2002-2003 breeding season, resulting in up to 60 percent loss in reproduction due to a combination of collection and predation. In some locations, the spot-billed pelicans abandoned their nests for the remainder of the breeding season (Clements *et al.* 2007, p. 57). It is likely that other waterbirds, such as the greater adjutant at Prek Toal would be similarly affected due to illegal collection of eggs by humans, nest site disturbance, and subsequent increase in crow presence, thereby increasing the predation of their chicks and eggs.

In summary, although incidence of local residents collecting eggs and chicks for consumption has been reduced in some areas due to educational and enforcement programs, these impacts still occur. At the largest breeding sites for this species in India, reproductive success is low, less than one chick per nest per year. Because the total population of the greater adjutant is fewer than 1,000 birds, the loss of eggs and chicks in populations in India and Cambodia is a significant threat to the species. In addition, there may be secondary impacts due to predation by crows. Therefore, we find that predation is a threat to the continued existence of the greater adjutant throughout its range.

D. Inadequacy of existing regulatory mechanisms

The greater adjutant is classified as critically endangered by the IUCN. Although there is evidence of commercial trade across the Cambodia border into Laos and Thailand, this species is currently not listed under CITES.

India: The greater adjutant is listed under Schedule I of the Indian Wildlife Protection Act of 1972 (IWPA). Schedule I provides absolute protection, with the greatest penalties for offenses. This law prohibits hunting, possession, sale, and transport of listed species. The IWPA also provides for the designation and management of sanctuaries and national parks for the purposes of protecting, propagating, or developing wildlife or its environment. Protected areas in India allow for regulated levels of human use and disturbance and are managed to prevent widespread clearing and complete loss of suitable habitat. Although the greater adjutant uses habitat in three national parks in India, almost all nesting colonies of this species in India are found outside of protected areas (Singha *et al.* 2003, p. 148). Some of the species' foraging areas are also located outside of protected areas. As stated above in Factor A, the ongoing loss of habitat through habitat

conversion for development and agriculture is a primary threat to this species. The regulatory mechanisms currently in place in India do not provide protection of habitat for the greater adjutant outside of existing protected areas such as national parks, and therefore are not adequate.

Cambodia: Areas designated as natural areas by the Ministry of Environment, such as the Tonle Sap Biosphere Reserve, are to be managed for the protection of the natural resources contained within. Portions of the Biosphere Reserve have also been designated as areas of importance under the Convention of Wetlands of International Importance of 1971.

The Mekong River Commission (MRC) was formed between the governments of Cambodia, Lao PDR, Thailand, and Vietnam in 1995 as part of the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin. The signatories agreed to jointly manage their shared water resources and the economic development of the river (MRC 2007, p. 1–2). According to the Asian Development Bank, 13 dams have been built, are being built, or are proposed to be built along the Mekong River (ADB 2005, p. 2). The continued modification of greater adjutant habitat has been identified as a primary threat to this species (Factor A), and this regional regulatory mechanism is not effective at reducing that threat.

Several laws exist in Cambodia to protect the greater adjutant from two of the primary threats to the species: habitat destruction and hunting. However, they are ineffective at reducing those threats. In Cambodia, Declaration No. 359, issued by the Ministry of Agriculture, Forestry and Fisheries in 1994, prohibits the hunting of greater adjutant. However, reports of severe hunting pressure within the greater adjutant's habitat exist and illegal poaching of wildlife in Cambodia continues (Bird *et al.* 2006, p. 23; Poole 2002, pp. 34–35; UNEP-SEF 2005, pp. 23, 27).

The Creation and Designation of Protected Areas regulation (November 1993) established a national system of protected areas. In 1994, through Declaration No. 1033 on the Protection of Natural Areas, the following activities were banned in all protected areas:

(1) Construction of saw mills, charcoal ovens, brick kilns, tile kilns, limestone ovens, tobacco ovens;

(2) hunting or placement of traps for tusks, bones, feathers, horns, leather, or blood;

(3) deforestation;

(4) mining minerals or use of explosives;

(5) the use of domestic animals such as dogs;

(6) dumping of pollutants;

(7) the use of machines or heavy cars which may cause smoke pollution;

(8) noise pollution; and

(9) unpermitted research and experiments.

In addition, the Law on Environmental Protection and Natural Resource Management of 1996 sets forth general provisions for environmental protection. Under Article 8 of this law, Cambodia declares that its natural resources (including wildlife) shall be conserved, developed, and managed and used in a rational and sustainable manner.

Protected Areas have been established within the range of the greater adjutant, such as the Tonle Sap Lake Biosphere Reserve. The Tonle Sap Great Lake protected area was designated a multi-purpose protected area in 1993 (Matsui *et al.* 2006, p. 411). Under this decree, Multiple Use Management Areas are those areas which provide for the sustainable use of water resources, timber, wildlife, fish, pasture, and recreation; the conservation of nature is primarily oriented to support these economic activities. In 1997, the Tonle Sap region was nominated as a Biosphere Reserve under UNESCO's (United Nations Educational, Scientific and Cultural Organization) ''Man and the Biosphere Program.'' The Cambodian government developed a National Environmental Action Plan (NEAP) in 1997, supporting the UNESCO site goals. Among the priority areas of intervention are fisheries and floodplain agriculture at Tonle Sap Lake, biodiversity and protected areas, and environmental education. NEAP was followed by the adoption of the Strategy and Action Plan for the Protection of Tonle Sap (SAPPTS) in February 1998 (Matsui *et al.* 2006, p. 411), and the issuance of a Royal Decree officially creating Tonle Sap Lake a Biosphere Reserve (TSBR) on April 10, 2001. The royal decree was followed by a subdecree by the Prime Minister to establish a Secretariat, along with its roles and functions, for the TSBR with the understanding that its objectives could not be achieved without cooperation and coordination among relevant stakeholders (TSBR Secretariat 2007, p. 1).

Joint Declaration No. 1563, on the Suppression of Wildlife Destruction in the Kingdom of Cambodia, was issued by the Ministry of Agriculture, Forestry, and Fisheries in 1996. Although the Japan International Cooperation Agency (JICA 1999, p. 19) reported that this regulatory measure was ineffectively enforced, some strides have been made recently through the combined efforts of WCS, the Cambodian government, and local communities at Tonle Sap Lake. WCS Cambodia (2009, unpaginated) reports that the illegal wildlife trade in Cambodia is ''enormous'' and driven by demand for meat and traditional medicines in Thailand, Vietnam, and China. Substantial progress has been made in protecting seven species of waterbirds at Prek Toal Core Area in the TSBR, increasing populations of some species tenfold by working with the primary management agencies and working at the field level to improve community engagement, law enforcement, and long-term research and monitoring (WCS Cambodia 2009, unpaginated).

The Forestry Law of 2002 strictly prohibits hunting, harming, or harassing wildlife (Article 49) (Law on Forestry 2003). This law further prohibits the possession, trapping, transport, or trade in rare and endangered wildlife (Article 49). However, to our knowledge, Cambodia has not yet published a list of endangered or rare species. Thus, this law is not currently effective at protecting the greater adjutant from threats by hunting.

In 2006, the Cambodian government created Integrated Farming and Biodiversity Areas (IFBA), including over 161 km (100 mi) of grassland (over 30,000 ha (74,132 ac)) near Tonle Sap Lake to protect the Bengal florican, an endangered bird in that region (WWF 2006a, pp. 1–2). The above measures have focused attention on the conservation situation at TSBR and have begun to improve the conservation of the area and its wildlife there, but several management challenges remain. These challenges include overexploitation of flooded forests and fisheries; negative impacts from invasive species; lack of monitoring and enforcement; low level of public awareness of biodiversity values; and uncoordinated research, monitoring, and evaluation of species' populations (Matsui *et al.* 2006, pp. 409–418; TSBR Secretariat 2007, pp. 1–6).

Even though these wildlife laws exist, greater adjutant habitat within Cambodian protected areas faces several challenges. The legal framework governing wetlands management is institutionally complex. It rests upon legislation vested in government agencies responsible for land use planning (Land Law 2001), resource use (Fishery Law 1987), and environmental conservation (Environmental Law 1996, Royal Decree on the Designation and

Creation of National Protected Areas System 1993); however, there is no interministerial coordinating mechanism nationally for wetland planning and management (Bonheur *et al.* 2005, p. 9). As a result of this institutional complexity and lack of defined jurisdiction, natural resource use goes largely unregulated (Bonheur *et al.* 2005, p. 9). Thus, the protected areas system in Cambodia is ineffective in removing or reducing the threats of habitat modification and hunting faced by the greater adjutant.

Summary of Factor D

Existing regulatory mechanisms in both India and Cambodia are ineffective at reducing or removing threats to the species such as habitat modification and collection of eggs and chicks for consumption. Although progress has been made recently in the protection of nests and birds at specific locations, this has largely been driven by measures from the private sector. We believe that the inadequacy of regulatory mechanisms, especially with regard to lack of law enforcement and habitat protection, is a significant risk factor for the greater adjutant. Therefore we find that existing regulatory mechanisms are inadequate to ameliorate the current threats to the greater adjutant throughout its range.

E. Other natural or man-made factors affecting the species' continued existence

India: Due to a lack of natural foraging areas and availability of native wildlife carcasses to feed upon, the greater adjutant is known to commonly forage in refuge dumps and slaughterhouses during certain times of the year. Researchers believe that along with the refuse at these sites, these birds are inadvertently ingesting household contaminants and plastics that can adversely affect their health and reproductive capability (Singha *et al.* 2003, p. 148; BLI 2009a, unpaginated). In addition, pesticide has been used in winter to kill fish at a national park in India, and may be a widespread practice throughout the Brahmaputra lowlands (BLI 2001, p. 287). As the remaining natural foraging habitat for this species continues to shrink, the level of foraging at refuge dumps and slaughter houses is expected to increase, thereby increasing the incidence of greater adjutants ingesting contaminants at these sites. Also, the use of pesticides in and near water sources in the Brahmaputra lowlands may result in further contamination to the species.

Cambodia: Increasing use of agro-chemicals, especially pesticides, is a major concern in the TSBR and throughout Cambodia. A survey conducted in Cambodian agriculture practices in 2000 showed that 67 percent of farms used pesticides. Of these farms, 44 percent began using pesticides in the 1980s, and 23 percent began using them in the 1990s (Environmental Justice Foundation (EJF) 2002, p. 13). All of the pesticides used in Cambodia are produced outside of the country, and the labels, which include information on the appropriate use of these chemicals, are often not written in a language understandable to local villagers (EJF 2002, p. 18). A Food and Agriculture Organization of the United Nations (FAO) study found that only 1 percent of vegetable farmers received technical training in pesticide use (EJF 2002, p. 17). This problem often leads to overuse of these highly toxic compounds.

In Cambodia, organochlorine insecticides, such as dichloro-diphenyl-trichloroethane (DDT), and organophosphate insecticides such as methyl-parathion are commonly used. Organochlorine insecticides are known to accumulate in aquatic systems and concentrate in the organs of species of waterbirds such as the greater adjutant. The effects of persistent organic pesticides are variable depending on concentration and species, but can include direct mortality, feminization of embryos, reduced hormones for egg-laying, and egg-shell thinning (EJF 2002, p. 24).

In the 1970s and 1980s, agricultural use of DDT was banned in most developed countries; however, it is still used for agriculture in Cambodia. In recent years, mong bean farmers in Siem Reap province are estimated to have applied 10 tons of a pesticide mix of DDT, Thiodan (endosulfan), and methyl-parathion on fields that are submerged in the wet season and thus capable of polluting the Tonle Sap basin (EJF 2002, p. 25). In addition, methyl-parathion and endosulfan are used in illegal fishing (EJF 2002, p. 14). Methyl-parathion is considered highly toxic to birds and may take 2 weeks to degrade in lakes and rivers. The decline in the number of some bird species from around the Tonle Sap Lake may be partly due to pesticide poisoning (EJF 2002, p. 25). Further, because higher levels of persistent organochlorines have been recorded in freshwater fish and mussels than marine fish and mussels, the source of these compounds is likely inland watersheds (EJF 2002, p. 24). Although we could not locate any specific contaminant reports on the amount of these toxic chemicals found in greater adjutants based on the above data, it is likely that the persistent use of these compounds is contributing to the decline of this species.

Summary of Factor E

The use of pesticides occurs in both India and Cambodia for a variety of reasons, including agriculture, fishing, and insect control. As human interactions with the adjutant continue to increase, the chances of poisoning of the species, both directly and indirectly, also continue to rise. Therefore we find that other natural or manmade factors affecting the continued existence of the species in the form of pesticide use and ingesting other contaminants is a threat to the greater adjutant throughout its range.

Status Determination for the Greater Adjutant

We have carefully assessed the best available scientific and commercial information regarding the past, present, and potential future threats faced by the greater adjutant. The species is currently at risk throughout all of its range due to ongoing threats of habitat destruction and modification (Factor A); overutilization for commercial, recreational, scientific, or educational purposes in the form of hunting, egg and chick collection, and trapping (Factor B); predation (Factor C); inadequacy of existing regulatory mechanisms (Factor D); and other natural or manmade factors affecting its continued existence in the form of overuse of toxic compounds (Factor E).

Section 3 of the Act defines an ''endangered species'' as ''any species which is in danger of extinction throughout all or a significant portion of its range,'' and a ''threatened species'' as ''any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' Based on the magnitude of the ongoing threats to the greater adjutant throughout its entire range, as described above, we determine that this species is in danger of extinction throughout all of its range. Therefore, on the basis of the best available scientific and commercial information, we propose to list the greater adjutant as an endangered species throughout all of its range. Because we find that the greater adjutant is endangered throughout all of its range, there is no reason to consider its status in a significant portion of its range.

IV. Jerdon's courser (*Rhinoptilus bitorquatus*)

Species Description

The Jerdon's courser, also known as the double-banded courser (*Rhinoptilus bitorquatus*), is a small, nocturnal bird, which is specialized for running and belongs to the family Glareolidae (Bhushan 1986, pp. 1, 6; Jeganathan *et al.* 2004a, p. 225; Jeganathan *et al.* 2004b, p. 7). It was first described by T. C. Jerdon in 1848 (Bhushan 1986, p. 1; Jeganathan *et al.* 2004b, p. 1). This species averages 27 cm (11 in) in length, its plumage consists of two brown bands around its breast, a blackish colored crown, a broad buff-colored supercilium (eyebrow stripe), an orange patch that runs from its throat down to its chest, and it has a short yellow bill with a black tip (BLI 2009b, unpaginated).

The Jerdon's courser is a rare species of bird that is endemic to the Eastern Ghats of the states of Andhra Pradesh and extreme southern Madhya Pradesh in India (BLI 2009b, unpaginated). The size of the population is not known. Historically, this species was reported in the Khamman, Nellore, and Anantapur districts of Andhra Pradesh and the Gadchiroli District of Maharashtra (Jeganathan *et al.* 2005, p. 5). Until 1900, its presence was periodically recorded, including some records in the Pennar and Godavari river valleys and near Anantapur (Bhushan 1986, p. 2; Jeganathan *et al.* 2004a, p. 225; Jeganathan *et al.* 2004b, p. 7; Jeganathan *et al.* 2006, p. 227). Efforts by various ornithologists in the early 1930s and mid to late 1970s to record the presence of this species failed, leading to the belief that the species was extinct (Bhushan 1986, p. 2; Jeganathan *et al.* 2004b, p. 7). In 1986, the Jerdon's courser was rediscovered near Reddipalli village, Cuddapah District, Andhra Pradesh (Bhushan 1986, pp. 8–9; Jeganathan *et al.* 2004a, p. 225; Jeganathan *et al.* 2004b, p. 7; Jeganathan *et al.* 2005, p. 3; Jeganathan *et al.* 2006, p. 227; Senapathi *et al.* 2007, p. 1).

The area where the species was rediscovered was designated as the Sri Lankamaleswara Wildlife Sanctuary (SLWS) (Jeganathan *et al.* 2004b, p. 7; Jeganathan *et al.* 2005, p. 3). After its rediscovery, it was only observed regularly at a few sites in and around the SLWS (Jeganathan *et al.* 2004b, p. 7, 18; Jeganathan *et al.* 2005, p. 5; Jeganathan *et al.* 2006, p. 227; Senapathi *et al.* 2007, p. 1), including reports of its presence in Sri Penusula Narasimha Wildlife Sanctuary (SPNWS) in the Cuddapah and Nellore districts, Andhra Pradesh (Jeganathan *et al.* 2005, p. 3). It has since been found at three additional localities (Jeganathan *et al.* 2004a, p. 228; Jeganathan *et al.* 2004b, p. 20; BLI 2009b, unpaginated).

Due to the nocturnal nature of the species and the wooded nature of its habitat, individuals are rarely seen; therefore, very little information is available on the distribution, ecology, population size, and habitat requirements of the Jerdon's courser (Jeganathan *et al.* 2004a, p. 225; Jeganathan *et al.* 2004b, p. 7; Jeganathan *et al.* 2005, p. 3; Jeganathan *et al.* 2006, p. 227; Senapathi *et al.* 2007, p. 1). New survey techniques have allowed researchers to detect the presence and absence of Jerdon's courser using track strips and a tape playback of the species call. These methods can be useful in mapping the geographic range of the Jerdon's courser and in estimating the population size, and have contributed to a better understanding of habitat preferences. Surveys have not been conducted in all areas with suitable habitat characteristics; additional surveys are needed to confirm the current range and population size of this species. Although the size of the population is not known, it is believed to be a small, declining population (Jeganathan 2004b, p. 7; BLI 2009b, unpaginated; IUCN 2009c, unpaginated).

The Jerdon's courser inhabits open patches within scrub-forest interspersed with patches of bare ground, in gently undulating, rocky foothills (Jeganathan *et al.* 2005, p. 5; Senapathi *et al.* 2007, p. 1). Studies show that this species is most likely to occur where the density of large bushes (greater than 2 m (6 ft) tall) ranges from 300 to 700 per ha (121-283 large bushes per acre) and the density of smaller bushes (less than 2 m (6 ft) tall) is less than 1,000 per ha (404 per acre) (Jeganathan *et al.* 2004a, p. 228; Jeganathan *et al.* 2004b, p. 22; Jeganathan *et al.* 2005, p. 5; Senapathi *et al.* 2007, p. 1). The dominant woody vegetation includes species of shrub, particularly *Zizyphus rugosa, Carissa carandas*, and *Acacia horrida* (Jeganathan *et al.* 2004a, p. 228; Jeganathan *et al.* 2004b, p. 22).

The amount of suitable habitat that existed for this species in 2000 was estimated to be approximately 3,847 km2 (1,485 mi2) of scrub habitat in the Cuddapah and Nellore districts of the State of Andhra Pradesh (Senapathi *et al.* 2007, p. 6). Jeganathan (2008, pers. comm.) further stated that the amount of suitable habitat available in and around the SLWS is approximately 132 km2 (51 mi2). A comprehensive habitat assessment of all the shrub habitat areas within the historic range of this species has not yet been completed; therefore, suitable habitat may occur elsewhere for this species.

Little information is known about feeding habits or feeding areas of this species. The only information known comes from the analysis of two Jerdon's courser fecal samples, which consisted mainly of termites and ants. Jeganathan (2004a, p. 234) suggested that despite being nocturnal and affected by the shadowing effects of the canopy, coursers may be able to see invertebrate prey on the ground by selecting relatively well-illuminated open areas.

There is no information on the life history of the Jerdon's courser; no nests or young birds have ever been found, although the footprints of a young bird along with an adult Jerdon's courser suggests successful breeding is taking place (Jeganathan *et al.* 2004b, pp. 17, 29). The calling period is brief, starting approximately 45 to 50 minutes after sunset and continuing for a few minutes to approximately 20 minutes.

Conservation Status

Due to the single, small, and declining population of the Jerdon's courser, it is classified as ''critically endangered'' by the IUCN (Jeganathan *et al.* 2004b, p. 7; Senapathi *et al.* 2007, p. 1; Jeganathan *et al.* 2008, p. 73; IUCN 2009c, unpaginated), a category assigned to species facing an extremely high risk of extinction in the wild. It is also listed under Schedule I of the Indian Wildlife Protection Act of 1972. The species has not been formally considered for listing in the Appendices of CITES (*http://www.cites.org*).

Summary of Factors Affecting the Jerdon's Courser

A. Present or threatened destruction, modification, or curtailment of habitat or range

The primary threat to the persistence of the Jerdon's courser is habitat destruction and alteration due to conversion of suitable habitat to agriculture lands, grazing, and construction within and around the SLWS and SPNWS, and increasing settlements (Jeganathan 2005 *et al.* 2005, p. 6; Norris 2008, pers. comm.; Jeganathan 2009, pers. comm..). Agriculture is the main occupation of the people living in the area. The State of Andhra Pradesh has experienced growth of intensive agricultural practices in recent years (Senapathi *et al.* 2007, pg. 2), with paddy (*Oryza sativa*), sunflower (*Helianthus annuus*), cotton (*Gossypium* sp.), groundnut (*Arachis hypogaea*), finger millet (*Eleusince coracana*), turmeric

(*Curcuma longa*), and onion (*Allium cepa*) being the major crops of the area (Jeganathan *et al.* 2008, p. 77). From 1991 to 2000, scrub habitat in the Cuddapah District and parts of the Nellore District in Andhra Pradesh decreased by 11–15 percent, while the area occupied by agricultural land more than doubled (109 percent increase) during the same time period. Remaining scrub patches were also found to be smaller (38.4 percent decrease) and further from human settlements (Senapathi *et al.* 2007, pp. 1, 4; Jeganathan *et al.* 2008, p. 76).

The main causes for the loss of scrub habitat were human settlements and subsequent conversions of scrub habitat to agriculture and cleared areas (Senapathi *et al.* 2007, p. 6). From 2001 to 2004, an estimated 480 ha (1,186 ac) of scrub habitat were cleared within and around the SLWS, 275 ha (680 ac) of which were cleared to provide land for agriculture to the people of India who were displaced by floods and for farming of lemons and forestry plantations. These cleared areas fall within 1 km (0.6 mi) of previously known and newly discovered Jerdon's courser areas (Jeganathan *et al.* 2008, p. 76). From 2000 to 2005, Jeganathan *et al.* (2008, p. 77) noted that approximately 215 ha (531 ac) of scrub habitat outside of the SLWS were cleared and most likely will become lemon farms. The irrigation required to sustain agricultural activities will likely further fragment any remaining suitable habitat (Senapathi *et al.* 2007, p. 7).

The Jerdon's courser inhabits open patches within scrub-forest and prefers areas with moderate densities of trees and brush (Jeganathan *et al.* 2004a, p. 234). Researchers believe this open habitat is maintained by grazing animals and some woodcutting (Norris 2008, pers. comm.). Known Jerdon's courser sites are already being used for grazing livestock and woodcutting, but at moderate levels that maintain the appropriate vegetation structure (Jeganathan 2005, p. 15). Mechanical clearing of bushes to create pasture, orchards, and tilled land; high levels of woodcutting; and high level of use by domestic livestock are likely to cause deterioration in scrub habitat by creating a scrub forest that is too open for the Jerdon's courser. However, low levels of grazing by livestock or absence of woodcutting may also lead to habitat that is more closed and, therefore, unsuitable (Jeganathan *et al.* 2004a, p. 234; Jeganathan *et al.* 2004b, p. 23; Norris 2008, pers. comm.).

Land in SLWS and adjacent areas is used by the people from villages in Sagileru valley for grazing herds of domestic buffalo (*Bubalus bubalis*), sheep (*Ovis aries*), and goats (*Capra hircus*), and for woodcutting (Jeganathan *et al.* 2004b, p. 9). Jeganathan (2008, pers. comm.) states that most of the potentially suitable habitat for Jerdon's courser is located on the fringe of the forest and can be easily accessed by locals for grazing and woodcutting. Jeganathan *et al.* (2008, p. 77) notes three types of grazing within and around the SLWS and SPNWS. The first includes shepherds who bring goats, sheep, and buffalo into the scrub habitat in and around the sanctuaries every morning, grazing 2-3 km (1-2 mi) into the forest before returning to the villages in the evening. The second includes nomads with 200-300 cattle. Although they are invited by farmers to help fertilize the lemon farms, they stay 3 to 4 months and graze in the forested areas in and around the sanctuaries. The third includes sheep that graze inside the sanctuaries throughout the year; however, this type of grazing did not occur in scrub habitat. Furthermore, a common practice is to cut and bend the branches of scrub and tree species to facilitate better access for grazing (Jeganathan *et al.* 2008, p. 78). In addition, the people of the local villages also use the sanctuaries for timber and nontimber forest products; including fuel wood, illegal wood collecting, grass, and bamboo. From 2001 to 2003, Jeganathan *et al.* (2008, pp. 77–78) regularly observed wood loads being removed by either head loads, bullock cart, or tractor.

Development activities within the SLWS, including the construction of check dams, and percolation ponds, and digging of trenches, have been observed in known and newly recorded areas of the Jerdon's courser (Jeganathan *et al.* 2004a, pp. 26, 28; Jeganathan *et al.* 2008, p. 76). Approximately 0.5 to 1 ha (1-2 ac) of scrub forest was cleared for each of five percolation ponds dug near the main Jerdon's courser area and exotic plant species planted on the embankment. In addition, scrub habitat was thinned (removal of all scrub species except saplings), and pits for collecting rainwater were dug (Jeganathan *et al.* 2008, p. 76). Furthermore, various sizes of stones were collected from the scrub jungle within and around the SLWS for road construction every year. Collection included digging of stones with crowbars, collection of stones in heavy vehicles, and the excavation of 15 large pits (Jeganathan *et al.* 2008, p. 76).

Construction of dams and reservoirs and river floods in the area has resulted in the relocation of villages near the SLWS and SPNWS. Fifty-seven villages were relocated closer to SLWS after the construction of the Somasila dam. Fifteen were displaced due to the construction of the Sri Potuluri Veera Brahmendraswamy (SPVB) Reservoir. Currently, there are approximately 146 villages between the SLWS and SPNWS (Jeganathan *et al.* 2008, pp. 76–77). There are more villages in the area of Somasila and SPVB Reservoir that could be relocated near the sanctuaries in the future, and there are plans to increase the height of the Somasila dam, which will cause the displacement of more villages near the southeastern part of SLWS (Jeganathan *et al.* 2008, p. 77). With the relocation and expansion of human settlements, there is concern over additional land conversion for agriculture, increased pressure for grazing and woodcutting, and further development.

At the time of the Jerdon's courser rediscovery in 1986, the only known site where the species was found was under threat from a project to construct the Telugu-Ganga canal through its habitat. The Andhra Pradesh Forestry Department (APFD) and the State Government of Andhra Pradesh responded by designating the site as the SLWS to protect the species. The proposed route of the canal was adjusted to avoid the sanctuary (Jeganathan *et al.* 2005, p. 6; Jeganathan *et al.* 2008, p. 78). However, in 2005, construction of the Telugu-Ganga canal began, illegally, within the SLWS. Construction was stopped immediately once the APFD was notified (Jeganathan *et al.* 2005, p. 6; Kohli 2006, unpaginated). Illegal excavation was reported even after construction was stopped and the contracting company fined (Kohli 2006, unpaginated). A report by the Bombay National History Society (BNHS) found that 80 to 100 m (263 to 328 ft) were cleared for canals that were 16 to 20 m (53 to 66 ft) wide. It also found that approximately 22 ha (54 ac) of potentially suitable habitat were cleared and one of the three newly recorded sites for the Jerdon's courser was destroyed by the illegal construction within the SLWS (Jeganathan *et al.* 2005, p. 12; BNHS 2007, p. 1; Jeganathan *et al.* 2008, p. 73). The report also assessed the potential impacts of the proposed realignment and determined that the construction of the canal would still impact 650 ha (1,606 ac) of suitable habitat around the SLWS and would pass within 500 m (1640 ft) of recent records of the Jerdon's courser and pass very close to the only place where the species has been regularly sighted since 1986 (Jeganathan *et al.* 2005, p. 12; Jeganathan *et al.* 2008,

p. 80). Plans for the Telugu-Ganga canal included another canal project along the western boundary of the SPNWS. Unauthorized work near the Sanctuary boundary was stopped by the Cuddapah Forest Division in October 2005. In some locations along the canal route, forest had been cleared and roads developed inside of the Sanctuary boundary (Jeganathan *et al.* 2005, p. 9). Approximately 163 ha (403 ac) were cleared for the construction of the canal in and around the SPNWS (Jeganathan *et al.* 2005; Jeganathan *et al.* 2008, p. 80). It is unknown how much of this area is occupied by the Jerdon's courser.

Following the illegal construction of the canal within the SLWS and SPNWS, the issue was raised to the Central Empowered Committee (CEC), a monitoring body on forest matters set up by the Supreme Court (Kholi 2006, unpaginated). The CEC ruled in favor of a realignment route completely avoiding courser habitat. Also, the government of Andhra Pradesh has transferred approximately 1,000 ha (2,4711 ac) of land between the canal and the SLWS to the APFD (BLI 2009b, unpaginated; Jeganathan 2009, pers. comm.).

During the BNHS study on the construction of the Telugu-Ganga canal, additional threats were identified in association with the construction. Roads were built along the canal route and from the main roads to the canal, which subsequently provided easy access to the forest for unauthorized woodcutting. Furthermore, the SLWS is known to have red sanders (*Pterocarpus santalinus*), a highly valued species of trees sought after by illegal woodcutters. APDF records from 1984 to 2003 show that over 116,000 kilograms (255,736 pounds) of matured red sanders were seized from smugglers (Jeganathan *et al.* 2005, p. 13). Pressure from smugglers on mature red sanders, coupled with the increased access points into the SLWS due to canal construction activities, has caused extensive unauthorized woodcutting within the SLWS (Jeganathan *et al.* 2005, p. 13).

Summary of Factor A

In summary, the scrub habitat known to be occupied by the species and potentially suitable habitat on adjacent lands in and around the SLWS and SPNWS in the Cuddapah District of India have been destroyed and diminished due to conversion of land for agriculture purposes, grazing livestock, construction, and woodcutting. These actions are a result of human expansion and the subsequent increase in human activity in and around the SLWS and SPNWS. Additional relocation of villages around SLWS and SPNW is anticipated. Because the two most common livelihoods are agriculture and cattle rearing and because the establishment of additional villages will require more land to accommodate agriculture and livestock needs, the scrub habitat that is vital to the Jerdon's courser remains at risk of further curtailment. The population of the Jerdon's courser is extremely small and believed to be declining, so any further loss or degradation of remaining suitable habitat represents a significant threat to the species. Therefore, we find that present or threatened destruction, modification, or curtailment of the habitat or range are threats to the continued existence of the Jerdon's courser throughout its range.

B. Overutilization for commercial, recreational, scientific, or educational purposes

We are not aware of any information currently available that indicates the use of this species for any commercial, recreational, scientific, or educational purpose. As a result, we are not considering overutilization to be a contributing threat to the continued existence of the Jerdon's courser throughout its range.

C. Disease or predation

We are not aware of any information currently available that indicates disease or predation pose a threat for this species. As a result, we are not considering disease or predation to be contributing threats to the continued existence of the Jerdon's courser throughout its range.

D. Inadequacy of existing regulatory mechanisms

The Jerdon's courser is listed under Schedule I of the Indian Wildlife Protection Act of 1972. Schedule I provides absolute protection with the greatest penalties for offenses. This law prohibits hunting, possession, sale, and transport of listed species and allows the State Government to designate an area as a sanctuary or national park for the purpose of protecting, propagating, or developing wildlife or its environment. The SLWS and SPNWS were established for the purpose of protecting the habitat of the Jerdon's courser. The sanctuaries allow for regulated levels of human use and disturbance while preventing complete loss of scrub habitat (Senapathi *et al.* 2007, p. 8). In addition, the SLWS and SNPWS are designated as Important Bird Areas (IBA) in India (Jeganathan *et al.* 2005, p. 5). IBAs are sites of international importance for the conservation of birds, as well as other animals and plants, and are meant to be used to focus conservation efforts and reinforce the existing protected areas network. However, designation as an IBA provides no legal protection of these areas (BNHS 2009, unpaginated).

The Jerdon's courser is also listed as a priority species under the National Wildlife Action Plan (2002–2016) of India. This National Plan includes guidance to expand and strengthen the existing network of protected areas, develop management plans for protected areas in the country, restore and manage degraded habitats outside of protected areas, and control activities such as poaching and illegal trade, among others. We are unaware of any management plans for the protected areas in Andhra Pradesh where the Jerdon's courser occurs. Additionally, the SLWS and SPNWS are protected by the Forest Conservation Act of 1980. Section 2 of this law restricts the use of forest land for nonforest purposes, such as the fragmentation or clearing of any forest.

In summary, although protections for the species exist, the primary threat to this species is ongoing loss of habitat. Senapathi *et al.* (2007, pp. 7–8) found an extensive and rapid decline in scrub habitat, with most removal of scrub occurring up to sanctuary boundaries and little loss occurring within the wildlife sanctuaries. Due to the threat of an increasing number of settlements near the sanctuaries, and the subsequent further loss of scrub habitat to agriculture and livestock, protection of scrub habitat used by the Jerdon's courser will be important for the species' continued existence. Jeganathan *et al.* (2004, p. 28) classified many areas in the Cuddapah District as suitable habitat for the Jerdon's courser; however, with the exception of one sanctuary, the rest of the suitable habitats are not protected. Therefore, current regulatory mechanisms do not provide enough protection of suitable habitat for this species outside of existing protected areas. We are also unaware of any grazing standards within SLWS and SPNWS to ensure the maintenance of open scrub habitat and that prevent overgrazing by livestock. When combined with Factor A (the present or threatened destruction, modification, or curtailment of the habitat or range), we find that the existing regulatory mechanisms are inadequate to ameliorate the current threats to the Jerdon's courser throughout its range.

E. Other natural or manmade factors affecting the species' continued existence

There are particular species characteristics which render a species vulnerable to extinction (Primack 2002, p. 193). For example, species with a narrow geographic range, small population size, declining population, and specialized habitat requirements are more susceptible to extinction than others without these characteristics (Primack 2002, pp. 193–200). Although exact population estimates and distribution of the Jerdon's courser are not available, the species has been reported as a small, declining population (Jeganathan 2004b, p. 7; BLI 2009b, unpaginated; IUCN 2009c, unpaginated) and only reported from a small patch of scrub habitat in and around the SLWS (Jeganathan *et al.* 2008, p. 73). Furthermore, certain species characteristics, such as those found in this species, predispose it to particular sources of extinction (Owens and Bennett 2000, p. 12147). Owens and Bennett (2000, p. 12147) found that extinction risks for birds with specialized habitat and small body size increased with habitat loss. The Jerdon's courser is a small bird dependent on scrub habitat of moderate density for survival. Habitat loss, as described under Factor A, is the primary threat to this species. Further loss of Jerdon's courser habitat may fragment remaining suitable habitat adjacent to the SLWS and increase the extinction risk for the species. In addition, small, isolated populations may experience decreased demographic viability and increased susceptibility of extinction from stochastic environmental factors (e.g., weather events, disease) and an increased threat of extinction from genetic isolation and subsequent inbreeding depression and genetic drift.

In conclusion, the single known population of Jerdon's courser may be vulnerable to threats associated with low population sizes. Because the known population is small in size, and restricted in range, and depends on a special habitat for survival, any factor (i.e., habitat change, a loss of demographic viability, etc.) that results in a decline in habitat or individuals may be problematic for the long-term recovery of this species. Therefore, we find that other natural or manmade factors pose a threat to the Jerdon's courser throughout its range.

Status Determination for the Jerdon's Courser

We have carefully assessed the best available scientific and commercial information regarding the past, present, and potential future threats faced by the Jerdon's courser. The species is currently at risk throughout all of its range due to ongoing threats of habitat destruction and modification (Factor A), and demographic, genetic, and environmental stochastic events and other complications associated with the species' low population and restricted range (Factor E). Furthermore, we have determined that the existing regulatory mechanisms (Factor D) are not adequate to ameliorate the current threats to the species.

Section 3 of the Act defines an ''endangered species'' as ''any species which is in danger of extinction throughout all or a significant portion of its range'' and a ''threatened species'' as ''any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' Based on the magnitude of the ongoing threats to the Jerdon's courser throughout its entire range, as described above, we determine that this species is in danger of extinction throughout all of its range. Therefore, on the basis of the best available scientific and commercial information, we propose to list the Jerdon's courser as an endangered species throughout all of its range. Because we find that the Jerdon's courser is endangered throughout all of its range, there is no reason to consider its status in a significant portion of its range.

V. Marquesan Imperial Pigeon (*Ducula galeata*)

Species Description

The Marquesan Imperial Pigeon (*Ducula galeata*), known locally as Upe, is a very large arboreal pigeon belonging to the family Columbidae. It was first described by Charles Lucien Bonaparte in 1855 (Villard *et al.* 2003, p. 198; BLI 2009, unpaginated). The species measures 55 cm (22 in) in length, is dark slate-grey with bronze-green reflections on the upperparts, rufous-chestnut undertail-coverts, white eyes, and a white and grey-black cere protruding almost to the tip of the bill (Blanvillain *et al.* 2007, unpaginated; BLI 2009c, unpaginated).

The pigeon is endemic to the French Polynesian Marquesas Archipelago in the Pacific Ocean. The Marquesas Archipelago is a territory of France located approximately 1,600 km (994 mi) northeast of Tahiti. Based on subfossil records, the pigeon was historically present on four islands in the Marquesas Archipelago, Hiva Oa, Ua Huka, Tahuata, and Nuku Hiva, as well as the Cook, the Pitcairn, and Society Island chains (Steadman 1997, p. 740; Thorsen *et al.* 2002, p. 6; Blanvillain and Thorsen 2003, p. 381; Blanvillain *et al.* 2007, unpaginated). At the time of its discovery, the pigeon was already restricted to Nuku Hiva, a 337 km2 (130 sq mi2) island. Researchers believe that hunting, degradation of local forest, invasive weeds and trees, and predation were the probable causes of its decline (Thorsen *et al.* 2002, pp. 8–9; Blanvillian *et al.* 2007, unpaginated). On Nuku Hiva, the pigeon is restricted to 7 sites which are difficult to access by hunters and livestock and appear to be resistant to colonization by rats (Villard *et al.* 2003, p. 191; BLI 2009c, unpaginated). In an effort to protect the remaining population from extinction due to catastrophic events, the pigeon was reintroduced to Ua Huka, an island 50 km (31 mi) east of Nuku Hiva in 2000 (Thorsen *et al.* 2002, p. 14; Blanvillain and Thorsen 2003, p. 385; BLI 2009c, unpaginated). Ua Huka was chosen as a reintroduction site primarily because the pigeon was historically found on the island, and due to availability of suitable habitat located in a protected area, a lack of black rats (*Rattus rattus*), and a smaller human population compared to other Marquesan islands (Thorsen *et al.* 2002, p. 13).

Population estimates on Nuku Hiva have ranged from 75 to 300 birds since 1975; however, the most recent survey, conducted in 2000, estimated the population to be approximately 80-150 birds (Villard *et al.* 2003, p. 194). In 2000, five birds were translocated to Ua Huka and an additional five translocated in 2003. As of 2006, approximately 32 birds were present. The population objective for the reintroduction project is to establish a population of 50 individuals on Ua Huka by 2010 (BLI 2009c, unpaginated).

The species is almost exclusively arboreal and prefers the intermediate and upper canopy forest layers consisting of *Guettarda speciosa, Cerbera manghas, Ficus* spp., *Terminalia cattapa*, and *Sapindus saponaria*; however, individuals have also been observed perched on shrubs (Blanvillain and Thorsen 2003, p. 382; Villard *et al.* 2003, p. 191). These pigeons heavily rely on this canopy forest for roosting and feeding. Based on observations of pigeons in 2000, this species appears to return to the same feeding and night roosting areas.

Species of *Ducula* are primarily frugivorous (fruit eaters). The diet of Marquesan imperial pigeons consists mainly of fruits, which are usually swallowed whole, from *Ficus* spp. and *Psidium guajava* (guava; an introduced

species); however, it has been reported that caterpillars from *S. saponaria* and the foliage and flowers of other tree and shrub species also make up a portion of the pigeon's diet. The species' consumption of an introduced shrub species, the guava, is likely due to the degradation of native habitat (Blanvillain and Thorsen 2003, p. 384) and the subsequent loss of native fruits, foliage, and flowers. Gleaning and browsing are the two main feeding methods (Blanvillain and Thorsen 2003, pp. 382–383).

Courtship behavior includes the male and female sitting next to one another and allopreening the breast and neck areas and mirroring each other's actions (Blanvillain and Thorsen 2003, p. 383). The breeding season is long, occurring from mid-May to December (Thorsen *et al.* 2002, p. 6). Nests are constructed of intermingled branches, approximately 60 cm (24 in) in diameter, 10 to 18 m (33 to 59 ft) above ground at the top of the canopy (Blanvillain and Thorsen 2003, p. 384); clutch size is only one egg (Villard *et al.* 2003, pp. 192, 195). Abundance of fruit is critical in determining the breeding success of frugivorous birds (Thorsen *et al.* 2002, p. 10). However, studies suggest that the pigeon is successfully breeding in different areas where it exists (Thorsen *et al.* 2002, p. 17; Villard *et al.* 2003, p. 195).

Conservation Status

The Marquesan imperial pigeon was originally classified as ''critically endangered'' by the IUCN. In 2008, however, this species was downlisted to ''endangered'' status due to the establishment of a second population through the translocation of birds to Ua Huka (IUCN 2009b, unpaginated). The Marquesan imperial pigeon is also protected under Law Number 95-257 in French Polynesia. The species has not been formally considered for listing in the Appendices of CITES (*http://www.cites.org*).

Summary of Factors Affecting the Marquesan Imperial Pigeon

A. Present or threatened destruction, modification, or curtailment of habitat or range

Destruction of habitat associated with human colonization is one of the main threats to the remaining populations of the Marquesan imperial pigeon. Since Polynesian occupation and discovery of the area by Europeans, substantial changes to the Nuku Hiva landscape have occurred (Thorsen *et al.* 2002, p. 8; Villard *et al.* 2003, p. 190) and are still occurring. These changes include clearing of land for agriculture and development, introduction of domestic livestock, introduction of exotic plants, and introduction of rats (*Rattus* spp.) and cats (*Felis catus*) (Thorsen *et al.* 2002, pp. 8–9).

Most of Nuku Hiva was originally covered by forest, with the exception of the drier northwestern plain where shrub savanna is predominant. Since colonization of Nuku Hiva, the native landscape has been cleared for agriculture and settlement. Fires have been used to clear land for agriculture and plantations (Manu 2009, unpaginated). In more recent times (between 1974 and 1989), all natural vegetation on a large area of the main plateau (de Toovii) on the island was cut down or burned to be converted into grassland for pasture, and 1,100 ha (2,718 ac) were planted with Caribbean pine (*Pinus caribaea*), an exotic tree species. By 2000, modern facilities, such as roads, an airport, and other buildings had been built (Villard *et al.* 2003, pp. 190, 195).

Suitable habitat for this species has also been modified and degraded by introduced domestic livestock and exotic plant species. Domestic livestock have become feral, and while cattle and horses are mostly controlled, feral goats (*Capra hircus*) and pigs (*Sus scrofa)* continue to be a major concern (Villard *et al.* 2003, p. 193). Goats are particularly destructive; they have caused devastation to natural habitats on several other islands (Sykes 1969, pp. 13–16; Parkes 1984, pp. 95–101; Thorsen *et al.* 2002, p. 9).

The Nuku Hiva goat population has been increasing since the 1970s, and both goats and pigs are found everywhere on the island (Villard *et al.* 2003, p. 195). Goats have the potential to damage and alter the vegetative composition of an area by overgrazing indigenous and endemic species to the point at which seedlings are consumed before they are able to mature to a height which is out of the reach of goats and, therefore, survive (Sykes 1969, p. 14; Parkes 1984, pp. 95, 96, 101; Villard *et al.* 2002, p. 189). Subsequently, exotic plant species are able to flourish and outcompete native species, which results in little or no regeneration of native trees (Sykes 1969, p. 15; Thorsen *et al.* 2002, p. 9). Large patches of natural forest have been destroyed by goats and pigs in areas where Marquesan imperial pigeons are found and there is poor natural forest regeneration (Villard *et al.* 2003, p. 193). Blanvillain and Thorsen (2003, pp. 382–383) found most of the ground covered by several introduced plant species, including guava, African basil (*Ocimum gratissimum)*, and soft elephants foot (*Elephantopus mollis*). Overgrazing, combined with the introduction of exotic species, prohibits the tall trees that comprise the canopy layer of the forest from regenerating and from providing feeding and roosting sites needed by pigeons.

In addition, introduced rats on the island of Nuka Hiva inhibit regeneration of native trees because they consume the flowers, fruits, seeds, seedlings, leaves, buds, roots, and rhizomes (Thorsen *et al.* 2002, p. 9; Meyer and Butaud 2009, p. 1570), thus further contributing to the alteration of the vegetation composition. Thorsen *et al.* (2002, p. 9) noted that seed caches containing many seeds that are part of the Marquesan imperial pigeon's food supply were common.

Marquesan imperial pigeons are frugivorous birds and act as seed dispersal agents for those trees from which they feed and roost. Habitat loss, predation, or any other factor resulting in the decline of pigeons indirectly contributes to a decrease in seed dispersal, possibly contributing to low recruitment of the vital native tree species. Therefore, hunting may also contribute to the destruction and modification of habitat (See also Factor B).

The habitat in the Vaiviki Valley on the island of Ua Huka, where the pigeon was reintroduced, was classified as a protected area in 1997 (Thorsen *et al.* 2002, p. 13). There are no indications that ongoing habitat degradation from livestock grazing is occurring in this area.

Summary of Factor A

In summary, the Marquesan imperial pigeon prefers to inhabit the canopy forest layer of mature forests and relies on the fruits of these trees as a food source. This habitat on Nuku Hiva has been destroyed, and continues to be destroyed by conversion of land for agriculture and development, overgrazing, and competition with exotic plant species. The species is currently restricted to seven small sites in the most remote areas of Nuku Hiva (Villard *et al.* 2003, p. 191). An intact canopy of native species is rare; in addition, the native understory and shrub layers are absent and composed mostly of browse-resistant species (Thorsen *et al.* 2002, p. 9). Poor natural forest regeneration is evident in areas where pigeons are found (Villard *et al.* 2003, p. 193). Overgrazing by goats and competition with exotic species remain a threat to the pigeon's habitat on Nuku Hiva; any additional loss of suitable habitat is likely to have a large impact

on the distribution of this species. Since the largest population of pigeons is located on Nuka Hiva and impacts to the suitable habitat on this island are ongoing, we find that present or threatened destruction, modification, or curtailment of the habitat or range is a threat to the continued existence of the Marquesan imperial pigeon on Nuku Hiva. Since Ua Huka is classified as a protected area and there is no indication of ongoing habitat degradation from livestock grazing in this area, we find that present or threatened destruction, modification, or curtailment of the habitat or range are not threats to the continued existence of the Marquesan imperial pigeon on Ua Huka.

B. Overutilization for commercial, recreational, scientific, or educational purposes

Two researchers found that hunting is the primary reason for the current restricted range of the species to remote areas of Nuku Hiva (Thorsen *et al.* 2002, p. 8; Villard *et al.* 2003, p. 193). By 1922, most of the modification of habitat by man had already occurred, yet Marquesan imperial pigeons were still abundant (Villard *et al.* 2003, p. 195). In 1922, 82 birds were killed during an expedition; Villard *et al.* (2003, p. 194) theorized that this represented a significant portion of the estimated several hundred birds present at that time. After these killings, the pigeon was reported as ''not so abundant.'' In 1944, many birds were reported on the northern coast of Nuku Hiva and hunters were known to bring back full bags of birds. In 1951, the population of pigeons appeared to be decreasing and, with the introduction of shotguns in the 1950s, the effect was amplified. During the construction of the airport from 1978 to 1979, workers were known to hunt for pigeons (Villard *et al.* 2003, pp. 193, 195). On Ua Huka, a local agreement now exists not to hunt pigeons (Thorsen *et al.* 2002, p. 13).

Bird hunting in the French Polynesia was banned in 1967; however, the law is rarely enforced and hunting still occurs (Thorsen *et al.* 2002, p. 10) on Nuku Hiva. Most Marquesan imperial pigeons that are killed are opportunistic kills by those hunting goats and pigs, but some intentionally target pigeons for sale to local inhabitants (Thorsen *et al.* 2002, p. 10). In an effort to reduce illegal hunting and engage the public in conservation of local endemic species, the Sociétéd'Ornithologie de Polynésie (Manu), a conservation organization in French Polynesia, developed a public outreach and educational program for local schools about the importance of this species. However, poaching remains a potential threat to the remaining small population (BLI 2009c, unpaginated). To protect the remaining populations from hunting, an agreement by the inhabitants of Nuku Hiva to stop hunting pigeons or the appointment of a ranger to enforce current laws (Thorsen *et al.* 2002, p. 11).

An adult Marquesan imperial pigeon lays only one egg per year, suggesting this species is long lived (Villard *et al.* 2003, pp. 192, 195). Populations of species that are long-lived with low fecundity rates tend to be more affected by loss of breeding adults than those species with shorter lifespans and high fecundity. Therefore, an increase in adult mortality due to illegal hunting would likely have a substantial impact on the survival of this species. Furthermore, because pigeons are frugivorous and act as seed dispersal agents for those trees from which they feed and roost, further declines in pigeons may indirectly contribute to low recruitment of the vital native tree species.

Summary of Factor B

In summary, hunting was likely a major contributing factor to the current restricted range and small population of Marquesan imperial pigeon. On the island of Ua Huka, because the species is in a protected area, there is a smaller human population compared to other Marquesan islands, and since there is no information indicating hunting is a threat to this species on the island of Ua Huka, we find that overutilization is not a threat to the continued existence of the pigeon. On the island of Nuku Hiva, although hunting of pigeons is illegal, the law is not enforced and poaching remains a potential threat. Because this species has a clutch size of one egg, poaching would have a substantial impact on the species' continued existence. Therefore, we find that overutilization is a threat to the continued existence of Marquesan imperial pigeon on the island of Nuku Hiva.

C. Disease or predation

Avian diseases are a concern for species with restricted ranges and small populations, especially if the species is restricted to an island. Extensive human activity in previously undisturbed or isolated areas can lead to the introduction and spread of exotic diseases, some of which (e.g., West Nile virus) can negatively impact endemic bird populations (Neotropical News 2003, p. 1; Naugle *et al.* 2004, p. 704). The introduction and transmittal of an avian disease could result in the extinction of the Marquesan imperial pigeon (Blanvillian *et al.* 2007, unpaginated). Beadell *et al.* (2006, p. 2940) found the presence of Hawaii's avian malaria in reed-warblers on Nuku Hiva; however, there is no data on the effects of this malaria on the population of pigeons on the island. Although large and stable populations of wildlife species have adapted to natural levels of disease and predation within their historic ranges, any additive mortality to the Marquesan imperial pigeon population or a decrease in its fitness due to an increase in the incidence of disease or predation could adversely impact the species' overall viability (see Factor E). However, while these potential influences remain a concern for future management of the species, we are not aware of any information currently available that specifically indicates the occurrence of disease in the Marquesan imperial pigeon. No other diseases are known to affect the pigeons. In addition, the reintroduction of the pigeons to the island of Ua Huka reduces the likelihood of diseases causing extinction of the species.

Black rats were introduced to Nuku Hiva in 1915 and are now found everywhere pigeons are located on Nuku Hiva (Villard *et al.* 2003, pp. 193, 195). Rats may prey upon the eggs and nestlings of Marquesan Imperial pigeons, even if the nests are located in the tops of trees (Thorsen *et al.* 2002, p. 10). However, due to the large size of this species, adult pigeons may be able to chase away rats from their nests (Villard *et al.* 2003, p. 195). Furthermore, Thorsen *et al.* (2002, p. 10) observed juveniles and Villard *et al.* (2003, p. 195) noted a significant proportion of young pigeons, suggesting that black rats are not affecting breeding success. Due to the potential threat of black rats, pigeons were introduced to Ua Huka where black rats were not present. As an additional measure, poison bait stations were established around the wharf area of Ua Huka to prevent introduction of black rats (Thorsen *et al.* 2002, p. 17).

Cats have also been introduced to both the islands of Nuku Hiva and Ua Huka. While predation of adult and juvenile birds by cats is possible when pigeons are forced to feed on low shrubs, such as guava, due to destruction and absence of native species (See Factor A) (Thorsen *et al.* 2002, p. 10), we are not aware of any information currently available that specifically indicates that predation by cats is a threat to the survival of this species.

Summary of Factor C

In summary, while avian diseases such as avian malaria in reed-warblers was found to be present on Nuku Hiva, no avian diseases are known to affect Marquesan imperial pigeons. Although predation has been indicated as a contributing factor to the decline of the species (Thorsen *et al.* 2002, pp. 9, 10; Blanvillain *et al.* 2007, unpaginated), we did not find information to suggest that predation is currently a threat to the survival of this species. Further, while black rats are found everywhere pigeons are found, the observation of a significant proportion of juveniles suggests that predation of pigeon's eggs and nestlings by black rats on Nuku Hiva is not a significant threat to pigeons. Cats are present on both islands, and there is potential for predation when pigeons are forced to feed on low shrubs, such as guava; however, there is no information to substantiate cat predation as a threat to the species' survival. Therefore, we find that disease and predation are not contributing threats to the continued existence of the pigeon throughout its range.

D. Inadequacy of existing regulatory mechanisms

The Marquesan imperial pigeon is a protected species in French Polynesia; it is classified as a Category A species under Law Number 95-257. Article 16 of this law prohibits the collection and exportation of species listed under Category A. Under Article L411-1 of the French Environmental Code, the destruction or poaching of eggs or nests, mutilation, destruction, capture or poaching, intentional disturbance, the practice of taxidermy, transport, peddling, use, possession, offer for sale, or the sale or the purchase of non-domestic species in need of conservation is prohibited. The French Environmental Code also prohibits the destruction, alteration, or degradation of habitat for these species.

Hunting of this species is believed to be one of the main reasons for the species' decline (Thorsen *et al.* 2002, p. 10; Villard *et al.* 2003, p. 195). Hunting and destruction of all species of birds in French Polynesia was prohibited by a decree enacted in 1967 (Villard *et al.* 2003, p. 193). Furthermore, although restrictions on possession of firearms in Marquesas are in place, firearms are made available through visiting boats (Thorsen *et al.* 2002, p. 10). On Ua Huka, there is an agreement in force not to hunt pigeons (Thorsen *et al.* 2002, p. 13). Although this species is fully protected, and hunting has been banned, illegal hunting of the Marquesan Imperial pigeon still occurs (see Factor B) and remains a threat on Nuku Hiva.

The Marquesas Archipelago is designated as an Endemic Bird Area (EBA) (Manu 2009, unpaginated, BLI 2009c). EBAs are territories less than 50,000 km2 (19,300 mi2) where at least two bird species with restricted ranges are found together, and represent priority areas for biodiversity. Nord-Ouest de Nuku Hiva is 9,000 ha area designated as an Important Bird Area (IBA) (Manu 2009, unpaginated). Designation as an IBA constitutes recognition of the area as a critical site for conservation of birds. In addition, Nuku Hiva is designated as an Alliance for Zero Extinction (AZE) (Manu 2009, unpaginated). AZEs are considered areas that are in the most urgent need of conservation. Although Nuku Hiva and Ua Huka are designated as areas of importance to the conservation of birds, these designations only serve to identify areas of biodiversity and focus conservation efforts; there is no legal protection of these areas. There is one officially protected area on Ua Huka (Vaikivi), established in 1997, which is actively managed.

In summary, regulations exist to protect the species and its habitat. The threats that affect the species on each island are different. On the island of Ua Huka, also described under Factors A and B, destruction and modification of habitat are not known to threaten this species and illegal hunting is not occurring. This is likely because the protected area on Ua Huka is actively managed, the human population is less substantial, and there is a local agreement preventing hunting on this island. Furthermore, pigeons were reintroduced to Ua Huka due to the absence of threats to the species. Therefore, we find that the inadequacy of existing regulatory mechanisms is not applicable to Ua Huka. However, as described in Factors A and B, habitat destruction continues to threaten this species and illegal hunting continues to occur on the island of Nuku Hiva. Therefore, we find that the existing regulatory mechanisms are inadequate to ameliorate the current threats to the Marquesan imperial pigeon on the island of Nuku Hiva.

E. Other natural or manmade factors affecting the species' continued existence

Introduced animal and plant species threaten the habitat and survival of the Marquesan imperial pigeon by inhibiting the growth of canopy tree species needed for nesting and roosting and creating competition for food sources.

As described under Factor A, the introduction of livestock, including cattle, horses, goats and pigs, has caused and continues to cause substantial changes in the forest composition, affecting the amount of suitable habitat available for pigeons. Horses are now under control and cattle were eradicated by hunters (Thorsen *et al.* 2002, p. 9; Villard *et al.* 2003, p. 193). However, goats, in particular, overgraze native species to a level at which seedlings are consumed before they mature to a height out of goats' reach (Sykes 1969, p. 14; Parkes 1984, pp 95, 96, 101; Villard *et al.* 2002, p. 189). Consequently, exotic plant species such as guava are able to proliferate, preventing regeneration of natural forest (Sykes 1969, p. 15; Thorsen *et al.* 2002, p. 9). To restore native forests, measures to control feral goats are needed. Local inhabitants hunt goats and pigs (Thorsen *et al.* 2002, p. 10); however, overgrazing continues to be a problem. Fenced enclosures would exclude any livestock and allow regeneration of native species (Thorsen *et al.* 2002, p. 11). In addition, introduced rats on the island of Nuka Hiva inhibit regeneration of native trees by consuming the flowers, fruits, seeds, seedlings, leaves, buds, roots, and rhizomes (Thorsen *et al.* 2002, p. 9; Meyer and Butaud 2009, p. 1570) of native tree species, further contributing to the alteration of forest composition. Introduced species are not known to threaten pigeons on Ua Huka.

Introduced rats on Nuku Hiva may also be a source of competition for food resources that would otherwise be available to pigeons. The diet for the Marquesan imperial pigeon consists of fruits from *Ficus* spp. and guava, foliage of *S. saponaria, T. cattapa*, and *Misceltum* spp., and the flowers of *H. tiliaceus, C. manghas*, and *G. speciosa* (Blanvillain and Thorsen 2003, p. 382). Rats are known to consume the flowers, fruits, and leaves of the same tree species, including guava, *T. cattapa, Ficus* spp., and *S. saponaria* (Thorsen *et al.* 2002, p. 9). The consumption of these fruits and foliage by rats may reduce the available food supply for this frugivorous bird. Furthermore, during periods of limited fruit availability, the pigeons may also compete with the white-capped fruit pigeon (*Ptilinopus dupetitbouarsii*), a wider ranging pigeon found in French Polynesia (including Nuku Hiva and Ua Huka), for food sources (Thorsen *et al.* 2002, p. 10). Abundance of fruit is critical to the breeding success of frugivorous birds. When food resources are limited, breeding output and fledgling and adult

survival may also be affected (Thorsen *et al*. 2002, p. 10). This may be especially critical to the Marquesan imperial pigeon since it is a long-lived species with low fecundity. An increase in adult mortality due to decreased food availability would likely have a substantial impact on the breeding success and, ultimately, on the survival of this species.

Island populations have a higher risk of extinction than mainland populations. Ninety percent of bird species driven to extinction were island species (as cited in Frankham 1997, p. 311). Based on genetics alone, endemic island species are predicted to have higher extinction rates than nonendemic island populations (Frankham 2007, p. 321). Small, isolated populations may experience decreased demographic viability (population birth and death rates, immigration and emigration rates, and sex ratios), increased susceptibility of extinction from stochastic environmental factors (e.g., weather events, disease), and an increased threat of extinction from genetic isolation and subsequent inbreeding depression and genetic drift. As discussed above, there are two small extant populations of Marquesan imperial pigeons, one on Nuku Hiva and a reintroduced population on Ua Huka. Because the species now present on Ua Huka originated from the Nuku Hiva population, there is no genetic variation between the two populations. Furthermore, we have no indication that there is natural dispersion between the populations and, thus, no genetic interchange. The lack of genetic variation may lead to inbreeding and associated complications, including reduced fitness. Species with low fecundity, like the pigeon, are particularly vulnerable to inbreeding depression because they can withstand less decrease in survival before population growth rates are affected and they recover more slowly (Lacy 2000, p. 47). In addition, genetic threats associated with small populations will exacerbate other threats to the species and likely increase the risk of extinction of island populations (Frankham 1997, p. 321).

Summary of Factor E

In summary, introduced livestock and rats are altering the native forests of Nuku Hiva on which the Marquesan imperial pigeon depends. Native tree species are unable to regenerate due to overgrazing by goats; allowing graze-resistant exotic plant species to proliferate. Through consumption of fruits, flowers, seeds, and foliage, rats contribute to the alteration of the native forest and also serve as a source of competition for food. On Nuku Hiva and Ua Huka, the white-capped fruit pigeon may also serve as a source of competition for food during periods of limited fruit availability. When food resources are limited, breeding output and fledgling and adult survival may also be affected, which may be particularly critical for a species with low fecundity.

Both pigeon populations are subject to detrimental effects typical of small island populations. Decreased demographic viability, environmental factors, and genetic isolation may lead to inbreeding depression and associated complications, including reduced fitness. Species with low fecundity are particularly vulnerable because they can withstand less decrease in survival and recover more slowly. These genetic threats will exacerbate other threats to the species and likely increase the risk of extinction. Therefore, we find that other natural or manmade factors are threats to the continued existence of the Marquesan imperial pigeon on both Nuku Hiva and Ua Huka.

Status Determination for the Marquesan Imperial Pigeon

We have carefully assessed the best available scientific and commercial information regarding the past, present, and potential future threats faced by the Marquesan Imperial Pigeon. The species is currently at risk on Nuku Hiva due to ongoing threats of habitat destruction and modification (Factor A); illegal hunting (Factor B); and demographic, genetic, and environmental stochastic events associated with the species' low population, restricted range, and low fecundity (Factor E). Furthermore, we have determined that the existing regulatory mechanisms (Factor D) are not adequate to ameliorate the current threats to the species. In addition, we have determined that Factors A, B, C, and D are not factors affecting the continued existence of the species on Ua Huka. However, we have determined that the Ua Huka population is at risk due to demographic, genetic, and environmental stochastic events associates with the species' low population, restricted range, and low fecundity (Factor E).

Section 3 of the Act defines an ''endangered species'' as ''any species which is in danger of extinction throughout all or a significant portion of its range'' and a ''threatened species'' as ''any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' Based on the magnitude of the ongoing threats to the Marquesan Imperial Pigeon throughout its entire range, as described above, we determine that this species is in danger of extinction throughout all of its range. Therefore, on the basis of the best available scientific and commercial information, we propose to list the Marquesan Imperial Pigeon as an endangered species throughout all of its range. Because we find that the Marquesan Imperial Pigeon is endangered throughout all of its range, there is no reason to consider its status in a significant portion of its range.

VI. Slender-billed Curlew (*Numenius tenuirostris*)

Species Description

The slender-billed curlew (*Numenius tenuirostris*) is a species of wading bird, one of the six curlews of the same genus within the family Scolopacidae. It is medium-sized and mottled brown-grey in color. It has white underparts marked with black heart-shaped spots on the flanks. It has a decurved bill that tapers to a distinctly fine tip. It has pale, barred inner primary feathers and its secondary feathers contrast markedly with its brown-black primary feathers. Its tail is virtually unmarked, with a few dark bars on a white background (BLI 2006, p. 1).

Though this species was regarded as common in the 19th century, it declined precipitously in the 20th century (Hirschfeld 2008, p. 139). The species is believed to breed in Northwest Siberia (though the only two confirmed cases of breeding were in 1914 and 1924). The species migrates 5,000 – 6,000 km (3,100 – 3,700 mi) towards the west-southwest, passing north of the Caspian and Black Seas through southeast and southern Europe to its overwintering grounds in southern Europe and northwest Africa (Gretton 1996, p. 6; Chandrinos 2000, p. 1; Hirschfeld 2008, p. 139). There are also records of wintering birds in the Middle East, but verification of a second wintering area has not been confirmed (Gretton 1996, p. 6).

The species has been sighted in Eastern Europe, including in Russia, Kazakhstan, Ukraine, Bulgaria, Hungary, Romania, and Yugoslavia; in Southern Europe, including Greece, Italy, and Turkey; and in North Africa, including Algeria, Morocco, and Tunisia (BLI 2006, p. 2). It has also been reported in Slovenia, Uzbekistan, and Turkmenistan (BLI 2006, p. 2).

During the second half of the 19th century and up until 1920, the slender-billed curlew was considered an abundant bird. Its population density frequently exceeded that of two relative

species: The Eurasian curlew (*Nemenius arquata*) and the whimbrel (*Numenius phaeopus*) (Chandrinos 2000, p. 1). Flocks of slender-billed curlew over 100 birds in size were recorded in Morocco as late as the 1960s and 1970 (Gretton 1996, p. 6). The population was estimated to be between 80 and 400 birds in 1990, but this estimate was later adjusted to 50 to 270 birds (Gretton 1996, p. 6). In recent years, records consist of sightings of 1 to 3 birds, with one exception in 1995, when a flock of 19 birds was sighted in Italy (BLI 2006, p. 3; Hirschfeld 2008, p. 139). The most recent population estimate is fewer than 50 birds (BLI 2006, p. 3; Hirschfeld 2008, p. 139). Surveys have been conducted in recent years (1987 through 2000) in various parts of the species' historic breeding range, which covered several thousand kilometers of habitat. No slender-billed curlews were found during these survey efforts (Gretton *et al.* 2002, p. 341; CMS update 2004, p. 2). This species has not been seen at its last regular wintering ground in Morocco since 1995 (Gretton 1996, p. 6; Chandrinos 2000, p. 2), and the last confirmed sighting anywhere in the world was in 1999 in Greece (Chandrinos 2000, p. 2).

There are only two confirmed accounts of slender-billed curlew nests. These accounts were both in the early 1900s and are described in four papers by V.E. Ushakav that were later translated. These nests were both located in a wet marsh at Krasnoperovaya, south of Tara, Siberia. The habitat was described as open marsh containing some birch (*Betula*) and marshy areas adjacent to pine (*Pinus*) forests. The nests were located in the middle of the marsh on grassy hillocks or on small dry islands. Based on these early accounts, complete clutch sizes were found to be four eggs per nest between May 11 and June 1, 1900. The young fledged in early July, and family groups of five to six birds were seen wandering around the marsh in early August. Overall, slender-billed curlews were seen in their nesting grounds in Siberia from mid-May until early August (Gretton *et al.* 2002, pp. 335–336).

During seasonal migrations and in the winter months, the species is known to use a variety of habitats, including steppe grassland, saltmarsh, fishponds, brackish lagoons, saltpans, tidal mudflats, semidesert, brackish wetlands, and sandy farmland near lagoons (Hirschfeld 2008, p. 139).

There is little information on the diet of this species. The birds at Merja Zerga (wintering grounds in Morocco) have been recorded eating earthworms and tipulid larvae. Elsewhere, the species has been recorded eating other insects (grasshoppers, earwigs, and beetles), mollusks, and crustaceans (Gretton 1996, p. 7).

Conservation Status

The slender-billed curlew is classified as critically endangered by the IUCN and is listed under CITES Appendix I. Live wild specimens, and parts and products of wild specimens of this species listed under Appendix I of CITES, are prohibited from being traded commercially internationally. The species is also listed on Annex I of the European Union (EU) Wild Bird Directive (Europa Environment 2009, unpaginated) and Appendix I of the Convention on the Conservation of Migratory Species of Wild Animals (also known as CMS or Bonn Convention), which encourages international cooperation for the conservation of species.

Summary of Factors Affecting the Slender-billed Curlew

A. Present or threatened destruction, modification, or curtailment of habitat or range

Krasnoperovaya, near Tara, where Ushakav made his observation in the early 1900s, is located towards the northern limits of the forest-steppe zone, with parts of the marsh having some characteristics of the taiga, such as the presence of conifers. Surveyors noted that in 1990 and 1994 there were still substantial areas of marsh at Krasnopervaya that were quite similar to that described by Ushakov, with possibly more trees being present than in the early 1900s. By 1997, the area had changed dramatically, with the higher grassland areas next to marsh under cultivation, and the marsh itself completely covered with young forest (Boere & Yurlov, as reported in Gretton *et al.* 2002, p. 342).

Threats on the breeding grounds are largely unknown due to the lack of information on this species' nesting localities. Within its potential breeding range, the habitat has been subject to some modification, the taiga is little modified, the forest-steppe has been partially cultivated, and much of the steppe has been modified by intensive agriculture. The impacts to the species from these types of modifications would vary depending on which of these habitat types are used for nesting (Gretton 1996, p. 8).

Habitat loss in the wintering grounds is of unknown importance; however this species has not been seen at the last regular wintering ground in Morocco since 1995 (BLI 2004, unpaginated). Threats to potential wintering habitat are summarized in the 1996 version of the International Action Plan for the Slender-billed Curlew (Gretton 1996, pp. 8–9). Parts of the wintering grounds (e.g., the Rharb plain of northwest Morocco) have undergone extensive drainage of wetlands. In Tunisia also, temporary freshwater marshes (e.g. Kairouan) have been seriously damaged by construction of dams for flood control and the provision of water supplies to these marshes. In other parts of North Africa, other types of wetland have been less affected, including coastal sites and inland sites, such as temporary brackish wetlands. In the Middle East, the permanent marshes in the central (Qurnah) area were reduced to 40 percent of their 1985 extent by 1992, from 1,133,000 ha to 457,000 ha (2,800,000 ac to 1,129,000 ac), with further loss expected (Gretton 1996, p. 8).

In conclusion, this species annually migrates 5,000 to 6,500 km (3,100 to 4,000 mi) between its presumed breeding grounds in Siberia to its wintering grounds in Morocco, passing though many European countries. Many of the areas along the migratory route, such as steppe areas in central and eastern Europe and the area around the Aral Sea, have experienced substantial anthropogenic impacts. There has also been a loss of wetlands in the Palearctic. However, since the species uses a wide variety of habitats along its migratory route and in its wintering grounds, it is unlikely that habitat loss in these areas has played a substantial part in the decline of this species, especially since many other wading birds using these areas have not shown such a decline (Gretton 1996, pp. 7–8). The situation is hard to assess, because Merja Zerga remains the only known regular wintering site for the species. Loss of breeding ground habitat would better explain such a drastic population decline, since the species is thought to use a more specialized habitat for breeding. Belik (1994, p. 37) argued that the species may nest primarily in steppe areas. If this is the case, then the species population decline would be better explained by the extensive loss of this habitat type, particularly in Kazakhstan (Gretton 1996, p. 7). Therefore, we find that present or threatened destruction, modification, or curtailment of the habitat or range threaten the continued existence of the slender-billed curlew throughout its range.

B. Overutilization for commercial, recreational, scientific, or educational purposes

Large-scale hunting of waders was known to occur across most of Europe during the early 20th century, with curlews being preferred (Gretton 1996, p. 8). This species has a reputation for being ''tame,'' meaning that it does not show fear of humans, and was an easy target during a hunt. A significant number of slender-billed curlew specimens, notably from Hungary and Italy, date from this time (Gretton 1991, pp. 37–38). Between 1962 and 1987, 17 slender-billed curlew were known to have been shot (13 of these in Italy and former Yugoslovia) (Gretton 1996, p. 9). Additionally, as late as 1980, one guide described the taking of ''a great number'' from a flock of about 500 in Morocco (Gretton 1991, p. 38).

In summary, hunting has been indicated as a factor in the range-wide decline of this species during the first half of the 20th century. Both legal and illegal hunting is likely to still occur throughout the range of this species. Based on the very small population size and the long-range migratory habits of this species, loss of individual birds is expected to have a significant impact on the remaining population. Therefore, we find that overutilization is a threat to the continued existence of the slender-billed curlew throughout its range.

C. Disease or predation

We are unaware of any threats due to disease or predation for this subspecies. As a result, we are not considering disease or predation to be contributing threats to the continued existence of the slender-billed curlew throughout its range.

D. Inadequacy of existing regulatory mechanisms

As stated above, the slender-billed curlew is listed on Annex I of the European Union (EU) Wild Bird Directive, which includes protection for habitat, bans for activities that directly threaten wild birds, and a network of protected areas for wild birds found within the EU (Europa Environment 2009, unpaginated), and Appendix I of the CMS or Bonn Convention, which includes strictly protected fauna species. This convention encourages international cooperation for the conservation of species.

Inclusion in Appendix I of CMS means that member states work toward strict protection, conserving and restoring the habitat of the species, controlling other reasons for endangerment, and mitigating obstacles to migration, whereas Appendix II encourages multistate and regional cooperation for conservation (CMS 2009, unpaginated). A Memorandum of Understanding (MOU) was developed under CMS auspices and became effective on September 10, 1994.

The MOU area covers 30 Range States in Southern and Eastern Europe, Northern Africa, and the Middle East. As of December 31, 2000, the MOU had been signed by 18 Range States and three cooperating organizations. In early 1996, a status report was produced and distributed by the CMS Secretariat. An International Action Plan for the Conservation of the Slender-billed Curlew was prepared by BLI in 1996, which was later approved by the European Commission and endorsed by the Fifth Meeting of the CMS. The Action Plan is the main tool for conservation activities for the species under the MOU. Conservation priorities include: effective legal protection for the slender-billed curlew and its look-alikes; locating its breeding grounds and key wintering and passage sites; appropriate protection and management of its habitat; and increasing the awareness of politicians in the affected countries (CMS 2009, unpaginated).

The Convention on Migratory Species website (CMS 2004) includes an update on the progress being made under the Slender-billed curlew MOU. It states that conservation activities have already been undertaken or are under way in Albania, Bulgaria, Greece, Italy, Morocco, the Russian Federation, Ukraine, and Iran (CMS 2009, unpaginated). However, no details of these activities are provided. The website also notes that population size may have stabilized at a low level (CMS 2009, unpaginated), although no data or references are provided to support this claim.

Based on the lack of information available on this species (location of breeding and wintering areas and its current population status), it is difficult to assess the adequacy of existing regulatory mechanisms in preventing the extinction of this species. Although progress is under way in various countries to better protect the habitat, prevent loss of individuals from hunting and misidentification, and educate the public about the precarious status of this species, not all 30 Range States of this species have signed the MOU (CMS 2009, unpaginated). Further, Gretton *et al.* 2002 (p. 344) reported that the combined efforts devoted to research and conservation of this species (from 1997–2002) had limited direct impact on this species' chance of survival. Therefore, we find that the inadequacy of existing regulatory mechanisms is a threat to the continued existence of the slender-billed curlew throughout its range.

E. Other natural or man-made factors affecting the species' continued existence

The status of the slender-billed curlew is extremely precarious. As stated above, the most recent population estimate for this species is fewer than 50 birds. The last confirmed sighting of a slender-billed curlew was of a single bird in 1999. Information on the nesting habits and locality of the breeding grounds for this species is extremely limited, and despite survey efforts over the last 20 years, slender-billed curlews have not been located on the only known historic nesting area of this species in the steppes of Siberia.

In smaller populations, additional threats to persistence and stability often surface, resulting from the stochastic nature of these events, which can lead to instability of population dynamics. Among these factors are rates of mate acquisition, breeding success, transmission of genetic material, dispersal, survival, and sex determination. Further, fluctuations in rates as described above can couple with reduction in growth rate to act synergistically (Lacy 2000, pp. 39–40).

Due to the distance of annual migration, the geographic spread of the range, and the limited numbers of birds, the slender-billed curlew is likely vulnerable to one or more threats associated with small population size. Early records of this species often referred to large flocks on migration and in winter. Based on what we know of other similar migratory bird species, it is likely that the experience of older birds was important in guiding such flocks along the migration route. As slender-billed curlew numbers declined, individuals would be more likely to join flocks of other species, notably the Eurasian curlew. The chances of slender-billed curlews meeting each other on the breeding grounds would become increasingly low (as was described for the Eskimo curlew by Bodsworth in 1954). The smaller the population, the less likely it is that this species would be able to locate another slender-billed curlew and successfully reproduce. Since this species has not been recorded on the only known historic breeding grounds for a number of years (Gretton 1996, p. 6), it is difficult to assess whether a breakdown of social behavior patterns has already occurred.

In summary, breakdown of social behavior patterns is increasingly likely

to occur in addition to the general threats posed by small population size such as increased susceptibility to demographic, environmental, and genetic stochasticity, as this species' population levels decline. Because so few individuals have been found in recent years, it is difficult to assess whether the breakdown of social behavior patterns has already occurred. However, given the species' low numbers, this and other threats of small population size could already be occurring. Therefore, we find that demographic, genetic, and environmental stochastic events are threats to the continued existence of the slender-billed curlew throughout its range.

Status Determination for the Slender-billed Curlew

We have carefully assessed the best available scientific and commercial information regarding the past, present, and potential future threats faced by the slender-billed curlew. The species is currently at risk throughout all of its range due to ongoing threats of habitat destruction and modification (Factor A); overutilization for commercial, recreational, scientific, or educational purposes in the form of hunting (Factor B); and threats associated with small population size (Factor E).

Section 3 of the Act defines an ''endangered species'' as ''any species which is in danger of extinction throughout all or a significant portion of its range'' and a ''threatened species'' as ''any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' Based on the magnitude of the ongoing threats to the slender-billed curlew throughout its entire range, as described above, we determine that this species is in danger of extinction throughout all of its range. Therefore, on the basis of the best available scientific and commercial information, we propose to list the slender-billed curlew as an endangered species throughout all of its range. Because we find that the slender-billed curlew is endangered throughout all of its range, there is no reason to consider its status in a significant portion of its range.

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 Federal and foreign governments, private agencies and interest 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 Cantabrian capercaillie, Marquesan Imperial Pigeon, Eiao Polynesian warbler, greater adjutant, Jerdon's courser, and slender-billed curlew are not native to the United States, we are not proposing critical habitat for these species under section 4 of the Act.

Section 8(a) of the Act authorizes the provision of 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 and threatened 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. As such, these prohibitions would be applicable to the Cantabrian capercaillie, Marquesan Imperial Pigeon, Eiao Polynesian warbler, greater adjutant, Jerdon's courser, and slender-billed curlew. These prohibitions, under 50 CFR 17.21 and 17.31, in part, make it illegal for any person subject to the jurisdiction of the United States to ''take'' (take includes: to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to engage in any such conduct) any endangered wildlife species 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 commercial activity; or 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.

Permits may be issued 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 17.32 for threatened species. With regard to endangered wildlife, a permit may 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 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 listing decisions are 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 species listed in this proposed rule. 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

Paperwork Reduction Act

This proposed rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under 44 U.S.C. 3501 *et seq.* The regulation will not impose new recordkeeping or reporting requirements on State or local

governments, individuals, businesses, or organizations. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

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. 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, the sections where you feel lists or tables would be useful, etc.

References Cited

A complete list of all references cited in this proposed rule is available upon request (see **FOR FURTHER INFORMATION CONTACT** section).

Author(s)

The primary authors of this proposed rule are staff members of the Branch of Listing, Endangered Species, U.S. Fish and Wildlife Service (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

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

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

2. Amend § 17.11(h) by adding new entries for ''Adjutant, Greater,'' ''Capercaillie, Cantabrian,'' ''Courser, Jerdon's,'' ''Curlew, Slender-billed,'' ''Pigeon, Marquesan Imperial,'' and ''Warbler, Eiao Polynesian'' in alphabetical order under BIRDS to the List of Endangered and Threatened Wildlife as follows:

§17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

SPECIES		Historic Range	Vertebrate population where endangered or threatened	Status	When Listed	Critical Habitat	Special Rules
Common name	Scientific name						
*	*	*	*		*	*	*
Birds							
*	*	*	*		*	*	*
Adjutant, greater	*Leptoptilos dubius*		Entire	E		NA	NA
*	*	*	*		*	*	*
Capercaillie, Cantabrian	*Tetrao urogallus cantabricus*		Entire	E		NA	NA
*	*	*	*		*	*	*
Courser, Jerdon's	*Rhinoptilus bitorquatus*	India	Entire	E		NA	NA
*	*	*	*		*	*	*
Curlew, slender-billed	*Numenius tenuirostris*		Entire	E		NA	NA
*	*	*	*		*	*	*
Pigeon, Marquesan Imperial	*Ducula galeata*	French Polynesia	Entire	E		NA	NA

SPECIES		Historic Range	Vertebrate population where endangered or threatened	Status	When Listed	Critical Habitat	Special Rules
Common name	Scientific name						
*	*	*	*		*	*	*
Warbler, Eiao Polynesian	*Acrocephalus percernis aquilonis*		Entire	E		NA	NA
*	*	*	*		*	*	*

Dated: December 16, 2009

Daniel M. Ashe,

Acting Director, Fish and Wildlife Service

[FR Doc. E9–31101 Filed 1–4–10; 8:45 am]

BILLING CODE 4310–55–S

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS-R9-ES-2009-0089]
[90100-1660-1FLA]

[RIN 1018-AW70]

Endangered and Threatened Wildlife and Plants; Withdrawal of Proposed Rule to List Cook's Petrel

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; withdrawal.

SUMMARY: We, the U.S. Fish and Wildlife Service, withdraw our December 17, 2007, proposal (72 FR 71298) to list the Cook's petrel (*Pterodroma cookii*) as a threatened species under the Endangered Species Act of 1973, as amended. Based on a thorough review of the best available scientific data, we do not believe this species is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

DATES: The December 17, 2007 (72 FR 71298), proposal to list the Cook's petrel as a threatened species is withdrawn as of January 5, 2010.

ADDRESSES: Comments and materials we receive, as well as supporting information used in the preparation of this document, are available for public inspection, by appointment, during normal business hours, Monday through Friday, at the U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Suite 110, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Douglas Krofta, Chief, Branch of Listing, Endangered Species, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 420, Arlington, VA 22203; telephone 703-358-2105. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Background

The Cook's petrel (*Pterodroma cookii*) is a small, grey and white gadfly petrel that is endemic to the New Zealand archipelago (del Hoyo *et al.* 1992, p. 11; Rayner *et al.* 2007b, p. 59; Birdlife International (BLI) 2009, unpaginated). Its darker grey wings show an ''M'' in flight. It is distinguished from other petrels by a whiter underwing (BLI 2009, unpaginated). The species was first taxonomically described by Gray in 1843 (Sibley and Monroe 1990, p. 322).

The New Zealand archipelago comprises two main islands, the North and South islands, and numerous smaller islands. The total land area of the archipelago covers 103,363 square miles (mi^2) (267,710 square kilometers (km^2)) (CIA 2009, unpaginated). Birds migrate to the east Pacific Ocean, mainly between 34 degrees south (°S) and 30 degrees north (°N) (Heather and Robertson 1997, as cited in BLI 2009, unpaginated).

The species' diet consists primarily of cephalopods, fish, crustaceans, and bioluminescent tunicates that can be hunted at night (Imber 1996, p. 189). It breeds in burrows on forested ridges and steep slopes. Ideal breeding habitat is unmodified forests close to ridge tops with a low and open canopy and many large stems (Marchant and Higgins 1990, as cited in BLI 2009, unpaginated; Rayner *et al.* 2007b, p. 59; Rayner *et al.* 2007c, p. 243; Rayner *et al.* 2007, as cited in BLI 2009). Historically, Cook's petrels were harvested in large numbers as a food source by native Moriori (Oliver 1955, p. 10).

Although the Cook's petrel was once considered a dominant species on these New Zealand islands, the species' breeding and nesting activities are now restricted to islands at the northern and southern limits of its former breeding range, including Great Barrier (Aotea), Little Barrier (Hauturu), and Codfish (Whenua Hou) islands (del Hoyo *et al.* 1992, p. 15).

BLI (2009, unpaginated) estimates the range of the Cook's petrel to be 124 mi^2 (320 km^2). However, BLI (2000, pp. 22, 27) defines ''range'' as the ''Extent of Occurrence, the area contained within the shortest continuous imaginary boundary which can be drawn to encompass all the known, inferred, or projected sites of present occurrence of a species, excluding cases of vagrancy.'' Therefore, this reported range includes a large area of nonbreeding habitat (i.e., the sea).

The population of the Cook's petrel on Little Barrier Island was thought to be about 50,000 pairs (BLI 2007, unpaginated). Using GIS (Geographic Information System) technology, Rayner *et al.* (2007c, pp. 241–242) and Rayner (2008, in litt.) determined that the population is approximately 286,000 pairs. The population on Codfish Island is approximately 5,000 breeding pairs (Rayner 2008, in litt.). In 2006, the Great Barrier Island population was considered to be in danger of extirpation because only four nest burrows had been located in recent years, and it was estimated that fewer than 20 pairs continued to breed on the island. However, the populations on Little Barrier and Codfish islands are increasing following predator eradications (Rayner 2008, in litt.; BLI 2009, unpaginated). The minimum world population for Cook's petrel is estimated to be approximately 1,300,000 individuals, with an increasing population trend (Rayner *et al.* 2007c, p. 245; Rayner 2008, in litt.; BLI 2009, unpaginated).

Previous Federal Actions

On November 28, 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 Endangered and Threatened Wildlife (50 CFR 17.11(h)), including Cook's petrel. Two of the foreign species identified in the

petition were already listed under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*); therefore, in response to the 1980 petition, we published a substantial 90–day finding on May 12, 1981 (46 FR 26464), for 58 foreign species and initiated a status review. 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 pending petition findings. 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. We published additional annual notices on the 58 species included in the 1980 petition on January 9, 1986 (51 FR 996), July 7, 1988 (53 FR 25511), December 29, 1988 (53 FR 52746), April 25, 1990 (55 FR 17475), November 21, 1991 (56 FR 58664), and May 21, 2004 (69 FR 29354).

On May 6, 1991, we received a petition (1991 petition) from ICBP to add an additional 53 species of foreign birds to the List of Endangered and Threatened Wildlife. The 1991 petition also confirmed the 1980 petition's request to add Cook's petrel to the List of Endangered and Threatened Wildlife.

Per the Service's listing priority guidelines (September 21, 1983; 48 FR 43098), in our April 23, 2007, Annual Notice on Resubmitted Petition Findings for Foreign Species (72 FR 20184), we determined that listing six seabird species of the family Procellariidae, including Cook's petrel, was warranted. In selecting these six species from the list of warranted-but-precluded species, we took into consideration the magnitude and immediacy of the threats to the species, consistent with the Service's listing priority guidelines.

On December 17, 2007 (72 FR 71298), we published in the **Federal Register** a proposal to list the Chatham petrel, Fiji petrel, and the magenta petrel as endangered under the Act, and the Cook's petrel, Galapagos petrel, and the Heinroth's shearwater as threatened under the Act. We implemented the Service's peer review process and opened a 60–day comment period to solicit scientific and commercial information on the species from all interested parties following publication of the proposed rule.

On December 30, 2008, the Service received a 60–day notice of intent to sue from the Center for Biological Diversity (CBD) over violations of section 4 of the Act and the Administrative Procedure Act (APA) for the Service's failure to issue a final determination regarding the listing of these six foreign birds. Under a settlement agreement approved by the U.S. District Court for the Northern District of California on June 15, 2009 (*CBD* v. *Salazar*, 09-cv-02578-CRB), the Service must submit to the **Federal Register** final determinations on the proposed listings of the Chatham petrel, Fiji petrel, and magenta petrel by September 30, 2009, and final determinations on the proposed listings of the Cook's petrel, Galapagos petrel, and Heinroth's shearwater by December 29, 2009.

We listed the Chatham petrel, Fiji petrel, and magenta petrel as endangered in a final rule published on September 14, 2009 (74 FR 46914). We are listing the Galapagos petrel and Heinroth's shearwater in a final rule published in the Rules and Regulations section of today's **Federal Register**. This document addresses only the Cook's petrel.

Summary of Comments and Recommendations

In the proposed rule published on December 17, 2007 (72 FR 71298), we requested that all interested parties submit information that might contribute to development of a final rule. We received nine comments addressing the proposed listing of the six Procellariid species: six from members of the public, one from an international conservation organization, one from the U.S. National Marine Fisheries Service (NMFS), and one from the New Zealand Department of Conservation (NZDOC). In all, four commenters supported the proposed listings. Five commenters provided information but did not express support or opposition to the proposed listings. We address the comments we received below.

Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from 14 knowledgeable individuals with scientific expertise that included familiarity with the six Procellariid species, the geographic region in which the six species occur, and conservation biology principles. We received a response from six of the peer reviewers from whom we requested comments. The peer reviewers generally agreed that the description of the biology and habitat for each species was accurate and based on the best available information. New or additional information on the current population numbers for the Cook's petrel and threats to the species was provided and incorporated into this determination as appropriate (as indicated in the citations by ''in litt.'').

Peer Review Comments

Comment 1: Provide the taxonomic list(s) of birds used to identify the six species.

Our Response: We have added information on taxonomy of the Cook's petrel to this determination.

Comment 2: One peer reviewer disagreed with our conclusion in the proposed rule that there was a likelihood of extinction for Cook's petrel within the foreseeable future. The peer reviewer provided us with new information on the population levels and threats to this species.

Our Response: Based on this new information (which is discussed above in the Background section of this document), we have reexamined our proposal to list the Cook's petrel (*Pterodroma cookii*) as a threatened species, and we are withdrawing our proposal to list this species under the Act. We concur with the peer reviewer and do not believe this species is likely to become an endangered species within the foreseeable future throughout all, or a significant portion, of its range.

Other Comments

Comment 3: Listing under the Act provides substantial benefits to foreign species, such as drawing attention to their needs and providing much-needed funding and expertise to address the significant threats they face.

Our Response: We agree that listing a foreign species under the Act provides benefits to the species in the form of conservation measures, such as recognition, requirements for Federal protection, and prohibitions against certain practices. However, we did not find any threats of such magnitude to warrant listing of this species. In addition, we found evidence of active support for the conservation of this species, which has contributed to the increasing population.

Comment 4: We would encourage the U.S. Fish and Wildlife Service to carefully consider how listing these species under the Act will benefit their conservation. Would listing under the Act prompt U.S.-based actions that the species would otherwise not receive?

Our Response: As part of the conservation measures provided to foreign species listed under the Act, recognition through listing results in public awareness and encourages and results in conservation actions by

Federal and State governments, private agencies and groups, and individuals. In addition, section 8(a) of the Act authorizes the provision of 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 and threatened species and to provide assistance for such programs in the form of personnel and the training of personnel.

Comment 5: The general statement that the ''long-line fishery...is the single greatest threat to all seabirds'' erroneously indicates long-line fishing as a threat to all seabirds. The main species of seabirds killed in long-line fisheries are albatrosses and other species of petrels (not *Pterodroma* species). The characteristics of a petrel species vulnerable to long-line fishing (seabird that is aggressive and good at seizing prey, or baited hooks, at the water's surface, or is a proficient diver) do not describe the five *Pterodroma* species or the Heinroth's shearwater that are proposed for listing under the Act. Fisheries by catch has not been identified as a key threat for any of these species; thus it is inaccurate to characterize long-line fishing as a threat to these species or to all seabird species.

Our Response: We received several comments disputing our statement that long-line fisheries threaten all seabirds and Cook's petrel, Galapagos petrel, and the Heinroth's shearwater in particular, and we have amended this determination for the Cook's petrel accordingly (see the Summary of Factors Affecting the Cook's Petrel section of this document).

Comment 6: The serious threats to the species are impacts from extremely small populations, limited breeding locations or foraging ranges, loss and degradation of nesting habitat, invasive alien species, introduced predators, and hunting.

Our Response: Although this may be true of the other Procellariid species included in the 2007 proposed rule, we are not aware of any information that indicates that the Cook's petrel is currently threatened by hunting or over collection in New Zealand.

Comment 7: The primary threats to these species are predation by introduced predators and risk at breeding colonies.

Our Response: Although this may be true of the other Procellariid species included in the 2007 proposed rule, we are not aware of any information that indicates that the Cook's petrel is currently threatened by nonnative predators.

Species Information and Factors Affecting the Species

Section 4 of the Act, 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. Listing actions may be warranted based on any of the above threat factors, singly or in combination.

Conservation Status

Rayner (2008, in litt.) suggested a revision of the conservation status of this species, under IUCN criteria, from endangered to vulnerable based on the refined population numbers mentioned above and discussed below. The IUCN has recently reclassified Cook's petrel from ''Endangered'' to ''Vulnerable'' based on an increasing population trend and habitat (BLI 2009, unpaginated).

Summary of Factors Affecting the Cook's Petrel

A. The Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

The range of this species changes intra-annually based on an established breeding cycle. During the breeding season, which appears to vary by population (Taylor 2000, p. 135), birds return to colonies to breed and nest. During the nonbreeding season, birds migrate far from their breeding range where they remain at sea until returning to breed. Therefore, our analysis of Factor A is separated into analyses of: (1) The species' breeding habitat and range, and (2) the species' nonbreeding habitat and range.

The Cook's petrel breeds on Little Barrier and Great Barrier islands in the Hauraki Gulf, northeast of New Zealand's North Island, and Codfish Island, west of Stewart Island in southern New Zealand. The species breeds on steep slopes near ridge tops at 984 feet (300 meters) above sea level or higher and prefers unmodified forest habitat with low, open canopies (Rayner *et al.* 2007b, pp. 65-66). Fire is unlikely to be a threat to this species' breeding habitat because Cook's petrels primarily breed in damp forests (Imber 1985a, as cited in Taylor 2000, p. 135). Breeding burrows are usually long and deep among tree roots and are not easily collapsed, so trampling by introduced species is not likely to be a threat to Cook's petrel nest sites (Taylor 2000, p. 135).

According to the best available information, a large amount of suitable habitat is available to the Cook's petrel on the three islands where it breeds (Rayner *et al.* 2007b, p. 59; Rayner 2008, in litt.). Of these islands, the largest, the Great Barrier Island covering 110 mi^2 (285 km^2), is the only island that has a permanent human population. This small population of 1,100 people is located primarily within coastal settlements, away from the species' breeding habitat. Inhabitants mostly make a living from farming and the tourist industry, but the island is not considered a major tourist destination due to its relative remoteness (Wikipedia 2007a, unpaginated). There is no indication that the Cook's petrel's breeding habitat on Great Barrier Island is threatened with human-induced habitat destruction or modification.

The other two islands, Little Barrier and Codfish islands, covering 11 and 9 mi^2 (28 km^2 and 23 km^2), respectively, are wildlife sanctuaries with restricted access. These islands are not inhabited by humans aside from rotational conservation staff (Wikipedia 2007a and b, unpaginated). Therefore, the Cook's petrel's breeding habitat on these islands is not threatened with human-induced habitat destruction or modification.

In 2004, the Maungatautari Ecological Island Trust prepared ''An Ecological Restoration Plan for Maungatautari,'' which included restoration of habitat and the removal of threats to attract or reintroduce Cook's petrel, as well as a number of other native species, to New Zealand's North Island (McQueen 2004, pp. 13-22). In 2007, the Trust finished construction of a 29-mi (47-km) pest-proof fence around the forest edge of Maungatautari [Mountain] to allow restoration of degraded habitat and reintroduction of native plants and animals that were historically known from this area but no longer occur there (Maungatautari Ecological Island Trust N.D., unpaginated). Reintroduction of Cook's petrel is suggested by McQueen (2004, p. 50) following eradication of all

pest species within the fenced area. There is no information to indicate that reintroduction efforts have begun for this species at Maungatautari. However, if successful, this effort would expand the current breeding range of the species.

During the nonbreeding season, the Cook's petrel migrates to the east Pacific Ocean, primarily between 34 °S and 30 °N (Heather and Robertson 1997, as cited in BLI 2009, unpaginated). We are unaware of any present or threatened destruction, modification, or curtailment of this species' current sea habitat or range.

Summary of Factor A

We are not aware of any scientific or commercial information that indicates that the present or threatened destruction, modification, or curtailment of the Cook's petrel's habitat or range poses a threat to this species. As a result, we do not consider the destruction, modification, or curtailment of the species' habitat or range to be a contributing factor to the continued existence of the Cook's petrel.

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

We are unaware of any scientific or commercial information that indicates that overutilization of the Cook's petrel for commercial, recreational, scientific, or education purposes poses a threat to this species. As a result, we do not consider the destruction, modification, or curtailment of the species' habitat or range to be a contributing factor to the continued existence of the Cook's petrel.

C. Disease or Predation

Although several diseases have been documented in other species of petrels, disease has not been documented in the Cook's petrel. Therefore, we have no other information to indicate that disease is a threat to Cook's petrel.

The introduction of predatory species by European settlers is believed to have contributed to the historical population decline in this species. The best available information indicates that the Codfish Island population declined due to predation by rats and the weka, a bird native to the North and South islands and introduced to Codfish Island (Marchant and Higgins 1990, as cited in BLI 2009, unpaginated). In 1934, there were an estimated 20,000 breeding pairs on Codfish Island, but weka predation reduced the population to 100 pairs by 1984 (Bartle *et al.* 1993, as cited in Taylor 2000, p. 135). On Little Barrier and Great Barrier islands, introduced feral cats and the Pacific rat reduced Cook's petrel population numbers. However, a Pacific rat eradication on Little Barrier Island in 2004 led to a tenfold increase in breeding success of Cook's petrel (Rayner *et al.* 2007a, p. 20862; Rayner 2008, in litt.). The black rat (*Rattus rattus*) also contributed to the decline on Great Barrier Island (Heather and Robertson 1997, Marchant and Higgins 1990, as cited in BLI 2009, unpaginated; Taylor 2000, p. 135).

Due to extensive predator eradication programs implemented by NZDOC, by 1980, feral cats had been eradicated from Little Barrier Island. By 1985, weka had been eradicated from Codfish Island (Taylor 2000, p. 135). Rats had been successfully eradicated from Codfish Island by 1998, and from Little Barrier Island by 2006 (NZDOC 2006a, unpaginated).

The NZDOC manages Little Barrier Island under the New Zealand Conservation Act of 1987 as a nature reserve for many of New Zealand's most threatened species as well as other native animals and plants (Little Barrier Island Supporters Trust 2007, unpaginated). Access to the island is restricted by permit for scientific or conservation purposes only, and visitor numbers and movements are strictly regulated. Resident NZDOC rangers are responsible for day-to-day management and for coordinating research activities and volunteer working groups (Little Barrier Island Supporters Trust 2007, unpaginated). While there is an ongoing risk that predators, such as rats or cats, may be inadvertently reintroduced to the island by boats transporting conservation and research groups to the island, we believe the risk of these predators becoming reestablished on the island is quite low because the NZDOC monitors and manages the island intensively to maintain the island as a predator-free habitat. In 2006, Cook's petrels were reported to be breeding in record numbers since rats were eradicated on Little Barrier Island, and 86 percent of eggs in a monitored area hatched with all chicks fledged or about to fledge (NZDOC News 2006, unpaginated).

The NZDOC also manages the 3,459-acre (1,400-hectare) Codfish Island Nature Reserve for several threatened species, as well as the Cook's petrel (NZDOC 2006b, unpaginated). Access is restricted and by permit for scientific or conservation purposes only. In order to prevent the inadvertent introduction of pest plants and animals, incoming bags and equipment are searched at an on-island quarantine facility (Encyclopedia of New Zealand 2007, unpaginated). As stated above, while there is an ongoing risk that predators, such as rats or cats, may be inadvertently reintroduced to the island by boats transporting conservation and research groups to the island, we believe the risk of these predators becoming reestablished on the island is quite low because the NZDOC monitors and manages the island intensively to maintain it as a predator-free habitat.

Although the introduced predators that threaten Cook's petrels have been eradicated from Little Barrier and Codfish Islands, introduced predators have not been removed from Great Barrier Island. As a result, the Cook's petrel population on Great Barrier Island, which has been reduced to 20 breeding pairs, continues to be severely threatened by introduced feral cats, the black rat, and the Pacific rat (Marchant and Higgins 1990, as cited in BLI 2009, unpaginated; Rayner 2008, in litt.), and the risk of extirpation of this species from Great Barrier Island is high. In fact, Rayner (2008, in litt.) believes this population has long since ceased to be viable and that the small number of burrows on Great Barrier Island are due to ongoing recruitment from the large population on Little Barrier Island, 1.9 mi (3 km) away.

Summary of Factor C

We are unaware of any threats to this species from disease affecting the continued existence of this species.

Predators have been successfully eradicated from both Little Barrier Island and Codfish Island. There is a current ongoing effort by NZDOC to monitor for reintroductions of nonnative plants and animals on these islands and immediately eradicate any detected. Therefore, we find that introduced predators are not an immediate threat to Cook's petrel populations on Little Barrier and Codfish islands. We find that introduced predators are a threat to Cook's petrels on Great Barrier Island. According to Rayner (2008, in litt.), burrows that have been found on Great Barrier Island over the last 25 years are likely due to recruitment of birds from nearby Little Barrier Island, and not due to the presence of a viable population on Great Barrier Island.

We are unaware of any threats due to predation on Cook's petrels during the nonbreeding season (while the species is at sea) affecting the continued existence of this species.

Therefore, we find that neither disease nor predation is a threat to the Cook's petrel on Codfish and Little Barrier islands now or in the foreseeable future. Predation is a threat to this species on Great Barrier Island, but it is questionable whether these birds comprise a viable population.

D. The Inadequacy of Existing Regulatory Mechanisms

The Cook's petrel is protected from disturbance and harvest under New Zealand's Wildlife Act of 1953 and its Reserves Act of 1977. The petrel is designated as a declining species by the NZDOC, which signifies the species is not seriously threatened, ''but may become so over time if population trends continue on their current trajectory'' (Hitchmough *et al.* 2005, p. 49; Townsend *et al.* 2008, pp. 10–11). As discussed in Factor C above, this species is not threatened by predators such as nonnative rats, feral cats, and weka on Codfish and Little Barrier islands due to the successful efforts of the NZDOC to eradicate and maintain these islands as predator-free. We are not aware of any predator eradication efforts in the burrow areas on Great Barrier Island, and therefore these birds are threatened by nonnative predators. Though currently not classified as a seriously threatened species, the NZDOC and other agencies and organizations have implemented many actions that directly or indirectly benefit the conservation of Cook's petrel. These actions include the removal of all predators on two of the three known islands with petrel breeding sites; the support of research and other studies on the Cook's petrel to better understand its biological and ecological requirements, and the reintroduction of Cook's petrel to predator-free sites in its historical range (e.g., Maungatautari on the North Island) (McQueen 2004, pp. 47, 50, 65; NZDOC News 2007, unpaginated; Taylor 2000, p. 136).

Summary of Factor of D

The available regulatory protections conferred by the New Zealand Wildlife and Reserves acts, in combination with the actions implemented for the protection of the Cook's petrel by the NZDOC and other organizations and agencies, provide significant protection to this species on Codfish and Little Barrier islands. Therefore, we find that the inadequacy of existing regulatory mechanisms is not a threat to Cook's petrel on Codfish and Little Barrier islands now and in the foreseeable future. However, while existing regulatory mechanisms have not eliminated the threat from predators on Great Barrier Island, this population is not believed to be viable and the presence of birds on this island is most likely due to ongoing recruitment from the large population on nearby Little Barrier Island.

E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

As previously mentioned, several commenters disputed our statement, in our 2007 proposed rule to list six Procellariid species (72 FR 71298), that long-line fisheries threaten all seabirds and in particular, Cook's petrel, Galapagos petrel, and Heinroth's shearwater. According to the U.S. National Marine Fisheries Service (Mecum, in litt. 2008) and BLI (Small, in litt. 2008), the main seabirds killed in long-line fisheries are albatrosses and other species of petrels (not *Pterodroma* species). The characteristics of a petrel species vulnerable to long-line fishing (seabird that is aggressive and good at seizing prey, or baited hooks, at the water's surface, or is a proficient diver) do not describe the five *Pterodroma* species, including Cook's petrel. According to the commenters, fisheries by catch has not been identified as a key threat for any of these species (Small, in litt. 2008; Mecum, in litt. 2008; NZDOC, in litt. 2008, pp. 2-3). Therefore, we do not believe that long-line fishing is a significant threat to the Cook's petrel.

In our 2007 proposal (72 FR 71298), we stated that the loss of the Cook's petrel population on Great Barrier Island would decrease the species' genetic diversity and increase the risk of extinction of this species. However, based on information we received during the public comment period, we now believe that the population on Great Barrier Island is no longer viable and that the small number of burrows on this island are due to ongoing recruitment from the large population on Little Barrier Island, 1.9 mi (3 km) away (Rayner 2008, in litt.). Therefore, the genetic diversity contributed by the Great Barrier Island population is likely already extirpated, and there is a low risk of extinction of this species due to the loss of the Great Barrier Island population because the presence of birds on Great Barrier Island is due to recruitment of birds from Little Barrier Island (i.e., currently there is not a Great Barrier population), the overall population number of the species is quite high (estimated to be approximately 1,300,000 individuals), and the populations on Codfish and Little Barrier islands are increasing.

We are unaware of any threats to this species from other natural or manmade factors affecting the continued existence of this species.

Summary of Factor E

The characteristics of a petrel species vulnerable to long-line fishing do not describe the Cook's petrel; therefore, we do not believe that long-line fishing is a significant threat to the Cook's petrel. Since the birds present on Great Barrier Island are believed to be mostly from recruitment of birds from Little Barrier Island, we find that the Cook's petrel is not threatened by other natural or manmade factors affecting the continued existence of the species throughout all of its range now or in the foreseeable future.

Significant Portion of the Range

We now consider whether more immediate threats place this species in imminent danger of extinction in any significant portion of the species' range. Having determined that this species does not meet the definition of threatened or endangered throughout its range, we must next consider whether there are any significant portions of its range that are in danger of extinction or are likely to become endangered in the foreseeable future. On March 16, 2007, a formal opinion was issued by the Solicitor of the Department of the Interior, ''The Meaning of In Danger of Extinction Throughout All or a Significant Portion of Its Range'' (U.S. Department of the Interior 2007). We have summarized our interpretation of that opinion and the underlying statutory language below.

A portion of a species' range is significant if it is part of the current range of the species and it contributes substantially to the representation, resiliency, or redundancy of the species. The contribution must be at a level such that its loss would result in a decrease in the ability to conserve the species. In other words, in considering significance, the Service should ask whether the loss of this portion likely would eventually move the species toward extinction, but not necessarily to the point where the species should be listed as threatened throughout its range.

The first step in determining whether a species is threatened or endangered in a significant portion of its range is to identify any portions of the range of the species that warrant further consideration. The range of a species can theoretically be divided into portions in an infinite number of ways. However, there is no purpose to analyzing portions of the range that are not reasonably likely to be significant and threatened or endangered. To identify only those portions that warrant further consideration, we determine whether there is substantial information indicating that (i) the portions may be significant and (ii) the species may be in danger of extinction there or likely to

become so within the foreseeable future. In practice, a key part of this analysis is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats applies only to portions of the range that are not significant to the conservation of the species, such portions will not warrant further consideration. If we identify any portions that warrant further consideration, we then determine whether in fact the species is threatened or endangered in any significant portion of its range.

The terms ''resiliency,'' ''redundancy,'' and ''representation'' are intended to be indicators of the conservation value of portions of the range. Resiliency of a species allows the species to recover from periodic disturbance. A species will likely be more resilient if large populations exist in high-quality habitat that is distributed throughout the range of the species in such a way as to capture the environmental variability found within the range of the species. It is likely that the larger size of a population will help contribute to the viability of the species overall. Thus, a portion of the range of a species may make a meaningful contribution to the resiliency of the species if the area is relatively large and contains particularly high-quality habitat or if its location or characteristics make it less susceptible to certain threats than other portions of the range. When evaluating whether or how a portion of the range contributes to resiliency of the species, it may help to evaluate the historical value of the portion and how frequently the portion is used by the species. In addition, the portion may contribute to resiliency for other reasons — for instance, it may contain an important concentration of certain types of habitat that are necessary for the species to carry out its life-history functions, such as breeding, feeding, migration, dispersal, or wintering.

Redundancy of populations may be needed to provide a margin of safety for the species to withstand catastrophic events. This does not mean that any portion that provides redundancy is a significant portion of the range of a species. The idea is to conserve enough areas of the range such that random perturbations in the system act on only a few populations. Therefore, each area must be examined based on whether that area provides an increment of redundancy is important to the conservation of the species.

Adequate representation insures that the species' adaptive capabilities are conserved. Specifically, the portion should be evaluated to see how it contributes to the genetic diversity of the species. The loss of genetically based diversity may substantially reduce the ability of the species to respond and adapt to future environmental changes. A peripheral population may contribute meaningfully to representation if there is evidence that it provides genetic diversity due to its location on the margin of the species' habitat requirements.

The population on Great Barrier Island is approximately 20 breeding pairs. Cook's petrels on Great Barrier Island are threatened by predation from rats and feral cats; however the available information suggests that the population on this island is essentially extirpated. Further, based on the best information available, petrels that use Great Barrier Island are believed to be birds that are dispersing from the other islands; they are not believed to be distinct genetically, nor are they believed to be a wholly separate population. On the basis that the habitat on Great Barrier Island appears to be of low quality and supports feral cats and rats, and because the birds are believed to be dispersing from other nearby islands, we believe that the birds and the habitat on Great Barrier Island are not significant to the species as a whole because they do not contribute significantly to the representation, resiliency, or redundancy of the species. Loss of these birds and the habitat on Great Barrier Island would not result in a meaningful effect on the representation, resiliency, and redundancy of the species. There are large, healthy, populations on two other islands that are protected, and the NZDOC is translocating birds to other protected areas.

Following an evaluation of the best available information, we conclude that the population and the portion of the Cook's petrel range on Great Barrier Island is not significant to the taxon and does not warrant further consideration as a significant portion of the species' range. The population is believed to be locally extirpated, thus limiting its overall contribution to the species. The loss of the birds on Great Barrier Island would not result in a decrease in the ability to conserve the species. Therefore, it is our judgment that the Great Barrier Island is not a significant portion of the range for the Cook's petrel.

Conclusion and Finding for the Cook's Petrel

We have carefully assessed the best scientific and commercial data available regarding the status of the Cook's petrel and have analyzed the five threat factors described in section 4(a)(1) of the Act. We find, based on the best available scientific data, that there is not sufficient information to justify the earlier proposed rule to list the Cook's petrel as threatened. In our December 2007 proposal (72 FR 71298), we determined that the Cook's petrel was threatened by predation from nonnative feral cats and rats within its breeding range on Little Barrier, Great Barrier, and Codfish islands. However, based on information we received during the proposal's public comment period, including information from the NZDOC, one peer reviewer, and one member of the public, we believe that introduced predators are not an immediate threat to Cook's petrel on Codfish and Little Barrier islands for the reasons discussed above (see Factor C). The overall population number of the Cook's petrel is not as low as previously thought, and the two viable populations of this species, Little Barrier Island and Codfish Island, with 286,000 and 5,000 pairs, respectively, are reported to be increasing (Rayner *et al.* 2007c, pp. 235, 245; Rayner 2008, in litt.; BLI 2009, unpaginated).

In conclusion, while the NZDOC classified this species as ''declining,'' and thus of lower priority for conservation, the NZDOC intensively manages both Little Barrier Island and Codfish Island for the conservation of native species, including the Cook's petrel. Nonnative predators have been removed from these islands, access is restricted, and monitoring for new introductions of predators is ongoing. Habitat restoration efforts are also ongoing. In addition, there are plans to translocate Cook's petrels to additional, appropriate, predator-free sites (NZDOC News 2007, unpaginated; Rayner 2008, in litt.). All of these actions are evidence of active support for the conservation of this species, even though the overall population number is not low.

We believe the population of Cook's petrel is likely to be increasing now and is likely to do so into the foreseeable future throughout all or a significant portion of its range due to the eradication of predators from Little Barrier Island and Codfish Island which contain viable populations of this species, and the translocation of birds to additional predator-free sites. Therefore, we do not believe Cook's petrel is likely to become an endangered species within

the foreseeable future throughout all or a significant portion of its range.

Withdrawal of Proposal to List Cook's Petrel

Based on the information discussed above, we withdraw our December 17, 2007 (72 FR 71298), proposal to list the Cook's petrel as a threatened species under the Act.

References Cited

A complete list of all references cited in this rule is available on the Internet at *http://www.regulations.gov* or upon request from the Branch of Listing, Endangered Species, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

Author

The primary authors of this final rule are staff members of the Branch of Listing, Endangered Species, U.S. Fish and Wildlife Service.

Dated: December 28, 2009

Robyn Thorson,

Acting Director, Fish and Wildlife Service

[FR Doc. E9–31215 Filed 1–4–10; 8:45 am]

BILLING CODE 4310–55–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

[Docket No. 0912161432–91436–01]

RIN 0648–XT37

Endangered and Threatened Wildlife; 90–Day Finding on a Petition to List the Insular Population of Hawaiian False Killer Whales as an Endangered Species

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

ACTION: 90–day petition finding; request for information.

SUMMARY: We, NMFS, announce a 90–day finding for a petition to list the insular population of Hawaiian false killer whales (*Pseudorca crassidens*) as endangered under the Endangered Species Act (ESA). We find that the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. Therefore, we have initiated a status review of the insular population of Hawaiian false killer whales to determine if listing under the ESA is warranted. To ensure this status review is comprehensive, we solicit scientific and commercial information regarding this species (see below).

DATES: Information and comments on the subject action must be received by February 4, 2010.

ADDRESSES: You may submit comments, information, or data, identified by the Regulation Identifier Number [RIN 0648–XT37], by any one of the following methods:

(1) Electronic Submissions: Submit all electronic information via the Federal eRulemaking Portal at *http://www.regulations.gov*;

(2) Mail: Assistant Regional Administrator, Protected Resources Division, National Marine Fisheries Service, Pacific Islands Regional Office, 1601 Kapiolani Boulevard Suite 1110, Honolulu, HI, 96814.

Instructions: All comments received are a part of the public record and may be posted to *http://www.regulations.gov* without change. Comments will be posted for public viewing after the comment period has closed. 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.

Interested persons may obtain a copy of the petition online at the NMFS Pacific Islands Regional Office website: *http://www.fpir.noaa.gov/PRD/prd_false_killer_whale.html*.

FOR FURTHER INFORMATION CONTACT: Krista Graham, NMFS, Pacific Islands Region, (808) 944–2238; Lance Smith, NMFS, Pacific Islands Region, (808) 944–2258; or Dwayne Meadows, NMFS, Office of Protected Resources, (301) 713–1401.

SUPPLEMENTARY INFORMATION:

Background

On October 1, 2009, we received a petition from the Natural Resources Defense Council (NRDC) requesting that the Secretary list the insular population of Hawaiian false killer whales as an endangered species under the ESA and designate critical habitat concurrent with listing. According to the final 2008 and draft 2009 Stock Assessment Reports (SAR) (available at *http://www.nmfs.noaa.gov/pr/pdfs/sars/*) that NMFS has completed as required by the Marine Mammal Protection Act (MMPA), Hawaiian false killer whales are divided into a Hawaii Pelagic Stock and a Hawaii Insular Stock. NRDC considers the insular population of Hawaiian false killer whales and the Hawaii Insular Stock of false killer whales to be synonymous.

NRDC asserts that the insular population of Hawaiian false killer whales faces the following threats: (1) mortality and/or serious injury from fishing gear; (2) overfishing and prey reductions; (3) potential for increased levels of toxic chemicals; (4) ocean acidification; (5) potential for acoustic impacts on false killer whale behavior; (6) inadequacy of existing regulatory mechanisms; (7) risks inherent to small populations; and (8) synergistic and cumulative effects. The petition contends that the small population size, evidence of a declining population trend, and multiple threats together qualify the insular population of Hawaiian false killer whales to be listed as an endangered species under the ESA.

ESA Statutory, Regulatory, and Policy Provisions

Section 4(b)(3)(A) of the ESA (16 U.S.C. 1531 *et seq.*) requires, to the maximum extent practicable, that within 90 days of the receipt of the petition to designate a species as threatened or endangered, the Secretary of Commerce (Secretary) make a finding on whether that petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. Joint ESA-implementing regulations between NMFS and the U.S. Fish and Wildlife Service (USFWS) (50 CFR 424.14) define ''substantial information'' as the amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.

In making a finding on a petition to list a species, the Secretary must consider whether the petition: (i) clearly indicates the administrative measure recommended, and gives the scientific and any common name of the species involved; (ii) contains a detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species involved and any threats faced by the species; (iii) provides information regarding the status of the species over all or a significant portion of its range; and (iv) is accompanied by the appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from

authorities, and maps (50 CFR 424.14(b)(2)). To the maximum extent practicable, this finding is to be made within 90 days of the date we received the petition, and the finding is to be published promptly in the **Federal Register**. When it is found that substantial information consistent with the guidelines above is presented in the petition, we are required to promptly commence a review of the status of the species concerned. Within one (1) year of receipt of the petition, we shall conclude the review with a finding as to whether or not the petitioned action is warranted.

Under the ESA, a listing determination may address a species, subspecies, or a distinct population segment (DPS) of any vertebrate species which interbreeds when mature (16 U.S.C. 1532(16)). In 1996, the USFWS and NMFS published the Policy on the Recognition of a Distinct Vertebrate Population Segments under the ESA (DPS Policy, 61 FR 4722; February 7, 1996). This policy clarifies the agencies' interpretation of the phrase ''distinct population segment of any species of vertebrate fish or wildlife'' (ESA section 3(16)) for the purposes of listing, delisting, and reclassifying a species under the ESA (61 FR 4722; February 7, 1996). The policy established two criteria that must be met for a population or group of populations to be considered a DPS: (1) the population segment must be discrete in relation to the remainder of the species (or subspecies) to which it belongs; and (2) the population segment must be significant to the remainder of the species (or subspecies) to which it belongs. A population segment may be considered discrete if it satisfies either one of the following conditions: (1) it is markedly separated from other populations of the same biological 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 across which there is a significant difference in exploitation control, habitat management, conservation status, or if regulatory mechanisms exist that are significant in light of section 4(a)(1) of the ESA. If a population is determined to be discrete, the agency must then consider whether it is significant to the taxon to which it belongs. Considerations in evaluating the significance of a discrete population include: (1) persistence of the discrete population in an unusual or unique ecological setting for the taxon; (2) evidence that the loss of the discrete population segment would cause a significant gap in the taxon's range; (3) evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere outside its historical geographical range; or (4) evidence that the discrete population has marked genetic differences from other populations of the species.

A species, subspecies, or DPS is ''endangered'' if it is in danger of extinction throughout all or a significant portion of its range, or ''threatened'' if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (ESA section 3(6) and 3(20), respectively). To determine whether a species is threatened or endangered, we conduct a risk analysis to evaluate risks based on specific demographic factors (e.g., abundance, productivity, spatial structure, and diversity), any quantitative or qualitative estimates of overall extinction risk for the species, and the relative contribution of identified demographic risks to the overall assessed level of extinction risk. Section 4(a)(1) of the ESA requires the Secretary of Commerce to determine whether any species is endangered or threatened due to of any of the following factors: (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting the species continuing existence. Therefore, to the extent possible, we describe the links between these demographic risks and these causative section 4(a)(1) factors. Listing determinations are based solely on the best available scientific and commercial data, after taking into account any efforts being made by any state or foreign nation to protect the species.

Analysis of Petition

Does the Petitioned Population Qualify as a DPS?

As described above, to be considered a DPS under the ESA, a population must meet both the ''discreteness'' and ''significance'' criteria of the DPS policy. NRDC contends that the insular population of Hawaiian false killer whales meets both ''discreteness'' and ''significance'' criteria, and thus is a DPS under the ESA.

Discreteness: NRDC states that the insular population of Hawaiian false killer whales is markedly separated from other false killer whales because it: (1) is behaviorally unique from other false killer whales; (2) is genetically distinct from other false killer whales; and (3) constitutes a stock under the MMPA. NRDC cites photo-identification data from Baird *et al.* (2008) to support its statement that, while false killer whales are considered a wide-ranging pelagic species not typically associated with coastal or island habitats, the insular Hawaiian false killer whales are the only known long-term, island-associated false killer whales in the world. NRDC adds that recent mitochondrial haplotype data from false killer whales throughout the Pacific including Hawaii, the central Indian Ocean, the eastern and western Pacific Ocean, and the western Atlantic Ocean indicate that the insular population of Hawaiian false killer whales includes genetically distinct matrilines (Chivers *et al.*, 2007), and that this suggests unique cultural traits (Whitehead, 1998). Finally, NRDC notes that, while the analysis of whether a given marine mammal population is considered a stock under the MMPA differs from a DPS analysis under the DPS Policy, the classification of Hawaii insular false killer whales as a stock supports the finding that the population is a listable entity under the ESA.

As described in the final 2008 and draft 2009 SARs for the Hawaii Pelagic and Hawaii Insular Stocks of false killer whales, the taxonomy of this group is not well understood, due to the very small number of genetic samples and lack of other biological information. However, the MMPA requires NMFS to use the best available information to delineate stock boundaries. The current delineations of the Hawaii Pelagic and Hawaii Insular Stocks of false killer whales are based on all currently available genetic samples, but only 2 samples are available from each stock. As noted in the 2008 and draft 2009 SARs, the boundary between these two stocks may be revised as additional information becomes available. We will need to review information from SARs for the Hawaii Pelagic and Hawaii Insular Stocks of false killer whales (*http://www.nmfs.noaa.gov/pr/pdfs/sars/*) and any other information we can obtain to determine whether this population is discrete from other populations of false killer whales. While information on stock delineation under the MMPA can be useful for delineating DPSs under the ESA, it is important to note, as NRDC has done, that an MMPA

stock does not necessarily qualify as a DPS under the ESA. MMPA stocks do not need to meet a criterion similar to the ''significance'' criterion of the DPS Policy.

Significance: NRDC states that the insular population of Hawaiian false killer whales meets the significance criterion of the DPS policy because it: (1) occupies a unique ecological setting; and (2) differs markedly from other populations of the species in its genetic characteristics. Evidence cited in the petition includes the fact that the Hawaiian archipelago is the most isolated island group in the world, leading to high rates of endemism, or ecologically and evolutionarily unique organisms (Briggs, 1961, 1966; Carlquist, 1966). They cite Baird *et al.* (2008) to support the theory that evolution of island-associated populations such as this population of false killer whales, Bryde's whales, and short-finned pilot whales in the Hawaiian archipelago may occur because the central tropical Pacific is oligotrophic, the oceanographic influence of the islands increases productivity immediately around the islands (Doty and Oguri, 1956; Gilmartin and Revelante, 1974; Seki *et al.*, 2002) and reduces the spatial and temporal variability in prey availability. Also, the insular population of Hawaiian false killer whales is the only population of false killer whales known to be residents of an island system (Baird *et al.*, 2008). The rest of the species occurs in pelagic waters, further indicating that this population occurs in an ecological setting that is unusual and unique to the taxon. Finally, the fact that individuals from this population are uniquely identifiable by their mitochondrial haplotypes indicates that this insular population differs markedly from other populations of the species in its genetic characteristics.

Is the Insular Population of Hawaiian False Killer Whales Threatened or Endangered?

Abundance and Trend Information: NRDC states that recent abundance estimates for this population (Mobley *et al.*, 2000 -121 individuals, line-transect aerial survey form 1993–1998; Baird *et al.*, 2005 - 123 individuals, mark-recapture photo-identification data from 2000–2004) indicate that insular false killer whales may have the smallest population size of any odontocete species within the Hawaiian Exclusive Economic Zone (Barlow, 2006). Additional data cited by NRDC indicate that the insular Hawaiian stock of false killer whales has experienced a decline within the past one or two decades: (1) the largest group of individuals observed in 1989 (470) is larger than the entire estimated abundance today; (2) false killer whales represented 17 percent of sightings in the 1989 aerial survey and only 1.5 percent in boat-based surveys from 2000–2006 (Baird *et al.*, 2008; Reeves *et al.*, 2009); (3) group size has declined from a median of 195 individuals in 1989 to a median of 15 in boat-based surveys from 2000–2006 (Baird *et al.*, 2008; Reeves *et al.*, 2009); (4) aerial surveys within approximately 46 km of the Hawaiian coast conducted throughout the 1990s made 18 sightings of false killer whales during 239 hours of survey effort (Mobley *et al.*, 2000; Mobely *et al.*, unpublished); and (5) re-sighting rates of false killer whales identified in the 1980s are low compared with rates in other species such as pygmy killer whales, Blainville's beaked whales and Cuvier's beaked whales, potentially suggesting a reduced survival rate in the 1990s (Baird, 2009).

Our final 2008 and draft 2009 SARs on the Hawaii Insular Stock of false killer whales confirms the low population size estimates for this population (approximately 120 individuals, with a minimum population size of 76 individuals). The draft 2009 SAR also cites evidence suggesting that this stock/population has declined in size over the past 2 decades.

Analysis of ESA Section 4(a)(1) Factors: NRDC provided information to suggest that the insular population of Hawaiian false killer whales may have been and may continue to be threatened by habitat modification (mortality and serious injury from fishing gear, overfishing and prey reductions, increased levels of toxic chemicals, ocean acidification, and noise-producing activities), inadequate regulatory mechanisms, risk factors such as its high trophic level, low population density, slow growth and large calving interval, and small geographic range, and the synergistic and cumulative effects of these threats.

NRDC states that, from 1994–2005, false killer whales were killed or seriously injured at a rate of 0.81 per 1,000 sets in the Hawaii-based deep-set longline fishery (Forney and Kobayashi, 2007). Our 2008 SAR states that, between 1994 and 2007, at least 24 false killer whales were observed as hooked or entangled in the same fishery. While some of these false killer whales could be from the pelagic stock, fin disfigurations suggest that near-shore individuals of this population experience fisheries interactions and injuries (Baird and Gorgone, 2005). NRDC states that near-shore commercial and recreational fisheries interactions with insular false killer whales also occurs (Nitta and Henderson, 1993; Rhodes *et al.*, 2007).

Observations of large-scale reductions in predatory fish populations such as bigeye tuna (NMFS, 2009) and yellowfin tuna (Sibert *et al.*, 2006) suggest to NRDC that prey reductions may be impacting the insular population of Hawaiian false killer whales.

NRDC cites Ylitalo *et al.* (2009) as documenting wide ranges of persistent organic pollutants in 9 of 9 samples taken from false killer whales from the insular Hawaiian population, with one third of these samples containing PCB levels above the safety recommendations identified for other species (Kannan *et al.*, 2000).

While NRDC provides no direct evidence that this population is suffering from ocean acidification, it includes a discussion on how atmospheric concentrations of CO2 may further endanger this population by decreasing the availability of prey by reducing the forage base of large game fish such as yellowfin tuna and mahi mahi. Similarly, NRDC provides no direct evidence that this population is threatened by noise-producing activities, but it provides examples of how beaked whales, which vocalize in the same mid-frequencies as false killer whales, are negatively impacted by mid-frequency acoustic sources that occur in the Hawaiian Islands.

NRDC provides examples of state and Federal laws that should provide for the protection of the insular population of Hawaiian false killer whales but do not do so. For example, NRDC notes that the applicability of Hawaii statutes and regulations to this insular population is limited and none has proven effective in conserving this population. Similarly, NRDC notes that we do not presently recognize the population as a ''strategic stock'' under the MMPA, and, because we have not otherwise decided to address bycatch of the population, the insular stock of false killer whales has not benefited from a take reduction plan for any of the salient Hawaii fisheries. Regardless, they add, the development of a bycatch reduction plan would not address other threats to the stock, such as overfishing of its principal prey species, toxic contamination, and direct shootings of animals by local fishers. The Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA) also provides some authority to protect marine mammal species, but NRDC states that it does not mandate the use of regulatory mechanisms adequate to conserve the

false killer whale because its reach is limited, changes made to the longline fisheries managed under the MSFCMA have not proven adequate to prevent the hooking or entanglement of insular false killer whales, and it has not been successful in preventing the depletion of bigeye tuna, yellowfin tuna, and mahi mahi, primary prey for the insular stock of false killer whales.

In discussing the risks to small populations, NRDC notes that small populations are particularly vulnerable to extinction due to demographic and environmental stochasticity, the risks of local catastrophes, slower rates of adaptation, deleterious effects of inbreeding, and ''mutational meltdown'' (genetic load that arises from expression of harmful alleles). NRDC emphasizes the Allee effect, also known as depensation, as causing a decline in per capita reproduction at low population densities.

Finally, NRDC discusses the potential cumulative and synergistic impacts on the population, noting that some of these threats may have significant sublethal effects (e.g., contamination with persistent organochlorine pollutants), they may also contribute cumulatively towards reduced survival and reproductive rates (e.g., decline in reproductive rate from toxic contamination combined with the Allee effect) in false killer whales.

Petition Finding

We have reviewed the petition, the literature cited in the petition, and other literature and information readily available in our files. Based on our review, we find that the petition satisfies the requirements of 50 CFR 424.14(b)(2) because it: (i) clearly indicates the administrative measure recommended and gives the scientific and any common name of the species involved; (ii) contains a detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species involved and any threats faced by the species; (iii) provides information regarding the status of the species over all or a significant portion of its range; and (iv) is accompanied by the appropriate supporting documentation in the form of citations to journals that are readily accessible. This information would lead a reasonable person to believe that the measure proposed in the petition may be warranted. Therefore, we have determined that the petition, the literature cited in the petition, and other literature and information readily available in our files indicate that the petitioned action may be warranted.

Request for Information

As a result of the finding, we will commence a status review of Hawaiian false killer whales to determine: (1) if the insular population of Hawaiian false killer whales is a DPS under the ESA; and, if so (2) the risk of extinction to this DPS. Based on the results of the status review, we will then determine whether listing the insular population of Hawaiian false killer whales under the ESA is warranted. We intend that any final action resulting from this status review be as accurate and as effective as possible. Therefore, we are opening a 30–day public comment period to solicit suggestions and information from the public, government agencies, the scientific community, industry, and any other interested parties on the status of the insular population of Hawaiian false killer whales. Specifically, we solicit information on the following areas:

(1) Taxonomy, abundance, reproductive success, age structure, distribution, habitat selection, food habits, population density and trends, and habitat trends;

(2) Effects of other potential threat factors, including climate change, ocean acidification, acoustic impacts, and persistent organic pollutants;

(3) Interactions with fisheries, including longline, unregulated nearshore, and shortline fisheries;

(4) Unconfirmed interactions from local fishermen; and

(5) Effects of management on the insular population of Hawaiian false killer whales.

We request that all data and information be accompanied by supporting documentation such as maps, bibliographic references, or reprints of pertinent publications. Please send any comments to the **ADDRESSES** listed above. We will base our findings on a review of best available scientific and commercial information available, including all information received during the public comment period.

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

Dated: December 29, 2009.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

[FR Doc. E9–31297 Filed 1–4–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 0808061067–91396–01]

RIN 0648–AX06

Endangered and Threatened Species: Proposed Rule To Revise the Critical Habitat Designation for the Endangered Leatherback Sea Turtle

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

ACTION: Proposed rule; request for comments.

SUMMARY: We, the National Marine Fisheries Service (NMFS), propose revising the current critical habitat for the leatherback sea turtle (*Dermochelys coriacea*) by designating additional areas within the Pacific Ocean. Specific areas proposed for designation include two adjacent marine areas totaling approximately 46,100 square miles (119,400 square km) stretching along the California coast from Point Arena to Point Vincente; and one 24,500 square mile (63,455 square km) marine area stretching from Cape Flattery, Washington to the Umpqua River (Winchester Bay), Oregon east of a line approximating the 2,000 meter depth contour. The areas proposed for designation comprise approximately 70,600 square miles (182,854 square km) of marine habitat. Other Pacific waters within the U.S. Exclusive Economic Zone (EEZ) were evaluated based on the geographical area occupied by the species, but it was decided to exclude those areas from the critical habitat designation because the potential costs outweighed the benefits of critical habitat designation and exclusion would not result in the extinction of the species. We are soliciting comments from the public on all aspects of the proposal, including information on the economic, national security, and other relevant impacts. We will consider additional information received prior to making a final designation.

DATES: Comments and information regarding this proposed rule must be received by March 8, 2010.

ADDRESSES: You may submit comments, identified by RIN 0648–AX06, addressed to: David Cottingham, Chief, Marine Mammal and Sea Turtle Conservation Division, by any of the following methods:

• *Electronic Submissions:* Submit all electronic comments via the Federal eRulemaking Portal *http://www.regulations.gov.*

• *Facsimile (fax):* 301–713–4060, Attn: David Cottingham.

• *Mail:* Chief, Marine Mammal and Sea Turtle Conservation Division, NMFS, Office of Protected Resources, 1315 East West Highway, Silver Spring, MD 20910.

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FOR FURTHER INFORMATION CONTACT: Sara McNulty, NMFS, Office of Protected Resources, 301–713–2322; Elizabeth Petras, NMFS Southwest Region, 562–980–3238; Steve Stone, NMFS Northwest Region, 503–231–2317.

SUPPLEMENTARY INFORMATION:

Background

The leatherback sea turtle was listed as endangered throughout its range on June 2, 1970 (35 FR 8491). Pursuant to a joint agreement, the U.S. Fish and Wildlife Service (USFWS) has jurisdiction over sea turtles on the land and NMFS has jurisdiction over sea turtles in the marine environment. The USFWS initially designated critical habitat for leatherbacks on September 26, 1978 (43 FR 43688). The critical habitat area consists of a strip of land 0.2 miles (0.32 kilometers) wide (from mean high tide inland) at Sandy Point Beach on the western end of the island of St. Croix in the U.S. Virgin Islands. On March 23, 1979, NMFS designated the marine waters adjacent to Sandy Point Beach as critical habitat from the hundred fathom (182.9 meters) curve shoreward to the level of mean high tide (44 FR 17710).

On October 2, 2007, we received a petition from the Center for Biological Diversity, Oceana, and Turtle Island Restoration Network (''Petitioners'') to revise the leatherback critical habitat designation. The Petitioners sought to revise the designation to include the area currently managed under the authority of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act to reduce leatherback interactions in the California/Oregon drift gillnet fishery targeting swordfish and thresher sharks. This area encompasses roughly 200,000 square miles (321,870 square km) of the U.S. EEZ from 45° N. latitude about 100 miles (160 km) south of the Washington/Oregon border southward to Point Sur, California and along a diagonal line due west of Point Conception, California, and west to 129° W. longitude. Under the current regulations implementing the Highly Migratory Species Fishery Management Plan, the use of large mesh drift gillnet gear is prohibited in this area from August 15th through November 15th (50 CFR 660.713).

On December 28, 2007, we announced our 90-day finding that the petition provided substantial scientific information indicating that the petitioned action may be warranted (72 FR 73745). We did not meet the statutory deadline of October 2, 2008 for deciding whether to proceed with a proposed designation and the Petitioners filed a lawsuit seeking to compel that decision. Per the settlement agreement, we agreed to submit this finding to the **Federal Register** by December 4, 2009. We were then granted an extension to submit this finding by December 31, 2009.

When initially evaluating the petition to designate critical habitat off the U.S. West Coast, we reviewed a variety of data sources to identify specific areas within and adjacent to the petitioned area that might warrant consideration as critical habitat. Due to the extensive movements of leatherback sea turtles throughout the U.S. West Coast within the U.S. EEZ, we determined that areas adjacent to the petitioned area should also be considered. Additionally, the petitioned area included waters outside the U.S. EEZ, however, joint NMFS and FWS regulations provide that areas outside of U.S. jurisdiction not be designated as critical habitat (50 CR 424.12(h)), so any areas outside of the U.S. EEZ were excluded from our analysis. Therefore, this CH analysis evaluated approximately 292,600 square miles (757,833 square km) of Pacific waters within the U.S. West Coast EEZ.

We considered various alternatives to the critical habitat designation for the leatherback sea turtle. The alternative of not designating critical habitat for leatherbacks would impose no economic, national security, or other relevant impacts, but would not provide any conservation benefit to the species. This alternative was considered and rejected because such an approach does not meet the legal requirements of the ESA and would not provide for the conservation of the species. The alternative of designating all potential critical habitat areas (*i.e.,* no areas excluded) also was considered and rejected because, for a number of areas, the economic benefits of exclusion outweighed the benefits of inclusion, and we determined that exclusion of these areas would not significantly impede conservation or result in extinction of the species. The total estimated annualized economic impact associated with the designation of all potential critical habitat areas would be $3.8 million to $25.5 million (discounted at 7 percent) or $3.5 million to $25 million (discounted at 3 percent). An alternative to designating critical habitat within all of the areas considered for designation is the designation of critical habitat within a subset of those areas. Under section 4(b)(2) of the ESA, we must consider the economic impacts, impacts to national security, and other relevant impacts of designating any particular area as critical habitat. NMFS has the discretion to exclude an area from designation as critical habitat if the benefits of exclusion (*i.e.,* the impacts that would be avoided if an area were excluded from the designation) outweigh the benefits of designation (*i.e.,* the conservation benefits if an area were designated), so long as exclusion of the area will not result in extinction of the species. Exclusion under section 4(b)(2) of the ESA of one or more of the particular areas considered for designation would reduce the total impacts of designation. The determination of which particular areas and how many to exclude depends on NMFS' ESA 4(b)(2) analysis, which is conducted for each area and described in detail in the 4(b)(2) report. Under the preferred alternative, we propose to exclude 5 out of 8 areas considered. The total estimated economic impact associated with this proposed rule is $3.1 million to $20.4 million (discounted at 7 percent) or $2.8 million to $20 million (discounted at 3 percent).

We believe that the exclusion of these areas would not significantly impede conservation or result in the extinction of the leatherback sea turtle. We selected this alternative because it would result in a critical habitat designation that provides for the conservation of the species while reducing the economic impacts on entities. This alternative also meets ESA and joint NMFS and USFWS regulations concerning critical habitat.

Leatherback Natural History

The leatherback is the sole remaining member of the taxonomic family Dermochelyidae. All other extant sea turtles belong to the family Cheloniidae. Leatherbacks are the largest marine turtle, with a curved carapace length (CCL) often exceeding 150 cm and front flippers that can span 270 cm (NMFS and USFWS, 1998). The leatherback's slightly flexible, rubber-like carapace is distinguishable from other sea turtles that have carapaces with bony plates covered with horny scutes. In adults, the carapace consists mainly of tough, oil-saturated connective tissue raised into seven prominent ridges and tapered to a blunt point posteriorly. The carapace and plastron are barrel-shaped and streamlined. Leatherbacks display several unique physiological and behavioral traits that enable this species to inhabit cold water, unlike other chelonid species. These include a countercurrent circulatory system (Greer *et al.,* 1973), a thick layer of insulating fat (Goff and Lien, 1988; Davenport *et al.,* 1990), gigantothermy (Paladino *et al.,* 1990), and the ability to elevate body temperature through increased metabolic activity (Southwood *et al.,* 2005; Bostrom and Jones, 2007). These adaptations enable leatherbacks to extend their geographic range farther than other species of sea turtles.

The leatherback life cycle is broken into several stages: (1) Egg/hatchling; (2) post-hatchling; (3) juvenile; (4) sub-adult; and (5) adult. There is still uncertainty regarding the age at first reproduction. The most recent study, based on skeletochronological data from scleral ossicles, suggests that leatherbacks in the western North Atlantic may not reach maturity until 29 years of age (Avens *et al.,* 2009), which is longer than earlier estimates (Pritchard and Trebbau, 1984: 2–3 years; Rhodin, 1985: 3–6 years; Zug and Parham, 1996: 13–14 years for females; Dutton *et al.,* 2005: 12–14 years for leatherbacks nesting in the U.S. Virgin Islands). The average size of reproductively active females is generally 150–162 cm CCL for Atlantic, western Pacific, and Indian Ocean populations, and 140–150 cm CCL for eastern Pacific populations (Hirth *et al.,* 1993; Starbird and Suarez, 1994; Benson *et al.,* 2007a; Benson *et al.,* 2007d). However, females as small as 105–125 cm CCL have been observed nesting at various sites (Stewart *et al.,* 2007). Rhodin *et al.* (1996) speculated that extreme rapid growth may be possible in leatherbacks due to a mechanism that allows fast penetration of vascular canals into the fast growing cartilaginous matrix of their bones. Whether the vascularized cartilage in leatherbacks serves to facilitate rapid growth, or some other physiological function, has not yet been determined.

Female leatherbacks typically nest on sandy, tropical beaches at intervals of 2 to 4 years (McDonald and Dutton, 1996; Garcia and Sarti, 2000; Spotila *et al.,* 2000). Females lay clutches of approximately 100 eggs several times during a nesting season, typically at 8–12 day intervals. Female leatherbacks appear to exhibit more variable nesting site fidelity than cheloniids and may nest at more than one beach in a single season (Eckert *et al.,* 1989a; Keinath and Musick, 1993; Steyermark *et al.,* 1996; Dutton *et al.,* 2005). This nesting behavior has been observed in the western Pacific Ocean; one female nesting on Jamursba-Medi, Indonesia was observed nesting approximately 30 km east on Wermon, Indonesia a few weeks later (S. Benson, NMFS, April 2006, pers. comm.).

A comparison of sex ratios between Atlantic and some Pacific nesting populations suggests that Pacific populations may be more female biased (Binckley *et al.,* 1998) than Atlantic populations (Godfrey *et al.,* 1996; Turtle Expert Working Group, 2007). However, caution is necessary when making basin-wide comparisons because only one study was conducted in the Pacific (Binckley *et al.,* 1998) and sex ratios may vary by beach or even clutch. Chevalier *et al.* (1999) compared temperature-dependent sex determination patterns between the Atlantic (French Guiana) and the Pacific (Playa Grande, Costa Rica) and found that the range of temperatures producing both sexes was significantly narrower for the Atlantic population.

Reliable estimates of survival and mortality at different life history stages are not easily obtained. The annual mortality for leatherbacks that nested at Playa Grande, Costa Rica, was estimated to be 34.6 percent in 1993–1994 and 34.0 percent in 1994–1995 (Spotila *et al.,* 2000). Leatherbacks nesting in French Guiana and St. Croix had estimated annual survival rates of 91 percent (Rivalan *et al.,* 2005b) and 89 percent (Dutton *et al.,* 2005) respectively. For the St. Croix population, the average annual juvenile survival rate was estimated to be approximately 63 percent, and the total survival rate from hatchling to first year of reproduction for a female was estimated to be between 0.4 and 2 percent, given an assumed age at first reproduction between 9 and 13 years (Eguchi *et al.,* 2006). Spotila *et al.* (1996) estimated first year survival rates for leatherbacks at 6.25 percent. Individual female leatherbacks have been observed to reproduce as long as 25 years (Hughes, 1996; D. Dutton, Ocean Planet Research, Inc., August 2009, pers. comm.). The data suggest that leatherbacks follow a life history strategy similar to many other long-lived species that delay age of maturity, have low and variable survival in the egg and juvenile stages, and have relatively high and constant annual survival in the subadult and adult life stages (Spotila *et al.,* 1996; 2000; Crouse, 1999; Heppell *et al.,* 1999; 2003; Chaloupka, 2002).

Leatherbacks have the most extensive range of any living reptile and have been reported circumglobally throughout the oceans of the world (Marquez, 1990; NMFS and USFWS, 1998). Leatherbacks can forage in the cold temperate regions of the oceans, occurring at latitudes as high as 71° N. and 47° S.; however, nesting is confined to tropical and subtropical latitudes. In the Pacific Ocean, significant nesting aggregations occur primarily in Mexico, Costa Rica, Indonesia, the Solomon Islands, and Papua New Guinea. In the Atlantic Ocean, significant leatherback nesting aggregations have been documented on the west coast of Africa, from Guinea-Bissau south to Angola, with dense aggregations in Gabon. In the wider Caribbean Sea, leatherback nesting is broadly distributed across 36 countries or territories with major nesting colonies (≤1,000 females nesting annually) in Trinidad, French Guiana, and Suriname (Dow *et al.,* 2007). In the Indian Ocean, nesting aggregations are reported in South Africa, India and Sri Lanka. Leatherbacks have not been reported to nest in the Mediterranean Sea.

Migratory routes of leatherbacks are not entirely known. However, recent satellite telemetry studies have documented transoceanic migrations between nesting beaches and foraging areas in the Atlantic and Pacific Ocean basins (Ferraroli *et al.,* 2004; Hays *et al.,* 2004; James *et al.,* 2005; Eckert, 2006; Eckert *et al.,* 2006; Benson *et al.,* 2007a). In a single year, a leatherback may swim more than 10,000 kilometers (Eckert, 2006; Eckert *et al.,* 2006). Leatherbacks

nesting in Central America and Mexico migrate thousands of miles into tropical and temperate waters of the South Pacific (Eckert and Sarti, 1997). After nesting, females from Jamursba-Medi, Indonesia, make long-distance migrations across the equator either to the eastern North Pacific, westward to the Sulawasi and Sulu and South China Seas, or northward to the Sea of Japan (Benson *et al.,* 2007a). One turtle tagged after nesting in July at Jamursba-Medi arrived in waters off Oregon in August (Benson *et al.,* 2007a) coincident with seasonal maxima aggregations of jellyfish (Shenker, 1984; Suchman and Brodeur, 2005). Other studies similarly indicate that leatherbacks arrive along the Pacific coast of North America during the summer and fall months, when large aggregations of jellyfish form (Bowlby, 1994; Starbird *et al.,* 1993; Benson *et al.,* 2007b; Graham, 2009). Leatherbacks primarily forage on cnidarians (jellyfish and siphonophores) and, to a lesser extent, tunicates (pyrosomas and salps) (NMFS and USFWS, 1998). Largely pelagic, leatherbacks forage widely in temperate waters and exploit convergence zones and upwelling areas in the open ocean along continental margins and in archipelagic waters (Morreale *et al.,* 1994; Eckert, 1998; 1999).

Critical Habitat

Section 4(b)(2) of the ESA requires NMFS to designate critical habitat for threatened and endangered species ''on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.'' This section also grants the Secretary of Commerce (Secretary) discretion to exclude any area from critical habitat if he determines ''the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat.'' The Secretary's discretion is limited, as he may not exclude areas that ''will result in the extinction of the species.''

The ESA defines critical habitat under section 3(5)(A) as: ''(i) The specific areas within the geographical area occupied by the species, at the time it is listed * * *, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination by the Secretary that such areas are essential for the conservation of the species.''

If critical habitat is designated, section 7 of the ESA requires Federal agencies to ensure they do not fund, authorize, or carry out any actions that will destroy or adversely modify that habitat. This requirement is additional to the section 7 requirement that Federal agencies ensure their actions do not jeopardize the continued existence of listed species.

Methods and Criteria Used To Identify Critical Habitat

In the following sections, we describe the relevant definitions and requirements in the ESA, our implementing regulations, and the key information and criteria used to prepare this proposed critical habitat designation. In accordance with section 4(b)(2) of the ESA and our implementing regulations (50 CFR 423.12(a)), this proposed rule is based on the best scientific information available.

To assist with the revision of leatherback critical habitat, we convened a critical habitat review team (CHRT) consisting of biologists from NMFS Headquarters, the Southwest and Northwest Regional Offices, and the Southwest and Northwest Fisheries Science Centers. The CHRT members had experience and expertise on leatherback biology, distribution and abundance of the species along the U.S. West Coast as it relates to oceanography, consultations and management, and/or the critical habitat designation process. The CHRT used the best available scientific data and their best professional judgment to: (1) Verify the geographical area occupied by the leatherbacks at the time of listing; (2) identify the physical and biological features essential to the conservation of the species that may require special management considerations or protection; (3) identify specific areas within the occupied area containing those essential physical and biological features; (4) evaluate the conservation value of each specific area; and (5) identify activities that may affect any designated critical habitat. The CHRT's evaluation and conclusions are described in detail in the following sections.

Physical or Biological Features Essential for Conservation

Joint NMFS and USFWS regulations (50 CFR 424.12(b)) state that in determining what areas are critical habitat, the agencies ''shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection.'' Features to consider may include, but are not limited to: ''(1) Space for individual and population growth, and for normal behavior; (2) Food, water, air, light, minerals, or other nutritional or physiological requirements; (3) Cover or shelter; (4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally; (5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.'' The regulations also require agencies to ''focus on the principle biological or physical constituent elements'' (hereafter referred to as ''Primary Constituent Elements'' or PCEs) within the specific areas considered for designation, which may include, but are not limited to, the following: spawning sites, feeding sites, water quality or quantity, geological formation, and tide.

The northeastern Pacific Ocean is a highly variable environment where the habitat upon which leatherbacks and other marine species depend can change rapidly. Although some relatively permanent features are present, transient oceanographic features, such as eddies or fronts, are strong drivers of ecological interactions. The major current of the region is the southward-flowing California Current, which is the eastern boundary current within the North Pacific Ocean (Huyer, 1983; Hickey, 1979; 1998). The California Current is subject to significant variations in seasonal (Barber and Smith, 1981; Hutchings *et al.,* 1995; Castelao *et al.,* 2006), inter-annual (*e.g.* El Niño: Barber and Chavez, 1983), and decadal (*e.g.* Pacific Decadal Oscillation (PDO) cycles: McGowan *et al.,* 1998; 2003) time scales, adding variability to local productivity resulting from upwelling (Longhurst, 1996).

Wind-driven coastal upwelling drives primary productivity within waters off the U.S. West Coast. As nutrient-rich water comes to the surface, phytoplankton blooms occur and are transported offshore. Productivity dissipates as upwelled waters move offshore (away from regions of upwelling) and phytoplankton deplete available nutrients (Thomas and Strub, 2001). Episodic intrusions of offshore, nutrient depleted water and offshore movement of nutrient-rich water occur throughout the year. The characteristics of coastal upwelling vary over the extent of the California Current, with upwelling north of Cape Blanco (~42.8° N.) confined to a narrower band than upwelling farther south (Huyer, 1983;

Brodeur *et al.,* 2004). Seasonally, upwelling begins earlier and lasts longer in the southern California Current. The peak time of sea turtle sightings (July-September) in neritic waters corresponds to the period when intermittent relaxation of upwelling causes sea surface temperatures to increase to their warmest annual levels. During these relaxation events, there is less mixing of nutrient rich upwelled waters and greater retention of these waters near the coast.

Eddy and frontal features are also critical elements of regional productivity. The interaction of the California Current and topographic features, such as banks, canyons, and other submerged features, as well as shoreline features, such as Cape Blanco, result in the formation of eddies, jets, and squirts (Barth *et al.,* 2000). The most prominent regional eddy is the Juan de Fuca Eddy, which develops offshore of northern Washington at the mouth of the Strait of Juan de Fuca as a result of wind-driven current interaction with the continental slope (Hickey and Banas, 2003). The eddy is persistent from the spring through the fall and delivers nutrient-rich waters to the surface (Freeland and Denman, 1982; Hickey and Banas, 2003). Where eddy features interact with coastal waters, oceanic fronts are often found. Off Oregon and Washington, these frontal features tend to reoccur in the same places, such as near Cape Blanco in Oregon or off Vancouver Island and the coast of Washington (Freeland and Denman, 1982).

Leatherbacks are often described as a pelagic species; however, it is becoming increasingly evident that they aggregate in productive coastal areas to forage on preferred jellyfish prey (scyphomedusae) (Houghton *et al.,* 2006; Benson *et al.,* 2007b; Witt *et al.,* 2007). While their range spans the entire Pacific, occupation of the California Current is highly seasonal. Most of our current knowledge of leatherback turtle use of the California Current comes from recent and ongoing telemetry studies, aerial surveys, and ship-based research conducted primarily in the nearshore areas off central California. The telemetry work has documented trans-Pacific migrations between the western tropical Pacific and the California Current; however, it is difficult to define specific migratory corridors.

There is likely an important temporal component to the arrival and departure of leatherbacks to and from key nearshore foraging areas. Current research has shown that leatherbacks clearly target the dense aggregations of brown sea nettle (*Chrysaora fuscescens)* that occur near the central California coast and north through Washington during summer and fall (Peterson *et al.,* 2006; Harvey *et al.,* 2006; Benson *et al.,* 2006; 2008). Leatherbacks have also been observed foraging on other scyphomedusae in this area, particularly moon jellies (*Aurelia labiata)* (Eisenberg and Frazier, 1983; S. Benson, NMFS, September 2007, pers. comm.). The CHRT hypothesized that leatherbacks are primarily transiting through offshore areas to get to these dense nearshore aggregations of scyphomedusae, and that the boundary between primary coastal foraging habitat and the offshore areas may vary seasonally and inter-annually with changing oceanographic conditions. In some years, the primary foraging habitat may be poor, or oceanographic features may deter migration into the nearshore habitat (Benson *et al.,* 2007c), resulting in a more diffuse or offshore leatherback distribution.

Although jellyfish blooms are seasonally and regionally predictable, their fine-scale local distribution is patchy and dependent upon oceanographic conditions. Some descriptive studies have been conducted on the distribution of scyphomedusae along the west coast of North America; however, much more information is needed to characterize the temporal variability from seasonal patterns to long-term climate-linked variations. Moreover, it is ultimately the benthic polyp stages that contribute to seasonal and annual population variation of the adult medusae, and little information exists on their populations in open coastal systems, including the California Current upwelling system (W.M. Graham, University of South Alabama, September 2009, pers. comm.). Graham *et al.* (2001) found that jellyfish tend to collect along boundaries: mesoscale oceanic fronts, local circulation patterns, thermoclines, haloclines, etc., and that scyphomedusae (specifically *C. fuscescens*) are closely linked to the physical structure of the water column and the dynamics of upwelling-related circulations. An important example is the Columbia River plume which can act to aggregate and retain jellyfish in the northern California Current (Shenker, 1984). These hydrographic features can be persistent or recurrent (seasonally) in space and time (Castelao *et al.,* 2006).

Prey concentrating forces may also be fixed in space and time associated with geomorphologic features (*e.g.* headlands, capes, seamounts, and canyons). Upwelling shadows (*e.g.* north Monterey Bay) are areas of sustained high productivity (Graham and Largier, 1997) and these areas are favorable for leatherback prey (Graham, 1994; Benson *et al.,* 2007b). Features such as the Monterey Bay upwelling shadow often persist longer than other coastal fronts of similar length scale (Graham, 1993). *C. fuscescens* are highly abundant north of Cape Blanco off the Oregon Coast (Suchman and Brodeur, 2005; Reese, 2005) where leatherback occurrence has been documented from sighting records and telemetry studies (Bowlby, 1994; Benson *et al.,* 2007a; 2007c). Reese (2005) found that *A. labiata* was frequently abundant south of Cape Blanco, off the coast of Crescent City, CA (~42° N). Reese (2005) also described areas of persistent jellyfish abundance north and south of Cape Blanco and farther north along the Oregon coast inshore of Heceta Bank (~44° N), all inshore of the 100m isobath line. The abundance of jellyfish close to shore may be enhanced by their need for substrate during the benthic stage of their lifecycle (Suchman and Brodeur, 2005). Jellyfish are largest and most abundant in coastal waters of California, Oregon, and Washington during late summer-early fall months (Shenker, 1984; Suchman and Brodeur, 2005; Graham, 2009), which overlaps with the time when turtles are most frequently sighted near Monterey Bay (Starbird, 1993; Benson *et al.,* 2007b) and in Oregon and Washington waters (Bowlby, 1994).

There is evidence that prey-concentrating hydrographic features can be influenced by El Nino and other climate forcing. Survey data has shown a poleward and offshore re-distribution of *C. fuscescens* during El Nino events (Lenarz *et al.,* 1995). However, it is likely that the reliable availability of prey associated with fixed or recurrent physical features is the reason for the leatherbacks trans-Pacific migration from Western Pacific nesting beaches and their presence in neritic west coast waters during summer and fall.

Jellyfish, and to a lesser extent tunicates (pyrosomas and salps), have a low nutritive value per unit biomass, although the nutritional value of the entire organism can be quite high in the case of large scyphomedusae (Doyle *et al.,* 2007). Davenport and Balazs (1991) debated the hypothesis that the source of nutrients for leatherbacks may be from the stomach contents of the prey, rather than from the medusae and tunicates themselves. Leatherbacks consuming *C. fuscescens* might also ingest additional prey items found in the stomach contents of this jellyfish (Suchman *et al.,* 2008). Regardless, leatherbacks must eat a massive amount of jellyfish per day, approximately 20–

30 percent of their body weight compared to cheloniids, which eat approximately 2–3 percent of their body weight (Davenport and Balazs, 1991). It has been estimated that an adult leatherback would need to eat about 50 large jellyfish (equivalent to approximately 200 liters) per day to maintain its nutritional needs (Bjorndal, 1997). Leatherbacks have been observed at or near the surface consuming *C. fuscescens* within upwelling shadows or oceanographic retention areas within neritic waters off central California (Benson *et al.,* 2003; 2007b); however, satellite-linked time-depth recorders suggest foraging can also occur at deeper offshore waters of the U.S. West Coast (S. Benson, NMFS, February 2006, pers. comm.). Leatherbacks likely select *C. fuscescens* as prey over other scyphomedusae species in neritic central California waters because *C. fuscescens* is larger and more nutritionally beneficial than other available scyphomedusae species (Graham, 2009). The CHRT considered areas as primary foraging habitat if they contain great densities of *C. fuscescens;* secondary foraging habitat if they contain *A. labiata* and some scattered C. fuscescens; and tertiary foraging habitat if they contain only scattered *A. labiata.*

Although leatherbacks are capable of deep diving (Lutcavage and Lutz, 1997; Hays *et al.,* 2004), the majority of their time is spent at or near the surface. Depth profiles developed for four leatherbacks tagged and tracked from Monterey Bay in 2000 and 2001 (using satellite-linked dive recorders) showed that most dives were to depths of less than 100 meters and leatherbacks spent most of their time shallower than 80 meters. Dutton (NMFS, January 2004, pers. comm.) estimated that leatherbacks spend 75–90 percent of their time at depths of less than 80 meters based on preliminary data analysis. Within neritic central California waters, leatherbacks spend approximately 50 percent of their time at or within one meter of the surface while foraging and over 75 percent of their time within the upper five meters of the water column (Benson *et al.,* 2007b). Leatherback turtles also appear to spend almost the entire dive time traveling to and from maximum depth, suggesting that efficient transit of the water column is of paramount importance (Eckert *et al.,* 1989b). Leatherbacks have been observed periodically resting on the surface, presumably to replenish oxygen stores after repeated dives (Harvey *et al.,* 2006; Benson *et al.,* 2007b).

Primary Constituent Elements (PCEs)

Based on the aforementioned information, the CHRT identified two PCEs essential for the conservation of leatherbacks in marine waters off the U.S. West Coast: (1) Occurrence of prey species, primarily scyphomedusae of the order Semaeostomeae (*Chrysaora, Aurelia, Phacellophora,* and *Cyanea*) of sufficient condition, distribution, diversity, and abundance to support individual as well as population growth, reproduction, and development; (2) Migratory pathway conditions to allow for safe and timely passage and access to/from/within high use foraging areas.

When evaluating the second identified PCE, migratory pathway conditions or passage, the CHRT considered the type of activities that could affect or impede the passage of a leatherback turtle. After reviewing several potential types of impediments, the CHRT determined that only permanent or long-term structures that alter the habitat would be considered as having potential effects on passage. Given this determination, the CHRT did not consider fishing gear or vessel traffic as potential threats to passage.

The CHRT considered a third PCE—water quality to support normal growth, development, viability, and health. This PCE would encompass bioaccumulation of contaminants and pollutants in prey and subsequent accumulation in leatherbacks as well as direct ingestion and contact with contaminants and pollutants. The CHRT eliminated this option because knowledge on how water quality affects scyphomedusae was lacking, and, where data were available, the CHRT believed prey condition, distribution, diversity, and abundance would encompass water quality considerations regarding bioaccumulation. The CHRT also felt that direct ingestion and contact with contaminants and pollutants would be encompassed in a direct effects analysis for the listed species. We encourage public comment on the exclusion of water quality as a PCE (*see* **ADDRESSES**).

Geographical Area Occupied and Specific Areas

One of the first steps in the critical habitat revision process was to define the geographical area occupied by the species at the time of listing. As described above, leatherbacks are distributed circumglobally throughout the oceans of the world, and along the U.S. West Coast (including the petitioned area) within the U.S. EEZ. The CHRT reviewed a variety of data sources to identify specific areas within and adjacent to the petitioned area that contain one or more PCE requiring special management considerations or protection. Information reviewed included: turtle distribution data from nearshore aerial surveys (Peterson *et al.,* 2006; Benson *et al.,* 2006; 2007b; 2008; NMFS unpublished data); offshore ship sightings and fishery bycatch records (Bowlby, 1994; Starbird *et al.,* 1993; Bonnell and Ford, 2001; NMFS SWR Observer Program, unpublished data); satellite telemetry data (Benson *et al.,* 2007a; 2007c; 2008; 2009; NMFS unpublished data); distribution and abundance information on the preferred prey of leatherbacks (Peterson *et al.,* 2006; Harvey *et al.,* 2006; Benson *et al.,* 2006; 2008); bathymetry (Benson *et al.,* 2006; 2008); and regional oceanographic patterns along the U.S. West Coast (Parrish *et al.,* 1983; Shenker, 1984; Graham, 1994; Suchman and Brodeur, 2005; Benson *et al.,* 2007b).

Joint NMFS and FWS regulations provide that areas outside of U.S. jurisdiction not be designated as critical habitat (50 CR 424.12(h)), so any areas outside of the U.S. EEZ were excluded from our analysis. Thus, the occupied geographic area under consideration for this designation was limited to areas along the U.S. West Coast within the U.S. EEZ from the Washington/Canada border to the California/Mexico border.

The CHRT recognized that leatherback habitat use appears to vary seasonally and spatially. The boundaries chosen to define each specific area represent the CHRT's best estimate of where these turtles transition from foraging to migrating or where prey composition or abundances change. Most leatherback sightings occur in marine waters within the neritic zone. The species may pursue prey as far as the extent of mean lower low water (S. Benson, NMFS, September 2000, unpublished) so the CHRT considered this as the shoreward extent of distribution in those specific areas with documented nearshore distribution.

The following paragraphs describe each specific area (shown on Figure 1) and summarize the data used to determine that each area is occupied by leatherbacks:

Area 1: Nearshore area from Point Arena (peninsula where the Point Arena Lighthouse is located) to Point Sur California and offshore to the 200 meter isobath. The specific boundaries are the area bounded by Point Sur (36°18′22″ N./121°54′9″ W.) then north along the shoreline following the line of mean lower low water to Point Arena, California (38°57′14″ N./123°44′26″ W.) then west to 38°57′14″ N./123°56′44″ W. then south along the 200 meter isobath

to 36°18′22″ N./122°4′13″ W. then east to the point of origin at Point Sur. Leatherback presence is based on aerial surveys, shipboard sightings, and telemetry studies. This area is a principal California foraging area (Benson *et al.,* 2007b) with high densities of primary prey species *C. fuscescens* occurring here seasonally from April to November (Graham, 1994).

Area 2: Nearshore area from Cape Flattery, Washington, to Umpqua River (Winchester Bay), Oregon and offshore to a line approximating the 2000 meter isobath. The specific boundaries are the area bounded by Winchester Bay, Oregon (at the tip of the south jetty) north along the shoreline following the line of mean lower low water to Cape Flattery, Washington (48°23′10″ N./124°43′32″ W.) then north to the U.S./Canada boundary at 48°29′38″ N./124°43′32″ W. then west and south along the line of the U.S. EEZ to 47°57′38″ N./126°22′54″ W. then south along a line approximating the 2,000 meter isobath that passes through points at 47°39′55″ N./126°13′28″ W., 45°20′16″ N./125°21′ W. to 43°40′8″ N./125°17′ W. then east to the point of origin at Winchester Bay. Leatherback presence is based on aerial surveys, shipboard surveys, fishery interaction data, and telemetry studies. This area is the principal Oregon/Washington foraging area and includes important habitat associated with Heceta Bank, Oregon. The greatest densities of a primary prey species *C. fuscescens* occur north of Cape Blanco, Oregon and in shallow inner shelf waters (Suchman and Brodeur, 2005).

Area 3: Nearshore area south of Area 2 from Umpqua River (Winchester Bay), Oregon, to Point Arena, California, shoreward of a line approximating the 2000 meter isobath. This line runs from 43°40′ N./125°17′ W. through 43°24′10″ N./125°16′ W., 42°39′3″ N./125°7′37″ W., 42°24′49″ N./125°0′13″ W., 42°3′17″ N./125°9′51″ W., 40°49′38″ N./124°49′29″ W., 40°23′33″ N./124°46′32″ W., to 38°57′14″ N./123°56′44″ W. then east to Point Arena. Leatherback presence is based on aerial survey data. This area includes major upwelling centers between Cape Blanco, Oregon and Cape Mendocino, California and is characterized by cold sea surface temperatures (<13° C) and great densities of the prey species *A. labiata.* Although leatherback use is limited, this area could experience greater use during warm water episodes such as an El Nino event.

Area 4: Offshore area west and adjacent to Area 2 (see above). Includes waters west to a line from 47°57′38″ N./126°22′54″ W. southwest to 43°40′8″ N./129°1′30″ W. Leatherback presence is based on aerial surveys. This area is used primarily as a region of passage to/from Areas 2 and 5 (see below) although prey species are present and it is used as a secondary foraging area. This area contains large numbers of *A. labiata* and some *C. fuscescens,* with greater densities of *C. fuscescens* found east of Area 4 in Area 2.

Area 5: Offshore area south and adjacent to Area 4 and west and adjacent to the northern portion of Area 3 (see above). This area includes all waters north of a line consistent with the California/Oregon border and west to the boundary of the U.S. EEZ. Leatherback presence is based on aerial surveys, telemetry studies, and fishery interaction data. This area includes prey species within primary offshore foraging habitat and passage to Areas 2, 3 and 4 (see above).

Area 6: Offshore area south and adjacent to Area 5 and west and adjacent to the southern portion of Area 3 (see above) offshore to a line connecting 42° N./129° W. and 38°57′14″ N./126°22′55″ W. Leatherback presence is based on aerial surveys, telemetry studies, and fishery interaction data. This area includes prey species within secondary foraging habitat west of Cape Mendocino and passage between Area 5 (see above) and Area 7 (see below).

Area 7: Nearshore area from Point Arena, California, to Point Vicente, California (35°44′30″ N./118°24′44″ W.), exclusive of Area 1 (see above) and offshore to a line connecting 38°57′14″ N./126°22′55″ W. and 33°44′30″ N./121°53′41″ W. This area includes waters surrounding the northern Santa Barbara Channel Islands (San Miguel, Santa Rosa, Santa Cruz, and Anacapa Islands). Leatherback presence is based on aerial surveys, telemetry studies, and fishery interaction data. This area includes prey species within secondary foraging areas characterized by ocean frontal zones west of the continental shelf that are occupied by aggregations of *A. labiata* and lower densities of *C. fuscescens.* The frontal zones are created by a series of quasi-permanent, retentive eddies or meanders, associated with offshore-flowing squirts and jets anchored at coastal promontories between Point Reyes and Point Sur, which create linkages between nearshore waters of Area 1 and offshore waters of the California Current. Telemetry data indicate that this area is commonly utilized by leatherbacks, particularly when jellyfish availability in Area 1 is poor. This area also provides passage to/from foraging habitat in Areas 1, 5, and 6 (see above), often through the northern Santa Barbara Channel Islands during the spring and early summer months.

Area 8: Extreme offshore area west and adjacent to Areas 6 and 7 from the California/Oregon border then south of Area 7, including areas closer to the coast, along the U.S. EEZ to the U.S./Mexico border. The western and southern borders of Area 8 are the U.S. EEZ. This area includes waters surrounding the southern Santa Barbara Channel Islands (San Nicholas, Santa Barbara, Catalina, and San Clemente Islands). Leatherback presence is based on aerial surveys, telemetry studies, and fishery interaction data. This area includes prey species within tertiary foraging habitat characterized by warm, low salinity offshore waters and passage to/from foraging habitat in Areas 1, 5, 6, and 7 (see above).

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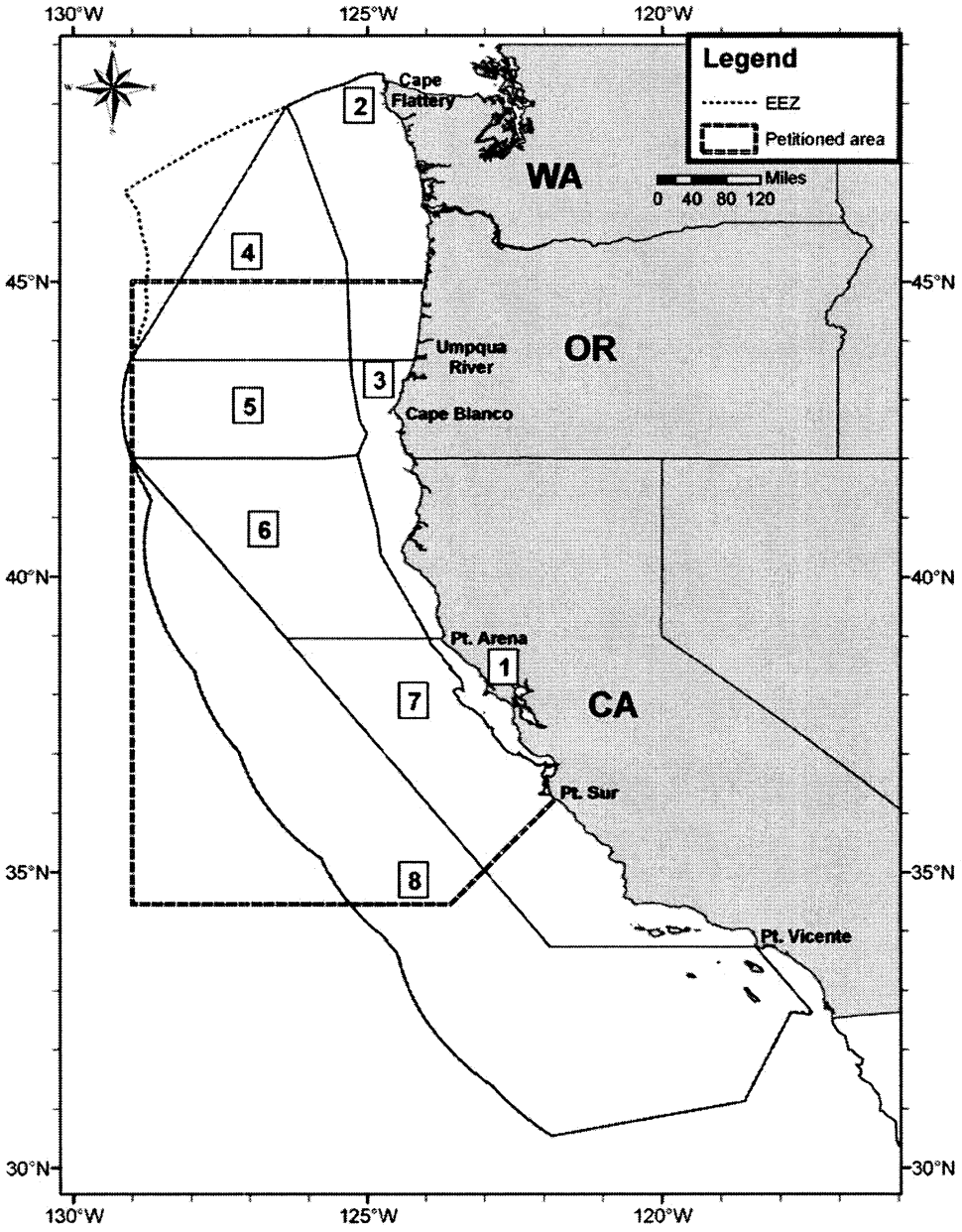
Figure 1. Specific Areas Considered and the Petitioned Area



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Unoccupied Areas

Section 3(5)(A)(ii) of the ESA authorizes designation of ''specific areas outside the geographical areas occupied by the species at the time it is listed'' if those areas are determined to be essential to the conservation of the species. Joint NMFS and USFWS regulations (50 CFR 424.12(e)) emphasize that the agency shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species. At the present time we have not identified additional specific areas outside the geographic area occupied by leatherbacks that may be essential for the conservation of the species.

Special Management Considerations or Protections

An occupied area may be designated as critical habitat if it contains physical and biological features that ''may require special management considerations or protection.'' Joint NMFS and USFWS regulations (50 CFR 424.02(j)) define ''special management considerations or protection'' to mean ''any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species.'' The CHRT identified a number of activities that may threaten the identified PCEs, as impacts to the PCEs also impact the physical and biological features. The CHRT grouped these activities into eight

activity types: Pollution from point sources (*e.g.* National Pollution Discharge Elimination System (NPDES)); runoff from agricultural pesticide use; oil spills; power plants; aquaculture; desalination plants; tidal energy or wave energy projects; and liquid natural gas (LNG) projects. All of these activities have the potential to affect the PCEs by altering prey abundance, prey contamination levels, and free passage between and within specific areas (Table 1). Some of these activities may also have the potential to impact PCEs positively (*e.g.* infrastructure for aquaculture may provide substrate and habitat for the benthic polyp stages of medusae).

The CHRT initially considered impacts to PCE's from potential offshore wind energy projects, but due to lack of data and uncertainty regarding the potential for offshore wind energy projects off the U.S. West Coast, they did not have enough information to fully evaluate costs and effects of wind projects alongside the analysis on tidal energy and wave energy projects. Therefore, the CHRT recommended that we exclude wind energy from this analysis and solicit public comment on this issue (*see* **ADDRESSES**).

The CHRT also considered impacts to PCE's from commercial fishing activities, but ultimately determined that commercial fisheries would not impact PCE's. When considering the prey PCE, the CHRT looked at potential fisheries that would target jellyfish, but no such fishery was anticipated, within the evaluated areas, in the foreseeable future. The bycatch of jellyfish in existing commercial fisheries was also considered, but it was determined that the level of bycatch was limited. When considering impacts to the passage PCE, the team considered whether fishing gear could be considered an impediment to the passage of leatherbacks to and from their foraging areas, and if the presence of that gear altered the habitat. It was determined that only permanent or long-term structures would be considered for their potential to affect habitat and the passage PCE. Additionally, the direct take of the species in fishing gear is more appropriately considered under the jeopardy standard in ESA section 7 consultations. Therefore, the CHRT recommended that we exclude commercial fishing activities from our analysis and solicit public comment on this issue (*see* **ADDRESSES**).

The CHRT also considered ocean acidification (and myriad contributing activities) as possibly affecting the prey PCE. The Class Scyphozoa, which includes *C. fuscescens* and *A. labiata,* has calcium sulfate hemihydrate statoliths, which may be affected by acidification. Winans and Purcell (in review) found no pH effect on production of new medusae (ephyrae); statoliths were not decreased in number, but were smaller in low pH. Iglesias-Rodriquez *et al.* (2008) found increases in biogenic calcification in phytoplankton with increased CO_2 using methods they argued were more realistic than those used in previous studies that showed decreased calcification with increasing PCO_2. Attrill *et al.* (2007) suggested that lower pH in parts of the North Sea opened an ecological niche leading to an increase in jellyfish abundance. Yet, Richardson and Gibbons (2008) repeated and expanded the work of Attrill *et al.* (2007) and found no correlation between ocean acidification and scyphomedusae abundance. Given equivocal or sparse data, the CHRT recommended that we exclude ocean acidification and the contributing activities from our analysis and solicit public comment on this issue (*see* **ADDRESSES**).

TABLE 1—SUMMARY OF OCCUPIED SPECIFIC AREAS, SURFACE AREA COVERED, THE PCEs PRESENT, AND ACTIVITIES THAT MAY AFFECT THE PCEs WITHIN EACH AREA SUCH THAT SPECIAL MANAGEMENT CONSIDERATIONS OR PROTECTION MAY BE REQUIRED

Specific area	Est. area (sq. mi)	PCE(s) present	Activities
Area 1	4,700 (12,173 sq. km)	Prey, Passage	Prey—point pollution, pesticides, oil spills, power plants, desalination plants, tidal wave/energy projects, aquaculture. Passage—oil spills, tidal wave/energy projects, aquaculture.
Area 2	24,500 (63,455 sq. km)	Prey, Passage	Prey—point pollution, pesticides, oil spills. Passage—oil spills.
Area 3	11,600 (30,044 sq. km)	Prey, Passage	Prey—point pollution, pesticides, oil spills, tidal wave/energy projects, LNG. Passage—oil spills, tidal wave/energy projects.
Area 4	30,000 (77,700 sq. km)	Prey, Passage	Prey—oil spills. Passage—oil spills.
Area 5	24,500 (63,455 sq. km)	Prey, Passage	Prey—oil spills. Passage—oil spills.
Area 6	34,200 (88,578 sq. km)	Prey, Passage	Prey—oil spills. Passage—oil spills.
Area 7	46,100 (119,398 sq. km)	Prey, Passage	Prey—point pollution, pesticides, oil spills, power plants, desalination plants, tidal wave/energy projects, LNG, aquaculture. Passage—oil spills, tidal wave/energy projects, aquaculture.
Area 8	117,000 (303,030 sq. km)	Prey, Passage	Prey— oil spills, LNG, aquaculture. Passage—oil spills, aquaculture.

Military Areas Ineligible for Designation

Recent amendments to the ESA preclude the Secretary from designating military lands as critical habitat if those lands are subject to an Integrated Natural Resource Management Plan (INRMP) under the Sikes Act and the Secretary certifies in writing that the plan benefits the listed species (Section 4(a)(3), Pub. L. 108–136). We are not aware of any INRMPs in the areas under

consideration for designation as critical habitat.

ESA Section 4(b)(2) Analysis

Section 4(b)(2) of the ESA requires us to use the best scientific information available in designating critical habitat. It also requires that before we designate any ''particular areas,'' we must consider the economic impacts, impacts on national security, and any other relevant impacts. The ESA does not define what ''particular areas'' means in the context of section 4(b)(2), or the relationship of particular areas to ''specific areas'' that meet the statute's definition of critical habitat. As there was no biological basis to further subdivide the eight ''specific areas'' identified within the occupied geographical area into smaller units, we treated these areas as the ''particular areas'' for our initial consideration of impacts of designation. Once impacts are determined, we decide whether to consider exercising discretion to exclude any areas. If we consider exercising such discretion, we are to weigh the benefits of excluding any particular area (avoiding the economic, national security or other costs) against the benefits of designating it (the conservation benefits to the species). If we conclude that the benefits of exclusion in any particular area outweigh the benefits of designation, we have discretion to exclude areas, so long as exclusion will not result in extinction of the species. We determined to proceed with evaluating the benefits of designation.

Benefits of Designation

The primary benefit of designation is the protection afforded under section 7 of the ESA, requiring all Federal agencies to ensure their actions are not likely to destroy or adversely modify critical habitat. This is in addition to the requirement that all Federal agencies ensure that their actions are not likely to jeopardize the continued existence of the species. The designation of critical habitat also provides other benefits such as improved education and outreach by informing the public about areas and features important to species conservation.

For the purposes of conducting the 4(b)(2) analysis, it was not possible to directly compare the benefits to the costs of designation. For a direct comparison, the benefits would need to be monetized, but we are unaware of available data that would allow us to monetize the benefits expected from ESA section 7 consultations, education, and outreach for the considered areas. As an alternative approach, we used the overall conservation value ratings that were calculated for each area by the CHRT to represent the qualitative conservation benefit of designation.

In evaluating the conservation value of each specific area, the CHRT assessed how leatherbacks use each area, the frequency and duration of that use, and the quality and quantity of prey species within each area. After reviewing the best available information, the CHRT determined that the eight specific areas varied in terms of potential conservation value for leatherback turtles. The CHRT used professional judgment to assign a relative biological importance score of 1, 2, or 3 (3 representing the highest importance) to each area for each of our two identified PCEs. Scores were then summed and used to assign an overall conservation rating of ''Very Low'', ''Low'', ''Medium'', or ''High'' for each specific area. Summed numeric equivalents for each conservation rating were: Very Low = 3 or less; Low = 4; Medium = 5; High = 6. The scoring criteria, parameter scores, and overall conservation rating for each specific area are summarized in Table 2.

TABLE 2—SUMMARY OF PRESENCE (YES/NO) OF PRIMARY CONSTITUENT ELEMENTS AND THE RESULTANT CONSERVATION VALUE RATINGS FOR SPECIFIC AREAS OCCUPIED BY LEATHERBACK TURTLES

Specific area	PCE Condition & Frequency 1 = Preferred prey rare or absent and passage conditions to/from/within high use foraging areas needed infrequently or inconsistently 2 = Preferred prey present but not consistently abundant or not well distributed and passage conditions to/from/within high use foraging areas are needed more frequently and consistently 3 = Preferred prey consistently abundant and well distributed and passage conditions to/from/within high use foraging areas needed frequently and consistently				Overall conservation rating
	Prey	Value	Passage	Value	Total
Area 1	Yes	3	Yes	3	High.
Area 2	Yes	3	Yes	3	High.
Area 3	Yes	2	Yes	1	Very Low.
Area 4	Yes	2	Yes	3	Medium.
Area 5	Yes	2	Yes	3	Medium.
Area 6	Yes	1	Yes	3	Low.
Area 7	Yes	2	Yes	3	Medium.
Area 8	Yes	1	Yes	3	Low.

Economic Benefits of Exclusion

To determine the economic benefits of excluding particular areas from designation, we estimated the potential cost of designation associated with each area. To do this we first accounted for the baseline level of protection afforded to leatherbacks based on existing Federal and state regulations. When calculating baseline cost estimates, the CHRT heavily relied on information from the draft economic reports supporting critical habitat designations for the southern resident killer whale (Industrial Economics Incorporated, 2006), green sturgeon (Industrial Economics Incorporated, 2008), and the final economic report for salmon and steelhead (NMFS, 2005). The level of future activities was developed using GIS data and other published data on existing, pending, or future actions (*e.g.* Federal Energy Regulatory Commission (FERC) permit license data for LNG projects).

In areas where listed species coexist with leatherbacks (particularly green sturgeon), a portion of affected future activities modifications (and associated costs) are expected to occur regardless of leatherback critical habitat designation. Thus, after estimating the number of projects that may potentially

require modifications, the CHRT applied an ''incremental score'' to more accurately represent the portion of the projects that would be affected solely by leatherback critical habitat designation. For activities that occur in areas with more existing protections (*e.g.* areas with Marine Sanctuaries or overlapping critical habitat with other listed species), the CHRT estimated that 30 percent of costs would be attributable to designated leatherback critical habitat. For activities that occur in areas with fewer existing protections (*e.g.* areas with other listed species), the CHRT estimated that 50 percent of costs would be attributable to designation of leatherback critical habitat (*see* economic report for more details).

Annual costs were estimated for each activity in each area and then modified by the incremental score percentage to determine the estimated costs for project modifications due to leatherback critical habitat designation. The majority of activity costs were projected 20 years into the future and where applicable, costs were adjusted for inflation to reflect 2009 values (with a 7 percent discount rate applied to future costs). The CHRT calculated low and high cost scenarios based on spatial considerations for activities that occur on land (*e.g.* agriculture pesticide application) and the likelihood of modifications to existing activities. Where applicable, the high cost scenario estimated costs for activities within 5 miles of the coastline; the low cost scenario estimated costs for activities within 1 mile of the coastline. Estimated costs were determined for all activities except LNG and aquaculture, therefore only a qualitative assessment was possible for these activities. The median value between the high and low cost scenarios was used as the estimated incremental cost for the designation of each area (*see* economic report for more details).

Exclusion of Particular Areas Based on Economic Impacts

The conservation benefit to the species resulting from the designation of a particular area is not directly comparable to the economic benefit resulting from the exclusion of that particular area. As explained above, we had sufficient information to monetize the estimated economic benefits of exclusion, but were not able to monetize the conservation benefits of designation. To qualitatively scale the economic cost estimates in the same manner as the conservation value ratings, we created economic thresholds (*see* Table 3) and assigned each area an economic rating based on its median annualized cost.

TABLE 3—ECONOMIC THRESHOLDS AND CORRESPONDING ECONOMIC RATINGS

Threshold	Economic rating
$20,000,000 or more	High.
$700,000–$19,999,999	Medium.
$25,000–$699,999	Low.
$0–$24,999	Very Low.

As shown in Table 3 above, we set the high economic threshold at $20 million or more in costs, based on an estimate of 3 percent of total revenue for activities associated with Area 7, the area with the highest estimated revenues and costs. The economic threshold between medium and low economic costs was set at $700,000 based on the median value of cost per area. A very low estimated cost threshold was set at less than $25,000, based on the presumed insignificant distributed burden this would place on affected activities. No areas currently under review as potential leatherback critical habitat have either high or very low economic costs using this economic scale (see the economic and ESA section 4(b)(2) reports for more details).

The dollar thresholds do not represent a judgment that areas with medium conservation value are worth no more than $19,999,999, or that areas with very low conservation value ratings are worth no more than $24,999. These thresholds represent the levels at which we believe the economic impact associated with a particular area would outweigh the conservation benefits of designating that area.

To weigh the benefits of designation against the benefits of exclusion, we compared the conservation value ratings against the economic ratings. Areas were determined to be eligible for exclusion based on economic impacts using three decision rules: (1) Areas with conservation value ratings of ''high'' or ''medium'' were eligible for exclusion only if they had an economic rating above the conservation rating, unless decision rule 3 applies; (2) Areas with conservation value ratings of ''low'' or ''very low'' were eligible for exclusion if they had an economic rating equal to or above the conservation value rating; and (3) Offshore areas with oil spills as the only activity that may affect PCEs are eligible for exclusion regardless of conservation value or economic ratings (*see* explanation below). We seek public comment on these decision rules (*see* **ADDRESSES**).

The dollar thresholds and decision rules provided a relatively simple process for identifying specific areas warranting consideration for exclusion. See Table 4 for a summary of the information used to determine which areas are eligible for exclusion based on economic impacts.

TABLE 4—MEDIAN ANNUAL COSTS AND RATINGS BY AREA

Areas	Median annualized cost	# Activities types that may affect PCEs	Economic rating	Conservation value rating	Eligible for exclusion based on economic impacts?
7	* $6,820,450	8	Medium	Medium	No.
1	* 3,581,850	6	Medium	High	No.
3	* 2,739,800	5	Medium	Very Low	Yes.
2	* 1,345,950	3	Medium	High	No.
4	46,650	** 1	Low	Medium	Yes.
5	46,650	** 1	Low	Medium	Yes.
6	46,650	** 1	Low	Low	Yes.
8	* 46,650	3	Low	Low	Yes.

* Cost estimates for LNG and Aquaculture were not available so were not included in these estimates. See the economic report for more details.

** Oil spill is only activity.

Based on this analysis, Areas 3, 4, 5, 6 and 8 were identified as eligible for exclusion based on economic impacts. The Secretary may exclude any area from critical habitat if he determines that the benefits of exclusion outweigh

the benefits of designating such an area as critical habitat, unless he determines that failure to designate will result in the extinction of the species concerned. Therefore, the CHRT considered whether the exclusion of Areas 3, 4, 5, 6, and 8 would result in the extinction of the endangered leatherback sea turtle.

The CHRT evaluated this question based on the information reviewed when addressing the conservation value ratings and activities that may impact PCEs, and determined that exclusion of Areas 3, 4, 5, 6, and 8 is not likely to cause the extinction of leatherbacks. The CHRT also evaluated whether excluding any of these areas would significantly impede the conservation of the species. After examining relevant scientific and commercial information, the CHRT determined that the exclusion of these areas would not significantly impede conservation. For Area 3 the CHRT based this determination in part on the area's limited overall prey abundance, distribution of preferred prey species, and use of the area by leatherbacks. For Areas 6 and 8 the CHRT based this determination on the fact that these areas have relatively few threats and offer only secondary and tertiary foraging habitat, respectively.

Given their medium conservation value ratings, special attention was given to Areas 4 and 5 to ensure that exclusions would not significantly impede conservation. The CHRT found that although these areas received a medium conservation value rating, oil spills are the only identified activity that may affect PCEs. Based on NOAA's records since the late 1950s, there have been very few and relatively small oil spills documented in these two areas. In general, vessels transiting offshore are widely dispersed and less vulnerable to collisions with one another or with man-made or natural structures. In addition, there has been limited or no response to offshore oil spills when they have occurred off the U.S. West Coast. Therefore, the CHRT reasoned that exclusion of these areas would not impede conservation of leatherback sea turtles since there are few activities within Areas 4 and 5 likely to require special management afforded by critical habitat designation.

Based on the best scientific data currently available, we propose to exclude Areas 3, 4, 5, 6, and 8 from critical habitat designation because the benefits of exclusion outweigh the benefits of inclusion and exclusion will not impede conservation or result in the extinction of the species. We recognize that the lack of documented evidence of leatherbacks in some of these areas may be the result of inadequate monitoring and encourage directed surveys in both offshore and nearshore areas to increase our knowledge of leatherback use of the waters of the U.S. West Coast. We will evaluate any new information in the final rule stage and encourage public comment on these proposed exclusions (*see* **ADDRESSES**).

Exclusions Based on Impacts on National Security

The Secretary must consider possible impacts on national security when determining critical habitat. Discussions with the Department of Defense (DOD) indicate that there is overlap between the areas proposed here as critical habitat and areas off southern California and Washington where the U.S. Navy conducts training exercises. The Navy provided letters to NMFS detailing the operations areas that they believe should be excluded from critical habitat due to national security. We will continue working with the DOD to identify impacts to national security and to determine whether any military areas are eligible for exclusion from the proposed critical habitat designation. We encourage the public to see Appendix 1 of the 4(b)(2) report for additional information.

Exclusions for Indian Lands

The longstanding and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the Federal Government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian Tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. Pursuant to these authorities lands have been retained by Indian Tribes or have been set aside for tribal use. These lands are managed by Indian Tribes in accordance with tribal goals and objectives within the framework of applicable treaties and laws. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, outlines the responsibilities of the Federal Government in matters affecting tribal interests. Indian lands are those defined in the Secretarial Order ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act'' (June 5, 1997), including: (1) Lands held in trust by the United States for the benefit of any Indian tribe; (2) land held in trust by the United States for any Indian Tribe or individual subject to restrictions by the United States against alienation; (3) fee lands, either within or outside the reservation boundaries, owned by the tribal government; and (4) fee lands within the reservation boundaries owned by individual Indians.

We reviewed maps indicating that several areas along the Washington coast under consideration as critical habitat overlap with Indian lands. These overlapping areas consist of a narrow intertidal zone associated with Indian lands, from the line of mean lower low water to extreme low water, for the following federally recognized tribes (73 FR 18553, April 4, 2008): The Hoh, Makah, Quileute, and Quinault tribes.

To assess the exclusion of Indian lands under section 4(b)(2) of the ESA, we compared the benefits of designation to the benefits of exclusion. The benefits of exclusion include: (1) The furtherance of established national policies, our Federal trust obligations and our deference to the tribes in management of natural resources on their lands; (2) the maintenance of effective long-term working relationships to promote species conservation on an ecosystem-wide basis; (3) the allowance for continued meaningful collaboration and cooperation in scientific work to learn more about the conservation needs of the species on an ecosystem-wide basis; and (4) continued respect for tribal sovereignty over management of natural resources on Indian lands through established tribal natural resource programs. Given that the affected Indian lands represent a very small proportion of the total critical habitat area and, moreover, the high benefits of exclusion, we determined that the benefits of exclusion outweigh the benefits of designation. We also determined that these proposed exclusions will not result in extinction, or impede conservation, of leatherback turtles. Therefore, we propose the exclusion of the identified Indian lands from the proposed critical habitat designation for leatherback turtles. The 4(b)(2) report provides a more detailed description of our assessment and determination for Indian lands.

Critical Habitat Designation

We proposed to designate areas 1, 2, and 7, which includes approximately 70,600 square miles (182,854 square km) of marine habitat in California, Oregon, and Washington and offshore Federal waters. The proposed critical habitat areas contain the physical or biological features essential to the conservation of

the species that may require special management considerations or protection. We propose to exclude from designation areas 3, 4, 5, 6, and 8, for which the benefits of exclusion outweigh the benefits of designation. We conclude that the exclusion of these areas will not result in the extinction of the species, nor impede conservation of the species.

Effects of Critical Habitat Designation

Section 7(a)(2) of the ESA requires Federal agencies to insure that any action authorized, funded, or carried out by the agency (agency action) does not jeopardize the continued existence of any threatened or endangered species or destroy or adversely modify designated critical habitat. Federal agencies are also required to confer with us regarding any actions likely to jeopardize a species proposed for listing under the ESA, or likely to destroy or adversely modify proposed critical habitat, pursuant to section 7(a)(4). A conference involves informal discussions in which we may recommend conservation measures to minimize or avoid adverse effects. The discussions and conservation recommendations are to be documented in a conference report provided to the Federal agency. If requested by the Federal agency, a formal conference report may be issued; including a biological opinion prepared according to 50 CFR 402.14. A formal conference report may be adopted as the biological opinion when the species is listed or critical habitat designated, if no significant new information or changes to the action alter the content of the opinion. When a species is listed or critical habitat is designated, Federal agencies must consult with NMFS on any agency actions to be conducted in an area where the species is present and that may affect the species or its critical habitat. During the consultation, we would evaluate the agency action to determine whether the action may adversely affect listed species or critical habitat and issue our findings in a biological opinion or concurrence letter. If we conclude in the biological opinion that the agency action would likely result in the destruction or adverse modification of critical habitat, we would also recommend any reasonable and prudent alternatives to the action. Reasonable and prudent alternatives (defined in 50 CFR 402.02) are alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that would avoid the destruction or adverse modification of critical habitat. Regulations (50 CFR 402.16) require Federal agencies that have retained discretionary involvement or control over an action, or where such discretionary involvement or control is authorized by law, to reinitiate consultation on previously reviewed actions in instances where: (1) Critical habitat is subsequently designated; or (2) new information or changes to the action may result in effects to critical habitat not previously considered in the biological opinion. Consequently, some Federal agencies may request reinitiation of a consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or adversely modify or destroy proposed critical habitat. Activities subject to the ESA section 7 consultation process include activities on Federal lands and activities on private or state lands requiring a permit from a Federal agency (*e.g.* an ESA section 10(a)(1)(B) permit from NMFS) or some other Federal action, including funding (*e.g.* Federal Highway Administration (FHA)). ESA section 7 consultation would not be required for Federal actions that do not affect listed species or critical habitat and for actions on non-federal and private lands that are not federally funded, authorized, or carried out.

Activities That May Be Affected

Section 4(b)(8) of the ESA requires that we describe briefly and evaluate, in any proposed or final regulation to designate critical habitat, those activities that may destroy or adversely modify such habitat or that may be affected by such designation. A wide variety of activities may affect critical habitat and, when carried out, funded, or authorized by a Federal agency, will require an ESA section 7 consultation. These Federal actions and/or regulated activities (detailed in the economic report) include: regulation of point source pollution, particularly NPDES facilities and pesticide application (*e.g.* EPA); oil spills (*e.g.* U.S. Coast Guard (USCG) and EPA have response authorities); power plants (*e.g.* Nuclear Regulatory Commission (NRC) regulates commercial nuclear power); desalination plants (*e.g.* EPA regulates discharge/USCG and U.S. Army Corps of Engineers (USACE) are involved with permitting or approving structures or placing fill that may affect navigation); tidal/wave energy (*e.g.* FERC permitting or licensing); LNG projects (*e.g.* FERC or USCG permitting requirement), and aquaculture (*e.g.* USACE, EPA, or Minerals Management Service permitting requirements). We believe this proposed rule will provide Federal agencies, private entities, and the public with clear notification of critical habitat for leatherback sea turtles and the boundaries of such habitat. This designation will also allow Federal agencies and others to evaluate the potential effects of their activities on critical habitat to determine if ESA section 7 consultation with NMFS is needed. Questions regarding whether specific activities will constitute destruction or adverse modification of critical habitat should be directed to NMFS (*see* **ADDRESSES**).

Information Quality Act and Peer Review

The data and analyses supporting this proposed action have undergone a pre-dissemination review and have been determined to be in compliance with applicable information quality guidelines implementing the Information Quality Act (IQA) (Section 515 of Pub. L. 106–554). In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review pursuant to the IQA. The Bulletin established minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation with regard to certain types of information disseminated by the Federal Government. The peer review requirements of the OMB Bulletin apply to influential or highly influential scientific information disseminated on or after June 16, 2005. To satisfy our requirements under the OMB Bulletin, we obtained independent peer review of the scientific information that supports the proposal to designate critical habitat for the leatherback sea turtle and incorporated the peer review comments prior to dissemination of this proposed rulemaking.

Public Comments Solicited

We solicit comments or suggestions from the public, other concerned governments and agencies, the scientific community, industry, non-governmental organizations, or any other interested party concerning the proposed designation and exclusions, the biological report, the economic report, IRFA analysis, and the 4(b)(2) report. We are particularly interested in comments and information in the following areas: (1) Information describing the abundance, distribution, and habitat use of leatherback sea turtles in the eastern Pacific Ocean; (2)

Information on the identification, location, and the quality of physical or biological features and PCEs which may be essential to the conservation of the species, including whether water quality should be a PCE; (3) Information regarding potential benefits of designating any particular area of the proposed critical habitat, including information on the types of Federal actions that may affect the designated critical habitat, the physical and biological features, and/or the PCEs; (4) Information regarding potential impacts of designating any particular area, including the types of Federal actions that may trigger an ESA section 7 consultation and the possible modifications that may be required of those activities; (5) Information regarding the benefits of excluding a particular area of the proposed critical habitat; (6) Current or planned activities in the area proposed as critical habitat and costs of potential modifications to those activities due to critical habitat designation; (7) Any foreseeable economic, national security, or other relevant impact resulting from the proposed designation; (8) Information on water quality, ocean acidification and projected global climate change impacts in the proposed areas and their potential effects on the physical and biological features, and/or the PCEs; (9) Information regarding commercial fishing activities and their potential effects on the physical and biological features, and/or the PCEs; (10) Information on the potential for wind energy projects off the U.S. West Coast, including potential economic costs and effects on the physical and biological features, and/or the PCEs.

You may submit your comments and materials concerning this proposal by any one of several methods (*see* **ADDRESSES**). Copies of the proposed rule and supporting documentation, including the biological report, economic analysis, IRFA analysis, and the 4(b)(2) report, can be found on the NMFS Web site *http://www.nmfs.noaa.gov/pr/species/turtles/leatherback.htm#documents.* We will consider all comments pertaining to this designation received during the comment period in preparing the final rule. Accordingly, the final decision may differ from this proposal.

Public Hearings

Joint NMFS and USFWS regulations (50 CFR 424.16(c)(3)) state that the Secretary shall promptly hold at least one public hearing if any person requests one within 45 days of publication of a proposed regulation to list a species or to designate critical habitat. Requests for public hearings must be made in writing (*see* **ADDRESSES**) by February 19, 2010. If a public hearing is requested, a notice detailing the specific hearing location and time will be published in the **Federal Register** at least 15 days before the hearing is to be held. Information on the specific hearing locations and times will be posted on our Web site at *http://www.nmfs.noaa.gov/pr/species/turtles/leatherback.htm#documents.* Such hearings provide the opportunity for interested individuals and parties to give comments, exchange information and opinions, and engage in a constructive dialogue concerning this proposed rule. We encourage the public's participation and involvement in ESA matters.

Classification

Regulatory Planning and Review

The Office of Management and Budget (OMB) has determined that this proposed rule is significant under Executive Order 12866. An economic report and 4(b)(2) report have been prepared to support the exclusion process under section 4(b)(2) of the ESA.

National Environmental Policy Act

We have determined that an environmental analysis as provided for under the National Environmental Policy Act of 1969 for critical habitat designations made pursuant to the ESA is not required. See *Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. Denied, 116 S.Ct 698 (1996).

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency publishes a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis describing the effects of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). We have prepared an initial regulatory flexibility analysis (IRFA). This document is available upon request (*see* **ADDRESSES**), via our Web site *http://www.nmfs.noaa.gov/pr/species/turtles/leatherback.htm#documents,* or via the Federal eRulemaking Web site at *http://www.regulations.gov.* The results of the IRFA are summarized below. A description of the action, why it is being considered, and the objectives of and legal basis for this action are contained in the preamble of this proposed rule.

At the present time, little information exists regarding the cost structure and operational procedures and strategies in the sectors that may be directly affected by the potential critical habitat designation. In addition, a great deal of uncertainty exists with regard to how potentially regulated entities will attempt to avoid the destruction or adverse modification of critical habitat. This is because relatively little data exist on the effects to leatherback sea turtles and their prey from aspects of the activities identified (*i.e.,* water quality, water temperature, etc.). With these limitations in mind, we considered which of the potential economic impacts we analyzed might affect small entities. These estimates should not be considered exact estimates of the impacts of potential critical habitat to individual businesses.

The impacts to small businesses were assessed for the following six activities: NPDES activities; agriculture; oil spills; power plants; tidal/wave energy projects; and LNG projects. The impacts on small entities were not assessed for desalination plants and aquaculture facilities due to lack of information.

Small entities were defined by the Small Business Administration size standards for each activity type. The majority (> 97 percent) of entities affected within each specific area would be considered a small entity. A total of 3,458 small businesses involved in the activities listed above would most likely be affected by the proposed critical habitat designation. The estimated annualized costs associated with ESA section 7 consultations incurred per small entity range from $0 to $281,800, with the largest annualized impacts estimated for entities involved in agricultural pesticide application ($5,500 to $281,800) and tidal/wave energy projects ($11,300 to $236,600). These amounts are most likely overestimates, as they are based on assumptions that such actions may not be able to proceed if a consultation found that the project adversely modified critical habitat. The total estimated annualized cost of section 7 consultation incurred by small entities is estimated to be about $930,000. The estimated economic impacts on small entities vary depending on the activity type and location.

As required by the RFA (as amended by the SBREFA), we considered various alternatives to the proposed critical habitat designation for the leatherback. We considered and rejected the alternative of not designating critical habitat for the leatherback because such

an approach does not meet the legal requirements of the ESA. Because the benefits of exclusion for particular areas appear to outweigh the benefits of designation, NMFS is proposing to exclude those areas from the designation; however, NMFS is seeking comments on the alternative of designating all potential critical habitat areas (*i.e.,* no areas excluded), and will evaluate comments received.

We have considered and evaluated each of these alternatives in the context of the ESA section 4(b)(2) process of weighing benefits of exclusion against benefits of designation, and we believe that the current proposal provides an appropriate balance between conservation needs and the associated economic and other relevant impacts. It is estimated that small entities will avoid $578,300 in compliance costs, due to the proposed exclusions made in this designation. We seek information regarding the information in the economic analysis and the impacts to small entities (*see* **ADDRESSES**).

Coastal Zone Management Act

Section 307(c)(1) of the Federal Coastal Zone Management Act of 1972 requires that all Federal activities that affect the land or water use or natural resource of the coastal zone be consistent with approved state coastal zone management programs to the maximum extent practicable. We have determined that this proposed designation of critical habitat is consistent to the maximum extent practicable with the enforceable policies of approved Coastal Zone Management Programs of California, Oregon, and Washington. The determination has been submitted for review by the responsible agencies in the aforementioned states.

Federalism

Executive Order 13132 requires agencies to take into account any Federalism impacts of regulations under development. It includes specific consultation directives for situations where a regulation will preempt state law, or impose substantial direct compliance costs on state and local governments (unless required by statute). We have determined that the proposed rule to designate critical habitat for the leatherback sea turtle under the ESA is a policy that does not have federalism implications. Consistent with the requirements of Executive Order 13132, recognizing the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual state and Federal interest, and in keeping with Department of Commerce policies, the Assistant Secretary for Legislative and Intergovernmental Affairs will provide notice of the proposed action and request comments from the appropriate officials in states where leatherback sea turtles occur.

Paperwork Reduction Act

This proposed rule does not contain a collection-of-information requirement for the purposes of the Paperwork Reduction Act.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act, we make the following findings: (a) The designation of critical habitat does not impose an ''enforceable duty'' on state, local, tribal governments or the private sector and therefore does not qualify as a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an ''enforceable duty'' upon non-federal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' Under the ESA, the only regulatory effect is that Federal agencies must ensure that their actions do not jeopardize the continued existence of the species or destroy or adversely modify critical habitat under section 7. While non-federal entities who receive Federal funding, assistance, permits or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid jeopardy and the destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply. (b) We do not believe that this proposed rule would significantly or uniquely affect small governments because it is not likely to produce a Federal mandate of $100 million or greater in any year; that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. In addition, the designation of critical habitat imposes no obligations on local, state or tribal governments. Therefore, a Small Government Agency Plan is not required.

Takings

Under Executive Order 12630, Federal agencies must consider the effects of their actions on constitutionally protected private property rights and avoid unnecessary takings of property. A taking of property includes actions that result in physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use. In accordance with Executive Order 12630, the proposed critical habitat designation does not pose significant takings implications. A takings implication assessment is not required. This proposed designation affects only Federal agency actions (*i.e.* those actions authorized, funded, or carried out by Federal agencies). Therefore, the critical habitat designation does not affect landowner actions that do not require Federal funding or permits. This designation would not increase or decrease the current restrictions on private property concerning take of leatherback sea turtles, nor do we expect the final critical habitat designation to impose substantial additional burdens on land use or substantially affect property values. Additionally, the final critical habitat designation does not preclude the development of Habitat Conservation Plans and issuance of incidental take permits for non-Federal actions. Owners of areas included within the proposed critical habitat designation would continue to have the opportunity to use their property in ways consistent with the survival of listed leatherback sea turtles.

Government to Government Relationships With Tribes

The longstanding and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the Federal Government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian Tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, outlines the responsibilities of the Federal Government in matters affecting tribal interests. If NMFS issues a regulation with tribal implications (defined as having a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal

Government and Indian tribes) we must consult with those governments or the Federal Government must provide funds necessary to pay direct compliance costs incurred by tribal governments. The proposed critical habitat designation does not have tribal implications. The proposed critical habitat designation excludes tribal lands (*see* Exclusions for Indian Lands section above) and does not affect tribal trust resources or the exercise of tribal rights.

Energy Effects

Executive Order 13211 requires agencies to prepare a Statement of Energy Effects when undertaking a ''significant energy action.'' According to Executive Order 13211, ''significant energy action'' means any action by an agency that is expected to lead to the promulgation of a final rule or regulation that is a significant regulatory action under Executive Order 12866 and is likely to have a significant adverse effect on the supply, distribution, or use of energy. We have considered the potential impacts of this action on the supply, distribution, or use of energy (*see* economic report). Activities associated with the supply, distribution, or use of energy that may be affected by the critical habitat designation include the operation of: (1) Power plants; (2) proposed and potential tidal, wave and wind energy projects; (3) LNG projects.

The economic analysis identified seven power plants that may be affected by the potential critical habitat designation. Future management and required project modifications for leatherback critical habitat related to power plants under ESA Section 7 consultation include: Cooling of thermal effluent before release to the environment; treatment of any contaminated waste materials; and modifications associated with permits issued under NPDES. All of the power plants are located on the California coast and are subject to existing regulations through the NRC and California Energy Commission.

The economic analysis identified twelve tidal/wave energy projects that may be affected by the potential critical habitat designation. Eight of these energy projects have received preliminary permits from the FERC and four of the projects have pending applications. Given the necessary timeframes for project construction, it may be reasonable to assume that this set of projects will incur project modification costs related to leatherback critical habitat within the next 20 years. However, it should also be noted that other new permit applications are likely to be filed in the future, and that rate of application may be increasing. We seek comment on the likely number of projects within the timeframe of this analysis (*see* **ADDRESSES**). Relevant information received will inform our final analysis of energy effects.

Given that these projects are in their preliminary stages, it is not clear what effects the projects will have on habitats and natural resources, nor what effects a critical habitat designation would have on these projects. The exact nature of habitat impacts is difficult to predict; however, possible impacts to features of the potential leatherback critical habitat include obstruction of passage or migration and disturbance to prey species during their benthic, polyp stage. It is unknown whether the passage PCE could also be affected by the electromagnetic fields generated by these types of projects.

The economic analysis identified seven LNG projects that may be affected by potential leatherback critical habitat. FERC regulates LNG projects. There are three proposed LNG projects and four potential LNG projects within the analyzed areas. Like the alternative energy projects, there is a high degree of uncertainty regarding whether these proposed projects will be implemented. As a result, it is unclear at this time what effects a critical habitat designation would have on these proposed LNG projects; however, using available information, project modifications may include: biological monitoring; spatial restrictions on project installation; and specific measures to respond to catastrophes. We seek information on the nature and extent of likely modifications from LNG projects resulting from the designation of leatherback critical habitat (*see* **ADDRESSES**). Relevant information received will inform our final analysis.

We have determined that the energy effects of this proposed rule are unlikely to exceed the energy impact thresholds identified in Executive Order 13211 and that this proposed rulemaking is, therefore, not a significant energy action (*see* economic report).

References Cited

A complete list of all references cited in this rule making can be found on our Web site at *http://www.nmfs.noaa.gov/pr/species/turtles/leatherback.htm#documents,* and is available upon request from the NMFS (*see* **ADDRESSES**).

List of Subjects in 50 CFR Part 226

Endangered and threatened species.

Dated: December 30, 2009.

James W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, we propose to amend 50 CFR part 226 to read as follows:

PART 226—DESIGNATED CRITICAL HABITAT

1. The authority citation of part 226 continues to read as follows:

Authority: 16 U.S.C. 1533.

2. Revise § 226.207, to read as follows:

§ 226.207 Critical habitat for leatherback turtles (Dermochelys coriacea).

Critical habitat is designated for leatherback turtles as described in this section. The textual descriptions of critical habitat in this section are the definitive source for determining the critical habitat boundaries. The overview maps are provided for general guidance purposes only and not as a definitive source for determining critical habitat boundaries.

(a) The waters adjacent to Sandy Point, St. Croix, U.S. Virgin Islands, up to and inclusive of the waters from the hundred fathom curve shoreward to the level of mean high tide with boundaries at 17°42′12″ N. and 64°50′00″ W.

(b) All U.S. coastal marine waters within the areas in paragraphs (b)(1) and (2) of this section and as described in paragraphs (b)(3) and (4) of this section and depicted in paragraph (b)(5) of this section:

(1) California.

(i) The area bounded by Point Sur (36°18′22″ N./121°54′9″ W.) then north along the shoreline following the line of mean lower low water to Point Arena, California (38°57′14″ N./123°44′26″ W.) then west to 38°57′14″ N./123°56′44″ W. then south along the 200 meter isobath to 36°18′22″ N./122°4′13″ W. then east to the point of origin at Point Sur.

(ii) Nearshore area from Point Arena, California, to Point Vicente, California (35°44′30″ N./118°24′44″ W.), exclusive of Area 1 (see above) and offshore to a line connecting 38°57′14″ N./126°22′55″ W. and 33°44′30″ N./121°53′41″ W.

(2) Oregon/Washington. The area bounded by Winchester Bay, Oregon (43°39′58″ N./124°13′06″ W.) north along the shoreline following the line of mean lower low water to Cape Flattery, Washington (48°23′10″ N./124°43′32″ W.) then north to the U.S./Canada boundary at 48°29′38″ N./124°43′32″ W. then west and south along the line of the U.S. Exclusive Economic Zone to 47°57′38″ N./126°22′54″ W. then south along a line approximating the 2,000

meter isobath that passes through points at 47°39′55″ N./126°13′28″ W., 45°20′16″ N./125°21′ W. to 43°40′8″ N./125°17′ W. then east to the point of origin at Winchester Bay.

(3) Critical habitat extends to a water depth of 80 meters from the ocean surface and is delineated along the shoreline at the line of mean lower low water, except in the case of estuaries and bays where COLREGS lines (defined at 33 CFR part 80) shall be used as the shoreward boundary of critical habitat.

(4) Primary Constituent Elements. The primary constituent elements essential for conservation of leatherback turtles are:

(i) Occurrence of prey species, primarily scyphomedusae of the order Semaeostomeae (*Chrysaora, Aurelia, Phacellophora,* and *Cyanea*) of sufficient condition, distribution, diversity, and abundance to support individual as well as population growth, reproduction, and development.

(ii) Migratory pathway conditions to allow for safe and timely passage and access to/from/within high use foraging areas.

(5) A map of proposed critical habitat for leatherback sea turtles.

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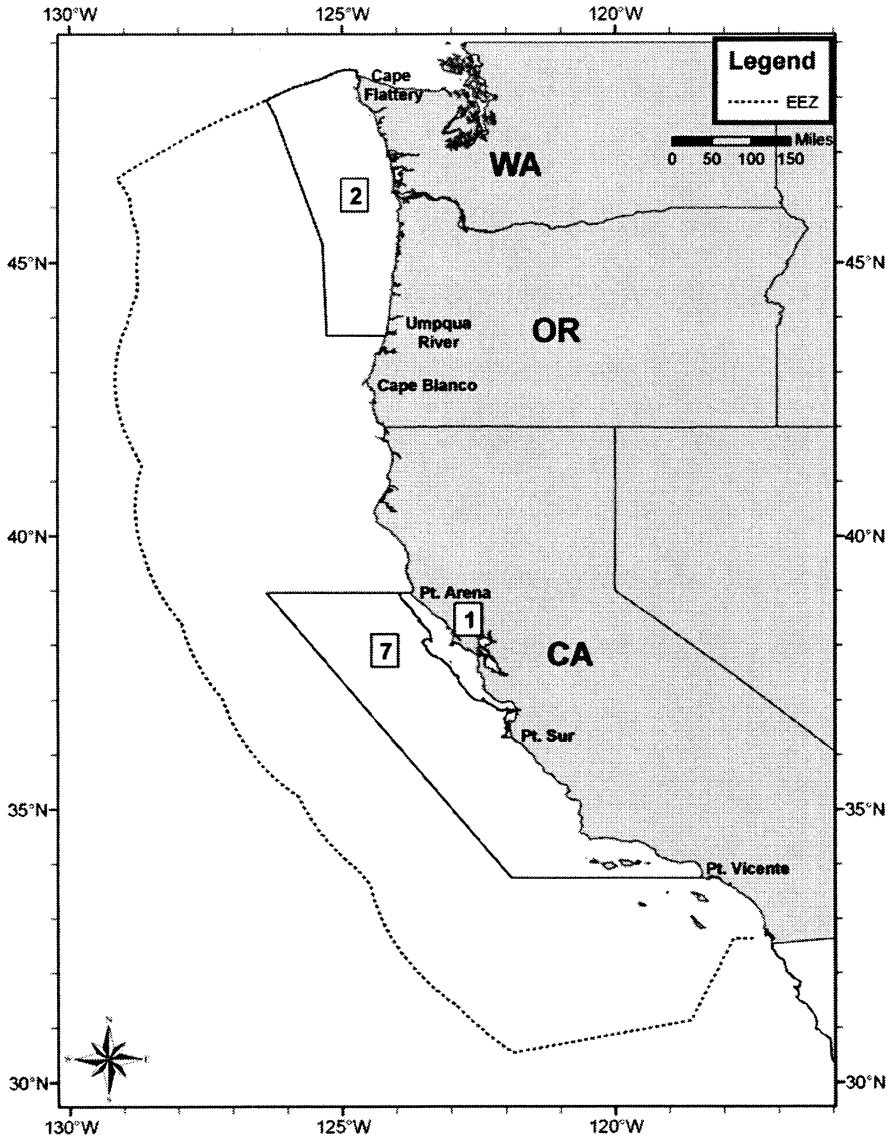

[FR Doc. E9–31310 Filed 12–31–09; 11:15 am]

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Notices

Federal Register
Vol. 75, No. 2
Tuesday, January 5, 2010

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

Rural Housing Service

Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: The Rural Housing Service, USDA.

ACTION: Proposed collection; comments requested.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Rural Housing Service's (RHS) intention to request an extension for a currently approved information collection in support of the program for ''Section 515 Multi-Family Housing Preservation and Revitalization Restructuring Demonstration Program (MPR) for Fiscal Year 2006.''

DATES: Comments on this notice must be received by March 8, 2010 to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: Melinda Price, Finance and Housing Analyst, Multi-Family Housing Preservation and Direct Loan Division, USDA Rural Development, Federal Building, Room 507, 200 North High Street, Columbus, OH 43215–2418, telephone (614) 255–2403.

SUPPLEMENTARY INFORMATION:

Title: Section 515 Multi-Family Housing Preservation and Revitalization Restructuring (MPR) demonstration Program.

OMB Number: 0575–0190.

Expiration Date of Approval: February 28, 2010.

Type of Request: Extension of currently approved information collection.

Abstract: The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006 (Pub. L. 109–97) provides funding for, and authorizes Rural Development to conduct a demonstration program for the preservation and revitalization of the section 515 multi-family housing portfolio. The section 515 multi-family housing program is authorized by section 515 of the Housing Act of 1949 (42 U.S.C. 1485) and provides Rural Development the authority to make loans for low-income multi-family housing and related facilities.

Rural Development refers to this program as Multi-Family Housing Preservation and Revitalization Restructuring Program (MPR). This NOFA sets forth the eligibility and application requirements. Information will be collected from applicants and grant recipients by Rural Development staff in its Local, Area, State, and National offices. This information will be used to determine applicant eligibility for this demonstration program. If an applicant proposal is selected, that applicant will be notified of the selection and given the opportunity to submit a formal application.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 1 hour per response.

Respondents: Individuals, partnerships, public and private nonprofit corporations, agencies, institutions, organizations, and Indian tribes.

Estimated Number of Respondents: 1,500.

Estimated Number of Responses per Respondent: 1.

Estimated Number of Responses: 2,420.

Estimated Total Annual Burden on Respondents: 2,720.

Copies of this information collection can be obtained from Linda Watts Thomas, Regulations and Paperwork Management Branch, Support Services Division at (202) 692–0226.

Comments: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the RD, including whether the information will have practical utility; (b) the accuracy of RD's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Linda Watts Thomas, Regulations and Paperwork Management Branch, Support Services Division, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave., SW., Washington, DC 20250. All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Dated: December 29, 2009.

Sylvia Bolivar,

Acting Administrator, Rural Housing Service.

[FR Doc. E9–31339 Filed 1–4–10; 8:45 am]

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DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of Industry and Security (BIS).

Title: National Security and Critical Technology Assessment of the U.S. Industrial Base.

OMB Control Number: 0694–0119.

Form Number(s): N/A.

Type of Request: Extension of currently approved information colletion.

Burden Hours: 24,000.

Number of Respondents: 3,000.

Average Hours per Response: 8.

Needs and Uses: The Department of Commerce/BIS, in coordination with other government agencies and private entities, conduct assessments of U.S. industries deemed critical to our national security. The information gathered is needed to assess the health and competitiveness as well as the needs of the targeted industry sector in order to maintain a strong U.S. industrial base. Data obtained from the surveys will be used to prepare an assessment of the current status of the

targeted industry, addressing production, technological developments, economic performance, employment and academic trends, and international competitiveness. The surveys used for the assessments are approved using the generic clearance process.

Affected Public: Business or other for-profit organizations; not-for-profit institutions.

Frequency: On occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: Jasmeet Seehra, (202) 395–3123.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Jasmeet Seehra, OMB Desk Officer, via the Internet at *Jasmeet_K._Seehra@omb.eop.gov,* or via FAX (202) 395–5607.

Dated: December 30, 2009.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E9–31337 Filed 1–4–10; 8:45 am]

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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[07–BIS–02]

Action Affecting Export Privileges: Ning Wen

In the Matter of: Ning Wen, No. 07511–089, Federal Prison Camp—H Dorm, P.O. Box 1000, Duluth, MN 55814; and 1218 Dewey St., #14, Manitowoc, WI 54220, Respondent.

Order Relating to Ning Wen

The Bureau of Industry and Security, U.S. Department of Commerce (''BIS'') has initiated an administrative proceeding against Ning Wen (''Wen'') pursuant to Section 766.3 of the Export Administration Regulations (the ''Regulations''),[1] and Section 13(c) of the Export Administration Act of 1979, as amended (the ''Act''),[2] through issuance of a charging letter to Wen that alleged that he committed 124 violations of the Regulations. Specifically, the charges are:

Charge 1: 15 CFR 764.2(d)—Conspiracy To Export Electronic Components to People's Republic of China Without the Required Licenses

Between on or about March 16, 1992 and on or about September 30, 2004, Wen conspired with others, known and unknown, to bring about acts that violated the Regulations. The object of the conspiracy was to export electronic components from the United States to the People's Republic of China (PRC) in violation of U.S. export control laws by failing to obtain the proper export licenses for certain shipments, and/or providing false descriptions and/or withholding required information on the invoices provided to the shippers. In furtherance of this conspiracy, the co-conspirators, through Wen Enterprises—a business run out of Wen's home—caused exports of electronic components controlled under Export Control Classification Numbers (''ECCNs'') 3A001 and 3A002 on the Commerce Control List to the PRC without the licenses required by the Regulations. Items classified under ECCNs 3A001 and 3A002 are controlled for national security reasons and their export to the PRC requires a license from the U.S. Department of Commerce pursuant to Section 742.2 of the Regulations. Also in furtherance of this conspiracy, the co-conspirators made false representations regarding the true value of shipments being exported to the PRC and, on several occasions between May 2004 and July 2004, Wen consulted directly with Ms. Hailin Lin regarding matters relevant to the conspiracy, including on methods to avoid detection of illegal exports. In conspiring to bring about acts that violate the Regulations, Wen committed one violation of Section 764.2(d) of the Regulations.

Charges 2–56: 15 CFR 764.2(b)—Causing an Export Without the Required License

Between on or about January 28, 2002 through on or about September 30, 2004, Wen caused 55 acts prohibited by the Regulations. Specifically, Wen caused 55 exports of items controlled under ECCNs 3A001 and 3A002 to the PRC without the licenses required by Section 742.2 of the Regulations. These exports were committed in furtherance of and as a reasonably foreseeable consequence of the conspiracy described in Charge One above. In so doing, Wen committed 55 violations of Section 764.2(b) of the Regulations.

Charges 57–111: 15 CFR 764.2(e)—Acting With Knowledge of a Violation

In connection with each of the transactions described in Charges 2 through 56 above, on 55 occasions between on or about January 28, 2002 through on or about September 30, 2004, Wen bought, sold, and/or transferred electronic components subject to the Regulations to be exported from the United States with knowledge that a violation of the Regulations was about to occur or was intended to occur in connection with the components. Specifically, at the time that the electronic components were bought, sold and/or transferred, all of which were done as a reasonably foreseeable consequence of the conspiracy described in Charge One above, Wen knew or had reason to know that the export of the items required an export license but that an export license would not be obtained. In so doing, Wen committed 55 violations of Section 764.2(e) of the Regulations.

Charges 112–124: 15 CFR 764.2(h)—Taking Action With Intent To Evade the Regulations

In connection with certain transactions described above, on thirteen occasions between on or about April 5, 2004 through on or about September 30, 2004, Wen took actions with intent to evade the provisions of the Regulations. Specifically, in connection with the preparation of export control documents, Wen did make false statements and conceal material facts by representing on shipping invoices that the value of thirteen different shipments was less than $2500 when in fact the true value of the shipments exceeded $2500. This was done so that Shipper's Export Declarations, which are filed with the U.S. Government and which must contain information about export license requirements, would not be requested for the exports. In so doing, Wen committed 13 violations of Section 764.2(h) of the Regulations.

Whereas, BIS and Wen have entered into a Settlement Agreement pursuant to Section 766.18(b) of the Regulations whereby they agreed to settle this matter

[1] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2009). The violations charged occurred between 2002 and 2004. The Regulations governing the violations at issue are found in the 2002–2004 versions of the Code of Federal Regulations. The 2009 Regulations govern the procedural aspects of this case.

[2] 50 U.S.C. app. sections 2401–2420 (2000). Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), as extended most recently by the Notice of August 13, 2009 (74 FR 41325 Aug. 14, 2009)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706).

in accordance with the terms and conditions set forth therein, and

Whereas, I have approved of the terms of such Settlement Agreement;

It is therefore ordered:

First, that Wen shall be assessed a civil penalty in the amount of $1,364,000, the payment of which shall be suspended for a period of one (1) year from the date of entry of this Order, and thereafter shall be waived, provided that during the suspension, Wen has committed no violation of the Act, or any regulation, order or license issued thereunder.

Second, that for a period of 15 years from the date of issuance of the Order, Ning Wen, No. 07511–089, Federal Prison Camp–H Dorm, P.O. Box 1000, Duluth, MN 55814, with an address at 1218 Dewey St., #14, Manitowoc, WI 54220, and when acting on behalf of Wen, his representatives, assigns, or agents (''Denied Person'') may not participate, directly or indirectly, in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

Third, that no person may, directly or indirectly, do any of the actions described below with respect to an item that is subject to the Regulations and that has been, will be, or is intended to be exported or reexported from the United States:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Fourth, that, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any person, firm, corporation, or business organization related to Wen by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of the Order.

Fifth, that the charging letter, the Settlement Agreement, this Order, and the record of this case as defined by Section 766.20 of the Regulations shall be made available to the public.

Sixth, that the Administrative Law Judge shall be notified that this case is withdrawn from adjudication.

Seventh, that this Order shall be served on the Denied Person and on BIS, and shall be published in the **Federal Register**.

This Order, which constitutes the final agency action in this matter, is effective immediately.

Entered this 29th day of December 2009.

Kevin Delli-Colli,

Deputy Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. E9–31367 Filed 1–4–10; 8:45 am]

BILLING CODE 3510–DT–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; NOAA Teacher at Sea Program

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

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 March 8, 2010.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 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 Jennifer Hammond, (301) 713–0353, or *Jennifer.Hammond@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

NOAA provides educators an opportunity to gain first-hand experience with field research activities through the Teacher at Sea Program. Through this program, educators spend up to 3 weeks at sea on a NOAA research vessel, participating in an on-going research project with NOAA scientists. The application solicits information from interested educators: basic personal information, teaching experience and ideas for applying program experience in their classrooms, plus two recommendations and a NOAA Health Services Questionnaire required of anyone going to sea. Once educators are selected and participate on a cruise, they write a report detailing the events of the cruise and ideas for classroom activities based on what they learned while at sea. These materials are then made available to other educators so they may benefit from the experience, without actually going to sea themselves. NOAA does not collect information from this universe of respondents for any other purpose.

II. Method of Collection

Forms can be completed on line and submitted electronically, and/or printed and mailed.

III. Data

OMB Control Number: 0648–0283.
Form Number: None.
Type of Review: Regular submission.
Affected Public: Individuals or households.
Estimated Number of Respondents: 375.
Estimated Time per Response: 45 minutes to read a complete application, 15 minutes to complete a Health Services Questionnaire, 15 minutes to deliver and discuss recommendation forms to persons from whom recommendations are being requested, 15 minutes for those persons to complete a recommendation form, and 2 hours for a follow-up report.
Estimated Total Annual Burden Hours: 309.
Estimated Total Annual Cost to Public: $660.

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: December 30, 2009.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E9–31338 Filed 1–4–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Advance Notification of Sunset Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

Background

Every five years, pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act''), the Department of Commerce (''the Department'') and the International Trade Commission automatically initiate and conduct a review to determine whether revocation of a countervailing or antidumping duty order or termination of an investigation suspended under section 704 or 734 of the Act would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) and of material injury.

Upcoming Sunset Reviews for February 2010

The following Sunset Review is scheduled for initiation in February 2010 and will appear in that month's notice of Initiation of Five-Year Sunset Reviews.

Antidumping duty proceedings	Department contact
Tissue Paper Products from the People's Republic of China (A–570–894)	Brandon Farlander (202) 482–0182.

Countervailing Duty Proceedings

No Sunset Review of countervailing duty orders is scheduled for initiation in February 2010.

Suspended Investigations

No Sunset Review of suspended investigations is scheduled for initiation in February 2010.

The Department's procedures for the conduct of Sunset Reviews are set forth in 19 CFR 351.218. Guidance on methodological or analytical issues relevant to the Department's conduct of Sunset Reviews is set forth in the Departments Policy Bulletin 98.3—Policies Regarding the Conduct of Five-year (''Sunset'') Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, 63 FR 18871 (April 16, 1998). The notice of Initiation of Five-Year (''Sunset'') Reviews provides further information regarding what is required of all parties to participate in Sunset Reviews.

Pursuant to 19 CFR 351.103(c), the Department will maintain and make available a service list for these proceedings. To facilitate the timely preparation of the service list(s), it is requested that those seeking recognition as interested parties to a proceeding contact the Department in writing within 10 days of the publication of the Notice of Initiation.

Please note that if the Department receives a Notice of Intent to Participate from a member of the domestic industry within 15 days of the date of initiation, the review will continue. Thereafter, any interested party wishing to participate in the Sunset Review must provide substantive comments in response to the notice of initiation no later than 30 days after the date of initiation.

This notice is not required by statute but is published as a service to the international trading community.

Dated: December 17, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E9–31185 Filed 1–4–10; 8:45 am]

BILLING CODE 3510–DS–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–890]

Wooden Bedroom Furniture From the People's Republic of China: Rescission of Antidumping Duty New Shipper Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* January 5, 2010.

SUMMARY: In response to a request from Rise Furniture Co., Ltd. (''Rise''), the Department of Commerce (''Department'') initiated a new shipper

review of the antidumping duty order on wooden bedroom furniture from the People's Republic of China (''PRC'') covering the period January 1, 2009, through July 30, 2009.[1] On November 10, 2009, Rise withdrew its request for a new shipper review. Accordingly, the Department is rescinding the new shipper review with respect to Rise.

FOR FURTHER INFORMATION CONTACT: Howard Smith or Rebecca Pandolph, AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–5193 or (202) 482–3627, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 31, 2009, the Department received a timely request from Rise in accordance with section 751(a)(2)(b)(i) of the Tariff Act of 1930, as amended (the ''Act''), and 19 CFR 351.214(b)(1) for a new shipper review of the antidumping duty order on wooden bedroom furniture from the PRC. On August 26, 2009, the Department found that the request for a new shipper review of Rise met all of the regulatory requirements set forth in 19 CFR 351.214(b)(2) and initiated the requested antidumping duty new shipper review.[2] On November 10, 2009, Rise submitted a letter to the Department in which it stated that it was withdrawing from participation in the new shipper review.[3] On November 24, 2009, Rise submitted a letter stating that its November 10, 2009, letter was not entirely clear and that it desires to ''withdraw its request and have the review terminated.''[4]

Rescission of New Shipper Review

Section 351.214(f)(1) of the Department's regulations provides that the Department may rescind a new shipper review if the party that requested the review withdraws its request for review within 60 days of the date of publication of the notice of initiation of the requested review. Although Rise withdrew its request for review after the 60-day deadline, the Department finds it reasonable to extend the deadline because it has not yet committed significant resources to the new shipper review of Rise. Specifically, the Department has not completed a full analysis of Rise's sales or factors of production data for the period of review nor has it calculated a preliminary margin for Rise. On December 4, 2009, the Department notified interested parties of its intent to rescind the new shipper review of Rise and provided parties with an opportunity to comment on the rescission.[5] The Department received no comments. Based upon the above, the Department is rescinding the new shipper review of the antidumping duty order on wooden bedroom furniture from the PRC with respect to Rise. As the Department is rescinding the new shipper review of Rise, it is not calculating a company-specific rate for Rise, and Rise will remain part of the PRC-wide entity.

Assessment

The Department will not order liquidation of the 2009 entries of Rise's merchandise at this time because the deadline for requesting an administrative review of these entries has not passed.

Cash Deposit

The Department will notify U.S. Customs and Border Protection (''CBP'') that bonding is no longer permitted to fulfill security requirements for subject merchandise produced and exported by Rise that is entered, or withdrawn from warehouse, for consumption in the United States on or after the publication of this rescission notice in the **Federal Register.** In addition, the Department will notify CBP that a cash deposit of 216.01 percent *ad valorem* should be collected for any entries of subject merchandise exported by Rise.

Notification to Interested Parties

This notice serves as the only reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a). 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 rescission and notice in accordance with section 777(i) of the Act and 19 CFR 351.214(f)(3).

Dated: December 29, 2009.

Susan Kuhbach,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E9–31303 Filed 1–4–10; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Wooden Bedroom Furniture from the People's Republic of China: Initiation of Antidumping New Shipper Reviews,* 74 FR 43096 (August 26, 2009) (''*Initiation Notice*'').

[2] *See Initiation Notice.*

[3] *See* letter from Rise regarding, ''Withdrawal from Participation in Proceedings: Wooden Bedroom Furniture From the People's Republic of China'' (November 10, 2009).

[4] *See* letter from Rise regarding, ''Wooden Bedroom Furniture from the People's Republic of China: Rise Furniture Clarification Regarding Withdrawal of Review'' (November 24, 2009).

[5] *See* letter to all interested parties regarding, ''Wooden Bedroom Furniture from the People's Republic of China: 2009 New Shipper Review of Rise Furniture Co., Ltd.'' (December 4, 2009).

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1654]

Approval for Expansion of Subzone 22F, Abbott Molecular, Inc. (Pharmaceutical and Molecular Diagnostic Products), Chicago, IL, Area

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Illinois International Port District, grantee of FTZ 22, has requested to expand the subzone and the scope of manufacturing authority on behalf of Abbott Molecular, Inc., within FTZ 22F in Des Plaines and Elk Grove Village, Illinois (FTZ Docket 06–2009, filed 02–17–09);

Whereas, notice inviting public comment has been given in the Federal Register (74 FR 8052, 02/23/09) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that the proposal is in the public interest:

Now, therefore, the Board hereby orders:

The application to expand the subzone and the scope of manufacturing authority under zone procedures within Subzone 22F, as described in the application and the **Federal Register** notice, is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 18th day of December 2009.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

ATTEST:

Andrew McGilvray,

Executive Secretary.

[FR Doc. E9–31315 Filed 1–4–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 0912181433–91433–01; I.D. GF001]

FY 2010–FY 2011 Broad Agency Announcement

AGENCY: Office of Finance and Administration (NFAPO), Office of Finance and Administration (NFA), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of funding availability.

SUMMARY: The purpose of this Broad Agency Announcement (BAA) is to request proposals for special projects and programs associated with the Agency's strategic plan and mission goals, as well as to provide the general public with information and guidelines on how NOAA will select proposals and administer discretionary Federal assistance for Fiscal Year 2010, Fiscal Year 2011 and Fiscal Year 2012. This BAA is a mechanism to encourage research, education and outreach, innovative projects, or sponsorships that are not addressed through our competitive discretionary programs; it is not a mechanism for awarding congressionally directed funds.

DATES: NOAA will accept full applications until to 5 p.m. Eastern Daylight Time September 30, 2011. Applications received after this time will not be reviewed or considered for funding.

ADDRESSES: Electronic application packages are strongly encouraged and are available through grants.gov and can be searched for using Funding Opportunity Number NOAA–NFA–NFAPO–2010–2002272. Grants.gov requires applicants to register with the system prior to submitting an application. This registration process can take several weeks and involves multiple steps. In order to allow sufficient time for this process, you should register as soon as you decide to apply even if you are not ready to submit your proposal. For those applicants without Internet access, application forms can be acquired by contacting the individuals listed under the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: National Environmental Satellite Data Information Service (NESDIS): Ingrid Guch, 301–763–8282 Hqtr. Route: E/RA1 Bldg: WWBG RM: 701 5200 Auth RD Camp Springs MD 20746–4304.

National Marine Fisheries Service (NMFS): Daniel Namur, 301–713–1364,. Hqtr. Route: F/MB2 Bldg: SSMC3, Rm: 14358, 1315 East-West Hwy, Silver Spring, MD 20910–3282.

National Ocean Service (NOS): Jane Piercy, 301–713–3050, Hqtr. Route: N/MB3 Bldg: SSMC4 Rm: 13250, 1305 East-West Hwy, Silver Spring, MD 20910–3281.

National Weather Service (NWS): Sam Contorno, 301–713–3557, NWS Hqtr Route: W/CFO2, Bldg: SSMC2, Rm: 18394, 1325 East-West Hwy, Silver Spring, MD 20910.

Office of Atmospheric Research (OAR): Sharon Schroeder, 301–713–2474, Hqrt. Route: R/OM61, Bldg: SSMC3, Rm: 11464, 1315 East-West Hwy, Silver Spring, MD 20910–3282.

NOAA Office of Education (OED): Sarah Schoedinger, 704–370–3528, Bldg: HCHB Room: 6863, 1401 Constitution Ave., NW., Washington, DC 20230–0001.

SUPPLEMENTARY INFORMATION: The purpose of this Broad Agency Announcement (BAA) is to request proposals for special projects and programs associated with the Agency's strategic plan and mission goals, as well as to provide the general public with information and guidelines on how NOAA will select proposals and administer discretionary Federal assistance for Fiscal Year 2010, Fiscal Year 2011 and Fiscal Year 2012.

As an agency with responsibilities for maintaining and improving the viability of marine and coastal ecosystems, for delivering valuable weather, climate, and water information and services, for understanding the science and consequences of climate change, and for supporting the global commerce and transportation upon which we all depend, NOAA must remain current and responsive in an ever-changing world. We do this in concert with our partners and stakeholders in Federal, State, and local governments and private organizations, applying a systematic approach that links our strategic goals through multi-year plans to the daily activities of our employees. Every year we are committed to re-evaluating our progress and priorities, looking for efficiencies, and taking advantage of new opportunities to improve our information, products, and services. In furtherance of this objective, NOAA issues this BAA for extramural research, innovative projects, and sponsorships (*e.g.*, conferences, newsletters etc.) that address one or more of the following five mission goal descriptions contained in the NOAA Strategic Plan:

1. Protect, Restore, and Manage the Use of Coastal and Ocean Resources through an Ecosystem Approach to Management;
2. Understand Climate Variability and Change to Enhance Society's Ability to Plan and Respond;
3. Serve Society's Needs for Weather and Water Information;
4. Support the Nation's Commerce with Information for Safe, Efficient, and Environmentally Sound Transportation; and
5. Provide Critical Support for NOAA's Mission.

This BAA is a mechanism to encourage research, education and outreach, innovative projects, or sponsorships that are not addressed through our competitive discretionary programs; it is not a mechanism for awarding congressionally directed funds. As a result, funding for potential projects in this notice is contingent upon the availability of Fiscal Year 2010, Fiscal Year 2011 and Fiscal Year 2012 appropriations. Applicants are hereby given notice that funds have not yet been appropriated for any proposed activities in this notice. Publication of this announcement does not oblige NOAA to review an application beyond an initial administrative review, or to award any specific project, or to obligate any available funds.

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: The specific program authority will vary depending on the nature of the proposed project. A list of the most prevalent assistance authorities are 15 U.S.C. 1540; 15 U.S.C. 2901 *et seq.*; 16 U.S.C. 661; 16 U.S.C. 1456c; 33 U.S.C. 883a–d; 33 U.S.C. 893a(a); 33 U.S.C. 1442; 49 U.S.C. 44720(b). CFDA: 11.481, Educational Partnership Program.

Funding Availability: There are no funds specifically appropriated by

Congress for this BAA. Funding for potential projects in this notice is contingent upon the availability of Fiscal Year 2010, Fiscal Year 2011 and Fiscal Year 2012 appropriations. Applicants are hereby given notice that funds have not yet been appropriated for any proposed activities in this notice.

Eligibility: Eligible applicants may be institutions of higher education, nonprofits, commercial organizations, international or foreign organizations or governments, individuals, State, local and Indian Tribal governments. Eligibility also depends on the statutory authority that permits NOAA to fund the proposed activity. Refer to the CFDA in order to determine an applicant's eligibility.

Cost Sharing Requirements: Cost sharing is not required unless it is determined that a project can only be funded under an authority that requires matching/cost sharing funds.

Evaluation and Selection Procedures: The general evaluation criteria and selection factors that apply for 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

A. Evaluation Criteria

NOAA has standardized evaluation criteria for all competitive assistance announcements. The criteria for this BAA are listed below. Applicants are required to adhere to all the noted submission requirements and to provide a demonstrable link and/or to emphasize the manner in which study objectives results will serve to support NOAA's mission goals/priorities. Since proposals responding to this BAA may vary significantly in their activities/objectives, assigning a set weight for each evaluation criterion is not feasible but is based on a total possible score of 100. The Program Office and/or Selection Official will determine which of the following criteria and weights will be applied. Some proposals, for example sponsorships, may not be able to address all the criteria like technical/scientific merit. However, it is in your best interest to prepare a proposal that can be easily evaluated against these five criteria.

1. Importance and/or relevance and applicability of proposed project to the mission goals: This ascertains whether there is intrinsic value in the proposed work and/or relevance to NOAA, Federal, regional, State, or local activities: *i.e.*, How does the proposed activity enhance NOAA's strategic plan and mission goals? Proposals should also address significance/possibilities of securing productive results, *i.e.*, does this study address an important problem? If the aims of the application are achieved, how will scientific knowledge be advanced? What will be the effect of these studies on the concepts or methods that drive this field? What effect will the project have on improving public understanding of the role of the ocean, coasts, and atmosphere in the global ecosystem? Proposals may also be scored for innovation, *i.e.*, does the project employ novel concepts, approaches or methods? Are the aims original and innovative? Does the project challenge existing paradigms or develop new methodologies or technologies?

2. *Technical/scientific merit:* This assesses whether the approach is technically sound and if the methods are appropriate, and whether there are clear project goals and objectives. Proposals should address the approach/soundness of design: *i.e.*, are the conceptual framework, design, methods, and analyses adequately developed, well-integrated, and appropriate to the aims of the project? Does the applicant acknowledge potential problem areas and consider alternative tactics? This criterion should also address the applicant's proposed methods for monitoring, measuring, and evaluating the success or failure of the project, *i.e.*, what are they? Are they appropriate?

3. *Overall qualifications of applicants:* This ascertains whether the applicant possesses the necessary education, experience, training, facilities, and administrative resources to accomplish the project. If appropriate, proposals should also address the physical environment and collaboration, if any, *i.e.*, does the environment in which the work will be done contribute to the probability of success? Do the proposed experiments or activities take advantage of unique features of the intended environment or employ useful collaborative arrangements?

4. *Project costs:* The Budget is evaluated to determine if the cost is reasonable, allowable, allocable and necessary, and if it is realistic, and commensurate with the project needs and time-frame.

5. *Outreach and education:* NOAA assesses whether this project provides a focused and effective education and outreach strategy regarding NOAA's mission to protect the Nation's environmental resources. For example, how will the outcomes of the project be communicated to NOAA and the interested public to ensure it has met the project objectives over the short, medium or long term? Does the project address any of the goals or employ any of the strategies of the NOAA Education Plan (*http://www.oesd.noaa.gov/NOAA_Ed_Plan.pdf*)?

Review and Selection Process: Upon receipt of a full application by NOAA, an initial administrative review will be conducted to determine eligibility for award, compliance with requirements and completeness of the application. This review includes determining whether:

1. Sufficient funds are available in the budget of the program office receiving the application to support the proposed project;

2. Statutory authority exists to provide financial assistance for the project or organization;

3. A complete application package has been submitted;

4. The Project Description/Narrative is consistent with one or more of NOAA's mission goals; and,

5. The proposal falls within the scope of an existing NOAA competitive announcement (**Federal Register** Notices can be found at *http://www.Grants.gov* to find recent competitive announcements) or duplicates an existing nondiscretionary project announced or awarded in FY08, FY09, FY10 or FY11 (if it does, it cannot be funded under this announcement); and,

6. The work in the proposal directly benefits NOAA (if it will, it should be supported by a procurement contract, not a financial assistance award which cannot be funded under this announcement, as provided in 31 U.S.C. 6303).

Applications not passing this initial review will not be considered further for funding through this BAA, and will not receive further review. NOAA will evaluate proposal(s) that pass this initial review and comply with all the requirements under this BAA individually (*i.e.*, proposals will be not compared to each other). A merit review will be conducted by mail reviewers and/or peer panel reviewers. Each reviewer will individually evaluate the proposal(s) using the evaluation criteria provided above; a minimum of three merit reviewers per proposal is required. The reviewers may be any combination of Federal and/or non-Federal personnel. The proposal(s) will be individually scored (*i.e.*, a consensus is not reached) unless all reviewers are Federal employees. If all of the reviewers are Federal employees, the program officer has the discretion to authorize a score based on consensus. NOAA selects evaluators on the basis of

their professional qualifications and expertise as related to the unique characteristics of the proposal.

The NOAA Program Officer will assess the evaluations and make a fund or do-not-fund recommendation to the Selecting Official based on the evaluations of the reviewers. Any application considered for funding may be required to address the issues raised in the evaluation of the proposal by the reviewers, Program Officer, Selecting Official, and/or Grants Officer before an award is issued.

Applications not selected for funding in FY2010 or FY2011 may be considered for funding from FY2012 funds but may be required to revalidate the terms of the original application or resubmit in the next BAA cycle if one is published for FY2012. The Program Officer, Selecting Official and/or Grants Officer may negotiate the final funding level of the proposal with the intended applicant. The Selecting Official makes the final recommendation for award to the NOAA Grants Officer who is authorized to commit the Federal Government and obligate the funds.

Selection Factors for Projects: Not Applicable.

Intergovernmental Review: Applications submitted by State and local governments are subject to the provisions of Executive Order 12372, ''Intergovernmental Review of Federal Programs.'' Any applicant submitting an application for funding is required to complete item 16 on the SF–424 regarding clearance by the State Single Point of Contact (SPOC) established as a result of EO 12372. To find out about and comply with a State's process under EO 12372, the names, addresses and phone numbers of participating SPOC's are listed in the Office of Management and Budget's home page at *http://www.whitehouse.gov/omb/grants/spoc.html*.

Limitation of Liability: In no event will NOAA or the Department of Commerce 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 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 Web site: *http://www.nepa.noaa.gov/*, including our NOAA Administrative Order 216–6 for NEPA, *http://www.nepa.noaa.gov/NAO216_6.pdf*, and the Council on Environmental Quality implementation regulations, *http://ceq.hss.doe.gov/nepa/regs/ceq/toc_ceq.htm.* Consequently, as part of an applicant's package, and under the description of 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 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: December 29, 2009.

Tammy Journet,

Deputy Director, Acquisition and Grants Office, National Oceanic and Atmospheric Administration.

[FR Doc. E9–31300 Filed 1–4–10; 8:45 am]

BILLING CODE 3510–12–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–831]

Fresh Garlic From the People's Republic of China: Initiation of New Shipper Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) has determined that three timely requests for a new shipper review of the antidumping duty order on fresh garlic from the People's Republic of China (PRC), meet the statutory and regulatory requirements for initiation. The period of review (POR) of these new shipper reviews is November 1, 2008 through October 31, 2009.

EFFECTIVE DATE: January 5, 2010.

FOR FURTHER INFORMATION CONTACT: Scott Lindsay, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0780.

SUPPLEMENTARY INFORMATION:

Background

The notice announcing the antidumping duty order on fresh garlic from the PRC was published on November 16, 1994. *See Antidumping Duty Order: Fresh Garlic from the People's Republic of China*, 59 FR 59209 (November 16, 1994) (*Order*). On November 27, 2009, the Department received timely requests for a new shipper review from Jinxiang Chengda Imp & Exp Co., Ltd. (Chengda) and Jinxiang Yuanxin Imp & Exp Co., Ltd. (Yuanxin), and on December 1, 2009 the Department received a timely request from Zhengzhou Huachao Industrial Co., Ltd. (Huachao) in accordance with 19 CFR 351.214(c) and 351.214(d)(1). Chengda, Yuaxin and Huachao have each certified that it is both the producer and exporter of all of the fresh garlic they exported to the United States, which is the basis for its request for a new shipper review.

Pursuant to the requirements set forth in 19 CFR 351.214(b)(2)(i), in their requests for a new shipper review, Chengda, Yuaxin, and Huachao each certified that (1) it did not export fresh garlic to the United States during the period of investigation (POI); (2) since the initiation of the investigation, it has never been affiliated with any company that exported subject merchandise to the United States during the POI, including any exporter or producer not individually examined during the investigation; and (3) its export activities are not controlled by the central government of the PRC. In accordance with 19 CFR 351.214(b)(2)(iv), Chengda, Yuaxin, and Huachao submitted documentation establishing the following: (1) the date on which it first shipped fresh garlic for export to the United States and the date on which fresh garlic was first entered, or withdrawn from warehouse, for consumption; (2) the volume of its first shipment; and (3) the date of its first sale to an unaffiliated customer in the United States.

Initiation of New Shipper Review

Pursuant to section 751(a)(2)(B) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.214(d)(1), we find that the requests submitted by Chengda, Yuaxin, and Huachao meet the threshold requirements for initiation of a new shipper review for shipments of fresh garlic from the PRC. *See* Memoranda to the File through Barbara E. Tillman, Director, AD/CVD Operations, Office 6, F*resh Garlic from the People's Republic of China: Initiation of Antidumping New Shipper Review–Yuanxin, Fresh Garlic from the People's Republic of China: Initiation of Antidumping New Shipper Review–Chengda*, and *Fresh Garlic from the People's Republic of China: Initiation of Antidumping New Shipper Review–Huachao*, each dated concurrently with this notice. *See* 19 CFR 351.214(g)(1)(i)(A).

The Department will conduct these reviews according to the deadlines set forth in section 751(a)(2)(B)(iv) of the Act. It is the Department's usual practice, in cases involving non–market economies, to require that a company seeking to establish eligibility for an antidumping duty rate separate from the country–wide rate provide evidence of *de jure* and *de facto* absence of government control over the company's export activities. Accordingly, we will issue questionnaires to Chengda, Yuaxin, and Huachao, which will include a separate rate section. The review will proceed if the response provides sufficient indication that Chengda, Yuaxin, and Huachao are each not subject to either *de jure* or *de facto* government control with respect to the export of fresh garlic.

We will instruct U.S. Customs and Border Protection to allow, at the option of the importer, the posting, until the completion of the review, of a bond or security in lieu of a cash deposit for each entry of the subject merchandise from Chengda, Yuaxin, and Huachao in accordance with section 751(a)(2)(B)(iii) of the Act and 19 CFR 351.214(e). Because Chengda, Yuaxin, and Huachao each certified that it both produced and exported the subject merchandise, the sale of which is the basis for this new shipper review request, we will apply the bonding privilege to Chengda, Yuaxin, and Huachao only for subject merchandise which Chengda, Yuaxin, and Huachao each both produced and exported.

Interested parties requiring access to proprietary information in this new shipper review should submit applications for disclosure under administrative protective order in accordance with 19 CFR 351.305 and 351.306.

This initiation and notice are in accordance with section 751(a)(2)(B) of the Act and 19 CFR 351.214 and 351.221(c)(1)(i).

Dated: December 29, 2009.

Susan Kuhbach,

Senior Director, Office 1 for Antidumping and Countervailing Duty Operations.

[FR Doc. E9–31316 Filed 1–4–10; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XT51

Gulf of Mexico Fishery Management Council; Public Meeting; Correction

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

ACTION: Council to convene public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will convene joint meetings of the Standing, Special Shrimp, Special Spiny Lobster and Special Reef Fish Scientific and Statistical Committees. This document is being corrected and republished in its entirety.

DATES: The meetings of the Standing, Special Shrimp and Special Spiny Lobster Scientific and Statistical Committees will convene at 1:30 pm on Wednesday, January 20, 2010 and conclude no later than 5:30 pm. The meeting of the Standing and Special Reef Fish Scientific Statistical Committees will convene at 8:30 am on Thursday, January 21, 2010 and conclude no later than 12 pm on Friday, January 22, 2010. The meetings will be webcast over the internet. A link to the webcast will be available on the Council's web site, *http://www.gulfcouncil.org*.

ADDRESSES: The meeting will be held at the Crowne Plaza, 2829 Williams Blvd, Kenner, LA 70062.

Council address: Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, Florida, 33607.

FOR FURTHER INFORMATION CONTACT: Dr. Richard Leard, Deputy Executive Director; Gulf of Mexico Fishery Management Council; telephone: 813–348–1630.

SUPPLEMENTARY INFORMATION:

Correction

The original document was published at 74 FR 68788, December 29, 2009, and one sentence at the end of the first paragraph under **SUPPLEMENTARY INFORMATION** was omitted and is corrected in this document.

The Standing and Special Shrimp Scientific Statistical Committees will meet to review new approaches for assessing the stock of pink shrimp and possibly other shrimp species in the Gulf, and possibly make recommendations to the Council. The

Standing and Special Spiny Lobster Scientific Statistical Committees will review the terms of reference for an upcoming update assessment and make recommendations for the Gulf and South Atlantic Fishery Management Councils to consider. The Standing and Special Reef Fish Scientific Statistical Committees will review potential species groupings for the Generic Annual Catch Limits and Accountability Measures Amendment. They will also review progress on development of an Acceptable Biological Catch Control Rule for data-poor species that will be included in the Generic Amendment. Finally, the Scientific and Statistical Committee will review the National Standard 2 guidelines and possibly provide recommendations to the Council.

Copies of the agenda and other related materials can be obtained by calling 813–348–1630 or can be downloaded from the Council's ftp site, *ftp.gulfcouncil.org*.

Although other non-emergency issues not on the agenda may come before the Scientific and Statistical Committees for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions of the Scientific and Statistical Committees will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Tina O'Hern at the Council (see **ADDRESSES**) at least five working days prior to the meeting.

Dated: December 30, 2009.

Tracey L. Thompson,

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

[FR Doc. E9–31230 Filed 1–4–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before March 8, 2010.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: December 30, 2009.

James Hyler,

Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Office of Postsecondary Education

Type of Review: New.

Title: Application for Grants under the Predominantly Black Institutions Program.

Frequency: Annually.

Affected Public: Businesses or other for-profit; Not-for-profit institutions.

Reporting and Recordkeeping Hour Burden:

Responses: 30.

Burden Hours: 600.

Abstract: The Higher Education Opportunity Act of 2008 (HEOA) amended Title III, Part A of the Higher Education Act to include Section 318—The Predominantly Black Institutions (PBI) Program. Unlike the previous PBI Program (authorized by the College Cost Reduction and Access Act of 2007), which was competitive and focused on programs in the science, technology, engineering and mathematics (STEM) fields, the PBI program authorized under the HEOA is an institutional aid program and grants are based on a formula rather than being competitive. All institutions who qualify as PBIs and submit the required materials will receive a portion of the total appropriation based on a formula. The PBI Program makes grant awards to eligible colleges and universities to plan, develop, undertake and implement programs to enhance the institution's capacity to serve more low- and middle-income Black American students; to expand higher education opportunities for eligible students by encouraging college preparation and student persistence in secondary school and postsecondary education; and to strengthen the financial ability of the institution to serve the academic needs of these students. Allowable activities are numerous and include academic instruction, teacher education, faculty development, equipment purchase, construction and maintenance, and tutoring and counseling services. This information collection is necessary to comply with Section 318 of Title III, Part A of the HEA as amended.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 4160. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E9–31265 Filed 1–4–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

State Energy Advisory Board (STEAB)

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a Board Meeting of the State Energy Advisory Board (STEAB). The Federal Advisory Committee Act (Pub. L. No. 92–463; 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: March 9–10, 2010, 8 a.m.–5 p.m. March 11, 2010, 8 a.m.–12 p.m.

ADDRESSES: Marriott Metro Center, 775 12th Street, NW., Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Gary Burch, STEAB Designated Federal Officer, Senior Management Technical Advisor, Intergovernmental Projects, Golden Field Office, U.S. Department of Energy, 1617 Cole Boulevard, Golden, CO 80401, Telephone 303–275–4801.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: To make recommendations to the Assistant Secretary for the Office of Energy Efficiency and Renewable Energy regarding goals and objectives, programmatic and administrative policies, and to otherwise carry out the Board's responsibilities as designated in the State Energy Efficiency Programs Improvement Act of 1990 (Pub. L. No. 101–440).

Tentative Agenda: Discuss ways the State Energy Advisory Board can continue to support the Department of Energy's (DOE) commercialization and deployment efforts, consider potential collaborative activities with State Energy Programs in order to facilitate renewable energy advancement, find ways to encourage energy efficiency market transformation, and update members on routine business matters affecting the Board.

Public Participation: The meeting is open to the public. Written statements may be filed with the Board either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Gary Burch at the address or telephone number listed above. Requests to make oral comments must be received five days prior to the meeting; reasonable provision will be made to include requested topic(s) on the agenda. The Chair of the Board is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business.

Minutes: The minutes of the meeting will be available for public review and copying within 60 days on the STEAB Web site, *http://www.steab.org*.

Issued at Washington, DC, on December 29, 2009.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E9–31235 Filed 1–4–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Idaho National Laboratory

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Idaho National Laboratory. The Federal Advisory Committee Act (Pub. L. No. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, January 20, 2010, 8 a.m.–5 p.m.

Opportunities for public participation will be from 1:30 p.m. to 1:45 p.m. and from 3:30 p.m. to 3:45 p.m.

These times are subject to change; please contact the Federal Coordinator (below) for confirmation of times prior to the meeting.

ADDRESSES: Hilton Garden Inn, 700 Lindsay Boulevard, Idaho Falls, Idaho 83402.

FOR FURTHER INFORMATION CONTACT: Robert L. Pence, Federal Coordinator, Department of Energy, Idaho Operations Office, 1955 Fremont Avenue, MS–1203, Idaho Falls, ID 83415. Phone (208) 526–6518; Fax (208) 526–8789 or e-mail: *pencerl@id.doe.gov* or visit the Board's Internet home page at: *http://www.inlemcab.org*.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM in the areas of environmental restoration, waste management, and related activities.

Tentative Topics (agenda topics may change up to the day of the meeting; please contact Robert L. Pence for the most current agenda):

- Progress to Cleanup.
- InSitu Grouting—Draft Remedial Design and Remedial Action Work Plan.
- Update on Hot Cell Engineering Evaluation and Cost Analysis.
- Radiation Tutorial and Education.
- Update on Calcine Record of Decision.

Public Participation: The EM SSAB, Idaho National Laboratory, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Robert L. Pence at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral presentations pertaining to agenda items should contact Robert L. Pence at the address or telephone number listed above. The request must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Robert L. Pence, Federal Coordinator, at the address and phone number listed above. Minutes will also be available at the following Web site: *http://www.inlemcab.org/meetings.html*.

Issued at Washington, DC on December 29, 2009.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E9–31236 Filed 1–4–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Proposed Subsequent Arrangement

AGENCY: Office of International Regimes and Agreements, Department of Energy.

ACTION: Subsequent arrangement.

SUMMARY: This notice has been issued under the authority of Section 131 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2160). The Department is providing notice of a proposed subsequent arrangement under the

Agreement for Cooperation Between the United States of America and the Government of Canada Concerning Peaceful Uses of Nuclear Energy and the Agreement Between the United States and the Government of Japan Concerning Peaceful Uses of Nuclear Energy.

This subsequent arrangement concerns the retransfer of 28,409 kg of U.S.-origin natural uranium dioxide, 25,000 kg of which is uranium, from Cameco in Ontario, Canada to Global Nuclear Fuels in Kanakawa-ken, Japan. The material, which is currently located at Cameco, Port Hope, Ontario, will be transferred to Global Nuclear Fuel, Kanakawa-ken, Japan to be fabricated into fuel pellets and used by Electric Power Development Co, Ltd., Tokyo, Japan. The material was originally obtained by Cameco from Crowe Butte Resources Inc. pursuant to export license XSOU8798.

In accordance with Section 131 of the Atomic Energy Act of 1954, as amended, we have determined that this subsequent arrangement is not inimical to the common defense and security. This subsequent arrangement will take effect no sooner than fifteen days after the date of publication of this notice.

Dated: December 31, 2009.

For the Department of Energy.

Richard Goorevich,

Director, Office of International Regimes and Agreements.

[FR Doc. E9–31370 Filed 1–4–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Number IC09–731–001]

Information Collection; Notice of Submission to OMB for Its Review and Approval of the Voluntary Survey on Advanced Metering and Demand Response Programs

December 28, 2009.

1. Take notice that the Federal Energy Regulatory Commission staff (Commission staff) is submitting to the Office of Management and Budget (OMB), for its review and approval, a survey of demand response and time-based rate programs and tariffs, and advanced metering infrastructure (AMI). This survey will enable Commission staff to collect the necessary information to prepare a report for Congress, which assesses various aspects of demand response in the United States, as required by section 1252(e)(3) of the Energy Policy Act of 2005 (EPAct 2005).[1] The survey will be sent to approximately 3,443 electric power businesses and organizations who directly serve end-use customers. The survey results will be processed and analyzed in order to prepare the report and submit it to Congress in 2010.

2. This survey is Commission staff's third nationwide effort to gather information on the dispersion of advanced metering and demand response programs. Continued industry cooperation is important for us to obtain information that is as accurate and up-to-date as possible, so that we may respond to Congress, and provide information to states and other market participants. Commission staff seeks to strongly encourage all survey recipients to complete the survey.

3. Commission staff has designed a survey that imposes a minimal burden on respondents by providing an easy-to-complete form that includes such user-friendly features as pre-populated fields and drop-down menus, while providing Commission staff with the information necessary to prepare the report directed by EPAct 2005 section 1253(e)(3). It is a streamlined and simplified version of past surveys and can be electronically filed. A paper version of the survey may be filed by those who are unable to file electronically.

I. Background

4. EPAct 2005 section 1252(e)(3) requires the Commission to prepare and publish a report, by appropriate region, that assesses demand response resources, including those available from all consumer classes. Specifically, EPAct 2005 requires that the Commission identify and review:

(A) Saturation and penetration rate of advanced meters and communications technologies, devices and systems;

(B) Existing demand response programs and time-based rate programs;

(C) the annual resource contribution of demand resources;

(D) the potential for demand response as a quantifiable, reliable resource for regional planning purposes;

(E) steps taken to ensure that, in regional transmission planning and operations, demand resources are provided equitable treatment as a quantifiable, reliable resource relative to the resource obligations of any load-serving entity, transmission provider, or transmitting party; and

(F) regulatory barriers to improved customer participation in demand response, peak reduction and critical period pricing programs.

5. On August 7, 2009, a notice was published in the **Federal Register**, 74 FR 39,682 (2009) (August 7 Notice), requesting comments on proposed updates to the FERC–727, *Demand Response and Time Based Rate Programs Survey* (OMB Control No. 1902–0214), and FERC–728, *Advanced Metering Survey* (OMB Control No. 1902–0213). In the August 7 Notice, Commission staff explained that it had investigated alternatives to fielding and collecting data using a FERC-designed survey, including using data from the North American Electric Reliability Corporation (NERC) and the Energy Information Administration (EIA). However, the data from NERC and EIA will not be available to the Commission in time to complete the 2010 report to Congress.

II. Discussion

6. Commission staff appreciate the useful comments on the survey questions submitted in response to the August 7 Notice. Within the limits of the available survey instrument, Commission staff made revisions to improve the clarity of the questions, to update the survey to capture technological advances, and to reduce the burden in responding. In certain cases, Commission staff did not make the suggested changes because more detailed information is needed to respond to the specific statutory provisions in EPAct 2005, to provide useful data, or to ensure that the survey is consistent with previous surveys. Commenters noted that this survey is much more concise than previous ones and will help reduce the collection burden significantly. Commission staff agrees, and proposes that with the updates and the changes that have been made, the survey will not be onerous to complete. Commission staff plans to encourage all potential respondents to complete the survey. A higher response rate will enable Commission staff to obtain more precise information. Below is a summary of the major changes to the survey and responses to the concerns expressed by commenters.

A. Guidance on Responding to Survey Questions

7. In response to a request for instructions or other guidance on how to calculate the potential reductions for price-based (time-based) and other voluntary programs, Commission staff has revised the survey instructions to describe possible methodologies, such as the methodologies used in *A National Assessment of Demand Response*

[1] Public Law 109–58, section 1252(e)(3), 119 Stat. 594 (2005).

Potential.[2] These methodologies are just examples and respondents are not required to use them. Furthermore, in order to increase transparency, the instructions request that the respondents describe their estimation method in the comment field associated with the program. Commission staff acknowledges that it may be difficult for some respondents to estimate the potential reductions for price-based programs, and recognizes that estimates of reductions for price-based programs may be less reliable than for incentive-based programs. However, Commission staff has collected this information in past surveys and sees value in the ability to compare the past and current data.

8. Commission staff received a general comment that even though the survey includes definitions, the lack of a single set of industry-wide definitions will lead to inaccurate results. According to the commenter, potential respondents who are aware that their data will be released publicly in an identifiable form, and that the public will likely draw comparisons from the data between respondents, may choose not to respond, or will be compelled to portray themselves in a light most favorable to its intended audience. In either situation, there is a risk that reported data will be less accurate. Commission staff agrees that the lack of industry-wide standards and precise definitions may reduce the accuracy and comparability of the survey results. However, it is not possible for Commission staff to specify each and every parameter that may be required to formulate survey responses for demand response programs that vary by geography, participation, type and sponsorship. Nevertheless, efforts are underway by the North American Energy Standards Board (NAESB) and NERC to develop such standards and definitions. Commission staff encourages survey recipients to consider the NAESB and NERC efforts and to use their best efforts to provide accurate responses.

9. In addition, the Commission received comments related to whether the results should be publicly released or aggregated so as to mask the identity of individual respondents. A commenter argues that the data should either be kept confidential or be aggregated because potential respondents may consider much of it competitively sensitive. Another commenter argues that publicly releasing the data will lead to low survey response levels. However, another commenter requests that the Commission continue to publicly release the data collected in spreadsheet format that allows the public to match and sort programs by entity, region, state, and customer class. Commission staff recognizes that confidentiality is a concern for particular sub-sets of respondents, such as curtailment service providers. However, Commission staff also recognizes that publicly releasing the information collected in the survey is useful to the public. Several researchers and market participants have told Commission staff that they are using the data. While Commission staff could attempt to aggregate the data so as to mask company origin, doing so would complicate the analysis, making it more difficult for the Commission to meet its statutory requirement for regional reporting, and make the 2010 data less comparable to the data collected in 2006 and 2008. In those surveys, the Commission allowed case-by-case requests for confidential treatment and will do so again in 2010.

10. Several commenters requested clarification on the definition of advanced meters, and one commenter suggested that the Commission should distinguish between the recording capability of the meter and its reporting intervals. Commission staff clarifies that the definition of advanced meters includes meters with one-way communication capability, as well as two-way communication capability, and declines to distinguish between the recording and reporting functions. The objective of the survey is to assess the penetration of advanced metering rather than to draw distinctions between meter varieties or to enumerate the frequency of meter reading.

11. A commenter argues that the use of the terms ''number of meters'' and ''number of customers'' in Questions Three and Seven is ambiguous. They suggest that, if the terms are synonymous, only one be used, and if the terms are not synonymous, then the difference be explained. Question Three explicitly asks for the number of customers and for the number of meters in each of three customer classes. Commission staff does not agree that the terms are ambiguous or that only a single term can be used. Some large customers have multiple meters, and some customers are unmetered, so there is not a one-to-one correspondence between the two terms. Question Seven requests only the ''number of retail customers,'' and does not use the term ''number of meters.''

12. Commission staff clarifies that respondents may answer with either coincident or non-coincident demand. Coincident data is not always readily available and requiring respondents to provide this information would create an additional burden. Commission staff also clarifies that Question Four requests information about the number of customers that have the capability to receive data through the listed methods, rather than the number of customers who actually receive data through the listed methods.

B. Revisions to the Survey Definitions and Questions

13. According to one commenter, many respondents do not employ as many customer class categories as used in the previous surveys. Therefore respondents must either develop a system for developing the requested data by customer class, thus increasing the filing burden, or estimate their responses, reducing the accuracy of the data. In response, Commission staff has reduced the number of customer class categories to three in the 2010 survey: Residential, commercial and industrial, and other. Doing so will reduce the burden on respondents and encourage more entities to participate, without significantly reducing the value of the collected information.

14. Commission staff declines to accept a suggestion to specify in the instructions whether responses should enumerate ''processes, loads, sites, or data streams'' to reduce double counting of meters. While double counting may occur in the circumstances that the commenter describes, Commission staff expects such installations to be relatively uncommon. Further, it is not clear which of the suggested categories best meets the Commission's data collection objective, or precisely how a ''process'' differs from a ''load,'' for instance.

15. A commenter suggests that Question Five should ask whether demand response programs are pilot programs, or full-scale programs. Another suggests that the Commission request information about if and when respondents plan to conduct pilot programs, studies or testing, and if programs have been or will be phased out. Commission staff declines to ask whether reported demand response programs are pilot programs, or full-scale programs, as one commenter suggests. The incremental information gained from this question is not sufficient to justify the additional response burden and survey redesign. In addition, the amount of demand response reported for each program is

[2] *A National Assessment of Demand Response Potential* (June 2009), available at *http://www.ferc.gov/legal/staff-reports/06-09-demand-response.pdf.*

an indicator of whether it is a pilot or full-scale program.

16. A commenter suggests including a question asking respondents to identify primary reasons leading to the implementation of a demand response program, for example, economic, reliability, emergency response, or voltage. Commission staff finds it unnecessary to adopt such a question. The list of program types that appear in the survey (for example, Critical Peak Pricing, Spinning Reserves, and Emergency Demand Response) already reflect the primary reasons for which most demand response programs are implemented.

17. For further clarity, Commission staff has revised the survey's definition of demand response programs to explicitly include both incentive-based and time-based programs. The word ''Service'' now follows the word ''Regulation'' in the list of program types in order to make it consistent with the glossary and improve clarity. Commission staff has replaced the term ''regional entity'' with the term ''NERC Regional Entity'' to avoid confusion with other uses of the term ''entity.'' The survey now includes a field in Question Eight to collect the number of times the respondent called on the demand response program during the year. An entry of zero in the new field will indicate that the program was not called.

III. Information Collection Statement

In compliance with the requirements of section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507 (2006), the Federal Energy Regulatory Commission (Commission or FERC) has submitted the information collection described below to OMB for review of the information collection requirements. Any interested person may file comments directly with OMB and should address a copy of those comments to the Commission as explained below. The Commission received comments in response to its earlier notice and has provided responses in this notice as discussed above and also made the notation in its submission to OMB.

DATES: Comments on the collection of information are due by February 4, 2010.

ADDRESSES: Address comments on the collection of information to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Federal Energy Regulatory Commission Desk Officer. Comments to OMB should be filed electronically, c/o *oira_submission@omb.eop.gov* and include this Docket No. IC09–731–000 as a point of reference. The Desk Officer may be reached by telephone at 202–395–4638.

A copy of the comments should also be sent to the Federal Energy Regulatory Commission and should refer to Docket No. IC09–731–000. Comments may be filed either electronically or in paper format. Those persons filing electronically do not need to make a paper filing. Documents filed electronically via the Internet must be prepared in an acceptable filing format and in compliance with the Federal Energy Regulatory Commission submission guidelines. Complete filing instructions and acceptable filing formats are available at *http://www.ferc.gov/help/submission-guide/electronic-media.asp*. To file the document electronically, access the Commission's Web site and click on Documents & Filing, E-Filing (*http://www.ferc.gov/docs-filing/efiling.asp*), and then follow the instructions for each screen. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgement to the sender's e-mail address upon receipt of comments.

For paper filings, an original and 2 copies of the comments should be submitted to the Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426, and should refer to Docket No. IC09–731–001.

All comments may be viewed, printed or downloaded remotely via the Internet through FERC's homepage using the ''eLibrary'' link. For user assistance, contact *fercolinesupport@ferc.gov* or toll-free at (866) 208–3676 or for TTY, contact (202) 502–8659.

FOR FURTHER INFORMATION CONTACT: Michael Miller may be reached by telephone at (202) 502–8415, by fax at (202) 273–0873, and by e-mail at *michael.miller@ferc.gov*.

SUPPLEMENTARY INFORMATION: FERC–731 (Demand Response and Time-Based Rate Programs/Tariffs''), OMB No. (To be Determined) is used by the Commission to implement EPAct 2005 section 1252(e)(3) (Pub. L. 109–58, 119 Stat. 594) (2005). EPAct 2005 section 1252(e)(3) requires the Commission to prepare and publish an annual report, by appropriate region, that assesses demand response resources, including those available from all consumer classes.

The Commission will use the information obtained by the survey to prepare and publish a report, as required by EPAct 2005 as noted above, by appropriate region that assesses demand response resources, including those available from all consumer classes and describes the saturation and penetration rate of advanced meters. With respect to other issues the Commission must address in the report, the Commission will seek assistance from state regulators and members of the industry in presenting to Congress, a well informed and comprehensive report. The proposed report will be the fifth annual report, and the third based on survey data. The continuation of the survey and reporting allows the Commission, Congress and the public to assess and follow trends in the saturation and penetration rates of advanced meters, resource contributions of demand response, and other related issues.

Action: The Commission is requesting a three-year approval of the proposed information collection.

Burden Estimate: The average public reporting burden for FERC–731 is estimated as follows.

FERC data collection	Number of respondents annually (1)	Number of responses per respondent (2)	Average burden hours per response (3)	Total annual burden hours (1)×(2)×(3)
FERC–731	3,443	1	4	13,772

The total estimated annual cost burden to respondents is $787,345 (3,443 respondents × $228.68 per respondent).

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information;

(3) adjusting the existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) Whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden of the proposed collections of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.* permitting electronic submission of responses.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–31211 Filed 1–4–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13581–000]

FFP Qualified Hydro 16 LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

December 29, 2009.

On September 4, 2009, FFP Qualified Hydro 16 LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Fulton Lock and Dam Hydroelectric Project, located on the Tennessee-Tombigbee Waterway, in Itawamba County, Mississippi. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following:

(1) A 40-ft by 150-ft long power canal; (2) a 50-ft by 40-ft powerhouse; (3) a new 3 MVA substation; (4) a 1,400-ft long transmission line; (5) 200 feet of new access roads; and (6) appurtenant facilities. The proposed Fulton Lock and Dam Hydroelectric Project would have an average annual generation of 11 gigawatt-hours.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 33 Commercial Street, Gloucester, MA 01930.

FERC Contact: Allyson Conner, 202–502–6082.

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 (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the ''eFiling'' link. For a simpler method of submitting text only comments, click on ''Quick Comment.'' For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and eight copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, 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–13581) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–31329 Filed 1–4–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13576–000]

FFP Qualified Hydro 19 LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

December 29, 2009.

On September 4, 2009, FFP Qualified Hydro 19 LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the GV Montgomery Lock and Dam Project, located on the Tennessee-Tombigbee Waterway, in Itawamba County, Mississippi. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following:

(1) A 25-ft by 200-ft long power canal; (2) a 40-ft by 40-ft powerhouse; (3) a new 3 MVA substation; (4) a 200-ft long transmission line; (5) 100 feet of new access roads; and (6) appurtenant facilities. The proposed GV Montgomery Lock and Dam Project would have an average annual generation of 8 gigawatt-hours.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 33 Commercial Street, Gloucester, MA 01930.

FERC Contact: Allyson Conner, 202–502–6082.

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 (*http://www.ferc.gov/docs-filing/ferconline.asp*)

under the ''eFiling'' link. For a simpler method of submitting text only comments, click on ''Quick Comment.'' For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and eight copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, 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–13576) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–31326 Filed 1–4–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13575–000]

FFP Qualified Hydro 21 LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

December 29, 2009.

On September 4, 2009, FFP Qualified Hydro 21 LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Kentucky River Lock and Dam No. 1 Hydroelectric Project, located on the Kentucky River, in Carroll County, Kentucky. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following:

(1) A 100-ft by 200-ft long power canal; (2) a newly excavated 125-ft by 200-ft tailrace; (3) a 30-ft by 60-ft control building; (4) a new 5 MVA substation; (5) a 2,500-ft long transmission line; and (6) appurtenant facilities. The proposed Kentucky River Lock and Dam No. 1 Hydroelectric Project would have an average annual generation of 20 gigawatt-hours.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 33 Commercial Street, Gloucester, MA 01930.

FERC Contact: Allyson Conner, 202–502–6082.

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 (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the ''eFiling'' link. For a simpler method of submitting text only comments, click on ''Quick Comment.'' For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and eight copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, 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–13575–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–31325 Filed 1–4–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13456–000]

FFP Iowa 4, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

December 29, 2009.

On April 30, 2009, FFP Iowa 4, LLC filed an application pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Mississippi River Lock and Dam No. 17 Water Power Project (Lock & Dam 17 Project), to be located at River Mile 437.1 on the Mississippi River near Wapello, Louisa County, Iowa and in Mercer County, Illinois.

The proposed Lock & Dam 17 Project would be located at the existing U.S. Army Corps of Engineers Lock & Dam No. 17 and would consist of: (1) Twenty nine 525-kilowatt (kW) Very Low Head (VHL) generating units to be installed integral with the dam, and one hundred 37.5-kW hydrokinetic generating units to be installed in the Mississippi River in an area just downstream of the dam; (2) a combined capacity of 17.7 megawatts (MW) for all turbine generating units; and (3) an existing single overhead three-phase 27,000-foot-long, 69-kilovolt (or greater) transmission line connected to an existing above-ground local distribution system. The project would have an estimated average annual generation of 86,400 megawatt-hours.

Applicant Contact: Mr. Daniel R. Irvin, Free Flow Power Corporation, 33 Commercial Street, Gloucester, MA 01930, (978) 252–7631.

FERC Contact: Patrick Murphy, (202) 502–8755.

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 ''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–13456) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–31324 Filed 1–4–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13582–000]

FFP Qualified Hydro 18 LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

December 29, 2009.

On September 8, 2009, FFP Qualified Hydro 18 LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the John Rankin Lock and Dam Hydroelectric Project, located on the Tennessee-Tombigbee Waterway, in Itawamba County, Mississippi. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following:

(1) A 30-ft by 250-ft long power canal; (2) a 40-ft by 40-ft powerhouse; (3) a new 3 MVA substation; (4) a 200-ft long transmission line; (5) 100 feet of new access roads; and (6) appurtenant facilities. The proposed John Rankin Lock and Dam Hydroelectric Project would have an average annual generation of 9.5 gigawatt-hours.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 33 Commercial Street, Gloucester, MA 01930.

FERC Contact: Allyson Conner, 202–502–6082.

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 (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the ''eFiling'' link. For a simpler method of submitting text only comments, click on ''Quick Comment.'' For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and eight copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, 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–13582) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–31317 Filed 1–4–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12569–001]

Enloe Hydroelectric Project; Notice of Application Ready for Environmental Analysis and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

December 28, 2009.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Major License.

b. *Project No.:* 12569–001.

c. *Date filed:* August 22, 2008.

d. *Applicant:* Public Utility District No. 1 of Okanogan County.

e. *Name of Project:* Enloe Hydroelectric Project.

f. *Location:* On the Similkameen River, in the Town of Oroville, Okanogan County, Washington. The project would occupy about 35.47 acres of federal land administered by the U.S. Bureau of Land Management.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* John R. Grubich, General Manager, Public Utility District No. 1 of Okanogan County, P.O. Box 912, Okanogan, WA 98840, (509) 422–8485.

i. *FERC Contact:* Kim A. Nguyen, 888 First Street, NE., Room 61–01, Washington, DC 20426, (202) 502–6105.

j. Deadline for filing comments, recommendations, terms and conditions, and prescriptions is 60 days from the issuance of this notice; reply comments are due 105 days from the issuance date of this notice.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the ''eFiling'' link. For a simpler method of submitting text only comments click on ''Quick Comment.'' For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and eight copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted and is now ready for environmental analysis.

l. The Enloe Project would consist of: (1) An existing 315-foot-long and 54-foot-high concrete gravity arch dam with an integrated 276-foot-long central overflow spillway with 5-foot-high flashboards; (2) an existing 76.6-acre reservoir (narrow channel of the Similkameen River) with a storage capacity of 775 acre-feet at 1,049.3 feet mean sea level; (3) a 190-foot-long intake canal on the east abutment of the dam diverting flows into the penstock intake structure; (4) a 35-foot-long by 30-foot-wide penstock intake structure; (5) two aboveground 8.5-foot-diameter steel penstocks carrying flows from the intake to the powerhouse; (6) a powerhouse containing two vertical Kaplan turbine/generator units with a total installed capacity of 9.0 megawatts; (7) a 180-foot-long tailrace channel that would convey flows from the powerhouse to the Similkameen River, downstream of the Similkameen Falls; (8) a new substation adjacent to the powerhouse; (9) a new 100-foot-long, 13.2-kilovolt primary transmission line from the substation connecting to an existing distribution line; (10) new and upgraded access roads, and (11) appurtenant facilities. The project is estimated to generate an average of 54 gigawatt-hours annually.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be

viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

All filings must (1) bear in all capital letters the title ''COMMENTS'', ''REPLY COMMENTS'', ''RECOMMENDATIONS'', ''TERMS AND CONDITIONS'', or ''PRESCRIPTIONS''; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Public notice of the filing of the initial development application, which has already been given, established the due date for filing competing applications or notices of intent. Under the Commission's regulations, any competing development application must be filed in response to and in compliance with public notice of the initial development application. No competing applications or notices of intent may be filed in response to this notice.

o. A license applicant must file no later than 60 days following the date of issuance of this notice: (1) A copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–31210 Filed 1–4–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13580–000]

FFP Qualified Hydro 20 LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

December 29, 2009.

On September 4, 2009, FFP Qualified Hydro 20 LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Green River Lock and Dam No. 1 Water Power Project, located on the Green River, in Henderson County, Kentucky. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following:

(1) A 125-ft by 250-ft long power canal; (2) a newly excavated 150-ft by 300-ft tailrace; (3) a 30-ft by 60-ft control building; (4) a new 5 MVA substation; (5) a 1,900-ft long transmission line; and (6) appurtenant facilities. The proposed Green River Lock and Dam No. 1 Hydroelectric Project would have an average annual generation of 27 gigawatt-hours.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 33 Commercial Street, Gloucester, MA 01930.

FERC Contact: Allyson Conner, 202–502–6082.

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 (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the ''eFiling'' link. For a simpler method of submitting text only comments, click on ''Quick Comment.'' For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov*; call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and eight copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, 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–13580–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–31328 Filed 1–4–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP07–62–000; CP07–63–000]

AES Sparrows Point LNG, LLC and Mid-Atlantic Express, LLC; Notice of Availability of the Final General Conformity Determination for Maryland for the Proposed Sparrows Point LNG Terminal and Pipeline Project

December 29, 2009.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared this Final General Conformity Determination (GCD) for Maryland to assess the potential air quality impacts associated with the construction and operation of a liquefied natural gas (LNG) import terminal and natural gas pipeline proposed by AES Sparrows Point LNG, LLC and Mid-Atlantic Express, LLC, collectively referred to as AES, in the above-referenced dockets. A separate Final General Conformity Determination is being prepared for Pennsylvania.

The final GCD was prepared to satisfy the requirements of the Clean Air Act. The FERC has determined that the Project will achieve conformity in Maryland.

The final GCD addresses the potential air quality impacts from the construction and operation of the following LNG terminal and natural gas pipeline facilities:

- A ship unloading facility, with two berths, capable of receiving LNG ships with capacities up to 217,000 m^3;
- Three 160,000 m^3 (net capacity) full-containment LNG storage tanks;
- A closed-loop shell and tube heat exchanger vaporization system;

• Various ancillary facilities including administrative offices, warehouse, main control room, security building, and a platform control room;

• Meter and regulation station within the LNG Terminal site;

• Dredging an approximate 118 acre area in the Patapsco River to −45 feet below mean lower low water to accommodate the LNG vessels and transport of the processed dredge material to its disposal location;

• Approximately 88 miles of 30-inch-diameter natural gas pipeline (approximately 48 miles in Maryland and 40 miles in Pennsylvania), a pig launcher and receiver facility at the beginning and ending of the pipeline, 10 mainline valves, and three meter and regulation stations, one at each of three interconnection sites at the end of the pipeline;

• Marine vessel transit (including LNG vessels, security escort boats, and assist tugs) from the LNG vessel's entrance into State waters, through its transit to and from the LNG terminal at Sparrows Point; and

• The optional combined-cycle cogeneration power plant at the terminal site.

The final GCD has been placed in the public files of the FERC and is 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.

A limited number of hard copies of the final GCD are available from the FERC's Public Reference Room, identified above. This final GCD is also available for public viewing on the FERC's Internet Web site at *http://www.ferc.gov, via the eLibrary link.*

Copies of this final GCD have been mailed to the U.S. Environmental Protection Agency, Region III, the Maryland Department of Natural Resources, the Maryland Department of Environment, the Pennsylvania Department of Environmental Protection, and the Virginia Department of Environmental Quality.

Additional information about the project is available from the Commission's Office of External Affairs at 1–866–208–FERC (3372). The administrative public record for this proceeding to date is on the FERC Internet Web site (*http://www.ferc.gov*). Go to Documents & Filings and choose the eLibrary link. Under eLibrary, click on ''General Search,'' and enter the docket number excluding the last three digits in the Docket Number field (e.g., CP07–62). 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 call 202–502–8659. The eLibrary link on the FERC Internet Web site also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–31318 Filed 1–4–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

December 29, 2009.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER08–912–009; ER05–365–022.

Applicants: Elk River Windfarm LLC, Iberdrola Renewables, Inc.

Description: Iberdrola Renewables, Inc *et al.* submit Original Sheet 1 to FERC Electric Tariff, Third Revised Volume 1.

Filed Date: 12/23/2009.

Accession Number: 20091224–0069.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 13, 2010.

Docket Numbers: ER10–403–001.

Applicants: Covanta Plymouth Renewable Energy Limited.

Description: Covanta Plymouth Renewable Energy Limited Partnership submits Notice of Cancellation of its Rate Schedule FERC No. 2.

Filed Date: 12/23/2009.

Accession Number: 20091224–0068.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 13, 2010.

Docket Numbers: ER10–495–000.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc submits an unexecuted Amended and Restated Large Generator Interconnection Agreement among the Midwest ISO *et al.*

Filed Date: 12/23/2009.

Accession Number: 20091224–0066.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 13, 2010.

Docket Numbers: ER10–496–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc submits an executed Large Generator Interconnection Agreement with Grand River Dam Authority etc.

Filed Date: 12/23/2009.

Accession Number: 20091224–0067.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 13, 2010.

Docket Numbers: ER10–498–000.

Applicants: Central Maine Power Company.

Description: Central Maine Power Company submits executed Engineering and Procurement Agreement with Highland Wind LLC.

Filed Date: 12/24/2009.

Accession Number: 20091228–0023.

Comment Date: 5 p.m. Eastern Time on Thursday, January 14, 2010.

Docket Numbers: ER10–499–000.

Applicants: Central Maine Power Company.

Description: Central Maine Power submits executed Engineering and Procurement Agreement with Patriot Renewables, LLC.

Filed Date: 12/24/2009.

Accession Number: 20091228–0020.

Comment Date: 5 p.m. Eastern Time on Thursday, January 14, 2010.

Docket Numbers: ER10–500–000.

Applicants: California Independent System Operator Corporation.

Description: California Independent System Operator Corporation submits an amendment to its tariff.

Filed Date: 12/24/2009.

Accession Number: 20091228–0021.

Comment Date: 5 p.m. Eastern Time on Thursday, January 14, 2010.

Docket Numbers: ER10–502–000.

Applicants: Westar Energy, Inc.

Description: Westar Energy, Inc submits an executed Participation Power Agreement dated 10/19/09, between Westar and the Kansas Power Pool.

Filed Date: 12/24/2009.

Accession Number: 20091228–0024.

Comment Date: 5 p.m. Eastern Time on Thursday, January 14, 2010.

Docket Numbers: ER10–503–000.

Applicants: VERMONT ELECTRIC COOPERATIVE INC.

Description: Motion for Limited Waiver of VERMONT ELECTRIC COOPERATIVE, INC.

Filed Date: 12/23/2009.

Accession Number: 20091223–5160.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 13, 2010.

Take notice that the Commission received the following electric reliability filings.

Docket Numbers: RD10–8–000.

Applicants: North American Electric Reliability Corporation.

Description: Petition of the North American Electric Reliability Corporation for Approval of Interpretations to Reliability Standard

CIP–006–2, Physical Security of Critical Cyber Assets, Requirements R1.1 and R4 etc.

Filed Date: 12/22/2009.

Accession Number: 20091222–5280.

Comment Date: 5 p.m. Eastern Time on Thursday, January 21, 2010.

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. E9–31354 Filed 1–4–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

December 24, 2009.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC10–30–000.
Applicants: Trans Bay Cable LLC.
Description: Application of Trans Bay Cable LLC for Authorization to Dispose of Jurisdictional Facilities.
Filed Date: 12/18/2009.
Accession Number: 20091218–5237.
Comment Date: 5 *p.m.* Eastern Time on Friday, January 8, 2010.

Docket Numbers: EC10–31–000.
Applicants: Denver City Energy Associates, L.P.
Description: Denver City Energy Associates, LP submits an application for authorization for disposition of jurisdictional facilities and request for expedited order etc.
Filed Date: 12/18/2009.
Accession Number: 20091224–0017.
Comment Date: 5 *p.m.* Eastern Time on Friday, January 8, 2010.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG10–16–000.
Applicants: Cottonwood Energy Company LP.
Description: Notice of Self Certification of Exempt Wholesale Generator Status of Cottonwood Energy Company LP.
Filed Date: 12/22/2009.
Accession Number: 20091222–5248.
Comment Date: 5 *p.m.* Eastern Time on Tuesday, January 12, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER04–505–001.
Applicants: Hawkeye Energy Greenport, LLC.
Description: Hawkeye Energy Greenport, LLC submits its application for a determination as a Category 1 Seller pursuant to Order No. 697 and 697–A.
Filed Date: 12/18/2009.
Accession Number: 20091222–0053.
Comment Date: 5 *p.m.* Eastern Time on Friday, January 8, 2010.

Docket Numbers: ER05–454–007; ER05–131–008; ER05–118–008; ER03–796–009; ER06–1446–006; ER06–642–006; ER06–784–005; ER06–804–003; ER06–805–004; ER07–527–003; ER07–528–005; ER08–1125–003.
Applicants: Bear Swamp Power Company LLC; Erie Boulevard Hydropower, LP; Carr Street Generating Station, L.P.; Katahdin Paper Company LLC; HAWKS NEST HYDRO LLC; Brookfield Power Piney & Deep Creek LLC; Rumford Falls Hydro LLC; Great Lakes Hydro America LLC; Brookfield Energy Marketing Inc.; Longview Fibre Paper and Packaging, Inc.; Brookfield Energy Marketing US LLC; Brookfield Renewable Energy Marketing US.
Description: Notice of Non-Material Change in Status of Brookfield Asset Management Inc.
Filed Date: 12/23/2009.
Accession Number: 20091223–5107.
Comment Date: 5 *p.m.* Eastern Time on Wednesday, January 13, 2010.

Docket Numbers: ER09–1286–003.
Applicants: Elizabethtown Energy, LLC.
Description: Supplemental to Notice of Non-Material Change in Status of Elizabethtown Energy, LLC.
Filed Date: 12/23/2009.
Accession Number: 20091223–5159.
Comment Date: 5 *p.m.* Eastern Time on Wednesday, January 13, 2010.

Docket Numbers: ER10–124–001.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, LLC submits a fully executed Network Integration Transmission Service Agreement dated as of 10/5/09 with Easton Utilities Commission for Network Integration Transmission Service etc.
Filed Date: 12/18/2009.
Accession Number: 20091222–0055.
Comment Date: 5 *p.m.* Eastern Time on Friday, January 8, 2010.

Docket Numbers: ER10–450–000.
Applicants: Arlington Valley, LLC.
Description: Arlington Valley, LLC submits a Notice of Succession notifying the Commission of a name change from Dynergy Arlington Valley, LLC under FERC Electric Tariff, Third Revised Volume 1.
Filed Date: 12/18/2009.
Accession Number: 20091222–0049.
Comment Date: 5 *p.m.* Eastern Time on Friday, January 8, 2010.

Docket Numbers: ER10–451–000.
Applicants: Saracen Power LP.
Description: Saracen Power LP submits a Notice of Succession to reflect adoption of Saracen Power LLC's Rate Schedule FERC No 1.
Filed Date: 12/17/2009.

Accession Number: 20091222–0050.
Comment Date: 5 *p.m.* Eastern Time on Thursday, January 7, 2010.

Docket Numbers: ER10–452–000.
Applicants: EWO Marketing, L.P.
Description: EWO Marketing, LP submits Notices of Termination canceling several service agreements etc pursuant to the requirements set forth in Order No 614.
Filed Date: 12/18/2009.
Accession Number: 20091222–0051.
Comment Date: 5 *p.m.* Eastern Time on Friday, January 8, 2010.

Docket Numbers: ER10–453–000.
Applicants: PacifiCorp.
Description: PacifiCorp submits Revised Exhibits to the Cooperative Communications Agreement with Bonneville Power Administration designated as First Revised Sheet 68 *et al.*
Filed Date: 12/18/2009.
Accession Number: 20091222–0052.
Comment Date: 5 *p.m.* Eastern Time on Friday, January 8, 2010.

Docket Numbers: ER10–456–000; ER10–456–001; ER10–457–000.
Applicants: EWO Marketing, Inc.
Description: EWO Marketing, Inc submits a Notice of Non-Material Change in Status and Notice of Succession.
Filed Date: 12/18/2009.
Accession Number: 20091222–0062
Comment Date: 5 *p.m.* Eastern Time on Friday, January 8, 2010.

Docket Numbers: ER10–455–000.
Applicants: Ameren Energy Marketing Company.
Description: Ameren Energy Generating Company *et al.* submits two proposed revised rate schedules Rate Schedule 6 & Rate Schedule 4 with supporting cost data.
Filed Date: 12/22/2009.
Accession Number: 20091222–0063.
Comment Date: 5 *p.m.* Eastern Time on Tuesday, January 12, 2010.

Docket Numbers: ER10–462–000.
Applicants: T.E.S Filer City Station Ltd Partnership.
Description: T.E.S. Filer City Station Limited Partnership submits an application seeking approval of a Reactive Power Supply Tariff Application.
Filed Date: 12/22/2009.
Accession Number: 20091223–0089.
Comment Date: 5 *p.m.* Eastern Time on Tuesday, January 12, 2010.

Docket Numbers: ER10–463–000.
Applicants: Florida Power Corporation.
Description: Florida Power Corporation submits a Notice of Cancellation of a power sales tariff, Electric Service for Eligible Purchasers, FERC Electric Tariff, Second Revised Volume 3 etc.
Filed Date: 12/22/2009.
Accession Number: 20091223–0088.
Comment Date: 5 *p.m.* Eastern Time on Tuesday, January 12, 2010.

Docket Numbers: ER10–464–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, LLC submits an executed interconnection service agreement with Chestnut Flats Wind, LLC *et al.* effective November 20, 2009.
Filed Date: 12/22/2009.
Accession Number: 20091223–0087.
Comment Date: 5 *p.m.* Eastern Time on Tuesday, January 12, 2010.

Docket Numbers: ER10–465–000.
Applicants: Carolina Power & Light Company.
Description: Carolina Power & Light Company submits a Network Integration Transmission Service Agreement and Network Operating Agreement with the City of Seneca, SC.
Filed Date: 12/22/2009.
Accession Number: 20091223–0086.
Comment Date: 5 *p.m.* Eastern Time on Tuesday, January 12, 2010.

Docket Numbers: ER10–466–000.
Applicants: California Independent System Operator Corporation.
Description: The California Independent System Operator Corporation submits informational filing to provide notice regarding the revised transmission access charges etc.
Filed Date: 12/22/2009.
Accession Number: 20091223–0084.
Comment Date: 5 *p.m.* Eastern Time on Tuesday, January 12, 2010.

Docket Numbers: ER10–467–000.
Applicants: San Diego Gas & Electric Company.
Description: San Diego Gas & Electric Co submits revisions to reflect annual updates, retail Transmission Access Charge Balancing Account Adjustment rates etc.
Filed Date: 12/22/2009.
Accession Number: 20091223–0090.
Comment Date: 5 *p.m.* Eastern Time on Tuesday, January 12, 2010.

Docket Numbers: ER10–481–000.
Applicants: Public Service Electric and Gas Company.
Description: Public Service Electric and Gas Co's CD to their submittal of First Revised Sheet No. 36 *et al.* to its FERC Electric Tariff.
Filed Date: 12/23/2009.
Accession Number: 20091223–4004.
Comment Date: 5 *p.m.* Eastern Time on Wednesday, January 13, 2010.

Docket Numbers: ER10–497–000.
Applicants: Niagara Mohawk Power Corporation.
Description: Niagara Mohawk Power Corp's CD to their submittal of a Notice of Cancellation of Service Agreement No. 41 *et al.*
Filed Date: 12/23/2009.
Accession Number: 20091223–4006.
Comment Date: 5 *p.m.* Eastern Time on Wednesday, January 13, 2010.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES10–13–001.
Applicants: FirstEnergy Service Company.
Description: Amendment to Application of FirstEnergy Service Company for authorization for Pennsylvania Power Company, Pennsylvania Electric Company, Jersey Central Power & Light Company and Metropolitan Edison Company to issue short-term securities.
Filed Date: 12/22/2009.
Accession Number: 20091222–5257.
Comment Date: 5 *p.m.* Eastern Time on Monday, January 4, 2010.

Docket Numbers: ES10–18–000.
Applicants: Wolverine Power Supply Cooperative, Inc.
Description: Application for Authorization of the Assumption of Liabilities and the Issuance of Securities Under Section 204 of the Federal Power Act of Wolverine Power Supply Cooperative, Inc.
Filed Date: 12/23/2009.
Accession Number: 20091223–5105.
Comment Date: 5 *p.m.* Eastern Time on Wednesday, January 13, 2010.

Docket Numbers: ES10–19–000.
Applicants: KCP&L Greater Missouri Operations Company.
Description: KCP&L Greater Missouri Operations Co submits an application for authorization under Section 204(A) to issue short-term debt.
Filed Date: 12/22/2009.
Accession Number: 20091224–0014.
Comment Date: 5 *p.m.* Eastern Time on Tuesday, January 12, 2010.

Docket Numbers: ES10–20–000.
Applicants: Ameren Services Company, Ameren Energy Generating Company, Central Illinois Public Service Company, Central Illinois Light Company, Union Electric Company.
Description: Application of Ameren Services Co., Union Electric Co., Central Illinois Public Service Co., Central Illinois Light Co., and Ameren Energy Generating Co. for Authorizations Under Federal Power Act Section 204.
Filed Date: 12/22/2009.
Accession Number: 20091222–5260.
Comment Date: 5 *p.m.* Eastern Time on Tuesday, January 12, 2010.

Take notice that the Commission received the following public utility holding company filings:

Docket Numbers: PH10–1–000.
Applicants: NSTAR Companies.
Description: Waiver Notification, Form FERC–65B, of Aircraft Services Corporation, *et al.*
Filed Date: 12/23/2009.
Accession Number: 20091223–5110.
Comment Date: 5 *p.m.* Eastern Time on Wednesday, January 13, 2010.

Docket Numbers: PH10–4–000.
Applicants: Brookfield Asset Management Inc.
Description: Brookfield Asset Management Inc., *et al.,* Notification of Waiver Form FERC–65B.
Filed Date: 12/22/2009.
Accession Number: 20091222–5219.
Comment Date: 5 *p.m.* Eastern Time on Tuesday, January 12, 2010.

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. E9–31356 Filed 1–4–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

December 28, 2009.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER09–1287–003.
Applicants: Lumberton Energy, LLC.
Description: Supplement to Notice of Non-Material Change in Status of Lumberton Energy, LLC.
Filed Date: 12/23/2009.
Accession Number: 20091223–5161.
Comment Date: 5 p.m. Eastern Time on Wednesday, January 13, 2010.

Docket Numbers: ER10–458–000; ER10–459–000; ER10–460–000.
Applicants: Solios Power Trading LLC, Solios Power Midwest Trading LLC, Solios Power Trading LLC.
Description: Application for Market Based Rate Authority, Related Blanket Waivers and Authorization, and Submission of Initial Rate Schedules re Solios Power Mid Atlantic Trading LLC *et al.*
Filed Date: 12/23/2009.
Accession Number: 20091224–0070.
Comment Date: 5 p.m. Eastern Time on Wednesday, January 13, 2010.

Docket Numbers: ER10–468–000.
Applicants: Google Energy LLC.
Description: Application of Google Energy LLC for Market Based Rate Authority and Granting of Waivers and Blanket Authority.
Filed Date: 12/23/2009.
Accession Number: 20091224–0071.
Comment Date: 5 p.m. Eastern Time on Wednesday, January 13, 2010.

Take notice that the Commission received the following electric reliability filings.

Docket Numbers: RD10–7–000.
Applicants: North America Electric Reliability Council.
Description: Compliance Filing of NERC in Response to Paragraphs 143, 156, 164, 168, 173, 179, and 187 of Order No. 716.
Filed Date: 12/18/2009.
Accession Number: 20091218–5238.
Comment Date: 5 p.m. Eastern Time on Friday, January 8, 2010.

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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call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–31355 Filed 1–4–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

December 23, 2009.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–433–000.
Applicants: California Independent System Operator Corporation.
Description: Change of condition informational filing of California Independent System Operator Corporation.
Filed Date: 12/15/2009.
Accession Number: 20091215–5152.
Comment Date: 5 p.m. Eastern Time on Tuesday, January 05, 2010.

Docket Numbers: ER10–452–000.
Applicants: EWO Marketing, LP.
Description: EWO Marketing, LP submits Notices of Termination canceling several service agreements etc. pursuant to the requirements set forth in Order No 614.
Filed Date: 12/18/2009.
Accession Number: 20091222–0051.
Comment Date: 5 p.m. Eastern Time on Friday, January 08, 2010.

Docket Numbers: ER10–454–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc submits the unexecuted Interim Large Generator Interconnection Agreement with Oklahoma Gas & Electric Company *et al.*
Filed Date: 12/18/2009.
Accession Number: 20091222–0056.
Comment Date: 5 p.m. Eastern Time on Monday, January 04, 2010.

Take notice that the Commission received the following public utility holding company filings:

Docket Numbers: PH10–3–000.
Applicants: Brookfield Asset Management Inc.
Description: Brookfield Asset Management Inc. *et al.,* Notice of Material Change in Facts—FERC–65–A.
Filed Date: 12/22/2009.
Accession Number: 20091222–5210.
Comment Date: 5 p.m. Eastern Time on Tuesday, January 12, 2010.

Take notice that the Commission received the following electric reliability filings:

Docket Numbers: RD10–6–000.
Applicants: North American Electric Reliability Corp.
Description: Petition of the North American Electric Reliability Corp for Approval of VSLs to Critical Infrastructure Protection Version 2 Reliability Standards CIP–002–2 through CIP–009–2 and VRFs for CIP–003–2 and CIP–006–2.
Filed Date: 12/18/2009.
Accession Number: 20091218–5236.
Comment Date: 5 p.m. Eastern Time on Friday, January 08, 2010.

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. E9–31203 Filed 1–4–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP09–161–000]

Bison Pipeline, L.L.C.; Notice of Availability of the Final Environmental Impact Statement for the Proposed Bison Pipeline Project

December 29, 2009.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared a final environmental impact statement (EIS) for the Bison Pipeline Project proposed by Bison Pipeline, L.L.C. (Bison) in the above-referenced docket. Bison requests authorization to construct and operate pipeline facilities to deliver approximately 477 million cubic feet per day of natural gas from the Powder River Basin in northeast Wyoming, through southeastern Montana and southwestern North Dakota, to the Northern Border pipeline system. Through the existing Northern Border pipeline, the natural gas would be shipped to markets in the Midwestern United States (primarily Iowa, Minnesota, Wisconsin, and Illinois).

The final EIS assesses the potential environmental effects of the construction and operation of the Bison Pipeline Project in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA). The FERC staff concludes that approval of the proposed project would have some adverse environmental impact; however, we believe that environmental impacts would be reduced to less-than-significant levels if the proposed Project is constructed and operated in accordance with applicable laws and regulations, Bison's proposed mitigation, and additional measures recommended in the EIS.

The U.S. Department of the Interior, Bureau of Land Management (BLM) participated as a cooperating agency in the preparation of the EIS. Cooperating agencies have jurisdiction by law or special expertise with respect to resources potentially affected by the proposal and participate in the NEPA analysis. The BLM would present their own conclusions and recommendations

in their Record of Decision, and would adopt this EIS per 40 Code of Federal Regulations (CFR) 1506.3 if, after an independent review of the document, they conclude that their permitting requirements have been satisfied.

The final EIS addresses the potential environmental effects of the construction and operation of the following project facilities:

- Approximately 301.2 miles of 30-inch-diameter natural gas transmission pipeline;
- One new compressor station totaling 4,700 horsepower of compression: the Hettinger Compressor Station located in Hettinger County, North Dakota;
- Two new meter stations;
- Nineteen mainline valves; and
- Three pig [1] launcher and pig receiver facilities.

Dependent upon Commission approval, Bison proposes to complete construction and begin operating the proposed Project in November 2010.

The final EIS has been placed in the public files of the FERC and is available for public viewing on the FERC's Web site at *http://www.ferc.gov*. A limited number of copies 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 EIS have been mailed to federal, state, and local government agencies; elected officials; Native American tribes and regional organizations; local libraries and newspapers; parties to this proceeding; and other interested parties. Hard copy versions of the EIS were mailed to those specifically requesting them; all others received a CD–ROM version.

Questions?

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC (3372) or on the FERC 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 (i.e., CP09–161). 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; 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*.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–31319 Filed 1–4–10; 8:45 am]

BILLING CODE 6717–01–P

[1] A ''pig'' is a mechanical device used to clean or inspect the pipeline.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No AD10–2–000]

Guidance on Simultaneous Transmission Import Limit Studies; Notice Allowing Post-Technical Conference Comments

December 29, 2009.

On December 16, 2009, Commission staff convened a technical conference in the above-referenced proceeding.[1] The purpose of the technical conference was to provide guidance for performing Simultaneous Transmission Import Limit (SIL) studies. All interested persons are invited to file written comments no later than January 22, 2010 that relate to the issues that were the subject of the technical conference.

For further information please contact Joseph Cholka at (202) 502–8876 or by e-mail at *joseph.cholka@ferc.gov.*

Kimberly D. Bose,

Secretary.

[FR Doc. E9–31331 Filed 1–4–10; 8:45 am]

BILLING CODE 6717–01–P

[1] *Carolina Power & Light Company,* 128 FERC ¶ 61,039, *order on clarification,* 129 FERC ¶ 61,152 (2009).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER10–468–000]

Google Energy LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

December 29, 2009.

This is a supplemental notice in the above-referenced proceeding of Google Energy LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 19, 2010.

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 Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding 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.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–31323 Filed 1–4–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER10–458–000; ER10–459–000; ER10–460–000]

Solios Power Trading LLC; Solios Power Mid-Atlantic Trading LLC; Solios Power Midwest Trading LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

December 29, 2009.

This is a supplemental notice in the above-referenced proceeding of Solios Power Trading LLC, Solios Power Mid-Atlantic Trading LLC, and Solios Power Midwest Trading LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 19, 2010.

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 Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding 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.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–31322 Filed 1–4–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP10–35–000]

Laser Marcellus Gathering Company, LLC; Notice of Petition for Declaratory Order

December 28, 2009.

Take notice that on December 23, 2009, Laser Marcellus Gathering Company, LLC (Petitioner) under Rule 207(a)(2) of the Commission's Rules of Practice and Procedure, 18 CFR 385.207(a)(2) (2007), filed a petition for a declaratory order requesting that the Commission disclaim jurisdiction over the pipeline construction project, referred to as the Marcellus Project located in Pennsylvania and New York, because such facilities perform a gathering function exempt from the Commission's jurisdiction under section 1(b) of the Natural Gas Act.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Petitioner. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Petitioner.

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 January 20, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–31212 Filed 1–4–10; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2006–0407; FRL–9100–4]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; EPA's ENERGY STAR Program in the Commercial and Industrial Sectors; EPA ICR No. 1772.05, OMB Control No. 2060–0347

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before February 4, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2006–0407, to: (1) EPA online using *http://www.regulations.gov* (our preferred method), by e-mail to *a-and-r-Docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Air and Radiation Docket, Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Mary Susan Bailey, Climate Protection Partnerships Division, Mailcode: 6202J, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–343–9014; fax number: 202–343–2204; e-mail address: *bailey.marysusan@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 August 11, 2009 (74 FR 40183), 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 No. EPA–HQ–OAR–2006–0407, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at the Air and Radiation Docket in the EPA Docket Center (EPA/DC), EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 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 Air and Radiation Docket is 202–566–1742.

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: EPA's ENERGY STAR Program in the Commercial and Industrial Sectors.

ICR Numbers: EPA ICR No. 1772.05, OMB Control No. 2060–0347.

ICR Status: This ICR is currently scheduled to expire on February 28, 2010. 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 are 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: EPA created ENERGY STAR as a voluntary program to help businesses and individuals protect the environment through superior energy efficiency. The program focuses on reducing utility-generated emissions by reducing the demand for energy. In 1991, EPA launched the Green Lights Program to encourage corporations, State and local governments, colleges and universities, and other organizations to adopt energy-efficient lighting as a profitable means of preventing pollution and improving lighting quality. Since then, EPA has rolled Green Lights into ENERGY STAR and expanded ENERGY STAR to encompass organization-wide energy performance improvement, such as building technology upgrades, product purchasing initiatives, and employee training. At the same time, EPA has streamlined the reporting requirements of ENERGY STAR and focused on providing incentives for improvements (*e.g.*, ENERGY STAR Awards Program). EPA also makes tools and other resources available over the Web to help the public overcome the barriers to evaluating their energy performance and investing in profitable improvements. In addition, EPA is always looking for ways to simplify its information collections, such as by giving organizations the option of joining ENERGY STAR by completing an online partnership letter or agreement instead of using regular mail. Partnership in ENERGY STAR is voluntary and can be terminated by Partners or EPA at any time. EPA does not expect organizations to join the program unless they expect participation to be cost-effective and otherwise beneficial for them.

In addition, Partners and any other interested party can help EPA promote energy-efficient technologies by evaluating the efficiency of their buildings using EPA's on-line tools (*e.g.,* Portfolio Manager) and applying for recognition.

If a claim of confidential business information (CBI) is asserted, EPA will manage that information in accordance with EPA's provisions on confidentiality.

Burden Statement: The burden for joining the ENERGY STAR Program and related activities is expected to vary depending on the type of Partner. The burden is estimated to be 30 minutes for a Commercial and Industrial Sector Partner to prepare/submit a Partnership Letter, 1 hour for a Service and Product Provider (SPP) to prepare/submit a Partnership Agreement and related documents, and 2.5 hours for an Energy Efficiency Program Sponsor (EEPS) to prepare/submit a Partnership Agreement and a brief plan outlining the key activities it intends to undertake to promote ENERGY STAR. These organizations also may undertake other activities related to their partnership during the year. The burden is estimated to be about 1 hour for a SPP Partner to update its contact information and communicate efforts and successes each year and about 3 hours for an EEPS Partner to update its brief plan and contact information and promote ENERGY STAR each year.

The burden for benchmarking in Portfolio Manager is estimated to vary depending on the type of benchmarking method used. The burden is estimated to be about 2.75 hours per building for manual benchmarks, 1 hour per building for benchmarks using the import tool, and 30 minutes per building for benchmarks using the Automated Benchmarking System. In addition, the burden for using the ENERGY STAR Energy Performance Indicator is estimated to range from 10 to 15 minutes per plant. The burden for tracking a plant's energy performance under the ENERGY STAR Challenge for Industry (*e.g.,* using the ENERGY STAR Energy Tracking Tool) is estimated to be 2.5 hours per plant. These burden estimates include the time for conducting initial set-up, gathering facility and energy data, and entering

the data to track energy performance during the year.

The burden for applying to EPA for recognition is estimated to vary depending on the type of recognition. The burden is estimated to range up to 5 hours to apply for the ENERGY STAR. This includes the time for gathering information and completing/submitting the application materials. The burden is estimated to be about 3 hours to apply for the ''Designed to Earn the ENERGY STAR.'' This includes the time for gathering and entering data into Target Finder and completing/submitting the application materials. The burden is estimated to range up to 17 hours for an organization to apply for an ENERGY STAR Award. This includes the time for preparing and submitting the application materials.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or 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; adjust the existing ways to comply with any previously applicable instructions and requirements which 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: Organizations participating in ENERGY STAR in the Commercial and Industrial Sectors.

Approximate Number of Respondents: 18,000.

Frequency of Response: One-time, on occasion, monthly, annually, and/or periodically, depending on the type of respondent and collection.

Estimated Total Annual Hour Burden: 125,023.

Estimated Total Annual Cost: $14,659,784, including $8,694,520 in labor costs and $5,965,264 in O&M costs. There are no capital/start-up costs to respondents.

Changes in the Estimates: There is an increase of 70,523 hours in the total estimated annual burden hours currently identified in the OMB Inventory of Approved ICR Burdens. Specifically, there is a 3,065-hour decrease due to program changes and a 73,588-hour increase due to adjustments resulting from program growth. This resulted in a net increase of 70,523 hours.

Dated: December 24, 2009.

Richard T. Westlund,

Acting Director, Collection Strategies Division.

[FR Doc. E9–31277 Filed 1–4–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–R05–OW–2009–0932, FRL–9100–6]

Agency Information Collection Activities; Proposed Collection; Comment Request; Great Lakes Accountability System; EPA ICR No. 2379.01, OMB Control No. 2005–NEW

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA), this document announces that EPA is planning to submit a request for a new Information Collection Request (ICR) to the Office of Management and Budget (OMB). Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection described below.

DATES: Comments must be submitted on or before March 8, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OW–2009–0932, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Mail:* Great Lakes Accountability System, Attn: Rita Cestaric, EPA, Great Lakes National Program Office, 77 W. Jackson St., Chicago, Illinois 60604.
- *Hand Delivery:* Great Lakes Accountability System, Attn. Rita Cestaric, EPA, Great Lakes National Program Office, 77 W. Jackson St., Chicago, Illinois 60604. Such deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4:30 p.m. Monday through Friday excluding legal holidays), and special arrangements should be made for delivery of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R05–OW–2009–0932. EPA's policy is that all comments received will be included in the public docket without change and may be 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.* The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information. 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 FURTHER INFORMATION CONTACT: Rita Cestaric, USEPA, Great Lakes National Program Office, 77 W. Jackson Boulevard, Chicago, Illinois 60604; telephone number: (312) 886–6815; fax number: (312) 697–2014; e-mail address: *cestaric.rita@epa.gov* or Marcia Damato, USEPA, Great Lakes National Program Office, 77 West Jackson Boulevard, Chicago, Illinois 60604; telephone number: (312) 886–0266; fax number: (312) 582–5862; e-mail address: *damato.marcia@epa.gov.*

SUPPLEMENTARY INFORMATION:

How Can I Access the Docket and/or Submit Comments?

EPA has established a public docket for this ICR under Docket ID No. EPA EPA–R05–OW–2009–0932, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at USEPA, Great Lakes National Program Office, 77 West Jackson Boulevard, Chicago, Illinois 60604. Materials are available for viewing from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays; telephone number (312) 886–6815. An electronic version of the public docket is available at *http://www.regulations.gov.* This site can be used to obtain a copy of the draft collection of information, submit or

view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified in this document EPA–R05–OW–2009–0932.

What Information Is EPA Particularly Interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(ii) Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

What Should I Consider When I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Offer alternative ways to improve the collection activity.
6. Make sure to submit your comments by the deadline identified under **DATES**.
7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

What Information Collection Activity or ICR Does This Apply to?

Affected entities: Entities potentially affected by this action are state, local and tribal governments and non-government organizations receiving Great Lakes Restoration Initiative funding.

Title: Great Lakes Accountability System.

ICR numbers: EPA ICR No. 2379.01, OMB Control No. 2005–NEW.

ICR status: This ICR is for a new information collection activity. 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, are 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: In 2010, EPA, in concert with its federal partners, will begin implementation of a new Great Lakes Restoration Initiative (GLRI) which was included in the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (Pub. L. 111–88). The GLRI will invest funds in programs and projects strategically chosen to target the most significant environmental problems in the Great Lakes ecosystem.

The legislation calls for increased accountability for the GLRI and directs EPA to implement a process to track, measure and report on progress. As part of this process, federal and non-federal entities receiving GLRI funds will be required to submit detailed information on GLRI projects as part of their funding agreement. Recipients will be required to provide project-level information on the nature of the activity, responsible organization, organizational point of contact, resource levels, geographic location, major milestones and progress toward GLRI goals. The information is necessary to provide an accurate depiction of activities, progress and results. Information would be entered and updated on at least a quarterly basis.

A Web-based Great Lakes Accountability System (GLAS) is being developed as the primary mechanism for collecting information on GLRI activities. The Web site will contain a user-friendly data entry interface for recipients to enter and submit project information directly into the GLAS. The data entry interface will consist of a series of screens containing pull-down menus and text boxes, where users can enter project specific information. The GLAS will provide the necessary information for reports to the President and will be accessible to the public via Internet.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 101.9 hours per response for state, local and tribal governments and 20.5 hours per response for non-governmental organizations. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or 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; adjust the existing ways to comply with any previously applicable instructions and requirements which 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.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

Estimated total number of potential respondents: 458 (358 state, local and tribal governments, 100 non-government organizations).

Frequency of response: Quarterly.

Estimated average number of response cycles per year for each respondent: 1.

Estimated total annual burden hours: 38,530.2 hours (101.9 hours per annual response cycle (i.e., four quarters) for state, local governments and tribal governments, 20.5 hours per annual response cycle for non-government organizations).

Estimated total annual costs: $1,675,228.04. This includes an estimated burden cost of $1,675,228.04 for labor and an estimated cost of $0.00 for capital investment or maintenance and operational costs.

What Is the Next Step in the Process for This ICR?

EPA will consider the comments received and amend the ICR as

appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: December 30, 2009.

Richard T. Westlund,

Acting Director, Collection Strategies Division.

[FR Doc. E9–31408 Filed 1–4–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9100–7]

Notice of a Project Waiver of Section 1605 (Buy American Requirement) of the American Recovery and Reinvestment Act of 2009 (ARRA) to Valley City, ND

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA is hereby granting a project waiver of the Buy American requirements of ARRA Section 1605 under the authority of Section 1605(b)(2) [manufactured goods are not produced in the United States of a satisfactory quality] to Valley City, ND for the Zenon ZeeWeed 1000 membrane filter manufactured by General Electric Water & Process Technologies for a capacity of 4 MGD. This is a project-specific waiver and only applies to the use of the specified product for the ARRA-funded project being proposed. Any other ARRA project that may wish to use the same product must apply for a separate waiver based on project-specific circumstances. These membrane filters are manufactured in Canada, and meet Valley City's performance specifications and requirements. The Acting Regional Administrator is making this determination based on the review and recommendation of EPA Region 8's Technical & Financial Services Unit. Valley City has provided sufficient documentation to support its request. The Assistant Administrator of the Office of Administration and Resources Management has concurred on this decision to make an exception to Section 1605 of ARRA. This action permits the purchase of the Zenon ZeeWeed 1000 membrane filter for the Surface Water Treatment Plant upgrades being implemented by Valley City that may otherwise be prohibited under Section 1605(a) of the ARRA.

DATES: *Effective Date:* December 9, 2009.

FOR FURTHER INFORMATION CONTACT: Jody Ostendorf, ARRA Coordinator, (303) 312–7814, or Brian Friel, SRF Coordinator, (303) 312–6277, Technical & Financial Services Unit, Water Program, Office of Partnerships & Regulatory Assistance, U.S. EPA Region 8, 1595 Wynkoop St., Denver, CO 80202.

SUPPLEMENTARY INFORMATION: In accordance with ARRA Section 1605(c) and pursuant to Section 1605(b)(2) of Public Law 111–5, Buy American requirements, EPA hereby provides notice that it is granting a project waiver to Valley City for the Zenon ZeeWeed 1000 model of submerged membranes which are manufactured in Canada.

Section 1605 of the ARRA requires that none of the appropriated funds may be used for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States, or unless a waiver is provided to the recipient by the head of the appropriate agency, here EPA. A waiver may be provided if EPA determines that (1) applying these requirements would be inconsistent with the public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) inclusion of iron, steel, and the relevant manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

This manufactured good will be used as part of Valley City's Surface Water Treatment Plant renovation. Valley City states that only ZeeWeed 1000 submerged membranes meet the specific needs of this project, which requires a technology that can be installed into an existing basin previously used for pretreatment purposes. This basin will be retrofitted to house the ZeeWeed 1000 modules, thus taking advantage of the product's small footprint relative to other alternatives. The City provided a copy of the contractor's specifications that state the product must be manufactured by Zenon Environmental, Inc. or equivalent, and the product must meet certain performance standards for pH, turbidity, temperature, alkalinity, hardness, sodium, sulfate, chloride, iron and manganese.

The City also provided a letter from an engineer with the State of North Dakota asserting a lack of domestic alternatives to the Zenon ZeeWeed 1000 submerged membranes. The letter states, ''that the Zenon ZeeWeed 1000 membrane filter will be required to be used in Washburn and Valley City water treatment plant renovations because:

1. The Washburn and Valley City water treatment plant renovation projects will be using the existing infrastructure (existing filter bays) which require using the compact immersed vacuum membrane filters. Membrane filters for this waiver are as defined in the *EPA Membrane Filter Guidance Manual* for compliance under the LT2ESWTR. Zenon is the only manufacturer of immersed vacuum membranes that meet the required specifications. The Zenon ZeeWeed 1000 membrane cartilages are manufactured in Canada, but all the piping, pumps, etc. will be manufactured and assembled in America.

2. The Zenon ZeeWeed 1000 membrane meets the requirements of the LT2ESWTR of 3.5 log removal of *Giardia* and 4.0 log removal of Cryptosporidium.

3. To the best of our knowledge, there are no current domestic membrane manufacturers that meet the specifications of the ZeeWeed 1000 membrane. Any domestic alternative membrane process would require extensive renovation and/or building addition resulting in substantial cost increases.''

Given this requirement by the State and in light of the reasonableness of the retrofit specification, Valley City did not have a basis to use an alternative compliance technology within the ARRA time requirements for SRF projects to be under contract or construction by February 17, 2010.

The April 28, 2009 EPA HQ Memorandum, ''Implementation of Buy American provisions of Public Law 111–5, the 'American Recovery and Reinvestment Act of 2009','' defines *reasonably available quantity* as ''the quantity of iron, steel, or relevant manufactured good is available or will be available at the time needed and place needed, and in the proper form or specification as specified in the project plans and design.''

The applicant met the procedures specified for the availability inquiry as appropriate to the circumstances by conducting on-line research and contacting suppliers, and all sources indicated that submerged ultrafiltration

membrane treatment systems are only manufactured outside of the U.S. Therefore, based on the information provided to EPA and to the best of our knowledge at this time, Zenon ZeeWeed 1000 submerged membranes are not manufactured in the United States, and no other U.S. manufactured product can meet Valley City's performance specifications and requirements.

The purpose of the ARRA is to stimulate economic recovery in part by funding current infrastructure construction, not to delay projects that are ''shovel ready'' by requiring cities such as Valley City to revise their standards and specifications and to start the bidding process again. The imposition of ARRA Buy American requirements on such projects otherwise eligible for ARRA State Revolving Fund assistance would result in unreasonable delay and thus displace the ''shovel ready'' status for this project. To further delay project implementation is in direct conflict with a fundamental economic purpose of the ARRA, which is to create or retain jobs.

EPA's national contractor prepared a technical assessment report dated December 2, 2009 based on the submitted waiver request. The report determined that the waiver request submittal was complete, that adequate technical information was provided, and that there were no significant weaknesses in the justification provided. The report confirmed the waiver applicant's claim that there are no comparable domestic products that can meet the project specifications.

The Technical & Financial Services Unit has reviewed this waiver request and has determined that the supporting documentation provided by Valley City is sufficient to meet the criteria listed under Section 1605(b) of the ARRA and in the April 28, 2009, ''Implementation of Buy American provisions of Public Law 111–5, the 'American Recovery and Reinvestment Act of 2009' Memorandum'': Iron, steel, and the manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality. The basis for this project waiver is the authorization provided in Section 1605(b)(2) of the ARRA. Due to the lack of production of this product in the United States in sufficient and reasonably available quantities and of a satisfactory quality in order to meet Valley City's performance specifications and requirements, a waiver from the Buy American requirement is justified.

The March 31, 2009 Delegation of Authority Memorandum provided Regional Administrators with the authority to issue exceptions to Section 1605 of the ARRA within the geographic boundaries of their respective regions and with respect to requests by individual grant recipients. Having established both a proper basis to specify the particular good required for this project, and that this manufactured good was not available from a producer in the United States, Valley City is hereby granted a waiver from the Buy American requirements of Section 1605(a) of Public Law 111–5 for the purchase of Zenon ZeeWeed 1000 submerged membranes using ARRA funds as specified in the City's request of September 16, 2009. This supplementary information constitutes the detailed written justification required by Section 1605(c) for waivers ''based on a finding under subsection (b).''

Authority: Public Law 111–5, section 1605.

Dated: December 28, 2009.

Carol Rushin,

Acting Regional Administrator, Region 8.

[FR Doc. E9–31404 Filed 1–4–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than January 20, 2010.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. Notice by Hans J. Welker, White Lake, Michigan, to acquire more than 25 percent of the voting shares of Clarkston Financial Corporation, Waterford, Michigan, and thereby indirectly acquire control of Clarkston State Bank, Clarkston, Michigan.

2. Notice by Mark A. Murvay, Lake Angelus, Michigan, to acquire more than 25 percent of the voting shares of Clarkston Financial Corporation, Waterford, Michigan, and thereby indirectly acquire control of Clarkston State Bank, Clarkston, Michigan.

Board of Governors of the Federal Reserve System, December 30, 2009.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. E9–31255 Filed 1–4–10; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 29, 2010.

A. Federal Reserve Bank of Atlanta (Steve Foley, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309:

1. Florida Shores Shamrock, Inc., Naples Florida, to become a bank holding company by acquiring at least

60 percent of the voting shares of Shamrock Bank of Florida, Naples, Florida, to be known as Florida Shores Bank-Gulf Coast; and Florida Shores Bancorp, Inc., Smith Associates Bank Fund Management LLC, and Smith Associates Florida Banking Fund LLC, all of Pompano Beach, Florida, to collectively acquire at least 60 percent of Florida Shores Shamrock, Inc., and thereby indirectly acquire control of Shamrock Bank of Florida.

B. Federal Reserve Bank of San Francisco (Tracy Basinger, Director, Regional and Community Bank Group) 101 Market Street, San Francisco, California 94105-1579:

1. Carpenter Fund Manager GP, LLC, Carpenter Fund Management, LLC, Carpenter Community Bancfund, L.P., Carpenter Community Bancfund-A, LP, Carpenter Community Bancfund-CA, L.P., SCJ, Inc., and CCFW, Inc., all of Irvine, California, to acquire up to 87 percent of the voting shares of Mission Community Bancorp, San Luis Obispo, California.

Board of Governors of the Federal Reserve System, December 30, 2009.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. E9–31256 Filed 1–4–10; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL MARITIME COMMISSION

Notice of Agreement Filed

The Commission hereby gives notice of the filing of the following agreement under the Shipping Act of 1984. Interested parties may submit comments on the agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. A copy of the agreement is available through the Commission's Web site (*http://www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 012088.

Title: Hanjin and WHS Transpacific Vessel Sharing and Slot Allocation Agreement.

Parties: Hanjin Shipping Co., Ltd. and Wan Hai Lines (Singapore) PTE, Ltd.

Filing Party: Robert B. Yoshitomi, Esq.; Nixon Peabody LLP; Gas Company Tower; 555 West Fifth Street, 46th Floor; Los Angeles, CA 90013.

Synopsis: The agreement authorizes the parties to share vessel space in the trade between the U.S. ports and ports in Malaysia, Vietnam, Japan, Korea, People's Republic of China, Hong Kong, Taiwan, and Republic of Singapore.

By Order of the Federal Maritime Commission.

Dated: December 31, 2009.

Tanga S. FitzGibbon,

Assistant Secretary.

[FR Doc. E9–31371 Filed 1–4–10; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Federal Trade Commission (''FTC'' or ''Commission'').

ACTION: Notice.

SUMMARY: The information collection requirements described below will be submitted to the Office of Management and Budget (''OMB'') for review, as required by the Paperwork Reduction Act (''PRA''). The FTC is seeking public comments on its proposal to extend through March 31, 2013, the current PRA clearance for information collection requirements contained in its Alternative Fuel Rule. Those clearances expire on March 31, 2010.

DATES: Comments must be received on or before March 8, 2010.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form, by following the instructions in the Request for Comments to 60-Day Notice part of the **SUPPLEMENTARY INFORMATION** section below. Comments in electronic form should be submitted by using the following Web link: (*https://public.commentworks.com/ftc/alternativefuelrulepra*) (and following the instructions on the web-based form). Comments in paper form should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H–135 (Annex J), 600 Pennsylvania Avenue, NW, Washington, DC 20580, in the manner detailed in the **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: Requests for copies of the collection of information and supporting documentation should be addressed to Hampton Newsome, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., NJ–2122, Washington, DC 20580, (202) 326–2889.

SUPPLEMENTARY INFORMATION:

Proposed Information Collection Activities

Under the PRA, 44 U.S.C. 3501-3521, federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. ''Collection of information'' means agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. 44 U.S.C. § 3502(3), 5 CFR § 1320.3 (c). Because the number of entities affected by the Commission's requests will exceed ten, the Commission plans to seek OMB clearance under the PRA. As required by § 3506(c)(2)(A) of the PRA, the Commission is providing this opportunity for public comment before requesting that OMB extend the existing paperwork clearance for the information collection requirements associated with the Commission's regulations under the Alternative Fuel Rule (''the Rule''), 16 CFR part 309.

The Rule, which implements the Energy Policy Act of 1992, Pub. L. 102–486, requires disclosure of specific information on labels posted on fuel dispensers for non-liquid alternative fuels and on labels on Alternative Fueled Vehicles (AFVs). To ensure the accuracy of these disclosures, the Rule also requires that sellers maintain records substantiating product-specific disclosures they include on these labels.

Request for Comments to 60-Day Notice

The FTC invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. All comments should be filed as prescribed below, and must be received on or before March 8, 2010.

Because comments will be made public, they should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical

records or other individually identifiable health information. In addition, comments should not include any ''[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential. . . .,'' as provided in Section 6(f) of the Federal Trade Commission Act (''FTC Act''), 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).[1]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following web link: (*https://public.commentworks.com/ftc/alternativefuelrulepra*) (and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the web link: (*https://public.commentworks.com/ftc/alternativefuelrulepra*). If this Notice appears at (*http://www.regulations.gov/search/index.jsp*), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC Website at (*http://www.ftc.gov*) to read the Notice and the news release describing it.

A comment filed in paper form should include the ''Alternative Fuel Rule: FTC File No. R311002'' reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex J), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC Website, to the extent practicable, at (*http://www.ftc.gov/os/publiccomments.shtm*). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (*http://www.ftc.gov/ftc/privacy.shtm*).

Burden Statement

It is common practice for alternative fuel industry members to determine and monitor fuel ratings in the normal course of their business activities. This is because industry members must know and determine the fuel ratings of their products in order to monitor quality and to decide how to market them. ''Burden'' for PRA purposes is defined to exclude effort that would be expended regardless of any regulatory requirement. 5 CFR 1320.2(b)(2). Moreover, as originally anticipated when the Rule was promulgated in 1995, many of the information collection requirements and the originally-estimated hours were associated with one-time start up tasks of implementing standard systems and processes.

Other factors also limit the burden associated with the Rule. Certification may be a one-time event or require only infrequent revision. Disclosures on electric vehicle fuel dispensing systems may be useable for several years. [2] Nonetheless, there is still some burden associated with posting labels. There is also some minimal burden associated with new or revised certification of fuel ratings and recordkeeping. The burden on vehicle manufacturers is limited because only newly-manufactured vehicles require label posting and manufacturers produce very few new models each year.

(1) Estimated total annual hours burden: 38,000 total burden hours, rounded to nearest thousand *(*includes **Non-liquid Alternative Fuels**[3] and **Alternative Fuel Vehicle Manufacturers***)* .

Non-liquid Alternative Fuels:

Certification: Staff estimates that the Rule's fuel rating certification requirements affect approximately 550 industry members (compressed natural gas producers and distributors and manufacturers of electric vehicle fuel dispensing systems) and consume approximately one hour each per year for a total of 550 hours.

Recordkeeping: Staff estimates that all 1,900 industry members (non-liquid fuel producers, distributors, and retailers) are subject to the Rule's recordkeeping requirements (associated with fuel rating certification) and that compliance requires approximately one-tenth hour each per year for a total of 190 hours.

Labeling: Staff estimates that labeling requirements affect approximately nine of every ten industry members (or roughly 1,700 members), but that the number of annually affected members is only 340 because labels may remain effective for several years (staff assumes that in any given year approximately 20% of 1,700 industry members will need to replace their labels). Staff estimates that industry members require approximately one hour each per year for labeling their fuel dispensers for a total of 340 hours.

Sub-total **(Non-liquid Alternative Fuels):** 1,080 hours (550 + 190 +340).

AFV Manufacturers:

Recordkeeping: Staff estimates that a total of 8 manufacturers require 30 minutes to comply with the Rule's recordkeeping requirements for a total of 4 hours.

Producing labels: Staff estimates 2.5 hours as the average time required of manufacturers to produce labels for each of the five new AFV models introduced industry-wide each year for a total of 12.5 hours.

Posting labels: Staff estimates 2 minutes as the average time to comply with the posting requirements for each of the approximately 1,121,153 new AFVs manufactured each year for a total of 37,371 hours.

Sub-total **(AFV Manufacturers)** *:* 37,388 hours (4 + 12.5 + 37,371).

Thus, the total burden for these industries combined is approximately 38,000 hours (1,080 + 37,388), rounded to nearest thousand.

(2) Estimated labor costs: $1,155,017 per year rounded *(*includes both **Non-liquid Alternative Fuels** and **AFV Manufacturers***)* .

Labor costs are derived by applying appropriate hourly cost figures to the

[1] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CPR 4.9(c).

[2] Label specifications were designed to produce labels to withstand the elements for several years.

[3] This includes compressed natural gas producers and distributors and manufacturers of electric vehicle fuel dispensing systems.

burden hours described above. According to Bureau of Labor Statistics data for 2008 (most recent available whole-year information), the average compensation for producers and distributors in the fuel industry is $27.28 per hour and $9.46 per hour for service station employees; the average compensation for workers in the vehicle industry is $30.18 per hour.

Non-liquid Alternative Fuels:

Certification and labeling: Generally, all of the estimated hours except for recordkeeping will be performed by producers and distributors of fuels. Thus, the associated labor costs would be $24,279. [(550 certification hours + 340 labeling hours) × $27.28]

Recordkeeping: Only 1/6 of the total recordkeeping hours will be performed by the producers and distributors of fuels (1/6 of 190 hours = approximately 32 hours; 32 hours × $27.28 = $872.96); the other 5/6 is attributable to service station employees (5/6 of 190 hours = approximately 158 hours; 158 hours × $9.46 = $1,494.68). Thus, the labor cost due to recordkeeping for the entire industry is approximately $2,368 ($872.96 for producers and distributors of fuels +$1,494.68 for service station employees).

The total paperwork related labor cost for the entire industry (**Non-liquid alternative fuels)** is approximately $26,647 ($24,279 for certification and labeling costs + $2,368 for recordkeeping costs).

AFV manufacturers:

The maximum labor cost for the entire industry (**AFV manufacturers**) is approximately $1,128,370 per year for recordkeeping and producing and posting labels (37,388 hours × $30.18/hour).

Thus, the estimated total labor cost for both industries for all paperwork requirements is $1,155,017 ($26,647 + $1,128,370) per year, rounded.

(3) Estimated annual non-labor cost burden: $426,251 rounded (includes both **Non-liquid Alternative Fuels** and **AFV Manufacturers**).

Non-liquid Alternative Fuels:

Staff believes that there are no current start-up costs associated with the Rule, inasmuch as the Rule has been effective since 1995. Industry members, therefore, have in place the capital equipment and means necessary to determine automotive fuel ratings and comply with the Rule. Industry members, however, incur the cost of procuring fuel dispenser and AFV labels to comply with the Rule. The estimated annual fuel labeling cost, based on estimates of 560 fuel dispensers (assumptions: an estimated 20% of 1,400 total fuel retailers need to replace labels in any given year given an approximate five-year life for labels—i.e., 280 retailers—multiplied by an average of two dispensers per retailer) at thirty-eight cents for each label (per industry sources), is $212.8 ($0.38 × 560).

AFV Manufacturers:

Here, too, staff believes that there are no current start-up costs associated with the Rule, for the same reasons as stated immediately above regarding the nonliquid alternative fuel industry. However, based on the labeling of an estimated 1,121,153 new and used AFVs each year at thirty-eight cents for each label (per industry sources), the annual AFV labeling cost is estimated to be $426,038.14 ($0.38 × 1,121,153).

Thus, the estimated total annual nonlabor cost burden associated with the Rule is $426,251 ($212.8 + $426,038.14), rounded.

Willard Tom,

General Counsel.

[FR Doc. E9–31202 Filed 1–4–10; 8:45 am]

BILLING CODE 6750–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; HIT Standards Committee's Workgroup Meetings; Notice of Meetings

AGENCY: Office of the National Coordinator for Health Information Technology, HHS.

ACTION: Notice of meetings.

This notice announces forthcoming subcommittee meetings of a federal advisory committee of the Office of the National Coordinator for Health Information Technology (ONC). The meetings will be open to the public via dial-in access only.

Name of Committees: HIT Standards Committee's Workgroups: Clinical Operations, Clinical Quality, Privacy & Security, and Implementation workgroups.

General Function of the Committee: To provide recommendations to the National Coordinator on standards, implementation specifications, and certification criteria for the electronic exchange and use of health information for purposes of adoption, consistent with the implementation of the Federal Health IT Strategic Plan, and in accordance with policies developed by the HIT Policy Committee.

Date and Time: The HIT Standards Committee Workgroups will hold the following public meetings during the month of January 2010: January 21st Clinical Operations' Vocabulary Task Force, 9 a.m. to 3 p.m./Eastern Time; January 26th Implementation Workgroup, 10 a.m. to 12 p.m./Eastern Time; January 26th Privacy & Security Workgroup, 3 p.m. to 5 p.m./Eastern Time; and January 28th Clinical Quality Workgroup, 2 p.m. to 4 p.m./Eastern Time.

Location: All workgroup meetings will be available via webcast; visit *http://healthit.hhs.gov* for instructions on how to listen via telephone or Web. Please check the ONC Web site for additional information as it becomes available.

Contact Person: Judy Sparrow, Office of the National Coordinator, HHS, 330 C Street, SW., Washington, DC 20201, 202–205–4528, Fax: 202–690–6079, e-mail: *judy.sparrow@hhs.gov.* Please call the contact person for up-to-date information on these meetings. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice.

Agenda: The workgroups will be discussing issues related to their specific subject matter, e.g., clinical operations standards, clinical quality standards, privacy and security standards, and implementation activities. If background materials are associated with the workgroup meetings, they will be posted on ONC's Web site prior to the meeting at *http://healthit.hhs.gov*.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the workgroups. Written submissions may be made to the contact person on or before two days prior to the workgroups' meeting date. Oral comments from the pubic will be scheduled at the conclusion of each workgroup meeting. Time allotted for each presentation will be limited to three minutes. If the number of speakers requesting to comment is greater than can be reasonably accommodated during the scheduled open public session, ONC will take written comments after the meeting until close of business on that day.

If you require special accommodations due to a disability, please contact Judy Sparrow at least seven (7) days in advance of the meeting.

ONC is committed to the orderly conduct of its advisory committee

meetings. Please visit our Web site at *http://healthit.hhs.gov* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App. 2).

Dated: December 30, 2009.

Judith Sparrow,

Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. E9–31347 Filed 1–4–10; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; HIT Policy Committee's Workgroup Meetings; Notice of Meetings

AGENCY: Office of the National Coordinator for Health Information Technology, HHS.

ACTION: Notice of meetings.

This notice announces forthcoming subcommittee meetings of a federal advisory committee of the Office of the National Coordinator for Health Information Technology (ONC). The meetings will be open to the public via dial-in access only.

Name of Committees: HIT Policy Committee's Workgroups: Meaningful Use, Privacy & Security Policy, Strategic Plan, and Nationwide Health Information Infrastructure (NHIN) workgroups.

General Function of the Committee: To provide recommendations to the National Coordinator on a policy framework for the development and adoption of a nationwide health information technology infrastructure that permits the electronic exchange and use of health information as is consistent with the Federal Health IT Strategic Plan and that includes recommendations on the areas in which standards, implementation specifications, and certification criteria are needed.

Date and Time: The HIT Policy Committee Workgroups will hold the following public meetings during the month of January 2010: January 8th Meaningful Use Workgroup, 11 a.m. to 12 p.m./Eastern Time; January 11th Privacy & Security Policy Workgroup, 10 a.m. to 12 p.m./Eastern Time; January 12th Strategic Plan Workgroup, 9 a.m. to 12 p.m./Eastern Time; January 12th NHIN Workgroup, 1 p.m. to 4 p.m./Eastern Time; January 22nd Privacy & Security Policy Workgroup, 10 a.m. to 12 p.m./Eastern Time; and January 28th Meaningful Use Workgroup, 10 a.m. to 12 p.m./Eastern Time.

Location: All workgroup meetings will be available via webcast; visit *http://healthit.hhs.gov* for instructions on how to listen via telephone or Web. Please check the ONC Web site for additional information as it becomes available.

Contact Person: Judy Sparrow, Office of the National Coordinator, HHS, 330 C Street, SW, Washington, DC 20201, 202–205–4528, Fax: 202–690–6079, email: *judy.sparrow@hhs.gov*. Please call the contact person for up-to-date information on these meetings. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice.

Agenda: The workgroups will be discussing issues related to their specific subject matter, e.g., meaningful use, the NHIN, privacy and security policy, or strategic planning. If background materials are associated with the workgroup meetings, they will be posted on ONC's Web site prior to the meeting at *http://healthit.hhs.gov*.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the workgroups. Written submissions may be made to the contact person on or before two days prior to the workgroups' meeting date. Oral comments from the pubic will be scheduled at the conclusion of each workgroup meeting. Time allotted for each presentation will be limited to three minutes. If the number of speakers requesting to comment is greater than can be reasonably accommodated during the scheduled open public session, ONC will take written comments after the meeting until close of business on that day.

If you require special accommodations due to a disability, please contact Judy Sparrow at least seven (7) days in advance of the meeting.

ONC is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://healthit.hhs.gov* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App. 2).

Dated: December 30, 2009.

Judith Sparrow,

Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. E9–31348 Filed 1–4–10; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Office of the Assistant Secretary for Administration; Statement of Organization, Functions, and Delegations of Authority

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) is reorganizing the Office of the Assistant Secretary for Administration (ASA) located within the Office of the Secretary (OS). The reorganization is designed to increase the efficiency and effectiveness of the office by consolidating the administrative functions under ASA. The Office of the Secretary Executive Office will also be dissolved, and the administrative functions will be consolidated with similar functions already performed by existing offices within OS.

FOR FURTHER INFORMATION CONTACT: Lila Lee, Office of Business Management and Transformation, 200 Independence Ave., SW., Washington, DC 20201, (202) 690–6075.

1. Part A, Office of the Secretary, Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services (HHS) is being amended at Chapter AJ, Office of the Assistant Secretary for Administration (ASA), which was last amended at 74 FR 57679–82, dated November 9, 2009, at 74 FR 297–301, dated January 5, 2009, at 72 FR 40155–57, dated July 23, 2007, and at 72 FR 2282–83, dated January 18, 2007, as follows:

A. Under ''Section AJ.10 Organization,'' delete in its entirety and replace with the following:

Section AJ.10 Organization. The Office of the Assistant Secretary for Administration (ASA) is under the direction of the Assistant Secretary for Administration, who reports to the Secretary, and consists of the following components:

- Immediate Office (AJ).
- Office of Human Resources (AJA).
- Office for Facilities Management and Policy (AJE).
- Office of the Chief Information Officer (AJG).

• Office of Diversity Management and Equal Employment Opportunity (AJI).
• Office of Business Management and Transformation (AJJ).
• Program Support Center (P).

B. Under Section AJ.20 Functions, insert the following:

Office of Human Resources (AJA). The Office of Human Resources (OHR) provides leadership in the planning and development of personnel policies and human resource programs that support and enhance the Department's mission. OHR also provides technical assistance to the Operating Divisions (OPDIVs) to most effectively and efficiently accomplish the OPDIV's mission through improved planning and recruitment of human resources and serves as the Departmental liaison to central management agencies on related matters.

Office for Facilities Management and Policy (AJE). The Office for Facilities Management and Policy (OFMP) provides Department-wide leadership and direction in master planning, facilities planning, design and construction, leasing, capital program budget management, space utilization, sustainable buildings, operations and maintenance, environmental and energy management, historic preservation, and occupational health and safety. OFMP is responsible for the HHS Real Property Asset Management program; and in this role provides management oversight across the HHS portfolio of real property assets to ensure appropriate stewardship and accountability is maintained. In addition, OFMP is responsible for the operation of and physical security for the HHS headquarters facility, the Hubert H. Humphrey Building, and oversight of HHS-occupied space in the Southwest Complex of Washington, DC. OFMP also provides technical assistance to HHS' OPDIVs in evaluating the effectiveness of their facilities programs and policies and fosters creativity and innovation in the administration of these functions.

Office of the Chief Information Officer (AJG). The Office of the Chief Information Officer (OCIO) advises the Secretary and the ASA on matters pertaining to the use of information and related technologies to accomplish Departmental goals and program objectives. The mission of the Office is to establish and provide: assistance and guidance on the use of technology-supported business process reengineering; investment analysis; performance measurement; strategic development and application of information systems and infrastructure; policies to provide improved management of information resources and technology; and better, more efficient service to OCIO's clients and employees.

Office of Diversity Management and Equal Employment Opportunity (AJI). The Office of Diversity Management and Equal Employment Opportunity (ODME) provides leadership in creating and sustaining a diverse workforce and an environment free of discrimination at HHS. ODME works pro actively to enhance the employment of women, minorities, veterans, and people with disabilities through efforts that include policy development, oversight, complaint prevention, investigations and processing, outreach, commemorative events, and standardized education and training programs. ODME also provides resource management and equal opportunity services functions for the Department. To accomplish its mission, ODME provides functional oversight and works in collaboration with the Equal Employment Opportunity offices that service each of the Department's OPDIVs. ODME also conducts Department-wide program analysis to determine barriers to diversity and inclusion.

Office of Business Management and Transformation (AJJ). The Office of Business Management and Transformation (OBMT) provides results-oriented strategic and analytical support for key management initiatives and coordinates the business mechanisms necessary to account for the performance of these initiatives and other objectives as deemed appropriate. OBMT manages the budget and financial resources for the direct support of the ASA. OBMT oversees Department-wide multi-sector workforce management activities. OBMT also provides business process reengineering services, including the coordination of the review and approval process for reorganization and delegation of authority proposals that require the Secretary's or designees' signature.

2. Part P, Program Support Center (PSC), Statement of Organization, Functions, and Delegations of Authority, for the Department of Health and Human Services (HHS), which was last amended at 74 FR 297–301, dated January 5, 2009, at 62 FR 63952–03, dated December 3, 1997, and at 62 FR 5010–01, dated February 3, 1997, is amended as follows:

A. Delete Part P, ''Program Support Center (P),'' in its entirety and replace with the following:

Part P: Program Support Center

Program Support Center (P). The Program Support Center (PSC) provides a full range of support services to HHS and other Federal Agencies, allowing them to focus on their core missions that serve the American public. To accomplish its mission, PSC consolidates functions and concentrates skills and expertise on its customers' business needs. The PSC drives cost savings and continuous quality improvement through economies of scale, cost negotiations, standardized business processes, and consistent quality controls.

3. Part A, Office of the Secretary, Statement of Organization, Functions and Delegations of Authority for the Department of Health and Human Services (HHS) is being amended as Chapter AM, The Office of the Assistant Secretary for Financial Resources, as last amended 74 FR 39325–27, dated August 6, 2009, and at 71 FR 38884–88, dated July 10, 2006, is amended as follows:

A. Under Chapter AML, ''Office of Budget,'' ''Division of the Office of the Secretary Budget (AML5),'' insert the following:

r. Manages the budget and financial resources for the Office of the Secretary.

B. Under Chapter AMS, ''Office of Finance,'' ''Section AMS.20 Functions,'' ''Office of Financial Policy and Reporting (AMS1),'' ''Division of Financial Management Policy (AMS11),'' delete part ''(1)'' in its entirety and replace with the following:

(1) Ensures that proper internal controls for HHS, including the Office of the Secretary (OS), are implemented and maintained under OMB Circular A–123, Management's Responsibility for Internal Control;

4. Delegation of Authority. Pending further redelegation, directives or orders made by the Secretary or ASA, all delegations and redelegations of authority made to officials and employees of affected organizational components will continue in them or their successors pending further redelegations, provided they are consistent with this reorganization.

E.J. Holland, Jr.,
Assistant Secretary for Administration.

[FR Doc. E9–31193 Filed 1–4–10; 8:45 am]
BILLING CODE 4150–04–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare and Medicaid Services

[Document Identifier: CMS–10310]

Emergency Clearance: Public Information Collection Requirements Submitted to the Office of Management and Budget (OMB)

AGENCY: Center for Medicare and Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare and Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or

other forms of information technology to minimize the information collection burden.

We are, however, requesting an emergency review of the information collection referenced below. In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, we have submitted to the Office of Management and Budget (OMB) the following requirements for emergency review. We are requesting an emergency review because the collection of this information is needed before the expiration of the normal time limits under OMB's regulations at 5 CFR 1320(a)(2)(ii). This is necessary to ensure compliance with an initiative of the Administration. We cannot reasonably comply with the normal clearance procedures due to an unexpected event as stated in 5 CFR 1320.13(a). The Centers for Medicare and Medicaid Services (CMS) is requesting that an information collection request (ICR) for Consumer Research on Public Reporting of Hospital Outpatient Measures be processed under the emergency clearance process. Approval of this package is essential in order to comply with Section 1833(t) of the Social Security Act (42 U.S.C. 1395l(t)(17)).

1. *Type of Information Collection Request:* New collection; *Title of Information Collection:* Consumer Research on Public Reporting of Hospital Outpatient Measures *Use:* The Medicare Improvements and Extension Act under Division B of Title I of the Tax Relief and Health Care Act (MIEA–TRHCA) of 2006, enacted in December of 2006, made changes in the Outpatient Prospective Payment System (OPPS). Consequently, CMS is now statutorily required to establish a program under which hospitals will report data on the quality of hospital outpatient care using standardized measures to receive the full annual update to the OPPS payment rate. This will be effective for payments beginning in calendar year (CY) 2009. The program established under these amendments is the Hospital Outpatient Quality Data Reporting Program (HOP QDRP). The measures will expand as additional priority areas for quality improvement in hospital outpatient settings are identified and will be designed to evaluate the diversity of services and clinical topics provided to adult patients in hospital outpatient settings.

The Centers for Medicare & Medicaid Services contracted with L&M Policy Research, LLC (L&M) and its subcontractors, Mathematica Policy Research, Inc. (MPR) and McGee & Evers Consulting (M&E), to conduct exploratory or formative research around the new Hospital Outpatient Measures. Concepts and topics were presented to groups of consumers and caregivers, and to individual physicians. Subsequent to this exploratory or formative research, the research team designed mock-ups of the planned measures, utilizing feedback from the measure developers, the website programmers, plain language experts, and other CMS staff and contractors. The goals of the mock-ups were to integrate the measures into an existing website using the display devices similar to those used for extant measures, but presenting the measures clearly and in such a way that consumers and professionals could draw accurate and useful inferences from the data. The research team and CMS remain concerned about a number of issues in the displays and would like to conduct additional Web site research with consumers, caregivers and professionals to fine tune the recommendations to the website owners and programmers. The team proposes to conduct cognitive interviews with mock-ups and protocols in January 2010 in order to meet Agency deadlines for presentation of the data by June 2010. *Form Number:* CMS–10310 (OMB#: 0938–New); *Frequency:* Once; *Affected Public:* Individuals or Households; *Number of Respondents:* 104; *Total Annual Responses:* 104; *Total Annual Hours:* 41. (For policy questions regarding this collection contact David Miranda 410–786–7819. For all other issues call 410–786–1326.)

CMS is requesting OMB review and approval of this collection by *January 15, 2010,* with a 180-day approval period. Written comments and recommendations will be considered from the public if received by the individuals designated below by January 13, 2010.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web site address at *http://www.cms.hhs.gov/regulations/pra* or e-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

Interested persons are invited to send comments regarding the burden or any other aspect of these collections of information requirements. However, as noted above, comments on these information collection and recordkeeping requirements must be mailed and/or faxed to the designees referenced below by January 13, 2010.

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

3. *By Facsimile or E-mail to OMB.* OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395–6974, E-mail: *OIRA_submission@omb.eop.gov.*

Dated: December 22, 2009.

Michelle Shortt,

Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. E9–31298 Filed 1–4–10; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–09–09AY]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–5960 or send an e-mail to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Laboratory Response Network (LRN)—Existing Data Collection in use without an OMB Control Number—National Center for Preparedness, Detection, and Control of Infectious Diseases (NCPDCID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Laboratory Response Network (LRN) was established by the Department of Health and Human Services (HHS), Centers for Disease Control and Prevention (CDC) in accordance with Presidential Decision Directive 39, which outlined national anti-terrorism policies and assigned specific missions to Federal departments and agencies. The LRN's mission is to maintain an integrated national and international network of laboratories that can respond to suspected acts of biological, chemical, or radiological terrorism and other public health emergencies.

When Federal, State and local public health laboratories voluntarily join the LRN, they assume specific responsibilities and are required to provide information to the LRN Program Office at CDC. Each laboratory must submit and maintain complete information regarding the testing capabilities of the laboratory. Biannually, laboratories are required to review, verify and update their testing capability information. Complete testing capability information is required in order for the LRN Program Office to determine the ability of the Network to respond to a biological or chemical terrorism event. The sensitivity of all information associated with the LRN requires the LRN Program Office to obtain personal information about all individuals accessing the LRN Website. In addition, the LRN Program Office must be able to contact all laboratory personnel during an event so each laboratory staff member that obtains access to the restricted LRN Web site must provide his or her contact information to the LRN Program Office.

As a requirement of membership, LRN Laboratories must report all biological and chemical testing results to the LRN Program at CDC using a CDC developed software tool called the LRN Results Messenger. This information is essential for surveillance of anomalies, to support response to an event that may involve multiple agencies and to manage limited resources. LRN Laboratories must also participate in and report results for Proficiency Testing Challenges or Validation Studies. LRN Laboratories participate in multiple Proficiency Testing Challenges, Exercises and/or Validation Studies every year consisting of five to 500 simulated samples provided by the LRN Program Office. It is necessary to conduct such challenges in order to verify the testing capability of the LRN Laboratories. The rarity of biological or chemical agents perceived to be of bioterrorism concern prevents some LRN Laboratories from maintaining proficiency as a result of day-to-day testing. Simulated samples are therefore distributed to ensure proficiency across the LRN. The results obtained from testing these simulated samples must also be entered into Results Messenger for evaluation by the LRN Program Office.

During a surge event resulting from a bioterrorism or chemical terrorism attack, LRN Laboratories are also required to submit all testing results using LRN Results Messenger. The LRN Program Office requires these results in order to track the progression of a bioterrorism event and respond in the most efficient and effective way possible and for data sharing with other Federal partners involved in the response. The number of samples tested during a response to a possible event could range from 10,000 to more than 500,000 samples depending on the length and breadth of the event. Since there is potentially a large range in the number of samples for a surge event, CDC estimates the annualized burden for this event will be 3,000,000 hours or 625 responses per respondent.

Semiannually the LRN Program Office may conduct a Special Data Call to obtain additional information from LRN Member Laboratories in regards to biological or chemical terrorism preparedness. Special Data Calls are conducted using the LRN Web site.

Respondents are public health laboratorians. There are no costs to respondents other than their time. The total estimated annualized burden for this information collection is 3,176,400 hours.

ESTIMATE OF ANNUALIZED BURDEN HOURS

Forms	Respondents	Number of respondents	Average number of responses per respondent	Average burden per response (in hours)
Biennial Requalification	Public Health Laboratorians	100	1	2
General Surveillance Testing Results	Public Health Laboratorians	200	25	24
Proficiency Testing/Validation Testing Results	Public Health Laboratorians	200	5	56
Surge Event Testing Results	Public Health Laboratorians	200	625	24
Special Data Call	Public Health Laboratorians	200	2	30/60

Dated: December 30, 2009.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E9–31368 Filed 1–4–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0263]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Experimental Study: Presentation of Quantitative Effectiveness Information to Consumers in Direct-to-Consumer Television and Print Advertisements for Prescription Drugs

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by February 4, 2010.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–6974, or e-mailed to *oira_submission@omb.eop.gov*. All comments should be identified with the OMB control number 0910–New and title Experimental Study: Presentation of Quantitative Effectiveness Information to Consumers in Direct-to-Consumer (DTC) Television and Print Advertisements for Prescription Drugs. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Liz Berbakos, Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3792, *Elizabeth.Berbakos@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Experimental Study: Presentation of Quantitative Effectiveness Information to Consumers in Direct-to-Consumer (DTC) Television and Print Advertisements for Prescription Drugs—(OMB Control Number 0910–New)

I. Background

The Federal Food, Drug, and Cosmetic Act (the act) requires that manufacturers, packers, and distributors (sponsors) who advertise prescription human and animal drugs, including biological products for humans, disclose in advertisements certain information about the advertised product's uses and risks.[1] By its nature, the presentation of this information is likely to evoke active trade-offs by consumers, i.e., comparisons with the perceived risks of not taking treatment, and comparisons with the perceived benefits of taking a treatment (Ref. 1). FDA has an interest in fostering safe and proper use of prescription drugs, an activity that engages both risks and benefits. Therefore, an examination of ways to improve consumers' understanding of this information is central to this regulatory task.

Under the act, FDA engages in a variety of communication activities to ensure that patients and health care providers have the information they need to make informed decisions about treatment options, including the use of prescription drugs. FDA regulations (21 CFR 201.57) describe the content of required product labeling, and FDA reviewers ensure that labeling contains accurate and complete information about the known risks and benefits of each drug.

FDA regulations require that prescription drug advertisements that make (promotional) claims about a product also include risk information in a ''balanced'' manner (21 CFR 202.1(e)(5)(ii)), both in terms of the content and presentation of the information. This balance applies to both the front, display page of an advertisement, as well as including information ''in brief summary'' about the advertised product's ''side effects, contraindications, and effectiveness''[2] usually, but not always, on a separate page. However, beyond the ''balance'' requirement there is limited guidance and research to direct or encourage sponsors to present benefit claims that are informative, specific, and reflect clinical effectiveness data.

FDA has recently provided guidance to sponsors about ways to present risk information in prescription drug advertisements (Ref. 2). This guidance notwithstanding, research addressing specifically how to present benefit and efficacy information in prescription drug advertisements is limited. For example, ''benefit claims,'' broadly defined, appearing in advertisements are often presented in general language that does not inform patients of the likelihood of efficacy and are often simply variants of an ''intended use'' statement. One content analysis of DTC advertising by Woloshin and Schwartz (2001) (Ref. 3) found that information about product benefits and risks is often presented in an unbalanced fashion. The researchers classified the ''promotional techniques'' used in the advertisements. Emotional appeals were observed in 67 percent of the ads while vague and qualitative benefit terminology was found in 87 percent of the ads. Only 9 percent contained data. However, for risk information, half the advertisements used data to describe side-effects, typically with lists of side-effects that generally occurred infrequently. Similarly, a content analysis by Frosch et al. (2007) (Ref. 4) found that only a small proportion of product-claim ads gave specific information about the population prevalence of the medical condition being advertised. The authors criticize DTC for presenting ''best-case scenarios that can distort and inflate consumers' expectations about what prescription drugs can accomplish'' (see p. 12 of Frosch et al.) (Ref. 4) without disclosing how many consumers are likely to experience that benefit.

Some research has proposed that providing quantitative information about product efficacy enables consumers to make better choices about potential therapy. One possible format (termed the ''drug facts'' box by its creators) for this information has recently received attention (Refs. 5, 6, and 7). In these studies, the drug facts box format contained information about the product's efficacy and safety in terms of rate (how many people in the clinical trial experienced a benefit or side effect compared to placebo). As expected, this study showed that consumers who were provided efficacy information used it. Participants receiving efficacy information (without other potentially valuable information about the drug) were more likely to correctly choose the product with the higher efficacy than consumers who saw

[1] For prescription drugs and biologics, the act requires advertisements to contain ''information in brief summary relating to side effects, contraindications, and effectiveness'' (section 502(n) of the act (21 U.S.C. 352(n)).

[2] See section 502(n) of the act.

the brief summary that did not contain this information.

Although these results are intriguing, additional research is necessary to uncover important information about how consumers understand effectiveness information about prescription drug products from direct-to-consumer advertisements. For example, the research to date does not address whether simply adding efficacy rate information and qualitative summations to a consumer-friendly brief summary would enable consumers to find and report the correct answer, or if the presentation of information in a chart format itself increases comprehension.

Further, these data cannot address the best way in which to convey numerical information; percents were used but another format, such as frequencies, may be more effective at communicating quantitative information. Previous research shows that individuals have great difficulty processing numerical concepts (e.g., Beyth-Marom, 1982; Bowman, 2002; Cohen, Ferrell, and Johnson, 2002) (Refs. 8, 9, and 10). A few studies have attempted to determine what different formats makes these concepts least troublesome (e.g., Fagerlin, Wang, and Ubel, 2005; Lipkus, 2007) (Refs. 11 and 12), however, most research into the communication of numerical concepts concentrates on risk information. We are not aware of research looking into the integration of quantitative information about effectiveness or benefits into the body of the advertisement itself. The addition of this information may help consumers make better health care decisions, provided they can understand it.

It is also not known if ways of communicating product efficacy work equally well across print and television DTC media. To our knowledge, research on presenting quantitative information in risk communication has been conducted exclusively with static modalities. The ideal format for presenting quantitative information may vary as a function of presentation. The amount of mental processing capacity each individual can devote to understanding a message varies depending on how long individuals have to look at the material and whether the material is self-paced or presented at an uncontrollable speed. As a result, some forms of quantitative information may lend themselves to print, rather than broadcast. This particular understanding is crucial to the risk-benefit tradeoff that patients must make with the consultation of a health care professional in order to achieve the best health outcomes.

The proposed study will examine: (1) Various ways of communicating quantitative efficacy in DTC print ads and (2) whether the findings translate to DTC television ads.

In the **Federal Register** of June 22, 2009 (74 FR 29490), FDA published a 60-day notice requesting public comment on the proposed collection of information. FDA received four comments.

II. Comments on the Information Collection

In the following section, we outline the observations and suggestions raised in the comments and provide our responses.

(Statement 1) All four comments expressed support for the research to explore issues of quantitative benefit information. They all described the collection of data as a worthy endeavor which will provide useful information on how best to communicate information in DTC ads.

(Statement 2) Two comments suggested enhancing or supplementing the existing behavioral intention questions (questions 13a through d in the questionnaire).

(Response) We took this as an opportunity to examine our behavioral intention questions thoroughly. We decided to maintain three of our four behavioral intention questions but remove one of them because of possible redundancy. We also added a new item to this question on the basis of a comment from one of our peer reviewers. Although we took seriously the suggestion to inquire about use of the Internet, one of our existing questions already covers this issue. In the interest of brevity, we have decided to streamline this section.

(Statement 3) One comment suggested including some questions about the risk/benefit tradeoff.

(Response) We plan to do so and these questions can be seen in questions 23a through d of the questionnaire. We labeled this variable ''attitude toward drug'' because it is easier to analyze and interpret using this term.

(Statement 4) Three comments suggested adding different types of participants to our sample, including: (1) A general population sample, (2) a sample of participants suffering from a medical condition that they can diagnose themselves, and (3) samples of at least three different medical conditions.

(Response) We selected high cholesterol because it is prevalent in the population and is commonly advertised DTC. We think adding a medical condition that is symptomatic or can otherwise be self-diagnosed is an excellent suggestion. We hope to explore the research questions in the current study in a variety of other medical conditions in future research.

(Statement 5) Two comments suggested comparing the test ad with either the standard of care or with multiple other comparators instead of simply comparing it to placebo.

(Response) In response, we remind readers that this is the first study to examine issues of quantitative benefit information in print and television DTC ads and that existing literature paints a grim picture of the amount of numerical information viewers may be likely to absorb. Thus, we are using the simplest comparison for this first study. We agree that future studies should examine other types of comparisons; however, we remind readers that only comparisons that are in the approved product labeling can be displayed in promotional pieces.

(Statement 6) One comment recommended the use of the Newest Vital Sign health literacy test.

(Response) We examined this test and considered it for use in our design, but ultimately decided against it for a number of reasons. First, we would have to modify the test so that it could be administered over the Internet rather than in person. It is unclear how some aspects of the test could be altered in such a way. Second, the test takes approximately 3 minutes when administered in person and may take as long or longer to administer via computer. We believe that numeracy is the key component of health literacy that will influence the results of our study, and we have devoted considerable space in the questionnaire to its measurement (see questions 29a through f, 30a through d, and 31a through d of the questionnaire). Because of time constraints and the key role of numeracy, we will maintain our current questions to thoroughly examine numeracy and provide basic information on health literacy. We will also include a one-item subjective health literacy item (see question 28 in the questionnaire). We will continue to examine the Newest Vital Sign measure for future research.

(Statement 7) Two comments expressed concern that our study does not address the role of the health care provider and overstates the decisions that consumers can make about their prescription drugs.

(Response) We agree that the health care provider is the best person to interpret clinical data and that the consumer or patient does not make the final prescribing decision. Nonetheless,

DTC is currently directed at consumers in such a way that they have information about the risk side of the risk/benefit tradeoff but no specific information about the benefit side. This study is designed to assess whether adding specific benefit information will help consumers understand how well the product works, which may ultimately result in better-informed conversations with their health care providers.

(Statement 8) One comment suggested looking at the results of this study in conjunction with the results of another study we are conducting concerning the role of distraction in television ads in order to inform the development of future research.

(Response) This is an excellent suggestion that shows a strong understanding of the Division of Drug Marketing, Advertising and Communications' (DDMAC) long-term research goals. We plan to use the results of these two studies, in part, to strengthen the development of our future research.

(Statement 9) One comment recommended the inclusion of open-ended recall questions in the questionnaire.

(Response) We have included some open-ended questions in the revised questionnaire (see questions 4 and 15 in the questionnaire).

(Statement 10) One comment suggested including questions about perceptions of safety and efficacy. A related comment suggested using personal framing rather than asking about ''the average person.''

(Response) We have included questions about safety and efficacy perceptions and these are shown in the revised questionnaire (see questions 15, 16, 17, and 20 in the questionnaire). We combed through the questionnaire to determine the best framing for each question. Where possible we added personalizing language, but in portions of the questionnaire that measure recall of the words in the ad, we mimicked the language of the ad (see questions 14a through h and 18a through i in the questionnaire).

(Statement 11) One comment suggested copy testing our mock ad before it is included in the protocol.

(Response) This is an excellent suggestion that cannot be implemented due to limited resources. Nevertheless, we conducted extensive pretesting of the stimuli ad for a previous project and applied the same procedures and concepts to the creation of the current mock ad. Moreover, we conducted limited cognitive testing (of fewer than nine people) to address such issues and these interviews provided some assurance that our ads were acceptable as were the ads for the other project.

(Statement 12) One comment suggested that we show the ads to participants as they would view them at home, i.e., in a clutter reel of ads for the television component and in a group of magazine ads in the magazine component.

(Response) Although embedding our stimuli within other ads would more closely mimic real viewing, we have several research questions to answer before we reach that point. We are not confident participants will understand any numerical information even when specifically directing them to one ad because this type of information seems to be so difficult for people to understand. We need to establish the basic parameters of statistical and visual information presentation before we can manipulate the realism of the situation and begin to examine other issues such as stopping power and attention.

(Statement 13) One comment recommended against using the Internet to administer the study and instead suggested the use of a mall-intercept protocol.

(Response) Although we recognize that one study cannot address all questions and repeat that the current study is planned to be the first among future studies, we do require several experimental conditions to answer basic presentation and comprehension questions. The resources necessary to conduct this study using a mall-intercept procedure give us less than half of the participants we are currently utilizing. Given that we are using a nationally representative, random digit dialing-based Internet panel to collect our experimental data, we feel that we are obtaining the best value for our funds. We do not feel that the tradeoffs in terms of external validity regarding mall-intercepts are favorable to that method.

(Statement 14) One comment recommended including an analysis plan for review, specifically one that addresses what result(s) would support a conclusion that the test ad has achieved a balanced presentation.

(Response) In response to the first part of this comment, we have included an analysis plan in this current document. In response to the second part of this comment, the primary research question in this study is not whether the information is balanced, but simply how well participants can understand numerical benefit information. Although we will address questions of balance and risk/benefit tradeoff in our questionnaire (see questions 23a through d in the questionnaire), our main dependent variables concern the recall and understanding of the benefit information, independent of the other information in the ad. Secondarily, we will examine recall and comprehension of risk information to assess whether it is affected by the inclusion of benefit information and the form the benefit information takes. Finally, we will look at the intersection of benefit and risk information, primarily in risk and benefit perception questions. Our main analyses, however, involve the understanding of benefit information and not in the balance of benefit and risk information. That is an excellent suggestion for future research.

(Statement 15) One comment expressed concern that high efficacy may not be the only reason to select one drug over another.

(Response) We agree. The current research is not designed to examine the multiple factors that a physician or a consumer considers when prescribing or deciding to take a drug. The scope of this project is to investigate the presentation of quantitative benefit information. We have chosen to vary the efficacy of the product (high versus low) as a simple method for determining whether viewers can understand how well the product works when this information is presented in different forms. We maintain that the efficacy of the drug is a major consideration in this decision and therefore represents a reasonable variable to use in this study.

(Statement 16) One comment was concerned that data presentation, and in particular the relative frequency presentation, would confuse consumers.

(Response) This comment reflects the very reason we are conducting the study. Before considering the idea of adding quantitative benefit information to DTC advertising, we want to ensure that we are not causing people to become more confused about their options. We have included the relative frequency condition specifically because we believe consumers do have trouble understanding this format. Sponsors have expressed interest in using this format in their ads and therefore this is a particularly important experimental condition for testing.

(Statement 17) One comment suggested that we ask questions about participant age and education.

(Response) We ask these and other demographic questions in this study (see questions 39 through 45 in the questionnaire).

(Statement 18) One comment mentioned that subjective measures of drug efficacy may confuse viewers.

(Response) We will define high and low efficacy quantitatively based on the range of efficacy currently found in the drug class. We will ask perception questions on Likert scales (e.g., strongly agree to strongly disagree) as well as numerical scales.

(Statement 19) One comment suggested that we are basing our entire study on an outdated study from 2001.

(Response) First, we provided information about the 2001 study to provide background information because it is relevant to the current study but have not based our entire research on it. Second, it is unclear what basic principles of human communication will have changed in the 8 years that have passed since the publication of this one study. Finally, although this one study shows that researchers in the field are investigating similar issues, no research currently exists to answer our research questions about the understanding of quantitative information in print and television DTC advertisements.

(Statement 20) One comment suggested that 20 minutes is not adequate for participants to complete this study.

(Response) We have completed similar studies in the past within 20 minutes. We will conduct cognitive testing before the administration of the study to ensure that the protocol can be completed within 20 minutes. Interviews lasting longer than 20 minutes have shown that participants tend not to want to spend that much time on them. Therefore, we will maintain the study at 20 minutes or less.

III. Revised Study

Based in part on these comments, further research discussions, and the input of three external reviewers, we propose the following revised design, hypotheses, and analysis plan.

A. Overview

This study will be conducted in two concurrent parts: One examining quantitative information in DTC print advertisements and the other examining such information in DTC television advertisements. Three factors will be examined: Drug efficacy, statistical format, and visual format.

We will investigate two levels of drug efficacy (low versus high), defined by a quantifiable, objective metric that can be conveyed in graphical representations of the drug versus the comparator reference drug (in this case, placebo). Specifically, high efficacy will be defined by a large, noticeable difference compared with no treatment; whereas low efficacy will be defined by a minimal difference between the drug and no treatment. We will examine two levels of efficacy to determine whether participants can accurately distinguish between these levels within various formats.

We will investigate five statistical formats, defined as the type of statistical information conveyed: Frequency, percent, frequency plus percent, relative frequency, and frequency plus relative frequency. Based on existing literature, we will use the frequency statistical format in all of our visual formats for consistency.

Visual format is defined as various methods through which efficacy can be visually represented. We have chosen to investigate four different formats: Pie chart, bar chart, table, and pictograph.

Additionally, we will have a control condition with no specific efficacy information provided. Please see the sample stimuli for the operationalization of each of these conditions. The factors will be combined in a partially crossed factorial design as follows:

		Statistical Format				
		Frequency	Percent	Frequency + Percent	Relative Frequency	Frequency + Relative Frequency
Efficacy	Low					
	High					

and

		Visual Format				
		None	Pie Chart	Bar Chart	Table	Pictograph
Efficacy	Low					
	High					

+ 1

No Statistical Format/No Efficacy

B. Procedure

This study will be administered over the Internet. A total of 2,250 interviews involving print ads will be completed. Participants in this part of the study will be randomly assigned to view one version of the magazine promotion page and the brief summary page of a prescription drug ad. Following their perusal of this document, they will answer questions about their recall and

understanding of the benefit and risk information, their perceptions of the benefits and risks of the drug, and their intent to ask a doctor about the medication.

A total of 2,250 interviews involving television ads will be completed. Participants in this part of the study will be randomly assigned to view one version of a television ad twice and answer the same questions described in the previous paragraph.

For both parts, demographic and health care utilization information will be collected. The entire procedure is expected to last approximately 20 minutes. This will be a one-time (rather than annual) information collection.

C. Participants

Data will be collected using an Internet protocol. Participants will all have reported that a health care professional has diagnosed them with high cholesterol and will represent a range of education levels. Because the task presumes basic reading abilities, all selected participants must speak English as their primary language. Participants must be 18 years or older.

D. Hypotheses

1. Preface

The proposed research has two main objectives. First, we plan to test several statistical formats to determine whether the presentation of efficacy information in different formats affects perceptions of efficacy. The risk communication literature suggests that presenting numerical risk information as an absolute frequency (e.g., N out of 100) may be the most easily understood format (Fagerlin et al., 2007) (Ref. 13). Percent, and a combination of absolute frequency and percent, represent increasingly complex statistical formats; however, they may not differ from the baseline of absolute frequency for average consumers. In contrast, the risk communication literature suggests that presenting numerical risk information as a relative frequency (e.g., 10 times higher) is a markedly more complex statistical format that biases perceptions (Fagerlin et al., 2007) (Ref. 13). Thus, presenting efficacy information as a relative frequency, compared to absolute frequency, may affect perceptions of efficacy. Presenting the combination of absolute frequency and relative frequency may mitigate this effect.

Second, we plan to test several visual formats to determine whether the presentation of a visual format, in conjunction with the presentation of absolute frequency information, affects perceptions of efficacy. The risk communication literature suggests that the addition of visual formats such as bar charts, tables, and pictographs increase peoples' understanding of numerical information (Ancker et al., 2006; Lipkus and Hollands, 1999) (Refs. 14 and 15). However, not all visual formats are always helpful; for instance, pie charts may only help when people are comparing proportions (Lipkus, 2007) (Ref. 12). Thus, presenting efficacy information with a bar chart, table, and pictograph—but not necessarily with a pie chart—may affect people's understanding of efficacy information, in comparison to when there is no visual format.

Measuring numeracy will allow us to assess the magnitude of these effects across participants. Similarly, the separate TV and print portions of the study will allow us to assess the magnitude of these effects across these modalities.

2. Specific Hypotheses

a. Efficacy effects in print and TV ads.

(1) Behavioral intentions, attitude toward drug, and perceived efficacy will be higher in high efficacy conditions than in low efficacy conditions.

(2) We will explore whether there are differences between the no efficacy condition (control) and the low and high efficacy condition on behavioral intentions, attitude toward drug, and perceived efficacy.

(3) Benefit accuracy will be higher in the low and high efficacy conditions than in the no efficacy condition. There will be no difference between the low and high efficacy conditions.

(4) The effects tested in hypotheses (1) and (2), explained previously in section III.D.2 of this document, will be modified by numeracy, such that high numeracy participants will be more likely to show these effects than will low numeracy participants.

(5) Risk recall will not differ by efficacy level (no, low, high).

(6) Perceived risk will be lower in the high efficacy condition compared with the low efficacy condition because, according to the Affect Heuristic (Slovic and Peters, 2006) (Ref. 16), people perceive things that are more beneficial as less risky.

b. Statistical format effects in print and TV ads.

(1) We will test competing hypotheses for behavioral intentions, attitude toward drug, and perceived efficacy.

(1a) Overestimation hypothesis: The first hypothesis rests on the assumption that in the absence of any quantitative information people overestimate the effectiveness of drugs. Accordingly, we would predict that behavioral intentions, attitude toward drug, and perceived efficacy will be higher for participants in the no statistical format condition, compared to all other statistical format conditions. Support for this interpretation will be found if estimates of the benefits are higher in the no statistical format condition than in all other statistical format conditions.

(1b) Peripheral cue hypothesis: The competing hypothesis rests on the assumption that any statistical information will be used as a peripheral cue; that is, participants will not process the quantitative information provided in the various statistical formats but will rather view it as ''scientific proof'' of the drug's efficacy. Accordingly, we would predict that behavioral intentions, attitude toward drug, and perceived efficacy will be lower for participants in the no statistical format condition, compared to all other statistical format conditions. Support for this interpretation will be found if, in addition to perceived efficacy effects, estimates on attitude toward the ad ''peripheral cue'' measures—ratings of how believable, persuasive, informative, etc., the ad is—are lower in the no statistical format condition than in all other statistical format conditions.

(2) Based on the risk communication literature, we predict that the absolute frequency, percent, and absolute frequency and percent conditions may not differ on behavioral intentions, attitude toward drug, or perceived efficacy. However, we predict that behavioral intentions, attitude toward drug, and perceived efficacy will be higher in the relative frequency condition than in the absolute frequency, percent, absolute frequency + percent, and absolute frequency + relative frequency conditions.

(3) The effects tested in hypotheses (1) and (2) will be modified by numeracy. (See sections III.D.1 through 2 of this document.) For instance, we expect that the difference between the relative frequency and the absolute frequency + relative frequency conditions will be greater for high numeracy participants than for low numeracy participants (because high numeracy participants will be more likely to use the additional information provided by the absolute frequency).

(4) Benefit accuracy will be lowest in the no statistical format condition and highest in the absolute frequency condition (Slovic, Monahan, and MacGregor, 2000) (Ref. 17). Tests of other relations between statistical formats will be exploratory. For instance, we might see information overload with some formats (e.g., absolute frequency and relative

frequency) which impedes benefit accuracy.

(5) The effects tested in hypothesis (4) will be modified by numeracy, such that low numeracy participants will show greater differences in benefit accuracy across statistical formats than will high numeracy participants (Peters, Vastfjall, et al., 2006) (Ref. 18).

(6) We expect that risk recall will not differ by statistical format, but we will conduct exploratory analyses to determine whether information overload impedes risk recall.

(7) We expect that perceived risk will be lowest in the relative frequency condition if perceived benefit is indeed highest in this condition (see Slovic and Peters, 2006, reference 16 of this document).

c. *Visual format effects in print and TV ads.*

(1) We will test competing hypotheses for benefit accuracy, behavioral intentions, attitude toward drug, and perceived efficacy.

(1a) Visual information facilitation hypothesis: The first hypothesis rests on the assumption that participants will, to the extent possible, process and use the information in the visual formats. The risk communication literature suggests that visual representations of risk can increase understanding, and that people have a more difficult time processing this kind of information in pie charts, as compared to other visual formats. Therefore, our first hypothesis is that benefit accuracy will be higher in the bar chart, table, and pictograph conditions—but not necessarily the pie chart condition—than in the no visual format condition. Tests of other relations between visual formats will be exploratory.

(1b) Information overload hypothesis: Alternatively, there may be no differences across visual formats on behavioral intentions, attitude toward drug, perceived efficacy, or benefit accuracy if the visual serves as a distraction or is too much information to process.

(1c) Peripheral cue hypothesis: Behavioral intentions, attitude toward drug, and perceived efficacy—but not benefit accuracy—may be higher in all visual conditions than in the no visual condition if the visual information serves as a peripheral cue.

(2) The effects tested in hypothesis (1) will be modified by numeracy. For instance, we expect that high numeracy participants will be more likely to process the information in the visual formats, and thus more likely to show the pattern of effects outlined in 1a, compared to low numeracy participants.

(3) We expect that perceived risk and risk recall will not differ by visual format but we will conduct exploratory analyses to determine whether information overload impedes risk recall.

E. Analysis Plan

We will conduct the following statistical analyses separately for the print and television versions of the ad.

Efficacy effects in print and TV ads: We will conduct Analysis of Variance (ANOVAs) to test whether the no statistical format/no efficacy condition differs from the low and high efficacy condition on the dependent measures (i.e., benefit accuracy, behavioral intentions, attitude toward drug, perceived efficacy, perceived risk, and risk recall, peripheral cue measures). We will conduct these analyses both with and without covariates (e.g., demographic and health characteristics) included in the model. In addition, we will test whether any main effects are moderated by other measured variables (e.g., numeracy, demographic, and health characteristics). If the main effect of efficacy is significant, we will conduct pairwise-comparisons to determine which conditions are significantly different from one another. We will also conduct planned comparisons in line with our hypotheses (see section III.D of this document). In addition, the main effect of efficacy (low vs. high) and any interaction it has with statistical format or visual format will be tested in the ANOVAs presented in the following two sections.

Statistical format effects in print and TV ads: We will conduct ANOVAs to test whether the no statistical format/no efficacy condition differs from the other statistical format conditions on the dependent measures. In addition, we will examine the main effect of statistical format in ANOVAs predicting our dependent measures from statistical format, efficacy level, and their interaction. We will conduct these analyses both with and without covariates included in the model. In addition, we will test whether any main effects are moderated by other measured variables. If the main effect of statistical format is significant, we will conduct pairwise-comparisons statistical tests to determine which conditions are significantly different from one another. We will also conduct planned comparisons in line with our hypotheses. (See section III.D of this document.)

Visual format effects in print and TV ads: To test our hypotheses regarding visual format, we will examine the main effect of visual format in ANOVAs predicting our dependent measures from visual format, efficacy level, and their interaction. We will conduct these analyses both with and without covariates included in the model. In addition, we will test whether any main effects are moderated by other measured variables. If the main effect of visual format is significant, we will conduct pairwise-comparisons to determine which conditions are significantly different from one another. We will also conduct planned comparisons in line with our hypotheses. (See section III.D of this document.)

The total annual estimated burden imposed by this collection of information is 1,755 hours for this one-time collection (table 1 of this document).

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

Activity	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
Screener	9,000	1	9,000	2/60	270
Questionnaire	4,500	1	4,500	20/60	1,485
Total					1,755

[1]There are no capital costs or operating and maintenance costs associated with this collection of information.

These estimates are based on FDA's experience with previous consumer studies.

IV. References

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

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14. Ancker, J.S., Y. Senathirajah, R. Kukafka, et al., Design Features of Graphs in Health Risk Communication: A Systematic Review, *Journal of the American Medical Information Association*, 13, 608–618, 2006.
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17. Slovic, P., J. Monahan, DG MacGregor, Violence Risk Assessment and Risk Communication: The Effects of Using Actual Cases, Providing Instruction, and Employing Probability Versus Frequency Formats, *Law and Human Behavior*, 24, 271–96, 2000.
18. Peters, E., D. Vastfjall, P. Slovic, et al., Numeracy and Decision Making, *Psychological Science*, 17, 407–13, 2006.

Dated: December 23, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–31200 Filed 1–4–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0372]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Environmental Impact Considerations

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by February 4, 2010.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–7285, or e-mailed to *oira_submission@omb.eop.gov*. All comments should be identified with the OMB control number 0910–0322. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Elizabeth Berbakos, Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3792, *Elizabeth.Berbakos@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Environmental Impact Considerations—21 CFR Part 25—OMB Control Number 0910–0322)—Extension

FDA is requesting OMB approval for the reporting requirements contained in the FDA regulation ''Environmental Impact Considerations.''

The National Environmental Policy Act (NEPA) (42 U.S.C. 4321–4347), states national environmental objectives and imposes upon each Federal agency the duty to consider the environmental effects of its actions. Section 102(2)(C) of NEPA requires the preparation of an environmental impact statement (EIS) for every major Federal action that will significantly affect the quality of the human environment.

FDA's NEPA regulations are in part 25 (21 CFR part 25). All applications or petitions requesting agency action require the submission of a claim for a categorical exclusion or an environmental assessment (EA). A categorical exclusion applies to certain classes of FDA-regulated actions that usually have little or no potential to cause significant environmental effects and are excluded from the requirements to prepare an EA or EIS. Section 25.15(a) and (d) specifies the procedures for submitting to FDA a claim for a categorical exclusion. Extraordinary circumstances (§ 25.21), which may result in significant environmental impacts, may exist for some actions that are usually categorically excluded. An EA provides information that is used to determine whether an FDA action could result in a significant environmental impact. Section 25.40(a) and (c) specifies the content requirements for EAs for nonexcluded actions.

This collection of information is used by FDA to assess the environmental impact of agency actions and to ensure that the public is informed of environmental analyses. Firms wishing to manufacture and market substances regulated under statutes for which FDA is responsible must, in most instances, submit applications requesting approval. Environmental information must be included in such applications for the purpose of determining whether the proposed action may have a significant impact on the environment. Where significant adverse effects cannot be avoided, the agency uses the submitted information as the basis for

preparing and circulating to the public an EIS, made available through a **Federal Register** document also filed for comment at the Environmental Protection Agency. The final EIS, including the comments received, is reviewed by the agency to weigh environmental costs and benefits in determining whether to pursue the proposed action or some alternative that would reduce expected environmental impact.

Any final EIS would contain additional information gathered by the agency after the publication of the draft EIS, a copy of or a summary of the comments received on the draft EIS, and the agency's responses to the comments, including any revisions resulting from the comments or other information. When the agency finds that no significant environmental effects are expected, the agency prepares a finding of no significant impact (FONSI).

Estimated Annual Reporting Burden for Human Drugs (Including Biologics in the Center for Devices and Radiological Health)

Under § 312.23(a)(7)(iv)(*e*) (21 CFR 312.23(a)(7)(iv)(*e*)), 21 CFR 314.50(d)(1)(iii), and 21 CFR 314.94(a)(9)(i), each investigational new drug application (IND), new drug application (NDA), and abbreviated new drug application (ANDA) must contain a claim for categorical exclusion under § 25.30 or § 25.31 or an EA under § 25.40. In 2008, FDA received 2,550 INDs from 2,026 sponsors; 106 NDAs from 88 applicants; 2,856 supplements to NDAs from 615 applicants; 13 biologics license applications (BLAs) from 9 applicants; 206 supplements to BLAs from 64 applicants; 835 ANDAs from 165 applicants; and 4,143 supplements to ANDAs from 224 applicants. FDA estimates that it receives approximately 10,689 claims for categorical exclusions as required under § 25.15(a) and (d), and 20 EAs as required under § 25.40(a) and (c). Based on information provided by the pharmaceutical industry, FDA estimates that it takes sponsors or applicants approximately 8 hours to prepare a claim for a categorical exclusion and approximately 3,400 hours to prepare an EA.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN FOR HUMAN DRUGS[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
25.15(a) and (d)	3,171	3.37	10,686	8	85,488
25.40(a) and (c)	20	1	20	3,400	68,000
Total					153,488

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Estimated Annual Reporting Burden for Human Foods

Under 21 CFR 71.1, 171.1, 170.39, and 170.100, food additive petitions, color additive petitions, requests for exemption from regulation as a food additive, and submission of a food contact notification for a food contact substance must contain either a claim of categorical exclusion under § 25.30 or § 25.32, or an EA under § 25.40. In 2008, FDA received 112 industry submissions. FDA received an annual average of 67 claims of categorical exclusions as required under § 25.15(a) and (d), and 45 EAs as required under § 25.40(a) and (c). FDA estimates that, on average, it takes petitioners, notifiers, or requestors approximately 3 hours to prepare a claim of categorical exclusion and approximately 210 hours to prepare an EA.

TABLE 2.—ESTIMATED ANNUAL REPORTING BURDEN FOR HUMAN FOODS[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
25.15(a) and (d)	40	1.7	68	3	204
25.40(a) and (c)	24	1.9	45	210	9,450
Total					9,654

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Estimated Annual Reporting Burden for Medical Devices

Under 21 CFR 814.20(b)(11), premarket approvals (PMAs) (original PMAs and supplements) must contain a claim for categorical exclusion under § 25.30 or § 25.34 or an environmental assessment under § 25.40. In 2008, FDA received approximately 39 claims (original PMAs and supplements) for categorical exclusions as required under § 25.15(a) and (d), and 0 EAs as required under § 25.40(a) and (c). Based on information provided by less than 10 sponsors, FDA estimates that it takes approximately 6 hours to prepare a claim for a categorical exclusion and an unknown number of hours to prepare an EA.

TABLE 3.—ESTIMATED ANNUAL REPORTING BURDEN FOR MEDICAL DEVICES[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
25.15(a) and (d)	39	1	39	6	234
25.40(a) and (c)	1	1	1	1	1
Total					235

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Estimated Annual Reporting Burden for Biological Products in the Center for Biologics Evaluation and Research

Under § 312.23(a)(7)(iv)(*e*) and 21 CFR 601.2(a), IND and BLAs must contain a claim for categorical exclusion under § 25.30 or § 25.31 or an EA under § 25.40. In 2008, FDA received 245 INDs from 180 sponsors; 28 BLAs from 13 applicants; and 972 BLA supplements to license applications from 173 applicants. FDA estimates that approximately 10 percent of these supplements would be submitted with a claim for categorical exclusion or an EA.

FDA estimates that it received approximately 370 claims for categorical exclusion as required under § 25.15(a) and (d), and 2 EAs as required under § 25.40(a) and (c). Based on information provided by industry, FDA estimates that it takes sponsors and applicants approximately 8 hours to prepare a claim for categorical exclusion and approximately 3,400 hours to prepare an EA for a biological product.

TABLE 4.—ESTIMATED ANNUAL REPORTING BURDEN FOR BIOLOGICAL PRODUCTS[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
25.15(a) and (d)	210	1.76	370	8	2,960
25.40(a) and (c)	2	1	2	3,400	6,800
Total					9,760

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Estimated Annual Reporting Burden for Animal Drugs

Under 21 CFR 514.1(b)(14), new animal drug applications (NADAs) and abbreviated new animal drug applications (ANADAs); § 514.8(a)(1) supplemental NADAs and ANADAs; § 511.1(b)(10) investigational new animal drug applications (INADs); and § 571.1(c) food additive petitions must contain a claim for categorical exclusion under § 25.30 or § 25.33 or an EA under § 25.40. In 2008, FDA's Center for Veterinary Medicine has received approximately 676 claims for categorical exclusion as required under § 25.15(a) and (d), and 8 EAs as required under § 25.40(a) and (c). FDA estimates that it takes sponsors/applicants approximately 5 hours to prepare a claim for a categorical exclusion and an average of 2,160 hours to prepare an EA.

TABLE 5.—ESTIMATED ANNUAL REPORTING BURDEN FOR ANIMAL DRUGS[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
25.15(a) and (d)	65	10.4	676	5	3,380
25.40(a) and (c)	6	1.3	8	2,160	17,280
Total					20,660

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 6.—COMBINED ESTIMATED ANNUAL TOTAL BURDEN HOURS FOR ALL CENTERS

Total	193,797

In the **Federal Register** of September 9, 2009 (74 FR 46430), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

Dated: December 23, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–31199 Filed 1–4–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request; Process Evaluation of the NIH's Roadmap Interdisciplinary Research Work Group Initiatives

SUMMARY: In compliance with the requirements of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the Office of the Director, the National Institutes of Health (NIH), will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection: The National Institute of Dental and Craniofacial Research of the National Institutes of Heath requests a three-year clearance for the ''Process Evaluation of the NIH Roadmap Interdisciplinary Research Work Group Initiatives,'' a new collection. This study will be used to determine whether the NIH's Interdisciplinary Research Work Group initiatives have been, and are being, conducted as planned, whether the expected outputs are being produced, and how the activities and processes associated with the initiatives can be improved. Information collected during the evaluation will be used to assess whether and how these initiatives differed from existing initiatives to determine whether these unique initiatives or mechanisms are necessary, to make decisions about whether to continue and/or to modify the programs, and to make decisions about structural or procedural changes within NIH that may be necessary to support cross-cutting interdisciplinary programs. The frequency of response is once for most respondents, and twice for a limited group. The affected public includes a limited number of individuals; *Type of respondents:* principal investigators, other grant investigators, and Initiative trainees. The annual reporting burden is as follows: *Estimated number of respondents:* 450; *Estimated number of responses per respondent:* PIs, 2; Other Investigators, 1; Trainees, 1; *Average burden hours per response:* 30 minutes; and *Estimated total annual burden hours requested:* 250 hours. The total annualized cost to respondents (calculated as the number of respondents * frequency of response * average time per response * approximate hourly wage rate) is estimated to be $4,565.

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Sue Hamann, Ph.D., Science Evaluation Officer, Office of Science Policy Officer and Analysis, NIDCRD, NIH. You may reach Dr. Hamann by telephone on 301–594–4849 (this is not a toll-free number), or you may e-mail your request to Dr. Hamann at *Sue.Hamann@nih.hhs.gov*.

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

Dated: December 22, 2009.

Sue Hamann,

Science Evaluation Officer, OSPA, NIDCR, National Institutes of Health.

[FR Doc. E9–31234 Filed 1–4–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60 Day–10–0004]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. Alternatively, to obtain a copy of the data collection plans and instrument, call 404–639–5960 and send comments to Maryam I. Daneshvar, CDC Acting Reports Clearance Officer, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30333; comments may also be sent by e-mail to *omb@cdc.gov.*

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 a 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 clarify 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 information technology. Written comments should be received within 60 days of this notice.

Proposed Project

National Disease Surveillance Program II. Disease Summaries (0920–0004 Exp. 5/31/2010)—Revision—National Center for Emerging and Zoonotic Infectious Diseases (NCEZID) (proposed), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Surveillance of the incidence and distribution of disease has been an important function of the U.S. Public Health Service (PHS) since 1878. Through the years, PHS/CDC has formulated practical methods of disease control through field investigations. The CDC National Disease Surveillance Program is based on the premise that diseases cannot be diagnosed, prevented, or controlled until existing knowledge is expanded and new ideas developed and implemented. Over the years, the mandate of CDC has broadened to include preventive health

activities and the surveillance systems maintained have expanded.

CDC and the Council of State and Territorial Epidemiologists (CSTE) collect data on disease and preventable conditions in accordance with jointly approved plans. Changes in the surveillance program and in reporting methods are effected in the same manner. At the onset of this surveillance program in 1968, the CSTE and CDC decided on which diseases warranted surveillance. These diseases are reviewed and revised based on variations in the public's health. Surveillance forms are distributed to the State and local health departments who voluntarily submit these reports to CDC at variable frequencies, either weekly or monthly. CDC then calculates and publishes weekly statistics via the Morbidity and Mortality Weekly Report (MMWR), providing the states with timely aggregates of their submissions.

The following diseases/conditions are included in this program: Diarrheal disease surveillance (includes campylobacter, salmonella, and shigella), foodborne outbreaks, arboviral surveillance (ArboNet), Influenza virus, including the annual survey and influenza-like illness, Respiratory and Enterovirus surveillance, rabies, waterborne diseases, cholera and other vibrio illnesses, Listeria, Calcinet, Harmful Algal Bloom-related Infectious Surveillance System (HABISS) data entry form, and the HABISS monthly reporting form. These data are essential on the local, state, and Federal levels for measuring trends in diseases, evaluating the effectiveness of current prevention strategies, and determining the need for modifying current prevention measures.

This request is for revision of the currently approved data collection for three years. The revisions include minor changes to reporting forms already approved under this OMB Control Number. Because of the distinct nature of each of the diseases, the number of cases reported annually is different for each. There is no cost to respondents other than their time.

ESTIMATE OF ANNUALIZED BURDEN HOURS

Form	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Diarrheal Disease Surveillance: *Campylobacter* (electronic)	53	52	3/60	138
Diarrheal Disease Surveillance: *Salmonella* (electronic)	53	52	3/60	138
Diarrheal Disease Surveillance: *Shigella* (electronic)	53	52	3/60	138
Foodborne Outbreak Form	54	25	15/60	338
Arboviral Surveillance (ArboNet)	57	1,421	4/60	5,400
—Influenza virus (fax, Oct–May)	8	33	10/60	44
—Influenza virus (fax, year round)	15	52	10/60	130
*** Influenza virus (Internet; Oct–May)	13	33	10/60	72
*** Influenza virus (Internet; year round)	24	52	10/60	208
—Influenza virus (electronic, Oct–May)	9	33	5/60	25
—Influenza virus (electronic, year round)	14	52	5/60	61
Influenza Annual Survey	83	1	15/60	21
Influenza-like Illness (Oct–May)	824	33	15/60	6,798
Influenza-like Illness (year round)	496	52	15/60	6,448
Monthly Respiratory & Enterovirus Surveillance Report: Excel format (electronic)	25	12	15/60	75
National Respiratory & Enteric Virus Surveillance System (NREVSS)	92	52	10/60	797
Rabies (electronic)	40	12	8/60	64
Rabies (paper)	15	12	20/60	60
Waterborne Diseases Outbreak Form	26	2	20/60	17
Cholera and other *Vibrio* illnesses	450	1	20/60	150
CaliciNet	30	10	10/60	50
Listeria	53	1	30/60	27
HABISS data entry form	10	12	8	960
HABISS monthly reporting form	10	12	30/60	60
Total				22,219

Dated: December 29, 2009.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E9–31369 Filed 1–4–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0119]

Canned Pacific Salmon Deviating From Identity Standard; Extension of Temporary Permit for Market Testing

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the extension of a temporary permit issued to Yardarm Knot Fisheries, LLC, to market test products designated as ''skinless and boneless sockeye salmon'' that deviate from the U.S. standard of identity for canned Pacific salmon. The extension will allow the permit holder to continue to collect data on consumer acceptance of the product while the agency takes action on a petition to amend the standard of identity for canned Pacific salmon that was submitted by Yardarm Knot Fisheries, LLC.

DATES: The new expiration date of the permit will be either the effective date of a final rule to amend the standard of

identity for canned Pacific salmon that may result from the petition or 30 days after denial of the petition, whichever the case may be.

FOR FURTHER INFORMATION CONTACT: Catalina Ferré-Hockensmith, Center for Food Safety and Applied Nutrition (HFS–820), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–2371.

SUPPLEMENTARY INFORMATION: In accordance with § 130.17 (21 CFR 130.17), FDA issued a temporary permit to Yardarm Knot Fisheries, LLC, 3600 15th Avenue West, Suite 300, Seattle, Washington 98119, to market test canned Pacific salmon that deviates from the U.S. standard of identity for canned Pacific salmon (§ 161.170 (21 CFR 161.170)) (73 FR 12180, March 6, 2008). The agency issued the permit to facilitate market testing of a food deviating from the requirements of the standards of identity issued under section 401 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 341).

The permit covers limited interstate marketing tests of a product identified as Yardarm Knot ''Skinless and Boneless Sockeye Salmon.'' This canned salmon product may deviate from the U.S. standard of identity for canned Pacific salmon (§ 161.170) in that the product is prepared by removing the skin and bones of the salmon used. Therefore, in addition to the optional forms of pack provided in § 161.170(a)(3), this temporary marketing permit provides for an alternative ''skinless and boneless'' form of pack. The test product meets all the requirements of the standard with the exception of the ''skinless and boneless'' form of pack.

On April 9, 2009, Yardarm Knot Fisheries, LLC, requested that its temporary marketing permit be extended to allow for additional time for the market testing of its test product and indicated that it had moved its corporate office to the address stated below. The petitioner has also submitted a petition requesting that FDA amend the standard of identity for canned Pacific salmon.

The agency finds that it is in the interest of consumers to issue an extension of the time period for the market testing of the product identified in the original permit (73 FR 12180, March 6, 2008). FDA is inviting interested persons to participate in the market test under the conditions that apply to Yardarm Knot Fisheries, LLC, except that the designated area of distribution shall not apply. Any person who wishes to participate in the extended market test must notify, in writing, the Supervisor, Product Evaluation and Labeling Team, Food Labeling and Standards Staff, Office of Nutrition, Labeling and Dietary Supplements, Center for Food Safety and Applied Nutrition (HFS–820), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740. The notification must include a description of the test product to be distributed, a justification statement for the amount requested, the area of distribution, and the labeling that will be used for the test product (i.e., a draft label for each size of container and each brand of product to be market tested). The information panel of the label must bear nutrition labeling in accordance with 21 CFR 101.9. Each of the ingredients used in the food must be declared on the label as required by applicable sections of 21 CFR part 101.

Therefore, under the provisions of § 130.17(i), FDA is extending the temporary permit granted to Yardarm Knot Fisheries, LLC, 2440 West Commodore Way, Suite 200, Seattle, Washington 98199 to provide for continued marketing tests of not more than 1.35 million pounds (or 612 thousand kilograms in weight) annually of the canned Pacific salmon identified in this notice. FDA is extending the expiration date of the permit so that the permit expires either on the effective date of a final rule to amend the standard of identity for canned Pacific salmon that may result from the petition or 30 days after denial of the petition. All other conditions and terms of this permit remain the same.

Dated: December 16, 2009.

Barbara Schneeman,

Director, Office of Nutrition, Labeling and Dietary Supplements, Center for Food Safety and Applied Nutrition.

[FR Doc. E9–31196 Filed 1–4–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0576]

Event Problem Codes Web Site; Center for Devices and Radiological Health; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a Web site where the Center for Devices and Radiological Health (CDRH) is posting updates to the problem codes used in conjunction with the medical device adverse event reports (MDR) regulation.

DATES: Submit electronic or written comments at any time.

ADDRESSES: Submit electronic comments to *http://www.regulations.gov*. Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Terrie L. Reed, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., rm. 3324, Silver Spring, MD 20993, 301–796–6130.

SUPPLEMENTARY INFORMATION:

I. Background

Under part 803 (21 CFR part 803), user facilities and importers are required to submit FDA Form 3500A for deaths and serious injuries that a medical device may have caused or to which it may have contributed. Block F10 of FDA Form 3500A asks user facilities and importers to provide event problem codes for both the patient and the device. Manufacturers are required by § 803.52(f)(11)(i) to include ''Any information missing on the user facility report or importer report, including any event codes that were not reported * * *.'' The patient problem codes indicate the effects that an event may have had on the patient, including signs, symptoms, syndromes, or diagnoses. The device codes describe device failures or issues related to the device that are encountered during the event. The medical device reporting regulation also states that if CDRH makes modifications to these reporting codes, the information will be made available to all reporters (§ 803.21(b)).

FDA is announcing the availability of a Web site that will make modifications to the problem codes available to all reporters and will also fully describe the problem codes. The Web site is located at *http://www.fda.gov/MedicalDevices/Safety/ReportaProblem/EventProblemCodes/default.htm*. This Web site reflects the current updates to the problem codes, provides a description for each problem code, and notes that April 2, 2010, is the target date to reject all inactivated and retired codes specified in this update. After April 2, 2010, no old codes or code numbers will be accepted. The Web site also describes a joint project between CDRH and the

National Cancer Institute (NCI) Enterprise Vocabulary Services (EVS) to improve the problem codes. The goals of this initiative are to streamline the patient and device problem codes, integrate FDA's problem codes into the NCI Thesaurus and Meta-Thesaurus, organize the vocabulary into a hierarchical format, and provide information that will assist reporters in requesting new codes, such as a mapping of inactivated or merged terms to preferred terms.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) electronic or written comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 11, 2009.

Jeffrey Shuren,

Acting Director, Center for Devices and Radiological Health.

[FR Doc. E9–31197 Filed 1–4–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Advisory Committee to the Director, NIH.

The meeting will be open to the public. Individuals who plan to listen to this teleconference should notify the Contact Person listed below in advance of the meeting.

Name of Committee: Advisory Committee to the Director, NIH.

Date: January 22, 2010.

Time: 10:45 a.m. to 11:45 a.m., Eastern Standard Time.

Place: National Institutes of Health, 1 Center Drive, Bethesda, MD 20892.

Agenda: ACD Working Group Report on Stem Cells (Telephone Conference Call).

Contact Person: Penny Wung Burgoon, PhD, National Institutes of Health, 1 Center Drive, Building 1, Room 109, Bethesda, MD 20892, 301–451–5870, *burgoonp@od.nih.gov*.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and, when applicable, the business or professional affiliation of the interested person.

Information is also available on the Office of the Director's home page: *http://www.nih.gov/about/director/acd.htm*, where an agenda and any additional information for the meeting will be posted when available.

Dated: December 29, 2009.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–31233 Filed 1–4–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; 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 Mental Health, Special Emphasis Panel K99.

Date: January 28, 2010.

Time: 10 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Megan Libbey, PhD, Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6148, MSC 9609, Rockville, MD 20852–9609, 301–402–6807. *libbeym@mail.nih.gov*.

Name of Committee: National Institute of Mental Health Special Emphasis Panel Conte Center Review.

Date: February 26, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Mandarin Oriental, 1330 Maryland Avenue, SW., Washington, DC 20024.

Contact Person: Francois Boiler, MD, PhD, Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6142, MSC 9606, Bethesda, MD 20892–9606, 301–443–1513, *bollerf@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: December 23, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–31143 Filed 1–4–10; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; 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 Drug Abuse Special Emphasis Panel; Substance Use and Abuse Among U.S. Military Personnel, Veterans, and their Families.

Date: March 9–10, 2010.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Dupont Hotel, 1500 New Hampshire Avenue, NW., Washington, DC 20036.

Contact Person: Nadine Rogers, PhD, Scientific Review Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, 301–402–2105, *rogersn2@nida.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: December 24, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–31142 Filed 1–4–10; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0667]
[FDA 225–09–007]

Memorandum of Understanding Between the United States Department of Health and Human Services, Food and Drug Administration, Center for Drug Evaluation and Research and Northeastern University

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is providing notice of a Memorandum of Understanding (MOU) between FDA and Northeastern University. The purpose of the MOU is to form a collaborative relationship between FDA and Northeastern University; provide opportunities for exchanging of graduate and undergraduate students, faculty, and personnel and for advanced training and outreach; stimulate cooperative research, and information exchange in biological product characterization and regulation with Northeastern University's Barnett Institute of Chemical and Biological Analysis; and develop training programs for FDA and potentially other Government agencies and Industry in the broad areas of biotechnology and analytical chemistry.

DATES: The agreement became effective November 19, 2009.

FOR FURTHER INFORMATION CONTACT: Keith O. Webber, Office of Pharmaceutical Science, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20903, 301–796–2400, e-mail: *Keith.webber@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 20.108(c), which states that all written agreements and MOUs between FDA and others shall be published in the **Federal Register**, the agency is publishing notice of this MOU.

Dated: December 17, 2009.

David Dorsey,

Acting Deputy Commissioner for Policy, Planning and Budget.

BILLING CODE 4160–01–S

Control No. 225-09-0007

MEMORANDUM OF UNDERSTANDING
BETWEEN THE
NORTHEASTERN UNIVERSITY
AND THE
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
FOOD AND DRUG ADMINISTRATION
CENTER FOR DRUG EVALUATION AND RESEARCH

I. Preamble:

This Memorandum of Understanding between the U.S. Food and Drug Administration and Northeastern University is established to develop collaboration between the two parties in the areas of education, research, and outreach.

II. Purpose:

The objectives of this collaborative relationship resulting from this MOU include:

1. development of a collaborative working relationship between U.S. Food and Drug Administration and Northeastern University
2. provision of exchange of graduate and undergraduate students, faculty, and personnel, for the purposes of advanced training and outreach,
3. stimulation of cooperative activities, research, and information exchange in areas such as biological product characterization and regulation with Northeastern University's Barnett Institute of Chemical and Biological Analysis
4. development of training programs for U.S. Food and Drug Administration and potentially other Government agencies and Industry in the broad areas of biotechnology and analytical chemistry.

III. Background:

FDA is authorized to enforce the Federal Food, Drug, and Cosmetic Act (the Act) as amended (21 U.S.C. 301). In fulfilling its responsibilities under the Act, FDA among other things, directs its activities toward promoting and protecting the public health by assuring the safety, efficacy, and security of drugs, veterinary products, medical devices and radiological products and the safety and security of foods and cosmetics. To accomplish its mission, FDA must stay abreast of the latest developments in research and also communicate with stakeholders about complex scientific and public health issues. Increased development of research, education and outreach partnerships with Northeastern University will greatly contribute to FDA's mission.

Northeastern University (NU), a private research university located in Boston, MA, is a leader in interdisciplinary, translational research and experiential education. NU has

active research programs in medicinal chemistry, drug targeting, molecular imaging and bioengineering. Educational programs in various areas of biotechnology, including professional science masters and Ph.D. programs are offered. NU's Barnett Institute of Chemical and Biological analysis is an internationally recognized research center in the field of protein and carbohydrate analysis. It has established a Center for Advanced Regulatory Analysis focused in the development and application of new technologies to biopharmaceutical analysis.

IV. Substance of Agreement:

The Memorandum of Understanding is intended as a broad vehicle to promote programmatic interaction in the form of joint collaboration between U.S. Food and Drug Administration and Northeastern University researchers, students, and personnel as well as joint development of relevant projects.

The collaboration may include the following:

Joint exchange program. These exchanges would include internships, research opportunities, and shadowing opportunities for Northeastern University undergraduate, post-baccalaureate and graduate students at the U.S. Food and Drug Administration. Faculty and senior staff from U.S. Food and Drug Administration and Northeastern University and other collaborators will be encouraged to participate in the work of the sister institutions for mutual research and training interactions.

Joint research programs. Joint research programs will be formed by scientists from the respective institutions with mutual complementary interests.

Joint training activities. Training activities arising from complementary interests will be developed by Northeastern University and offered to U.S. Food and Drug Administration, industry, and others as identified needs arise.

Joint dissemination of information and outreach. The partners will disseminate information and enhance the visibility of the work of the collaboration through mutually agreed vehicles including training activities, meetings, and symposia.

Participants will include faculty and students from Northeastern University's Barnett Institute, as well as other relevant departments at Northeastern University. Participants from the U.S. Food and Drug Administration may include scientists from the the Center for Drug Evaluation and Research or other FDA Centers and investigators from the FDA Office of Regulatory Affairs.

V. General Provisions:

- Data Sharing Guidelines: Access to non-public information shall be governed by separate Confidentiality Disclosure Agreements in which the Parties will agree and certify in writing that they shall not further release, publish or disclose such information and that they shall protect such information in accordance with the provisions of 21 U.S.C. 331(j), 21 U.S.C. 360j(c), 18 U.S.C. 1905, and other pertinent laws and regulations governing the confidentiality of such information. No proprietary data, tradesecrets or patient confidential information shall be disclosed among the Parties unless permitted by applicable law.

- Intellectual Property Guidelines: "Invention" refers to any subject matter or discovery patentable under Title 35 of the United States Code and conceived or first reduced to practice under the activities of the MOU. "Intellectual Property" refers to patents, patent applications, know-how, trade secrets, copyrights and computer programs either use or developed under the activities of the MOU. Rights to Inventions or Intellectual Property developed under the MOU will be addressed in separate project-specific development and implementation agreements among the Parties. Inventorship will be governed by U.S. law. In the case of sole inventorship, ownership will be governed by the policies of the employer of the Invention. In the case of joint Inventorship, ownership of Inventions will be jointly owned. Inventions made under a Federal grant or contract will be subject to the Bayh-Dole Act. No Party, by virtue of their participation in activities under the MOU, will be required to disclose or license intellectual property to the other Party.

- Conflict of Interest: Participants in activities under this MOU who are not U.S. Government employees will be expected to abide by conflict of interest rules and policies as specified by FDA. This may require participants to disclose their financial holdings and those of their spouse and minor children, and may limit their ability to accept gifts and have employment with entities that are substantially regulated by FDA. The Parties will be advised of any potential conflict so that conflicting assignments can be avoided consistent with the HHS/FDA requirements. If at any time prior to or during the performance of the activities under the MOU, the Parties believe that a potential or actual conflict exists, the Parties must notify the appropriate authorities within their respective institutions and contact the designated FDA official listed on the MOU so that the necessary action can be undertaken. A determination will be made by FDA as to whether a conflict of interest exists and, if so, as to how to resolve or mitigate it. Parties to the MOU will make every effort to avoid activities or relationships that would cause a reasonable person to question the impartiality of their actions.

VI. Resource Obligations:

This MOU represents the broad outline of the Parties' intent to enter into specific agreements for collaborative efforts in intellectual areas of mutual interest to FDA and Northeastern University. It does not create binding, enforceable obligations against any Party. All activities undertaken pursuant to the MOU are subject to the availability of personnel, resources, and funds. This MOU does not affect or supersede any existing or future agreements or arrangements among the Parties and does not affect the ability of the Parties to enter into other agreements or arrangements related to this MOU. This MOU and all associated agreements will be subject to the applicable policies, rules, regulations, and statutes under which FDA and Northeastern University operate.

VII. Liaison Officers:

A. For the Northeastern University:
Kenneth Blank, Ph.D.
Vice Provost for Research
Northeastern University
360 Huntington Ave.
Boston, Massachusetts 02115

B. For the Food and Drug Administration:
Keith O. Webber, Ph.D.
Deputy Director
Office of Pharmaceutical Science
Center for Drug Evaluation and Research
U.S. Food and Drug Administration
10903 New Hampshire Ave.
Silver Spring, Maryland 20903

VIII. Term, Termination, and Modification:

This agreement, when accepted by all participating parties, will have an effective period of performance from the date of the latest signature until December 31, 2014 and may be modified or terminated by mutual written consent by both parties or may be terminated by either party upon a thirty-day advance written notice to the other.

APPROVED AND ACCEPTED FOR NORTHEASTERN UNIVERSITY
By Deborah Grupp-Patrutz
Title Director
Research Admin & Finance
Date 11/19/09

APPROVED AND ACCEPTED FOR FOOD AND DRUG ADMINISTRATION
By
Title Director, CDER
Date 12/4/09

NU PI acknowledgement of Terms and Conditions:
Barry L. Karger
Signature

[FR Doc. E9–31195 Filed 1–4–10; 8:45 am]
BILLING CODE 4160–01–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0664]

Medical Device Quality System Regulation Educational Forum on Risk Management Through the Product Life Cycle; Public Workshop

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop.

SUMMARY: The Food and Drug Administration (FDA), Office of Regulatory Affairs (ORA), Southwest Region (SWR), Dallas District Office (DALDO), in collaboration with the FDA Medical Device Industry Coalition (FMDIC), is announcing a public workshop entitled ''Medical Device Quality System Regulation Educational Forum on Risk Management through the Product Life Cycle.'' This public workshop is intended to provide information about FDA's Medical Device Quality Systems Regulation (QSR) to the regulated industry, particularly small businesses.

Date and Time: The public workshop will be held on April 2, 2010, from 8 a.m. to 5 p.m.

Location: The public workshop will be held at the new Cowboy Stadium in Irving, TX. Directions to the facility are available at the FMDIC Web site at *http://www.fmdic.org/*.

Contact Person: David Arvelo, Food and Drug Administration, 4040 North Central Expressway, suite 900, Dallas, TX 75204, 214–253–4952, FAX: 214–253–4970, e-mail: *david.arvelo@fda.hhs.gov*.

Registration: FMDIC has a $250 early registration fee. Discounts for full-time students and government employees with valid identification are available. Early registration ends March 19, 2010. Registration is $300 thereafter. For more information on fees and/or to register online, please visit *http://www.fmdic.org/*. As an alternative, you may send registration information including name, title, firm name, address, telephone and fax numbers, and e-mail, along with a check or money order for the appropriate amount payable to the FMDIC, to William Hyman, Texas A&M University, Department of Biomedical Engineering, 3120 TAMU, College Station, TX 75843–3120. Registration on site will be accepted on a space available basis on the day of the public workshop beginning at 8 a.m. The cost of registration at the site is $300 payable to the FMDIC. The registration fee will be used to offset expenses of hosting the event, including food, venue, and equipment.

If you need special accommodations due to a disability, please contact David Arvelo (see *Contact Person*) at least 21 days in advance.

Transcripts: Transcripts of this event will not be available due to the format of this workshop. Digital event handouts will be posted online at *http://www.fmdic.org/* or may be requested in writing from the Freedom of Information Office (HFI–35), Food and Drug Administration, 5600 Fishers Lane, rm.12A–16, Rockville, MD 20857, after the public workshop at a cost of 10 cents per page.

SUPPLEMENTARY INFORMATION: The workshop is being held in response to the interest in the topics discussed from small medical device manufacturers in the Dallas District area. This workshop helps achieve objectives set forth in section 406 of the Food and Drug Administration Modernization Act of 1997 (21 U.S.C. 393), which include working closely with stakeholders and maximizing the availability and clarity of information to stakeholders and the public. This is also consistent with the purposes of FDA's Regional Small Business Program, which are in part to respond to industry inquiries, develop educational materials, sponsor workshops and conferences to provide firms, particularly small businesses, with firsthand working knowledge of FDA's requirements and compliance policies. This workshop is also consistent with the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), as an outreach activity by Government agencies to small businesses.

The goal of the workshop is to present information that will enable manufacturers and regulated industry to better comply with the medical device QSR. The following topics will be discussed at the workshop: (1) Standards and guidance, (2) risk management in design, (3) risk management in execution, and (4) risk management and post market surveillance.

Dated: December 23, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–31198 Filed 1–4–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Statement of Organization, Functions and Delegations of Authority

This notice amends Part R of the Statement of Organization, Functions and Delegations of Authority of the Department of Health and Human Services (HHS), Health Resources and Services Administration (HRSA) (60 FR 56605, as amended November 6, 1995; as last amended at 74 FR 48089–48090 dated September 21, 2009).

This notice reflects organizational changes in the Health Resources and Services Administration. Specifically, this notice establishes the Office of Special Health Affairs (RA1) and the Office of Planning, Analysis and Evaluation (RA5) within the Office of the Administrator; transfers the functions and renames the Office of Minority Health and Health Disparities (RA9) and the Office of International Health Affairs (RAH) to the Office of Special Health Affairs (RA1); establishes the Office of Strategic Priorities (RA13) within the Office of Special Health Affairs (RA1); renames the Office of Equal Opportunity and Civil Rights (RA2); abolishes the Office of Health Information Technology (RT) and moves the functions to the Office of Planning, Analysis and Evaluation (RA5), the Office of Rural Health Policy (RH) and the Bureau of Primary Health Care (RC); and updates the functional statement for the Healthcare Systems Bureau (RR), the Bureau of Health Professions (RP), and the Office of Operations (RB).

Chapter RA—Office of the Administrator

Section RA–10, Organization

Delete in its entirety and replace with the following:

The Office of the Administrator (RA) is headed by the Administrator, Health Resources and Services Administration, who reports directly to the Secretary. The OA includes the following components:

(1) Immediate Office of the Administrator (RA);

(2) Office of Equal Opportunity, Civil Rights, and Diversity Management (RA2);

(3) Office of Planning, Analysis, and Evaluation (RA5);

(4) Office of Communications (RA6);

(5) Office of Special Health Affairs (RA1); and

(6) Office of Legislation (RAE).

Section RA–20, Functions

(1) Update the functional statement for the Immediate Office of the Administrator (RA); (2) rename the Office of Equal Opportunity and Civil rights (RA2); (3) establish the Office of Planning, Analysis and Evaluation (RA5); (4) establish the Office of Special Health Affairs (RA1); (5) delete the functional statement for the Office of International Health Affairs (RAH), rename and transfer the function to the Office of Special Health Affairs (RA1); (6) delete the functional statement for the Office of Minority Health and Health Disparities (RA9), rename and transfer the function to the Office of Special Health Affairs (RA1); and (7) delete the functional statement for the Office of Planning and Evaluation, and transfer the function to the Office of Planning, Analysis and Evaluation (RA5).

Immediate Office of the Administrator (RA)

(1) Leads and directs programs and activities of the Agency and advises the Office of the Secretary of Health and Human Services on policy matters concerning them; (2) provides consultation and assistance to senior Agency officials and others on clinical and health professional issues; (3) serves as the Agency's focal point on efforts to strengthen the practice of public health as it pertains to the HRSA mission; (4) establishes and maintains verbal and written communications with health organizations in the public and private sectors to support the mission of HRSA; (5) coordinates the Agency's strategic, evaluation and research planning processes; (6) manages the legislative and communications programs for the Agency; (7) administers HRSA's equal opportunity and civil rights activities; and (8) provides overall leadership, direction, coordination, and planning in the support of the Agency's special health programs.

Office of Equal Opportunity, Civil Rights and Diversity Management (RA2)

Directs, coordinates, develops, and administers HRSA's equal opportunity and civil rights activities. Specifically: (1) Provides advice, counsel, and recommendations to HRSA personnel, including regional divisions, on equal opportunity and civil rights and represents HRSA in all equal employment opportunity (EEO) areas; (2) administers affirmative action programs designed to ensure equality of opportunity in employment; (3) manages the Civil Service complaints system and prepares final HRSA decisions; (4) manages the complaints system for Public Health Service (PHS) Commissioned Corps personnel under the provisions of PHS Personnel Instruction 6 and issues proposed depositions; (5) develops and directs implementation of the requirements of Section 504 of the Rehabilitation Act of 1973, Title VI of the Civil Rights Act of 1964, the Age Discrimination Act of 1975 and the Americans With Disabilities Act, as they apply to recipients of HRSA funds; (6) provides technical assistance and guidance to HRSA on developing education and training programs regarding equal opportunity and civil rights; (7) approves and executes settlement agreements and attorney fees; (8) applies all applicable laws, guidelines, rules and regulations in accordance with those of the HHS Office of Equal Employment Opportunity and Civil Rights; and (9) provides leadership and guidance in HRSA's efforts to maintain and improve a diverse workforce.

Office of Planning, Analysis, and Evaluation (RA5)

Office of the Director (RA5)

Serves as the Administrator's primary staff unit for coordinating the Agency's strategic planning process, and for conducting analysis, evaluation and research planning process, including: (1) Maintains liaison between the Administrator, other OPDIVs, higher levels of the Department and other Departments on all matters involving analysis of program policy undertaken in the Agency; (2) prepares policy analysis papers and planning documents as required in the Administration's strategic planning and other process; (3) analyzes budgetary data with regard to planning guidelines; (4) collaborates with the Office of Operations in the development of budgets, performance plans, and other administration reporting requirements; and (5) provides medical claims support.

Intergovernmental Affairs: (1) Provides the Administrator with a single point of contact on all activities related to important State and local government, stakeholder association, and interest group activities; (2) coordinates Agency cross-Bureau cooperative agreements and activities with organizations such as the National Governors Association, National Conference of State Legislature, Association of State and Territorial Health Officials, National Association of Counties, and National Association of County and City Health Officials; (3) interacts with various commissions such as the Delta Regional Authority, Appalachian Regional Commission, Denali Commission and the United States and Mexico Border Health Commission; and (4) serves as the primary liaison to Department intergovernmental staff.

Office of Planning and Evaluation (RA51)

(1) Serves as the Administrator's primary staff for coordinating the Agency's strategic, evaluation and research planning processes; (2) prepares policy analysis papers and other planning documents as required in the Administration's strategic planning process; (3) analyzes budgetary data with regard to planning guidelines; (4) collaborates in the development of budgets, performance plans, and performance reports required under the Government Performance and Accountability Report; (5) coordinates activity related to the prevention agenda, Healthy People activities and other departmental and Agency initiatives; (6) analyzes and coordinates the information needs of the Agency, including coordination of the public use reports clearance function; (7) analyzes policy issues surrounding the application and promotion of healthcare information technology in HRSA programs; and (8) serves as the focal point for health systems organization and financing issues, with particular emphasis on the Agency's relationship with the Centers for Medicare & Medicaid Services and safety net providers.

Division of Health Information Technology & Quality (RA52)

Provides support and policy direction for HRSA's programs for quality improvement. Serves as the focal point for developing policy to promote the coordination and advancement of health information technology to HRSA's programs, including user networks, and the use of electronic health record systems. Specific responsibilities include: (1) Develops a nationwide health information technology and telehealth strategy for HRSA that focuses on the health care safety net and the needs of the uninsured, underserved, and special needs populations; (2) develops HRSA's Health Information Technology (HIT) and telehealth policy; (3) ensures successful dissemination of appropriate information technology advances, such as electronic health records systems or provider networks, to HRSA programs; (4) works collaboratively with States, foundations, national organizations,

private sector providers, as well as departmental agencies and other Federal departments in order to promote the adoption of health information technology by HRSA's grantees; (5) ensures the health information technology policy and programs of HRSA are coordinated with those of other HHS components; (6) assesses the impact of health information technology initiatives in the community, especially for the uninsured, underserved, and special needs populations; (7) coordinates outreach and consultation with public and private parties of interest (within the extent of the law), including consumers, providers, payers, and administrators focusing on the needs of the uninsured, underserved, and special needs populations; and (8) develops and translates policy to promote the coordination and advancement of health information technology to HRSA's programs.

Office of Special Health Affairs (RA1)

Office of the Director (RA1)

Provides overall leadership, direction, coordination, and planning in the support of the Agency's special health programs. Specifically, (1) plans and directs activities to advance health equity and improve minority health and eliminate health disparities; (2) develops strategies to maximize HRSA's participation in efforts to improve health care for vulnerable populations worldwide; and (3) provides leadership and direction to improve the delivery and quality of oral health care, mental health and other priority health concerns.

Office of Health Equity (RA11)

Serves as the principal advisor and coordinator to the Agency for the special needs of minority and disadvantaged populations, including: (1) Provides leadership and direction to address HHS and HRSA Strategic Plan goals and objectives related to improving minority health and eliminating health disparities; (2) establishes and manages an Agency-wide data collection system for minority health activities and initiatives including the White House Initiatives for Historically Black Colleges and Universities, Educational Excellence for Hispanic Americans, Tribal Colleges and Universities, Asian Americans and Pacific Islanders, and Departmental Initiatives; (3) implements activities to increase the availability of data to monitor the impact of Agency programs in improving minority health and eliminating health disparities; (4) participates in the formulation of HRSA's goals, policies, legislative proposals, priorities, and strategies as they affect health professional organizations and institutions of higher education and others involved in or concerned with the delivery of culturally-appropriate, quality health services to minorities and disadvantaged populations; (5) consults with Federal agencies and other public and private sector agencies and organizations to collaborate in addressing health equity, including enhancing cultural competence in health service providers; (6) establishes short-term and long-range objectives; and (7) participates in the focus of activities and objectives in assuring equity in access to resources and health careers for minorities and the disadvantaged.

Office of Global Health Affairs (RA12)

Serves as the principal advisor to the Administrator on global health issues. (1) Provides leadership, coordination, and advancement of international health activities relating to health care services for vulnerable and at-risk populations and for training programs for health professionals; and (2) provides leadership within HRSA for the support for international health and coordinates policy development with the Office of Global Health Affairs (OGHA) and other departmental agencies.

Office of Strategic Priorities (RA13)

Serves as the principal advisor to the Administrator on major health priorities including, but not limited to oral and mental health. (1) Provides leadership and coordination to improve oral and mental health infrastructure, delivery, and systems of care; (2) establishes short-term and long-term goals and objectives to improve the quality of oral and mental health care; (3) collaborates with other departmental and Federal agencies to promote oral and mental health by building public-private partnerships; (4) coordinates oral and mental health activities across HRSA programs; and (5) establishes program goals, objectives and priorities to improve oral and mental health status and outcomes to eliminate disparities.

Section RA–30, Delegations of Authority

All delegations of authority and re-delegations of authority made to HRSA officials that were in effect immediately prior to this reorganization, and that are consistent with this reorganization, shall continue in effect pending further re-delegation.

Chapter RB—Office of Operations

Section RB–20, Functions

Delete the functional statement for the Office of Operations and replace in its entirety.

Office of Operations

Office of the Chief Operating Officer (RB)

(1) Provides leadership for operational activities, interaction and execution of Agency initiatives across the Health Resources and Services Administration; (2) plans, organizes and manages annual and multi-year budgets and resources and assures that the conduct of Agency administrative and financial management activities effectively support program operations; (3) provides an array of Agency-wide services including information technology, procurement management, facilities, workforce management, and budget execution and formulation; (4) maintains overall responsibility for policies, procedures, monitoring of internal controls and systems related to payment and disbursement activities; (5) provides management expertise, staff advice, and support to the Administrator in program and policy formulation and execution; (6) provides leadership in the development, review and implementation of policies and procedures to promote improved information technology management capabilities and best practices throughout HRSA; (7) coordinates IT workforce issues and works closely with the Department on IT recruitment and training issues; and (8) administers functions of the Chief Financial Officer.

Office of Budget (RB1)

(1) Reviews funds control measures to assure that no program, project or activity of HRSA obligates or disburses funds in excess of appropriations or obligates funds in violation of authorized purposes; (2) provides advice and assistance to senior HRSA management to verify the accuracy, validity, and technical treatment of budgetary data in forms, schedules, and reports, or the legality and propriety of using funds for specific purposes; (3) maintains primary liaison to expedite the flow of financial management work and materials within the Agency and/or between Agency components and HHS, Office of Management and Budget (OMB), and congressional staff; (4) provides overall financial-based analyses and fiduciary review for senior HRSA management in order to assure appropriate workforce planning, funds control guidance, and analytical

technical assistance in all phases of the budgetary process; and (5) develops the long-range program and financial plan for the Agency in collaboration with the Office of Planning, Analysis and Evaluation, and other administrative Agency components.

Division of Budget Formulation and Presentation (RB11)

(1) Manages and coordinates development of the Administration's budget for HRSA from independent submissions prepared by Bureau/Office contacts; (2) formulates the total HRSA financial plan for the Administrator, and evaluates and assures total Agency budget requests conform to current Administration policy and economic assumptions; (3) coordinates performance measures pursuant to the Government Performance and Results Act with budget proposals; (4) represents, supports and defends the HRSA budget in meetings/hearings before the Office of the Secretary, OMB, and the Congress; (5) provides policy direction and guidance for the preparation and consolidation of the budget and its transmittal to OMB through information technology; (6) analyzes proposed legislation and subsequent congressional action for budgetary implications; (7) prepares periodic summary analysis and impact statements on budget allowances and applicable congressional actions; (8) develops all financial and personnel staffing aspects of HRSA's implementation plans for establishing new or phasing out existing programs; (9) develops analyses of proposed budget estimates and supporting narrative through the use of available financial data reporting systems for Agency senior management; (10) maintains liaison with the Office of the Secretary and the OMB, the General Accountability Office, other Government organizations, and the Congress on HRSA's financial management matters; (11) consults with the Office of Program Evaluation to provide guidance and advice in implementing performance systems, including the Performance Assessment and Rating Tool assessments, Key Performance Indicators, and HRSA's Government Performance Results Act program; (12) collaborates with other parts of HRSA in the development and implementation of long-range program and financing plans; (13) completes chain-of-command requirements in timing and reporting of cleared information to parties outside the Executive Branch (*i.e.,* the Congress, media, public); and (14) appropriately safeguards all embargoed information and all draft materials to maintain integrity of data, and secure work information.

Division of Budget Execution and Management (RB12)

(1) Provides budget policy interpretation, management guidance and direction for senior HRSA management; (2) conducts the HRSA budget control process in conformance with statutory requirements and OMB guidelines; (3) approves program spending plans and obtains apportionment of funds from the OMB; (4) establishes and maintains a system of budgetary fund and position control; (5) provides senior HRSA management status and activity reports on total funds control and position control activities throughout the fiscal year; (6) administers and reviews requests for apportionments and allotments; (7) reviews, controls, and reports obligations and expenditures through central monitoring and advice to Bureau/Office management officials; (8) verifies funds available to Central HRSA Offices, and the propriety of using appropriated and non-appropriated funds for the requested purposes for which the funds have been proposed for expenditure through commitment accounting; (9) develops and interprets budgetary policies and practices for operating units of the Agency including analysis and approval for all equipment, supplies, travel, transportation and services procured by HRSA, and ensures the validity, legality and proper accounting treatment of expenditures processed through the Unified Financial Management System (UFMS); (10) controls the Agency's processes of allotment, allocation, obligation, and expenditure of funds in approved annual operating plans for all HRSA accounts; (11) monitors Bureau obligations in current allocations, disbursements and outlays and notifies Bureaus of potential deficiencies in allotments and allowances for specific periods for corrective action by Bureau staff; (12) maintains primary liaison between HRSA and the Program Support Center's Financial Operations Center for accounting functions; (13) maintains tracking of inputs into HRSA account for the central HHS accounting system (UFMS), which includes the examination, verification, and maintenance of accounts and accounting data within the accounting system; (14) provides standardized accounting codes across the Agency, performs technical audit functions, develops and/or installs revised accounting procedures, and serves as primary administrator of systems accounting functions within HRSA; (15) provides appropriate tracking of all ''fee-for-service'' charges to HRSA from other HHS components and outside entities; and (16) manages the centralized HRSA Pay Management for allocation of staff and position management.

Division of Program Budget Services (RB13)

(1) Provides direct budget execution services to assigned program components working with appropriate program management officials; (2) coordinates budget services through formalized and integrated communications with program management officials or their designees to ensure effective and efficient delivery of services to its customers; (3) supports the formulation of annual budgets, develops spending plans and manages budget activities ensuring funds are expended in accordance with congressional intent; (4) provides reports on program activities to Budget Execution and Management Staff for control of commitment accounting within allotments and allowances and for position control activities; (5) analyzes and maintains reports on disbursements and changing obligations within closed year accounts for assigned program components; and (6) assures all open documents are closed without outstanding balances.

Office of Financial Policy and Controls (RB2)

(1) Chief Financial Officer serves as liaison with all HRSA Bureau/Office components and outside customers to provide financial information, resolve problems, and provide information on payment, and disbursement issues; (2) maintains overall responsibility for policies, procedures, monitoring of internal controls and systems related to payment and disbursement activities; (3) coordinates the development and improvement of HRSA's financial systems with the UFMS; (4) samples obligation documents and payment requests from a variety of private sector and Government sources to determine the validity and legality of the requests; (5) compiles and submits a variety of cash management and travel reports required by the Department of the Treasury and various other outside agencies; (6) provides leadership to define the control environment with Senior HRSA management to perform risk assessments identifying the most significant areas necessary for internal control placements; (7) analyzes internal reports to provide management information on special interest topics;

(8) develops needs assessment for financial management training based on Government-wide and HHS standards; and (9) assures Treasury requirements and OMB suggestions for best practices are implemented in training plan for Agency-wide use.

Division of Internal Controls (RB21)

(1) Coordinates risk assessments identifying the most significant areas necessary for internal control placements; (2) analyzes and reconciles disbursements made for HRSA by other Federal activities, and insures that disbursements are consistent with Federal Appropriations Law requirements, GAO policies, interagency elimination entry requirements, and other governing financial regulations; (3) analyzes year-end unliquidated obligations for compliance with Federal Appropriations Laws and the Economy Act, and recommends funding changes to senior HRSA management; (4) reviews and reconciles all U.S. Treasury Department reports and transmissions; (5) performs ongoing quality control reviews of various payment and disbursement processes and systems in the Office of Operations; (6) develops needs assessment for financial management training based on Government-wide and HHS standards; and (7) assures Treasury requirements and OMB suggestions for best practices are implemented in training plan for Agency-wide use.

Division of Financial Policy and Analysis (RB22)

(1) Defines the control environment (*e.g.,* programs, operations, or financial reporting) with Senior HRSA management; (2) maintains overall responsibility for policies, procedures, monitoring of internal controls and systems related to payment and disbursement activities; (3) conducts analyses to inform Office of Operations and Senior HRSA management of relevant financial information, potential problems/solutions, and information on payment, travel, and disbursement issues; (4) reviews policy documents, Inter/Intra-Agency agreements and Agency materials for financial consistency with internal controls and disbursement requirements; (5) conducts analyses of management and operational problems in terms of financial management information; (6) analyzes the design, implementation, enhancement and documentation of automated financial systems within the Office of Operations to assist management in operating more efficiently; (7) provides consultative services to systems implementers within HRSA on a broad range of issues including policy, data integrity, systems integration and interfacing issues as they relate to financial management systems; (8) provides technical support and assistance to operating components and users in the integration of financial systems and the access and interpretation of financial system data; (9) analyzes and offers recommendations concerning the costs and benefits of alternative methods of financing Agency programs and administrative operations; (10) prepares long-range resource projections for the acquisition and use of funds to support specific Agency projects and programs; (11) facilitates the review of HRSA audit activities in compliance with the Chief Financial Officer's Act of 1990; and (12) provides support to the Annual Financial Statements by monitoring statement of net cost, preparing management representation correspondence, cycle memoranda and serves as audit liaison to the combined HHS Combined Financial Statement.

Office of Acquisitions Management and Policy (RB3)

(1) Provides leadership in the planning, development, and implementation of policies and procedures for contracts; (2) exercises the sole responsibility within HRSA for the award and management of contracts; (3) provides advice and consultation of interpretation and application of the Department of Health and Human Services' policies and procedures governing contracts management; (4) develops operating procedures and policies for the Agency's contracts programs; (5) establishes standards and guides for and evaluates contracts operations throughout the Agency; (6) coordinates the Agency's positions and actions with respect to the audit of contracts; (7) maintains liaison directly with or through Agency Bureaus or Offices with contractors, other organizations, and various components of the Department; (8) provides leadership, guidance, and advice on the promotion of the activities in HRSA relating to procurement and material management governed by the Small Business Act of 1958, Executive Order 11625, and other statutes and national policy directives for augmenting the role of private industry, and small and minority businesses as sources of supply to the Government and Government contractors; and (9) plans, directs, and coordinates the Agency's sourcing program.

Division of Contracts Operations (RB31)

(1) Responsible for soliciting, negotiating, awarding, and administering negotiated contracts in support of HRSA programs and activities; (2) provides professional, in-depth advice and consultation to HRSA staff regarding the various phases of the acquisition cycle relating to contracts awarded by the Agency; (3) conducts pre-award reviews of proposed contracts that exceed the requirements called for in the Federal and departmental acquisition regulations; (4) plans and coordinates acquisition reviews of contracting activities within HRSA headquarters and the field components; and (5) responds to congressional inquiries and requests for acquisition information from other Federal agencies and non-Federal sources.

Division of General Acquisitions (RB32)

(1) Plans, negotiates and awards simplified acquisitions for headquarters and field components; (2) administers HRSA's acquisition data retrieval system; (3) oversees system and inputs data to the automated contracts reporting system, and reviews the PRISM reports and obtains specific information from various outside sources; (4) takes necessary actions regarding close out of both negotiated contracts and simplified acquisitions in support of HRSA programs; (5) provides a full range of in-depth advice and consultation regarding acquisition matters relating to the simplified acquisition to headquarters and field contracting activities; (6) conducts and monitors the performance of the HRSA purchase card IMPAC program for headquarters and field offices; (7) responds to congressional inquiries and requests for information from other departments and non-Federal sources on simplified acquisitions; (8) reviews and provides necessary recommendations on the disposition of awards which result in mistakes of bids, protests, and unauthorized obligations; (9) administers the training and certification program for acquisition officials; (10) manages close-out of completed contracts and purchase orders; and (11) manages the Inter/Intra-Agency agreement process.

Office of Management (RB4)

Provides Agency-wide leadership, program direction, and coordination of all phases of administrative management. Specifically, the Office of Management: (1) Provides management expertise, staff advice, and support to the Administrator in program and policy formulation and execution; (2)

provides administrative management services including human resources, procurement, property, space planning, safety, physical security, and general administrative services; (3) conducts Agency-wide workforce analysis studies and surveys; (4) plans, directs, and coordinates the Agency's activities in the areas of human resources management, including labor relations, personnel security, performance and alternative dispute resolution; (5) coordinates the development of policy and regulations; (6) oversees the development of annual operating objectives and coordinates HRSA work planning and appraisals; (7) directs and coordinates the Agency's organizations, functions and delegations of authority programs; (8) manages the Continuity of Operations (COOP) program for the Offices supported by the Office of Management; (9) administers the Agency's Executive Secretariat and committee management functions; (10) provides staff support to the Agency Chief Travel Official; and (11) provides staff support to the Deputy Ethics Counselor.

Division of Policy Review and Coordination (RB41)

(1) Advises the Administrator and other key Agency officials on cross-cutting policy issues and assists in the identification and resolution of cross-cutting policy issues and problems; (2) establishes and maintains tracking systems that provide Agency-wide coordination and clearance of policies, regulations and guidelines; (3) plans, organizes and directs the Agency's Executive Secretariat with primary responsibility for preparation and management of written correspondence; (4) arranges briefings for Department officials on critical policy issues and oversees the development of necessary briefing documents; (5) administers administrative early alert system for the Agency to assure senior Agency officials are informed about administrative actions and opportunities; (6) coordinates the preparation of proposed rules and regulations relating to Agency programs and coordinates Agency review and comment on other Department regulations and policy directives that may affect the Agency's programs; (7) manages and maintains a records management program for the Agency; (8) oversees and coordinates the Agency's committee management activities; (9) coordinates the review and publication of Federal Register Notices; (10) provides advice and guidance for the establishment or modification of administrative delegations of authority; (11) provides advice and guidance for the establishment or modification of program delegations of authority; and (12) contributes to the analysis, development and implementation of Agency-wide administrative policies through coordination with relevant Agency program components and other related sources.

Division of Workforce Management (RB42)

(1) Conducts Agency-wide workforce analysis studies and surveys; (2) develops comprehensive workforce strategies that meet the requirements of the President's Management Agenda, programmatic needs of HRSA, and the governance and management needs of HRSA leadership; (3) evaluates employee development practices to develop and enhance strategies to ensure HRSA retains a cadre of public health professionals and reduces risks associated with turnover in mission critical positions; (4) provides advice and guidance for the establishment or modification of organization structures, functions, and delegations of authority; (5) manages ethics and personnel security programs; (6) administers the Agency's performance management programs, including the SES Performance Review Board; (7) manages quality of work life, flexi place, and incentive and honor awards programs; (8) coordinates with the service provider the provision of human resources management, working with the service provider to communicate human resources requirements and monitoring the provider's performance; (9) directs and serves as a focal point for the Agency's intern and mentoring programs; (10) manages the Alternative Dispute Resolution Program; (11) provides support and guidance on human resources issues for the Offices supported by the Office of Management; and (12) oversees the commissioned corps liaison activities including the day-to-day operations of workforce management.

Division of Management Services (RB43)

(1) Provides administrative management services including procurement, property, space planning, safety, physical security, and general administrative services; (2) ensures implementation of statutes, Executive Orders, and regulations related to official travel, transportation, and relocation; (3) provides oversight for the HRSA travel management program involving use of travel management services/systems, passenger transportation, and travel charge cards; (4) provides planning, management and oversight of all interior design projects, move services and furniture requirements; (5) develops space and furniture standards and related policies; (6) provides analysis of office space requirements required in supporting decisions relating to the acquisition of commercial leases and manages the furniture inventory; (7) provides advice, counsel, direction, and support to employees to fulfill the Agency's primary safety responsibility of providing a workplace free from recognizable safety and health concerns; (8) manages, controls, and/or coordinates all matters relating to mail management within HRSA, including developing and implementing procedures for the receipt, delivery, collection, and dispatch of mail; (9) maintains overall responsibility for the HRSA Forms Management Program which includes establishing internal controls to assure conformity with departmental policies and standards, including adequate systems for reviewing, clearing, costing, storing and controlling forms; and (10) manages the Continuity of Operations (COOP) program for the Offices supported by the Office of Management.

Office of Information Technology (RB5)

The Chief Information Officer (CIO) is responsible for the organization, management, and administrative functions necessary to carry out the responsibilities of the office including: (1) Organizational development, investment control, budget formulation and execution, policy development, strategic and tactical planning, and performance monitoring; (2) provides leadership in the development, review and implementation of policies and procedures to promote improved information technology management capabilities and best practices throughout HRSA; and (3) coordinates IT workforce issues and works closely with the Department on IT recruitment and training issues.

The Chief Technology Officer (CTO) is responsible for HRSA's emerging and advanced technology integration program consistent with HRSA's missions and program objectives including: (1) Managing technology planning and coordinating the Agency's Enterprise Architecture (EA) efforts with the capital planning process, ensuring the suitability and consistency of technology investments with HRSA's EA and strategic objectives; (2) incorporating security standards as a component of the EA process; (3) providing leadership for strategic planning that leverages information systems security, program strategies,

and advanced technology integration to achieve program objectives through innovative technology use; and (4) providing leadership and establishing policy to address legislative or regulatory requirements, such as Section 508 of the Rehabilitation Act, and providing oversight for Agency IT configuration management and control.

The Chief Information Security Officer (CISO) is responsible for: (1) Leadership and collaboration with Agency staff to oversee the implementation of security and privacy policy in the management of their IT systems, and plans all activities associated with the Federal Information Security Management Act (FISMA) or other agency security and privacy initiatives; (2) implementing, coordinating, and administering security and privacy programs to protect the information resources of HRSA in compliance with legislation, Executive Orders, directives of the Office of Management and Budget (OMB), or other mandated requirements; (*e.g.,* Presidential Decision Directive 63, OMB Circular A–130, the National Security Agency, the Privacy Act, and other Federal agencies); (3) executing the Agency's Risk Management Program, and evaluates and assists with the implementation of safeguards to protect major information systems, and IT infrastructure; (4) coordinating with the Division of IT Operations and Customer Service to develop and implement HRSA level policies, procedures, guidelines, and standards for the incorporation of intrusion detection systems, vulnerability scanning, forensic and other security tools used to monitor automated systems and subsystems to safeguard HRSA's electronic information and data assets; and (5) managing the development, implementation, and evaluation of the HRSA information technology security and privacy training program to meet the requirements as mandated by OMB Circular A–130, the Computer Security Act, and Privacy Act.

Division of Business Information Management (RB51)

(1) Provides consultation, assistance, and services to HRSA to promote and manage information dissemination and collaboration practices using appropriate electronic media; (2) evaluates and integrates emerging technology to facilitate the translation of data and information from data repositories into electronic formats for internal and external dissemination; (3) collaborates with the Office of Communications on the design, deployment, and maintenance of HRSA's Internet and Intranet Web sites including development and implementation of related policies and procedures; (4) develops and maintains an overall data and information management strategy for HRSA that is integrated with HHS and Government-wide strategies; (5) identifies information needs across HRSA and develops approaches for meeting those needs using appropriate technologies including development and maintenance of an enterprise reporting platform; (6) provides for data quality and ensures that data required for enterprise information requirements are captured in appropriate enterprise applications and that necessary data repositories are built and maintained; (7) enhances and expands use and utility of HRSA's data by providing basic analytic and user support, develops and maintains a range of information products for internal and external users and demonstrates potential uses of information in supporting management decisions; and (8) provides leadership and establishes policy to address legislative or regulatory requirements in its areas of responsibility.

Division of Capital Planning and Project Management (RB52)

(1) Coordinates the development and review of policies and procedures for IT Capital Planning and Investment Control, Earned Value Management, IT portfolio management, IT project management, and the enterprise performance lifecycle methodology; (2) administers the Department's multi-year strategic information resources planning process, including developing and administering the Department's Strategic IT Plan; (3) supports the Budget Office in its evaluation of IT initiatives, and preparation of Agency, departmental, and OMB Budget Exhibits and documents; (4) works to obtain required information and analyzes it as appropriate; (5) coordinates control and evaluation review of ongoing IT projects, including support to the HRSA ITIRB in conducting such review; (6) promotes and follows a consistent methodology for project management and improves Agency-wide project management; and (7) operates a Project Management Office to improve management, communications, and functional user involvement, assists with project prioritization, and monitors progress and budget.

Division of Enterprise Solutions Development and Management (RB53)

(1) Provides leadership, consultation, and IT project management services in the definition of Agency business applications architectures, the engineering of business processes, the building and deployment of applications, and the development, maintenance and management of enterprise systems and data collections efforts; (2) responsible for technology evaluation, application and data architecture definition, controlling software configuration management, data modeling, database design, development and management and stewardship services for business process owners; (3) manages the systems development lifecycle by facilitating business process engineering efforts, systems requirements definition, and provides oversight for application change management control; and (4) provides enterprise application user training, Tier-3 assistance, and is responsible for end-to-end application building, deployment, maintenance and data security assurance.

Division of IT Operations and Customer Services (RB54)

(1) Provides leadership, consultation, training, and management services for HRSA's enterprise computing environment; (2) directs and manages the support and acquisition of HRSA network and desktop hardware, servers, wireless communication devices, and software licenses; (3) is responsible for the HRSA Data Center and the operation and maintenance of a complex, high-availability network infrastructure on which mission-critical applications are made available 24 hours per day, 7 days per week; (4) provides oversight for outsourced electronic mail, Internet and connectivity, web and video conferencing, and co-managed firewall and security monitoring services; (5) controls infrastructure configuration management, installations and upgrades, security perimeter protection, and system resource access; (6) coordinates IT activities for Continuity of Operations Planning (COOP) Agency-wide, including provisioning and maintaining IT infrastructure and hardware at designated COOP locations to support emergency and COOP requirements; (7) accounts for property life cycle management and tracking of Agency-wide IT capital equipment; and (8) provides oversight for outsourced Tier-1 and Tier-2 Help Desk Call Center technical assistance, maintains workstation hardware and software configuration management controls, and provides oversight of outsourced network and desktop services to staff in HRSA Regional Offices.

Section RB–30, Delegations of Authority

All delegations of authority and re-delegations of authority made to HRSA officials that were in effect immediately prior to this reorganization, and that are consistent with this reorganization, shall continue in effect pending further re-delegation.

Chapter RH—Office of Rural Health Policy

Section RH–10, Organization

Delete in its entirety and replace with the following:

The Office of Rural Health Policy (RH) is headed by the Associate Administrator for Rural Health Policy, who reports directly to the Administrator. The Office of Rural Health Policy (RH) includes the following components:

(1) Office of the Associate Administrator (RH);

(2) Hospital State Division (RH1);

(3) Community Based Division (RH2);

(4) Border Health Division (RH3); and

(5) Office for the Advancement of Telehealth (RH4).

Section RH–20, Functions

Delete the functional statement for the Office of the Associate Administrator and replace in its entirety.

Office of the Associate Administrator (RH)

The Office of the Associate Administrator is headed by the Associate Administrator who, in conjunction with other management officials within HRSA, is responsible for the overall leadership and management of the Office of Rural Health Policy. The Office of Rural Health Policy serves as a focal point within the Department and as a principal source of advice to the Administrator and Secretary for coordinating efforts to strengthen and improve the delivery of health services to populations in the Nation's rural areas and border areas, providing leadership and interacting with stakeholders in the delivery of health care to underserved and at risk populations. Specifically, the Office of Rural Health Policy is organized around the following primary issue areas:

Delivery of Health Services: (1) Collects and analyzes information regarding the special problems of rural health care providers and populations; (2) works with States, State hospital associations, private associations, foundations, and other organizations to focus attention on, and promote solutions to, problems related to the delivery of health services in rural communities; (3) provides staff support to the National Advisory Committee on Rural Health and Human Services; (4) stimulates and coordinates interaction on rural health activities and programs in the Agency, Department and with other Federal agencies; (5) supports rural health center research and keeps informed of research and demonstration projects funded by States and foundations in the field of rural health care delivery; (6) establishes and maintains a resource center for the collection and dissemination of the latest information and research findings related to the delivery of health services in rural areas; (7) coordinates congressional and private sector inquiries related to rural health; (8) advises the Agency, Administrator and Department on the effects of current policies and proposed statutory, regulatory, administrative, and budgetary changes in the programs established under titles XVIII and XIX of the Social Security Act on the financial viability of small rural hospitals, the ability of rural areas to attract and retain physicians and other health professionals; (9) oversees compliance by CMS with the requirement that rural hospital impact analyses are developed whenever proposed regulations might have a significant impact on a substantial number of small rural hospitals; (10) supports specialized rural programs on minority health, mental health, preventive health education, oral health, and occupational health and safety; (11) directs the management of a nationwide rural health grants program; (12) directs the management of a program of State grants which support collaboration within State offices of rural health; and (13) funds radiation exposure screening and education programs that screen eligible individuals adversely affected by the mining, transport and processing of uranium and the testing of nuclear weapons for cancer and other diseases.

Hospital State Division (RH1)

The Hospital State Division serves as the focal point within the Office of Rural Health Policy to support rural hospital and State grant programs focused on rural populations. Specifically, the Hospital State Division is organized around the following primary issue areas: (1) Plans and manages a program of State grants which support collaboration within State offices of rural health; (2) works with States, State hospital associations, private associations, foundations, and other organizations to focus attention on, and promote solutions to, problems related to the delivery of health services in rural communities; and (3) provides coordinated technical assistance to grantees and rural communities.

Community Based Division (RH2)

The Community Based Division serves as the focal point within the Office of Rural Health Policy to support rural community grant programs. Specifically, the Community Based Division is organized around the following primary issue areas: (1) Plans and manages several nationwide rural health grants programs; (2) supports programs on rural health, public health, and health status improvement; (3) funds public and private non-profit entities for the operation of clinics that provide diagnosis, treatment and rehabilitation of active and retired coal miners and others with respiratory ailments (black lung) and other occupational related respiratory disease impairments; (4) funds radiation exposure screening and education programs that screen eligible individuals adversely affected by the mining, transport and processing of uranium and the testing of nuclear weapons for cancer and other diseases; and (5) provides technical assistance to grantees and rural communities.

Border Health Division (RH3)

The Border Health Division provides leadership and direction to coordinate the Agency's assets in border regions. Specifically, the Border Health Division: (1) Assures that the Agency's engagement with regions of the border is strategic, performance based, builds partnerships and alliances, and maximizes utilization of Agency assets; (2) assures Agency-wide coordination by establishing border health program policies and procedures including tracking mechanisms; (3) conducts management and evaluation studies to improve the health delivery system on the border; (4) serves as the secretariat and chair for the Agency's Border Health Workgroup; (5) plans, directs, and coordinates the Agency's border health activities; and (6) plans, coordinates and facilitates the Agency agreements activities with border health issues.

Office for the Advancement of Telehealth (RH4)

Serves as the operational focal point for coordinating and advancing the use of telehealth technologies across all of HRSA's programs including, but not limited to, the provision of healthcare at a distance (telemedicine); distance-based learning to improve the knowledge of Agency grantees, and others; and improved information dissemination to both consumers and

providers about the latest developments in telemedicine. The Office for the Advancement of Telehealth carries out the following functions, specifically: (1) Develops and coordinates telehealth network and telehealth resource centers grant programs; (2) provides professional assistance and support in developing telehealth initiatives; (3) administers grant programs to promulgate and evaluate the use of appropriate telehealth technologies among HRSA grantees and others; and (4) disseminates the latest information and research findings related to the use of telehealth technologies in Agency programs and underserved areas, including findings on ''best practices.''

Section RH–30, Delegations of Authority

All delegations of authority and re-delegations of authority made to HRSA officials that were in effect immediately prior to this reorganization, and that are consistent with this reorganization, shall continue in effect pending further re-delegation.

Chapter RC—Bureau of Primary Health Care

Section RC–10, Organization

Delete in its entirety and replace with the following:

The Bureau of Primary Health Care (RC) is headed by the Associate Administrator for Primary Health Care, who reports directly to the Administrator. The Bureau of Primary Health Care (RC) includes the following components:

(1) Office of the Associate Administrator (RC);
(2) Office of Minority and Special Populations (RCG);
(3) Office of Policy and Program Development (RCH);
(4) Office of Quality and Data (RCK);
(5) Eastern Division (RCN);
(6) Central Mid-Atlantic Division (RCP);
(7) Western Division (RCQ); and
(8) Health Information Technology State and Community Assistance Division (RCR).

Section RC–20, Functions

Delete the functional statement for the Bureau of Primary Health Care and replace in its entirety.

Office of the Associate Administrator (RC)

Provides overall leadership, direction, coordination, and planning in support of Bureau of Primary Health Care (BPHC) programs that are designed to improve the health of the Nation's underserved communities and vulnerable populations by assuring access to comprehensive, culturally competent, quality primary health care services. Specifically, (1) establishes program goals, objectives and priorities, and provides oversight as to their execution; (2) plans, directs, coordinates and evaluates Bureau-wide management activities; (3) maintains effective relationships within HRSA and with other Department of Health and Human Services (HHS) organizations, other Federal agencies, State and local governments, and other public and private organizations concerned with primary health care, eliminating health disparities, and improving the health status of the Nation's underserved and vulnerable populations; and (4) plans, directs, and coordinates Bureau-wide administrative management activities, (*i.e.,* budget, finance, personnel, procurements, delegations of authority, emergency planning, training, executive secretariat), and has responsibilities related to the awarding of BPHC grant and contract funds.

Office of Minority and Special Populations (RCG)

Serves as the organizational focus for the coordination of Bureau activities relating to the delivery of health services to minority and special populations, including migrant and seasonal farmworkers, homeless persons, and residents of public housing. Specifically, (1) ensures that the needs and special circumstances of minority and special populations and the provider organizations that serve them are addressed in BPHC programs and policies; (2) advises BPHC about the needs of minority and special populations; (3) identifies, provides and coordinates assistance to communities, community-based organizations and BPHC programs related to the development, delivery and expansion of services targeted to minority and special populations; (4) coordinates Bureau activities for minority and special populations within HRSA and HHS, and with other Federal agencies, State and local governments, and other public and private organizations concerned with primary health care, eliminating health disparities, and improving the health status of the Nation's underserved and vulnerable populations; and (5) provides support to the National Advisory Council on Migrant Health.

Office of Program and Policy Development (RCH)

Serves as the organizational focus for the development of BPHC programs and policies. Specifically, (1) leads and monitors the development and expansion of health centers and health systems infrastructure; (2) identifies, provides and coordinates assistance to communities, community-based organizations and BPHC programs related to the development and expansion of health centers and health systems infrastructure; (3) manages the Bureau's loan guarantee program; (4) oversees and coordinates the Federally Qualified Health Center (FQHC) Look-Alike program; (5) leads and coordinates the analysis, development and drafting of policy impacting BPHC's programs; (6) consults and coordinates with other components within HRSA and HHS, and with other Federal agencies, State and local governments, and other public and private organizations on issues affecting BPHC's programs and policies; (7) performs environmental scanning on issues that affect BPHC's programs; (8) monitors BPHC's activities in relation to HRSA's Strategic Plan; and (9) serves as the Bureau's focal point for communication and program information.

Office of Quality and Data (RCK)

Serves as the organizational focus for quality and program performance reporting. Specifically, (1) provides leadership for implementing BPHC clinical and quality strategies; (2) oversees BPHC Federal Tort Claims Act (FTCA) malpractice programs, reviewing clinical, quality improvement, risk management, and patient safety activities to improve policies and programs for primary health care services, including clinical information systems; (3) serves as the Bureau's focal point for the design and implementation of data systems to assess and improve program performance; (4) coordinates BPHC clinical, quality and performance reporting activities within HRSA and HHS, and with other Federal agencies, State and local governments, and other public and private organizations concerned with primary health care, eliminating health disparities, and improving the health status of the Nation's underserved and vulnerable populations; and (5) identifies, provides and coordinates assistance to BPHC programs around clinical, quality and performance reporting activities.

Eastern Division (RCN)

Manages BPHC primary health care grant programs and activities within HHS Regions 1, 2 and 4. Specifically, for Regions 1, 2 and 4: (1) Manages the post-award administration of the Bureau's primary health care grant programs; (2) serves as the BPHC representative to organizations receiving Bureau grants; (3) promotes a continued

focus on efficient and effective care for underserved and vulnerable populations; (4) communicates and interprets program statutory/regulatory requirements, policy, expectations and reporting requirements, providing technical guidance to grantees on the management and integration of community-based systems of care, the adaptation of successful strategies/models, and the resolution of difficult issues; (5) monitors the performance of BPHC primary health care grantees, making programmatic recommendations and providing assistance to improve performance, where appropriate; (6) reviews findings and recommendations of periodic and episodic grantee assessments, developing actions needed to assure continuity of services to underserved and vulnerable populations and appropriate use of Federal resources; (7) identifies, provides and coordinates training and technical assistance activities for BPHC primary health care grant programs, including State-based training and technical assistance; (8) conducts State and regional surveillance on issues that affect BPHC grant programs; and (9) provides consultation to and coordinates activities within HRSA and HHS, and with other Federal agencies, State and local governments, and other public and private organizations involved in the implementation of program activities.

Central Mid-Atlantic Division (RCP)

Manages BPHC primary health care grant programs and activities within HHS Regions 3, 5 and 6. Specifically, for Regions 3, 5 and 6: (1) Manages the post-award administration of the Bureau's primary health care grant programs; (2) serves as the BPHC representative to organizations receiving Bureau grants; (3) promotes a continued focus on efficient and effective care for underserved and vulnerable populations; (4) communicates and interprets program statutory/regulatory requirements, policy, expectations and reporting requirements, providing technical guidance to grantees on the management and integration of community-based systems of care, the adaptation of successful strategies/models, and the resolution of difficult issues; (5) monitors the performance of BPHC primary health care grantees, making programmatic recommendations and providing assistance to improve performance, where appropriate; (6) reviews findings and recommendations of periodic and episodic grantee assessments, developing actions needed to assure continuity of services to underserved and vulnerable populations and appropriate use of Federal resources; (7) identifies, provides and coordinates training and technical assistance activities for BPHC primary health care grant programs, including State-based training and technical assistance; (8) conducts State and regional surveillance on issues that affect BPHC grant programs; and (9) provides consultation to and coordinates activities within HRSA and HHS, and with other Federal agencies, State and local governments, and other public and private organizations involved in the implementation of program activities.

Western Division (RCQ)

Manages BPHC primary health care grant programs and activities within HHS Regions 7, 8, 9 and 10. Specifically, for Regions 7, 8, 9 and 10: (1) Manages the post-award administration of the Bureau's primary health care grant programs; (2) serves as the BPHC representative to organizations receiving Bureau grants; (3) promotes a continued focus on efficient and effective care for underserved and vulnerable populations; (4) communicates and interprets program statutory/regulatory requirements, policy, expectations and reporting requirements, providing technical guidance to grantees on the management and integration of community-based systems of care, the adaptation of successful strategies/models, and the resolution of difficult issues; (5) monitors the performance of BPHC primary health care grantees, making programmatic recommendations and providing assistance to improve performance, where appropriate; (6) reviews findings and recommendations of periodic and episodic grantee assessments, developing actions needed to assure continuity of services to underserved and vulnerable populations and appropriate use of Federal resources; (7) identifies, provides and coordinates training and technical assistance activities for BPHC primary health care grant programs, including State-based training and technical assistance; (8) conducts State and regional surveillance on issues that affect BPHC grant programs; and (9) provides consultation to and coordinates activities within HRSA and HHS, and with other Federal agencies, State and local governments, and other public and private organizations involved in the implementation of program activities.

Division of National Hansen's Disease Program (RC7)

Manages the National Hansen's Disease Program in accordance with regulations of the Public Health Service; establishes policies and procedures, maintains standards and represents the program to other agencies and the public; provides leadership necessary to ascertain and maintain equal employment opportunities; develops, executes, and maintains effective public relations which are required because of the nature of the institution. Directs, supervises, and evaluates the functions of Ambulatory Care.

Division of Health Information Technology State and Community Assistance (RCR)

Serves as the operational focal point for coordinating and advancing the adoption of health information technology across all of HRSA's programs, including, but not limited to, user networks, clinical management systems, and the use of electronic medical record systems. Ensures information dissemination to HRSA grantees and other consumers and providers about the latest developments in health care information technology, and the impact of health information technology on other activities designed to improve the health status of the Nation. The Division of Health Information Technology State and Community Assistance carries out the following functions: (1) Develops and coordinates health information technology (HIT) programs and policies; (2) provides professional assistance and support in developing HIT initiatives among HRSA grantees; (3) administers grant programs to promote and evaluate the use of appropriate HIT among grantees and others; (4) advises HRSA grantees on strategies to maximize the potential of new and existing HIT technologies for meeting quality and technical assistance objectives; (5) disseminates the latest information and research findings related to the use of HIT technologies in the Agency programs and underserved areas, including findings on ''best practices;'' and (6) provides guidance on HIT policy for safety net providers through the Associate Administrator to the Office of the National Health Information Technology Coordinator and the other components of the Department, with other Federal and State agencies and with the private sector to promote and overcome barriers to effective HIT programs.

Section RC–30, Delegations of Authority

All delegations of authority and re-delegations of authority made to HRSA officials that were in effect immediately prior to this reorganization, and that are consistent with this reorganization, shall continue in effect pending further re-delegation.

Chapter RR—Healthcare Systems Bureau

Section RR–20, Functions

Delete the functional statement for the Health Care Systems Bureau and replace in its entirety.

(1) Administers the Organ Procurement and Transplantation Network (OPTN) to facilitate the allocation of donor organs to patients waiting for an organ transplant and the Scientific Registry of Transplant Recipients that provides analytic support to the OPTN in the development and assessment of organ allocation and other OPTN policies; (2) administers the C.W. Bill Young Cell Transplantation Program to increase the number of unrelated blood stem cell transplants and improve the outcomes of blood stem cell transplants; (3) administers the National Cord Blood Inventory (NCBI) to increase the number of high quality cord blood units available for transplantation; (4) develops and maintains a national program of grants and contracts to organ procurement organization and other entities to increase the number of organs made available for transplantation; (5) manages the national program for compliance with the Hill-Burton uncompensated care requirement and other assurances; (6) directs and administers an earmarked grant program for the construction/renovation/equipping of health care and other facilities; (7) directs and administers the National Vaccine Injury Compensation Program; (8) directs and administers the Smallpox Emergency Personnel Protection Act Program; (9) serves as the focal point for providing leadership and direction to States to develop plans for providing access to affordable health insurance coverage for all citizens; (10) directs and administers the Poison Control Center Enhancement and Awareness Act; (11) manages and promotes the 340B Drug Pricing Program; (12) implements and administers the Countermeasures Injury Compensation Program (CICP) under Public Readiness and Emergency Preparedness (PREP) Act authorities; (13) coordinates HRSA activities related to emergency preparedness planning, policy, and continuity of operations, including the operation of the HRSA Emergency Operations Center, and serves as HRSA's liaison to HHS and interagency partners on emergency preparedness matters; (14) ensures HRSA's commissioned corps is ready to respond to public health challenges and emergencies identified by the Secretary; (15) in conjunction with the Office of Force Readiness and Deployment, ensures the readiness and deployment capability of officers assigned to HRSA; and (16) directs and administers the State Health Access Program that awards grants to States to expand access to affordable healthcare coverage for people who are uninsured.

Division of Transplantation (RR1)

On behalf of the Secretary of Health and Human Services (HHS), administers all statutory authorities related to the operation of the Nation's organ procurement and transplantation system, the C.W. Bill Young Cell Transplantation Program and the National Cord Blood Inventory Program. The Organ Transplantation program supports: (1) The operation of the Organ Procurement and Transplantation Network (OPTN), which facilitates the matching of donor organs to patients in need of organ transplants; (2) the operation of the Scientific Registry of Transplant Recipients (SRTR), which facilitates the ongoing evaluation of the scientific and clinical status of organ transplantation; (3) public education programs to increase awareness about the need for organ donation; (4) peer-reviewed grants and contracts with public and private nonprofit entities to conduct studies and demonstration projects designed to increase organ donation and recovery rates; (5) grants to States to support organ donation awareness programs; (6) public education, outreach programs, and studies designed to increase the number of organ donors, including living donors; (7) the development and dissemination of educational materials to inform health care professionals and other appropriate professionals on issues surrounding organ, tissue and eye donation; (8) grants to qualified organ procurement organizations and hospitals to establish programs to increase the rate of organ donation; (9) financial assistance to living donors to help defray travel, subsistence and other incidental non-medical expenses; (10) supports mechanisms to evaluate the long-term effects of living organ donation; and (11) manages the Secretary's Advisory Committee on Organ Transplantation as it advises the Secretary of the HHS on the activities of the OPTN.

The Division administers two closely related national blood stem cell programs, the C. W. Bill Young Cell Transplantation Program and the National Cord Blood Inventory (NCBI) to facilitate blood stem cell transplants (using adult volunteer donors or umbilical cord blood units) to treat individuals with leukemia and other life-threatening blood and genetic diseases, who lack a related donor. In administering these two programs, the Division: (1) Provides a national system for recruiting and tissue-typing potential bone marrow donors, particularly in racial and ethnic minority populations; (2) funds and oversees collection of high quality cord blood units from diverse population; (3) supports the Advisory Council on Blood Stem Cell Transplantation as it advises the Secretary of the HHS and the Administrator of the Health Resources and Services Administration (HRSA) on the activities of the C.W. Bill Young Cell Transplantation Program and the NCBI Program; (4) stays informed of the medical, scientific, research, and financial environment for blood stem cell transplantation; (5) develops policy in the area of blood stem cell transplantation, in coordination with the C.W. Bill Young Cell Transplantation Program and NCBI contractors, other DHHS agencies, and the U.S. Navy; (6) administers and oversees the contracts for the operation of the C.W. Bill Young Cell Transplantation Program and NCBI, advising on contractor projects and participating in contractor committees; (7) consults with the Department of State (through HRSA's Office of International Health) regarding the possible foreign policy implications of proposed international agreements between the C.W. Bill Young Cell Transplantation Program and NCBI contractors and transplant centers and other organizations outside the U.S.; and (8) initiates, and conducts directly or contracts for, studies to advance the knowledge of blood and marrow transplantation, to address patient needs, to increase donor recruitment in targeted populations, and to address financial issues in transplantation.

Division of Facilities Compliance and Recovery (RR2)

This Division substantiates health facilities' compliance with Hill-Burton uncompensated services and care assurance and administers the Health Care and Other Facilities (HCOF) program. Specifically, the Division: (1) Establishes, develops, monitors, and enforces the implementation of Hill-Burton regulations, policies, procedures,

and guidelines for use by staff and health care facilities; (2) maintains a system for receipt, analysis and disposition of audit appeals by Hill-Burton obligated facilities and for receiving and responding to patient complaints; (3) processes and determines or recommends to the Director, approval or disapproval of recovery claims, waiver actions, and management contracts of Title VI and XVI grant recipient facilities subject to review; (4) manages the recovery of Federal grant funds process for Titles VI and XVI; (5) manages the national Hill-Burton Hotline to ensure that consumers receive timely and accurate information on the program; (6) administers the process for awarding new HCOF grants, including ensuring compliance with historic preservation and other laws and regulations related to construction projects, maintaining a computerized database of key project information, and providing technical assistance in application preparation to potential grantees under Section 1610(b) and the ''Health Care and Other Facilities'' grant programs; (7) monitors grant projects during construction to assure compliance with the terms of the award, reviews requests for changes in scope to grant projects, and obtains information needed to close out completed grant projects; and (8) provides architectural and engineering services in accordance with the Intra-agency Agreement between HRSA and the Administration for Children and Families.

Division of Vaccine Injury Compensation (RR4)

This Division administers all statutory authorities related to the operation of the National Vaccine Injury Compensation Program (VICP) by the: (1) Evaluation of petitions for compensation filed under the VICP through medical review and assessment of compensability for all complete claims; (2) processing of awards for compensation made under the VICP; (3) promulgation of regulations to revise the Vaccine Injury Table; (4) provision of professional and administrative support to the Advisory Commission on Childhood Vaccines (ACCV); (5) development and maintenance of all automated information systems necessary for program implementation; (6) provision and dissemination of program information; and (7) promotion of safer childhood vaccines. VICP maintains a working relationship with other relevant Federal and private sector partners in its administration and operation.

Office of Pharmacy Affairs (RR7)

The Office promotes access to clinically and cost effective pharmacy services by maximizing the value of the 340B Drug Pricing Program for entities eligible to participate by: (1) Managing the PHS Pharmaceutical Pricing Agreements with pharmaceutical manufacturers who participate in the Medicaid program; (2) maintaining a database of covered entities and organizations eligible to become covered entities, including status of certifications, where required, and identification of contracted pharmacies, when used by covered entities; (3) publishing guidelines and/or regulations to assist covered entities, drug manufacturers, and wholesalers to use the Drug Pricing Program and comply with the requirements of Section 340B of the Public Health Service Act; (4) implementing and overseeing the 340B Prime Vendor Program that provides drug distribution and price negotiation services for participating covered entities; (5) coordinating the 340B implementation activities of programs in the Health Resources and Services Administration, the Centers for Disease Control and Prevention, the Indian Health Service, and the Office of Public Health and Science that provide support to entities eligible to access the Drug Pricing Program; (6) providing a full range of technical assistance to eligible and participating entities; (7) working with the Centers for Medicare and Medicaid Services and the Department of Veterans Affairs, which operate related drug rebate and discount programs, to coordinate policies and operations; and (8) maintaining liaison with grantee associations, professional organizations, the pharmaceutical industry, and trade associations concerning drug pricing and pharmacy issues.

The Office also supports HRSA health centers, States, and other delivery systems as they develop quality programs for affordable drug benefits through: (1) Managing clinical pharmacy demonstration projects; (2) assisting health centers and other grantees to make optimum use of resources available for pharmacy services; (3) demonstrating innovative methods of delivering pharmacy services; (4) providing technical assistance to grantees, States, local governments, and other health care delivery systems to plan and implement pharmacy benefits; (5) serving as a Federal Government resource for pharmacy practice through the development and maintenance of cooperative relationships with national pharmacy and governmental organizations; (6) the provision of technical assistance for pharmacy practice; and (7) the provision of model pharmacy products (such as sample contracts and business plans) for safety-net health care providers.

Section RR–30, Delegations of Authority

All delegations of authority and re-delegations of authority made to HRSA officials that were in effect immediately prior to this reorganization, and that are consistent with this reorganization, shall continue in effect pending further re-delegation.

Chapter RP—Bureau of Health Professions

Section RP–20, Functions

Delete the functional statement for the Bureau of Health Professions and replace in its entirety.

Office of the Associate Administrator (RP)

Provides national leadership in coordinating, evaluating, and supporting the development and utilization of the Nation's health personnel. Specifically: (1) Directs the national health professions education, student assistance, and development programs and activities; (2) provides policy guidance and staff direction to the Bureau; (3) maintains liaison with other Federal and non-Federal organizations and agencies with health personnel development interest and responsibilities; (4) provides guidance and direction for technical assistance activities in the international aspects of health personnel development; (5) provides guidance and assistance to the Regional Health Administrators or regional staff as appropriate; (6) directs and coordinates Bureau programs in support of Equal Employment Opportunity; (7) coordinates and provides guidance on the Freedom of Information Act and Privacy Act activities; (8) plans, directs, coordinates, and evaluates Bureau-wide administrative management activities; and (9) serves as the Bureau's focal point for correspondence control.

Office of Shortage Designation (RP2)

Provides national leadership and management of the designation of health professional shortage areas and medically-underserved populations. Specifically: (1) Maintains and enhances the Agency's critical role in the Nation's efforts to address equitable distribution of health professionals and access to health care for underserved populations; (2) encourages and fosters an ongoing, positive working relationship with other

Federal, State and private sector partners regarding health professional shortage areas and medically-underserved populations; (3) approves designation requests and finalizes designation policies and procedures for both current and proposed designation criteria; (4) negotiates and approves State designation agreements (*e.g.,* use of databases, population estimates, Statewide Rational Service Areas); and (5) oversees grants to State primary care offices.

Office of Workforce Policy and Performance Management (RP3)

Serves as the Bureau focal point for program planning, evaluation, coordination, and analysis, including analysis and operations review of Information Management systems; health professions data analysis and research; and for health professions quality assurance efforts. Maintains liaison with governmental, professional, voluntary, and other public and private organizations, institutions, and groups for the purpose of providing information exchange. Specifically the office is responsible for the following activities: (1) Stimulates, guides, and coordinates program planning, reporting, and evaluation activities of the Divisions and staff offices; (2) provides staff services to the Associate Administrator for program and strategic planning and its relation to the budgetary and regulatory processes; (3) develops issue papers and congressional reports relating to Bureau programs; (4) coordinates the development and implementation of the Bureau's evaluation program; (5) coordinates Bureau performance measurement and reporting; (6) sponsors and conducts research, special studies, and forecasting models on important issues that affect the national, State and local health workforce including studies relevant to current and future policies of the Bureau and their impact on the supply and demand for health professionals and the health industry at large; (7) provides technical assistance to States, educational institutions, professional associations and other Federal agencies relative to health personnel analytical information and analysis; and (8) develops and coordinates the Bureau data collection and modeling in conjunction with other entities involved in data collection and analysis, such as the Agency for Healthcare Research and Quality (AHRQ), the National Center for Health Statistics (NCHS), the Centers for Medicare and Medicaid Services (CMS), and the Administration on Aging (AOA).

Division of Nursing (RPB)

Serves as the principal focus for nursing education and practice. Specifically: (1) Provides national leadership and professional nursing expertise in the areas of policy development, budget, planning, coordination, evaluation and utilization of nursing personnel resources; (2) serves, on behalf of the Secretary, as the Chair of the National Advisory Council on Nurse Education and Practice; (3) supports and conducts programs which address the development, supply, utilization, and quality of nursing personnel; (4) promotes the involvement of States and communities in developing and administering nursing programs and assists States and communities in improving nursing services and educational programs; (5) encourages coordination of nursing-related issues within and across departmental entities; (6) facilitates coordination of nursing-related issues with other governmental agencies and consults with them on national or international nursing workforce planning and development issues; (7) maintains liaison with external health professional groups, the academic community, consumers, and State and community groups with a common interest in the Nation's capacity to deliver nursing services; (8) advances and promotes the development of effective models of nursing practice and education; (9) stimulates initiatives in the area of international nursing information exchange and nursing workforce planning and development; and (10) provides overall direction and management of Division human and financial resources.

Division of Medicine and Dentistry (RPC)

Serves as the principal focus with regard to education, practice, and research of health personnel, with special emphasis on allopathic and osteopathic physicians, podiatrists, dentists, physician assistants and clinical psychologists. Specifically: (1) Provides professional expertise in the direction and leadership required by the Bureau for planning, coordinating, evaluating, and supporting development and utilization of the Nation's health personnel for these professions; (2) supports and conducts programs with respect to the need for and the development, use, credentialing, and distribution of such personnel; (3) engages with other Bureau programs in cooperative efforts of research, development, and demonstration on the interrelationships between the members of the health care team, their tasks, education requirements, training modalities, credentialing and practice; (4) conducts and supports studies and evaluations of physician, dentist, physician assistant, podiatrist and clinical psychologist personnel requirements, distribution and availability, and cooperates with other components of the Bureau and Agency in such studies; (5) analyzes and interprets physician, dental, physician assistant, podiatrists and clinical psychologists programmatic data collected from a variety of sources; (6) conducts, supports, or obtains analytical studies to determine the present and future supply and requirements of physicians, dentists, physician assistants, podiatrists and clinical psychologists by specialty and geographic location, including the linkages between their training and practice characteristics; (7) conducts and supports studies to determine potential national goals for the training and distribution of physicians in graduate medical education programs and develops alternative strategies to accomplish these goals; (8) supports and conducts programs with respect to activities associated with the international migration, domestic training, and utilization of foreign medical graduates and U.S. citizens studying abroad; (9) maintains liaison with relevant health professional groups and others, including consumers, having common interest in the Nation's capacity to deliver health services; (10) provides consultation and technical assistance to public and private organizations, agencies, and institutions, including Regional Offices, other agencies of the Federal Government, and international agencies and foreign governments on all aspects of the Division's functions; (11) provides administrative and staff support for the Advisory Committee on Training and Primary Care Medicine and Dentistry and for the Council on Graduate Medical Education; (12) represents the Bureau, Agency and Federal Government, as designated, on national committees and/or the Accreditation Council for Graduate Medical Education (ACGME) and the Accreditation Council for Continuing Medical Education (ACCME); (13) administers support programs for the development, improvement, and the operation of general, pediatric, and public health dental educational programs; (14) designs, administers and supports activities relating to dentists; (15) provides technical assistance and consultation to grantee institutions and

other governmental and private organizations on the operation of these educational programs; (16) promotes the dissemination and application of findings arising from programs supported; (17) develops congressional and other mandated or special program-specific reports and publications on dental educational processes, programs and approaches; and (18) promotes, plans, and develops collaborative educational activities in clinical psychology.

Division of Student Loans and Scholarships (RPD)

Serves as the focal point for overseeing loan and scholarship programs supporting health professionals. Specifically: (1) Directs and administers the Health Professions and Nursing Student Loan and Scholarship Programs, the Federal Assistance to Disadvantaged Health Professions Scholarship Program, the Health Educational Assistance Loan Program, and the Primary Care Loan Program; (2) monitors and assesses educational and financial institutions with respect to capabilities and management of Federal support for students and of tracking of obligatory service requirements; (3) develops and conducts training activities for staff of educational and financial institutions; (4) maintains liaison with and provides assistance to program-related public and private professional organizations and institutions; (5) maintains liaison with the Office of the General Counsel, and the Office of the Inspector General, DHHS, components of the Department of Education and the Department of Defense, and State agencies concerning student assistance; (6) coordinates financial aspects of programs with educational institutions; and (7) develops program data needs, formats, and reporting requirements, including collection, collation, analysis and dissemination of data.

Division of Diversity and Interdisciplinary Education (RPF)

Serves as the principal focal point for interdisciplinary health professions issues and programs, including geriatric training, and for activities to increase the diversity of the health professional workforce. Specifically: (1) Provides leadership and direction for the development and implementation of Bureau objectives as they relate to diverse and disadvantaged populations; (2) develops and recommends health resources and health career opportunities for diverse and disadvantaged populations; (3) initiates, stimulates, supports, coordinates, and evaluates Bureau programs for improving the availability and accessibility of health careers for diverse and disadvantaged populations; (4) conducts special studies and collects baseline data to identify specific factors contributing to the health and health-related problems of diverse and disadvantaged populations, and to develop strategies for improving health services and career opportunities for diverse and disadvantaged populations; (5) conducts extramural programs, including the use of grants and contracts, specifically designed to promote equity in access to health careers; (6) promotes, designs, supports and administers activities relating to the planning and development of nationally integrated health professions education programs; (7) promotes, plans and develops collaborative, interdisciplinary activities in the specialty areas of behavioral/mental health, rural health, geriatrics and the associated health professions, and other new and developing health disciplines; (8) promotes quality improvement in health professions education through collaboration and partnerships with national and international institutes and centers for quality improvement; (9) promotes and supports academic-community partnerships whose goal is the development of interdisciplinary, community-based programs designed to improve access to health care through improving the quality of health professions education and training; (10) serves as the Federal focus for the development and improvement of education for professional public health, preventive medicine, environmental health, and health administration practice, including undergraduate, graduate, and continuing professional development; and (11) provides administrative and staff support for the Advisory Committee on Interdisciplinary, Community-Based Linkages.

Division of Practitioner Data Banks (RPG)

Coordinates with the Department and other Federal entities, State licensing boards, and national, State and local professional organizations to promote quality assurance efforts and deter fraud and abuse by administering the National Practitioner Data Bank (NPDB) as authorized under Title IV of the Health Care Quality Improvement Act of 1986 and Section 5 of the Medicare and Medicaid Patient and Program Protection Act of 1987, and administering the Healthcare Integrity and Protection Data Bank (HIPDB) for the Office of Inspector General. Specifically: (1) Maintains active consultative relations with professional organizations, societies, and Federal agencies involved in the NPDB and HIPDB; (2) develops, proposes and monitors efforts for (a) credentials assessment, granting of privileges, and monitoring and evaluating programs for physicians, dentists, and other health care professionals including quality assurance, (b) professional review of specified medical events in the health care system including quality assurance, and (c) risk management and utilization reviews; (3) encourages and supports evaluation and demonstration projects and research concerning quality assurance, medical liability and malpractice; (4) conducts and supports research based on NPDB and HIPDB information; (5) works with the Secretary's office to provide technical assistance to States undertaking malpractice reform; and (6) maintains liaison with the Office of the General Counsel and the Office of the Inspector General, HHS, concerning practitioner licensing and data bank issues.

Section RP–30, Delegations of Authority

All delegations of authority and re-delegations of authority made to HRSA officials that were in effect immediately prior to this reorganization, and that are consistent with this reorganization, shall continue in effect pending further re-delegation.

This reorganization is effective January 4, 2010.

Dated: December 28, 2009.

Mary K. Wakefield,

Administrator.

[FR Doc. E9–31201 Filed 1–4–10; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2009–0127]

Privacy Act of 1974; Department of Homeland Security U.S. Immigration and Customs Enforcement—009 External Investigations System of Records

AGENCY: Privacy Office, DHS.

ACTION: Notice of Privacy Act system of records.

SUMMARY: In accordance with the Privacy Act of 1974 the Department of Homeland Security is updating and reissuing a system of records notice titled, ''Department of Homeland Security U.S. Immigration and Customs

Enforcement—009 External Investigations System of Records.'' Categories of individuals, purpose, and routine uses of the system of records have been updated to clarify the nature of the law enforcement investigatory records maintained by U.S. Immigration and Customs Enforcement. Specifically, the amended system of records will include certain investigatory records that are generated prior to the creation of an official case file, certain records pertaining to immigration status inquiries that do not constitute an official criminal investigation, and certain records pertaining to immigration and criminal background checks that are conducted on behalf of the legislative and executive branches of the U.S. Government. The Privacy Act exemptions for this system go unchanged and the Final Rule remains in place. This updated system will continue to be included the Department's inventory of record systems.

DATES: Written comments must be submitted on or before February 4, 2010. This amended system will be effective February 4, 2010.

ADDRESSES: You may submit comments, identified by docket number DHS–2009–0127 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 703–483–2999.
- *Mail:* Mary Ellen Callahan, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Lyn Rahilly (202–732–3300), Privacy Officer, U.S. Immigration and Customs Enforcement, Washington, DC 20536. For privacy issues please contact: Mary Ellen Callahan (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

U.S. Immigration and Customs Enforcement (ICE) is the largest investigative branch of the Department of Homeland Security (DHS). The agency was created to more effectively enforce our immigration and customs laws and to protect the United States against terrorist attacks. ICE does this by targeting the people, money and materials that support terrorism and other criminal activities. ICE investigates on its own and in conjunction with other agencies a broad range of illegal activities, such as terrorism, organized crime, gangs, child exploitation, and intellectual property violations.

DHS is updating and reissuing a system of records notice titled ''DHS/ICE—009 External Investigations System of Records.'' The purpose of this update is to add and modify the categories of individuals, purpose statement, and routine uses for the system of records in order to clarify the nature of the law enforcement investigatory records maintained by ICE. The general purpose of this system of records is to document external audits, inquiries and investigations performed by ICE pertaining to suspected violations of laws regulating the movement of people and goods into and out of the United States in addition to other violations of other laws within ICE's jurisdiction; to facilitate communication between ICE and foreign and domestic law enforcement agencies for the purpose of enforcement and administration of laws, including immigration and customs laws; and to provide appropriate notification to victims in accordance with Federal victim protection laws. With this amendment, the purpose statement has been updated to include the following: To support inquiries and investigations performed to enforce the administrative provisions of the Immigration and Nationality Act (INA); to support requests from the U.S. Congress relating to potential recipients of private immigration relief; and to identify potential criminal activity, immigration violations, and threats to homeland security; to uphold and enforce the law; and to ensure public safety.

The legal authority for the operation of this system is the Homeland Security Act of 2002 (6 U.S.C. 201–203); the Immigration and Nationality Act, as amended (Title 8, United States Code, ''Aliens and Nationality''); Title 18, United States Code, ''Crimes''; Title 19, United States Code, ''Customs Duties''; 22 U.S.C. 2778; 40 U.S.C. 1315; 50 U.S.C. 1701 and 2410.

With this update and republication of the DHS/ICE—009 External Investigation System of Records, the categories of records and individuals has been expanded to cover certain investigatory records that are generated prior to the creation of an official case file, certain records pertaining to immigration status inquiries that do not constitute an official criminal investigation, records pertaining to employment eligibility inquiries and investigations, records pertaining to law enforcement investigations of U.S. export control violations, and certain records pertaining to immigration and criminal background checks that are conducted on behalf of the legislative and executive branches of the U.S. Government.

New routine uses are proposed to:

(1) Cover data sharing between ICE and other Executive Branch Departments for the purpose of facilitating their missions, including the Department of State (DOS) and the Department of Justice's (DOJ) Organized Crime Drug Enforcement Task Force (OCDETF) Program and the International Organized Crime Intelligence and Operations Center (IOC–2). This routine use is compatible with the general criminal and immigration law enforcement purposes of this system of records.

(2) Allow for sharing with Federal law enforcement and/or regulatory agencies, technical or subject matter experts, or any other entities involved in or assisting with ICE's law enforcement efforts pertaining to suspected or confirmed export violations in accordance with Federal export laws. This routine use is compatible with the purpose of the system of records in that it allows ICE to obtain information necessary to carry on its investigations into violations of Federal export laws.

(3) Allow for sharing of information with the U.S. Senate Committee on the Judiciary or the U.S. House of Representatives Committee on the Judiciary and the Office of Management and Budget (OMB) on individuals who are potential recipients for private immigration relief. This routine use is compatible with the purpose of the system of records in that it allows ICE to provide information from this system of records requested by Congress about an individual Congress is considering for private immigration relief.

(4) Allow data sharing between ICE and other organizations for the purpose of law enforcement intelligence. This routine use is compatible with the stated purpose of the system to identify criminal activity and other threats and to ensure public safety.

(5) Allow data sharing between ICE and other law enforcement agencies for the purpose of collaboration, coordination, and de-confliction of

cases. This routine use is compatible with the stated purpose of the system to identify criminal activity and other threats and to ensure public safety.

An existing routine use is updated to cover all potential data sharing partners ICE may engage with, including organizations and authorities that may not be law enforcement agencies.

This system is exempt from certain provisions of the Privacy Act to avoid compromise of law enforcement interests and information.

II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR Part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses to which personally identifiable information is put, and to assist individuals to more easily find such files within the agency. Below is the description of the DHS/ICE—009 External Investigations System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget (OMB) and to Congress.

System of Records DHS/ICE–009

SYSTEM NAME:

ICE External Investigations.

SECURITY CLASSIFICATION:

Unclassified, and Law Enforcement Sensitive (LES).

SYSTEM LOCATION:

Records are maintained at U.S. Immigration and Customs Enforcement Headquarters in Washington, DC and in field offices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Categories of individuals covered by this system include:

(1) Individuals who are the subjects of current or previous law enforcement investigations into violations of U.S. customs and immigration laws, as well as other laws and regulations within ICE's jurisdiction, including investigations led by other domestic or foreign agencies where ICE is providing support and assistance;

(2) Individuals who are the subjects of investigatory referrals from other agencies, tips, and other leads acted on by ICE pertaining to potential violations of U.S. customs and immigration law, as well as other laws and regulations within ICE's jurisdiction;

(3) Individuals who are or have been the subject of inquiries or investigations conducted by ICE related to the enforcement of the employment control provisions of the Immigration and Nationality Act (INA) and related criminal statutes including individuals who are being investigated or have been investigated to determine whether their employment-related activities are in violation of the employment control provisions of the INA and/or related criminal statutes; individuals who employ others in their individual capacity whether related to a business activity or not; and individuals who have submitted completed Form I–9 (Employment Eligibility Verification Form) and other documentation to establish identity and work eligibility/authorization under the employment control provisions of the INA;

(4) Individuals who are being considered for private immigration relief by the U.S. Senate Committee on the Judiciary or the U.S. House of Representatives Committee on the Judiciary;

(5) Victims and witnesses in ICE law enforcement investigations described above;

(6) Fugitives with outstanding Federal or State warrants;

(7) Operators of vehicles crossing U.S. borders who are the subject of an ICE investigation, including but not limited to, drivers of automobiles, private yacht masters, private pilots arriving in or leaving the United States; and

(8) Regulatory and licensing agency personnel and other individuals who are involved with or supporting law enforcement investigations pertaining to U.S. export control matters conducted by ICE.

CATEGORIES OF RECORDS IN THE SYSTEM:

Categories of records in this system may include:

Subject Information:

- Name and Aliases;
- Addresses;
- Social Security Number;
- Armed Forces Number;
- Alien Registration number;
- Date and place of birth;
- Citizenship;
- Passport and visa information;
- License information for owners and operators of vehicles, aircraft, and vessels;
- Information related to the subject's entry and exit of the United States; and
- Other biographical information.

Victim and Witness Records:

- Name;
- Contact information, including address and telephone numbers;
- Sworn statements, reports of interview, and testimony; and
- Other relevant biographical and background information, such as employment, and education.

Investigatory and Evidentiary Records:

- ICE case number;
- Incident reports;
- I–9 Forms and other records pertaining to employment control audits, inquiries, and investigations;
- Reports and memoranda prepared by investigators during the course of the investigation or received from other agencies participating in or having information relevant to the investigation;
- Law enforcement intelligence reports;
- Electronic surveillance reports;
- Asset ownership information such as registration data and license data, for vehicles, vessels, merchandise, goods and other assets;
- Information about duties and penalties owed, assessed, and paid;
- Information about goods and merchandise, such as import and export forms and declarations filed, lab or analytical reports, valuation and classification of goods, and other relevant data;
- Correspondence and court filings;
- Information received from other governmental agencies, confidential sources, and other sources pertaining to an investigation, as well as investigatory referrals from other agencies, tips, and other leads pertaining to potential

violations of U.S. customs and immigration law, as well as other laws and regulations within ICE's jurisdiction; and

• Any other evidence in any form, including papers, photographs, electronic recordings, electronic data, or video records that was obtained, seized, or otherwise lawfully acquired from any source during the course of the investigation.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 6 U.S.C. 201–203; 18 U.S.C. 554; 19 U.S.C. 66; 19 U.S.C. 1431; 19 U.S.C. 1603; 19 U.S.C. 2072; 22 U.S.C. 2778; 40 U.S.C. 1315; 50 U.S.C. 1701; 50 U.S.C. 2410; Title 18, United States Code; Title 19, United States Code; 31 CFR part 103; Title 40 United States Code.

PURPOSE(S):

(1) To document external audits, inquiries and investigations performed by ICE pertaining to suspected violations of laws regulating the movement of people and goods into and out of the United States in addition to other violations of other laws within ICE's jurisdiction;

(2) To facilitate communication between ICE and foreign and domestic law enforcement agencies for the purpose of enforcement and administration of laws, including immigration and customs laws;

(3) To provide appropriate notification to victims in accordance with Federal victim protection laws;

(4) To support inquiries and investigations performed to enforce the administrative provisions of the INA;

(5) To support requests from the U.S. Senate Committee on the Judiciary and the U.S. House of Representatives Committee on the Judiciary relating to proposed recipients of private immigration relief; and

(6) To identify potential criminal activity, immigration violations, and threats to homeland security; to uphold and enforce the law; and to ensure public safety.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. The Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) that rely upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, Tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To an appropriate Federal, State, local, Tribal, foreign, or international agency, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit and disclosure is appropriate to the proper performance of the official duties of the person making the request.

I. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings or in response to a subpoena.

J. To third parties during the course of a law enforcement investigation to the extent necessary to obtain information pertinent to the investigation, provided disclosure is appropriate to the proper performance of the official duties of the officer making the disclosure.

K. To an appropriate Federal law enforcement and/or regulatory agency, technical or subject matter expert, or any other entity involved in or assisting with law enforcement efforts pertaining to suspected or confirmed export violations in accordance with Federal export laws, including the Arms Export Control Act, 22 U.S.C. 2778 and the Export Administration Act, 50 U.S.C. 2410.

L. To Federal and foreign government intelligence or counterterrorism agencies or components where DHS becomes aware of an indication of a threat or potential threat to national or international security, or where such use is to assist in anti-terrorism efforts and disclosure is appropriate to the

proper performance of the official duties of the person making the disclosure.

M. To victims regarding custodial information, such as release on bond, order of supervision, removal from the U.S., or death in custody, about an individual who is the subject of a criminal or immigration investigation, proceeding, or prosecution.

N. To any person or entity to the extent necessary to prevent immediate loss of life or serious bodily injury, such as disclosure of custodial release information to witnesses who have received threats from individuals in custody;

O. To international, foreign, and intergovernmental agencies, authorities, and organizations in accordance with law and formal or informal international arrangements.

P. To a public or professional licensing organization when such information indicates, either by itself or in combination with other information, a violation or potential violation of professional standards, or reflects on the moral, educational, or professional qualifications of an individual who is licensed or who is seeking to become licensed.

Q. To a Federal, State, Tribal, local or foreign government agency or organization, or international organization, lawfully engaged in collecting law enforcement intelligence information, whether civil or criminal, or charged with investigating, prosecuting, enforcing or implementing civil or criminal laws, related rules, regulations or orders, to enable these entities to carry out their law enforcement responsibilities, including the collection of law enforcement intelligence.

R. To the Department of State when it requires information to consider and/or provide an informed response to a request for information from a foreign, international, or intergovernmental agency, authority, or organization about an alien or an enforcement operation with transnational implications.

S. To a criminal, civil, or regulatory law enforcement authority (whether Federal, State, local, territorial, Tribal, international, or foreign) where the information is necessary for collaboration, coordination, and de-confliction of investigative matters, to avoid duplicative or disruptive efforts, and for the safety of law enforcement officers who may be working on related investigations.

T. To the Department of Justice to facilitate the missions of the Organized Crime Drug Enforcement Task Force (OCDETF) Program and the International Organized Crime Intelligence and Operations Center (IOC–2).

U. To the U.S. Senate Committee on the Judiciary or the U.S. House of Representatives Committee on the Judiciary when necessary to inform members of Congress about an alien who is being considered for private immigration relief.

V. To the Office of Management and Budget (OMB) in connection with the review of private relief legislation as set forth in OMB Circular No. A–19 at any stage of the legislative coordination and clearance process as set forth in the Circular.

W. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

RETRIEVABILITY:

Records are retrieved by individual's name, date of birth, ICE investigative file number, Social Security Number, driver's license number, pilot's license number, vehicle license plate number, address, home telephone number, passport number, citizenship, country of birth, armed forces number, and date of entry into the United States.

SAFEGUARDS:

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated system security access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions. The system maintains a real-time auditing function of individuals who access the system. Additional safeguards may vary by component and program.

RETENTION AND DISPOSAL:

Investigative files concerning munitions control cases are permanent records that are transferred to the Federal Records Center after one year, and then transferred to the National Archives and Records Administration (NARA) fifteen years after case closure. Records for other closed investigative cases are maintained in the investigating ICE Headquarters or field office for either one year or five years after the end of the fiscal year in which the related investigative file is closed, depending on the category of the case. Those records are then transferred to the Federal Records Center where they are held for periods of time ranging from five to twenty-five years, depending on the category of the case, after which they are destroyed. Destruction is by burning or shredding. DHS is proposing to retain electronic records associated with law enforcement investigations for seventy-five years after case closure, after which they will be destroyed. An updated schedule for investigative records is under review and will be submitted to NARA for approval.

SYSTEM MANAGER AND ADDRESS:

Immigration and Customs Enforcement, Mission Support Division, Unit Chief, Executive Information Unit/Program Management Oversight (EIU/PMO), Potomac Center North, 500 12th Street, SW., Washington, DC 20536.

NOTIFICATION PROCEDURE:

The Secretary of Homeland Security has exempted this system from the notification, access, and amendment procedures of the Privacy Act because it is a law enforcement system. However, ICE will consider requests to determine whether or not information may be released. Thus, individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the U.S. Immigration and Customs Enforcement FOIA Officer, whose contact information can be found at *http://www.dhs.gov/foia* under ''contacts.'' If an individual believes more than one component maintains Privacy Act records concerning him or her, the

individual may submit the request to the Chief Privacy Officer and Chief Freedom of Information Act Officer, Department of Homeland Security, 245 Murray Drive, SW., Building 410, STOP–0550, Washington, DC 20528.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR Part 5. You must first verify your identity, meaning that you must provide your full name, current address, and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Chief Privacy Officer and Chief Freedom of Information Act Officer, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you;
- Identify which component(s) of the Department you believe may have the information about you;
- Specify when you believe the records would have been created;
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records; and
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information, the component(s) may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

RECORD ACCESS PROCEDURES:

See ''Notification procedure'' above.

CONTESTING RECORD PROCEDURES:

See ''Notification procedure'' above.

RECORD SOURCE CATEGORIES:

ICE may receive information in the course of its law enforcement investigations from nearly any source. Sources of information include: domestic and foreign governmental and quasi-governmental agencies and data systems, public records, commercial data aggregators, import and export records systems, immigration and alien admission records systems, members of the public, subjects of investigation, victims, witnesses, confidential sources, and those with knowledge of the alleged activity.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

The Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act, subject to the limitations set forth in 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5) and (e)(8); (f); and (g) of the Privacy Act pursuant to 5 U.S.C. 552a(j)(2). Additionally, the Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act, subject to the limitation set forth in 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5) and (e)(8); (f); and (g) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2). To the extent a record contains information from other exempt systems of records, ICE will rely on the exemptions claimed for those systems.

Dated: December 29, 2009.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. E9–31269 Filed 1–4–10; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2009–0123]

Privacy Act of 1974; United States Citizenship and Immigration Services—010 Asylum Information and Pre-Screening System of Records

AGENCY: Privacy Office; DHS.

ACTION: Notice of Privacy Act systems of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of Homeland Security proposes to add a new system of records to the Department of Homeland Security's inventory, entitled Unites States Citizenship and Immigration Services-010 Asylum Information and Pre-Screening System of Records. This new system of records is composed of two existing legacy IT systems: The Refugees, Asylum, and Parole System and the Asylum Pre-Screening System. Refugees, Asylum, and Parole System and Asylum Pre-Screening System have been in operation prior to the publication of this system of records notice as both systems were deemed to contain active records for only non-United States citizens and non-legal permanent residents. Refugees, Asylum, and Parole System and Asylum Pre-Screening System are used to capture information pertaining to asylum applications, credible fear and reasonable fear screening processes, and applications for benefits provided by Section 203 of the Nicaraguan Adjustment and Central American Relief Act. This newly established system will be included in the Department of Homeland Security's inventory of record systems.

DATES: Submit comments on or before February 4, 2010. This new system will be effective February 4, 2010.

ADDRESSES: You may submit comments, identified by Docket Number DHS–2009–0123, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 703–483–2999.
- *Mail:* Mary Ellen Callahan, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this notice. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions please contact: United States Citizenship and Immigration Services (202–272–1663), 20 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529. For privacy issues please contact: Mary Ellen Callahan (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

As set forth in section 451(b) of the Homeland Security Act of 2002, Congress charged United States Citizenship and Immigration Services (USCIS) with the administration of the asylum program, which provides protection to qualified individuals in the United States who have suffered past persecution or have a well-founded fear of future persecution in their country of origin as outlined under 8 CFR part 208. USCIS is also responsible for the adjudication of the benefit program established by section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA 203), in

accordance with 8 CFR part 241, and the maintenance and administration of the credible fear and reasonable fear screening processes, in accordance with 8 CFR 208.30 and 208.31.

In order to carry out its statutory obligations in administering these benefit programs, USCIS has established the Asylum Information and Pre-Screening System of Records to facilitate every aspect of intake, adjudication, and review of the specified programs.

The Asylum Information and Pre-Screening System tracks case status and facilitate the scheduling of appointments and interviews as well as to issue notices at several stages of the adjudication process and to generate decision documents. This system also initiates, facilitates and tracks security and background check screening, and prevents the approval of any benefit prior to the review and completion of all security checks. Finally, the system provides a fully developed and flexible means for analyzing and managing program workflows and provides the Asylum Program with statistical reports to assist with oversight of production and processing goals.

The Asylum Information and Pre-Screening System is composed of two IT systems: Refugees, Asylum and Parole System (RAPS) and Asylum Pre-Screening System (APSS). RAPS is a comprehensive case management tool that enables USCIS to handle and process applications for asylum pursuant to section 208 of the Immigration and Nationality Act (Act) and applications for adjustment pursuant to section 203 of NACARA. DHS offices worldwide can access RAPS as a resource of current and historic immigration status information on more than one million applicants. DHS officials can use RAPS to verify the status of asylum applicants, asylees, and their dependents to assist with the verification of an individual's immigration history in the course of a review of visa petitions and other benefit applications as well.

APSS is a program-focused case management system that supports USCIS in the screening of individuals in the expedited removal process and of individuals subject to reinstatement of a final order of removal or an administrative removal order based on a conviction of an aggravated felony to determine whether they have credible fear or reasonable fear, thus providing the individual with an opportunity for a hearing before an immigration judge. Case tracking, application processing, and workflow management are carried out for all credible fear and reasonable fear screenings using APSS.

II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records. A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses to which personally identifiable information is put, and to assist the individual to more easily find such files within the agency. Below is a description of DHS/USCIS–010 system of records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of these new systems of records to the Office of Management and Budget and to the Congress.

System of Records DHS/USCIS–010

SYSTEM NAME:

United States Citizenship and Immigration Services Asylum Information and Pre-Screening System.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

The system is currently located at the Department of Justice (DOJ) Data Processing Center, Dallas, Texas, with data access by Department of Homeland Security (DHS) users including, but not limited to, U.S. Citizenship and Immigration Services (USCIS) users from Headquarters, Regional, and District Offices, Service Centers, the National Benefit Center and Asylum Offices.

CATEGORIES OF INDIVIDUALS COVERED BY THIS SYSTEM:

Categories of individuals covered by Asylum Information and Pre-Screening System include:

- Individuals covered by provisions of section 208 of the Immigration and Nationality Act (Act), as amended, who have applied with USCIS for asylum on Form I–589 (Application for Asylum and for Withholding of Removal) and/or for suspension of deportation/special rule cancellation of removal under section 203 of NACARA on Form I–881 (Application for Suspension of Deportation or Special Rule Cancellation of Removal);
- Individuals who were referred to a USCIS Asylum Officer for a credible fear or reasonable fear screening determination under 8 CFR part 208, subpart B, after having expressed a fear of return to the intended country of removal because of fear of persecution or torture, during the expedited removal process under 8 U.S.C. 1225(b), the administrative removal processes under 8 U.S.C. 1228(b) (removal of certain aliens convicted of aggravated felonies), or 8 U.S.C. 1231(a)(5) (reinstatement of certain prior removal orders);
- The spouse and children of a principal asylum applicant properly included in an asylum application; and
- Persons who complete asylum applications on behalf of the asylum applicant (e.g., attorneys, form preparers, representatives).

CATEGORIES OF RECORDS IN THE SYSTEM:

Categories of records in Asylum Information and Pre-Screening System include:

- Name,
- Alias,
- Alien number (A-number),
- Address,
- Sex,
- Marital status,
- Date of birth,
- Country of birth,
- Country of nationality,
- Ethnic origin,
- Religion,
- Port and date of entry,
- Social Security number (if available),
- Status at entry, filing date of asylum application,
- Results of security checks,
- Languages spoken.
- Claimed basis of eligibility for benefit(s) sought,

- Case status,
- Case history,
- Employment authorization eligibility and application history.
- Information from other systems of records (or their successor systems) such as Removable Alien Records System (DHS/ICE–011, published May 5, 2009, 74 FR 20719), TECS (DHS/CBP–011, published December 1, 2008, 73 FR 77778), the Records and Management Information System (JUSTICE/EOIR–001, published May 11, 2004, 69 FR 26179), and the USCIS Benefits Information System (BIS) (DHS/USCIS–003, published September 29, 2008, 73 FR 56596).

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

8 U.S.C. 1101, 1103, 1158, 1225, 1228, and 1522.

PURPOSE(S):

The purpose of Asylum Information and Pre-Screening System is to manage, control, and track the following types of adjudications:

A. Affirmative asylum applications and

B. Applications filed with USCIS for suspension of deportation/special rule cancellation of removal pursuant to section 203 of NACARA.

C. Credible fear screening cases under 8 U.S.C. 1225(b)(1)(B) and

D. Reasonable fear screening cases under 8 CFR 208.31.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. The Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) that rely upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm as limited by the terms and conditions of 8 CFR 208.6.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations and the limitations of Title 8, Code of Federal Regulations (8 CFR) § 208.6 on disclosure as are applicable to DHS officers and employees. 8 CFR 208.6 prohibits the disclosure to third parties of information contained in or pertaining to asylum applications, credible fear determinations, and reasonable fear determinations except under certain limited circumstances.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To any element of the U.S. Intelligence Community, or any other Federal or state agency having a counterterrorism function, provided that the need to examine the information or the request is made in connection with its authorized intelligence or counterterrorism function or functions and the information received will be used for the authorized purpose for which it is requested.

I. To other Federal, State, tribal, and local government agencies, foreign governments, intergovernmental organizations and other individuals and organizations as necessary and proper during the course of an investigation, processing of a matter, or during a proceeding within the purview of U.S. or foreign immigration and nationality laws, to elicit or provide information to enable DHS to carry out its lawful functions and mandates, or to enable the lawful functions and mandates of other federal, state, tribal, and local government agencies, foreign governments, or intergovernmental organizations as limited by the terms and conditions of 8 CFR 208.6 and any waivers issued by the Secretary.

J. To a Federal, State, tribal, or local government agency or foreign government seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law.

K. To appropriate agencies, entities, and persons when:

1. It is suspected or confirmed that the security or confidentiality of information in the system of records has been compromised;

2. It is determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) that rely upon the compromised information; and

3. The disclosure is made to such agencies, entities, and persons when reasonably necessary to assist in connection with efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

The records are stored in a database on magnetic disk and tape. A record, or any part thereof, may be printed and stored in the applicant's A-file.

RETRIEVABLITY:

Records are indexed and retrievable by name and/or A-file number.

SAFEGUARDS:

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions. The system maintains a real-time auditing function of individuals who access the system. Additional safeguards may vary by component and program.

RETENTION AND DISPOSAL:

The following USCIS proposal for retention and disposal is pending approval by NARA:

Master File automated records will be maintained for 25 years after the case is closed, and then archived at the DOJ Data Processing Center or its designated successor, for 75 years and then destroyed. Copies of system data may be stored in the individual's Alien File (NCI–85–80–5/1).

Reports used to facilitate case processing that contains personally identifiable information will be maintained at Headquarters and Asylum Field Offices and destroyed when no longer needed.

SYSTEM MANAGER AND ADDRESS:

The Chief of the Asylum Division, Refugee, Asylum and International Operations Directorate, U.S. Citizenship and Immigration Services, Suite 3300, 20 Massachusetts Avenue, NW., Washington, DC 20529.

NOTIFICATION PROCEDURE:

The Secretary of Homeland Security has exempted this system from the notification, access, and amendment procedures of the Privacy Act because of criminal, civil, and administrative enforcement requirements. However, USCIS will consider individual requests to determine whether or not information may be released. Thus, individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the Headquarters or component's FOIA Officer, whose contact information can be found at *http://www.dhs.gov/foia* under ''contacts.'' If an individual believes more than one component maintains Privacy Act records concerning him or her the individual may submit the request to the Chief Privacy Officer, Department of Homeland Security, 245 Murray Drive, SW., Building 410, STOP–0655, Washington, DC 20528.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Identify which component(s) of the Department you believe may have the information about you,
- Specify when you believe the records would have been created,
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

RECORD ACCESS PROCEDURES:

See ''Notification procedure'' above.

CONTESTING RECORD PROCEDURES:

See ''Notification procedure'' above.

RECORD SOURCE CATEGORIES:

Records are obtained from the individuals who are the subject of these records. Information contained in this system may also be supplied by DHS, other U.S. Federal, State, tribal, or local government agencies, foreign government agencies, and international organizations.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Dated: December 29, 2009.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. E9–31267 Filed 1–4–10; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2009–0104]

Privacy Act of 1974; Department of Homeland Security U.S. Immigration and Customs Enforcement—001 Student and Exchange Visitor Information System (SEVIS) System of Records

AGENCY: Privacy Office, DHS.

ACTION: Modification to an existing system of records.

SUMMARY: The Department of Homeland Security U.S. Immigration and Customs Enforcement is modifying an existing system of records titled Student and Exchange Visitor Information System (Mar. 22, 2005), to reflect proposed changes in the personal information that will be collected and maintained on individuals. In conjunction with its development and launch of the next generation Student and Exchange Visitor Information System application, called Student and Exchange Visitor Information System II, U.S. Immigration and Customs Enforcement is modifying the Student and Exchange Visitor Information System system of records notice to propose the collection of additional information on students, exchange visitors, and their dependents who are in the U.S. on F, M, or J classes of admission (F/M/J nonimmigrants), and officials of approved schools for and designated sponsors of F/M/J nonimmigrants. Like its predecessor, Student and Exchange Visitor Information System II is an information system that tracks and monitors F/M/J nonimmigrants throughout the duration of approved participation within the U.S. education system or designated exchange visitor program. This Student

and Exchange Visitor Information System II system of records notice updates categories of individuals; categories of records; purpose of the system; routine uses; policies and practices for storing, retrieving, accessing, retaining, and disposing of records in the system; and record access procedures. Additionally, this notice includes non-substantive changes to simplify the formatting and text of the previously published notice. A Privacy Impact Assessment on Student and Exchange Visitor Information System II that describes the new system in detail is being published concurrently with this notice.

DATES: Submit comments on or before February 4, 2010. This amended system will be effective February 4, 2010.

ADDRESSES: You may submit comments, identified by docket number DHS–2009–0104 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 703–483–2999.
- *Mail:* Mary Ellen Callahan, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions please contact: ITMB Chief, ICE Student and Exchange Visitor Program, 2450 Crystal Drive, Tower 1 9th Floor, Arlington, VA 22201, by telephone (703) 603–3400 or by facsimile (703) 603–3598. For privacy issues please contact: Mary Ellen Callahan (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to Section 641 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law 104–208, 110 Stat. 3009, as amended, and other statutes, Congress mandated that the Department of Homeland Security (DHS) in consultation with the Department of State (DOS) develop a national system to collect and maintain pertinent information on nonimmigrant students, exchange visitors, and their dependents admitted to the U.S. under an F, M, or J class of admission (F/M/J nonimmigrants), and the schools and exchange visitor program sponsors that host these individuals in the United States. In accordance with that mandate the Immigration and Naturalization Service, the predecessor to U.S. Immigration and Customs Enforcement (ICE), developed the Student and Exchange Visitor Information System (SEVIS) and deployed the system in January 2003. In 2005, after SEVIS was transferred to ICE, DHS published a system of records notice (SORN) titled DHS/ICE–001, Student and Exchange Visitor Information System, (70 FR 14477, Mar. 22, 2005), and a PIA that described the SEVIS application and data.

Currently, ICE is developing the next generation SEVIS system, called SEVIS II, which will serve the same purpose and provide the same capabilities as the original system, plus additional features such as user accounts for F/M/J nonimmigrants. SEVIS II will deploy in two phases; the first phase will occur in early 2010 and will allow SEVIS II users, such as students, exchange visitors, schools and sponsors, to establish their SEVIS II customer accounts on a voluntary basis. The personal data collected from individuals during the first phase is limited to user account data. The first phase will also support the periodic migration of SEVIS data to SEVIS II. During the first phase, users that elect to establish SEVIS II accounts may view their migrated record and request correction of any incorrect information. The original SEVIS system will remain operational during the first phase.

The second and final phase of SEVIS II deployment will occur at a date yet to be determined. This phase will implement all other SEVIS II functionality as described in this PIA and SEVIS II will become the system of record in which all student and exchange visitor transactions described in this PIA will occur. With the full deployment of SEVIS II, ICE will migrate all data from and retire the original SEVIS system. ICE will retain a copy of the original SEVIS dataset separate from SEVIS II for seven (7) years in case it is needed for reference or to repopulate the SEVIS II system if a problem is identified with the data migration.

DHS is updating this notice to include the following substantive changes: (1) An update to the categories of individuals to include perspective and former nonimmigrants and their dependents to the U.S. on a F, M, or J class of admission; (2) categories of records to include the addition of SEVIS II account requirements; (3) purpose of the system to include the ability to identify and act on potential violations by schools, sponsors, and F, M, or J nonimmigrants; (4) several routine uses were updated to reflect the standard DHS routine uses; (5) the addition of routine uses to (a) permit disclosure of SEVIS data to relevant parties in litigation, including the courts, parties, opposing counsel and witnesses, (b) provide for other litigation disclosures, including during the course of settlement negotiations, (c) allow to disclose information to foreign governments about their citizens or permanent residents during a disaster or health emergency, (d) allow SEVIS to verify an F/M/J nonimmigrant's information when payment is made, and ensure it is credited to the right person, (e) allow Student and Exchange Visitors Program and schools/sponsors to exchange data to assist in the functions necessary to process and monitor individuals in the program, (f) allow for disclosure of SEVIS data to the DOS's Consolidated Consular Database (CCD) for use by consular officers and other CCD users, (g) support sharing with government agencies for the research and development software and technologies to the Student and Exchange Visitor Program; and (6) policies and practices for storing retrieving, accessing, retaining, and disposing of records in the system.

The new SEVIS II system will maintain personal information on officials of approved schools and designated sponsors that host F/M/J nonimmigrant students and exchange visitors. It also will maintain personal information on F/M/J nonimmigrants. The personal information collected under SEVIS II will be somewhat different than under the original SEVIS system. New personal data elements will be collected from F/M/J nonimmigrants and school/exchange visitor sponsor officials; the new data will primarily be used to establish SEVIS II user accounts for these individuals. In addition, limited personal information that was collected and maintained in the original SEVIS system will not be used by SEVIS II and therefore will not be migrated to the new system (i.e., Social Security Numbers, driver's license information).

In accordance with the Privacy Act of 1974 (Privacy Act), 5 U.S.C. 552a, the DHS is amending DHS/ICE–001, Student and Exchange Visitor Information System (SEVIS) SORN, to reflect changes in the personal information that will be maintained

with the deployment of SEVIS II. This amended system of records supports ICE's mandate to track and monitor F/M/J nonimmigrants throughout the duration of approved participation within the U.S. education system or designated exchange visitor program. The collection and maintenance of the information described in this amended SORN assists ICE and DOS's Bureau of Educational and Cultural Affairs in meeting their obligations and legislative mandate. This amended SORN is being published concurrently with the SEVIS II PIA. Pursuant to the final rule that exempts the SEVIS SORN from certain requirements of the Privacy Act (73 FR 63057, Oct. 23, 2008), portions or all of these records may be exempt from disclosure pursuant to 5 U.S.C. 552a(k)(2).

Consistent with DHS's information sharing mission, information stored in SEVIS II may be shared with other DHS components, as well as appropriate Federal, State, local, Tribal, foreign, or international government agencies. This sharing will only take place after DHS determines that the receiving component or agency has a need to know the information to carry out national security, law enforcement, immigration, intelligence, or other functions consistent with the routine uses set forth in this SORN.

II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses to their records are put, and to assist individuals to more easily find such files within the agency. Below is the description of DHS/ICE–001, Student and Exchange Visitor Information System (SEVIS) system of records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget and to Congress.

System of Records DHS/ICE–001

SYSTEM NAME:

Student and Exchange Visitor Information System (SEVIS).

SECURITY CLASSIFICATION:

Unclassified, sensitive.

SYSTEM LOCATION:

Records in the SEVIS II application are maintained in electronic form in a government-secured facility located in Rockville, Maryland and at a contingency site.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Categories of individuals covered by this system include: (1) Prospective, current and former nonimmigrants to the U.S. on an F–1, M–1, or J–1 class of admission and their dependents who have been admitted under an F–2, M–2, or J–2 class of admission (collectively, F/M/J nonimmigrants); (2) a proxy, parent or guardian of an F/M/J nonimmigrant; and (3) officials, owners, chief executives, and legal counsel of Student and Exchange Visitor Program (SEVP)-certified schools and designated exchange visitor sponsors.

F nonimmigrants are foreign students pursuing a full course of study in a college, university, seminary, conservatory, academic high school, private elementary school, other academic institution, or language training program in the U.S. that SEVP has certified to enroll foreign students. M nonimmigrants are foreign students pursuing a full course of study in a vocational or other recognized nonacademic institution (e.g., technical school) in the U.S. that SEVP has certified to enroll foreign students. J nonimmigrants are foreign nationals selected by a sponsor that the Department of State (DOS) has designated to participate in an exchange visitor program in the U.S.

CATEGORIES OF RECORDS IN THE SYSTEM:

Categories of records in this system include:

Biographical information for F/M/J nonimmigrants and school/sponsor officials used in the creation of SEVIS II user accounts, specifically names; U.S. domestic address; foreign address (F/M/J nonimmigrants only); date of birth; birth country and city; country of citizenship; country of legal permanent residence; username; e-mail addresses; the DHS-assigned Immigrant Identification Number (IIN); Alien Registration Number (A–Number) (for school/sponsor officials who are U.S. lawful permanent residents only); National Identity Number (for F/M/J nonimmigrants only); and passport information (number, issuing country, expiration date). This information would also be collected for any proxy, parent or guardian for an F/M/J nonimmigrant who is unable to create their own account due to age (under 13 years old), disability, or other reasons. The proxy, parent, or guardian would first need to create their own SEVIS II account before they could create an account for the F/M/J nonimmigrant.

F–1, M–1, or J–1 nonimmigrant educational and financial information, specifically program of study; school registration information; program completion or termination information; transfer information; leave of absence information and study abroad; extensions; change of education level; student ID number; I–901 fee payment information; and financial information (for F/M nonimmigrants, financial information includes data on source of funds—personal or school, and average annual cost—tuition, books, fees, and living expenses; for J nonimmigrants financial information includes total estimated financial support, financial organization name and support amount).

F/M/J nonimmigrant status and benefit information, specifically the DHS-assigned Fingerprint Identification Number (for individuals 14 years of age and older); U.S. visa number, issuing country, expiration date; class of admission; immigrant benefit application information (primarily reinstatement, employment authorization, 212e waiver, *etc.*); and arrival and departure information (port of entry, date of entry/exit).

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Public Law 104–208, Illegal Immigration Reform and Immigrant Responsibility Act of 1996; Public Law 106–215, Immigration and Naturalization Service Data Management Improvement Act of 2000;

Public Law 106–396, Visa Waiver Permanent Program Act of 2000; Public Law 107–56, USA PATRIOT Act; and Public Law 107–173, Enhanced Border Security and Visa Entry Reform Act of 2002. The collection of information is mandated by 8 CFR 214.2 (f), (j), (m), 8 CFR 214.3, 8 CFR 214.4, and 22 CFR part 62.

PURPOSE(S):

The purpose of this system of records is to track F, M and J nonimmigrants and their dependents during their stay in the U.S. This system allows DHS and DOS to administer the student and exchange visitor programs by certifying and designating schools and sponsors and ensuring their ongoing compliance with Federal requirements and regulations. The system also enables DHS and DOS to monitor the progress and status of lawfully admitted F/M/J nonimmigrants residing in the United States, to ensure they comply with the obligations of their U.S. admittance, and to maintain a history of their status-related activities. The system is used to identify and act on potential compliance violations by schools, sponsors, and F/M/J nonimmigrants. The system is also used to support other homeland security and immigration activities, such as deciding F/M/J nonimmigrants' requests for immigration benefits and for admission to the U.S. Finally, the system supports the analysis of information in the system for law enforcement, reporting, management, and other mission-related purposes.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (including United States Attorney Offices) or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation: (1) DHS or any component thereof; (2) any employee of DHS in his/her official capacity; (3) any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or (4) the United States or any agency thereof; is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. The Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual that rely upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, Tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To appropriate Federal, State, local, Tribal, or foreign governmental agencies or multilateral governmental organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, license, or treaty where DHS determines that the information would assist in the enforcement of civil or criminal laws.

I. To a court, magistrate, administrative tribunal, opposing counsel, parties, and witnesses, in the course of a civil or criminal proceeding before a court or adjudicative body when (a) DHS or any component thereof; or (b) any employee of DHS in his or her official capacity; or (c) any employee of DHS in his or her individual capacity where the agency has agreed to represent the employee; or (d) the United States, where DHS determines that litigation is likely to affect DHS or any of its components, is a party to litigation or has an interest in such litigation, and DHS determines that use of such records is relevant and necessary to the litigation, provided however that in each case, DHS determines that disclosure of the information to the recipient is a use of the information that is compatible with the purpose for which it was collected.

J. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings.

K. To an attorney or representative who is acting on behalf of an individual covered by this system of records for use in any proceeding before the Executive office for Immigration Review.

L. To clerks and judges of courts exercising naturalization jurisdiction for the purpose of filing petitions for naturalization and to enable such courts to determine eligibility for naturalization or grounds for revocation of naturalization.

M. To appropriate Federal, State, local, Tribal, or foreign governmental agencies or multilateral governmental organizations for the purpose of protecting the vital interests of a data subject or other persons, including to assist such agencies or organizations in preventing exposure to or transmission of a communicable or quarantinable disease or to combat other significant

public health threats; appropriate notice will be provided of any identified health threat or risk.

N. To foreign governments for the purpose of providing information about their citizens or permanent residents, or family members thereof, during local or national disasters or health emergencies.

O. To the U.S. Treasury Department and its contractors for the purpose of facilitating and tracking Student and Exchange Visitor Program fee payments made by F/M/J nonimmigrants.

P. To certified schools and designated exchange visitor sponsors participating in the Student and Exchange Visitor Program for the purpose of certification and designation, enrollment and monitoring of F/M/J nonimmigrants, audit, oversight, and compliance enforcement.

Q. To the U.S. Department of State for the purpose of visa issuance to F/M/J nonimmigrants; the operation of its Exchange Visitor Program; or the enforcement of and investigation into its visa and Exchange Visitor Program laws, regulations, and requirements.

R. To the Department of State in the processing of petitions or applications for benefits under the Immigration and Nationality Act, and all other immigration and nationality laws including treaties and reciprocal agreements.

S. To appropriate Federal, State, local, Tribal, or foreign governmental agencies or multilateral governmental organizations where DHS is aware of a need to utilize relevant data for purposes of testing new technology and systems for SEVIS II or other systems supporting the Student and Exchange Visitor Program.

T. To appropriate Federal, State, local, Tribal, or foreign government agencies or multinational government organizations where DHS desires to exchange relevant data for the purpose of developing new software or implementing new technologies for the purposes of data sharing to enhance the efficiency of the Student and Exchange Visitor Program or homeland security.

U. To a Federal, State, Tribal, local, international, or foreign government agency or entity for the purpose of consulting with that agency or entity: (1) To assist in making a determination regarding redress for an individual in connection with the operations of a DHS component or program; (2) for the purpose of verifying the identity of an individual seeking redress in connection with the operations of a DHS component or program; or (3) for the purpose of verifying the accuracy of information submitted by an individual who has requested such redress on behalf of another individual.

V. To a former employee of the Department for purposes of: responding to an official inquiry by a Federal, State, or local government entity or professional licensing authority, in accordance with applicable Department regulations; or facilitating communications with a former employee that may be necessary for personnel-related or other official purposes where the Department requires information and/or consultation assistance from the former employee regarding a matter within that person's former area of responsibility.

W. To a Federal State, or local agency, or other appropriate entities or individuals, or through established liaison channels to selected foreign governments, in order to provide intelligence, counterintelligence, or other information for the purposes of intelligence, counterintelligence, or antiterrorism activities authorized by U.S. law, Executive Order, or other applicable national security directive.

X. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

RETRIEVABILITY:

Records may be retrieved by Immigration Identification Number, name and school, name and citizenship country, name and entry detail, name and date of birth, and passport number.

SAFEGUARDS:

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RETENTION AND DISPOSAL:

Inputs will be deleted after the data has been transferred to the master file and verified. The master file will be retained for 75 years. System outputs are deleted or destroyed when no longer needed for agency business. Once SEVIS II terminates a non-government SEVIS II user account, the system retains user information for 75 years from the date of last transaction. Government user audit information will be retained for seven years. At this time, SEVP envisions destroying their SEVIS audit records seven years after the date SEVIS II is fully operational. The data from the legacy SEVIS will be retained for seven (7) years.

SYSTEM MANAGER AND ADDRESS:

ITMB Chief, ICE Student and Exchange Visitor Program, 2450 Crystal Drive, Tower 1 9th Floor, Arlington, VA 22201.

NOTIFICATION PROCEDURE:

The Secretary of Homeland Security has exempted this system from the notification, access, and amendment procedures of the Privacy Act because it is a law enforcement system. However, ICE will consider requests to determine whether or not information may be released. Thus, individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the Headquarters or component's FOIA Officer, whose contact information can be found at *http://www.dhs.gov/foia* under ''contacts.'' If an individual believes more than one component maintains Privacy Act records concerning him or her the individual may submit the request to the Chief Privacy Officer, Department of Homeland Security, 245 Murray Drive, SW., Building 410, STOP–0550, Washington, DC 20528.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity,

meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Identify which component(s) of the Department you believe may have the information about you,
- Specify when you believe the records would have been created,
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

RECORD ACCESS PROCEDURES:

See ''Notification procedure'' above.

CONTESTING RECORD PROCEDURES:

See ''Notification procedure'' above.

RECORD SOURCE CATEGORIES:

Records are obtained directly from individuals who create a SEVIS II account (F/M/J nonimmigrants; parents, proxies and guardians; and school and sponsor officials, owners, chief executives, and legal counsel. Status information about F/M/J nonimmigrants is also obtained from schools and sponsors. Records are also obtained from other Federal agency information systems, including the DHS Arrival and Departure Information System (ADIS); the DHS Automated Biometric Identification System (IDENT); U.S. Treasury Department's I–901 Web portal; DOS's Consular Consolidated Database (CCD); and USCIS's Computer-Linked Application Information Management System 3 Mainframe (CLAIMS 3).

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Certain portions or all of these records may be exempt from disclosure pursuant to 5 U.S.C. 552a(k)(2).

The Secretary of Homeland Security has exempted this system from subsections (c)(3), (d), (e)(1), (e)(4)(G) and (H), and (f) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2). These exemptions apply only to the extent that records in the system are subject to exemption pursuant to 5 U.S.C. 552a(k)(2).

Dated: December 29, 2009.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. E9–31268 Filed 1–4–10; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF HOMELAND SECURITY

National Protection and Programs Directorate; Statewide Communication Interoperability Plan Implementation Report

AGENCY: National Protection and Programs Directorate, Department of Homeland Security.

ACTION: 60-Day Notice and request for comments; New Information Collection Request: 1670–NEW.

SUMMARY: The Department of Homeland Security, National Protection and Programs Directorate/Cybersecurity and Communications/Office of Emergency Communications, has submitted the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35).

DATES: Comments are encouraged and will be accepted until March 8, 2010. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Written comments and questions about this Information Collection Request should be forwarded to NPPD/CS&C/OEC, Attn.: Jonathan Clinton, *Jonathan.Clinton@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Office of Emergency Communications (OEC), formed under Title XVIII of the Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.,* is responsible for ensuring that activities funded by the Interoperable Emergency Communications Grant Program (IECGP) (6 U.S.C. 579) comply with the Statewide Communication Interoperability Plan (SCIP) for that State required by section 7303(f) of the Intelligence Reform and Terrorism Prevention Act of 2004 (6 U.S.C. 194(f)). Further, under the Implementing Recommendations of the 9/11 Commission Act of 2007 (6 U.S.C. 579(m)), a State that receives a grant under the IECGP must annually submit to the Director of OEC a report on the progress of the State in implementing its SCIP and on achieving interoperability at the city, county, regional, State, and interstate levels. OEC is then required to make these reports publicly available (6 U.S.C. 579(m)). The SCIP Implementation Report Form is designed to meet these statutory requirements. SCIP Implementation Reports will be submitted electronically.

Analysis

Agency: Department of Homeland Security, National Protection and Programs Directorate.

Title: Statewide Communication Interoperability Plan Implementation Report.

Form: Not Applicable.

OMB Number: 1670–NEW.

Frequency: Yearly.

Affected Public: State, local, or tribal government.

Number of Respondents: 56.

Estimated Time per Respondent: 6 hours.

Total Burden Hours: 336 annual burden hours.

Total Burden Cost (operating/maintaining): $8,205.12.

Signed: December 22, 2009.

Thomas Chase Garwood, III,

Chief Information Officer, National Protection and Programs Directorate, Department of Homeland Security.

[FR Doc. E9–31266 Filed 1–4–10; 8:45 am]

BILLING CODE 9910–9P–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2009–1100]

Certificate of Alternative Compliance for the High Speed Ferry SUSITNA

AGENCY: Coast Guard, DHS.

ACTION: Notice.

SUMMARY: The Coast Guard announces that a Certificate of Alternative Compliance was issued for the high speed ferry SUSITNA as required by 33 U.S.C. 1605(c) and 33 CFR 81.18.

DATES: The Certificate of Alternative Compliance was issued on December 18, 2009.

ADDRESSES: The docket for this notice is 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. You may also find this docket on the Internet by going to *http://www.regulations.gov,* inserting USCG–2009–1100 in the ''Keyword'' box, and then clicking ''Search.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call LT Robert Fields, District Seventeen, Prevention Branch, U.S. Coast Guard, telephone 907–463–2812. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Background and Purpose

A Certificate of Alternative Compliance, as allowed under Title 33 of the Code of Federal Regulations, Parts 81 and 89, has been issued for the high speed ferry SUSITNA, O.N. 1189367. Full compliance with 72 COLREGS and the Inland Rules Act would hinder the vessel's ability to operate as designed. The forward masthead light may be located 18′–4″ above the hull. Placing the forward masthead light at the height as required by Annex I, paragraph 2(a) of the 72 COLREGS and Annex I, Section 84.03(a) of the Inland Rules Act would result in a masthead light location that would interfere with the line of sight of the pilot house. In addition, the horizontal distance between the forward and aft masthead lights may be 58′–5″. Placing the aft masthead light at the horizontal distance from the forward masthead light as required by Annex I, paragraph 3(a) of the 72 COLREGS would result in an aft mast being placed on the center barge deck of the ferry which is designed to move vertically.

The Certificate of Alternative Compliance allows for the vertical placement of the forward masthead light to deviate from requirements set forth in Annex I, paragraph 2(a) of 72 COLREGS and Annex I, Section 84.03(a) of the Inland Rules Act. In addition, this Certificate of Alternative Compliance allows for the horizontal separation of the forward and aft masthead lights to deviate from the requirements of Annex I, paragraph 3(a) of 72 COLREGS.

This notice is issued under authority of 33 U.S.C. 1605(c), and 33 CFR 81.18.

Dated: December 18, 2009.

J.S. Kenyon,

Captain, U.S. Coast Guard, Chief, Prevention Division, by Direction of the Commander, Seventeenth Coast Guard District.

[FR Doc. E9–31227 Filed 1–4–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2009–1050]

Certificate of Alternative Compliance for the Offshore Supply Vessel KELLY ANN CANDIES

AGENCY: Coast Guard, DHS.

ACTION: Notice.

SUMMARY: The Coast Guard announces that a Certificate of Alternative Compliance was issued for the offshore supply vessel KELLY ANN CANDIES as required by 33 U.S.C. 1605(c) and 33 CFR 81.18.

DATES: The Certificate of Alternative Compliance was issued on November 18, 2009.

ADDRESSES: The docket for this notice is 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. You may also find this docket on the Internet by going to *http://www.regulations.gov,* inserting USCG–2009–1050 in the ''Keyword'' box, and then clicking ''Search.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call CWO2 David Mauldin, District Eight, Prevention Branch, U.S. Coast Guard, telephone 504–671–2153. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Background and Purpose

The offshore supply vessel KELLY ANN CANDIES will be used for offshore supply operations. Full compliance with 72 COLREGS and the Inland Rules Act will hinder the vessel's ability to maneuver within close proximity of offshore platforms and conduct helicopter operations. The forward masthead light may be located forward of the helideck 10.5 meters above the hull. Placing the forward masthead light at the height as required by Annex I, paragraph 2(a) of the 72 COLREGS would result in a masthead light location that would interfere with helideck operations. In addition, the horizontal distance between the forward and aft masthead lights may be 33.023 meters. Placing the aft masthead light at the horizontal distance from the forward masthead light as required by Annex I, paragraph 3(a) of the 72 COLREGS would result in an aft masthead light location directly over the aft cargo deck where it would interfere with loading and unloading operations. Furthermore, the sidelights may be placed 2.2 meters above the forward masthead light. Placing the sidelights lower than the forward masthead light as required by Annex I, paragraph 2(g) of 72 COLREGS and Annex I, paragraph 84.03(g) of the Inland Rules Act, would subject them to interference from the deck lights and obstruction by the helideck.

A Certificate of Alternative Compliance, as allowed under Title 33 of the Code of Federal Regulations, Parts 81 and 89, has been issued for the offshore supply vessel KELLY ANN CANDIES, O.N. 1219617. The Certificate of Alternative Compliance allows for the vertical placement of the forward masthead light to deviate from requirements set forth in Annex I, paragraph 2(a) of 72 COLREGS. In addition, the Certificate of Alternative Compliance allows for the horizontal separation of the forward and aft masthead lights to deviate from the requirements of Annex I, paragraph 3(a) of 72 COLREGS. Furthermore, the Certificate of Alternative Compliance allows for the placement of the sidelights to deviate from requirements set forth in Annex I, paragraph 2(g) of 72 COLREGS and Annex I, paragraph 84.03(g) of the Inland Rules Act.

This notice is issued under authority of 33 U.S.C. 1605(c), and 33 CFR 81.18.

Dated: December 7, 2009.

J.W. Johnson,

Commander, U.S. Coast Guard, Chief, Inspections and Investigations Branch, by Direction of the Commander, Eighth Coast Guard District.

[FR Doc. E9–31226 Filed 1–4–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1868–DR; Docket ID FEMA–2008–0018]

Kansas; 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 Kansas (FEMA–1868–DR), dated December 23, 2009, and related determinations.

DATES: *Effective Date:* December 23, 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 December 23, 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 Kansas resulting from a severe winter storm during the period of November 14–16, 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 Kansas.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Michael R. Scott, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Kansas have been designated as adversely affected by this major disaster:

Marshall, Republic, and Washington Counties for Public Assistance.

All counties within the State of Kansas 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. E9–31229 Filed 1–4–10; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Quarterly IRS Interest Rates Used in Calculating Interest on Overdue Accounts and Refunds on Customs Duties

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This notice advises the public of the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties. For the calendar quarter beginning January 1, 2010, the interest rates for overpayments will be 3 percent for corporations and 4 percent for non-corporations, and the interest rate for underpayments will be 4 percent. This notice is published for the convenience of the importing public and Customs and Border Protection personnel.

DATES: *Effective Date:* January 1, 2010.

FOR FURTHER INFORMATION CONTACT: Ron Wyman, Revenue Division, Collection and Refunds Branch, 6650 Telecom Drive, Suite #100, Indianapolis, Indiana 46278; telephone (317) 614–4516.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of customs duties must be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 was amended (at paragraph (a)(1)(B) by the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105–206, 112 Stat. 685) to provide different interest rates applicable to overpayments: one for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2009–37, the IRS determined the rates of interest for the calendar quarter beginning January 1, 2010, and ending on March 31, 2010. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (1%) plus three percentage points (3%) for a total of four percent (4%). For corporate overpayments, the rate is the Federal short-term rate (1%) plus two percentage points (2%) for a total of three percent (3%). For overpayments made by non-corporations, the rate is the Federal short-term rate (1%) plus three percentage points (3%) for a total of four percent (4%). These interest rates are subject to change for the calendar quarter beginning April 1, 2010, and ending June 30, 2010.

For the convenience of the importing public and Customs and Border Protection personnel the following list of IRS interest rates used, covering the period from before July of 1974 to date, to calculate interest on overdue accounts and refunds of customs duties, is published in summary format.

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpayments (Eff. 1–1–99) (percent)
070174	063075	6	6	
070175	013176	9	9	
020176	013178	7	7	
020178	013180	6	6	
020180	013182	12	12	
020182	123182	20	20	
010183	063083	16	16	
070183	123184	11	11	
010185	063085	13	13	
070185	123185	11	11	
010186	063086	10	10	
070186	123186	9	9	
010187	093087	9	8	
100187	123187	10	9	
010188	033188	11	10	
040188	093088	10	9	
100188	033189	11	10	
040189	093089	12	11	
100189	033191	11	10	
040191	123191	10	9	
010192	033192	9	8	
040192	093092	8	7	
100192	063094	7	6	
070194	093094	8	7	
100194	033195	9	8	
040195	063095	10	9	
070195	033196	9	8	
040196	063096	8	7	
070196	033198	9	8	
040198	123198	8	7	
010199	033199	7	7	6
040199	033100	8	8	7
040100	033101	9	9	8
040101	063001	8	8	7
070101	123101	7	7	6
010102	123102	6	6	5
010103	093003	5	5	4
100103	033104	4	4	3
040104	063004	5	5	4
070104	093004	4	4	3
100104	033105	5	5	4
040105	093005	6	6	5
100105	063006	7	7	6
070106	123107	8	8	7
010108	033108	7	7	6
040108	063008	6	6	5
070108	093008	5	5	4
100108	123108	6	6	5
010109	033109	5	5	4
040109	033110	4	4	3

Dated: December 29, 2009.

Jayson P. Ahern,

Acting Commissioner, U.S. Customs and Border Protection.

[FR Doc. E9–31353 Filed 1–4–10; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[Docket No. USCBP–2009–0036]

Receipt of Domestic Interested Party Petition Concerning the Tariff Classification of Wickless Wax Objects

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of receipt of domestic interested party petition; solicitation of comments.

SUMMARY: Customs and Border Protection (CBP) has received a petition submitted on behalf of a domestic interested party requesting the reclassification under the Harmonized Tariff Schedule of the United States (HTSUS) of certain wickless wax objects from China. Currently, these objects are classified as ''Molded or carved articles of wax'' under subheading 9602.00.40, HTSUS. The petitioner contends that the proper classification for these wickless wax objects is in subheading 3406.00.00, HTSUS, as candles. While the 2009 duty rates of both these subheadings is free, petitioner claims

that the importers of these products are using this classification as a means of circumventing a dumping order that has been placed on petroleum wax candles from China. This document invites comments with regard to the correctness of the current classification.

DATES: Comments must be received on or before March 8, 2010.

ADDRESSES: You may submit comments, identified by docket number, by one of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments via docket number USCBP–2009–0036.

• *Mail:* Trade and Commercial Regulations Branch, Regulations and Rulings, Office of International Trade, Customs and Border Protection, 799 9th Street, NW. (Mint Annex), Washington, DC 20229–1179.

Instructions: All submissions received must include the agency name and docket number for this notice of domestic interested party petition concerning the tariff classification of wickless wax objects. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents, exhibits, or comments received go to *http://www.regulations.gov*. Submitted comments may also be inspected during regular business days between the hours of 9 a.m. and 4:30 p.m. at the Customs and Border Protection, Trade and Commercial Regulations Branch, Regulations and Rulings, Office of International Trade, 799 9th Street, NW., 5th Floor, Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark, Trade and Commercial Regulations Branch, at (202) 325–0118. Please note that any submitted comments that CBP receives by mail will be posted on the above-referenced docket for the public's convenience.

FOR FURTHER INFORMATION CONTACT: Jean-Rene Broussard, Tariff Classification and Marking Branch, Regulations and Rulings, Office of International Trade, Customs and Border Protection at (202) 325–0284.

SUPPLEMENTARY INFORMATION:

Background

A petition has been filed under section 516 of the Tariff Act of 1930, as amended (19 U.S.C. 1516), on behalf of the National Candle Association (NCA), which represents approximately 150 member companies. A majority of NCA's members manufacture, produce, or wholesale candles or candle supplies in the United States. Its members account for approximately 90 percent of all candles made in the United States. The NCA meets all of the requirements of a domestic interested party set forth in 19 U.S.C. 1516(a)(2) and 19 CFR 175.3. The NCA is requesting that Customs and Border Protection (CBP) reclassify the imported wickless wax objects classified in heading 9602, Harmonized Tariff Schedule of the United States (HTSUS), in the following rulings:

• NY L85725, dated June 30, 2005, classified a white solid wax cylinder with a scented fragrance that measures approximately 3″ in height and 3″ in diameter.

• NY L85383, dated June 15, 2005, classified four wax items without wicks. Item 1 is described as a yellow colored solid wax molded cylinder measuring approximately 3″ in height and 3″ in diameter. The cylinder has a ¼″ hole drilled through its center from top to bottom but does not contain a wick. Item 2 is a pink colored solid wax molded cylinder that measures approximately 2″ x 2″ x 6″. The cylinder has a ¼″ hole drilled through its center from top to bottom, but does not contain a wick. Item 3 is an orange colored solid wax molded triangle that measures approximately 3″ x 3″ x 3″. The triangle has a ¼″ hole drilled through its center from top to bottom, but does not contain a wick. Item 4 is a blue and white colored solid wax molded hexagon that measures approximately 1″ on each side and 4″ in height. The hexagon has a ¼″ hole drilled through its center from top to bottom, but does not contain a wick.

• NY L84761, dated June 2, 2005, classified a red solid wax cylinder with a scented fragrance that measures approximately 3″ in height and 3″ in diameter. The cylinder has a ¼″ hole drilled through its center from top to bottom, but does not contain a wick.

• NY G88343, dated March 26, 2001, classified three wax items without wicks. Item 1 is a yellow and lime colored solid wax cylinder that measures approximately 3″ in height and 3″ in diameter. The cylinder has a ¼″ hole drilled through its center from top to bottom, but does not contain a wick. Item 2 is a cylindrical white wax candle holder embedded with fruits, cinnamon sticks and green leaves. The container measures approximately 4″ in height and 4″ across its widest point. Item 3 is a cylindrical white wax candle holder decorated with a flower, a turkey and rain drop stickers. The container measures approximately 4″ in height and 4″ across its widest point.

• NY G87878, dated March 7, 2001, classified one wax object without a wick. Item CA23505B, a Basket weave-Look Wax Bowl, is a green colored wax bowl without a wick that measures approximately 3¼″ in height and 8″ in diameter.

• NY G85945, dated January 16, 2001, classified one wax object without a wick. Item 6 is described as a wax bowl, which is a white colored scented wax bowl with no wick that measures approximately 4″ in height and 10½″ in diameter and is decorated with a flower design.

• NY F82375, dated February 11, 2000, classified five wax objects without a wick. Item A is a purple colored solid paraffin wax cylinder that measures approximately 5½″ in height and 3″ in diameter. Item B is a white solid paraffin wax square pillar, approximately 6″ in height and 3″ wide. Item C is a brown solid paraffin wax block that is approximately 3″ in height and 6″ square. Item D is a pearl colored rounded wax piece molded in the shape of an oval approximately 1½″ in height and 3½″ in diameter. Item E is a white solid paraffin scented wax square block, approximately 3½″ in height and 3″ wide. This item has a hole drilled directly through the center, but does not contain a wick. The ruling indicates that further processing may be performed on the objects such as drilling a hole when needed, adding wicks, dipping, polishing, labeling and packaging.

• NY F81245, dated January 11, 2000, classified a wax block that is scented and measures approximately 6⅛″ in height and 2¾″ wide. The block is blue and white colored and does not have a hole drilled through it.

• NY E89220, dated November 8, 1999, classified two wax objects. The first sample is described as a scented burgundy colored wax column that measures approximately 9″ in height and 3⅞″ in diameter. There is a hole in the top and bottom of the column. The second sample is a pink colored wax column molded in the shape of a baluster that measures approximately 12″ in height and 2¾″ in diameter. The column has a hole in its top and bottom.

• NY E87727, dated September 27, 1999, classified one wax object without a wick. Raw Material C is a white colored solid wax cylinder that measures approximately 5″ in height and 5″ in diameter. The cylinder has a ¼″ hole drilled through its center from top to bottom.

• NY E82227, dated May 18, 1999, classified a paraffin wax column molded in the shape of an orange colored 3″ cube. The cube has a hole in the middle, but does not have a wick.

The wax column may also be imported in various rectangular dimensions or in a round shape measuring either 3″ in height or 6″ in height and 6″ in diameter.

• NY E81505, dated May 12, 1999, classified a cog wheel which is described as a wax disc molded in the shape of a cog wheel and measures approximately 1½″ in height and 1½″ in diameter. The disc is scented and has a hole in the middle, but does not have a wick. The indicated use of the object is for aroma therapy.

• NY D88246, dated March 12, 1999, classified three wax items. One sample is molded in the shape of a square pillar (approximately 3″ square and 3½″ in height). The other two items are molded in the shape of round columns (approximately 3″ in diameter and 3″ in height). All of the objects have a hole drilled directly through the center but do not have wicks. The importer indicated that further finishing would be performed in the U.S.

In the rulings listed above, CBP applied General Rule of Interpretation (GRI) 1 to classify the subject merchandise in subheading 9602.00.40, HTSUS, which provides for ''[w]orked vegetable or mineral carving material and articles of these materials; molded or carved articles of wax, of stearin, of natural gums or natural resins, of modeling pastes, and other molded or carved articles, not elsewhere specified or included; worked, unhardened gelatin (except gelatin of heading 3503) and articles of unhardened gelatin: [m]olded or carved articles of wax * * *''. Petitioner maintains that this classification is incorrect because it believes that the wax objects are unfinished or unassembled candles and should be classified in heading 3406, HTSUS, which provides for ''[c]andles, tapers and the like'' by application of GRI 2(a). In the alternative, the petitioner argues that the wax objects are *prima facie* classifiable in headings 3406 and 9602, HTSUS, and that heading 3406, HTSUS, is the more specific heading by application of GRI 3(a). The 2009 column one general rate of duty for heading 3406, HTSUS, is free.

Classification under the HTSUS is made in accordance with the GRIs. GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the system. CBP believes the ENs should always be consulted. *See* Treasury Decision (T.D.) 89–80, 54 FR 35127, 35128 (Aug. 23, 1989).

The Petitioner's Views

The NCA asserts that Chinese importers are using the classification of wax articles in heading 9602, HTSUS, to circumvent the dumping order on petroleum wax candles from China. *See Petroleum Wax Candles from the People's Republic of China: Antidumping Duty Order,* 51 FR 30686 (August 28, 1986). In particular, the NCA cites a recent circumvention order issued in 2007 as evidence of this attempt to avoid dumping duties. The order provides that wickless wax forms in the shape of tapers, spirals, rounds, columns, votives pillars, as well as wax-filled containers being imported by or sold to DÉCOR–WARE, Inc., A&M Wholesalers, Inc., or Albert E. Price are circumventing the dumping order on petroleum wax candles from China. *See Notice of Partial Termination and Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order: Petroleum Wax Candles from the People's Republic of China,* 72 FR 14518 (March 28, 2007) and *Petroleum Wax Candles from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order,* 72 FR 31053 (June 5, 2007). As in the circumvention inquiry noted above, NCA points to sample candles with wicks that were allegedly inserted after importation into the U.S. claiming that the wicks of these candles are easily removed which indicates that the wicks were inserted into drilled holes in the wax after importation into the United States. Hence, the NCA believes that the wickless wax forms should be classified as unfinished candles in heading 3406, HTSUS, so as to make circumvention of anti-dumping duties difficult.

In support of NCA's classification argument it refers to the EN for heading 9602, HTSUS, which states ''moulded articles means articles which have been moulded to a shape appropriate to their intended use. On the other hand, materials moulded in the shape of blocks, cubes, plates, bars, sticks, etc., whether or not impressed during moulding, are not included.'' The NCA asserts that the exclusionary language of this note prevents the classification of these objects in heading 9602, HTSUS, by application of GRI 1, thus requiring the application of GRIs 2 or 3.

NCA asserts that the wax objects should be classified in heading 3406, HTSUS, by application of either GRI 2(a) or 3(a). NCA argues that the wax objects are unfinished candles, or blanks, that have the essential character of a candle. It contends that the wax objects provide the finished candle with the shape, color, and size of the finished product and that most consumers identify candles based on these characteristics. In the alternative it argues that the wax objects are unassembled candles by application of GRI 2(a). A third alternative argument offered by NCA is that the wax objects are *prima facie* classifiable in both heading 3406, HTSUS, and heading 9602, HTSUS, and that heading 3406, HTSUS, is more specific than heading 9602, requiring classification in heading 3406, HTSUS, by application of GRI 3(a).

Analysis Used by CBP in Prior Rulings

In the rulings that are the subject of this petition, CBP held that classification in heading 3406, HTSUS, at the GRI 1 level is not possible because these objects do not meet the common definition of a candle.

Historically CBP has classified these wax objects in subheading 9602.00.40, HTSUS, as molded or carved articles of wax by application of GRI 1 because it concluded that the terms of heading 9602, HTSUS, completely describe the subject goods. CBP has interpreted the language of the EN to heading 9602, HTSUS, to mean that a molded article of wax is any object that has been shaped or cut from its primary or bulk form. The exclusionary language of this EN describes wax that is in its primary or bulk form. All of the articles are molded into smaller shapes from their primary or bulk forms and many of the objects have been carved by the act of drilling holes into the wax. CBP's position has been that these objects are not classifiable as wax in its primary form and thus are completely described as molded articles of wax in heading 9602, HTSUS, by application of GRI 1.

Moreover, in its prior rulings, CBP held that the wax objects are not classifiable as unfinished candles in heading 3406, HTSUS, by application of GRI 2(a) because the wax objects are classifiable by application of GRI 1. CBP reasoned that a candle functions as a

source of illumination that is composed of a wick surrounded by wax. CBP concluded that the wax objects, on their own, were unable to provide illumination. CBP's historical position is that the essential character of a candle is imparted by both the wick and the wax components. None of the wax objects have a wick and are unable to provide its user with light. Therefore, CBP held that the wax objects do not have the essential character of a candle.

In addition, CBP also held that the wax forms are not unassembled candles because unassembled goods must be imported with the requisite number of parts. None of the rulings indicate that the wax objects were being imported with an equal number of wicks. Therefore, CBP has concluded that classification by application of GRI 2(a) in heading 3406, HTSUS is inappropriate.

Finally, CBP's prior decisions held that classification by application of GRI 3(a) is inappropriate because the wax objects are not *prima facie* classifiable in two or more headings of the HTSUS. In order for classification by application of GRI 3(a) to be appropriate the goods cannot be classifiable by application of GRIs 1 or 2 and the good must be *prima facie* classifiable in two or more headings. As indicated above, CBP has held that heading 3406, HTSUS, does not describe the imported products. As a result, the wax articles are not *prima facie* classifiable in any other heading, except heading 9602, HTSUS.

Comments

Pursuant to section 175.21(a), CBP regulations (19 CFR 175.21(a)), before making a determination on this matter, CBP invites written comments on the petition from interested parties.

The domestic interested party petition concerning the tariff classification of wax objects, as well as all comments received in response to this notice, will be available for public inspection on the docket at *http://www.regulations.gov*. Please note that any submitted comments that CBP receives by mail will be posted on the above-referenced docket for the public's convenience.

Authority: This notice is published in accordance with section 175.21(a), CBP Regulations (19 CFR 175.21(a)) and 19 U.S.C. 1516.

Dated: December 29, 2009.

Jayson P. Ahern,

Acting Commissioner, U.S. Customs and Border Protection.

[FR Doc. E9–31352 Filed 1–4–10; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5369–N–01]

Notice of Availability: HUD Real Estate Settlement Procedures Act (RESPA) Handbook

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: Through today's **Federal Register** notice, HUD announces the availability on its Web site of the revised special information booklet (Booklet) pursuant to the Real Estate Settlement Procedures Act (RESPA) requirement in 12 U.S.C. § 2604. The Real Estate Settlement Procedures Act of 1974 (RESPA) (12 U.S.C. 2601–2617), establishes the process for disclosing settlement costs in the financing or refinancing of a home, and helps protect consumers from unethical practices by settlement service providers during the home-buying and loan process. Under RESPA, lenders and mortgage brokers are required to give borrowers this Booklet within three days of the borrower's applying for a mortgage loan. The Booklet provides information designed to assist individuals seeking to buy a home to become familiar with the home-buying process. As a result, the Booklet provides information regarding the purchase contract, how to use a Good Faith Estimate to shop for the best loan, required settlement services to close the loan, and the HUD–1 Settlement Statement. It also provides information regarding interest rates, points, balloon payments, prepayment penalties and how they can affect mortgage payments. The Booklet also discusses how to resolve loan servicing problems that will help avoid actions that could lead to foreclosure.

The Booklet is currently available on the HUD Web site at: *http://www.hud.gov/utilities/intercept.cfm?http://portal.hud.gov/portal/page/portal/HUD/documents/Settlement%20Booklet%20December%2015%20REVISED.pdf.* It is also currently the top link at *http://www.hud.gov/respa.*

FOR FURTHER INFORMATION CONTACT: The Office of RESPA and Interstate Land Sales, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW., Room 9158, Washington, DC 20410; telephone number 202–708–0502 (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

Dated: December 29, 2009.

David H. Stevens,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. E9–31304 Filed 1–4–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5275–N–04]

Native American Housing Assistance and Self-Determination Reauthorization Act of 2008: Notice of Final List of Negotiated Rulemaking Committee Members

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: On September 23, 2009, HUD published a **Federal Register** notice establishing the negotiated rulemaking committee that will work with HUD to develop regulatory changes to programs authorized under the Native American Housing Assistance and Self-Determination Act of 1996. Changes to these programs were made by the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, which also directs that HUD undertake negotiated rulemaking to implement the statutory revisions. The September 23, 2009, notice also announced the names and affiliations of the committee's proposed members and requested public comment on the committee and its proposed membership. Today's notice announces the final list of committee members.

FOR FURTHER INFORMATION CONTACT: Rodger Boyd, Deputy Assistant Secretary for Native American Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4126, Washington, DC 20410, telephone number 202–401–7914 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

The Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*) (NAHASDA) changed the way that housing assistance is provided to Native Americans. NAHASDA eliminated several separate assistance programs and replaced them with a single block

grant program, known as the Indian Housing Block Grant (IHBG) program. In addition, Title VI of NAHASDA authorizes federal guarantees for the financing of certain tribal activities (Title VI Loan Guarantee Program). The regulations governing the IHBG and Title VI Loan Guarantee programs are located in part 1000 of HUD's regulations in title 24 of the Code of Federal Regulations. In accordance with section 106 of NAHASDA, HUD developed the regulations with active tribal participation and using the procedures of the Negotiated Rulemaking Act of 1996 (5 U.S.C. 561–570).

The Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 (Pub. L. 110–411, approved October 14, 2008) (NAHASDA Reauthorization) reauthorizes NAHASDA through September 30, 2013, and makes a number of amendments to the statutory requirements governing the IHBG and Title VI Loan Guarantee programs. The NAHASDA Reauthorization amends section 106 of NAHASDA to provide that HUD shall ''initiate a negotiated rulemaking in accordance with this section by not later than 90 days after enactment of the [2008 Reauthorization Act].''

On January 12, 2009 (74 FR 1227), HUD published a notice in the **Federal Register** announcing the initiation of the negotiated rulemaking required by the NAHASDA Reauthorization. On March 2, 2009 (74 FR 9100), HUD published a notice in the **Federal Register** that commenced the negotiated rulemaking process by soliciting nominations for membership on the negotiated rulemaking committee. The notice provided that the negotiated rulemaking committee must consist of representatives of interests that are potentially affected by the rulemaking, such as tribally designated housing entities, elected officials of tribal governments, and HUD representatives. The notice explained that there was no requirement that each potentially affected organization or entity necessarily have its own representation on the committee. However, HUD noted that the committee, as a whole, must reflect a geographically diverse cross-section of small, medium, and large Indian tribes. The March 2, 2009, notice was followed by a September 23, 2009, notice published in the **Federal Register** (74 FR 48584) that listed the proposed members of the NAHASDA Reauthorization negotiated rulemaking committee.

II. Discussion of Public Comments

The public comment period for the September 23, 2009, notice ended on October 23, 2009. HUD received 10 public comments. A number of commenters objected that there was no representative of a particular tribe or too few representatives of a category of tribes on the proposed committee. Another commenter found HUD's description of the scope of the subject rule and the interests affected to be insufficiently detailed, and also questioned why HUD is proposing that the committee have a total of 26 members, including HUD. One commenter objected to the inclusion of a particular individual on the committee, while others objected that a particular individual was not included. Finally, HUD received requests from tribes requesting that their nominees, who were included in the proposed committee, be replaced with representatives of the same tribes.

HUD appreciates the interest of the commenters in the composition of the NAHASDA Reauthorization negotiated rulemaking committee. HUD regrets it is unable to include a representative of every tribe or group of tribes on the committee. In order to ensure that the negotiated rulemaking process is workable, the Negotiated Rulemaking Act directs agencies to limit committee composition to no more than 25 members, unless the agency determines that such number cannot achieve the desired balance of interests. (See 5 U.S.C. 565(b).) The Negotiated Rulemaking Act's preference for limiting committees to workable numbers of members means that not every tribe can have its own representative and not every interested and qualified individual can be a member. HUD has determined that allocating all 25 seats to tribal members, and increasing the committee size by two members to accommodate HUD's representatives, maximizes tribal representation. This committee size and allocation are sufficient to satisfactorily achieve the balance of interests, with respect to size and geographical location, that HUD strives to achieve through this committee, while also ensuring that the negotiated rulemaking process remains workable. Although committee membership is limited, committee meetings are open to the public, and HUD welcomes the participation of individuals beyond those who are members of the committee. HUD also notes that, as it has stated in prior notices, affected interests include those of tribally designated housing entities, tribal governments, and tribes of different sizes and geographic locations, and are similar to those involved in previous NAHASDA negotiated rulemaking, which also addressed the distribution of block grant funding for Indian housing and federal guarantees for financing certain tribal activities. Accordingly, HUD proposed a committee whose membership is diverse and that approximates membership from prior NAHASDA negotiated rulemaking committees. Finally, in cases where a tribe or group of tribes requested that its representative be replaced with a substitute, HUD has honored the request.

III. First Committee Meeting

HUD intends to announce the date and location of the first meeting of the NAHASDA Reauthorization negotiated rulemaking committee in a future **Federal Register** notice.

IV. Final Membership of the Negotiated Rulemaking Committee

Following is the final list of tribal negotiated rulemaking committee members. In making the selections for membership on the negotiated rulemaking committee, HUD's goal was to establish a committee whose membership reflects a balanced representation of Indian tribes. In addition to the tribal members of the committee, there will be two HUD representatives: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing, and Rodger J. Boyd, Deputy Assistant Secretary for Native American Programs.

The final list of NAHASDA negotiated rulemaking committee members is as follows:

Steven Angasan, King Salmon Tribe, Naknek, Alaska.

Carol Gore, President/CEO, Cook Inlet Housing Authority, Anchorage, Alaska.

Blake Kazama, President, Tlingit-Haida Regional Housing Authority, Juneau, Alaska.

Marty Shuravloff, Executive Director, Kodiak Island Housing Authority, Kodiak, Alaska.

Retha Herne, Executive Director, Akwesasne Housing Authority, Hogansburg, New York.

Ray DePerry, Housing Director, Red Cliff Chippewa Housing Authority, Bayfield, Wisconsin.

Robert Durant, Executive Director, White Earth Reservation Housing Authority, Waubun, Minnesota.

Leon Jacobs, Lumbee Tribe of North Carolina, Mystic, Connecticut.

Susan Wicker, Executive Housing Director, Poarch Band of Creek Indians, Atmore, Alabama.

Jason Adams, Executive Director, Salish Kootenai Housing Authority, Pablo, Montana.

Lafe Haugen, Executive Director, Northern Cheyenne Tribal Housing Authority, Lame Deer, Montana.

Rebecca Phelps, Development Specialist, Turtle Mountain Housing Authority, Belcourt, North Dakota.

S. Jack Sawyers, Paiute Indian Tribe of Utah, Cedar City, Utah.

Marguarite Becenti, Member, Board of Commissioners, Umatilla Reservation Housing Authority, Pendleton, Oregon.

Henry Cagey, The Honorable Chairman, Lummi Nation, Bellingham, Washington.

Larry Coyle, Executive Director, Cowlitz Indian Tribal Housing, Chehalis, Washington.

Karin Foster, Legal Counsel, Yakama Nation Housing Authority, Toppenish, Washington.

Marvin Jones, Manager, Housing Oversight, Cherokee Nation, Tahlequah, Oklahoma.

Thomas McGeisey, Executive Director, Seminole Nation Housing Authority, Wewoka, Oklahoma.

Shawna Pickup, Housing Director/Secretary, Eastern Shawnee Tribe of Oklahoma, Wyandotte, Oklahoma.

Russell Sossamon, Executive Director, Choctaw Nation Housing Authority, Hugo, Oklahoma.

Ervin Keeswood, Member, Navajo Housing Authority Board of Commissioners, Window Rock, Arizona.

Judith Marasco, Executive Director, Yurok Indian Housing Authority, Klamath, California.

Alvin Moyle, The Honorable Chairman, Fallon Business Council, Fallon Paiute-Shoshone Tribe, Fallon, Nevada.

Darlene Tooley, Executive Director, Northern Circle Indian Housing Authority, Ukiah, California.

Dated: December 24, 2009.

Sandra B. Henriquez,

Assistant Secretary for Public and Indian Housing.

[FR Doc. E9–31302 Filed 1–4–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWO320000L1320000.PP]

Extension of Approved Information Collection, OMB Control Number 1004–0073

AGENCY: Bureau of Land Management, Interior.

ACTION: 60-day notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Bureau of Land Management (BLM) announces its intention to request that the Office of Management and Budget (OMB) extend approval for the paperwork requirements in 43 CFR parts 3400 through 3500, which cover leasing or developing Federal coal. The BLM uses the information to determine if the applicant is qualified to hold a Federal coal lease. The Office of Management and Budget (OMB) previously approved this information collection activity under the control number 1004–0073.

DATES: You must submit your comments to the BLM at the address below on or before March 8, 2010. The BLM is not obligated to consider any comments postmarked or received after the above date.

ADDRESSES: You may mail comments to: U.S. Department of the Interior, Bureau of Land Management, Mail Stop 401–LS, 1849 C St., NW., Washington, DC 20240, Attention: 1004–0073. You may also comment by e-mail at: *Jean_Sonneman@blm.gov.* Comments will be available for public review at the L Street address during regular business hours (7:45 a.m. to 4:15 p.m.), Monday through Friday, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: You may contact John A. Lewis, Division of Solid Minerals at (202) 912–7116 (Commercial or FTS). Persons who use a telecommunication device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) on 1–800–877–8339, 24 hours a day, seven days a week, to contact Mr. Lewis. You may also contact Mr. Lewis to obtain a copy, at no cost, of the regulations and forms that require this collection of information.

SUPPLEMENTARY INFORMATION: OMB regulations at 5 CFR part 1320, which implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501–3521), require that interested members of the public and affected agencies be provided an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d) and 1320.12(a)). This notice identifies information collections that are contained in 43 CFR parts 3400 through 3500, which cover leasing and the development of Federal coal. The BLM will request that the OMB approve this information collection activity for a 3-year term.

Comments are invited on: (1) The need for the collection of information for the performance of the functions of the agency; (2) the accuracy of the agency's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collection; and (4) ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information. A summary of the public comments will accompany the BLM's submission of the information collection requests to OMB.

The following information is provided for the information collection:

Title: Coal Management (43 CFR 3400–3500).

Forms:

- Form 3400–12; Coal Lease.
- Form 3440–1; License to Mine.

OMB Control Number: 1004–0073.

Abstract: This notice pertains to information collections that cover the leasing and development of Federal coal. The BLM determines if the applicant to lease is qualified to hold a lease or develop Federal coal. The information collections covered by this notice are found at 43 CFR parts 3400 through 3500; and in the form listed above.

Frequency: On occasion.

Estimated Number and Description of Respondents: Approximately 1235 applicants to hold a coal lease or develop Federal coal.

Estimated Reporting and Recordkeeping ''Hour'' Burden: The currently approved annual reporting burden for this collection is 21,022 hours. The following chart details the individual components and respective hour burden estimates of this information collection request:

Regulation 43 CFR	Type of application	Estimated number of responses	Estimated hours per response
3410	Application for an exploration license	10	36
3410	Issuance and termination of an exploration license	5	12

Regulation 43 CFR	Type of application	Estimated number of responses	Estimated hours per response
3410	Operations under and modification of an exploration license	1	1
3410	Collection and submission of data from an exploration license	5	18
3420	Call for coal resource and other resource information	0	3
3420	Surface owner consultation	7	1
3420	Expressions of leasing interest	0	7
3422	Response to notice of sale	8	56
3422	Consultation with Attorney General	7	4
3425	Leasing on application	15	308
3427	Surface owner consent	7	1
3430	Preference right lease application	3	800
3432	Lease modifications	5	12
3440	License to mine	2	21
3452	Relinquishments	30	18
3453	Transfers, assignments, subleases	43	10
3410, 3453, 3473	Bonds	196	8
3471	Land description requirements	15	2
3471	Future interest lease application	0	16
3472	Special leasing qualifications	4	3
3472	Qualification statement	4	3
3473	Lease rental and royalty rate reductions	9	13
3473, 3483	Lease suspensions	7	20
3475	Lease form	12	1
3475, 3481, 3487	Logical mining units	5	170
3481	General obligations of the operator/lessee	1	1
3482	Exploration plans	11	30
3482	Resource recovery and protection plan	4	192
3482	Modifications to exploration plans and resource recovery and protection plans	79	16
3482	Mining operations maps	311	20
3483	Request for payment of advance royalty in lieu of continued operation	12	22
3484	Performance standards for exploration (Retention of samples)	22	1
3484	Performance standards for surface and underground coal mines	6	1
3485	Exploration reports	7	4
3485, 3486	Production reports	323	10
3486	Notices and orders	1	2
3486	Enforcement	8	2

Estimated Reporting and Recordkeeping "Non-Hour Cost" Burden: The currently approved annual non-hour cost burden for Control Number 1004–0073 is $1,048,578.

The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond.

The BLM will summarize all responses to this notice and include them in the request for OMB approval. All comments will become a matter of public record. 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.

Jean Sonneman,

Acting Information Collection Clearance Officer, Bureau of Land Management.

[FR Doc. E9–31375 Filed 1–4–10; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLMT924000–L54200000–FR0000–LVDIE09E0470; SDM 99176]

Notice of Application for Disclaimer of Interest, Brookings County, SD

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: An application has been filed with the Bureau of Land Management (BLM) by Northern States Power Company (NSP), d/b/a/Xcel Energy, for a Recordable Disclaimer of Interest from the United States for an easement in Brookings County, South Dakota. This notice is intended to inform the public of the pending application.

DATES: Comment period is open for 90 days from publication of this notice. Only written comments will be accepted. Refer to serial No. SDM 99176.

ADDRESSES: Address all written comments to Cindy Staszak, Chief, Branch of Land Resources, BLM Montana State Office, 5001 Southgate Drive, Billings, Montana 59101–4669.

FOR FURTHER INFORMATION CONTACT: Tami Lorenz, BLM Montana State Office, 5001 Southgate Drive, Billings, Montana 59101–4669; 406–896–5053.

SUPPLEMENTARY INFORMATION: Pursuant to Section 315 of the Federal Land Policy and Management Act of 1976, as amended (43 U.S.C. 1745), and the regulations contained in 43 CFR subpart 1864, a Recordable Disclaimer of Interest, if issued, will confirm that the United States has no valid interest in the easement. The NSP has filed condemnation proceedings for easement rights to construct, operate, maintain, use, rebuild, or remove an electric transmission line through, over, under and across the subject land. A Recordable Disclaimer of Interest will not be issued until the NSP secures title

to the easement through condemnation. The easement is described as follows:

Fifth Principal Meridian, South Dakota

T. 110 N., R. 47 W.,
sec. 3, south 75.5 feet of lot 6.

The area described contains approximately 1.7 acres in Brookings County.

A review of the General Land Office plat and original patent documents indicate that the surface and subsurface interests in the above-described property were transferred out of Federal ownership by land patents, with no reservations to the United States. The BLM South Dakota Field Office reported there have been no on-the-ground changes that reflect any remaining Federal interest.

All persons who wish to present comments, suggestions, or objections in connection with the proposed disclaimer may do so by writing to the undersigned authorized officer at the above address. 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.

If no valid objection is received, a Recordable Disclaimer of Interest may be approved stating that the United States does not have a valid interest in the land.

Cindy Staszak,

Chief, Branch of Land Resources.

[FR Doc. E9–31242 Filed 1–4–10; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R9-IA-2009-N283]
[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 February 4, 2010.

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: Chelonian Conservation Center, Ojai, CA, PRT-217124

The applicant requests a permit to import up to 10 angulated tortoises (*Astrochelys yniphora*) which were previously illegally removed from the wild in Madagascar. The import would be for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 1–year period.

Applicant: Zoological Society of San Diego, CA, PRT-223447

The applicant requests a permit to export biological samples from Western lowland gorilla (*Gorilla gorilla*) to Cambridge University, Department Of Veterinary Medicine, Cambridge, United Kingdom, for the purpose of enhancement of the species through scientific research. This notification covers activities to be conducted by the applicant over a 1–year period.

Applicant: Metro Richmond Zoo, Moseley, VA, PRT-228022

The applicant requests a permit to import two captive–bred female cheetahs (*Acinonyx jubatus*) from the DeWildt Center, South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Wildlife Conservation Society, Bronx Zoo, New York, NY, PRT-231585

The applicant requests a permit to export up to 1000 captive hatched Kihansi spray toads (*Nectophrynoides asperginis*) to their range state at the University of Dar Es Salaam, Tanzania, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5–year period.

Applicant: Jarrell W. Martin, Jacksonville, FL, PRT-235302

The applicant requests 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.

Dated: December 18, 2009

Brenda Tapia,

Program Analyst, Branch of Permits, Division of Management Authority.

[FR Doc. E9–31270 Filed 1–4–10; 8:45 am

]BILLING CODE 4310–55–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Continuation of Visitor Services

AGENCY: National Park Service, Interior.

ACTION: Public notice.

DATES: *Effective Date:* January 1, 2010.

FOR FURTHER INFORMATION CONTACT: Jo A. Pendry, Chief, Commercial Services Program, National Park Service, 1201 Eye Street, NW., 11th Floor, Washington, DC, 20005, Telephone, 202/513–7156.

SUMMARY: Pursuant to the terms of existing concession contracts, public notice is hereby given that the National Park Service intends to request a continuation of visitor services for a period not-to-exceed 1 year from the date of contract expiration.

SUPPLEMENTARY INFORMATION: The contracts listed below have been extended to maximum allowable under 36 CFR 51.23. Under the provisions of current concession contracts and pending the completion of the public solicitation of a prospectus for a new concession contract, the National Park Service authorizes continuation of visitor services for a period not-to-exceed 1 year under the terms and

conditions of the current contract as amended. The continuation of operations does not affect any rights with respect to selection for award of a new concession contract.

Conc ID No.	Concessioner name	Park
FOMC001–96	Evelyn Hill Corporation	Fort McHenry National Monument and Historic Shrine.
INDE001–94	Concepts by Staid, Ltd	Independence National Historical Park
SHEN001–85	ARAMARK Sports & Entertainment Services, Inc	Shenandoah National Park.
CHIS003–98	Truth Aquatics	Channel Islands National Park.
DEVA002–81	Xanterra Parks & Resorts, Inc	Death Valley National Monument.
GOGA008–88	Demosthemes Hontalas, Thomas Hontalas & William Hontalas	Golden Gate National Recreation Area.
LAME001–73	Rex G. Maughan & Ruth G. Maughan Area	Lake Mead National Recreation Area
LAME002–82	Lake Mead RV Village, LLC	Lake Mead National Recreation Area.
LAME005–97	Rex G. Maughan	Lake Mead National Recreation Area.
LAME006–74	Las Vegas Boat Harbor, Inc	Lake Mead National Recreation Area.
LAME007–84	Seven Crown Resorts, Inc	Lake Mead National Recreation Area.
LAME009–88	Temple Bar Marina LLC	Lake Mead National Recreation Area.
LAME010–71	Seven Crown Resorts, Inc	Lake Mead National Recreation Area.
OLYM001–78	ARAMARK Sports & Entertainment, Inc	Olympic National Park.
OLYM002–89	Log Cabin Resort, Inc	Olympic National Park.
OLYM005–87	Forever Resorts, LLC	Olympic National Park.
ROLA003–87	Ross Lake Resort, Inc	Ross Lake National Recreation Area.
YOSE001–98	Best's Studio, Inc	Yosemite National Park.
AMIS002–89	Forever Resorts LLC	Amistad National Recreation Area.
AMIS003–87	Rough Canyon Marina, LLC	Amistad National Recreation Area.
CACH001–84	White Dove Inc., dba Thunderbird Lodge	Canyon de Chelly National Monument.
GLAC002–81	Glacier Park, Inc	Glacier National Park.
GLCA003–69	Aramark	Glen Canyon National Recreation Area.
GRCA004–88	Magnum Enterprises, Inc	Grand Canyon National Park.
GRTE003–97	Rex G. and Ruth G. Maughan	Grand Teton National Park.
LAMR002–87	Rex Maughan	Lake Meredith National Recreation Area.
MEVE001–82	ARAMARK	Mesa Verde National Park.
PEFO001–85	Xanterra Parks & Resorts, LLC	Petrified Forest National Park.
HOSP002–94	Buckstaff Bath House Company	Hot Springs National Park.
OZAR012–88	Akers Ferry Canoe Rental, Inc	Ozark National Scenic Riverway.
OZAR016–89	Carr's Grocery & Canoe Rental	Ozark National Scenic Riverway.
VOYA002–85	Kettle Falls Hotel	Voyageurs National Park.
BLRI001–93	Southern Highland Handicraft Guild	Blue Ridge Parkway.
BLRI002–83	Northwest Trading Post, Inc	Blue Ridge Parkway.
BLRI007–82	Forever NPC Resorts, LLC	Blue Ridge Parkway.
CAHA001–98	Avon-Thornton Limited Partnership	Cape Hatteras National Seashore.
CAHA002–98	Cape Hatteras Fishing Pier, Inc	Cape Hatteras National Seashore.
CAHA004–98	Oregon Inlet Fishing Center, Inc	Cape Hatteras National Seashore.
MACA002–82	Forever Resorts, Inc	Mammoth Cave National Park.
VIIS001–71	Caneel Bay, Inc	Virgin Islands National Park.

FOR FURTHER INFORMATION CONTACT: Jo A. Pendry, Chief, Commercial Services Program, National Park Service, 1201 Eye Street, NW., 11th Floor, Washington, DC, 20005, Telephone 202/513–7156.

Dated: November 24, 2009.

Katherine H. Stevenson,

Assistant Director, Business Services.

[FR Doc. E9–31144 Filed 1–4–10; 8:45 am]

BILLING CODE 4312–53–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNVSO0000.L16100000. DO0000.LXSS100F0000; 9–08807; TAS: 14X1109]

Notice of Intent To Prepare a Revision to the Las Vegas Resource Management Plan and Associated Environmental Impact Statement, Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, as amended, and the Federal Land Policy Management Act of 1976, as amended, the Bureau of Land Management (BLM) Southern Nevada District intends to prepare a Resource Management Plan (RMP) revision with an associated Environmental Impact Statement (EIS) for the Las Vegas RMP and by this notice is announcing the beginning of the scoping process and soliciting input on the identification of issues and the proposed planning criteria. The RMP revision will replace the existing Las Vegas RMP.

DATES: This notice initiates the public scoping process for the RMP with an associated EIS. Comments on issues may be submitted in writing until February 4, 2010. The date(s) and location(s) of any scoping meetings will be announced at least 15 days in advance through local media, newspapers and the BLM Web site at: *http://www.blm.gov/nv/st/en/fo/lvfo.html.* In order to be included in the Draft EIS, all comments must be received prior to the close of the scoping period or 15 days after the last public

meeting, whichever is later. We will provide additional opportunities for public participation upon publication of the Draft EIS.

ADDRESSES: You may submit comments on issues and planning criteria related to the Las Vegas RMP/EIS Revision by any of the following methods:

- *Web site: http://www.blm.gov/nv/st/en/fo/lvfo.html.*
- *E-mail: Carolyn_Ronning@blm.gov.*
- *Fax:* (702) 515–5023.
- *Mail:* Bureau of Land Management, 4701 North Torrey Pines Drive, Las Vegas, Nevada 89130–2301.

Documents pertinent to this proposal may be examined at the Southern Nevada District Office.

FOR FURTHER INFORMATION CONTACT: For further information and/or to have your name added to the mailing list, contact Carrie Ronning, Telephone (702) 515–5143 or by e-mail *Carolyn_Ronning@blm.gov.*

SUPPLEMENTARY INFORMATION: This document provides notice that the BLM Field Office, Las Vegas, Nevada intends to prepare a RMP with an associated EIS for the Las Vegas Office and part of the Pahrump Field Office. The document also announces the beginning of the scoping process and the opportunity for public input on issues and planning criteria. The planning area is located in Nye and Clark counties and encompasses approximately 3.1 million acres of public land. The purpose of the public scoping process is to determine relevant issues that will influence the scope of the environmental analysis, including alternatives, and guide the planning process. Preliminary issues for the planning area have been identified by BLM personnel, other State and Federal agencies, and other stakeholders. The issues include renewable energy development for geothermal, wind, and solar power; management of site type rights-of-way for renewable energy and other uses; visual resource management; land tenure adjustments to meet community growth needs; management of split-estate lands; evaluation of existing and potential new Areas of Critical Environmental Concern; Wild and Scenic River designation for the Virgin River; Off-Highway Vehicle Designations and Special Recreation Management Areas; and fluid minerals management stipulations to protect sensitive resources. The preliminary planning criteria include the items discussed below.

(1) The planning area is defined as the area covered by the existing Las Vegas RMP. The plan revision will make planning determinations for public lands within the defined planning area boundary.

(2) The plan revision effort will rely on available inventories of the lands and resources as well as data gathered during the planning process, which will include an updated wilderness characteristics inventory, to reach sound management decisions. Any decisions requiring additional inventories will be deferred until such time as the inventories can be conducted.

(3) Use and protection of water, water resources, riparian zones, and other related values will be given a high priority.

(4) Geographic Information Systems and corporate geospatial data will be used to the extent practicable.

(5) The plan revision will be consistent to the maximum extent possible with the plans and management programs of local government, consistent with state and Federal laws and regulations and coordinated with other Federal agencies where appropriate.

(6) The principles of multiple use and sustained yield will be followed.

(7) The planning process will involve consultation with Native American Tribal governments.

(8) The RMP revision will acknowledge valid existing rights established under the current Las Vegas RMP.

(9) Federal Geographic Data Committee standards and other applicable BLM data standards will be followed.

(10) Opportunities for public involvement will be encouraged throughout the RMP process.

(11) Findings and tentative classification of waterways as eligible for inclusion in the National Wild and Scenic River System will follow the criteria contained in 43 CFR 8351.

(12) The impacts of various proposed land uses on land with wilderness characteristics will be analyzed as part of the RMP process.

(13) Environmental protection and energy production are desirable and necessary objectives and will not be considered mutually exclusive priorities.

You may submit comments on issues and planning criteria in writing to the BLM at any public scoping meeting, or you may submit them to the BLM using one of the methods listed in the **ADDRESSES** section above. To be most helpful, you should submit comments within 60 days of the last public meeting. 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. The minutes and list of attendees for each scoping meeting will be available to the public and open for 30 days after the meeting to any participant who wishes to clarify the views he or she expressed. The BLM will evaluate identified issues to be addressed in the plan and will place them into one of three categories. These categories are:

(1) Issues to be resolved in the plan;

(2) Issues to be resolved through policy or administrative action; or

(3) Issues beyond the scope of this plan.

The BLM will provide an explanation in the plan as to why it placed an issue in category two or three. The public is also encouraged to help identify any management questions and concerns that should be addressed in the plan.

The BLM will use an interdisciplinary approach to develop the plan and to consider the variety of resource issues and concerns identified. Specialists with expertise in the following disciplines will be involved in the planning process: renewable energy, lands and realty, minerals management, outdoor recreation, air resources, visual resources, vegetation, cultural resources, paleontology, botany, special status species, wildlife and fisheries, hydrology, sociology and economics.

Authority: 40 CFR 1501.7 and 43 CFR 1610.2.

Ron Wenker,

Nevada State Director.

[FR Doc. E9–31251 Filed 1–4–10; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLORW00000 L51010000.ER0000. LVRWH09H0570; HAG10–0008]

Notice of Intent To Prepare an Environmental Impact Statement for the Vantage to Pomona Heights 230 Kilovolt Transmission Line Project, Yakima, Kittitas, and Grant Counties, WA

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent.

SUMMARY: In compliance with the National Environmental Policy Act (NEPA) of 1969, as amended, and the

Federal Land Policy and Management Act (FLPMA) of 1976, as amended The Bureau of Land Management (BLM) Wenatchee Field Office and the U.S. Army Yakima Training Center (YTC) intend to prepare an Environmental Impact Statement (EIS) for the Vantage to Pomona Heights 230 kilovolt (kV) Transmission Line Project. By this notice, the BLM and YTC are announcing the beginning of the scoping process to solicit public comments and identify issues.

DATES: Comments on this Notice of Intent may be submitted in writing until March 8, 2010. The dates and the locations of any scoping meetings will be announced through local media and individual letter mailings at least 15 days prior to the events. To be considered in the Draft EIS, all comments must be received prior to the close of the scoping period or 15 days after the last public meeting, whichever is later. BLM will provide additional opportunities for public involvement after publication of the Draft EIS.

ADDRESSES: You may submit comments or resource information related to the Vantage to Pomona Heights 230 kV Transmission Line Project by either of the following methods:

- *E-mail: OR_Wenatchee_Mail@blm.gov* (please reference Vantage to Pomona Heights EIS in the subject line).
- *Mail/hand deliver to:* BLM Wenatchee Field Office, ATTN: Vantage to Pomona Heights EIS, 915 Walla Walla Avenue, Wenatchee, Washington 98801–1521.

Documents pertinent to this proposal may be examined at the BLM Wenatchee Field Office.

FOR FURTHER INFORMATION CONTACT: For further information and/or to have your name added to our mailing list, contact William Schurger, Realty Specialist, at (509) 655–2100; e-mail: *OR_Wenatchee_Mail@blm.gov.*

SUPPLEMENTARY INFORMATION: Pacific Power has submitted applications for rights-of-way (ROWs) across BLM- and YTC-administered lands to construct the Vantage to Pomona Heights 230kV Transmission Line Project. The new 230 kV transmission line is being proposed to address energy demand growth in the Yakima region by increasing the capacity of the transmission system [that will serve growing needs] while ensuring continued reliable service to existing customers.

The new 230 kV transmission line would be constructed from Pacific Power's existing Pomona Heights substation east of Selah, Washington to the Bonneville Power Administration's existing Vantage substation east of the Wanapum Dam on the Columbia River. The project would cross a distance of approximately 38 miles through Grant, Kittitas, and Yakima Counties. The proposed route is generally parallel and south of Pacific Power's existing Pomona-Wanapum 230 kV transmission line. The line would cross approximately four miles of BLM-administered land, 19 miles of the YTC administered lands, and 15 miles of private land. The permanent ROW requested for the project is 125 feet wide. H-frame wood pole structures are proposed for most of the line located in open terrain. The H-frame structures would be between 65 and 100 feet tall and spaced approximately 750 to 900 feet apart depending on terrain. In developed areas, such as around the Pomona Heights substation, single wood or steel pole structures would be used. The single pole structures would be between 80 and 95 feet tall and spaced approximately between 300 to 500 feet apart. For the Columbia River crossing, steel lattice structures would be approximately 200 feet tall. This extra height is required to safely span the more than 3,000-foot river crossing. Construction would begin in mid 2011 and be completed in late 2012.

The BLM and YTC are joint lead Federal agencies for preparation of the EIS. Through public scoping, BLM and YTC expect to identify various issues, potential impacts, mitigation measures, and alternatives associated with the proposed action. Through internal scoping, the BLM and YTC identified the following preliminary issues and concerns:

(1) Potential conflict with YTC training operations. The YTC is concerned about how the proposed transmission line would interfere with or constrain its military training mission.

(2) Cultural properties. Cultural properties in the vicinity of the proposed route are of concern to several Native American Tribes.

(3) Habitat for sage-grouse and other species of concern. The proposed route would pass through occupied sage-grouse habitat.

(4) Values within the Yakima River Canyon Area of Critical Environmental Concern (ACEC). The proposed route would cross through this ACEC, whose values include three plant species of concern, unique wildlife habitat, and recreational opportunities.

(5) Visual resources. Portions of the proposed transmission line would be visible from great distances in this open terrain.

(6) Wildland fire management. High value facilities, such as the proposed transmission line, require additional protection from wildland fire.

The BLM will use the NEPA commenting process to satisfy the public involvement process of Section 106 of the National Historic Preservation Act (16 U.S.C. 470f), as provided for in 36 CFR 800.2(d)(3). Native American Tribal consultations will be conducted and Tribal concerns, including impacts on Indian trust assets, will be given due consideration. Federal, State, and local agencies, along with other stakeholders that may be interested in or affected by the BLM's decision on this project, are invited to participate in the scoping process. Federal, State, and local agencies may request or be asked by the BLM to participate as a cooperating agency. 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.

Robert B. Towne,

Spokane District Manager.

[FR Doc. E9–31240 Filed 1–4–10; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLUTC00000.L51010000.ER0000. LVRWJ09J4050; UTU–83067]

Notice of Intent To Prepare an Environmental Impact Statement for the Sigurd–Red Butte Transmission Line Project (Project) in Utah

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent.

SUMMARY: In compliance with the National Environmental Policy Act (NEPA) of 1969, as amended, and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) Cedar City Field Office, Cedar City, Utah, intends to prepare an Environmental Impact Statement (EIS) for a right-of-way (ROW) application for the Sigurd-Red Butte 345 kilovolt (kV) Transmission Line Project and by this notice is announcing the beginning of the scoping process to solicit public comments and identify issues.

DATES: This notice initiates the public scoping process for the EIS. Comments on issues may be submitted in writing

until February 19, 2010. The date(s) and location(s) of any scoping meetings will be announced at least 15 days in advance through local media, newspapers, and the BLM Web site at: *http://www.blm.gov/ut/st/en/fo/cedar_city/planning.html*. In order to be considered in the Draft EIS, all comments must be received prior to the close of the scoping period or 15 days after the last public meeting, whichever is later. The BLM will provide additional opportunities for public participation upon publication of the Draft EIS.

ADDRESSES: You may submit comments related to the Sigurd-Red Butte 345 Transmission Line Project by any of the following methods:

- *Web site: http://www.blm.gov/ut/st/en/fo/cedar_city/planning.html.*
- *Mail:* Bureau of Land Management, Cedar City Field Office, 176 East D.L. Sargent Drive, Cedar City, Utah 84721, Attention: Lucas Lucero.
- *E-mail: utsrbproj@blm.gov.*

Documents pertinent to the right-of-way (ROW) application for the transmission line project may be examined at:

- U.S. Forest Service, Dixie Office, 1789 North Wedgewood Lane, Cedar City, Utah 84721.
- U.S. Forest Service, Fishlake Office, 115 East 900 North, Richfield, Utah 84701.
- BLM, Cedar City Field Office, 176 D.L. Sargent Drive, Cedar City, Utah 84721.

FOR FURTHER INFORMATION CONTACT: For further information and/or to have your name added to our mailing list, contact Lucas Lucero, BLM Project Manager; telephone (702) 515–5059; e-mail *Lucas_Lucero@blm.gov*; address BLM, Cedar City Field Office, 176 East D.L. Sargent Drive, Cedar City, Utah 84721.

SUPPLEMENTARY INFORMATION: PacifiCorp, doing business as Rocky Mountain Power Company, has filed a ROW application seeking authorization to construct, operate, maintain, and decommission a 345 kV single-circuit overhead electric transmission line on Federal lands. The project would provide an additional 600 megawatts of reliable electrical capacity by 2014 to respond to anticipated load growth in Southwestern Utah. The proposed project begins at the existing Sigurd Substation near Richfield, Utah, and terminates at the existing Red Butte Substation near the town of Central, Utah. The project area spans approximately 160 miles. Rocky Mountain Power Company has identified multiple alternative routes between the two substations. Alternative routes identified so far would affect Federal, State, and private lands. The requested ROW width on Federal lands is 150 feet. Rocky Mountain Power Company proposes to predominantly use steel H-frame towers approximately 80 to 130 feet in height with average spans between towers of 1,000 to 1,200 feet. Permanent access roads approximately 14 feet wide would be needed. Temporary work space would be needed during construction for material storage, conductor tensioning sites, and to accommodate vehicles and equipment. Alternative routes currently identified would use portions of utility corridors on Federal lands and parallel portions of existing overhead and underground utilities and roadways.

The BLM is the designated lead Federal agency for preparation of the EIS. Other agencies with legal jurisdiction or special expertise have been invited to participate as cooperating agencies in preparation of the EIS. Currently, the U.S. Forest Service (Dixie and Fishlake National Forests), State of Utah, Millard County, Sevier County, Beaver County, Utah Division of Wildlife Resources, City of St. George, and City of Enterprise have agreed to participate as cooperating agencies.

The purpose of the public scoping process is to determine relevant issues that will influence the scope of the environmental analysis, including alternatives, and guide the process for developing the EIS. At present, the BLM has identified the following preliminary issues: public health and safety, noise, visual intrusions, migratory bird habitat, crucial deer and elk habitat, Utah Prairie Dog habitat, socioeconomic impacts, cultural and historic sites, National Scenic and Historic Trails, and nearby inventoried roadless areas on National Forests.

The BLM will use and coordinate the NEPA commenting process to satisfy the public involvement process for Section 106 of the National Historic Preservation Act (16 U.S.C. 470f) as provided for in 36 CFR 800.2(d)(3). Native American Tribal consultations will be conducted and Tribal concerns will be given due consideration, including impacts on Indian trust assets. Federal, State, and local agencies, along with other stakeholders that may be interested or affected by the BLM's decision on this project are invited to participate in the scoping process and, if eligible, may request or be requested by the BLM to participate as a cooperating agency.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 40 CFR 1501.7.

Selma Sierra,

State Director.

[FR Doc. E9–31239 Filed 1–4–10; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNML00000 L16100000.DO0000]

Notice of Intent To Prepare a Resource Management Plan for the Prehistoric Trackways National Monument, Las Cruces District Office, New Mexico and Associated Environmental Impact Statement

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent.

SUMMARY: In compliance with the National Environmental Policy Act of 1969 (NEPA), as amended, and the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, the Bureau of Land Management (BLM) Las Cruces District Office, Las Cruces, New Mexico, intends to prepare a Resource Management Plan (RMP) with an associated Environmental Impact Statement (EIS) for the Prehistoric Trackways National Monument and by this notice is announcing the beginning of the scoping process to solicit public comments and identify issues. The RMP will replace the existing Mimbres RMP (1993).

DATES: This notice initiates the public scoping process for the RMP with associated EIS. Comments on issues may be submitted in writing until February 4, 2010. The dates and locations of any scoping meetings will be announced at least 15 days in advance through local media, newsletters, and the BLM Web site at: *http://www.blm.gov/nm/st/en/fo/Las_Cruces_District_Office.html.* In order to be included in the Draft EIS, all comments must be received prior to the close of the scoping period or 15 days after the last public meeting, whichever is later. We will provide additional opportunities for

public participation upon publication of the Draft RMP/EIS.

ADDRESSES: You may submit comments on issues and planning criteria related to Prehistoric Trackways National Monument RMP/EIS by any of the following methods:

- *Web site: http://www.blm.gov/nm/st/en/fo/Las_Cruces_District_Office.html.*
- *E-mail: lcfo_rmp@nm.blm.gov.*
- *Fax:* (575) 525–4412.
- *Mail:* BLM, Las Cruces District Office, 1800 Marquess Street, Las Cruces, New Mexico 88005.

Documents pertinent to this proposal may be examined at the Las Cruces District Office.

FOR FURTHER INFORMATION CONTACT: For further information and/or to have your name added to our mailing list, contact Lori Allen; telephone (575) 525–4454; address BLM, Las Cruces District Office, 1800 Marquess Street, Las Cruces, New Mexico 88005; e-mail *Lori_Allen@blm.gov.*

SUPPLEMENTARY INFORMATION: This document provides notice that the BLM District Office, Las Cruces, New Mexico, intends to: (1) Prepare an RMP with an associated EIS for the Prehistoric Trackways National Monument; (2) announce the beginning of the scoping process; and (3) seek public input on issues and planning criteria.

The planning area is located in Doña Ana County, New Mexico and encompasses approximately 6,000 acres of public land.

The purpose of the public scoping process is to determine relevant issues that will influence the scope of the environmental analysis, including alternatives, and guide the planning process. Preliminary issues for the planning area have been identified by BLM personnel, Federal, State, and local agencies, and other stakeholders and include Paleozoic resource protection, scientific research, off-highway vehicle use/recreation, and interpretation and education. Preliminary planning criteria will include the following:

1. The RMP will be in compliance with the Omnibus Public Land Management Act of 2009, FLPMA, NEPA, and all other applicable laws, regulations, and policies;
2. Land use decisions will apply to the surface and subsurface estate managed by the BLM;
3. The planning process will follow the BLM Land Use Planning Handbook, H–1601–1 and NEPA Handbook, H–1790–1 for program specific guidance;
4. Public participation and collaboration will be an integral part of the planning process;
5. The BLM will strive to make decisions in the plan compatible with the existing plans and policies of adjacent local, State, and Federal agencies and tribal entities, as long as the decisions are consistent with the purposes, policies, and programs of Federal law and regulations applicable to public land;
6. The RMP will recognize valid existing rights;
7. The RMP will incorporate, where applicable, management decisions brought forward from existing planning documents;
8. The BLM will work cooperatively and collaboratively with cooperating agencies and all other interested groups, agencies, and individuals;
9. The BLM will consider public welfare and safety when addressing hazardous materials and fire management;
10. Geographic Information System and metadata information will meet Federal Geographic Data Committee standards, as required by Executive Order 12906;
11. The planning process will provide for ongoing consultation with tribal entities and strategies for protecting recognized traditional uses;
12. Planning and management direction will focus on the relative values of resources and not the combination of uses that will give the greatest economic return or economic output;
13. Where practicable and timely for the planning effort, the best available scientific information, research, and new technologies will be used; and
14. The Economic Profile System will be used as one source of demographic and economic data for the planning process.

You may submit comments on issues and planning criteria in writing to the BLM at any public scoping meeting, or you may submit them to the BLM using one of the methods listed in the **ADDRESSES** section above. 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. The minutes and list of attendees for each scoping meeting will be available to the public and open for 30 days after the meeting to any participant who wishes to clarify the views he or she expressed. The BLM will evaluate identified issues to be addressed in the plan, and will place them into one of three categories:

1. Issues to be resolved in the plan;
2. Issues to be resolved through policy or administrative action; or
3. Issues beyond the scope of this plan.

The BLM will provide an explanation in the Draft RMP/Draft EIS as to why an issue was placed in category two or three. The public is also encouraged to help identify any management questions and concerns that should be addressed in the plan. The BLM will work collaboratively with interested parties to identify the management decisions that are best suited to local, regional, and national needs and concerns.

The BLM will use an interdisciplinary approach to develop the plan in order to consider the variety of resource issues and concerns identified. Specialists with expertise in the following disciplines will be involved in the planning process: Planning and NEPA, Paleontology, Outdoor Recreation, Minerals and Geology, Archeology, Wildlife, and others as may be needed.

Authority: 40 CFR 1501.7; 43 CFR 1610.2.

Linda S. C. Rundell,

State Director, New Mexico.

[FR Doc. E9–31248 Filed 1–4–10; 8:45 am]

BILLING CODE 4310–VC–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Extension of Concession Contracts

AGENCY: National Park Service, Interior.

ACTION: Public notice.

DATES: *Effective Date:* January 1, 2010.

FOR FURTHER INFORMATION CONTACT: Jo A. Pendry, Chief, Commercial Services Program, National Park Service, 1201 Eye Street, NW., 11th Floor, Washington, DC, 20005, Telephone 202/513–7156.

SUMMARY: Pursuant to 36 CFR 51.23, public notice is hereby given that the National Park Service proposes to extend the following expiring concession contracts for a period of up to 1 year, or until such time as a new contract is executed, whichever occurs sooner.

SUPPLEMENTARY INFORMATION: All of the listed concession authorizations will expire by their terms on or before December 31, 2009. The National Park Service has determined that the proposed short-term extensions are necessary in order to avoid interruption

of visitor services and has taken all reasonable and appropriate steps to consider alternatives to avoid such interruption.

Conc ID No.	Concessioner name	Park
GLCA002–88	Aramark Glen	Canyon National Recreation Area.
GRTE004–98	Triangle X Ranch, LLP	Grand Teton National Park.
JODR002–90	International Leisure Hosts, Ltd	John D. Rockefeller, Jr. Memorial Parkway.
NACC001–89	Golf Course Specialist, Inc	National Capital Parks—Central.
NACC004–89	Landmark Services Tourmobile, Inc	National Capital Parks—Central.
FIIS004–02	Davis Park Ferry Co	Fire Island National Seashore.
GATE003–98	Marinas of the Future, Inc	Gateway National Recreation Area.
CHIS001–98	Island Packers, Inc	Channel Islands National Park.
LAME017–05	Black Canyon/Willow Beach River Adventures	Lake Mead National Recreation Area.
PORE003–98	Golden Gate Council of American Youth Hostels	Point Reyes National Seashore.
BISC002–04	Biscayne National Underwater Park, Inc	Biscayne National Park.
BLRI004–88	Virginia Peaks of Otter	Blue Ridge Parkway.
EVER004–98	TRF Concessions Specialists of Florida, Inc	Everglades National Park.
GUTS001–03	Dudley Food and Beverage	Gulf Islands National Seashore.

FOR FURTHER INFORMATION CONTACT: Jo A. Pendry, Chief, Commercial Services Program, National Park Service, 1201 Eye Street, NW., 11th Floor, Washington, DC 20005, Telephone 202/513–7156.

Dated: November 24, 2009.

Katherine H. Stevenson,

Assistant Director, Business Services.

[FR Doc. E9–31126 Filed 1–4–10; 8:45 am]

BILLING CODE 4312–53–M

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate a Cultural Item: Seton Hall University Museum, Seton Hall University, South Orange, NJ

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 a cultural item in the possession of the Seton Hall University Museum, Seton Hall University, South Orange, NJ, that meets the definitions of ''sacred object'' and ''object of cultural patrimony'' 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 item. The National Park Service is not responsible for the determinations in this notice.

Consultation was conducted with representatives of the Onondaga Nation of New York and the Tuscarora Nation of New York. Requests for consultation were sent to the Cayuga Nation of New York; Oneida Nation of New York; Oneida Tribe of Indians of Wisconsin; Seneca Nation of New York; Seneca-Cayuga Tribe of Oklahoma; Tonawanda Band of Seneca Indians of New York; the Mohawk Nation (which is comprised of the Mohawks of the Saint Regis Mohawk Tribe, New York; Mohawk Council of Akwesasne; and Mohawk Nation Council of Chiefs); and the Haudenosaunee Standing Committee on Burial Rules and Regulations, a non-Federally recognized Indian group.

The artifact is a miniature false face mask or medicine face. The miniature was obtained at a ''reservation near Syracuse,'' by Mr. Samuel Tarrant of Newark, NJ. Museum officials reasonably believe that the reservation is the Onondaga Reservation, which is near Syracuse, NY. It is not known when or how Mr. Tarrant obtained it. The Seton Hall University Museum purchased it from Mr. Tarrant in 1962 or 1963.

Written evidence of Haudenosaunee oral tradition identifies false face masks as being sacred objects needed by traditional Haudenosaunee religious leaders, as well as being objects of cultural patrimony that have ongoing historical, traditional, and cultural significance to the group and could not have been alienated by a single individual. The Haudenosaunee Confederacy includes the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora Nations (which are represented by the following Federally-recognized groups: Cayuga Nation of New York; Oneida Nation of New York; Oneida Tribe of Indians of Wisconsin; Onondaga Nation of New York; Seneca Nation of New York; Seneca-Cayuga Tribe of Oklahoma; Saint Regis Mohawk Tribe, New York; Tonawanda Band of Seneca Indians of New York; and Tuscarora Nation of New York). Based on the provenience, this false face mask is considered to be culturally affiliated to the Onondaga Nation of New York.

Officials of the Seton Hall University Museum have determined that, pursuant to 25 U.S.C. 3001 (3)(C), the cultural object described above is a specific ceremonial object needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. Officials of the Seton Hall University Museum have also determined that, pursuant to 25 U.S.C. 3001 (3)(D), the cultural item described above has ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual. Lastly, officials of the Seton Hall University 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 sacred object/object of cultural patrimony and the Onondaga Nation of New York.

Representatives of any other Indian nation or tribe that believes itself to be culturally affiliated with this sacred object/object of cultural patrimony should contact Dr. Thomas W. Kavanagh, Seton Hall University Museum, Seton Hall University, 400 South Orange Ave., South Orange, NJ 07079, telephone (973) 275–5873, or Thomas.Kavanagh@shu.edu, before February 4, 2010. Repatriation of the sacred object/object of cultural patrimony to the Onondaga Nation of New York may proceed after that date if no additional claimants come forward.

The Seton Hall University Museum is responsible for notifying the Haudenosaunee Standing Committee on Burial Rules and Regulations, and the Cayuga Nation of New York; Oneida

Nation of New York; Oneida Tribe of Indians of Wisconsin; Onondaga Nation of New York; Seneca Nation of New York; Seneca-Cayuga Tribe of Oklahoma; Saint Regis Mohawk Tribe, New York; Tonawanda Band of Seneca Indians of New York; and Tuscarora Nation of New York, that this notice has been published.

Dated: November 25, 2009.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E9–31223 Filed 1–4–10; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items: 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. 3005, of the intent to repatriate cultural items in the possession of the Thomas Burke Memorial Washington State Museum (Burke Museum), University of Washington, Seattle, WA, 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.

In 1965, human remains representing a minimum of one individual were removed from south of the International District in Seattle, King County, WA. The human remains were transferred from the King County Coroner's Office to the Burke Museum in 1965 (Burke Accn. #1966–77). All human remains are now missing. No known individual was identified. The six unassociated funerary objects are one infant bracelet, two metal spoons, one brass button, one woman's shoe, and one glass ketchup bottle.

Before 1955, unassociated funerary objects were found between Bellevue and Renton in King County, WA. The objects were found during road construction and collected by Mrs. Willa W. Mylroie. The objects were donated to the Burke Museum in 1955 (Burke Accn. #3979). No known human remains are associated with the objects. The 124 unassociated funerary objects are 12 copper bracelets, 1 decorative brass clip, 4 glass beads, 15 brass buttons, 1 brass thimble, 1 can of vermillion, 89 trade beads, and 1 blanket fragment.

In 1892, an unassociated funerary object was removed from Bryn Mawr, King County, WA. The funerary object was collected by Frank E. Fuller and donated to the Burke Museum by the Washington World's Fair Commission in 1893 (Burke Accn. #1119). No known human remains are associated with the object. The one unassociated funerary object is a metal knife with incised bone handle.

The funerary objects were removed from the area surrounding Lake Washington primarily on the southern end. This area falls within the Southern Lushootseed language group of Salish cultures. The Duwamish people primarily occupied this area, specifically the Lake people (Swanton 1952:423). In the 1870s, as the City of Seattle developed, the Lake people were pushed out to other areas, including the Muckleshoot, Suquamish, and Tulalip reservations. The Lake people also joined the Snoqualmie people on Lake Sammamish and in the Snoqualmie River drainage (Miller and Blukis Onat 2004:109). Descendants of the Lake people are members of the present-day Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington; Snoqualmie Tribe, Washington; Suquamish Indian Tribe of the Port Madison Reservation, Washington; and Tulalip Tribes of the Tulalip Reservation, Washington.

In 1923, unassociated funerary objects were found near Kirkland, King County, WA. The objects were found under the roots of a tree and sent by Mrs. Loyal C. Wright to Professor Meany of the University of Washington. Prof. Meany subsequently transferred the objects to the Burke Museum in 1923 (Burke Accn. ι2022). No known human remains are associated with the objects. The six unassociated funerary objects are four glass beads, one copper bracelet, and one brass button.

The above-mentioned funerary objects were removed from the northeastern shores of Lake Washington south of the mouth of the Sammamish River. This area falls within the Southern Lushootseed language group of Salish cultures. The Sammamish people primarily occupied this area (Ruby and Brown 1986, Suttles and Lane 1990, Swanton 1952). The Sammamish people were closely related to the Duwamish people and other tribes in the area. As per the terms of the 1855 Point Elliot Treaty, the Sammamish were assigned to go to the Tulalip Reservation. Many Sammamish people chose not to relocate to the Tulalip Reservation. The Sammamish people are represented by the present-day Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington; Snoqualmie Tribe, Washington; Suquamish Indian Tribe of the Port Madison Reservation, Washington; and Tulalip Tribes of the Tulalip Reservation, Washington.

Officials of the Burke Museum have determined that, pursuant to 25 U.S.C. 3001 (3)(B), the 137 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 an Native American individual. 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 unassociated funerary objects and the Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington; Snoqualmie Tribe, Washington; Suquamish Indian Tribe of the Port Madison Reservation, Washington; and Tulalip Tribes of the Tulalip Reservation, Washington.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the unassociated funerary objects should contact Dr. Peter Lape, Burke Museum, University of Washington, Box 353010, Seattle, WA 98195–3010, telephone (206) 685–3849, before February 4, 2010. Repatriation of the unassociated funerary objects to the Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington; Snoqualmie Tribe, Washington; Suquamish Indian Tribe of the Port Madison Reservation, Washington; and Tulalip Tribes of the Tulalip 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; 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: November 25, 2009

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E9–31220 Filed 1ndash;4–10; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Field Museum of Natural History, Chicago, IL

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 Field Museum of Natural History, Chicago, IL. The human remains were removed from the Channel Islands in Santa Barbara and Los Angeles Counties, 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. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Field Museum of Natural History professional staff in consultation with representatives of the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California.

On an unknown date, human remains were removed from San Miguel Island, Santa Barbara County, CA. In 1893, human remains representing a minimum of six individuals from that removal were purchased by the Field Museum of Natural History from Ward's Natural Science Establishment of Rochester, NY (Field Museum of Natural History catalog numbers 42700–42703, accession number 407). The human remains were accessioned into the Field Museum of Natural History the same year. No known individuals were identified. No associated funerary objects are present.

On an unknown date, human remains were removed from San Miguel Island, Santa Barbara County, CA. In 1894, the Field Museum of Natural History purchased human remains representing a minimum of one individual from that removal from Franz Boas (Field Museum of Natural History catalog number 42704, accession number 68). The human remains were accessioned into the Field Museum of Natural History the same year. No known individual was identified. No associated funerary objects are present.

In 1897, human remains were removed from San Nicolas Island, Santa Barbara County, CA, by A.B. Chappell. Later that year, the Field Museum of Natural History purchased human remains representing a minimum of one individual from that removal from A.B. Chappell (Field Museum of Natural History catalog number 42705, accession number 522). The human remains were accessioned into the Field Museum of Natural History the same year. No known individual was identified. No associated funerary objects are present.

In 1904, F.H. Sellers donated human remains representing a minimum number of two individuals to the Field Museum of Natural History (Field Museum of Natural History catalog numbers 42715 and 42716, accession number 867). The human remains were accessioned into the Field Museum of Natural History the same year. Field Museum records indicate the locality of removal as ''Probably Channel Isl., California.'' No known individuals were identified. No associated funerary objects are present.

In 1932, the Field Museum of Natural History received human remains representing a minimum number of one individual as part of an exchange with Byron Knoblock (Field Museum of Natural History catalog number 42860, accession 1964). Field Museum records indicate that the human remains came from Santa Catalina Island, Los Angeles County, CA. No known individual was identified. No associated funerary objects are present.

At an unknown date, the Field Museum of Natural History acquired human remains representing a minimum of three individuals from Santa Catalina Island, Los Angeles County, CA, from an unknown source (Field Museum of Natural History catalog number 42706, accession 3910). In 1995, the human remains were located in the collections of the Field Museum of Natural History and were accessioned the same year. No known individuals were identified. No associated funerary objects are present.

The human remains have been identified as Native American, based on craniometric analysis and the specific cultural and geographic attribution in Field Museum of Natural History records. Archeological investigations have identified a cultural continuity for the Chumash Indians that traces their presence on the northern Channel Islands back 7,000 to 9,000 years. Geographical, archeological, and oral history evidence indicate a shared group identity between these human remains from San Miguel, San Nicolas, and Santa Catalina Islands and the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California, the present-day tribe most closely associated with the prehistoric and historic Chumash Indians.

Officials of the Field Museum of Natural History have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above are reasonably believed to be the physical remains of 14 individuals of Native American ancestry. Officials of the Field Museum of Natural History 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 Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Helen Robbins, Repatriation Director, Field Museum of Natural History, 1400 S. Lake Shore Drive, Chicago, IL 60605, telephone (312) 665–7317, before February 4, 2010. Repatriation of the human remains to the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California may proceed after that date if no additional claimants come forward.

The Field Museum of Natural History is responsible for notifying the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California that this notice has been published.

Dated: November 19, 2009

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E9–31224 Filed 1–4–10; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Department of Anthropology, University of Massachusetts, Amherst, MA

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 and control of the Department of Anthropology, University of Massachusetts, Amherst, MA. The human remains were removed from a tributary of the Spokane River, 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 the Department of Anthropology, University of Massachusetts, Amherst professional staff in consultation with representatives of the Coeur d'Alene Tribe of the Coeur d'Alene Reservation, Idaho; Confederated Tribes of the Colville Reservation, Washington; Kalispel Indian Community of the Kalispel Reservation, Washington; Nez Perce Tribe, Idaho; and Spokane Tribe of the Spokane Reservation, Washington.

In 1940, human remains representing a minimum of one individual were removed from a talus slope of a tributary of the Spokane River in Washington State. The human remains were excavated by David L. Stone. The grave was located on one of the tributaries of the Spokane River, in one of three possible counties (Spokane, Stevens or Lincoln County), but the exact location is unknown. A note accompanying the human remains, presumably written by Stone, states that the human remains were excavated from a grave that was originally marked with a 20 ft. or longer cedar stake, and that they were believed to be approximately 500 years old. The history of how these human remains came to be in the collection of the Department of Anthropology at the University of Massachusetts, Amherst is unknown. No known individual was identified. No associated funerary objects are present.

During consultation, a tribal representative of the Coeur d'Alene Tribe stated that the tribe occupied the head of the Spokane River down to the Spokane Falls and Hangman Creek areas with settlements to the north and south. In particular, one band of the Coeur d'Alene occupied the Spokane River area. Traditional burial practices of the Coeur d'Alene included the burying of ancestors along talus slopes, which matches the description by Stone regarding the burial and its placement. In addition, during consultation, tribal representatives for the Spokane Tribe stated that the Spokane River, including tributaries such as Hangman Creek and Little Spokane River, are the ancestral homeland of the Upper Band of Spokane Indians. Spokane representatives also stated that their traditional burial practices included burial along talus slopes with cedar stakes as markers, which also matches the description by Stone regarding the burial and its placement. Based on consultation and museum records, museum officials reasonably believe the human remains are Native American and ancestral to the Coeur d'Alene Tribe of the Coeur d'Alene Reservation, Idaho, and/or the Spokane Tribe of the Spokane Reservation, Washington.

Officials of the Department of Anthropology, University of Massachusetts, Amherst, 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 Department of Anthropology, University of Massachusetts, Amherst 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 Coeur d'Alene Tribe of the Coeur d'Alene Reservation, Idaho, and/or the Spokane Tribe of the Spokane Reservation, Washington.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Robert Paynter, Repatriation Committee Chair, Department of Anthropology, University of Massachusetts, 201 Machmer Hall, 240 Hicks Way, Amherst, MA 01003, telephone (413) 545–2221, before February 4, 2010. Repatriation of the human remains to the Coeur d'Alene Tribe of the Coeur d'Alene Reservation, Idaho, and/or Spokane Tribe of the Spokane Reservation, Washington, may proceed after that date if no additional claimants come forward.

The Department of Anthropology, University of Massachusetts, Amherst is responsible for notifying the Coeur d'Alene Tribe of the Coeur d'Alene Reservation, Idaho; Confederated Tribes of the Colville Reservation, Washington; Kalispel Indian Community of the Kalispel Reservation, Washington; Nez Perce Tribe, Idaho; and Spokane Tribe of the Spokane Reservation, Washington that this notice has been published.

Dated: November 27, 2009

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E9–31222 Filed 1–4–10; 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 objects in the control of the Thomas Burke Memorial Washington State Museum (Burke Museum), University of Washington, Seattle, WA. The human remains and associated funerary objects were removed from 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 objects. 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 1920, human remains representing a minimum of one individual were removed from near Laurelhurst in King County, WA, during construction by a steam shovel crew. The human remains were transferred to the King County Coroner's Office and subsequently transferred to the Burke Museum in 1920 (Burke Accn. #1811). No known individual was identified. No associated funerary objects are present.

In 1963, human remains representing a minimum of one individual were removed from the Seattle Tennis Club

land, King County, WA, during an excavation of the Seattle Tennis Club. In 1963, the human remains were donated to the Burke Museum by Mr. and Mrs. Ralph W. Nicholson and Dr. Helen Schuster (Burke Accn. #1963–76). No known individual was identified. No associated funerary objects are present.

The above-mentioned human remains have been determined to be Native American based on a variety of sources, including archeological and biological evidence. The human remains were determined to be consistent with Native American morphology, as evidenced either through cranial deformation, bossing of the cranium, presence of wormian bones, or shovel shaped incisors. Information available in the original accession files helped affirm the determination.

Both sites are on the western shore of Lake Washington and near Union Bay. This area falls within the Southern Lushootseed language group of Salish cultures. The Duwamish people primarily occupied this area, specifically the Lake people and the Thluwi'thalbsh band (Swanton 1952:423). In the 1870s, as the City of Seattle developed, the Lake people were pushed out to other areas, including the Muckleshoot, Suquamish, and Tulalip reservations. The Lake people also joined the Snoqualmie people on Lake Sammamish and in the Snoqualmie River drainage (Miller and Blukis Onat 2004:109). Descendants of the Lake people are members of the present-day Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington; Snoqualmie Tribe, Washington; Suquamish Indian Tribe of the Port Madison Reservation, Washington; and Tulalip Tribes of the Tulalip Reservation, Washington.

In 1930, human remains representing a minimum of two individuals were removed from the Denny Regrade, Seattle, King County, WA. The human remains were discovered with cedar bark over them during construction of the Denny Regrade, and collected by E.S. Harrar of the University of Washington, College of Forestry. The human remains were transferred to the Burke Museum in 1930 (Burke Accn. #2412). No known individuals were identified. No associated funerary objects are present.

In 1930, human remains representing a minimum of two individuals were removed from the bank of the Duwamish River Ox Bow, Georgetown, King County, WA. The human remains were donated to the Burke Museum by Earl Burke and Charles D. McCormick in 1930 (Burke Accn. #2431 and 2432). No known individuals were identified. The 100 associated funerary objects are 96 beads, 2 sea urchin shell fragments, and 2 copper bracelets.

The above-mentioned human remains have been determined to be Native American based on a variety of sources, including archeological and biological evidence. The human remains were determined to be consistent with Native American morphology, as evidenced either through cranial deformation, bossing of the cranium, presence of wormian bones, or shovel shaped incisors. Information available in the original accession files helped affirm the determination. Associated artifacts provided additional contextual information to confirm the human remains were buried consistent with Native American burial practices in the Puget Sound area.

The above-mentioned sites are in an area surrounding Elliott Bay and the Duwamish River. This area falls within the Southern Lushootseed language group of Salish cultures. The Duwamish people primarily occupied this area (Ruby and Brown 1986:72). As per the terms of the 1855 Point Elliot Treaty, the Duwamish were assigned to the Suquamish Reservation (called Fort Kitsap at the time). After 1856, due to violence between whites and Native Americans, as well as the competition over available resources, many Duwamish left the Suquamish Reservation. The Indian agent subsequently assigned the Duwamish to the Muckleshoot Reservation. The Duwamish people are represented by the present-day Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington; Snoqualmie Tribe, Washington; Suquamish Indian Tribe of the Port Madison Reservation, Washington; and Tulalip Tribes of the Tulalip Reservation, Washington.

In 1963, human remains representing a minimum of one individual were removed from Kenmore, King County, WA. The remains were discovered by children digging near the water, and were transferred to the King County Coroner's Office. In 1963, the human remains were donated to the Burke Museum by Mr. and Mrs. Phillip E. Sharpe (Burke Accn. #1963–71). No known individual was identified. No associated funerary objects are present.

In 1927, human remains representing a minimum of one individual were removed from Bothell, Sammamish Slough, King County, WA. The human remains were found under a tree on the property of Dr. E.B. Fromm and were collected by J.W. There were two iron knives found with the human remains, and two stone tools and one dentalium shell were found in the cranium. In 1927, the human remains and associated funerary objects were donated to the Burke Museum (Burke Accn. #2181). In 1937, the associated funerary objects were discarded by the museum. No known individual was identified. No associated funerary objects are present.

The above-mentioned human remains have been determined to be Native American based on a variety of sources, including archeological and biological evidence. The human remains were determined to be consistent with Native American morphology, as evidenced either through cranial deformation, bossing of the cranium, presence of wormian bones, or shovel shaped incisors. Information available in the original accession files helped affirm the determination.

The above-mentioned human remains and funerary objects were removed from the area surrounding the mouth of the Sammamish River and northeastern Lake Washington. This area falls within the Southern Lushootseed language group of Salish cultures. The Sammamish people primarily occupied this area, (Ruby and Brown 1986, Suttles and Lane 1990, Swanton 1952). The Sammamish people were closely related to the Duwamish people and other tribes in the area. As per the terms of the 1855 Point Elliott Treaty, the Sammamish were assigned to the Tulalip Reservation. Many Sammamish people chose not to relocate to the Tulalip Reservation. The Sammamish people are represented by the present-day Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington; Snoqualmie Tribe, Washington; Suquamish Indian Tribe of the Port Madison Reservation, Washington; and Tulalip Tribes of the Tulalip Reservation, Washington.

In 1932, human remains representing a minimum of one individual were removed from either southeast of Sea-Tac in King County, WA, or off Holman Road in Seattle, King County, WA. The human remains were transferred to the museum by the King County Coroner's Office in 1932 (Burke Accn. #2602). The accession file lists two sets of remains associated with this record, however, there is only one set present in the collection. This individual does not have documentation as to which location it was removed. No known individual was identified. No associated funerary objects are present.

The above-mentioned human remains have been determined to be Native American based on biological evidence. The human remains were determined to be consistent with Native American morphology.

The human remains were removed either from south of Seattle or northern Seattle. Both of these areas fall within the Southern Lushootseed language group of Salish cultures. The Duwamish people primarily occupied the Seattle area. The Muckleshoot tribe occupied the area south of Seattle. As per the terms of the 1855 Point Elliot Treaty, the Duwamish were assigned to the Suquamish Reservation (called Fort Kitsap at the time). After 1856, due to violence between whites and Native Americans, as well as the competition over available resources, many Duwamish left the Suquamish Reservation. The Duwamish people are represented by the present-day Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington; Snoqualmie Tribe, Washington; Suquamish Indian Tribe of the Port Madison Reservation, Washington; and Tulalip Tribes of the Tulalip Reservation, Washington.

Officials of the Burke Museum have determined that, pursuant to 25 U.S.C. 3001 (9- 10), the human remains listed above represent the physical remains of nine individuals of Native American ancestry. Officials of the Burke Museum also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the 100 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 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 objects and the Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington; Snoqualmie Tribe, Washington; Suquamish Indian Tribe of the Port Madison Reservation, Washington; and Tulalip Tribes of the Tulalip Reservation, Washington.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains or associated funerary objects should contact Dr. Peter Lape, Burke Museum, University of Washington, Box 353010, Seattle, WA 98195–3010, telephone (206) 685–3849, before February 4, 2010. Repatriation of the human remains and associated funerary objects to the Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington; Snoqualmie Tribe, Washington; Suquamish Indian Tribe of the Port Madison Reservation, Washington; and Tulalip Tribes of the Tulalip 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: November 25, 2009

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E9–31221 Filed 1–4–10; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Field Museum of Natural History, Chicago, IL

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 Field Museum of Natural History, Chicago, IL. The human remains were removed from Howkan, AK.

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 Field Museum of Natural History professional staff in consultation with representatives of the Hydaburg Cooperative Association.

In 1902, human remains representing a minimum of one individual were removed from a grave south of Howkan, AK, by Charles F. Newcombe for the Field Museum of Natural History (Field Museum of Natural History accession number 850, catalog number 40935). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American, based on the specific cultural and geographic attribution in Field Museum of Natural History records. The records identify the human remains as ''Kaigani Haida'' and ''From Shaman's grave south of Howkan.'' Scholarly publications and consultation information provided by the Hydaburg Cooperative Association indicate that Howkan is considered to be within the traditional territory of the Kaigani Haida. The Kaigani Haida are represented by the Hydaburg Cooperative Association.

Officials of the Field Museum of Natural History 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 Field Museum of Natural History 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 Hydaburg Cooperative Association.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Helen Robbins, Repatriation Director, Field Museum of Natural History, 1400 S. Lake Shore Drive, Chicago, IL 60605, telephone (312) 665–7317, before February 4, 2010. Repatriation of the human remains to the Hydaburg Cooperative Association may proceed after that date if no additional claimants come forward.

The Field Museum is responsible for notifying the Hydaburg Cooperative Association that this notice has been published.

Dated: November 19, 2009

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E9–31219 Filed 1–4–10; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLMT921000–09–L13200000–EL0000–P; MTM 99242]

Notice of Invitation—Coal Exploration License Application MTM 99242

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: Members of the public are hereby invited to participate with Western Energy Company in a program for the exploration of coal deposits owned by the United States of America in lands located in Rosebud County, Montana, encompassing 2,533.88 acres. The authority for the notice is section

2(b) of the Mineral Leasing Act of 1920, as amended by section 4 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. 201(b), and the regulations adopted at 43 CFR part 3410.

FOR FURTHER INFORMATION CONTACT: Robert Giovanini, Mining Engineer, or Connie Schaff, Land Law Examiner, Branch of Solid Minerals (MT–921), Bureau of Land Management (BLM), Montana State Office, 5001 Southgate Drive, Billings, Montana 59101–4668, telephone (406) 896–5084 or (406) 896–5060, respectively.

SUPPLEMENTARY INFORMATION: The lands to be explored for coal deposits are described as follows:

T. 1 N., R. 40 E., P.M.M.
Sec. 26: All
Sec. 28: All
Sec. 34: Lots 1–4, N½, N½S½
T. 1 S., R. 41 E., P. M.M.
Sec. 6: Lots 1–7, S½NE¼, SE¼NW¼, E½SW¼, SE¼

Any party electing to participate in this exploration program shall notify, in writing, both the State Director, BLM, 5001 Southgate Drive, Billings, Montana 59101–4669, and Western Energy Company, P.O. Box 99, Colstrip, Montana 59323. Such written notice must refer to serial number MTM 99242 and be received no later than 30 calendar days after publication of this Notice in the **Federal Register** or 10 calendar days after the last publication of this Notice in the *Independent Press* newspaper, whichever is later. This Notice will be published once a week for two consecutive weeks in the *Independent Press,* Forsyth, Montana.

The proposed exploration program is fully described, and may be conducted pursuant to an exploration plan subject to approval by the BLM. The exploration plan, as submitted by Western Energy Company, is available for public inspection at the BLM, 5001 Southgate Drive, Billings, Montana, during regular business hours (9 a.m. to 4 p.m.), Monday through Friday.

Phillip C. Perlewitz,

Chief, Branch of Solid Minerals.

[FR Doc. E9–31243 Filed 1–4–10; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNM920000 L13200000.EW0000; NMNM–123298]

Notice of Invitation To Participate; Exploration for Coal in New Mexico; License NMNM 123298

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: Members of the public are invited to participate with the San Juan Coal Company, on a pro rata cost-sharing basis, in a program for the exploration of coal deposits owned by the United States of America.

DATES: The Bureau of Land Management (BLM) and the San Juan Coal Company must receive notices from the public expressing their interest in participating in the coal-exploration program no later than February 4, 2010.

ADDRESSES: Interested parties may obtain a complete description of the lands covered in the license application by contacting the San Juan Coal Company, or the Bureau of Land Management, New Mexico State Office, Solid Minerals Adjudication, P.O. Box 27115, Santa Fe, New Mexico 87502–0115. Any parties electing to participate in this exploration program shall notify, in writing, both the State Director, Bureau of Land Management, New Mexico State Office, P.O. Box 27115, Santa Fe, New Mexico 87502–0115 and the San Juan Coal Company, P.O. Box 561, Waterflow, New Mexico 87421. The written notice must include a justification for participation and any recommended changes in the exploration plan with specific reasons for such changes.

FOR FURTHER INFORMATION CONTACT: Angela Trujillo at (505) 438–7592.

SUPPLEMENTARY INFORMATION: The lands are located in San Juan County, New Mexico, and are described as follows:

T. 30 N., R. 14 W., NMPM
Sec. 9: All;
Sec. 10: Lots 1, 2, 3, 4, S½N½, S½;
Sec. 15: All;
Sec. 21: All;
Sec. 22: All;
Sec. 27: All;
Sec. 28: All;
Sec. 33: Lots 1, 2, 3, 4, N½, N½S½;
Sec. 34: Lots 2, 3, 4, 5, 6, 7, 8, N½, N½S½.

These lands contain 5,802.15 acres, more or less.

This proposed exploration program is for the purpose of determining the quality and quantity of the coal in the area and will be conducted pursuant to an exploration plan to be approved by the BLM. A copy of the exploration plan, as submitted by the San Juan Coal Company, may be examined at the BLM's New Mexico State Office, 301 Dinosaur Trail, Santa Fe, New Mexico 87508, and the BLM's Farmington Field Office, 1235 La Plata Highway, Suite A, Farmington, New Mexico 87401.

Jesse J. Juen,

Acting State Director.

[FR Doc. E9–31241 Filed 1–4–10; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Glen Canyon Dam Adaptive Management Work Group (AMWG)

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of public meeting.

SUMMARY: The Glen Canyon Dam Adaptive Management Program (AMP) was implemented as a result of the Record of Decision on the Operation of Glen Canyon Dam Final Environmental Impact Statement to comply with consultation requirements of the Grand Canyon Protection Act (Pub. L. 102–575) of 1992. The AMP includes a Federal advisory committee, the Adaptive Management Work Group (AMWG), a Technical Work Group (TWG), a Grand Canyon Monitoring and Research Center, and independent review panels. The AMWG makes recommendations to the Secretary of the Interior concerning Glen Canyon Dam operations and other management actions to protect resources downstream of Glen Canyon Dam consistent with the Grand Canyon Protection Act. The TWG is a subcommittee of the AMWG and provides technical advice and recommendations to the AMWG.

DATES: Meeting dates are Wednesday, February 3, 2010, 9:30 a.m.–5:40 p.m., and Thursday, February 4, 2010, 8 a.m.–3 p.m.

ADDRESSES: Radisson Hotel Phoenix, 3600 North 2nd Avenue, Phoenix, AZ 85013.

FOR FURTHER INFORMATION CONTACT: Dennis Kubly, Bureau of Reclamation, telephone (801) 524–3715; facsimile (801) 524–3858; e-mail at *dkubly@usbr.gov.*

SUPPLEMENTARY INFORMATION: The primary purpose of the meeting will be for the AMWG to discuss previous high flow experiment results and development of a high flow experimental protocol as announced by

Secretary of the Interior Ken Salazar on December 10, 2009. This meeting is intended to provide scoping information for the National Environmental Policy Act environmental assessment that will be used to evaluate the effects of the protocol. Other agenda items will include discussion on (1) the fall steady flow plan, (2) non-native fish control planning, (3) tribal issues, and (4) desired future conditions. The AMWG will also receive results from the Core Monitoring Plan and Socio-economic workshops, updates from the public outreach ad hoc group, and a report from the TWG Chair. In addition, other administrative and resource issues pertaining to the AMP may be discussed as necessary. To view a copy of the agenda and documents related to the above meeting, please visit Reclamation's Web site at: *http://www.usbr.gov/uc/rm/amp/amwg/mtgs/10feb03/index.html.* Time will be allowed at the meeting for any individual or organization wishing to make formal oral comments. To allow for full consideration of information by the AMWG members, written notice must be provided to Dennis Kubly, Bureau of Reclamation, Upper Colorado Regional Office, 125 South State Street, Room 6107, Salt Lake City, Utah 84138; telephone 801–524–3715; facsimile 801–524–3858; e-mail at *dkubly@usbr.gov* at least five (5) days prior to the meeting. Any written comments received will be provided to the AMWG members.

Before including your name, address, phone number, e-mail address, or other personal identifying information in any correspondence, you should be aware that your entire correspondence—including your personal identifying information—may be made publicly available at any time. While you can ask us in your correspondence to withhold your personal identifying information from public review, we cannot guarantee that we will be able to so do.

Dated: December 21, 2009.

Thomas P. Ryan,

Manager, Environmental Resources Division, Upper Colorado Regional Office, Salt Lake City, Utah.

[FR Doc. E9–31365 Filed 1–4–10; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLMT922200–10–L13100000–FI0000–P;MTM 91625]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease MTM 91625

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: Per 30 U.S.C. 188(d), Denise Matlock timely filed a petition for reinstatement of noncompetitive oil and gas lease MTM 91625, Musselshell County, Montana. The lessee paid the required rental accruing from the date of termination.

No leases were issued that affect these lands. The lessee agrees to new lease terms for rentals and royalties of $5 per acre and 16⅔ percent. The lessee paid the $500 administration fee for the reinstatement of the lease and $163 cost for publishing this Notice.

The lessee met the requirements for reinstatement of the lease per Sec. 31(d) and (e) of the Mineral Leasing Act of 1920 (30 U.S.C. 188). We are proposing to reinstate the lease, effective the date of termination subject to:

- The original terms and conditions of the lease;
- The increased rental of $5 per acre;
- The increased royalty of 16⅔ percent; and
- The $163 cost of publishing this Notice.

FOR FURTHER INFORMATION CONTACT: Teri Bakken, Chief, Fluids Adjudication Section, Bureau of Land Management Montana State Office, 5001 Southgate Drive, Billings, Montana 59101–4669, 406–896–5091.

Teri Bakken,

Chief, Fluids Adjudication Section.

[FR Doc. E9–31245 Filed 1–4–10; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–923–1310–FI; WYW160181]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease, WYW160181, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of proposed reinstatement of terminated oil and gas lease

SUMMARY: Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(2), the Bureau of Land Management (BLM) received a petition for reinstatement from El Paso E&P Company LP for competitive oil and gas lease WYW160181 for land in Fremont County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Julie L. Weaver, Chief, Branch of Fluid Minerals Adjudication, at (307) 775–6176.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10 per acre, or fraction thereof, per year and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the BLM is proposing to reinstate lease WYW160181 effective June 1, 2009, under the original terms and conditions of the lease and the increased rental and royalty rates cited above.

BLM has not issued a valid lease affecting the lands.

Julie L. Weaver,

Chief, Branch of Fluid Minerals Adjudication.

[FR Doc. E9–31244 Filed 1–4–10; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NMP010 L14300000.ET0000; NMNM 120333]

Notice of Proposed Withdrawal and Opportunity for Public Meeting; New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The U.S. Department of Agriculture's Forest Service has filed an application with the Bureau of Land Management (BLM) requesting the Secretary of the Interior to withdraw 15 acres of National Forest System land from mining to protect the Red Cloud Campground on the Cibola National Forest. This notice segregates the land for up to 2 years from location and entry under the United States mining laws. The land will remain open to all other

uses which may, by law, be authorized on these National Forest System lands.

DATES: Comments and requests for a public meeting must be received no later than April 5, 2010.

ADDRESSES: Comments and meeting requests should be sent to the Roswell Field Office Manager, Bureau of Land Management, 2909 W. Second Street, Roswell, New Mexico 88201, and to the Forest Supervisor, Cibola National Forest, 2113 Osuna Road, NE., Suite A., Albuquerque, New Mexico 87113, or Doug Williams, Cibola National Forest, at the above address, or at (505) 346–3869.

FOR FURTHER INFORMATION CONTACT: Doug Williams, Cibola National Forest, at the above address, or at (505) 346–3869.

SUPPLEMENTARY INFORMATION: The Forest Service has filed an application with the BLM, pursuant to Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714, to withdraw the following described National Forest System land within the Cibola National Forest for a period of 20 years from location and entry under the United States' mining laws (30 U.S.C. 22 *et seq.*), subject to valid existing rights:

New Mexico Principal Meridian

Cibola National Forest

T. 1 S., R. 12 E.,
Sec. 30, NW¼SE¼NE¼SW¼, SE¼SW¼NE¼SW¼, S½SE¼NE¼SW¼ and N½NE¼SE¼SW¼.

The area described contains 15 acres in Lincoln County, New Mexico.

The purpose of the proposed withdrawal is to protect the unique recreational and historical interpretive integrity of the Red Cloud Campground, within the Cibola National Forest, and to protect a capital investment in the recreation area of approximately $750,000 in Federal funds.

The use of a right-of-way, an interagency agreement, or a cooperative agreement would not adequately constrain nondiscretionary mining locations and related uses and, therefore, would not provide adequate protection of the Federal investment in the improvements located on the land.

There are no suitable alternative sites which contain the unique cultural and associated natural ecosystem values. No additional water rights will be needed to fulfill the purpose of the requested withdrawal.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may present their views in writing, by the date specified above, to both the BLM and the Forest Supervisor, Cibola National Forest, at the addresses stated above. Records relating to the application, as well as comments, including the names and street addresses of respondents, will be available for public review at both the BLM Roswell Field Office and Forest Supervisor's Office, Cibola National Forest at the above addresses during regular business hours, 8 a.m. to 4:45 p.m., Monday through Friday, except holidays. Individual respondents may request confidentiality. 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.

Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed withdrawal. All interested persons who desire a public meeting for the purpose of being heard on the proposed withdrawal must submit a written request, by the date specified above, to the BLM Roswell Field Office Manager, at the address stated above, within 90 days from the date of publication of this notice. Upon determination by the authorized officer that a public meeting will be held, a notice of time and place will be published in the **Federal Register** and in at least one newspaper having a general circulation in the vicinity of the land involved at least 30 days before the scheduled date of the meeting.

The application will be processed in accordance with the regulations set forth in 43 CFR 2300.

For a period of 2 years from the date of publication of this notice in the **Federal Register,** the lands will be segregated from location and entry under the United States mining laws (30 U.S.C. 22 *et seq.*). The segregative effect of publication of this notice shall terminate upon denial or cancellation of the subject application, approval of the application, in whole or in part, or 2 years from publication of this notice, whichever occurs first. The temporary land uses, which may be permitted during this segregative period, include leases, licenses, permits, and disposal of mineral and vegetative resources other than under the mining laws.

(Authority: 43 CFR 2310.3–1(b).

Charles Schmidt,
Roswell Field Manager.

[FR Doc. E9–31247 Filed 1–4–10; 8:45 am]
BILLING CODE 3410–11–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLOR–936000–L14300000–ET0000; HAG–09–0032; OR–44410]

Notice of Proposed Withdrawal Extension and Opportunity for Public Meeting; Oregon

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Secretary of the Interior proposes to extend the duration of Public Land Order (PLO) Number 6865 for an additional 20-year term. This PLO withdrew approximately 507.50 acres of public land in Baker County, Oregon, from settlement, sale, location, or entry under the general land laws, including the mining laws, to protect the significant historic and cultural resource values and the investment of Federal funds at the National Historic Oregon Trail Interpretive Center at Flagstaff Hill. The withdrawal created by PLO Number 6865 will expire on July 16, 2011, unless extended. This notice also gives the public an opportunity to comment on the proposed action and to request a public meeting.

DATES: Comments and requests for a public meeting must be received by April 5, 2010.

ADDRESSES: Comments and meeting requests should be sent to the Oregon/Washington State Director, BLM, P.O. Box 2965, Portland, Oregon 97208–2965.

FOR FURTHER INFORMATION CONTACT: Sarah LeCompte, Bureau of Land Management Oregon Vale Field Office, (541) 523–1825, or Charles R. Roy, Bureau of Land Management Oregon/Washington State Office, (503) 808–6189.

SUPPLEMENTARY INFORMATION: The Bureau of Land Management (BLM) has filed an application to extend the withdrawal established by PLO Number 6865 (56 FR 32515), which withdrew 507.50 acres of public land in Baker County, Oregon, from settlement, sale, location, or entry under the general land laws, including the United States mining laws, for an additional 20-year period, subject to valid existing rights. The land applied for is described in the

Federal Register document cited above. The document is available to the public at the BLM office listed in the **ADDRESSES** section.

The use of a right-of-way, or interagency or cooperative agreement would not adequately constrain non-discretionary uses and would not provide adequate protection of the Federal investment in the improvements located on the land.

There are no suitable alternative sites with equal or greater benefit to the government.

No additional water rights will be needed to fulfill the purpose of the requested withdrawal extension.

The purpose of the proposed withdrawal extension is to protect significant historic and cultural resource values and the investment of Federal funds at the National Historic Oregon Trail Interpretive Center at Flagstaff Hill.

Until April 5, 2010, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal extension may present their views in writing to the BLM State Director at the address listed in the **ADDRESSES** section.

Comments, including names and street addresses of respondents, will be available for public review at the address indicated above during regular business hours.

Individual respondents may request confidentiality. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, be advised 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 from public review your personal identifying information, we cannot guarantee that we will be able to do so.

Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed withdrawal extension. All interested parties who desire a public meeting for the purpose of being heard on the proposed withdrawal must submit a written request to the BLM State Director at the address listed in the **ADDRESSES** section by April 5, 2010. Upon determination by the authorized officer that a public meeting will be held, a notice of the time and place will be published in the **Federal Register** and at least one local newspaper at least 30 days before the scheduled date of the meeting.

The application will be processed in accordance with the regulations set forth in 43 CFR part 2300.

Authority: 43 CFR 2310.3–1.

Fred O'Ferrall,

Chief, Branch of Lands and Mineral Resources.

[FR Doc. E9–31250 Filed 1–4–10; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[SDM 76798]

Notice of Proposed Withdrawal Extension and Opportunity for Public Meeting; South Dakota

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The United States Department of Agriculture (USDA) Forest Service has filed an application with the Bureau of Land Management (BLM) proposing to extend the duration of Public Land Order (PLO) No. 6782 for an additional 20-year term. PLO No. 6782 withdrew 2,387.22 acres of National Forest System land from location and entry under United States mining laws in order to protect the unique cave resources in the area surrounding Jewel Cave National Monument. PLO No. 6782 will expire on May 17, 2010, unless extended. This notice also gives the public an opportunity to comment on the proposed action and to request a public meeting.

DATES: Comments and requests for a public meeting must be received by April 5, 2010.

ADDRESSES: Comments and meeting requests should be sent to the Regional Forester, Rocky Mountain Region, 740 Simms Street, Golden, Colorado 80401, or the Montana State Director (MT–924), Bureau of Land Management, 5001 Southgate Drive, Billings, Montana 59101–4669.

FOR FURTHER INFORMATION CONTACT: Valerie Hunt, USDA Forest Service, Rocky Mountain Region, 740 Simms Street, Golden, Colorado 80401, 303–275–5071, or Sandra Ward, BLM Montana State Office, 5001 Southgate Drive, Billings, Montana 59101–4669, 406–896–5052.

SUPPLEMENTARY INFORMATION: The USDA Forest Service has filed an application requesting that the Secretary of the Interior extend the duration of PLO No. 6782 (55 FR 20766, (1990)), which, subject to valid existing rights, withdrew certain land in Custer County, South Dakota, from location and entry under the mining laws (30 U.S.C. Ch. 2) for an additional 20 years. The area described contains 2,387.22 acres in Custer County as follows:

Black Hills Meridian

Black Hills National Forest

T. 3 S., R. 2 E.,
  Sec. 34, S½S½.
T. 4 S., R. 2 E.,
  Sec. 2, lot 4, SW¼NW¼, SW¼ excluding that portion of the NE¼NE¼SW¼ east of the U.S. Highway 16; and those portions of lot 3, SW¼NE¼, and SE¼NW¼ west of U.S. Highway 16;
  Sec. 3, lots 1 to 4, inclusive, S½N½, and S½;
  Sec. 10, N½;
  Sec. 11, N½;
  Sec. 12, S½N½.
T. 4 S., R. 3 E.,
  Sec. 6, lots 6 and 7, E½SW¼, and W½SE¼;
  Sec. 7, lots 1 and 2, W½NE¼:, and E½NW¼:.

The area described contains 2,387.22 acres in Custer County.

The purpose of the proposed extension is to continue the withdrawal created by PLO No. 6782 for an additional 20-year term to protect the unique cave resources in the area surrounding the Jewel Cave National Monument.

As extended, the withdrawal would not alter the applicability of those public land laws governing the use of National Forest System lands under lease, license, or permit or governing the disposal of the mineral or vegetative resources other than under the mining laws.

The use of a right-of-way or interagency or cooperative agreement would not adequately protect this area.

There are no suitable alternative sites available. The Jewel Cave formations are unique to this area and follow the local geology.

No water will be needed to fulfill the purpose of the requested withdrawal extension.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal extension may present their views in writing to the BLM Montana State Director at the address noted above. Comments, including names and street addresses of respondents, and records relating to the application will be available for public review at the BLM Montana State Office at the address stated above, or the Forest Supervisor's Office, Black Hills National Forest, 1019 North 5th Street, Custer, South Dakota 57730, during regular business hours.

Individual respondents may request confidentiality. Before including your address, phone number, e-mail address,

or other personal identifying information in your comment, be advised 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 from public review your personal identifying information, we cannot guarantee that we will be able to do so.

Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed withdrawal extension. All interested persons who desire a public meeting for the purpose of being heard on the proposed withdrawal extension must submit a written request to the BLM Montana State Director by April 5, 2010. Upon determination by the authorized officer that a public meeting will be held, a notice of the time and place will be published in the **Federal Register** and at least one local newspaper at least 30 days before the scheduled date of the meeting.

The application will be processed in accordance with the applicable regulations set forth in 43 CFR 2310.4.

(Authority: 43 CFR 2310.3–1)

Cynthia Staszak,

Chief, Branch of Land Resources.

[FR Doc. E9–31249 Filed 1–4–10; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNV9330000.L14300000.ET0000; NVN–50818; 10–08807; MO:4500011433; TAS:14X1109]

Public Land Order No. 7738; Extension of Public Land Order No. 6760, Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order extends a withdrawal created by Public Land Order No. 6760 for an additional 20-year period. This extension is necessary to continue protection of the Federal investment in the U.S. Forest Service Austin Administrative Site in Lander County, Nevada. The administrative site is located within the Humboldt-Toiyabe National Forest.

DATES: *Effective Date:* December 29, 2009.

FOR FURTHER INFORMATION CONTACT: Jacqueline Gratton, Bureau of Land Management, Nevada State Office, P.O. Box 12000, 1340 Financial Blvd., Reno, Nevada 89502; or 775–861–6532.

SUPPLEMENTARY INFORMATION: The purpose for which the withdrawal was first made requires this extension to continue protection of the Federal investment in the Austin Administrative Site. The withdrawal extended by this order will expire on December 28, 2029, unless, as a result of a review conducted prior to the expiration date pursuant to Section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f), the Secretary determines that the withdrawal shall be further extended.

Order

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714, it is ordered as follows:

Public Land Order No. 6760 (54 FR 53612, (1989)), which withdrew 30 acres of National Forest System land from location under the United States mining laws (30 U.S.C. Ch. 2), but not the mineral leasing laws, to protect the Federal investment in the Austin Administrative Site, is hereby extended for an additional 20-year period until December 28, 2029.

(Authority: 43 CFR 2310.4)

Dated: December 18, 2009.

Wilma A. Lewis,

Assistant Secretary—Land and Minerals Management.

[FR Doc. E9–31213 Filed 12–30–09; 11:15 am]

BILLING CODE 3410–11–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LVCLB09B3610—CACA 050831]

Notice of Realty Action: Application for Conveyance of Federally-owned Mineral Interests, Monterey County, CA

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action.

SUMMARY: An application was filed on May 6, 2009, for the conveyance of the federally-owned mineral interests in the 10-acre tract of land described in this notice. Publication of this notice temporarily segregates the mineral interests in the land covered by the application from appropriation under the mining and mineral leasing laws while the application is being processed.

DATES: Interested persons may submit written comments to the Bureau of Land Management (BLM) at the address listed below. Comments must be received no later than February 19, 2010.

ADDRESSES: Bureau of Land Management, California State Office, 2800 Cottage Way, Sacramento, California 95825. Detailed information concerning this action is available for review at this address.

FOR FURTHER INFORMATION CONTACT: Liz Easley, BLM, at the above address or at (916) 978–4673.

SUPPLEMENTARY INFORMATION: The tract of land referred to in this notice consists of 10 acres of land situated in Monterey County, and is described as follows:

Mount Diablo Meridian, California

Parcel I:

Certain real property situated in Section 19 of Township 18 South, Range 1 East, Mount Diablo Meridian, according to the official plat thereof, in the County of Monterey, State of California, described as follows:

Beginning at a point of curvature of the westerly line of State Highway VMON–56–G (state sign Route No. 1 from which point Engineers Station 89 plus 83.68 of the centerline survey of said highway bears S. 75°17′ 40.00 feet, said Engineer's Station being the southerly terminus of that certain course stated as ''N. 14°43′ E., 87.76 feet'' in deed from Mary C. Brazil, et al. to the State of California, dated June 6, 1932 and recorded in Volume 341 of the official records of Monterey County at Page 1; thence

(1) N. 14°43′ E. Along the westerly line of said state highway as conveyed by said deed, 87.76 feet; thence

(2) Northerly and northwesterly, curving to the left on a circular curve of 160 feet radius, through a central angle of 81°24′, for an arc distance of 296.86 feet; thence, leaving said line of said highway as conveyed by said deed

(3) S. 5°06′ W., 168.71 feet, to a 1″ iron pipe; thence

(4) S. 42°06′ W., 350.00 feet, to a 1″ iron pipe; thence

(5) S. 71°00′ W., 150.00 feet, to a 1″ iron pipe; thence

(6) N. 73°00′ W., 300 feet, more or less, to the shoreline of the Pacific Ocean; thence

(7) South along the shoreline of the Pacific Ocean, 600 feet, more or less, to intersection with a line drawn S. 48°00′ W., from Engineers Station 88 plus 99.83 of the centerline survey of said highway; thence, leaving said shoreline

(8) N. 48°00′ E., along said line so drawn, 700 feet, more or less, to the westerly line of said highway as conveyed by said deed; thence

(9) Northerly along said westerly line of said highway, along a curve to the

right of radius 290 feet, for a distance of 130 feet more or less, to the point of beginning, and being a portion of parcel 1 and 2 as described in that certain deed from William Boggess, et ux to Ralph Downs, et ux, dated October 23, 1963 and recorded November 5, 1963 in reel 248 of the official records of Monterey County at Page 17.

Excepting therefrom all oils and other minerals as reserved in the patent from the United States to Leroy Dye, dated October 1, 1936 and recorded November 18, 1939 in Volume 640 of the official records of Monterey County at Page 412.

Also excepting the interest conveyed to the State of California by deed recorded March 24, 1939 in Book 611, Page 115, of the official records of Monterey County.

Parcel II:

A right of way for road purposes over a strip of land 15 feet wide lying 7.50 feet on each side of the following described centerline:

Beginning at a point on course numbered four (4) of the boundary of the above described Parcel I, distant N. 42°06′ E., along said course four (4) a distance of 38 feet from the southwesterly terminus thereof; thence

(1) S. 77°00′ W., 59.3 feet; thence

(2) N. 42°00′ W., 125.4 feet; thence

(3) North, 54.00 feet; thence

(4) Northerly and northeasterly along a tangent curve to the right of 60 feet radius through a central angle of 122°, for an arc distance of 127.76 feet; thence

(5) Easterly, northerly and westerly along a tangent curve a radius of 30 feet, through a central angle of 141°, for an arc distance of 73.83 feet; thence

(6) West, northerly and easterly along a tangent reverse curve a radius of 20 feet, through a central angle of 170°, for an arc distance of 59.34 feet; thence tangentially

(7) N. 73°00′ E., 102.00 feet; thence

(8) Easterly, northerly and westerly along a tangent curve to the left of radius 25 feet, through a central angle of 189° for an arc distance of 82.47 feet thence

(9) Westerly, northerly and easterly along a tangent reverse curve of radius 20 feet, through a central angle of 194½°, for an arc distance of 67.89 feet; thence tangentially

(10) N. 78°30′ E., 115.4 feet, to the southerly line of said highway at a point distance n. 84°54′ W., 4162 feet from a point of curvature of said southerly line which lines S. 5°06′ W., 40.00 feet from Engineer's Station 94 plus 35.36—94 plus 24.34 of the centerline survey of said highway.

The applicant is the owner of the ''non-mineral'' interest (also called the ''surface'' interest). Under certain conditions, Section 209(b) of the Federal Land Policy and Management Act of October 21, 1976, 43 U.S.C. 1719 (FLPMA) authorizes the sale and conveyance of the federally-owned mineral interests in land to the existing or prospective owner of the surface when the surface interest is not federally-owned. The objective is to allow consolidation of the surface and mineral interests when either one of the following conditions exist: (1) There are no known mineral values in the land; or (2) where continued Federal ownership of the mineral interests interferes with or precludes appropriate non-mineral development and such development is a more beneficial use of the land than mineral development.

An application was filed for the sale and conveyance of the federally-owned mineral interests in the above-described tract of land. Subject to valid existing rights, on January 5, 2010 the federally-owned mineral interests in the lands described above are hereby segregated from appropriation under the general mining and mineral leasing laws, while the application is being processed to determine if either one of the two specified conditions exists and, if so, to otherwise comply with the procedural requirements of 43 CFR part 2720 and Section 209 of FLPMA. The segregative effect shall terminate: (i) Upon issuance of a patent or other document of conveyance as to such mineral interests; (ii) upon final rejection of the application; or (iii) two years (May 5, 2011) from the date of filing of the application, whichever occurs first.

(Authority: 43 CFR 2720.1–1(b)

Comments: Your comments are invited. Please submit all comments in writing to Liz Easley at the address listed above. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

(Authority: 43 CFR 2720.1–1(b))

Thomas Pogacnik,

Deputy State Director of Natural Resources.

[FR Doc. E9–31238 Filed 1–4–10; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCAN06000.L58740000.EU0000. LXSS007B0000; CACA 49825]

Notice of Realty Action: Direct Sale of Public Lands in Tehama County, CA

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action.

SUMMARY: The Bureau of Land Management (BLM) proposes to sell a 70.72-acre parcel of public land in Tehama County, California, to the owners of the surrounding private land for the appraised fair market value of $28,000. The private land surrounding the public land is owned by W. James Edwards, trustee of the James Edwards Revocable Trust, Nancy E. Weber, trustee of the Nancy E. Weber Revocable Trust, and Dale E. Smith, trustee of the Lorraine W. Edwards Generation Skipping Trust, collectively the Trustees.

DATES: Comments regarding the proposed sale must be received by the BLM on or before February 19, 2010.

ADDRESSES: Written comments concerning the proposed sale should be sent to Steve Anderson, BLM Redding Field Manager, 355 Hemsted Drive, Redding, California 96002.

FOR FURTHER INFORMATION CONTACT: Ilene Emry, Realty Specialist, BLM, Redding Field Office, 355 Hemsted Dr., Redding, California 96002 or phone (530) 224–2100.

SUPPLEMENTARY INFORMATION: The following described public land is being proposed for direct sale to the Trustees in accordance with Sections 203 and 209 of the Federal Land Policy and Management Act of 1976, as amended (43 U.S.C. 1713), at not less than the appraised fair market value: Mount Diablo Meridian, T. 27 N., R. 2 W., Sec. 8, lots 3, 4, and 5.

The area described contains 70.72 acres in Tehama County and its appraised fair market value is $28,000. The public land is identified as suitable for disposal in the BLM Redding Resource Management Plan (RMP) approved July 27, 1993, and is not needed for any other Federal purpose.

The BLM is proposing a direct sale because the public lands lack legal access and are completely surrounded by private lands owned by the Trustees. A competitive sale is therefore not appropriate and the public interest would be best served by a direct sale. The lands identified for sale are considered to have no known mineral

value except for oil and gas, which the BLM proposes to reserve to the United States. The BLM proposes that conveyance of the Federal mineral interests, with the exception of oil and gas, would occur simultaneously with the sale of the land.

On December 15, 2008, the above described land was segregated from appropriation under the public land laws, including the mining laws. The segregation terminates upon issuance of a patent, publication in the **Federal Register** of a termination of the segregation, or 2 years from the date of segregation, whichever occurs first. The lands will not be sold until at least 60 days after the date of publication of this notice in the **Federal Register**. The Trustees would be required to pay a $50 nonrefundable filing fee for conveyance of the available mineral interests. Any patent issued will contain the following terms, conditions, and reservations:

a. A reservation of a right-of-way to the United States for ditches and canals constructed by authority of the United States under the Act of August 30, 1890 (43 U.S.C. 945);

b. A reservation of all oil and gas to the United States, together with the right of the United States, its permittees, licensees, and lessees to use the surface of the land to prospect for, mine, and remove the oil and gas under regulations prescribed by the Secretary of the Interior;

c. A condition that the conveyance be subject to all valid existing rights of record;

d. A notice and indemnification statement under the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9620(W), indemnifying, and holding the United States harmless from any release of hazardous materials that may have occurred; and

e. Additional terms and conditions that the authorized officer deems appropriate. Detailed information concerning the proposed land sale including the appraisal, planning and environmental documents, and a mineral report are available for review at the location identified in **ADDRESSES** above.

Public comments regarding the proposed sale may be submitted in writing to the attention of the BLM Redding Field Manager (see **ADDRESSES** above) on or before February 19, 2010. Comments received in electronic form, such as e-mail or facsimile, will not be considered. Any adverse comments regarding the proposed sale will be reviewed by the State Director or other authorized official of the Department, who may sustain, vacate, or modify this realty action in whole or in part. In the absence of timely filed objections, this realty action will become the final determination of the Department of the Interior. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, be advised 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 from public review your personal identifying information, we cannot guarantee that we will be able to do so.

(Authority: 43 CFR 2711.1–2(a) and (c))

Tom Pogacnik,

Deputy State Director for Natural Resources.

[FR Doc. E9–31237 Filed 1–4–10; 8:45 am]

BILLING CODE 4310–40–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–699]

In the Matter of Certain Liquid Crystal Display Devices and Products Containing the Same; Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on December 1, 2009, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Samsung Electronics Co., Ltd. of Korea. A supplement to the complaint was filed on December 16, 2009. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain liquid crystal display devices and products containing same by reason of infringement of certain claims of U.S. Patent Nos. 5,844,533; 6,888,585; and 7,436,479. The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue an exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing impaired individuals are advised that information on this matter can be obtained 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 at *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.*

FOR FURTHER INFORMATION CONTACT: Daniel L. Girdwood, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–3409.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2009).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on December 30, 2009, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of liquid crystal display devices or products containing same that infringe one or more of claims 1, 3, and 6 of U.S. Patent No. 5,844,533; claims 1, 4, 5, 7, 8, 10, 11, and 14 of U.S. Patent No. 6,888,585; and claims 1–11 and 13–20 of U.S. Patent No. 7,436,479, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is: Samsung Electronics Co., Ltd., Sumsung Main Bldg., 250, 2–ga, Taepyeongno, Jung-gu, Seoul, Korea 100–742.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Sharp Corporation, 22–22 Nagaike-cho, Abeno-ku, Osaka 545–8522, Japan;

Sharp Electronics Corporation, Sharp Plaza, Mahwah, NJ 07430–2135;

Sharp Electronics Manufacturing, Company of America, Inc., 9295 Siempre Viva Road, Suite J2, San Diego, CA 92154.

(c) The Commission investigative attorney, party to this investigation, is Daniel L. Girdwood, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436; and

(3) For the investigation so instituted, the Honorable Paul J. Luckern, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: December 30, 2009.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–31359 Filed 1–4–10; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–698]

In the Matter of Certain DC—DC Controllers and Products; Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on December 2, 2009, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Richtek Technology Corp. of Taiwan and Richtek USA, Inc. of San Jose, California. Supplements to the complaint were filed on December 3 and 23, 2009. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain DC—DC controllers and products containing same by reason of infringement of certain claims of U.S. Patent Nos. 7,315,190; 6,414,470; and 7,132,717; and by reason of trade secret misappropriation. The complaint further alleges that an industry in the United States exists as required by subsections (a)(1)(A) and (a)(2) of section 337.

The complainants request that the Commission institute an investigation and, after the investigation, issue an exclusion order and cease and desist orders.

ADDRESSES: The complaint and supplemental letters, except for any confidential information contained therein, are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing impaired individuals are advised that information on this matter can be obtained 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 at *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*.

FOR FURTHER INFORMATION CONTACT: Heidi E. Strain, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2606.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2009).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on December 29, 2009, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine:

(a) Whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain DC—DC controllers or products containing the same that infringe one or more of claims 1–7, 26, and 27 of U.S. Patent No. 7,315,190; claims 29 and 34 of U.S. Patent No. 6,414,470, and claims 1–3 and 6–9 of U.S. Patent No. 7,132,717, and whether an industry in the United States exists as required by subsection (a)(2) of section 337; and

(b) Whether there is a violation of subsection (a)(1)(A) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain DC—DC controllers or products containing the same by reason of misappropriation of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are:

Richtek Technology Corp., 5F, No. 20, Tai Yuen Street, Chupei City, Hsinchu, Taiwan 30288.

Richtek USA, Inc., 1210 South Bascom Avenue, Suite 227, San Jose, CA 95128(b).

The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

uPI Semicondutor Corp., 7F. No. 2, Gongye East 3rd Rd., Hsinchu Science Park, Hsinchu 300, Taiwan.

Advanced Micro Devices, Inc., One AMD Place, P.O. Box 3453, Sunnyvale, CA 94088–3453.

Sapphire Technology Limited, Unit 1908—1919, 19/F., Tower 2, Grand

Central Plaza, 138 Shatin Rural Committee Road, Shatin, N.T., Hong Kong.

Best Data Products Inc., d/b/a Diamond Multimedia, Inc., 9650 De Soto Avenue, Chatsworth, CA 91311.

XFX Technology, Inc., 1931 Lynx PlaceOntario, CA 91761.

(c) The Commission investigative attorney, party to this investigation, is Heidi E. Strain, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436; and

(3) For the investigation so instituted, the Honorable Paul J. Luckern, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: December 29, 2009.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–31252 Filed 1–4–10; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–630]

In the Matter of Certain Semiconductor Chips With Minimized Chip Package Size and Products Containing Same (III); Notice of the Commission's Final Determination of No Violation of Section 337; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined that there has been no violation of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, in this investigation, and has terminated the investigation.

FOR FURTHER INFORMATION CONTACT: Panyin A. Hughes, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–3042. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: This investigation was instituted on January 14, 2008, based on a complaint filed by Tessera, Inc. of San Jose, California (''Tessera'') on December 21, 2007, and supplemented on December 28, 2007. 73 *FR* 2276 (Jan. 14, 2008). The complaint alleged violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain semiconductor chips with minimized chip package size or products containing the same by reason of infringement of various claims of United States Patent Nos. 5,663,106 (''the '106 patent''); 5,679,977 (''the '977 patent''); 6,133,627 (''the '627 patent''); and 6,458,681 (''the '681 patent''). The complaint named eighteen respondents. Several respondents were terminated from the investigation based on settlement agreements and consent orders. Two respondents defaulted. The following respondents remain in the investigation: Acer Inc. of Taipei, Taiwan; Acer America Corp. of San Jose, CA; Centon Electronics, Inc. of Aliso Viejo, CA; Elpida Memory, Inc. of Tokyo, Japan and Elpida Memory (USA), Inc. of Sunnyvale, CA (collectively, ''Elpida''); Kingston Technology Co., Inc. of Fountain Valley, CA; Nanya Technology Corporation of Taoyuan, Taiwan; Nanya Technology Corp. USA of San Jose, CA; Powerchip Semiconductor Corporation of Hsinchu, Taiwan; ProMOS Technologies, Inc. of Hsinchu, Taiwan; Ramaxel Technology Ltd. of Hong Kong, China; and SMART Modular Technologies, Inc. of Fremont, CA. The '681 patent was terminated from the investigation prior to the hearing.

On August 28, 2009, the Administrative Law Judge (''ALJ'') issued his final Initial Determination (''ID''), finding no violation of section 337 by Respondents with respect to any of the asserted claims of the asserted patents. Specifically, the ALJ found that the accused products do not infringe the asserted claims of the '106 patent. The ALJ also found that none of the cited references anticipates the asserted claims and that none of the cited references renders the asserted claims obvious. The ALJ further found that the asserted claims of the '106 patent satisfy the requirement of 35 U.S.C. 112, first, second and fourth paragraphs. Likewise, the ALJ found that the accused products do not infringe the asserted claims of the '977 and '627 patents and that none of the cited references anticipates the asserted claims of the patents. The ALJ further found that the asserted claims of the '977 and '627 patents satisfy the definiteness requirement of 35 U.S.C. 112, second paragraph, and that Respondents waived their argument with respect to obviousness. The ALJ also found that all chips Respondents purchased from Tessera licensees were authorized to be sold by Tessera and, thus, Tessera's rights in those chips became subject to exhaustion, but that Respondents, except Elpida, did not purchase all their chips from Tessera licensees.

On September 17, 2009, Tessera and the Commission investigative attorney filed petitions for review of the ID. That same day, Respondents filed contingent petitions for review of the ID. On October 1, 2009, the parties filed responses to the various petitions and contingent petitions for review.

On October 30, 2009, the Commission determined to review the final ID in part and requested briefing on several issues it determined to review, and on remedy, the public interest and bonding. 74 *FR* 57192 (Nov. 4, 2009). The Commission determined to review (1) the finding that the claim term ''top layer'' recited in claim 1 of the '106 patent means ''an outer layer of the chip assembly upon which the terminals are fixed,'' the requirement that ''the 'top layer' is a single layer,'' and the effect of the findings on the infringement analysis, invalidity analysis and domestic industry analysis; (2) the finding that the claim term ''thereon'' recited in claim 1 of the '106 patent requires ''disposing the terminals on the top surface of the top layer,'' and its effect on the infringement analysis, invalidity analysis and domestic industry analysis; (3) the finding that the Direct Loading testing methodology employed by Tessera's expert to prove infringement is unreliable; and (4) the finding that the 1989 Motorola OMPAC 68-pin chip package fails to anticipate claims 17 and 18 of the '977 patent. *Id.*

On November 13, 2009, the parties filed written submissions on the issues under review, remedy, the public interest, and bonding. On November 20, 2009, the parties filed response submissions on the issues on review, remedy, the public interest and bonding.

Having examined the record of this investigation, including the ALJ's final ID, the Commission has determined that there is no violation of section 337. Specifically, the Commission has determined to (1) modify the ALJ's construction of the claim terms ''top layer'' and ''thereon'' recited in claim 1 of the '106 patent; (2) reverse the ALJ's finding that the accused wBGA products do not meet all of the limitations of the asserted claims of the '106 patent but affirm his finding that there is no infringement due to patent exhaustion; (3) affirm the ALJ's finding that the accused wBGA products do not infringe the asserted claims of the '106 patent; (4) affirm the ALJ's validity and domestic industry analyses pertaining to the asserted claims of the '106 patent; (5) affirm the ALJ's finding that the Direct Loading testing methodology employed by Tessera's expert fails to prove infringement; and (6) affirm the ALJ's finding that the 1989 Motorola OMPAC 68-pin chip package fails to anticipate claims 17 and 18 of the '977 patent under the on-sale bar provision of 35 U.S.C. 102(b), but modify a portion of the ID.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in sections 210.42–46 of the Commission's Rules of Practice and Procedure (19 CFR 210.42–46).

By order of the Commission.

Issued: December 29, 2009.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–31253 Filed 1–4–10; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–697]

In the Matter of: Certain Authentication Systems, Including Software and Handheld Electronic Devices; Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on December 2, 2009, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Prism Technologies LLC. A supplement to the complaint was filed on December 18, 2009. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain authentication systems, including software and handheld electronic devices, by reason of infringement of certain claims of U.S. Patent No 7,290,288. The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue an exclusion order and a cease and desist order.

ADDRESSES: The complaint and supplement, except for any confidential information contained therein, are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing impaired individuals are advised that information on this matter can be obtained 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 at *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.*

FOR FURTHER INFORMATION CONTACT: Vu Q. Bui, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2582.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2009).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on December 29, 2009, ordered that—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of authentication systems, including software and handheld electronic devices, that infringe one or more of claims 31–35, 38, 41, 51, 54, 56, 58, 59, 61, 87–92, 95, 98, 109–113, 115, 117, 119–126, 129–132, 143–145, 149, 150, 152–159, 164–167, 178–180, and 184–187 of U.S. Patent No. 7,290,288, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is: Prism Technologies LLC, 2323 South 171st Street, Suite 106, Omaha, Nebraska 68130.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served: Research In Motion, Ltd., 295 Phillip Street, Waterloo, Ontario, Canada N2L 2W8. Research In Motion Corp., 122 W. John Carpenter Parkway, Suite 430, Irving, Texas 75039.

(c) The Commission investigative attorney, party to this investigation, is Vu Q. Bui, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436; and

(3) For the investigation so instituted, the Honorable Paul J. Luckern, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: December 29, 2009.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–31246 Filed 1–4–10; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–700]

In the Matter of Certain MEMS Devices and Products Containing Same; Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on December 1, 2009, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Analog Devices, Inc. of Norwood, Massachusetts. A supplement to the complaint was filed on December 9, 2009. An amendment to the complaint was filed on December 22, 2009. The amended complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain MEMS devices and products containing same by reason of infringement of certain claims of U.S. Patent Nos. 7,220,614 and 7,364,942. The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue an exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing impaired individuals are advised that information on this matter can be obtained 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 at *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.*

FOR FURTHER INFORMATION CONTACT: Lisa A. Murray, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2734.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2009).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on December 30, 2009, *Ordered That*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain MEMS devices or products containing same that infringe one or more of claims 12, 15, 31, 32, 34, 35, 38, and 39 of U.S. Patent No. 7,220,614 and claims 1–6 and 8 of U.S. Patent No. 7,364,942, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is: Analog Devices, Inc., One Technology Way, P.O. Box 9106, Norwood, MA 02062–9106.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Knowles Electronics LLC, 1151 Maplewood Drive, Itasca, IL 60143.

Mouser Electronics, Inc., 1000 North Main Street, Mansfield, TX 76063.

(c) The Commission investigative attorney, party to this investigation, is Lisa A. Murray, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436; and

(3) For the investigation so instituted, the Honorable Paul J. Luckern, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease

and desist order or both directed against the respondent.

Issued: December 31, 2009.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–31360 Filed 1–4–10; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Employment and Training Administration

Comment Request for Information Collection for Work Application/Job Order Recordkeeping (OMB 1205–0001), Extension Without Revisions

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden conducts a preclearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment and Training Administration is soliciting comments concerning the collection of data concerning the extension without changes of the data retention required by 20 CFR 652.8(d)(5) of the Wagner-Peyser Act, which requires each state to retain applications and job orders for a minimum of one year. The current expiration date for this information collection request is May 31, 2010.

A copy of the proposed information collection request (ICR) can be obtained by contacting the office listed below in the addressee section of this notice.

DATES: Written comments must be submitted to the office listed in the addressee's section below on or before March 8, 2010.

ADDRESSES: Submit written comments to U.S. Department of Labor, Employment and Training Administration, Division of Adult Services, Attention: Adriana Kaplan, 200 Constitution Avenue NW., Room S4209, Washington, DC 20210. Telephone number: 202–693–3740 (this is not a toll-free number). Fax: 202–693–3587. E-mail: *Kaplan.Adriana@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Background:

Currently, the Employment and Training Administration is soliciting comments concerning the proposed extension/reinstatement of the data retention required by 20 CFR 652.8(d)(5) of the Wagner-Peyser Act, which requires each state to retain applications and job orders for a minimum of one year.

II. Review Focus:

The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. Current Actions:

Type of Review: Extension without changes.

Title: Work Application/Job Orders Record.

OMB Number: 1205–0001.

Affected Public: State Governments.

Total Respondents: 52.

Citation or Form: 20 CFR 652.8(d)(5).

Frequency: On occasion.

Total Responses: Variable depending on number of job orders and work applications.

Average Time per Response: Variable.

Estimated Total Burden Hours: 8 hours per state or 416.

Total Burden Cost for Respondents: 0.

Comments submitted in response to this comment request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: December 30, 2009.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

[FR Doc. E9–31263 Filed 1–4–10; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Proposed Collection, Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Bureau of Labor Statistics (BLS) is soliciting comments concerning the proposed revision of the ''National Longitudinal Survey of Youth 1997.'' A copy of the proposed information collection request (ICR) can be obtained by contacting the individual listed in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before March 8, 2010.

ADDRESSES: Send comments to Carol Rowan, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 4080, 2 Massachusetts Avenue, NE., Washington, DC 20212, 202–691–7628 (this is not a toll free number).

FOR FURTHER INFORMATION CONTACT: Carol Rowan, BLS Clearance Officer, 202–691–7628. (See **ADDRESSES** section.)

SUPPLEMENTARY INFORMATION:

I. Background

The National Longitudinal Survey of Youth 1997 (NLSY97) is a nationally representative sample of persons who were born in the years 1980 to 1984. These respondents were ages 12–17 when the first round of annual interviews began in 1997; the fourteenth round of annual interviews will be

conducted from September 2010 to May 2011. The Bureau of Labor Statistics (BLS) contracts with the National Opinion Research Center (NORC) at the University of Chicago to conduct the NLSY97. The primary objective of the survey is to study the transition from schooling to the establishment of careers and families. The longitudinal focus of this survey requires information to be collected from the same individuals over many years in order to trace their education, training, work experience, fertility, income, and program participation.

One of the goals of the Department of Labor (DOL) is to produce and disseminate timely, accurate, and relevant information about the U.S. labor force. The BLS contributes to this goal by gathering information about the labor force and labor market and disseminating it to policymakers and the public so that participants in those markets can make more informed, and thus more efficient choices. Research based on the NLSY97 contributes to the formation of national policy in the areas of education, training, employment programs, and school-to-work transitions. In addition to the reports that the BLS produces based on data from the NLSY97, members of the academic community publish articles and reports based on NLSY97 data for the DOL and other funding agencies. To date, more than 130 articles examining NLSY97 data have been published in scholarly journals. The survey design provides data gathered from the same respondents over time to form the only dataset that contains this type of information for this important population group. Without the collection of these data, an accurate longitudinal dataset could not be provided to researchers and policymakers, thus adversely affecting the DOL's ability to perform its policy- and report-making activities.

II. Current Action

The BLS seeks approval to conduct round 14 of annual interviews of the NLSY97. Respondents to the NLSY97 will undergo an interview of approximately 65 minutes during which they will answer questions about schooling and labor market experiences, family relationships, and community background.

During the fielding period for the main round 14 interviews, about 2 percent of respondents will be asked to participate in a brief validation interview a few weeks after the initial interview. The purpose of the validation interview is to verify that the initial interview took place as the interviewer reported and to assess the data quality of selected questionnaire items.

The BLS proposes to record randomly selected segments of the main interviews during round 14. Recording interviews helps the BLS and NORC to ensure that the interviews actually took place and that interviewers are reading the questions exactly as worded and entering the responses properly. Recording also helps to identify parts of the interview that might be causing problems or misunderstanding for interviewers or respondents. Each respondent will be informed that the interview may be recorded for quality control, testing, and training purposes. If the respondent objects to the recording of the interview, the interviewer will confirm to the respondent that the interview will not be recorded and then proceed with the interview.

During round 14, the BLS proposes to administer a noninterview respondent questionnaire to sample members who have missed at least five consecutive rounds and who do not complete the round 14 interview on first approach. Responses to this questionnaire will enable the BLS and NORC to learn more about long-term nonrespondents and therefore understand attrition patterns and any nonresponse bias. Other changes in round 14 include collecting permission forms from respondents to obtain their college transcripts. Permission forms will be sought from respondents who have received a high school diploma or General Education Development (GED) credential or completed coursework in a postsecondary degree program. Collection of permission forms is contingent on available funding.

The round 14 questionnaire includes questions on persons without jobs who are too discouraged by their job prospects to look for work. These questions on discouraged workers are asked in conjunction with existing questions on job search for current gaps in employment. Respondents who report having served on active military duty again will be asked a series of questions on their military service. Military veterans also will be asked about their experience with programs designed to help service members make the transition from military to civilian life.

As in prior rounds of the NLSY97, round 14 will include a pretest conducted several months before the main fielding to test survey procedures and questions and resolve problems before the main fielding begins. The round 14 pretest will include a trial collection of birth certificates on a small number of survey respondents. Birth certificates are the optimal source of information about birth weight, a measure of considerable research interest given its relationship with child development, lifetime obesity, and other outcomes. This trial collection of birth certificates will provide insight into respondent reactions and concerns regarding the release of administrative records and the logistical issues surrounding the handling, acquiring, and coding of such documents. The round 14 pretest also will include a trial Internet collection of selected information used to locate respondents for interviews. The purpose of the trial is to determine whether Internet collection yields information of higher quality when compared to the current method of collecting the information as part of the interview. The Internet trial also will be used to assess respondent acceptance of Internet collection generally and whether such collection can reduce respondent burden without reducing the quality of the survey information.

III. Desired Focus of Comments

The Bureau of Labor Statistics is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

Type of Review: Revision of a currently approved collection.

Agency: Bureau of Labor Statistics.

Title: National Longitudinal Survey of Youth 1997.

OMB Number: 1220–0157.

Affected Public: Individuals or households.

Form	Total respondents	Frequency	Total responses	Average time per response (minutes)	Estimated total burden (hours)
NLSY97 Pretest: July–August 2010	150	Annually	150	65	163
Collection of birth certificates in the NLSY97 Pretest: July–August 2010.	100	Once	100	1.5	3
Main NLSY97: September 2010–May 2011	7,350	Annually	7,350	65	7,963
Round 14 Validation Interview	147	Annually	147	4	10
Noninterview Respondent Questionnaire	120	Annually	120	10	20
College Transcript Release Form	6,311	Once	6,311	1.5	158
Totals	7,620		14,178		8,317

The difference between the total number of respondents and the total number of responses reflects the fact that about 6,311 are expected to complete the main interview and the college transcript release form. In addition, about 147 respondents will be interviewed twice, once in the main survey and a second time in the 4-minute validation interview.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they also will become a matter of public record.

Signed at Washington, DC, this 29th day of December, 2009.

Kimberley D. Hill,

Acting Chief, Division of Management Systems, Bureau of Labor Statistics.

[FR Doc. E9–31209 Filed 1–4–10; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,668; TA–W–64,668A]

Tenneco, Inc.; Including On-Site Workers From Elite Staffing, Inc.; Cozad, NE; Tenneco, Inc.; Including On-Site Leased Workers of Elite Staffing, Inc.; Monroe, MI; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on January 15, 2009, applicable to workers of Tenneco, Inc., Cozad, Nebraska. The notice was published in the **Federal Register** on February 2, 2009 (74 FR Number 5871). The Department issued an amended certification on December 8, 2009, to include on-site leased workers from Elite Staffing, Inc. The Notice of amendment will soon be published in the **Federal Register**.

At the request of workers of Tenneco, Inc., Monroe, Michigan, the Department reviewed the certification for workers of Tenneco Inc., Cozad, Nebraska.

New information shows that workers from Tenneco, Inc., Monroe, Michigan, provide management and administrative support to the Tenneco, Inc., Cozad, Nebraska, location.

The intent of the Department's certification is to include all workers of the subject firm adversely affected as a supplier to a trade certified primary firm.

Based on these findings, the Department is amending this certification to include employees of Tenneco, Inc., Monroe, Michigan.

The amended notice applicable to TA–W–64,668 is hereby issued as follows:

All workers of Tenneco, Inc., including on-site leased workers from Elite Staffing, Inc., Cozad, Nebraska (TA–W–64,668), and all workers of Tenneco, Inc., including on-site leased workers from Elite Staffing, Inc., Monroe, Michigan (TA–W–64,668A), who became totally or partially separated from employment on or after December 12, 2007, through January 15, 2011, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC this 15th day of December, 2009.

Del Min Amy Chen,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–31388 Filed 1–4–10; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,447]

Applied Materials, Inc. Including On-Site Leased Workers From Adecco Employment Services, Aerotek, Inc., CDI IT Solutions, Inc (CDI Corporation), D&Z Microelectronics, Pentagon Technology, Proactive Business Solution, Inc., Technical Resources, SQA Services and NSTAR; Austin, TX; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on September 30, 2009, applicable to workers of Applied Materials, Inc., including on-site leased workers from Adecco Employment Services, Aerotek, Inc., CDI IT Solutions, D&Z Microelectronics, Pentagon Technology, Proactive Business Solution, Inc., Technical Resources, SQA Services and NSTAR, Austin, Texas. The notice was published in the **Federal Register** on November 17, 2009 (74 FR 59253).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of semiconductor equipment.

Information shows that on-site leased workers from CDI IT Solution, Inc. had their wages reported under a separated unemployment insurance (UI) tax account for its parent firm, CDI Corporation.

Accordingly, the Department is amending this certification to properly reflect this matter.

The intent of the Department's certification is to include all workers of the subject firm who were adversely

affected by the shift in production of semiconductor equipment to Singapore.

The amended notice applicable to TA–W–71,447 is hereby issued as follows:

All workers of Applied Materials, Inc., including on-site leased workers from Adecco Employment Services, Aerotek, Inc., CDI IT Solutions, Inc. (CDI Corporation), D&Z Microelectronics, Pentagon Technology, Proactive Business Solution, Inc., Technical Resources, SQA Services, and NSTAR, Austin, Texas, who became totally or partially separated from employment on or after June 25, 2008 through September 30, 2011, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC this 15th day of December 2009.

Michael W. Jaffe,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–31391 Filed 1–4–10; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–72,048]

FLSMidth, Inc., Cement Division, Product Engineering, Including On-Site Leased Workers of Aerotek Contract Engineering, Allied Personnel Services, Eastern Engineering, Hobbie Professional Services, Mccallion Staffing Specialists, Peak Technical Services, Inc., Yoh Engineering, and Clarke Consulting, Inc., Bethlehem, PA; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on November 3, 2009, applicable to workers of FLSmidth, Inc., Cement Division, Product Engineering, including on-site leased workers of Aerotek Contract Engineering, Allied Personnel Services, Eastern Engineering, Hobbie Professional Services, McCallion Staffing Specialists, Peak Technical Services, Inc., and Yoh Engineering, Bethlehem, Pennsylvania. The notice will be published soon in the **Federal Register**.

At the request of the petitioner, the Department reviewed the certification for workers of the subject firm. The workers are engaged in employment related to the supply of product engineering services.

The company reports that on-site leased workers from Clarke Consulting, Inc. were also employed on-site at FLSmidth, Inc., Cement Division, Product Engineering, Bethlehem, Pennsylvania. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Clarke Consulting, Inc. working on-site at FLSmidth, Inc., Cement Division, Product Engineering, Bethlehem, Pennsylvania.

The amended notice applicable to TA–W–72, 048 is hereby issued as follows:

All workers of FLSmidth, Inc., Cement Division, Product Engineering, including on-site leased workers of Aerotek Contract Engineering, Allied Personnel Services, Eastern Engineering, Hobbie Professional Services, McCallion Staffing Specialists, Peak Technical Services, Inc., Yoh Engineering, and Clarke Consulting, Inc., Bethlehem, Pennsylvania, who became totally or partially separated from employment on or after August 14, 2008, through November 3, 2011, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 27th day of December 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–31392 Filed 1–4–10; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Request for Certification of Compliance—Rural Industrialization Loan and Grant Program

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Employment and Training Administration is issuing this notice to announce the receipt of a ''Certification of Non-Relocation and Market and Capacity Information Report'' (Form 4279–2) for the following:

Applicant/Location: Pevafersa America, Inc./Punta Santiago, Puerto Rico.

Principal Product/Purpose: The loan, guarantee, or grant application is to enable a new business venture to purchase and install the machinery and equipment needed to manufacture and assemble photo voltaic panels. The NAICS industry code for this enterprise is: 334413 Semiconductor and Related Device Manufacturing.

DATES: All interested parties may submit comments in writing no later than January 19, 2010. Copies of adverse comments received will be forwarded to the applicant noted above.

ADDRESSES: Address all comments concerning this notice to Anthony D. Dais, U.S. Department of Labor, Employment and Training Administration, 200 Constitution Avenue, NW., Room S–4231, Washington, DC 20210; or e-mail *Dais.Anthony@dol.gov;* or transmit via fax (202) 693–3015 (this is not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Anthony D. Dais, at telephone number (202) 693–2784 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Section 188 of the Consolidated Farm and Rural Development Act of 1972, as established under 29 CFR part 75, authorizes the United States Department of Agriculture to make or guarantee loans or grants to finance industrial and business activities in rural areas. The Secretary of Labor must review the application for financial assistance for the purpose of certifying to the Secretary of Agriculture that the assistance is not calculated, or likely, to result in: (a) A transfer of any employment or business activity from one area to another by the loan applicant's business operation; or, (b) an increase in the production of goods, materials, services, or facilities in an area where there is not sufficient demand to employ the efficient capacity of existing competitive enterprises unless the financial assistance will not have an adverse impact on existing competitive enterprises in the area. The Employment and Training Administration within the Department of Labor is responsible for the review and certification process. Comments should address the two bases for certification and, if possible, provide data to assist in the analysis of these issues.

Signed at Washington, DC, this 30th day of December 2009.

Jane Oates,

Assistant Secretary for Employment and Training.

[FR Doc. E9–31262 Filed 1–4–10; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Request for Certification of Compliance—Rural Industrialization Loan and Grant Program

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Employment and Training Administration is issuing this notice to announce the receipt of a ''Certification of Non-Relocation and Market and Capacity Information Report'' (Form 4279–2) for the following:

Applicant/Location: Frazier & Frazier Industries, Inc./Coolidge, Texas.

Principal Product/Purpose: The loan, guarantee, or grant application is to refinance an existing loan to preserve current employment and to create additional working capital for new jobs, machinery, and equipment. The NAICS industry code for this enterprise is: 331111 Iron and Steel Mills.

DATES: All interested parties may submit comments in writing no later than January 19, 2010. Copies of adverse comments received will be forwarded to the applicant noted above.

ADDRESSES: Address all comments concerning this notice to Anthony D. Dais, U.S. Department of Labor, Employment and Training Administration, 200 Constitution Avenue, NW., Room S–4231, Washington, DC 20210; or e-mail *Dais.Anthony@dol.gov;* or transmit via fax (202) 693–3015 (this is not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Anthony D. Dais, at telephone number (202) 693–2784 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Section 188 of the Consolidated Farm and Rural Development Act of 1972, as established under 29 CFR Part 75, authorizes the United States Department of Agriculture to make or guarantee loans or grants to finance industrial and business activities in rural areas. The Secretary of Labor must review the application for financial assistance for the purpose of certifying to the Secretary of Agriculture that the assistance is not calculated, or likely, to result in: (a) A transfer of any employment or business activity from one area to another by the loan applicant's business operation; or, (b) an increase in the production of goods, materials, services, or facilities in an area where there is not sufficient demand to employ the efficient capacity of existing competitive enterprises unless the financial assistance will not have an adverse impact on existing competitive enterprises in the area. The Employment and Training Administration within the Department of Labor is responsible for the review and certification process. Comments should address the two bases for certification and, if possible, provide data to assist in the analysis of these issues.

Signed at Washington, DC, this 30th day of December 2009.

Jane Oates,

Assistant Secretary for Employment and Training.

[FR Doc. E9–31261 Filed 1–4–10; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,591]

Gensym Corporation, a Subsidiary of Versata Enterprises, Inc.; Burlington, MA; Notice of Revised Determination on Remand

On August 25, 2009, the U.S. Court of International Trade (USCIT) remanded to the U.S. Department of Labor (Department) for further review *Former Employees of Gensym Corporation* v. *United States Secretary of Labor,* Court No. 09–00240.

The group eligibility requirements for directly-impacted (primary) workers under Section 222(a) the Trade Act of 1974, as amended, can be satisfied in either of two ways:

Under Section 222(a)(2)(A), the following criteria must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. The sales or production, or both, of such firm or subdivision have decreased absolutely; and

C. Increased imports of articles like or directly competitive with articles produced by such firm or subdivision have contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm or subdivision; or

Under Section 222(a)(2)(B), the following criteria must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. There has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

C. One of the following must be satisfied:

1. The country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

2. The country to which the workers' firm has shifted production of the articles is a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

3. There has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

On December 2, 2008, a State Workforce Office filed a petition for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) on behalf of workers and former workers of Gensym Corporation, a subsidiary of Versata Enterprises, Inc., Burlington, Massachusetts (Gensym-MA).

The initial investigation revealed that, during the relevant period, a significant number or proportion of workers at Gensym-MA was totally or partially separated from employment, the subject worker group performed information technology sales, consulting, and support services, and Gensym Corporation, a subsidiary of Versata Enterprises, Inc. (Gensym), did not produce an article within the meaning of Section 222(a)(2) of the Trade Act of 1974, as amended (the Trade Act).

The Department issued a Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on February 4, 2009. The Department's Notice of Determination was published in the **Federal Register** on March 3, 2009 (74 FR 9283).

By application dated February 20, 2009, the Division of Career Services, Trade Program Manager, Massachusetts,

requested administrative reconsideration of the Department's negative determination. The request for reconsideration alleged that Gensym produced software and that there may have been a shift of production to at least one foreign country.

The Department issued a Notice of Affirmative Determination Regarding Application of Reconsideration on March 2, 2009. The Department's Notice of Determination was published in the **Federal Register** on March 11, 2009 (74 FR 10616).

The reconsideration determination stated that Gensym did not produce software during the relevant period (the date one year prior to the petition date through the petition date). The Department concluded that because no production took place at Gensym during the relevant period, there could not have been a shift of production by Gensym to a foreign country during the relevant period and that the subject worker group could not have supported such domestic production during the relevant period.

The Department's Notice of Negative Determination of Reconsideration was issued on April 21, 2009. The Department's Notice of determination was published in the **Federal Register** on April 30, 2009 (74 FR 19997).

In the Complaint, the Plaintiff asserts that ''new releases'' of existing software were produced during the relevant period, and provided a copy of a Gensym news release (''Gensym Announces Release of Gensym G2 8.3 R2,'' Austin, Texas, March 20, 2008).

In order to determine whether the subject workers meet the TAA group eligibility requirements, the Department must first determine whether or not an article was produced at the subject firm, then determine whether the subject workers are adversely impacted by increased imports of articles like or directly competitive with those produced by the subject firm or by a shift in production abroad of articles like or directly competitive with articles produced by the subject firm.

In order for a worker group to qualify for TAA as primary workers, they must either be (1) engaged in domestic production, or (2) in support of an affiliated domestic production facility. Where the workers support production, the facility that they support must be import-impacted or have shifted production pursuant to Section 222(a)(2)(B).

The requirement that the firm employing the subject workers produce an article domestically was stated in the Notice of Revised Determination on Remand for Lands' End, A Subsidiary of Sears Roebuck and Company, Business Outfitters CAD Operations, Dodgeville, Wisconsin, TA–W–56,688 (issued on March 24, 2006, published at 71 FR 18357). The determination also stated that articles can be either tangible or intangible. Software code, software enhancements/updates, software ''patches'' and new releases of existing software are considered articles, for purposes of the Trade Act.

During the remand investigation, the Department sought from Gensym information regarding the software releases identified in Plaintiff's support documentation (''Gensym Announces Release of Gensym G2 8.3 R2'' news release). Based on information submitted during the course of the remand investigation, the Department also sought information from Gensym regarding articles (software updates/enhancements) produced at its Austin, Texas facility during the relevant period and the relationship between Gensym-MA and the Austin, Texas facility.

The Department had requested that Plaintiff's counsel provide new and additional information that Plaintiff indicated was relevant to the remand investigation, but did not receive any such information. Therefore, the remand determination is based solely on new information provided by Gensym.

During the remand investigation, Gensym confirmed that the firm did produce updates/enhancements for existing software products. Gensym also provided new information that revealed that production of software updates/enhancements was shifted abroad and that the shift was followed by increased imports of articles like or directly competitive with those produced by Gensym.

Based on the new information provided by Gensym during the remand investigation, the Department determines that the criteria set forth in Section 222(a)(2)(B) has been satisfied.

In accordance with Section 246 the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department herein presents the results of its investigation regarding certification of eligibility to apply for ATAA.

The Department has determined in the immediate case that the group eligibility requirements of Section 246 have been met.

A significant number of workers at Gensym-MA are age 50 or over and possess skills that are not easily transferable. Competitive conditions within the industry are adverse.

Conclusion

After careful review of the facts generated through the remand investigation, I determine that a shift of production to a foreign country by Gensym of articles like or directly competitive with software updates/enhancements, followed by increased imports of articles like or directly competitive with those produced by Gensym, contributed to the total or partial separation of a significant number or proportion of workers at Gensym Corporation, Burlington, Massachusetts.

In accordance with the provisions of the Act, I make the following certification:

All workers of Gensym Corporation, a subsidiary of Versata Enterprises, Inc., Burlington, Massachusetts, who became totally or partially separated from employment on or after December 2, 2007, through two years from the issuance of this revised determination, are eligible to apply for Trade Adjustment Assistance under Section 223 of the Trade Act of 1974, and are eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 23rd day of December 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–31387 Filed 1–4–10; 8:45 am]

BILLING CODE 4510–FN–P

LIBRARY OF CONGRESS

Copyright Royalty Board

[Docket No. 2010–1 CRB Cable Rate]

Adjustment of Cable Statutory License Royalty Rates

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Notice announcing commencement of proceeding with request for Petitions to Participate.

SUMMARY: The Copyright Royalty Judges are announcing the commencement of the proceeding to adjust the rates for the cable statutory license. The Copyright Royalty Judges also are announcing the date by which a party who wishes to participate in the rate adjustment proceeding must file its Petition to Participate and the accompanying $150 filing fee.

DATES: Petitions to Participate and the filing fee are due no later than February 4, 2010.

ADDRESSES: An original, five copies, and an electronic copy in Portable Document Format (PDF) on a CD of the Petition to Participate, along with the $150 filing fee, may be delivered to the Copyright Royalty Board by either mail

or hand delivery. Petitions to Participate and the $150 filing fee may not be delivered by an overnight delivery service other than the U.S. Postal Service Express Mail. If by mail (including overnight delivery), Petitions to Participate, along with the $150 filing fee, must be addressed to: Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024–0977. If hand delivered by a private party, Petitions to Participate, along with the $150 filing fee, must be brought between 8:30 a.m. and 5 p.m. to the Library of Congress, James Madison Memorial Building, LM–401, 101 Independence Avenue, SE., Washington, DC 20559–6000. If delivered by a commercial courier, Petitions to Participate, along with the $150 filing fee, must be delivered between 8:30 a.m. and 4 p.m. to the Congressional Courier Acceptance Site, located at 2nd and D Street, NE., Washington, DC. The envelope must be addressed to: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, LM–403, 101 Independence Avenue, SE., Washington, DC 20559–6000.

FOR FURTHER INFORMATION CONTACT: LaKeshia Keys, CRB Program Specialist, by telephone at (202) 707–7658 or e-mail at *crb@loc.gov*.

SUPPLEMENTARY INFORMATION:

Background

Section 111 of the Copyright Act, title 17 of the United States Code, grants a statutory copyright license to cable television systems for the retransmission of over-the-air television and radio broadcast stations to their subscribers. In exchange for the license, cable operators submit royalties, along with statements of account detailing their retransmissions, to the Copyright Office on a semi-annual basis. The Office then deposits the royalties with the United States Treasury for later distribution to copyright owners of the broadcast programming retransmitted by cable systems.

A cable system calculates its royalty payments in accordance with the statutory formula described in 17 U.S.C. 111(d). Royalty fees are based upon the gross receipts received by a cable system from subscribers receiving retransmitted broadcast signals. Section 111(d) subdivides cable systems into three categories based on their gross receipts: small, medium, and large. Small systems pay a fixed amount without regard to the number of broadcast signals they retransmit, while medium-sized systems pay a royalty within a specified range, with a maximum amount, based on the number of signals they retransmit. Large cable systems calculate their royalties according to the number of distant broadcast signals which they retransmit to their subscribers.[1] Under this formula, a large cable system is required to pay a specified percentage of its gross receipts for each distant signal that it retransmits.

Congress established the initial gross receipts limitations that determine a cable system's size and provided the gross receipts percentages (*i.e.*, the royalty rates) for distant signals. 17 U.S.C. 111(d)(1). It also provided for adjustment of both the gross receipts limitations and the distant signal rates. 17 U.S.C. 801(b)(2). The limitations and rates can be adjusted to reflect national monetary inflation, changes in the average rates charged by cable systems for the retransmissions of broadcast signals, or changes in certain cable rules of the Federal Communications Commission in effect on April 15, 1976. 17 U.S.C. 801(b)(2)(A), (B), (C), and (D). Prior rate adjustments of the Copyright Royalty Tribunal or Librarian of Congress made under section 801(b)(2)(B) and (C) may be reconsidered at five-year intervals. 17 U.S.C. 804(b). The current gross receipts limitations and rates are set forth in 37 CFR 256.2. Rate adjustments are now made by the Copyright Royalty Judges.

Section 804 of the Copyright Act provides that the gross receipts and royalty rates may be adjusted every five years beginning with 2005, thus making 2010 a royalty adjustment year, upon the filing of a petition to initiate a proceeding. 17 U.S.C. 804(b)(1). However, since no petition has been filed pursuant to section 804(b)(1), section 803(b)(1)(A)(i)(V) requires the Judges to publish a **Federal Register** notice no later than January 5, 2010, commencing this proceeding.

Petitions to Participate

Petitions to Participate must be filed in accordance with § 351.1(b) of the Judges' regulations. *See* 37 CFR 351.1(b). Petitions to Participate must be accompanied by the $150 filing fee. Cash will not be accepted; therefore, parties must pay the filing fee with a check or money order made payable to ''Copyright Royalty Board.'' If a check received in payment of the filing fee is returned for lack of sufficient funds, the corresponding Petition to Participate will be dismissed.

[1] For large cable systems which retransmit only local broadcast stations, there is a minimum royalty fee which must be paid. This minimum fee is not applied, however, once the cable system carries one or more distant signals.

Note that in accordance with 37 CFR 350.2 (Representation), only attorneys who are members of the bar in or more states and in good standing will be allowed to represent parties before the Copyright Royalty Judges, unless a party is an individual who represents herself or himself.

Dated: December 23, 2009.

William J. Roberts, Jr.,

U.S. Copyright Royalty Judge.

[FR Doc. E9–30825 Filed 1–4–10; 8:45 am]

BILLING CODE 1410–72–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Proposed Collection, Comment Request

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 March 8, 2010, 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 *splimpto@nsf.gov.*

FOR FURTHER INFORMATION CONTACT: Contact Suzanne Plimpton, the NSF Reports Clearance Officer, phone (703) 292–7556, or send e-mail to *splimpto@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, which is accessible 24 hours a day, 7 days a week, 365 days a year (including Federal holidays).

SUPPLEMENTARY INFORMATION:

Title of Collection: Evaluation of the Tribal Colleges and Universities Program.

OMB Control No.: 3145–NEW.

Expiration Date of Approval: Not applicable.

Abstract: Since 2001 the National Science Foundation's Tribal Colleges and Universities Program (TCUP) has been supporting science, technology, engineering, and mathematics (STEM) participation and retention among American Indians, Alaska Natives, and Native Hawaiians through the support of quality STEM teaching through faculty development, STEM degree and curriculum enhancement, and undergraduate research and training opportunities. The evaluation being conducted by Kauffman and Associates, Inc. focuses on a cross-site case study of the overall effectiveness of the programs as well as the impact the programs have had on participating institutions, STEM faculty, and students enrolled in STEM courses. To complement this comprehensive evaluation study three sub-studies—a model of practice study, an outcome study pertaining to the impact on institutional transformation, and a study about the STEM programmatic influences on student outcomes—will be conducted. The study will rely on a thorough review of college and STEM record assessments; telephone and face-to-face interviews with governing board members, college administrators, faculty members, and collaborative partners; focus groups with students, community members, faculty, and other stakeholders; and web-based surveys with alumni, governing board members, college presidents, administrators, and STEM faculty. The web-based surveys will be conducted with all grantees and past and present students and the interviews and focus groups will be conducted with the above specified populations at selected sites. The goal of this cross-site evaluation is to assess the effect of the STEM program on students, faculty, and administrators, to determine its overall effect on student achievement, outreach, and support in scientific research, faculty development, advancement, and collaboration, and to assess institutional change and development of best practices for STEM.

Respondents: Governing board members, college presidents and academic vice presidents, collaborative partners, and students, past and present, at or working with Tribal colleges and universities awarded TCUP grants from NSF.

Estimated Number of Annual Respondents: 4,819 (total).

Burden on the Public: 815 hours.

Dated: December 30, 2009.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. E9–31357 Filed 1–4–10; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC–2009–0422]

Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The NRC published a **Federal Register** Notice with a 60-day comment period on this information collection on October 14, 2009 (74 FR 52820).

1. *Type of submission, new, revision, or extension:* Extension.

2. *The title of the information collection:* ''10 CFR Part 71, Packaging and Transportation of Radioactive Material''.

3. *Current OMB approval number:* 3150–0008.

4. *The form number if applicable:* NA.

5. *How often the collection is required:* On occasion. Applications for package certification may be made at any time. Required reports are collected and evaluated on a continuing basis as events occur.

6. *Who will be required or asked to report:* All NRC specific licensees who place byproduct, source, or special nuclear material into transportation, and all persons who wish to apply for NRC approval of package designs for use in such transportation.

7. *An estimate of the number of annual responses:* 912 (661 responses + 1 third party reporting + 250 recordkeepers).

8. *The estimated number of annual respondents:* 250.

9. *An estimate of the total number of hours needed annually to complete the requirement or request:* 59,782 (54,208 reporting + 5,574 recordkeeping).

10. *Abstract:* NRC regulations in 10 CFR part 71 establish requirements for packaging, preparation for shipment, and transportation of licensed material, and prescribe procedures, standards, and requirements for approval by NRC of packaging and shipping procedures for fissile material and for quantities of licensed material in excess of Type A quantities.

A copy of the final supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F21, Rockville, MD 20852. OMB clearance requests are available at the NRC worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice. Comments and questions should be directed to the OMB reviewer listed below by February 4, 2010. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

Christine J. Kymn, Desk Officer, Office of Information and Regulatory Affairs (3150–0008), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be e-mailed to *Christine.J.Kymn@omb.eop.gov* or submitted by telephone at (202) 395–4638.

The NRC Clearance Officer is Tremaine Donnell, (301) 415–6258.

Dated at Rockville, Maryland, this 30th day of December 2009.

For the Nuclear Regulatory Commission.

Chris Colburn,

Acting NRC Clearance Officer, Office of Information Services.

[FR Doc. E9–31383 Filed 1–4–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC–2009–0395]

Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The NRC published a **Federal Register** Notice with a 60-day comment period on this information collection on September 25, 2009 (74 FR 49041).

1. *Type of submission, new, revision, or extension:* Revision.
2. *The title of the information collection:* NRC Form 171, ''Duplication Request''.
3. *Current OMB approval number:* 3150–0066.
4. *The form number if applicable:* NRC Form 171.
5. *How often the collection is required:* Frequently.
6. *Who will be required or asked to report:* Individuals or companies requesting document duplication.
7. *An estimate of the number of annual responses:* 1,200.
8. *The estimated number of annual respondents:* 1,200.
9. *An estimate of the total number of hours needed annually to complete the requirement or request:* 100.
10. *Abstract:* This form is utilized by the Public Document Room (PDR) staff members who collect information from the public requesting reproduction of publicly available documents in NRC Headquarters' Public Document Room. Copies of the form are utilized by the reproduction contractor to accompany the orders. One copy of the form is kept by the contractor for their records, one copy is sent to the public requesting the documents, and the third copy (with no credit card data) is kept by the PDR staff for 90 calendar days, and then securely discarded.

A copy of the final supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F21, Rockville, MD 20852. OMB clearance requests are available at the NRC worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer listed below by February 4, 2010. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

Christine J. Kymn, Desk Officer, Office of Information and Regulatory Affairs (3150–0066), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be e-mailed to *Christine.J.Kymn@omb.eop.gov* or submitted by telephone at (202) 395–4638.

The NRC Clearance Officer is Tremaine Donnell, (301) 415–6258.

Dated at Rockville, Maryland, this 28th day of December 2009.

For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. E9–31382 Filed 1–4–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0564]

Notice; Applications and Amendments to Facility Operating Licenses Involving Proposed No Significant Hazards Considerations and Containing Sensitive Unclassified Non-Safeguards Information and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information

I. Background

Pursuant to section 189a. (2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This notice includes notices of amendments containing sensitive unclassified non-safeguards information (SUNSI).

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in Title 10 of the Code of Federal Regulations (10 CFR), Section 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rulemaking and Directives Branch (RDB), TWB–05–

B01M, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be faxed to the RDB at 301–492–3446. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland, or at *http://www.nrc.gov/reading-rm/doc-collections/cfr/part002/part002-0309.html.* Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm.html.* If a request for a hearing or petition for leave to intervene is filed within 60 days, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also set forth the specific contentions which the requestor/petitioner seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the Internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plug-

in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at (866) 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from January 5, 2010. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

For further details with respect to this amendment action, see the application for amendment which is available for public inspection at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*

Carolina Power & Light Company, Docket No. 50–261, H. B. Robinson Steam Electric Plant (HBRSEP) Unit No. 2, Darlington County, South Carolina

Date of amendment request: June 19, 2009, as supplemented by letter dated October 20, 2009.

Description of amendment request: This amendment request contains sensitive unclassified non-safeguards information (SUNSI). The proposed amendment would revise TS 3.3.1, ''Reactor Protection System Instrumentation.'' The proposed change revises the requirements related to the reactor protection system interlock for the turbine trip input to the reactor protection system.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated.

The proposed change provides revised requirements for the reactor protection system interlock associated with the turbine trip protection function. The proposed change will allow the interlock for turbine trip function to be raised from the current interlock setting of nominally 10 percent reactor power to nominally 40 percent reactor power.

This change will allow the reactor to continue operating safely at power levels up to nominally 40 percent when the turbine is not operating. The applicable accident analyses, as described in the HBRSEP, Unit No. 2, Updated Final Safety Analysis Report (UFSAR) have been reviewed. The turbine trip input to reactor trip has been verified to be either not used in the accident analyses or that the change does not adversely affect the analyses results and conclusion. Therefore, it is concluded that the consequences as described in the UFSAR accident analyses are unaffected by the proposed change.

An analysis of plant response to a turbine trip at nominally 40 percent power provided with the amendment request shows that the applicable acceptance criteria are met. Specifically, analysis has shown that a turbine trip without a reactor trip below 40 percent power does not challenge the pressurizer PORVs [power operated relief valves] or the steam generator safety valves; thereby, not adversely affecting the probability of a small break LOCA [loss of coolant accident] due to a stuck open PORV, or an excessive cooldown event due to a stuck open steam generator safety valve. As a result, the probability of any accident

previously evaluated is not significantly increased by the proposed changes.

Therefore, operation of the facility in accordance with the proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Previously Evaluated.

As described above, the proposed change provides revised requirements for the reactor protection system interlock associated with the turbine trip protection function. The proposed change will allow the interlock for turbine trip function to be raised from the current interlock setting of nominally 10 percent reactor power to nominally 40 percent reactor power.

No new accident initiators or precursors are introduced by the proposed change. Changing the interlock for the reactor trip on turbine trip from P–7 to P–8 changes the power level associated with enabling and disabling the reactor trip on turbine trip function. The turbine pressure input to the reactor protection system permissive is not an accident initiator. The change does not affect how the associated trip functional units operate or function. The changes do not create the possibility of a new or different kind of accident from any previously evaluated because these interlock changes do not affect the way that the associated trip functional units operate or function.

Therefore, operation of the facility in accordance with the proposed amendment would not create the possibility of a new or different kind of accident from any previously evaluated.

3. The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety.

As described above, the proposed change provides revised requirements for the reactor protection system interlock associated with the turbine trip protection function. The proposed change will allow the interlock for the turbine trip function to be raised from the current interlock setting of nominally 10 percent reactor power to nominally 40 percent reactor power.

Also, as previously described, this change will allow the reactor to continue operating safely at power levels up to nominally 40 percent when the turbine is not operating. The applicable UFSAR accident analyses have been reviewed and it is concluded that the accident analyses are unaffected by the proposed change. An analysis of plant response to a turbine trip at nominally 40 percent power shows that the applicable acceptance criteria are met. Based on these evaluations, the margins of safety that could potentially have been impacted by the proposed change associated with the reactor, which include departure from nucleate boiling (DNB) and fuel temperature margins, and the margin of safety associated with reactor coolant system integrity, are not affected.

Therefore, operation of the facility in accordance with the proposed amendment would not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: David T. Conley, Associate General Counsel II—Legal Department, Progress Energy Service Company, LLC, Post Office Box 1551, Raleigh, North Carolina 27602.

NRC Branch Chief: Thomas H. Boyce.

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., Docket No. 50–271, Vermont Yankee Nuclear Power Station, Vernon, Vermont

Date of amendment request: October 27, 2009.

Description of amendment request: This amendment request contains sensitive unclassified non-safeguards information (SUNSI). This amendment request would change the Technical Specifications to provide revised values for the Safety Limit Minimum Critical Power Ratio (SLMCPR) for both single and dual recirculation loop operation.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The operation of Vermont Yankee Nuclear Power Station in accordance with the proposed amendment will not involve a significant increase in the probability or consequences of an accident previously evaluated.

The basis of the Safety Limit MCPR (SLMCPR) is to ensure no mechanistic fuel damage is calculated to occur if the limit is not violated. The new SLMCPR values preserve the existing margin to transition boiling and probability of fuel damage is not increased. The derivation of the revised SLMCPR for Vermont Yankee for incorporation into the Technical Specifications and its use to determine plant and cycle-specific thermal limits has been performed using NRC approved methods. These plant-specific calculations are performed each operating cycle and if necessary, will require future changes to these values based upon revised core designs. The revised SLMCPR values do not change the method of operating the plant and have no effect on the probability of an accident initiating event or transient.

Based on the above, Vermont Yankee has concluded that the proposed change will not result in a significant increase in the probability or consequences of an accident previously evaluated.

2. The operation of Vermont Yankee Nuclear Power Station in accordance with the proposed amendment will not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed changes result only from a specific analysis for the Vermont Yankee core reload design. These changes do not involve any new or different methods for operating the facility. No new initiating events or transients result from these changes.

Based on the above, Vermont Yankee has concluded that the proposed change will not create the possibility of a new or different kind of accident from those previously evaluated.

3. The operation of Vermont Yankee Nuclear Power Station in accordance with the proposed amendment will not involve a significant reduction in a margin of safety.

The new SLMCPR is calculated using NRC approved methods with plant and cycle specific parameters for the current core design. The SLMCPR value remains conservative enough to ensure that greater than 99.9% of all fuel rods in the core will avoid transition boiling if the limit is not violated, thereby preserving the fuel cladding integrity. The operating MCPR limit is set appropriately above the safety limit value to ensure adequate margin when the cycle specific transients are evaluated. Accordingly, the margin of safety is maintained with the revised values.

As a result, Vermont Yankee has determined that the proposed change will not result in a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. William C. Dennis, Assistant General Counsel, Entergy Nuclear Operations, Inc., 400 Hamilton Avenue, White Plains, NY 10601.

NRC Branch Chief: Nancy L. Salgado.

Entergy Operations, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, and Entergy Mississippi, Inc., Docket No. 50–416, Grand Gulf Nuclear Station, Unit 1, Claiborne County, Mississippi

Date of amendment request: October 27, 2009.

Description of amendment request: This amendment request contains sensitive unclassified non-safeguards information (SUNSI). The proposed amendment revises the Technical Specifications to increase the two recirculation loop minimum critical power ratio (MCPR) safety limit from 1.08 to 1.09 and the single recirculation loop MCPR safety limit from 1.10 to 1.12.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The Minimum Critical Power Ratio (MCPR) limit is defined in the Bases to Technical Specification 2.1.1.2 as that limit, ''that, in the event of an AOO [(Anticipated Operational Occurrence)] from the limiting condition of operation, at least 99.9% of the fuel rods in the core would be expected to avoid boiling transition.'' The MCPR safety limit satisfies the requirements of General Design Criterion 10 of Appendix A to 10CFR50 regarding acceptable fuel design limits. The MCPR safety limit is reevaluated for each reload using NRC-approved methodologies. The analyses for GGNS [Grand Gulf Nuclear Station] Cycle 18 have concluded that a two-loop MCPR safety limit of 1.09, based on the application of Global Nuclear Fuels' NRC approved MCPR safety limit methodology, will ensure that this acceptance criterion is met. For single-loop operation, a MCPR safety limit of 1.12, also ensures that this acceptance criterion is met. The MCPR operating limits are presented and controlled in accordance with the GGNS Core Operating Limits Report (COLR).

The requested Technical Specification changes do not involve any plant modifications or operational changes that could affect system reliability or performance or that could affect the probability of operator error. The requested changes do not affect any postulated accident precursors, do not affect any accident mitigating systems, and do not introduce any new accident initiation mechanisms.

Therefore, the changes to the Minimum Critical Power Ratio safety limit do not involve a significant increase in the probability or consequences of any accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The GNF2 fuel to be used in Cycle 18 is of a design compatible with the co-resident GE14 and ATRIUM–10 fuel. Therefore, the introduction of GNF2 fuel into the Cycle 18 core will not create the possibility of a new or different kind of accident. The proposed changes do not involve any new modes of operation, any changes to setpoints, or any plant modifications. The proposed revised MCPR safety limits have accounted for the mixed fuel core and have been shown to be acceptable for Cycle 18 operation. Compliance with the criterion for incipient boiling transition continues to be ensured. The core operating limits will continue to be developed using NRC approved methods which also account for the mixed fuel core design. The proposed MCPR safety limits or methods for establishing the core operating limits do not result in the creation of any new precursors to an accident.

Therefore, this change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The MCPR safety limits have been evaluated in accordance with Global Nuclear Fuels NRC-approved cycle-specific safety limit methodology to ensure that during normal operation and during AOO's at least 99.9% of the fuel rods in the core are not expected to experience transition boiling. The proposed revised MCPR safety limits have accounted for the mixed fuel core and have been shown to be acceptable for Cycle 18 operation. Compliance with the criterion for incipient boiling transition continues to be ensured. On this basis, the implementation of the change to the MCPR safety limits does not involve a significant reduction in a margin of safety.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Terence A. Burke, Associate General Counsel—Nuclear Entergy Services, Inc., 1340 Echelon Parkway, Jackson, Mississippi 39213.

NRC Branch Chief: Michael T. Markley.

Entergy Operations, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, and Entergy Mississippi, Inc., Docket No. 50–416, Grand Gulf Nuclear Station, Unit 1, Claiborne County, Mississippi

Date of amendment request: November 3, 2009.

Description of amendment request: This amendment request contains sensitive unclassified non-safeguards information (SUNSI). The proposed amendment revises the Technical Specifications (TSs) to reflect the installation of the digital General Electric—Hitachi Nuclear Measurement Analysis and Control (NUMAC) Power Range Neutron Monitoring (PRNM) System.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The probability (frequency of occurrence) of design basis accidents (DBAs) occurring is not affected by the NUMAC PRNM System, since the system does not interact with equipment whose failure could cause an accident. Compliance with the regulatory criteria established for plant equipment are maintained with the installation of the upgraded NUMAC PRNM System. Scram setpoints in the NUMAC PRNM System are established such that the analytical limits are met.

The unavailability of the new NUMAC PRNM System is equal to or less than the existing system and, as a result, the scram reliability is equal to or better than the existing analog power system. No new challenges to safety-related equipment result from the NUMAC PRNM System modification. Therefore, the proposed change does not involve a significant increase in the probability of an accident previously evaluated.

The proposed change replaces the current Option E–I–A stability solution with an NRC-approved Option III long-term stability solution. The NUMAC PRNM hardware incorporates the Oscillation Power Range Monitor (OPRM) Option III detect-and-suppress solution, which has been previously reviewed and approved by the NRC. The OPRM meets [10 CFR Part 50, Appendix A] General Design Criterion (GDC) 10, *Reactor Design,* and GDC 12, *Suppression of Reactor Power Oscillations,* requirements by automatically detecting and suppressing design basis thermal-hydraulic oscillations prior to exceeding the fuel Minimum Critical Power Ratio (MCPR) Safety Limit.

Based on the above, installation of the new NUMAC PRNM System with the OPRM Option III stability solution integrated into the NUMAC PRNM equipment does not increase the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The components of the NUMAC PRNM System are equivalent or of better design and qualification criteria than those currently installed and utilized in the plant. No new operating mode, safety-related equipment lineup, accident scenario, or interaction mode not reviewed and approved as part of the design and licensing of the NUMAC PRNM System has been identified. Therefore, the NUMAC PRNM System retrofit does not adversely affect plant equipment.

The new NUMAC PRNM System uses digital equipment that has software-controlled digital processing compared to the existing power range system that uses mostly analog and discrete component processing. Specific failures of hardware and potential software common-cause failures are different from the existing system. The effects of potential software common-cause failure are mitigated by specific hardware design and

system architecture as discussed in Section 6.0 of [GE Nuclear Energy Licensing Topical Report] NEDC–32410P–A. Failure(s) of the system have the same overall effect as the present design. No new or different kinds of accidents are introduced. Therefore, the NUMAC PRNM System does not adversely effect plant equipment.

The currently installed Average Power Range Monitoring (APRM) system is replaced with a NUMAC PRNM System that performs the existing power range monitoring functions and adds an OPRM to react automatically to potential reactor thermal-hydraulic instabilities.

Based on the above, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed TS changes associated with the NUMAC PRNM System retrofit implement the constraints of the NUMAC PRNM System design and related stability analyses. The NUMAC PRNM System change does not impact reactor operating parameters or the functional requirements of the APRM system. The replacement equipment continues to provide information, enforce control rod blocks, and initiate reactor scrams under appropriate specified conditions. The proposed change does not reduce safety margins. The replacement APRM equipment has improved channel trip accuracy compared to the current analog system, and meets or exceeds system requirements previously assumed in setpoint analysis. Thus, the ability of the new equipment to enforce compliance with margins of safety equals or exceeds the ability of the equipment which it replaces.

Therefore, the proposed changes do not involve a reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Terence A. Burke, Associate General Counsel—Nuclear Entergy Services, Inc., 1340 Echelon Parkway, Jackson, Mississippi 39213.

NRC Branch Chief: Michael T. Markley.

Exelon Generation Company, LLC, Docket Nos. 50–373 and 50–374, LaSalle County Station, Units 1 and 2, LaSalle County, Illinois

Date of amendment request: October 5, 2009.

Description of amendment request: This amendment request contains sensitive unclassified non-safeguards information (SUNSI). The amendment(s) would revise Technical Specification (TS) 4.3.1, ''Criticality,'' to address a non-conservative TS. The proposed change addresses the Boraflex degradation issue in the LaSalle County Station (LSCS) Unit 2 spent fuel storage racks by revising TS Section 4.3.1 to allow the use of NETCO–SNAP–IN® rack inserts in LSCS Unit 2 spent fuel storage rack cells as a replacement for the neutron absorbing properties of the existing Boraflex panels.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change adds an additional requirement to TS Section 4.3.1 to install a NETCO–SNAP–IN® rack insert in spent fuel storage rack cells that cannot otherwise maintain the requirements of TS Section 4.3.1.1.a to ensure that the effective neutron multiplication factor, K_{eff}, is less than or equal to 0.95, if the spent fuel pool (SFP) is fully flooded with unborated water. The proposed change also includes a revision to TS Section 4.3.1 to specify the bounding reactivity fuel design allowed for storage in the Unit 1 and Unit 2 SFPs. Since the proposed change pertains only to the SFP, only those accidents that are related to movement and storage of fuel assemblies in the SFP could be potentially affected by the proposed change.

The current licensing basis for the LSCS Unit 2 SFP credits the neutron absorbing properties of the Boraflex neutron poison material in the spent fuel storage racks. The current licensing basis demonstrates: (1) Adequate margin to criticality for spent fuel storage rack cells that credit the neutron absorption capabilities of Boraflex, (2) adequate margin for fuel assemblies inadvertently placed into locations adjacent to the spent fuel storage racks, and (3) adequate margin for assemblies accidentally dropped onto the spent fuel storage racks. Therefore, the probability that a misplaced fuel assembly would result in an inadvertent criticality is unchanged since the process and procedural controls governing fuel movement in the SFP will not be changed. The dose consequences of the most limiting drop of a fuel assembly in the SFP is limited by the number of the fuel rods damaged and other engineered features unaffected by the proposed change, including the fuel design, fuel decay time, water level in the SFP, water temperature of the SFP, and the engineering features of the Reactor Building Ventilation System.

The installation of NETCO–SNAP–IN® rack inserts does not result in a significant increase in the probability of an accident previously analyzed. The revised criticality analysis takes no credit for the Boraflex material. The use of a rack insert provides an alternative neutron absorber to take the place of the degraded Boraflex material, without removal of the existing Boraflex. The probability that a fuel assembly would be dropped is unchanged by the installation of the NETCO–SNAP–IN® rack inserts. These events involve failures of administrative controls, human performance, and equipment failures that are unaffected by the presence or absence of Boraflex and the rack inserts.

The installation of NETCO–SNAP–IN® rack inserts does not result in a significant increase in the consequence of an accident previously analyzed. A criticality analysis has been prepared to demonstrate adequate margin to criticality for spent fuel storage rack cells with rack inserts in the LSCS Unit 2 SFP, and adequate criticality margin for assemblies accidentally dropped onto the spent fuel storage racks.

The installation of NETCO–SNAP–IN@ rack inserts does not affect the consequences of a dropped fuel assembly. The consequences of dropping a fuel assembly onto any other fuel assembly or other structure are unaffected by the change. The consequences of dropping a fuel assembly onto a spent fuel storage rack cell with a rack insert are bounded by the event of dropping an assembly onto another assembly, both for criticality and for radiological consequences. For criticality, the effects on K_{eff} of dropping a fuel assembly have been evaluated and are acceptable. For radiological consequences, the number of rods damaged when a fuel assembly is accidentally dropped onto a spent fuel storage rack cell with or without a rack insert is bounded by the number of rods damaged by an assembly dropped onto another assembly. The change does not affect the effectiveness of the other engineered design features to limit the offsite dose consequences of the limiting fuel assembly drop accident.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

Onsite storage of spent fuel assemblies in the SFP is a normal activity for which LSCS has been designed and licensed. As part of assuring that this normal activity can be performed without endangering public health and safety, the ability to safely accommodate different possible accidents in the SFP, such as dropping a fuel assembly or misloading a fuel assembly, have been analyzed. The proposed spent fuel storage configuration does not change the methods of fuel movement or spent fuel storage. The proposed change allows for continued use of spent fuel storage rack cells that have been determined unusable based on the degradation of Boraflex within those spent fuel storage rack cells. The rack inserts are passive devices. These devices, when inside a spent fuel storage rack cell, perform the same function as the Boraflex in that cell without the potential for degradation. These devices do not add any limiting structural loads or affect the removal of decay heat from

the assemblies. No change in total heat load in the SFP is being made. The devices are resistant to corrosion and will maintain their structural integrity over the life of the SFP. An accidental fuel assembly drop does not challenge their structural integrity. The existing fuel handling accident, which assumes the drop of a fuel assembly, bounds the drop of a rack insert and/or rack insert installation tool. This change does not create the possibility of a misloaded assembly into a spent fuel storage rack cell.

The misloading of a more reactive assembly targeted for placement in the LSCS Unit 1 SFP or the LSCS Unit 2 SFP Boraflex region in a rack insert region of the LSCS Unit 2 SFP has been prevented since the most reactive fuel assembly at LSCS is bounded by the rack insert criticality analysis, and the most reactive fuel assembly allowed for future insertion in either the Unit 1 or Unit 2 SFP is being limited to the reference bounding ATRIUM–10 fuel assembly.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

LSCS TS 4.3.1.1 requires the spent fuel storage racks to maintain the effective neutron multiplication factor, K_{eff}, less than or equal to 0.95 when fully flooded with unborated water, which includes an allowance for uncertainties. Therefore, for criticality, the required safety margin is 5% including a conservative margin to account for engineering and manufacturing uncertainties.

The proposed change provides an alternative method to ensure that K_{eff} continues to be less than or equal to 0.95, thus preserving the required safety margin of 5%. The criticality analysis demonstrates the required margin to criticality of 5%, including a conservative margin to account for engineering and manufacturing uncertainties, is maintained assuming an infinite array of fuel with all fuel at the peak reactivity. In addition, the margin of safety for radiological consequences of a dropped fuel assembly are unchanged because the event involving a dropped fuel assembly onto a spent fuel storage rack cell containing a fuel assembly with a rack insert is bounded by the consequences of a dropped fuel assembly without a rack insert. The proposed change also maintains the capacity of the Unit 2 SFP to be no more than 4078 fuel assemblies.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. Bradley J. Fewell, Associate General Counsel, Exelon Nuclear, 4300 Winfield Road, Warrenville, IL 60555.

NRC Branch Chief: Stephen J. Campbell.

PSEG Nuclear LLC, Docket No. 50–272, Salem Nuclear Generating Station, Unit No. 1, Salem County, New Jersey

Date of amendment request: October 8, 2009.

Description of amendment request: This amendment request contains sensitive unclassified non-safeguards information (SUNSI). The proposed amendment would revise Technical Specification (TS) 6.8.4.i, ''Steam Generator (SG) Program,'' by adding a one-time alternate repair criterion that excludes certain portions of the tube below the top of the SG tubesheet from periodic SG tube inspections. In addition, the proposed amendment would revise TS 6.9.10, ''Steam Generator Tube Inspection Report,'' to provide reporting requirements specific to the alternate repair criteria. The proposed amendment is supported by Westinghouse Electric Company, LLC Topical Report WCAP–17071–P, ''H*: Alternate Repair Criteria for the Tubesheet Expansion Region in Steam Generators with Hydraulically Expanded Tubes (Model F).'' H* (pronounced ''H star'') is the length of hydraulically expanded SG tube that must remain intact within the tubesheet in order for the joint to resist pullout and leakage due to normal operating and accident conditions.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The previously analyzed accidents are initiated by the failure of plant structures, systems, or components. The proposed change that alters the steam generator (SG) inspection and reporting criteria does not have a detrimental impact on the integrity of any plant structure, system, or component that initiates an analyzed event. The proposed change will not alter the operation of, or otherwise increase the failure probability of any plant equipment that initiates an analyzed accident.

Of the applicable accidents previously evaluated, the limiting transients with consideration to the proposed change to the SG tube inspection and repair criteria are the steam generator tube rupture (SGTR) event, the steam line break (SLB), and the feed line break (FLB) postulated accidents.

During the SGTR event, the required structural integrity margins of the SG tubes and the tube-to-tubesheet joint over the H* distance will be maintained. Tube rupture in tubes with cracks within the tubesheet is precluded by the constraint provided by the presence of the tubesheet and the tube-to-tubesheet joint. Tube burst cannot occur within the thickness of the tubesheet. The tube-to-tubesheet joint constraint results from the hydraulic expansion process, thermal expansion mismatch between the tube and tubesheet, and from the differential pressure between the primary and secondary side, and tubesheet rotation. Based on this design, the structural margins against burst, as discussed in Regulatory Guide (RG) 1.121, ''Bases for Plugging Degraded PWR [pressurized-water reactor] Steam Generator Tubes,'' and Technical Specification 6.8.4.i, are maintained for both normal and postulated accident conditions.

The proposed change has no impact on the structural or leakage integrity of the portion of the tube outside of the tubesheet. The proposed change maintains structural and leakage integrity of the SG tubes consistent with the performance criteria of Technical Specification 6.8.4.i. Therefore, the proposed change results in no significant increase in the probability of the occurrence of a SGTR accident.

At normal operating pressures, leakage from tube degradation below the proposed limited inspection depth is limited by the tube-to-tubesheet crevice. Consequently, negligible normal operating leakage is expected from degradation below the inspected depth within the tubesheet region. The consequences of an SGTR event are not affected by the primary-to-secondary leakage flow during the event as primary-to-secondary leakage flow through a postulated tube that has been pulled out of the tubesheet is essentially equivalent to a severed tube. Therefore, the proposed change does not result in a significant increase in the consequences of a SGTR[.]

The probability of a SLB is unaffected by the potential failure of a steam generator tube as the failure of tube is not an initiator for a SLB event.

The leakage factor of 2.16 for Salem Unit 1, for a postulated SLB/FLB, has been calculated as shown in Table 9–7 of WCAP–17071–P as revised by the response to RAI [request for additional information] 24 (Attachment 7 [to the application dated October 8, 2009]). Through application of the limited tubesheet inspection scope, the existing operating leakage limit provides assurance that excessive leakage (*i.e.,* greater than accident analysis assumptions) will not occur. The accident analysis calculations have an assumption of 0.6 [gallons per minute (gpm)] at room temperature (gpmRT) primary-to-secondary leakage in a single SG and 1 gpm at room temperature (gpmRT) total primary-to-secondary leakage for all SGs. This apportioned primary-to-secondary leakage is used in the Main Steam Line Break and Locked Rotor accidents. Primary-to-secondary leakage of 1 gpm at room temperature (gpmRT) in a single SG is used in the Control Rod Ejection (CRE) accident.

No leakage factor will be applied to the locked rotor or control rod ejection transients due to their short duration.

The TS operational leak rate limit is 150 gallons per day (gpd) (0.104 gpmRT). The maximum accident leak rate ratio for Salem Unit 1 is 2.16. Consequently, this results in significant margin between the conservatively estimated accident leakage and the allowable accident leakage.

For the condition monitoring (CM) assessment, the component of leakage from the prior cycle from below the H* distance will be multiplied by a factor of 2.16 and added to the total leakage from any other source and compared to the allowable accident induced leakage limit. For the operational assessment (OA), the difference in the leakage between the allowable leakage and the accident induced leakage from sources other than the tubesheet expansion region will be divided by 2.16 and compared to the observed operational leakage.

Based on the above, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

The proposed change that alters the steam generator inspection and reporting criteria does not introduce any new equipment, create new failure modes for existing equipment, or create any new limiting single failures. Plant operation will not be altered, and all safety functions will continue to perform as previously assumed in accident analyses. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. The proposed changes do not involve a significant reduction in the margin of safety.

The proposed change defines the safety significant portion of the tube that must be inspected and repaired (plugged). WCAP–17071–P identifies the specific inspection depth below which any type tube degradation shown to have no impact on the performance criteria in [Nuclear Energy Institute (NEI) document] NEI 97–06 [Revision] 2, ''Steam Generator Program Guidelines.''

The proposed change that alters the steam generator inspection and reporting criteria maintains the required structural margins of the SG tubes for both normal and accident conditions. Nuclear Energy Institute 97–06, ''Steam Generator Program Guidelines,'' and NRC Regulatory Guide (RG) 1.121, ''Bases for Plugging Degraded PWR Steam Generator Tubes,'' are used as the bases in the development of the limited hot leg tubesheet inspection depth methodology for determining that SG tube integrity considerations are maintained within acceptable limits. RG 1.121 describes a method acceptable to the NRC for meeting General Design Criteria (GDC) 14, ''Reactor Coolant Pressure Boundary,'' GDC 15, ''Reactor Coolant System Design,'' GDC 31, ''Fracture Prevention of Reactor Coolant Pressure Boundary,'' and GDC 32, ''Inspection of Reactor Coolant Pressure Boundary,'' by reducing the probability and consequences of a SGTR. RG 1.121 concludes that by determining the limiting safe conditions for tube wall degradation, the probability and consequences of a SGTR are reduced. This RG uses safety factors on loads for tube burst that are consistent with the requirements of Section III of the American Society of Mechanical Engineers (ASME) Code.

For axially oriented cracking located within the tubesheet, tube burst is precluded due to the presence of the tubesheet. For circumferentially oriented cracking, Westinghouse WCAP–17071–P defines a length of degradation-free expanded tubing that provides the necessary resistance to tube pullout due to the pressure induced forces, with applicable safety factors applied. Application of the limited hot and cold leg tubesheet inspection criteria will preclude unacceptable primary-to-secondary leakage during all plant conditions. The methodology for determining leakage as described in WCAP–1707[1]–P shows that significant margin exists between an acceptable level of leakage during normal operating conditions that ensures meeting the accident-induced leakage assumptions and the TS leakage limit of 150 gpd.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Vincent Zabielski, PSEG Nuclear LLC—N21, P.O. Box 236, Hancocks Bridge, NJ 08038.

NRC Branch Chief: Harold K. Chernoff.

Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation

Carolina Power & Light Company, Docket No. 50–261, H. B. Robinson Steam Electric Plant (HBRSEP) Unit No. 2, Darlington County, South Carolina

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., Docket No. 50–271, Vermont Yankee Nuclear Power Station, Vernon, Vermont

Entergy Operations, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, and Entergy Mississippi, Inc., Docket No. 50–416, Grand Gulf Nuclear Station, Unit 1, Claiborne County, Mississippi

Entergy Operations, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, and Entergy Mississippi, Inc., Docket No. 50–416, Grand Gulf Nuclear Station, Unit 1, Claiborne County, Mississippi

Exelon Generation Company, LLC, Docket Nos. 50–373 and 50–374, LaSalle County Station, Units 1 and 2, LaSalle County, Illinois

PSEG Nuclear LLC, Docket No. 50–272, Salem Nuclear Generating Station, Unit No. 1, Salem County, New Jersey

A. This Order contains instructions regarding how potential parties to this proceeding may request access to documents containing Sensitive Unclassified Non-Safeguards Information (SUNSI).

B. Within 10 days after publication of this notice of hearing and opportunity to petition for leave to intervene, any potential party who believes access to SUNSI is necessary to respond to this notice may request such access. A ''potential party'' is any person who intends to participate as a party by demonstrating standing and filing an admissible contention under 10 CFR 2.309. Requests for access to SUNSI submitted later than 10 days after publication will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

C. The requestor shall submit a letter requesting permission to access SUNSI to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and provide a copy to the Associate General Counsel for Hearings, Enforcement and Administration, Office of the General Counsel, Washington, DC 20555–0001. The expedited delivery or courier mail address for both offices is: U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852. The e-mail address for the Office of the Secretary and the Office of the General Counsel are *Hearing.Docket@nrc.gov* and *OGCmailcenter@nrc.gov,* respectively.[1] The request must include the following information:

(1) A description of the licensing action with a citation to this **Federal Register** notice;

(2) The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the action identified in C.(1);

(3) The identity of the individual or entity requesting access to SUNSI and the requestor's basis for the need for the information in order to meaningfully participate in this adjudicatory proceeding. In particular, the request must explain why publicly available versions of the information requested would not be sufficient to provide the basis and specificity for a proffered contention;

D. Based on an evaluation of the information submitted under paragraph C.(3) the NRC staff will determine within 10 days of receipt of the request whether:

(1) There is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding; and

(2) The requestor has established a legitimate need for access to SUNSI.

E. If the NRC staff determines that the requestor satisfies both D.(1) and D.(2) above, the NRC staff will notify the requestor in writing that access to SUNSI has been granted. The written notification will contain instructions on how the requestor may obtain copies of the requested documents, and any other conditions that may apply to access to those documents. These conditions may include, but are not limited to, the signing of a Non-Disclosure Agreement or Affidavit, or Protective Order[2] setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI by each individual who will be granted access to SUNSI.

F. *Filing of Contentions.* Any contentions in these proceedings that are based upon the information received as a result of the request made for SUNSI must be filed by the requestor no later than 25 days after the requestor is granted access to that information. However, if more than 25 days remain between the date the petitioner is granted access to the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.

G. *Review of Denials of Access.*

(1) If the request for access to SUNSI is denied by the NRC staff either after a determination on standing and need for access, or after a determination on trustworthiness and reliability, the NRC staff shall immediately notify the requestor in writing, briefly stating the reason or reasons for the denial.

(2) The requestor may challenge the NRC staff's adverse determination by filing a challenge within 5 days of receipt of that determination with: (a) The presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an administrative law judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

H. *Review of Grants of Access.* A party other than the requestor may challenge an NRC staff determination granting access to SUNSI whose release would harm that party's interest independent of the proceeding. Such a challenge must be filed with the Chief Administrative Judge within 5 days of the notification by the NRC staff of its grant of access.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.[3]

I. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 CFR part 2. Attachment 1 to this Order summarizes the general target schedule for processing and resolving requests under these procedures.

It is so ordered.

Dated at Rockville, Maryland, this 23rd day of December 2009.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

ATTACHMENT 1—GENERAL TARGET SCHEDULE FOR PROCESSING AND RESOLVING REQUESTS FOR ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION IN THIS PROCEEDING

Day	Event/activity
0	Publication of **Federal Register** notice of hearing and opportunity to petition for leave to intervene, including order with instructions for access requests.
10	Deadline for submitting requests for access to Sensitive Unclassified Non-Safeguards Information (SUNSI) with information: Supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding.

[1] While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC's ''E-Filing Rule,'' the initial request to access SUNSI under these procedures should be submitted as described in this paragraph.

[2] Any motion for Protective Order or draft Non-Disclosure Affidavit or Agreement for SUNSI must be filed with the presiding officer or the Chief Administrative Judge if the presiding officer has not yet been designated, within 30 days of the deadline for the receipt of the written access request.

[3] Requestors should note that the filing requirements of the NRC's E-Filing Rule (72 FR 49139; August 28, 2007) apply to appeals of NRC staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SUNSI request submitted to the NRC staff under these procedures.

ATTACHMENT 1—GENERAL TARGET SCHEDULE FOR PROCESSING AND RESOLVING REQUESTS FOR ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION IN THIS PROCEEDING—Continued

Day	Event/activity
60	Deadline for submitting petition for intervention containing: (i) Demonstration of standing; (ii) all contentions whose formulation does not require access to SUNSI (+25 Answers to petition for intervention; +7 requestor/petitioner reply).
20	Nuclear Regulatory Commission (NRC) staff informs the requestor of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows need for SUNSI. (NRC staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information.) If NRC staff makes the finding of need for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents).
25	If NRC staff finds no ''need'' or no likelihood of standing, the deadline for requestor/petitioner to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC staff finds ''need'' for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC staff's grant of access.
30	Deadline for NRC staff reply to motions to reverse NRC staff determination(s).
40	(Receipt +30) If NRC staff finds standing and need for SUNSI, deadline for NRC staff to complete information processing and file motion for Protective Order and draft Non-Disclosure Affidavit. Deadline for applicant/licensee to file Non-Disclosure Agreement for SUNSI.
A	If access granted: Issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff.
A + 3	Deadline for filing executed Non-Disclosure Affidavits. Access provided to SUNSI consistent with decision issuing the protective order.
A + 28	Deadline for submission of contentions whose development depends upon access to SUNSI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.
A + 53	(Contention receipt +25) Answers to contentions whose development depends upon access to SUNSI.
A + 60	(Answer receipt +7) Petitioner/Intervenor reply to answers.
>A + 60	Decision on contention admission.

[FR Doc. E9–31060 Filed 1–4–10; 8:45 am]
BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No.: 040–09075; NRC–2009–0575]

Notice of Opportunity for Hearing, License Application Request of Powertech (USA) Inc. Dewey-Burdock In Situ Uranium Recovery Facility in Fall River and Custer Counties, SD, and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information (SUNSI) for Contention Preparation

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Notice of license application, and opportunity to request a hearing.

DATES: A request for a hearing must be filed by March 8, 2010.

FOR FURTHER INFORMATION CONTACT: Ronald A. Burrows, Project Manager, Uranium Recovery Licensing Branch, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone: (301) 415–6443; fax number: (301) 415–5369; e-mail: *ronald.burrows@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

By letter dated February 25, 2009, Powertech (USA) Inc. (Powertech (USA)) submitted a Source Materials License application to the U.S. Nuclear Regulatory Commission (NRC) for the Dewey-Burdock In Situ Recovery Facility in Fall River and Custer Counties, South Dakota. The Dewey-Burdock facility would involve the recovery of uranium by in situ recovery (ISR) extraction. By letter dated June 19, 2009, Powertech (USA) withdrew the application to provide additional information on hydrology/site characterization, waste disposal, location of extraction operations, protection of water resources, and operational issues. The application was resubmitted on August 10, 2009. An NRC Administrative review, documented in a letter to Powertech (USA) dated October 2, 2009, found the application acceptable to begin a technical and environmental review. Before approving the license application, the NRC will need to make the findings required by the Atomic Energy Act of 1954, as amended, and NRC's 10 CFR part 40 regulations. These findings will be documented in a Safety Evaluation Report (SER). A site-specific environmental review will also be conducted, consistent with the provisions of 10 CFR part 51.

The NRC has determined that documents containing sensitive unclassified non-safeguards information (SUNSI) are associated with this application. SUNSI associated with license applications is not made available to the general public, and is thus not on the NRC's Agencywide Document Access and Management System (ADAMS). The attached Order contains instructions regarding how potential parties to this proceeding may request access to documents containing SUNSI if needed to participate in the proceeding.

II. Opportunity To Request a Hearing

The NRC hereby provides notice that this is a proceeding on an application for a Source Materials License regarding Powertech (USA)'s proposal to construct and operate an ISR facility in Fall River and Custer Counties, South Dakota. All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene,

any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the Internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html*, by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at (866) 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) first class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

The formal requirements for documents contained in 10 CFR 2.304(c)–(e) must be met. If the NRC grants an electronic document exemption in accordance with 10 CFR 2.302(g)(3), then the requirements for paper documents, set forth in 10 CFR 2.304(b) must be met.

In accordance with 10 CFR 2.309(b), a request for a hearing must be filed by March 8, 2010.

In addition to meeting other applicable requirements of 10 CFR 2.309, a request for a hearing filed by a person other than an applicant must state:

1. The name, address, and telephone number of the requester;

2. The nature of the requester's right under the Act to be made a party to the proceeding;

3. The nature and extent of the requester's property, financial or other interest in the proceeding;

4. The possible effect of any decision or order that may be issued in the

proceeding on the requester's interest; and

5. The circumstances establishing that the request for a hearing is timely in accordance with 10 CFR 2.309(b).

In accordance with 10 CFR 2.309(f)(1), a request for hearing or petitions for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

1. Provide a specific statement of the issue of law or fact to be raised or controverted;

2. Provide a brief explanation of the basis for the contention;

3. Demonstrate that the issue raised in the contention is within the scope of the proceeding;

4. Demonstrate that the issue raised in the contention is material to the findings that the NRC must make to support the action that is involved in the proceeding;

5. Provide a concise statement of the alleged facts or expert opinions which support the requester's/petitioner's position on the issue and on which the requester/petitioner intends to rely to support its position on the issue; and

6. Provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the requester/petitioner disputes and the supporting reasons for each dispute, or, if the requester/petitioner believes the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the requester's/petitioner's belief.

In addition, in accordance with 10 CFR 2.309(f)(2), contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to the petitioner. On issues arising under the National Environmental Policy Act, the requester/petitioner shall file contentions based on the applicant's environmental report. The requester/petitioner may amend those contentions or file new contentions if there are data or conclusions in the NRC draft, or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents. Otherwise, contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer.

Each contention shall be given a separate numeric or alpha designation within one of the following groups:

1. Technical—primarily concerns issues relating to matters discussed or referenced in the Powertech (USA) Technical Report for the proposed action.

2. Environmental—primarily concerns issues relating to matters discussed or referenced in the Powertech (USA) Environmental Report for the proposed action.

3. Miscellaneous—does not fall into one of the categories outlined above.

If the requester/petitioner believes a contention raises issues that cannot be classified as primarily falling into one of these categories, the requester/petitioner must set forth the contention and supporting bases, in full, separately for each category into which the requester/petitioner asserts the contention belongs with a separate designation for that category.

Requesters/petitioners should, when possible, consult with each other in preparing contentions and combine similar subject matter concerns into a joint contention, for which one of the co-sponsoring requesters/petitioners is designated the lead representative. Further, in accordance with 10 CFR 2.309(f)(3), any requester/petitioner that wishes to adopt a contention proposed by another requester/petitioner must do so, in accordance with the E-Filing rule, within ten days of the date the contention is filed, and designate a representative who shall have the authority to act for the requester/petitioner.

In accordance with 10 CFR 2.309(g), a request for hearing and/or petition for leave to intervene may also address the selection of the hearing procedures, taking into account the provisions of 10 CFR 2.310.

III. Further Information

Documents related to this action, including the license application and the supporting documentation (i.e. Technical and Environmental Reports), are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession numbers for the documents related to this notice is ML092870160, Powertech (USA), Submittal of Source Materials License Application for the Dewey-Burdock Insitu Recovery Uranium Recovery Facility. The ADAMS accession number for the NRC staff's administrative review letter, dated October 2, 2009, is ML092610201. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr.resource@nrc.gov.* These documents may also be viewed electronically on the public computers located at the NRC's Public Document Room (PDR), O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation

A. This Order contains instructions regarding how potential parties to this proceeding may request access to documents containing Sensitive Unclassified Non-Safeguards Information (SUNSI).

B. Within 10 days after publication of this notice of hearing and opportunity to petition for leave to intervene, any potential party who believes access to SUNSI is necessary to respond to this notice may request such access. A ''potential party'' is any person who intends to participate as a party by demonstrating standing and filing an admissible contention under 10 CFR 2.309. Requests for access to SUNSI submitted later than 10 days after publication will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

C. The requester shall submit a letter requesting permission to access SUNSI to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and provide a copy to the Associate General Counsel for Hearings, Enforcement and Administration, Office of the General Counsel, Washington, DC 20555–0001. The expedited delivery or courier mail address for both offices is: U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852. The e-mail address for the Office of the Secretary and the Office of the General Counsel are *Hearing.Docket@nrc.gov* and *OGCmailcenter@nrc.gov,* respectively.[1]

[1] While a request for hearing or petition to intervene in this proceeding must comply with the

Continued

The request must include the following information:

(1) A description of the licensing action with a citation to this **Federal Register** notice;

(2) The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the action identified in C.(1);

(3) The identity of the individual or entity requesting access to SUNSI and the requester's basis for the need for the information in order to meaningfully participate in this adjudicatory proceeding. In particular, the request must explain why publicly-available versions of the information requested would not be sufficient to provide the basis and specificity for a proffered contention;

D. Based on an evaluation of the information submitted under paragraph C.(3) the NRC staff will determine within 10 days of receipt of the request whether:

(1) There is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding; and

(2) The requestor has established a legitimate need for access to SUNSI.

E. If the NRC staff determines that the requestor satisfies both D.(1) and D.(2) above, the NRC staff will notify the requestor in writing that access to SUNSI has been granted. The written notification will contain instructions on how the requestor may obtain copies of the requested documents, and any other conditions that may apply to access to those documents. These conditions may include, but are not limited to, the signing of a Non-Disclosure Agreement or Affidavit, or Protective Order [2] setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI by each individual who will be granted access to SUNSI.

F. Filing of Contentions. Any contentions in these proceedings that are based upon the information received as a result of the request made for SUNSI must be filed by the requestor no later than 25 days after the requestor is granted access to that information. However, if more than 25 days remain between the date the petitioner is granted access to the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.

G. Review of Denials of Access.

(1) If the request for access to SUNSI is denied by the NRC staff either after a determination on standing and need for access, or after a determination on trustworthiness and reliability, the NRC staff shall immediately notify the requestor in writing, briefly stating the reason or reasons for the denial.

(2) The requester may challenge the NRC staff's adverse determination by filing a challenge within 5 days of receipt of that determination with: (a) The presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an administrative law judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

H. Review of Grants of Access. A party other than the requester may challenge an NRC staff determination granting access to SUNSI whose release would harm that party's interest independent of the proceeding. Such a challenge must be filed with the Chief Administrative Judge within 5 days of the notification by the NRC staff of its grant of access.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.[3]

I. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 CFR Part 2. Attachment 1 to this Order summarizes the general target schedule for processing and resolving requests under these procedures.

It is so ordered.

Dated at Rockville, Maryland, this 30th day of December 2009.

For the Commission.

Andrew L. Bates,

Acting Secretary of the Commission.

Attachment 1—General Target Schedule for Processing and Resolving Requests for Access to Sensitive Unclassified Non-Safeguards Information in This Proceeding

Day	Event/activity
0	Publication of **Federal Register** notice of hearing and opportunity to petition for leave to intervene, including order with instructions for access requests.
10	Deadline for submitting requests for access to Sensitive Unclassified Non-Safeguards Information (SUNSI) with information: Supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding.
60	Deadline for submitting petition for intervention containing: (i) Demonstration of standing; (ii) all contentions whose formulation does not require access to SUNSI (+25 Answers to petition for intervention; +7 petitioner/requestor reply).
20	Nuclear Regulatory Commission (NRC) staff informs the requester of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows need for SUNSI. (NRC staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information.) If NRC staff makes the finding of need for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents).
25	If NRC staff finds no "need" or no likelihood of standing, the deadline for petitioner/requester to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC staff finds "need" for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC staff's grant of access.

filing requirements of the NRC's "E-Filing Rule," the initial request to access SUNSI under these procedures should be submitted as described in this paragraph.

[2] Any motion for Protective Order or draft Non-Disclosure Affidavit or Agreement for SUNSI must be filed with the presiding officer or the Chief Administrative Judge if the presiding officer has not yet been designated, within 30 days of the deadline for the receipt of the written access request.

[3] Requesters should note that the filing requirements of the NRC's E-Filing Rule (72 FR 49139; August 28, 2007) apply to appeals of NRC staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SUNSI request submitted to the NRC staff under these procedures.

Day	Event/activity
30	Deadline for NRC staff reply to motions to reverse NRC staff determination(s).
40	(Receipt +30) If NRC staff finds standing and need for SUNSI, deadline for NRC staff to complete information processing and file motion for Protective Order and draft Non-Disclosure Affidavit. Deadline for applicant/licensee to file Non-Disclosure Agreement for SUNSI.
A	If access granted: Issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff.
A + 3	Deadline for filing executed Non-Disclosure Affidavits. Access provided to SUNSI consistent with decision issuing the protective order.
A + 28	Deadline for submission of contentions whose development depends upon access to SUNSI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.
A + 53	(Contention receipt +25) Answers to contentions whose development depends upon access to SUNSI.
A + 60	(Answer receipt +7) Petitioner/Intervenor reply to answers.
> A + 60	Decision on contention admission.

[FR Doc. E9–31379 Filed 1–4–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act; Meetings

Agency Holding the Meetings: Nuclear Regulatory Commission.

DATES: Weeks of January 4, 11, 18, 25, and February 1, 8, 2010.

Place: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

Status: Public and Closed.

Week of January 4, 2010

Thursday, January 7, 2010

12:15 p.m. Affirmation Session (Public Meeting) (Tentative).

a. *PPL Bell Bend, LLC* (Combined License Application for Bell Bend Nuclear Power Plant), LBP–09–18 (Ruling on Standing and Contention Admissibility) (Tentative).

b. *Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning the Newfield Site), Shieldalloy's Amended Motion for Stay Pending Judicial Review of Commission Action Transferring Regulatory Authority Over Newfield, New Jersey Site to the State of New Jersey (Oct. 14, 2009) (Tentative).

Week of January 11, 2010—Tentative

Tuesday, January 12, 2010

9:30 a.m. Briefing on Office of Nuclear Security and Incident Response—Programs, Performance, and Future Plans (Public Meeting) (Contact: Marshall Kohen, 301–415–5436).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

1:30 p.m. Briefing on Threat Environment Assessment (Closed—Ex. 1).

Week of January 18, 2010—Tentative

Tuesday, January 19, 2010

9:30 a.m. Briefing on the NRC Enforcement and Allegations Programs (Public Meeting) (Contact: Shahram Ghasemian, 301–415–3591).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of January 25, 2010—Tentative

Tuesday, January 26, 2010

9:30 a.m. Briefing on Office of Nuclear Reactor Regulation—Programs, Performance, and Future Plans (Public Meeting). (Contact: Quynh Nguyen, 301–415–5844).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of February 1, 2010—Tentative

There are no meetings scheduled for the week of February 1, 2010.

Week of February 8, 2010—Tentative

Tuesday, February 9, 2010

9:30 a.m. Briefing on Regional Programs—Programs, Performance, and Future Plans (Public Meeting). (Contact: Richard Barkley, 610–337–5065).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Rochelle Bavol, (301) 415–1651.

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/about-nrc/policy-making/schedule.html.*

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify Angela Bolduc, Chief, Employee/Labor Relations and Work Life Branch, at 301–492–2230, TDD: 301–415–2100, or by e-mail at *angela.bolduc@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an e-mail to *darlene.wright@nrc.gov.*

Dated: December 30, 2009.

Rochelle C. Bavol,

Office of the Secretary.

[FR Doc. E9–31376 Filed 12–31–09; 4:15 pm]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2010–17 and CP2010–18; Order No. 373]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request to add Global Direct Contracts 1 to the Competitive Product List. The Postal Service has also filed a related contract. This notice addresses procedural steps associated with these filings.

DATES: Comments are due: January 6, 2010.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*. Commenters who cannot submit their views electronically should contact the person identified in ''FOR FURTHER INFORMATION CONTACT'' by telephone for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820 or *stephen.sharfman@prc.gov*.

SUPPLEMENTARY INFORMATION:

I. Background
II. Notice of Filing
III. Ordering Paragraphs

I. Background

On December 23, 2009, the Postal Service filed a notice, pursuant to 39 CFR 3015.5, announcing that it has entered into an additional Global Direct contract, and seeks to add it as Global Direct Contracts 1 to the Competitive Product List.[1] The Postal Service states that the instant contract is functionally equivalent to previously submitted Global Direct Contracts and is supported by Governors' Decision No. 08–10, which establishes prices and classifications not of general applicability for Global Direct Contracts.[2] The Request has been assigned Docket No. MC2010–17.

The Postal Service contemporaneously filed a contract related to the proposed competitive product classification pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. The contract has been assigned Docket No. CP2010–18. In Order No. 153, the Commission approved the individual Global Direct Contracts in Docket Nos. MC2009–9, CP2009–10, and CP2009.11.[3] In Order No 166, the Commission confirmed that individual Global Direct Contracts, such as Docket No. CP2009–18, are functionally equivalent and should be included in the Global Direct Contracts product on the Competitive Product List.[4] The Postal Service also urges that analysis under 39 U.S.C. 3642(b) is ''unnecessary here, because such an exercise would merely replicate the Commission's determination in Docket No. MC2009–9.'' Notice at 2–3.

The instant contract. The Postal Service filed the instant contract pursuant to 39 CFR 3015.5. The contract contemplates a rate for mail acceptance within the United States and transportation to a receiving country so as to enable a private mailer to directly use certain mailing services of Canada Post for deposit in that country's domestic mailstream for delivery to an ultimate destination outside of the United States. The Notice urges that the instant agreement is functionally equivalent to the previously submitted agreements, and that it is the immediate successor to the agreement that the Commission found to be functionally equivalent and eligible for inclusion in the Global Direct Contracts product in Docket No. CP2009–11. *Id.* The contract term is 1–year from the effective date and may be automatically renewed unless the parties agree otherwise. *Id.* at 3–4. Since the instant contracts take the place of its immediate predecessor and one of the original baseline Global Direct Contracts, the contract in Docket No. CP2009–11, the Postal Service requests that the instant contract be treated as the baseline for future functional equivalency comparisons. *Id.* at 2. It further requests that Global Direct Contracts 1 be added to the Competitive Product List, particularly as future Global Direct contracts are more likely to resemble this contract. *Id.* In support of its Notice, the Postal Service filed the following five attachments:

1. Attachment 1—a redacted copy of the contract;
2. Attachment 2—a certified statement required by 39 CFR 3015.5(c)(2);
3. Attachment 3—an application for non-public treatment of materials to maintain the contract and supporting documents under seal;
4. Attachment 4—a redacted copy of Governors' Decision No. 08–10, which establishes prices and classifications for Global Direct, Global Bulk Economy, and Global Plus Contracts; and
5. Attachment 5—a statement of supporting justification from Docket No. CP2009–11, which is included by reference for the instant contract to satisfy 39 CFR 3020.32.

In the Statement of Supporting Justification, Frank Cebello, Executive Director, Global Business Management, asserts that each contract will cover its attributable costs, make a positive contribution to institutional costs, and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. Notice, Attachment 5, at 2. Thus, Mr. Cebello contends there will be no issue of subsidization of competitive products by market dominant products as a result of these contracts. *Id.* The Postal Service will notify the customer of the effective date of the contract within 30 days after receiving all regulatory approvals. *Id.* at 3–4. The related contract at issue under Docket No. CP2009–11 expires on January 11, 2010. Notice at 2. The Postal Service also explains that a redacted version of the supporting financial documentation is included with this filing as a separate Excel file. *Id.* at 3.

Functional equivalency. The Postal Service asserts that the instant Global Direct contract is functionally equivalent to Global Direct Contracts previously submitted under Docket Nos. CP2009–10, CP2009–11, CP2009–18 and CP2009–29 because it shares ''similar, if not the same,'' cost and market characteristics and therefore the contracts should be classified as a single product. *Id.* at 5.[5] Further, it contends that the contract fits within the Mail Classification Schedule language for Global Direct Contracts included with Governors' Decision No. 08–10, since ''these agreements are 'functionally equivalent in all pertinent respects.''' *Id.* at 5, *citing* PRC Order No. 85 at 8.

In addition, the Postal Service contends that the contract is in accordance with Order No. 153, which established the individual Global Direct Contracts in Docket Nos. CP2009–10 and CP2009–11 as functionally equivalent and added the contracts to the Competitive Product List as one product under the Global Direct classification. It further asserts that the ''instant Global Direct Contract is fundamentally similar to that in Docket No. CP2009–11,'' except for differences relating to the new array of offerings by Canada Post, national treatment as to

[1] Notice of the United States Postal Service of Filing of Functionally Equivalent Global Direct Contracts Negotiated Service Agreement, and Request to Add Global Direct Contracts 1 to the Competitive Products List, December 23, 2009 (Notice).

[2] Governors' Decision No. 08–10, July 16, 2008, filed in Docket No. MC2008–7, establishes prices and classifications not of general applicability for Global Direct and Global Bulk Economy Contracts, as well as for Global Plus Contracts 2, which combines Global Direct and Global Bulk Economy services. As part of Governors' Decision No. 08–10, the Postal Service submitted a description of Global Direct Contracts which it describes as ''contracts giving a rate for mail acceptance within the United States and transportation to a receiving country with the addition by the customer of appropriate foreign postage charged by the receiving country.'' Notice, Attachment 4; see also *id.* at 2, n.3, *citing* PRC Order No 153 at 9 (regarding indirect postage payment).

[3] Docket Nos. MC2009–9, CP2009–10 and CP2009–11, Order Concerning Global Direct Contracts Negotiated Service Agreements, December 19, 2008 (Order No. 153).

[4] *See* Notice at 2, n.3, *citing* Docket No. CP2009–18, Order Concerning Additional Global Direct Contracts Negotiated Service Agreement, January 9, 2009, at 5, 6 (Order No. 166).

[5] Global Direct services provide customers with a price for mail acceptance within the United States and transportation to a receiving country of mail that bears the receiving country's indicia and meets the preparation requirements for that particular type of mail established by the receiving country.

preparation, the term, confidentiality, and price changes.[6]

Specifically, some of the distinctions reflected in the Notice include (a) Allowing mailers to use Canada Post's domestic Incentive Letter Mail Service if the requisite preparatory tasks are performed by the mailer; (b) requiring notice to comply with confidentiality rules; (c) modifying the term to a full year; (d) clarifying locations for tendering qualifying items; and (e) reflecting the price changes of Canada Post. *Id.* at 5. The Postal Service maintains that the differences do not affect the fundamental service being offered or the essential structure of the contracts. *Id.* Baseline treatment. The Postal Service requests that the instant contract be considered the baseline contract for future functional equivalency comparisons of future Global Direct contracts ''[b]ecause the Postal Service expects the text of any future Global Direct Contracts to resemble the instant contract more closely than those in Docket No. CP2009–10 and CP2009–11.'' *Id.* The Postal Service has made similar requests for a new baseline contract in recent filings.[7] The Commission intends to address the issue in light of all distinct characteristics in a subsequent order.

II. Notice of Filing

The Commission establishes Docket Nos. MC2010–17 and CP2010–18 for consideration of the Notice pertaining to the proposed Global Direct Contracts 1 Negotiated Service Agreement product and the related contract, respectively. In keeping with practice, these dockets are addressed on a consolidated basis for purposes of this order; however, future filings should be made in the specific docket in which issues being addressed pertain.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR part 3015, and 39 CFR 3020 subpart B. Comments are due no later than January 6, 2010. The public portions of these filings can be accessed via the Commission's Web site *http://www.prc.gov*.

The Commission appoints Jeremy Simmons to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2010–17 and CP2010–18 for consideration of the matters raised in each docket.
2. Pursuant to 39 U.S.C. 505, Jeremy Simmons is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.
3. Comments by interested persons in these proceedings are due no later than January 6, 2010.
4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. E9–31361 Filed 1–4–10; 8:45 am]

BILLING CODE 7710–FW–S

[6] The Postal Service confirms that it ''is providing the customer with price-based incentives to commit to large amounts of mail volume or postage revenue for Global Direct, a competitive service for delivery of Letter Post items bearing foreign postage and indicia.'' *Id.* at 4; *see also id.*, Attachment 5, at 2.

[7] *See, e.g.,* Docket No. CP2009–50, Order Granting Clarification and Adding Global Expedited Package Services 2 to the Competitive Product List, August 28, 2009, at 3; Docket No. CP2009–62, Order Concerning Inbound Direct Entry Contracts 1 Negotiated Service Agreement, September 4, 2009, at 7.

SMALL BUSINESS ADMINISTRATION

Community Express Pilot Program

AGENCY: U.S. Small Business Administration (SBA).

ACTION: Notice of extension of the Community Express Pilot Program.

SUMMARY: This notice extends the Community Express Pilot Program in its current form through December 31, 2010. Based upon the significant restructuring of this pilot program implemented in October 2008, the Agency seeks to extend the pilot to obtain sufficient experience to better evaluate the pilot's accomplishments. This notice also reminds SBA's participating lenders of the statutory limitation on the number of loans SBA can process under a pilot program.

DATES: The Community Express Pilot Program is extended through December 31, 2010.

FOR FURTHER INFORMATION CONTACT: V. Anita Jacobs, Office of Financial Assistance, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416; Telephone (202) 205–6557; *valoris.jacobs@sba.gov*.

SUPPLEMENTARY INFORMATION: The Community Express Pilot Program was established in 1999 based on the Agency's SBA Express Program. Lenders approved for participation in Community Express are authorized to use the expedited loan processing procedures in place for SBA Express, in order to specifically support lending to distressed or underserved markets. In addition, participating lenders must arrange and, when necessary, pay for appropriate management and technical assistance for their Community Express borrowers. To encourage lenders to make these loans, SBA provides its full 75–85 percent guaranty, rather than the 50 percent guaranty the Agency provides under SBA Express. The maximum loan amount under this pilot program is $250,000.

In June 2008, SBA published a notice in the **Federal Register** to extend the existing pilot program through September 30, 2008 and to notify the public of SBA's plan to significantly restructure the Community Express Pilot Program effective October 1, 2008. (73 FR 36950, June 30, 2008) The restructured pilot program was extended through December 31, 2009 (73 FR 36950). Extension of this restructured pilot for an additional year will allow SBA time to better evaluate the results of the program changes implemented in October 2008.

Because Community Express is a pilot program, SBA must ensure that it complies with Section 7(a)(25) of the Small Business Act, which prohibits the Agency from approving under any 7(a) pilot loan program more than 10 percent of the total number of 7(a) loans SBA approves in any fiscal year. During the early months of Fiscal Year 2008, SBA received loan guaranty requests under Community Express at a volume that would have exceeded this statutory limit by fiscal year end, if unchecked. As a result, during Fiscal Year 2008, and continuing through Fiscal Year 2009 and into Fiscal Year 2010, the SBA has taken steps to limit the number of Community Express loans accepted each month. In addition to keeping the number of Community Express loans within the statutory limitation, this action has helped enhance competition, diversify SBA lending, and control SBA's risk under the pilot program. SBA will continue to closely monitor the number of Community Express loans approved and make adjustments as needed.

Authority: 15 U.S.C. 636(a)(25); 13 CFR 120.3.

Grady B. Hedgespeth,

Director, Office of Financial Assistance.

[FR Doc. E9–31346 Filed 12–31–09; 11:15 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11992 and #11993]

Kansas Disaster #KS–00040

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Kansas (FEMA–1868–DR), dated 12/23/2009.

Incident: Severe Winter Storm.

Incident Period: 11/14/2009 through 11/16/2009.

DATES: *Effective Date:* 12/23/2009.

Physical Loan Application Deadline Date: 02/22/2010.

Economic Injury (EIDL) Loan Application Deadline Date: 09/23/2010.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 12/23/2009, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Marshall, Republic, Washington

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere ...	3.625
Non-Profit Organizations without Credit Available Elsewhere	3.000
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere:	3.000

The number assigned to this disaster for physical damage is 11992B and for economic injury is 11993B.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Roger B. Garland,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. E9–31257 Filed 1–4–10; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11984 and #11985]

Alaska Disaster #AK–00017

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Alaska (FEMA–1865–DR), dated 12/18/2009.

Incident: Severe Storms, Flooding, Mudslides, and Rockslides.

Incident Period: 10/06/2009 through 10/11/2009.

DATES: *Effective Date:* 12/18/2009.

Physical Loan Application Deadline Date: 02/16/2010.

Economic Injury (EIDL) Loan Application Deadline Date: 09/20/2010.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 12/18/2009, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Kodiak Island Borough.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere ...	4.500
Non-Profit Organizations without Credit Available Elsewhere	4.000
For Economic Injury:	
Non-Profit Organizations Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 11984B and for economic injury is 11985B.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. E9–31260 Filed 1–4–10; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11988 and #11989]

Alabama Disaster #AL–00026

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Alabama (FEMA–1866–DR), dated 12/22/2009.

Incident: Tropical Storm Ida.

Incident Period: 11/09/2009 through 11/10/2009.

DATES: *Effective Date:* 12/22/2009.

Physical Loan Application Deadline Date: 02/22/2010.

Economic Injury (EIDL) Loan Application Deadline Date: 09/22/2010.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 12/22/2009, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Baldwin, Mobile

The Interest Rates are:

	Percent
For Physical Damage:	

	Percent
Non-Profit Organizations with Credit Available Elsewhere ...	3.625
Non-Profit Organizations without Credit Available Elsewhere	3.000
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 119888 and for economic injury is 119898.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Roger B. Garland,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. E9–31259 Filed 1–4–10; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11990 and #11991]

New Jersey Disaster #NJ–00012

AGENCY: U.S. Small Business Administration.

ACTION: Notice

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of New Jersey (FEMA–1867–DR), dated 12/22/2009.

Incident: Severe Storms and Flooding Associated with Tropical Depression Ida and a Nor'easter.

Incident Period: 11/11/2009 through 11/15/2009.

Effective Date: 12/22/2009.

Physical Loan Application Deadline Date: 02/22/2010.

Economic Injury (EIDL) Loan Application Deadline Date: 09/22/2010.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 12/22/2009, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Atlantic, Cape May, Ocean

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere ...	3.625
Non-Profit Organizations without Credit Available Elsewhere	3.000
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 11990B and for economic injury is 11991B.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Roger B. Garland,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. E9–31258 Filed 1–4–10; 8:45 am]

BILLING CODE 8025–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, January 7, 2010 at 2 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)(5), (7), 9(B) and (10) and 17 CFR 200.402(a)(5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Walter, 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, January 7, 2010 will be:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

A litigation matter; and

Other matters relating 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: December 31, 2009.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–31429 Filed 12–31–09; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61253; File No. SR–FINRA–2009–081]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Adopt FINRA Rule 2261 (Disclosure of Financial Condition) in the Consolidated FINRA Rulebook

December 29, 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 November 18, 2009, Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. 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

FINRA is proposing to adopt NASD Rule 2270 (Disclosure of Financial Condition to Customers) and NASD Rule 2910 (Disclosure of Financial Condition to Other Members) as a FINRA rule in the consolidated FINRA rulebook. The proposed rule change would combine NASD Rule 2270 and NASD Rule 2910, subject to certain amendments, into FINRA Rule 2261 (Disclosure of Financial Condition) in the consolidated FINRA rulebook.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA 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. FINRA 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

As part of the process of developing a new consolidated rulebook (''Consolidated FINRA Rulebook''),[3] FINRA is proposing to adopt NASD Rule 2270 (Disclosure of Financial Condition to Customers) and NASD Rule 2910 (Disclosure of Financial Condition to Other Members), subject to certain amendments, as FINRA Rule 2261 in the Consolidated FINRA Rulebook.

NASD Rule 2270 requires members to make available for inspection, upon the request of any bona fide regular customer,[4] the information relative to such member's financial condition as disclosed in its most recent balance sheet prepared either in accordance with such member's usual practice or as required by any state or federal securities laws, or any rule or regulation thereunder.

FINRA is proposing to amend the requirements of NASD Rule 2270 to provide an alternative means of satisfying the requirement that members make balance sheet information available to bona fide regular customers. Currently, the rule requires that members ''make available to inspection by any bona fide regular customer, upon request, the information relative to such member's financial condition as disclosed in its most recent balance sheet . * * *'' FINRA is proposing to provide members with the option of delivering their balance sheet, in paper or electronic form, to customers who request it. With respect to electronic delivery, the requesting customer must consent to receive the balance sheet in electronic form to ensure that such information is accessible to the customer. FINRA is not proposing to require members to deliver their balance sheet to all customers (instead of making them available to inspection or delivering them upon request) because SEA Rule 17a–5(c) generally requires a broker-dealer that carries customer accounts to send its full balance sheet and certain other financial information to each of its customers twice a year.[5] NASD Rule 2270 provides customers with additional access to their broker's balance sheet information by requiring that members permit customers to inspect or obtain a copy of a member's most recent balance sheet at any time upon request.

NASD Rule 2910 requires any member that is a party to an open transaction or who has on deposit cash or securities of another member to furnish, upon the written request of the other member, a statement of its financial condition as disclosed in its most recently prepared balance sheet. FINRA is proposing to amend the provisions of NASD Rule 2910 to require, consistent with NASD Rule 2270, that members provide to other members the balance sheet that was ''prepared either in accordance with such member's usual practice or as required by any state or federal securities laws, or any rule or regulation thereunder.'' In addition, FINRA is proposing that members be permitted to provide their balance sheet to other members in paper or electronic form. However, unlike the proposed amendments to NASD Rule 2270, FINRA is not proposing to require members to obtain the consent of other members to electronically deliver the balance sheet. FINRA believes that other members, unlike all customers, will be equipped to receive electronic delivery.

FINRA believes that the requirements of NASD Rule 2270 and NASD Rule 2910 continue to provide access to important information by allowing customers and other members to have access to a copy of a member's most recent balance sheet at any time upon request and should be transferred, as amended, to the Consolidated FINRA Rulebook as FINRA Rule 2261.

FINRA will announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 90 days following Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[6] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade and, in general, to protect investors and the public interest. FINRA believes that adopting the proposed rules as part of the Consolidated FINRA Rulebook will continue to serve important objectives by ensuring that basic, current information regarding the financial condition of members with which customers and other members conduct business is available upon request.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

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:

[3] The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE (''Incorporated NYSE Rules'') (together, the NASD Rules and Incorporated NYSE Rules are referred to as the ''Transitional Rulebook''). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (''Dual Members''). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, *see Information Notice,* March 12, 2008 (Rulebook Consolidation Process).

[4] For purposes of the rule, ''customer'' means any person who, in the regular course of such member's business, has cash or securities in the possession of such member.

[5] SEC Rule 17a–5(c)(5) contains a conditional exemption from the requirement that broker-dealers semi-annually send customers a full balance sheet. Under the exemption, a broker-dealer can semi-annually send its customers summary information regarding its net capital, as long as it also provides customers with a toll-free number to call for a free copy of its full balance sheet, makes its full balance sheet available to customers on its website, and meets other specified requirements. *See* Securities Exchange Act Release No. 48272 (August 1, 2003), 68 FR 46446 (August 6, 2003).

[6] 15 U.S.C. 78*o*–3(b)(6).

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2009–081 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–FINRA–2009–081. 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 FINRA. 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–FINRA–2009–081 and should be submitted on or before January 26, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–31333 Filed 1–4–10; 8:45 am]

BILLING CODE 8011–01–P

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61250; File No. SR–NYSEAmex–2009–92]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Amex LLC Extending the Operative Date of Rule 92(c)(3) From December 31, 2009 to July 31, 2010

December 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 December 23, 2009, NYSE Amex LLC (the ''Exchange'' or ''NYSE Amex'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the operative date of Rule 92(c)(3) from December 31, 2009 to July 31, 2010. The text of the proposed rule change is available at the Exchange, on the Commission's Web site at *http://www.sec.gov,* the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to extend the delayed operative date of Rule 92(c)(3) from December 31, 2009 to July 31, 2010. The Exchange believes that this extension will provide the time necessary for the Exchange, the New York Stock Exchange LLC (''NYSE''), and the Financial Industry Regulatory Authority, Inc. (''FINRA'') to harmonize their respective rules concerning customer order protection to achieve a standardized industry practice.[4]

Background

On July 5, 2007, the Commission approved amendments to NYSE Rule 92 to permit riskless principal trading at the NYSE.[5] These amendments were filed in part to begin the harmonization process between NYSE Rule 92 and FINRA's Manning Rule.[6] In connection with those amendments, the NYSE implemented for an operative date of January 16, 2008, NYSE Rule 92(c)(3), which permits NYSE member organizations to submit riskless principal orders to the NYSE, but requires them to submit to a designated NYSE database a report of the execution of the facilitated order. That rule also requires members to submit to that same database sufficient information to provide an electronic link of the execution of the facilitated order to all of the underlying orders.

For purposes of NYSE Rule 92(c)(3), the NYSE informed member organizations that when executing riskless principal transactions, firms must submit order execution reports to the NYSE's Front End Systemic Capture (''FESC'') database linking the execution of the riskless principal order on the NYSE to the specific underlying orders. The information provided must be sufficient for both member firms and the NYSE to reconstruct in a time-sequenced manner all orders, including allocations to the underlying orders, with respect to which a member organization is claiming the riskless principal exception.

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] NYSE has filed a companion rule filing to conform its Rules to the changes proposed in this filing. *See* SR–NYSE–2009–129, formally submitted December 23, 2009.

[5] *See* Securities Exchange Act Release No. 56017 (Jul. 5, 2007), 72 FR 38110 (Jul. 12, 2007) (SR–NYSE–2007–21).

[6] *See* NASD Rule 2111 and IM–2110–2.

Because the rule change required both the NYSE and member organizations to make certain changes to their trading and order management systems, the NYSE filed to delay to May 14, 2008 the operative date of the NYSE Rule 92(c)(3) requirements, including submitting end-of-day allocation reports for riskless principal transactions and using the riskless principal account type indicator.[7] The NYSE filed for additional extensions of the operative date of Rule 92(c)(3) to December 31, 2009.[8] Because NYSE Amex adopted NYSE Rule 92 in its then current form,[9] the delayed operative date for the NYSE Rule 92(c)(3) reporting requirements also applied for NYSE Amex Equities Rule 92(c)(3) reporting requirements and the Exchange filed for additional extensions of the operative date, the most recent of which was an extension to December 31, 2009.[10]

Request for Extension

FINRA, NYSE, and the Exchange have been working diligently on fully harmonizing their respective rules, including reviewing the possibilities for a uniform reporting standard for riskless principal transactions. However, because of the complexity of the existing customer order protection rules, including the need for input from industry participants as well as Commission approval, the Exchange, NYSE, and FINRA will not have harmonized their respective customer order protection rules by the current December 31, 2009 date for the implementation of the FESC riskless principal reporting.

The Exchange notes that it has agreed with NYSE and FINRA to pursue efforts to harmonize customer order protection rules. As authorized by their respective Boards, FINRA and NYSE Regulation, Inc. (''NYSE Regulation'') have each published a Regulatory Notice/Information Memo that solicited comments from their respective member participants on the proposed harmonized approach to customer order protection.[11] Because industry participants need to code their trading systems to comply with customer order protection rules, the Exchange believes that industry input is vital to ensuring that the approach to customer order protection both meets regulatory needs of protecting customer orders, but is also feasible technologically.

Both FINRA and NYSE Regulation have received comments from the public on the Regulatory Notice and Information Memo, including comments from industry forums such as Securities Industry and Financial Markets Association (''SIFMA'') and Financial Information Forum (''FIF'') that each jointly addressed the FINRA and NYSE Regulation proposals. The comments have generally supported efforts to harmonize the FINRA and NYSE rules. Among issues raised in the comment letters, however, is the concern that FINRA and NYSE have a harmonized approach for reporting riskless principal transactions. In addition, commenters note the need for an implementation period to develop any technology that would be needed to comply with the proposed reporting standard.

On December 10, 2009, FINRA filed with the Commission its rule proposal to adopt a new industry standard for customer order protection as proposed FINRA Rule 5320.[12] That proposed filing is based on the draft rule text that FINRA and NYSE Regulation each circulated to their respective member participants and includes copies of the comment letters that FINRA and NYSE Regulation received on the rule proposal. The Exchange intends to adopt a new customer order protection rule that is substantially identical to proposed FINRA Rule 5320.

The Exchange continues to believe that pending full harmonization of the respective customer order protection rules, it would be premature to require firms to meet the current Rule 92(c)(3) FESC reporting requirements.[13] Indeed, having differing reporting standards for riskless principal orders would be inconsistent with the overall goal of the harmonization process.

Accordingly, to provide the Exchange, NYSE, and FINRA the time necessary to obtain Commission approval for and implement a harmonized rule set that would apply across their respective marketplaces, including a harmonized approach to riskless principal trade reporting, the Exchange is proposing to delay the operative date for NYSE Amex Equities Rule 92(c)(3) from December 31, 2009 to July 31, 2010.

Pending the harmonization of the three rules, the Exchange will continue to require that, as of the date each member organization implements riskless principal routing, the member organization have in place systems and controls that allow them to easily match and tie riskless principal execution on the Exchange to the underlying orders and that they be able to provide this information to the Exchange upon request. To make clear that this requirement continues, the Exchange proposes to amend supplementary material .95 to Rule 92 to specifically provide that the Rule 92(c)(3) reporting requirements are suspended until July 31, 2010 and that member organizations are required to have in place such systems and controls relating to their riskless principal executions on the Exchange. Moreover, the Exchange will coordinate with NYSE and FINRA to examine for compliance with the rule requirements for those firms that engage in riskless principal trading under Rule 92(c).

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[14] in general, and furthers the objectives of Section 6(b)(5) of the Act,[15] in particular, in that it is designed to 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 Exchange believes the proposed extension provides the Exchange, NYSE, and FINRA the time necessary to develop a harmonized rule concerning customer order protection that will enable member organizations to participate in the national market system without unnecessary impediments.

[7] *See* Securities Exchange Act Release No. 56968 (Dec. 14, 2007), 72 FR 72432 (Dec. 20, 2007) (SR–NYSE–2007–114).

[8] *See* Securities Exchange Act Release Nos. 57682 (Apr. 17, 2008), 73 FR 22193 (Apr. 24, 2008) (SR–NYSE–2008–29); 59621 (Mar. 23, 2009), 74 FR 14179 (Mar. 30, 2009) (SR–NYSE–2009–30); and 60396 (July 30, 2009), 74 FR 39128 [sic] (Aug. 5, 2009) (SR–NYSE–2009–73).

[9] The NYSE Amex Equities Rules, which became operative on December 1, 2008, are substantially identical to the current NYSE Rules 1–1004 and the Exchange continues to update the NYSE Amex Equities Rules as necessary to conform with rule changes to corresponding NYSE Rules filed by the NYSE. *See* Securities Exchange Act Release Nos. 58705 (Oct. 1, 2008), 73 FR 58995 (Oct. 8, 2008) (SR–Amex-2008–63); No. 58833 (Oct. 22, 2008), 73 FR 64642 (Oct. 30, 2008) (SR–NYSE–2008–106); No. 58839 (Oct. 23, 2008), 73 FR 64645 (October 30, 2008) (SR–NYSEALTR–2008–03); No. 59022 (Nov. 26, 2008), 73 FR 73683 (Dec. 3, 2008) (SR–NYSEALTR–2008–10); and No. 59027 (Nov. 28, 2008), 73 FR 73681 (Dec. 3, 2008) (SR–NYSEALTR–2008–11).

[10] *See* Securities Exchange Act Release Nos. 59620 (Mar. 23, 2009), 74 FR 14176 (Mar. 30, 2009) (SR–NYSEALTR–2009–29) and 60397 (July 30, 2009), 74 FR 39128 (Aug. 5, 2009) (SR–NYSEAmex–2009–48).

[11] *See* NYSE Regulation Information Memo 09–13 (March 12, 2009); FINRA Regulatory Notice 09–15 (March 12, 2009).

[12] *See* SR–FINRA–2009–090 (December 10, 2009).

[13] The Exchange notes that it would also need to make technological changes to implement the proposed FESC reporting solution for Rule 92(c)(3).

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

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 does not:

(i) Significantly affect the protection of investors or the public interest;

(ii) Impose any significant burden on competition; and

(iii) Become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, 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 [16] and Rule 19b–4(f)(6) thereunder.[17]

The Exchange has requested the Commission to waive the 30-day operative delay so that the Exchange can extend the operative date of NYSE Amex Equities Rule 92(c)(3) without interruption. The Exchange notes that extending the delayed operative date of Rule 92(c)(3) from December 31, 2009 to July 31, 2010 will provide sufficient time for the Exchange, NYSE, and FINRA to obtain Commission approval for and implement a harmonized approach to customer order protection rules, including how riskless principal transactions should be reported. The Commission hereby grants the Exchange's request and believes such waiver is consistent with the protection of investors and the public interest.[18] Accordingly, the Commission designates the proposed rule change operative upon filing with the Commission.

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–2009–92 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–2009–92. 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 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–2009–92 and should be submitted on or before January 26, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–31273 Filed 1–4–10; 8:45 am]

BILLING CODE 8011–01–P

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 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.

[18] For purposes only of waiving the 30-day operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61244; File No. SR–NYSEAmex–2009–81]

Self-Regulatory Organizations; NYSE Amex LLC; Order Approving the Proposed Rule Change, as Modified by Amendment No. 1, Amending NYSE Amex Equities Rule 123C To Modify the Procedures for Its Closing Process and Make Conforming Changes to NYSE Amex Equities Rule 13 and Rule 15

December 28, 2009.

I. Introduction

On November 9, 2009, the NYSE Amex LLC (''NYSE Amex'' or the ''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 modify the procedures for its closing process in Rule 123C and make conforming changes to NYSE Amex Equities Rules 13 (''Definitions of Orders'') and Rule 15 (''Pre-Opening Indications''). The proposed rule change was published for comment in the **Federal Register** on November 17, 2009.[3] On November 25, 2009, the Exchange filed Amendment No. 1 to the proposed rule change.[4] The Commission received no comment letters on the proposal; however, the Commission received one comment letter on the parallel NYSE proposal [5] which is germane to this proposal.[6] This order

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 60973 (November 9, 2009), 74 FR 59308 (''Notice'').

[4] In Amendment No. 1, the Exchange proposes to correct an erroneous cross-reference in Exhibit 5. Because Amendment No. 1 is technical in nature, the Commission is not publishing it for comment.

[5] *See* Securities Exchange Act Release No. 60974 (November 9, 2009), 74 FR 59299 (November 17, 2009) (SR–NYSE–2009–111).

[6] *See* Letter from John F. Neary, Managing Director, Morgan Stanley, to Elizabeth M. Murphy,

Continued

approves the proposed rule change as amended.

II. Description of the Proposal

The Exchange seeks to amend NYSE Amex Equities Rule 123C to modify its closing process.[7] Specifically, the Exchange proposes to amend NYSE Amex Equities Rule 123C to: (i) Extend the time for the entry of Market ''At-The-Close'' (''MOC'') and Limit ''At-The-Close'' (''LOC'') orders from 3:40 p.m. to 3:45 p.m.; (ii) amend the procedures for the entry of MOC/LOC orders in response to imbalance publications and regulatory trading halts; (iii) change to the cancellation time for MOC/LOC orders to 3:58 p.m.; (iv) require only one mandatory imbalance publication; (v) rescind the provisions governing Expiration Friday Auxiliary Procedures for the Opening and Due Diligence Requirements; (vi) modify the dissemination of Order Imbalance Information pursuant to NYSE Amex Equities Rule 123C(6) to commence at 3:45 p.m.; (vii) include additional information in both the pre-opening and pre-closing Order Imbalance Information data feeds; (viii) amend NYSE Amex Equities Rule 13 to create a conditional-instruction limit order type called the Closing Offset Order (''CO order''); (ix) delete the ''At the Close'' order type from NYSE Amex Equities Rule 13 and replace it with the specific definitions of MOC and LOC orders; and (x) codify the hierarchy of allocation of interest in the closing transaction in NYSE Amex Equities Rule 123(C). Similar changes to the rules of the New York Stock Exchange LLC have recently been approved.[8]

The Exchange stated in its filing that it seeks to build on changes it made earlier this year to simplify its closing procedures in order to provide customers with a more efficient closing process.[9] The closing transaction on the Exchange continues to be a manual auction, which the Exchange believes facilitates greater price discovery and allows for the maximum interaction between market participants. While the Exchange currently provides DMM units with electronic tools to facilitate an efficient closing process, the Exchange believes that the proposed changes would maximize the use of those tools and allow for an even more efficient closing process.

Order Entry, Cancellation, Mandatory MOC/LOC Imbalance and Informational Imbalance Publications

The Exchange proposes to amend NYSE Amex Equities Rule 123C to require electronic entry of all MOC and LOC orders, including those entered to offset imbalances.[10] The Exchange stated that electronic entry of MOC and LOC interest would obviate the need to have imbalance publications at both 3:40 p.m. and 3:50 p.m. because the DMM would not have to manually keep track of the MOC/LOC interest; rather, Exchange systems would track the electronically entered MOC/LOC interest, which the Exchange believes would allow its systems to disseminate imbalance information to all market participants in a more accurate and timely fashion. In addition, according to the Exchange, its customers have expressed that in the current trading environment, two imbalance publications ten minutes apart are not useful. Accordingly, the Exchange proposes to modify the order information available prior to the closing transaction and amend NYSE Amex Equities Rule 123C to provide for a single imbalance publication as soon as practicable after 3:45 p.m., to be referred to as the ''Mandatory MOC/LOC Imbalance Publication'' (herein ''Mandatory MOC/LOC Imbalance''), when there is an imbalance: (i) Of 50,000 shares or more; or (ii) of less than 50,000 shares that is deemed to be ''significant'' (*i.e.,* significant in relation to the average daily volume of the security).[11] The last sale price at 3:45 p.m. would serve as the basis for the Mandatory MOC/LOC Imbalance.

The proposal retains the current ability to publish an Informational Imbalance of any size. The Exchange seeks to extend the time for the publication of such imbalance from 3:40 p.m. until 3:45 p.m. in order to provide a mechanism for an imbalance publication prior to any Mandatory MOC/LOC Imbalance if the DMM, in consultation with a Floor Official or qualified NYSE Euronext employee as defined in Supplementary Material .10 of NYSE Amex Equities Rule 46, deems that such imbalance publication is warranted for the security. In extending the time to 3:45 p.m., the proposed rule would provide that a Mandatory MOC/LOC Imbalance or ''no imbalance'' notice must occur as soon as possible after 3:45 p.m.[12]

The proposed new rule would further explicitly state that the entry of MOC/LOC orders in response to a Mandatory MOC/LOC Imbalance after 3:45 p.m. may be entered only to offset the published imbalance.[13] In the case of a ''no imbalance'' notification, no offsetting MOC/LOC interest could be entered at all after 3:45 p.m.[14]

The Exchange's proposal also allows customers to cancel or reduce MOC/LOC orders only in cases of legitimate errors[15] between 3:45 p.m. and 3:58 p.m.[16] After 3:58 p.m., cancellations or reductions in the size of MOC/LOC orders, even in the event of legitimate error, would not be permitted.[17]

Secretary, Commission, dated December 8, 2009 (''Morgan Stanley Letter''). While the Morgan Stanley Letter welcomed the incremental progress under the proposal with regard to transparency, the commenter urged the Exchange to adopt additional changes to the closing process, including mandating a final and absolute cutoff time for participation in the closing process and instituting a more transparent and accurate calculation of the real time closing imbalance feed.

On December 18, 2009, the Exchange responded to the Morgan Stanley letter. *See* Letter from Janet M. Kissane, Senior Vice President—Legal & Corporate Secretary, NYSE Euronext, to Elizabeth M. Murphy, Secretary, Commission (''Response Letter''). In the Response Letter, the Exchange noted that it took into consideration input provided by its diverse constituent base, including Morgan Stanley, in crafting the changes to the closing process, as well as accommodating the interests of diverse constituencies whose business models vary widely, and ensuring that changes are implemented in a way that minimizes the possibility of unintended consequences. The Exchange stated that, given available development resources and the complexity of modern markets, it was hesitant to introduce a level of incremental change that could have broad-ranging and unforeseen consequences. The Exchange noted further that, as it implements the changes to the closing process, it will continue to work with its varied constituency, including Morgan Stanley, to assess the operation of the closing process, with an eye toward any potential changes in the behavior of market participants and to identify further ways to enhance the efficiency and transparency of the Close.

[7] Conforming changes related to the information disseminated prior to the opening transaction are also proposed.

[8] *See* Securities Exchange Act Release No. 61233 (December 23, 2009) (SR–NYSE–2009–111).

[9] *See* Notice, *supra* note 3, at pp. 59308–13 for a detailed description of the current closing process.

[10] In the event a Floor broker's handheld device malfunctions, the DMM should assist the Floor broker by entering or cancelling MOC/LOC orders on the Floor broker's behalf. DMMs perform this administrative function on a best efforts basis. *See* NYSE Information Memos 09–26 (June 18, 2009); NYSE Member Education Bulletin 05–24 (December 9, 2005).

[11] *See* proposed NYSE Amex Equities Rule 123C(1)(d) and (4).

[12] *See* proposed NYSE Amex Equities Rule 123C(1)(b) and (4).

[13] *See* proposed NYSE Amex Equities Rule 123C(2)(b)(i).

[14] *See* proposed NYSE Amex Equities Rule 123C(2)(b)(ii).

[15] Pursuant to proposed NYSE Amex Equities Rule 123C(1)(c), a legitimate error is defined to be an error in any term of an MOC or LOC order, such as price, number of shares, side of the transaction (buy or sell) or identification of the security.

[16] *See* proposed NYSE Amex Equities Rule 123C(3) (Cancellation of MOC and LOC orders). The Exchange anticipates that DMMs will have sufficient time to perform the requisite calculations for the closing transaction while affording customers the ability to cancel or reduce in size an MOC/LOC order until 3:58 p.m.

[17] The Exchange could temporarily suspend the prohibitions on canceling or reducing an MOC or LOC order if there is an extreme order imbalance

The Exchange further proposes to create a CO order type, which would provide all market participants an additional method to offset an order imbalance at the close. The CO order would not be guaranteed to participate in the closing transaction. CO orders would only be eligible to participate in the closing transaction when there is an imbalance of orders to be executed on the opposite side of the market from the CO order and there is no other interest remaining to trade at the closing price. CO orders must yield to all other eligible interest.

Unlike MOC/LOC orders, CO orders could be entered on any side of the market at anytime prior to the close.[18] CO orders would not be included in the calculation of the Mandatory MOC/LOC Imbalance and Informational Imbalance. Consistent with the cancellation requirements for MOC and LOC orders, a CO order could be cancelled or reduced for any reason up to 3:45 p.m. Between 3:45 p.m. and 3:58 p.m., a CO order could be canceled or reduced only in the case of a legitimate error. After 3:58 p.m., a CO order, like MOC/LOC orders, could not be cancelled or reduced for any reason.

CO orders would be eligible to participate in the closing transaction only to offset an imbalance and could not add to or flip the imbalance. If there is an imbalance at the close and the price of the closing transaction is at or within the limit of the CO order, the CO order would be eligible to participate in the closing transaction, subject to strict time priority of receipt in Exchange systems among such eligible CO orders and after yielding to all other interest in the closing execution, including MOCs, marketable LOCs, ''G'' orders, DMM interest, and at-priced LOCs. CO orders deemed eligible to participate in the close would be executed at the price of the closing transaction. If the number of shares represented by CO orders is larger than the number of shares required to offset the imbalance, Exchange systems would execute only those shares of CO orders required to complete the execution of the imbalance in full based on the time priority of receipt in Exchange systems of the CO orders. CO orders therefore would not be allowed to swing an imbalance to the opposite side of the market.

Modifications To Order Imbalance Information Data Feed Prior to the Closing and Opening Transaction

The Exchange further proposes to modify the Order Imbalance data feed disseminated prior to the closing transaction. Pursuant to proposed NYSE Amex Equities Rule 123C(6)(a)(iii), the Order Imbalance data feed would be disseminated approximately every five seconds between 3:45 p.m. and 4 p.m. Moreover, the Exchange proposes to expand the order information included in the Order Imbalance Information data feed. Currently, the pre-closing Order Imbalance Information data feed includes the: (i) Reference price; (ii) MOC/LOC imbalance and the side of the market; (iii) d-Quotes and all other e-Quotes containing pegging instructions eligible to participate in the closing transaction; and (iv) MOC/LOC paired quantity at reference price. The proposed new data feed would also additionally include (i) CO orders on the opposite side of the imbalance and (ii) at-priced LOC interest eligible to offset the imbalance.

The proposed Order Imbalance Information data feed prior to the closing transaction would also make available two new data fields. The proposed new data fields would provide subscribers with a snap shot of the prices at which interest eligible to participate in the closing transaction would be executed in full against contra interest at the time data feed is disseminated. It would also provide subscribers with the price at which closing-only interest (*i.e.,* MOC orders, marketable LOC orders, and CO orders on the opposite side of the imbalance) may be executed in full and the price at which orders in the Display Book (*e.g.,* Minimum Display Reserve Orders, Floor broker reserve e-Quotes not designated to be excluded from the aggregated agency interest information available to the DMM, d-Quotes pegged e-Quotes,[19] and Stop orders) would be executed in full. Only those CO orders on the opposite side of the imbalance would be included in the calculation of the new data fields. If the price at which all closing orders in the Display Book would be executed in full is at or between the quote, then both data fields indicating imbalance information would publish the price at which the closing-only interest (*i.e.,* MOC orders, marketable LOC orders, and CO orders) could be executed in full.

Similarly the Exchange proposes to conform the pre-opening Order Imbalance Information data feed to provide its market participants with more information prior to the opening transaction. As such, the pre-opening Order Imbalance Information data feed would include the price at which all the interest eligible to participate in the opening transaction may be executed in full.[20] The Exchange does not propose to modify the time periods pursuant to NYSE Amex Equities Rule 15 when the pre-opening Order Imbalance data feed is disseminated. Moreover, the calculation of the reference price would also remain the same.

Execution of the Closing Transaction

The Exchange proposes to maintain its current execution logic and to codify the hierarchy of allocation logic applied to interest participating in the closing transaction. Proposed NYSE Amex Equities Rule 123C(7) would list all the interest that must be executed or cancelled as part of the closing transaction and the hierarchy of the interest that may be used to offset the closing imbalance. This codification would now also incorporate the new proposed CO order type into the closing transaction as the last interest eligible to participate in the closing transaction to offset an imbalance.

Trading Halts

The Exchange further proposes to amend NYSE Amex Equities Rule 123C to define ''trading halt'' as a halt in trading in any security pursuant to the provisions of NYSE Amex Equities Rule 123D (''Trading Halt'').[21] Under the proposal, when a Trading Halt is in effect at 3:45 p.m., a Mandatory MOC/LOC Imbalance would be published as close to the resumption of trading as possible if the Trading Halt is lifted prior to the close of trading. In this event, MOC/LOC orders could be entered to offset the published imbalance. If the Trading Halt is not lifted, the entry of MOC/LOC interest, including offsetting interest, would be prohibited.

Where a Trading Halt occurs in a security after a Mandatory MOC/LOC Imbalance is published, MOC/LOC orders could be entered to offset the published imbalance.[22] Where a Trading Halt occurs after 3:45 p.m. and there is no Mandatory MOC/LOC

at or near the close. *See* proposed NYSE Amex Equities Rule 123C(9).

[18] *See* proposed NYSE Amex Equities Rule 123C(2)(b)(iv).

[19] d-Quotes and pegged e-Quotes included in this new data field of the Order Imbalance Information data feed would be included at the price indicated on the order as the base price to be used to calculate the range of discretion and not at prices within their discretionary pricing instructions.

[20] *See* Proposed NYSE Amex Equities Rule 15.

[21] *See* proposed NYSE Amex Equities Rule 123C(1)(f).

[22] *See* proposed NYSE Amex Equities Rule 123C(2)(c)(i).

Imbalance in the security, the entry of MOC/LOC interest would not be allowed.[23]

Unlike MOC/LOC orders, the entry of CO orders on both sides of the market would be permitted when a Trading Halt occurs in a security, but is lifted prior to the close of trading in the security. Because CO orders are the interest of last resort in the closing transaction, entry of such orders is not restricted to offsetting the Mandatory MOC/LOC Imbalance.

Rescission of Expiration Friday Auxiliary Procedures for the Opening and Due Diligence Requirements

The Exchange proposes to rescind the provisions governing ''Expiration Friday Auxiliary Procedures for the Opening.'' According to the Exchange, the provisions governing Expiration Friday were created to facilitate a fair and orderly opening transaction in light of the additional order flow on Expiration Fridays. Because Exchange systems now allow the DMM to accommodate for such fluctuations in volume, the Exchange believes that these provisions are unnecessary. The order marking provisions were an accommodation to member organizations whose systems were unable to electronically affix the designation, and the Exchange states that all of its member organizations are capable of affixing appropriate order designations.

The Exchange further seeks to make the provisions of NYSE Amex Equities Rule 123C govern solely Market and Limit ''on the Close'' Policy. Therefore, the Exchange proposes to delete the ''Due Diligence Requirements'' from this rule as they are redundant with the provisions codified in NYSE Amex Equities Rule 405.

III. Discussion and Commission Findings

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[24] In particular, it is consistent with Section 6(b)(5) of the Act,[25] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Commission also finds that the proposed rule change as amended is consistent with the provisions of Section 6(b)(8) of the Act,[26] which requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The electronic entry of MOC/LOC interest should increase the efficiency of NYSE Amex's market and permit accurate information to be disseminated to market participants more quickly. The modification of the procedures for the entry of MOC/LOC orders in response to imbalance publications and regulatory trading halts should likewise improve transparency and efficiency.

In connection with the change from two imbalance publications to one, the Commission notes the Exchange's representation that its customers have expressed that two imbalance publications ten minutes apart in the current electronic environment are unnecessary. Moving the cut-off time for the entry of MOC/LOC orders from 3:40 p.m. to 3:45 p.m. should allow Exchange participants additional control of the handling of their orders to be executed in the closing transaction and additional participation in active markets.

In connection with the postponing of the cancellation time for MOC and LOC orders to 3:58 p.m, the Commission notes the Exchange's representations that, with the proposed requirement that all MOC/LOC orders be entered electronically, Exchange systems will keep track of the available interest thus making it more readily available for the DMM and that systemic tracking of MOC/LOC interest makes it entirely feasible for the DMM to review in two minutes the interest eligible to participate in the closing transaction and facilitate the execution of the closing transaction.

The creation of the CO order provides an additional source of liquidity to offset an imbalance going into the closing transaction, and thus should increase the greater efficiency of the closing process.

The Commission believes that these proposed modifications are consistent with the Act because, taken as a whole, they should enhance the efficiency and transparency of the closing transaction and provide customers with a more accurate depiction of market conditions prior to the closing transaction, and therefore allow them to make better-informed trading decisions.

The Commission believes that the remainder of the proposed changes, including the codification of the hierarchy of the allocation of interest in the closing, the clarification of the definition of MOC and LOC orders, the inclusion of additional information in the Order Imbalance Information data feeds, and the rescission of the provisions governing Expiration Friday Auxiliary Procedures for the Opening and Due Diligence Requirements are either non-substantive or non-controversial in nature, while enhancing the transparency of NYSE Amex's market at the close, and therefore are consistent with the Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[27] that the proposed rule change, as amended (SR–NYSEAmex–2009–81), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–31272 Filed 1–4–10; 8:45 am]

BILLING CODE 8011–01–P

[23] *See* proposed NYSE Amex Equities Rule 123C(2)(c)(iii).

[24] 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).

[25] 15 U.S.C. 78f(b)(5).

[26] 15 U.S.C. 78f(b)(8).

[27] 15 U.S.C. 78s(b)(2).

[28] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61251; File No. SR–NYSE–2009–129]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC Extending the Operative Date of NYSE Rule 92(c)(3) From December 31, 2009 to July 31, 2010

December 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 December 23, 2009, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

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 extend the operative date of NYSE Rule 92(c)(3) from December 31, 2009 to July 31, 2010. The text of the proposed rule change is available at the Exchange, on the Commission's Web site at *http://www.sec.gov*, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to extend the delayed operative date of NYSE Rule 92(c)(3) from December 31, 2009 to July 31, 2010. The Exchange believes that this extension will provide the time necessary for the Exchange and the Financial Industry Regulatory Authority, Inc. (''FINRA'') to harmonize their respective rules concerning customer order protection to achieve a standardized industry practice.

Background

On July 5, 2007, the Commission approved amendments to NYSE Rule 92 to permit riskless principal trading at the Exchange.[4] These amendments were filed in part to begin the harmonization process between Rule 92 and FINRA's Manning Rule.[5] In connection with those amendments, the Exchange implemented for an operative date of January 16, 2008, NYSE Rule 92(c)(3), which permits Exchange member organizations to submit riskless principal orders to the Exchange, but requires them to submit to a designated Exchange database a report of the execution of the facilitated order. That rule also requires members to submit to that same database sufficient information to provide an electronic link of the execution of the facilitated order to all of the underlying orders.

For purposes of NYSE Rule 92(c)(3), the Exchange informed member organizations that when executing riskless principal transactions, firms must submit order execution reports to the Exchange's Front End Systemic Capture (''FESC'') database linking the execution of the riskless principal order on the Exchange to the specific underlying orders. The information provided must be sufficient for both member firms and the Exchange to reconstruct in a time-sequenced manner all orders, including allocations to the underlying orders, with respect to which a member organization is claiming the riskless principal exception.

Because the rule change required both the Exchange and member organizations to make certain changes to their trading and order management systems, the NYSE filed to delay to May 14, 2008 the operative date of the NYSE Rule 92(c)(3) requirements, including submitting end-of-day allocation reports for riskless principal transactions and using the riskless principal account type indicator.[6] The Exchange filed for additional extensions of the operative date of Rule 92(c)(3), the most recent of which was an extension to December 31, 2009.[7]

Request for Extension [8]

FINRA and the Exchange have been working diligently on fully harmonizing their respective rules, including reviewing the possibilities for a uniform reporting standard for riskless principal transactions. However, because of the complexity of the existing customer order protection rules, including the need for input from industry participants as well as Commission approval, the Exchange and FINRA will not have harmonized their respective customer order protection rules by the current December 31, 2009 date for the implementation of the FESC riskless principal reporting.

The Exchange notes that it has agreed with FINRA to pursue efforts to harmonize customer order protection rules. As authorized by their respective Boards, FINRA and NYSE Regulation, Inc. (''NYSE Regulation'') have each published a Regulatory Notice/Information Memo that solicited comments from their respective member participants on the proposed harmonized approach to customer order protection.[9] Because industry participants need to code their trading systems to comply with customer order protection rules, the Exchange believes that industry input is vital to ensuring that the approach to customer order protection both meets regulatory needs of protecting customer orders, but is also feasible technologically.

Both FINRA and NYSE Regulation have received comments from the public on the Regulatory Notice and Information Memo, including comments from industry forums such as Securities Industry and Financial Markets Association (''SIFMA'') and the Financial Information Forum (''FIF'') that each jointly addressed the FINRA and NYSE Regulation proposals. The comments have generally supported efforts to harmonize the FINRA and NYSE rules. Among issues raised in the comment letters, however, is the concern that FINRA and NYSE have a harmonized approach for reporting riskless principal transactions. In addition, commenters note the need for an implementation period to develop any technology that would be needed to comply with the proposed reporting standard.

On December 10, 2009, FINRA filed with the Commission its rule proposal to adopt a new industry standard for customer order protection as proposed FINRA Rule 5320.[10] That proposed filing is based on the draft rule text that FINRA and NYSE Regulation each circulated to their respective member participants and includes copies of the comment letters that FINRA and NYSE Regulation received on the rule proposal. The Exchange intends to adopt a new customer order protection rule that is substantially identical to proposed FINRA Rule 5320.

The Exchange continues to believe that pending full harmonization of the respective customer order protection rules, it would be premature to require

[4] *See* Securities Exchange Act Release No. 34–56017 (July 5, 2007), 72 FR 38110 (July 12, 2007), SR–NYSE–2007–21.

[5] *See* NASD Rule 2111 and IM–2110–2.

[6] *See* Securities Exchange Act Release No. 56968 (Dec. 14, 2007), 72 FR 72432 (Dec. 20, 2007), SR–NYSE–2007–114.

[7] *See* Securities Exchange Act Release Nos. 57682 (Apr. 17, 2008), 73 FR 22193 (Apr. 24, 2008) (SR–NYSE–2008–29); 59621 (Mar. 23, 2009), 74 FR 14179 (Mar. 30, 2009) (SR–NYSE–2009–30); and 60396 (July 30, 2009), 74 FR 39128 [sic] (Aug. 5, 2009) (SR–NYSE–2009–73).

[8] NYSE Amex LLC has filed a companion rule filing to conform its Equities Rules to the changes proposed in this filing. *See* SR–NYSEAmex–2009–92, formally submitted December 23, 2009).

[9] *See* NYSE Regulation Information Memo 09–13 (March 12, 2009); FINRA Regulatory Notice 09–15 (March 12, 2009).

[10] *See* SR–FINRA–2009–090 (December 10, 2009).

firms to meet the current Rule 92(c)(3) FESC reporting requirements.[11] Indeed, having differing reporting standards for riskless principal orders would be inconsistent with the overall goal of the harmonization process.

Accordingly, to provide the Exchange and FINRA the time necessary to obtain Commission approval for and implement a harmonized rule set that would apply across their respective marketplaces, including a harmonized approach to riskless principal trade reporting, the Exchange is proposing to delay the operative date for NYSE Rule 92(c)(3) from December 31, 2009 to July 31, 2010.

Pending the harmonization of the two rules, the Exchange will continue to require that, as of the date each member organization implements riskless principal routing, the member organization have in place systems and controls that allow them to easily match and tie riskless principal execution on the Exchange to the underlying orders and that they be able to provide this information to the Exchange upon request. To make clear that this requirement continues, the Exchange proposes to amend supplementary material .95 to Rule 92 to specifically provide that the Rule 92(c)(3) reporting requirements are suspended until July 31, 2010 and that member organizations are required to have in place such systems and controls relating to their riskless principal executions on the Exchange. Moreover, the Exchange will coordinate with FINRA to examine for compliance with the rule requirements for those firms that engage in riskless principal trading under Rule 92(c).

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[12] in general, and furthers the objectives of Section 6(b)(5) of the Act,[13] in particular, in that it is designed 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 Exchange believes the proposed extension provides the Exchange and FINRA the time necessary to develop a harmonized rule concerning customer order protection that will enable member organizations to participate in the national market system without unnecessary impediments.

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 does not:

(i) Significantly affect the protection of investors or the public interest;

(ii) Impose any significant burden on competition; and

(iii) Become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, 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[14] and Rule 19b–4(f)(6) thereunder.[15]

The Exchange has requested the Commission to waive the 30-day operative delay so that the Exchange can extend the operative date of NYSE Rule 92(c)(3) without interruption. The Exchange notes that extending the delayed operative date of Rule 92(c)(3) from December 31, 2009 to July 31, 2010 will provide sufficient time for the Exchange and FINRA to obtain Commission approval for and implement a harmonized approach to customer order protection rules, including how riskless principal transactions should be reported. The Commission hereby grants the Exchange's request and believes such waiver is consistent with the protection of investors and the public interest.[16] Accordingly, the Commission designates the proposed rule change operative upon filing with the Commission.

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–NYSE–2009–129 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2009–129. 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 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

[11] The Exchange notes that it would also need to make technological changes to implement the proposed FESC reporting solution for Rule 92(c)(3).

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 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.

[16] For purposes only of waiving the 30-day operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2009–129 and should be submitted on or before January 26, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–31271 Filed 1–4–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61237; File No. SR–MSRB–2009–10]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Amendment No. 1 to Proposed Rule Change Relating to Additional Voluntary Submissions by Issuers to the MSRB's Electronic Municipal Market Access System (EMMA®)

December 23, 2009.

On July 14, 2009, the Municipal Securities Rulemaking Board (''MSRB'') 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 relating to additional voluntary submissions by issuers to the MSRB's Electronic Municipal Market Access System (EMMA®). The proposed rule change was published for comment in the **Federal Register** on July 22, 2009.[3] On December 18, 2009, the MSRB filed with the Commission Amendment No. 1 to the proposed rule change. The Commission is publishing this notice of Amendment No. 1 to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The MSRB has filed with the Commission the amendment to File No. SR–MSRB–2009–10, originally filed on July 14, 2009 (the ''original proposed rule change''). The amendment amends and restates the original proposed rule change relating to additional voluntary submissions by issuers to the MSRB's Electronic Municipal Market Access system (''EMMA'') (as amended, the ''proposed rule change''). The proposed rule change would amend EMMA's primary market and continuing disclosure services to permit issuers and their designated agents to submit preliminary official statements and other related pre-sale documents, official statements and advance refunding documents, as well as to permit issuers, obligated persons and their designated agents to submit information relating to the preparation and submission of audited financial statements and annual financial information and to post links to other disclosure information. The MSRB requests an effective date for the proposed rule change of a date to be announced by the MSRB in a notice published on the MSRB Web site, which date shall be no later than nine months after Commission approval of the proposed rule change and shall be announced no later than sixty (60) days prior to the effective date.

The text of the proposed rule change is available on the MSRB's Web site at *http://www.msrb.org/msrb1/sec.asp*, at the MSRB'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 MSRB 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 MSRB 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

Preliminary Official Statements and Other Primary Market Documents

The proposed rule change would amend the EMMA primary market disclosure service[4] to permit issuers and their designated agents to make voluntary submissions to the primary market disclosure service of official statements, preliminary official statements and related pre-sale documents, and advance refunding documents (collectively, ''primary market documents'').[5] Pre-sale documents other than a preliminary official statement (including but not limited to notices of sale or supplemental disclosures) would be accepted only if accompanied or preceded by the preliminary official statement.[6] An issuer seeking to make submissions of primary market documents to the EMMA primary market disclosure service would use the same accounts established with respect to submissions of continuing disclosure documents to the EMMA continuing disclosure service, subject to additional verification procedures to affirmatively establish the account holder's authority to act on behalf of the issuer in connection with such primary market disclosure submissions.

Submissions of primary market documents by issuers and their designated agents will be accepted on a voluntary basis if, at the time of submission, they are accompanied by information necessary to accurately identify: (i) The category of document being submitted; (ii) the issues or specific securities to which such document is related; and (iii) in the case of an advance refunding document, the specific securities being refunded pursuant thereto. The primary market documents and related indexing information would be displayed on the EMMA Web portal and also would be included in EMMA's primary market disclosure subscription service.

Additional Continuing Disclosure Submissions and Undertakings

As amended and restated by this amendment, the proposed rule change also would amend the EMMA continuing disclosure service to permit issuers, obligated persons and their agents to make voluntary submissions to the continuing disclosure service of additional categories of disclosures, as well as information about their continuing disclosure undertakings. Such additional continuing disclosures and related indexing information would be displayed on the EMMA Web portal and also would be included in EMMA's

[17] 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. 60315 (July 15, 2009), 74 FR 36294.

[4] This amendment does not modify the provisions of the original proposed rule change relating to the EMMA primary market disclosure service.

[5] Obligated persons would be permitted to submit primary market documents through the EMMA primary market disclosure service only if designated as an agent by the issuer.

[6] The MSRB believes that posting of such pre-sale documents without the related disclosure information provided in a preliminary official statement would be inconsistent with the core disclosure purposes of EMMA.

continuing disclosure subscription service. Such additional items are:

- An issuer's or obligated person's undertaking to prepare audited financial statements pursuant to generally accepted accounting principles (''GAAP'') as established by the Governmental Accounting Standards Board (''GASB''), or pursuant to GAAP as established by the Financial Accounting Standards Board (''FASB''), as applicable to such issuer or obligated person and as further described below (the ''voluntary GAAP undertaking''); [7]
- An issuer's or obligated persons' undertaking to submit annual financial information to EMMA within 120 calendar days after the end of the fiscal year or, as a transitional alternative that may be elected through December 31, 2013, within 150 calendar days after the end of the applicable fiscal year, as further described below (the ''voluntary annual filing undertaking''); [8] and
- Uniform resource locator (URL) of the issuer's or obligated person's Internet-based investor relations or other repository of financial/operating information.

Voluntary GAAP Undertaking. The voluntary GAAP undertaking would consist of a voluntary undertaking by an issuer or obligated person, either at the time of a primary offering or at any time thereafter, that the issuer or obligated person will prepare its audited financial statements in accordance with GAAP. The MSRB contemplates that state or local governments or any other entities to which GASB standards are applicable would apply GAAP as established by GASB and that any other entities to which FASB standards are applicable would apply GAAP as established by FASB.

The voluntary GAAP undertaking would assist investors and other market participants in understanding how audited financial statements were prepared. The fact that an issuer or obligated person has entered into a voluntary GAAP undertaking, and the standard under which audited financial statements are to be prepared, would be prominently disclosed on the EMMA Web portal as a distinctive characteristic of the securities to which such undertaking applies. An issuer or obligated person that has made a voluntary GAAP undertaking may later rescind such undertaking, which would be disclosed through EMMA. The MSRB would not review whether an entity has selected the appropriate accounting standard and would not review or confirm the conformity of submitted audited financial statements to GAAP. The MSRB contemplates that the making of a voluntary GAAP undertaking through EMMA by an issuer or obligated person would reflect the *bona fide* intent of the issuer or obligated person to perform as undertaken but would not, by itself, necessarily create a contractual obligation of such issuer or obligated person.

Voluntary Annual Filing Undertaking. The voluntary annual filing undertaking would consist of a voluntary undertaking by an issuer or obligated person, either at the time of a primary offering or at any time thereafter, that the issuer or obligated person, as appropriate, will submit to EMMA its annual financial information as contemplated under Rule 15c2–12 of the Securities Exchange Act of 1934 (the ''Exchange Act'') by no later than 120 calendar days after the end of such issuer's or obligated person's fiscal year (the ''120 day undertaking'').[9] Alternatively, to and including December 31, 2013, the EMMA continuing disclosure service will provide the option for an issuer or obligated person to indicate its undertaking to submit to EMMA its annual financial information by no later than 150 calendar days after the end of such issuer's or obligated person's fiscal year (the ''transitional 150 day undertaking'').[10] An issuer or obligated person that has made a transitional 150 day undertaking may convert such election to a 120 day undertaking at any time. On and after January 1, 2014, the transitional 150 day undertaking option would no longer be available for selection.

The voluntary annual filing undertaking would assist investors and other market participants in understanding when the annual financial information is expected to be available in the future. The fact that an issuer or obligated person has entered into a voluntary annual filing undertaking would be prominently disclosed on the EMMA Web portal as a distinctive characteristic of the securities to which such undertaking applies. An issuer or obligated person that has made a voluntary annual filing undertaking may later rescind such undertaking, which would be reflected on the EMMA Web portal. A transitional 150 day undertaking would continue to be displayed on the EMMA Web portal through June 30, 2014, and would automatically cease to be displayed on the EMMA Web portal after such date, unless the issuer or obligated person has previously changed or rescinded such undertaking.

The MSRB would not review or confirm the compliance of an issuer or obligated person with its voluntary annual filing undertaking. The MSRB contemplates that the making of a voluntary annual filing undertaking through EMMA by an issuer or obligated person would reflect the *bona fide* intent of the issuer or obligated person to perform as undertaken but would not, by itself, necessarily create a contractual obligation of such issuer or obligated person. Unless the issuer or obligated person incorporates the 120 day undertaking or transitional 150 day undertaking as an obligation under its continuing disclosure agreement, the MSRB would view such issuer's or obligated person's performance pursuant to such undertaking as distinct from any performance obligations under its continuing disclosure agreement entered into consistent with Rule 15c2–12, although the MSRB believes that successful performance in accordance with a voluntary annual filing undertaking generally should also satisfy the obligation under a continuing disclosure agreement, depending on the specific terms of such agreement, if the agreement provides a longer timeframe for such submission.

Investor Relation URL Posting. A URL of an issuer's or obligated person's Internet-based investor relations or other repository of financial/operating information would provide investors

[7] In response to the comments received on the original proposed rule change, as discussed below, this amendment modifies the original proposed rule change by permitting issuers and obligated persons to elect either the GASB standard or the FASB standard for GAAP, as appropriate. The original proposed rule change only contemplated the use of the GASB standard.

[8] In response to the comments received on the original proposed rule change, as discussed below, this amendment modifies the original proposed rule change by permitting issuers and obligated persons to elect to undertake to submit annual financial information either within 120 days or 150 days after the end of the fiscal year. The original proposed rule change only contemplated a 120 day timeframe.

[9] Under the Exchange Act, smaller public reporting companies, as non-accelerated filers, generally are required to file their annual reports on Form 10–K with the Commission within 90 days after the end of their fiscal year. The longer 120-day period included in the voluntary annual filing undertaking of the proposed rule change is designed to accommodate additional steps that state and local governments often must take—under state law, pursuant to their own requirements, or otherwise—in completing the work necessary to prepare their annual financial information as contemplated under Exchange Act Rule 15c2–12.

[10] The option to elect, through December 31, 2013, a transitional 150 day undertaking acknowledges that the 120 day undertaking may not be immediately achievable by most issuers and obligated persons, as described in the comments discussed below, and is designed to provide a means by which to recognize issuers and obligated persons that are taking steps toward ultimately making their annual financial information available within 120 days of fiscal year end in the future.

with an additional avenue for obtaining further financial, operating or other investment-related information about such issuer or obligated person.

Elimination of Proposed GFOA–CAFR Certificate. This amendment modifies the original proposed rule change by eliminating one item of additional voluntary submissions relating to the award of the Certificate of Achievement for Excellence in Financial Reporting awarded by the Government Finance Officers Association (''GFOA'') in connection with the preparation of a Comprehensive Annual Financial Report (''CAFR'') of an issuer. The MSRB notes that CAFRs are already frequently submitted to EMMA by issuers, and in most cases the issuers include the GFOA certificate in the submitted CAFR. Therefore, EMMA already effectively serves as a venue through which CAFRs and GFOA certificates are made available to investors.

Manner of Submission. Issuers and obligated persons would make a voluntary GAAP undertaking or voluntary annual filing undertaking through a data input election on EMMA. Voluntary undertakings could later be rescinded through the same EMMA interface process. The URL of an issuer's or obligated person's investor relations or other repository of financial/operating information also could be entered through a text/data input field on EMMA. No document would be required to be submitted to EMMA in connection with the voluntary GAAP undertaking, voluntary annual filing undertaking or the issuer/obligated person URL. The input process for each of these additional items would include a free text input field permitting issuers and obligated persons to include limited additional information relating to each such item that they deem appropriate with respect thereto for public dissemination. Further, the MSRB would include an explanation of the nature of the voluntary GAAP undertaking and voluntary annual filing undertaking on the EMMA Web portal.

Effective Date of Proposed Rule Change

As noted above, the MSRB has requested an effective date for the proposed rule change of a date to be announced by the MSRB in a notice published on the MSRB Web site, which date shall be no later than nine months after Commission approval of the proposed rule change and shall be announced no later than sixty (60) days prior to the effective date.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with the provisions of Section 15B(2)(C) of the Act,[11] which requires, among other things, that MSRB rules must be 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 municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.

The MSRB believes that the proposed rule change is consistent with the Exchange Act in that it serves to remove impediments to and help perfect the mechanisms of a free and open market in municipal securities and would serve to promote the statutory mandate of the MSRB to protect investors and the public interest. Voluntary dissemination of preliminary official statements through EMMA, particularly if made available prior to the sale of a primary offering to the underwriters, would provide timely access by investors and other market participants to key information useful in making an investment decision in a manner that is consistent with the MSRB's statutory authority. The voluntary GAAP undertaking would assist understanding of how such information was prepared and the voluntary annual filing undertaking would assist understanding of when such information is expected to be available in the future. A URL provided by an issuer or obligated person would provide investors with an additional avenue for obtaining further financial, operating or other investment-related information about such issuer or obligated person.

B. Self-Regulatory Organization's Statement on Burden on Competition

The MSRB does not believe the proposed rule change would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The additional items of information submitted by issuers and obligated persons to the EMMA system for public dissemination would be available to all persons simultaneously. In addition to making such information available for free on the EMMA Web portal to all members of the public, the MSRB would make such documents and information available by subscription on an equal and non-discriminatory basis. Further, the proposed rule change would apply equally to all issuers and obligated persons.

The MSRB does not believe that making the additional items of information to be included in the EMMA continuing disclosure service available to the public would compete with other information providers and, to the extent other information providers were to seek to make such information available to the public, such providers could obtain the information from the MSRB through the subscription service on an equal and non-discriminatory basis. Further, the MSRB does not believe that allowing issuers to submit documents to the EMMA primary market disclosure service would create a burden on or compete inappropriately with any other information providers to which such documents may also be provided and notes that other information providers would be able to obtain the information from the MSRB through the subscription service on an equal and non-discriminatory basis.

The proposed rule change also would not impose any additional burdens on competition among issuers of municipal securities since the voluntary submissions provided for under the proposed rule change may be made by any issuer on an equal and non-discriminatory basis.

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 by the MSRB on the original proposed rule change prior to filing with the Commission. The original proposed rule change was published by the Commission for comment in the **Federal Register** and the Commission received comments from a number of commentators.[12] In

[11] 15 U.S.C. 78*o*–4(b)(2)(C).

[12] *See* Securities Exchange Act Release No. 60315 (July 15, 2009) (File No. SR–MSRB–2009–10), 74 FR 36294 (July 22, 2009). The Commission received comments from the City of Brookfield, Wisconsin (''Brookfield''); Connecticut State Treasurer (''Connecticut''); Government Finance Officers Association (''GFOA''); Village of Greendale, Wisconsin (''Greendale''); Village of Hinsdale, Illinois (''Hinsdale''); Inland Empire Utilities Agency (''Inland''); International City/County Management Association, National Association of Counties, National Association of State Auditors, Comptrollers and Treasurers, National League of Cities, U.S. Conference of Mayors, American Public Power Association, and Council on Infrastructure Financing Authorities, jointly (''Joint Issuer Groups''); Investment Company Institute (''ICI''); Township of Lower Merion, Pennsylvania (''Lower

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addition, several commentators provided comments to the MSRB with respect to the submission of preliminary official statements to EMMA in response to a series of notices published by the MSRB seeking comment on the establishment of EMMA for purposes of official statement dissemination (the ''MSRB Notices'').[13]

General

Except with respect to the voluntary annual filing undertaking, virtually all commentators on the original proposed rule change supported the proposal. Most commentators opposed the voluntary annual filing undertaking, with some of these commentators not expressing opinions on the remaining portions of the original proposed rule change. NABL suggested delaying action on changes to the EMMA continuing disclosure service until the Commission's proposed amendments to Rule 15c2–12 are finalized,[14] and also noted general concerns regarding whether prominent display of the voluntary undertakings would be construed as recommendations by the MSRB and regarding the specific process by which issuers and obligated persons could later rescind any undertakings they make. SIFMA asked what responsibilities dealers may have arising from an issuer's failure to meet a voluntary undertaking. Various commentators provided comments on specific elements of the original proposed rule change, as described below.

Preliminary Official Statements

The original proposed rule change would amend the EMMA primary market disclosure service to permit issuers and their designated agents to make voluntary submissions to the primary market disclosure service of official statements, preliminary official statements and related pre-sale documents, and advance refunding documents. Pre-sale documents other than a preliminary official statement (including but not limited to notices of sale or supplemental disclosures) would be accepted only if accompanied or preceded by the preliminary official statement.

A number of commentators on the original proposed rule change expressed general support for the various elements thereof (other than the voluntary annual filing undertaking), including the element to permit issuers to submit preliminary official statements and related pre-sale documents. In addition, in comment letters to the MSRB on the MSRB Notices, SIFMA,[15] along with AMS, DPC, Ipreo, NABL, TRB, UMB and Zions, supported the concept of voluntary submissions of preliminary official statements. DPC and AGFS suggested that the MSRB explore making the submission of preliminary official statements mandatory, while SIFMA, AMS and NABL emphasized that preliminary official statement submissions should not be made mandatory.

The MSRB believes that there is considerable value in providing a means for centralized access to preliminary official statements at or prior to the time of trade and in sufficient time to make use of the information in coming to an investment decision. However, the MSRB is precluded from mandating pre-sale submission of preliminary official statement pursuant to Exchange Act Section 15B(d)(1). In its filing with the Commission to establish the EMMA primary market disclosure service, the MSRB stated that it expected to provide the opportunity for voluntary submissions of and access to preliminary official statements through EMMA, consistent with the MSRB's statutory authority, pursuant to a future filing with the Commission.[16] The proposed rule change would permit such voluntary submissions of preliminary official statements.

Connecticut noted in its comments on the original proposed rule change that preliminary official statements would generally not have CUSIP numbers associated with them and that EMMA's usability would be improved by making such documents identifiable by means other than CUSIP numbers, such as by issuer. NABL supported submissions of preliminary official statements and related pre-sale documents for competitive sales of new issues but expressed concerns with regard to potentially conflicting submissions by underwriters and issuers in the case of negotiated issues and therefore recommended that the ability to make preliminary official statement submissions by issuers be restricted solely to competitive issues.

The MSRB expects to provide search capabilities tailored to the types of indexing information that would be available for preliminary official statements, including issuer name, issue description, state, and appropriate date ranges, among other things. Submissions made by issuers would be noted as such on the EMMA Web portal. The MSRB believes that postings of preliminary official statements by issuers should be available for any new issue, not just those sold on a competitive basis, and the EMMA primary market submission process would be designed to discourage duplicative submissions by issuers and underwriters.

In commenting on the MSRB Notices, SIFMA and DPC noted the importance of ensuring version control where both preliminary official statements and official statements are made available (as well as in handling ''stickers'' to official statements), suggesting that the MSRB include a mechanism for notification to the public when the final official statement is posted in cases where a preliminary official statement has previously been submitted. DPC suggested that preliminary official statements be deleted when final official statements are submitted, while NABL suggested that underwriters be permitted to request that the preliminary official statement be removed from the centralized electronic system once the ''timeliness of a POS has ended,'' noting that its continued availability may confuse investors. However, SIFMA opposed the removal of the preliminary official statement.

The MSRB notes that the current operation of the EMMA Web portal provides processes that address each of these suggestions. Under current Rule

Merion''); Michigan State Treasurer (''Michigan''); National Association of Bond Lawyers (''NABL''); National Association of Health and Educational Facilities Finance Authorities (''NAHEFFA''); National Association of State Treasurers (''NAST''); Oregon Municipal Finance Officers Association (''OMFOA''); City of Portland, Oregon (''Portland''); City of Rock Hill, South Carolina (''Rock Hill''); Rutherford County, Tennessee (''Rutherford''); Securities Industry and Financial Markets Association (''SIFMA''); State of Tennessee (''Tennessee''); Utah Government Finance Officers Association (''UGFOA''); and Virginia Government Finance Officers' Association (''VGFOA''). The comment letters received by the Commission are posted on the Commission's Web site at *http://www.sec.gov/comments/sr-msrb-2009–10/msrb200910.shtml*.

[13] MSRB Notice 2006–19 (July 27, 2006) (the ''Concept Release''); MSRB Notice 2007–5 (January 25, 2007) (the ''January 2007 Notice''). Comments relating to preliminary official statement submissions were received in response to the Concept Release from American Government Financial Services Company (''AGFS''), TRB Associates (''TRB''), UMB Bank, N.A. (''UMB''), and Zions Bank Public Finance (''Zions''). Comments relating to preliminary official statement submissions were received in response to the January 2007 Notice from American Municipal Securities, Inc. (''AMS''), DPC DATA Inc. (''DPC''), Ipreo Holdings LLC (''Ipreo''), NABL and SIFMA. These notices and comment letters are included in Exhibit 2.

[14] *See* Securities Exchange Act Release No. 60332 (July 17, 2009) (File No. S7–15–09), 74 FR 36832 (July 24, 2009).

[15] Bear Stearns & Co., Inc. and Griffin, Kubik, Stephens & Thompson, Inc. stated that they participated in the formulation of SIFMA's comments on the January 2007 Notice and fully supported SIFMA's positions.

[16] *See* Securities Exchange Act Release No. 59636 (March 27, 2009), 74 FR 15190 (April 2, 2009) (File No. SR–MSRB–2009–02).

G–32, preliminary official statements, if available, are required to be submitted by the underwriter by closing solely in the circumstance where an official statement is not being prepared by the issuer or if the official statement is not available for submission to EMMA by the closing. Once the official statement is provided by the underwriter, the preliminary official statement generally is moved to a document archive that is accessible through the EMMA portal directly from the page where the link to the official statement is provided, thereby distinguishing the final official statement from the preliminary official statement while maintaining public access for those wishing to refer back to the preliminary official statement. Users of the EMMA portal are able to request to receive e-mail notifications for updates to the disclosure document for a specific security, which applies to the situation where an official statement is submitted to EMMA following an initial submission of the preliminary official statement.

Voluntary Annual Filing Undertaking

The original proposed rule change would amend the EMMA continuing disclosure service to permit issuers and obligated persons to undertake, on a voluntary basis, to submit annual financial information to EMMA within 120 calendar days after the end of the fiscal year. This would consist of a voluntary undertaking by an issuer or obligated person, either at the time of a primary offering or at any time thereafter, that the issuer or obligated person, as appropriate, will submit to EMMA its annual financial information as contemplated under Rule 15c2–12 by no later than 120 calendar days after the end of such issuer's or obligated person's fiscal year. Issuers and obligated persons would indicate the existence of such an undertaking through a data input election on EMMA. No document would be required to be submitted to EMMA in connection with this undertaking. The fact that an issuer or obligated person has entered into such an undertaking would be prominently disclosed on the EMMA Web portal as a distinctive characteristic of the securities to which such undertaking applies and the MSRB would include an explanation of the undertaking on the EMMA Web portal. If an issuer or obligated person that has made an undertaking later rescinds such undertaking, the issuer or obligated person would be able to disclose such action through EMMA. The MSRB would not review or confirm the compliance of an issuer or obligated person with this undertaking.

This element of the original proposed rule change generated significant, but not universal, negative commentary, with virtually all commentators, except as noted below, strongly objecting.[17] GFOA stated that it believes that ''setting an 'ideal' deadline of 120 days is unnecessary, arbitrary, and likely harmful to the quality of financial reporting.'' GFOA noted that many issuers that meet the 180 day timeframe for receiving its Certificate of Achievement for Excellence in Financial Reporting with respect to the preparation of their CAFRs must ''struggle'' to achieve that deadline and that a significantly shorter deadline ''might reasonably be expected to persuade any number of such governments to abandon a CAFR altogether in favor of a plain set of basic financial statements.'' GFOA also noted that GAAP requires reporting of data from legally separate component units over which most issuers have no legal ability to compel to provide such data in a timeframe that would make meeting the voluntary annual filing undertaking possible. GFOA further suggested that the voluntary annual filing undertaking could encourage the use of less qualified audit firms and the increased use of estimates. The Joint Issuer Groups and NAST stated that they ''strongly encourage the SEC and the MSRB to withdraw this part of the proposal, as it is not consistent with current practices and would diminish the quality of financial reporting and auditing standards.'' Various other issuers and issuer groups made arguments similar to those raised by the GFOA.[18]

Numerous issuers and issuer groups argued that the voluntary annual filing undertaking would likely become a de facto standard that issuers would feel compelled to meet.[19] They noted that the accelerated production of financial information would create significant financial and personnel burdens that would likely have adverse consequences to issuers while providing questionable benefits to investors.[20] Small issuers observed that their internal staffs are not able to support this timeframe and are given low priority by their auditors as compared to their larger clients.[21] Portland stated that ''even if the City 'staffed up' on its end, there are not a sufficient number of independent auditors available to conduct the auditing function within the 120-day time period.'' Rock Hill stated that auditing firms ''are increasingly less inclined to bid for governmental audits because of the specialized continuing education requirements and the perception that the work is not lucrative.''

Inland Empire expressed concern that the potential ''black eye'' for not making the voluntary annual filing undertaking could create pressure from elected officials to meet it that, in turn, could cause professional staff and their auditors to produce less accurate information just to meet the deadline. While not expressly opposing the voluntary annual filing undertaking, Connecticut questioned the usefulness of this element and expressed concern if this element is used by the market to screen issues. Many issuers stated that the 180 day standard used by GFOA in connection with its CAFR program is a more appropriate timeframe.[22] VGFOA cited difficulties in simultaneously meeting GFOA's CAFR timeframes, state law requirements and the existing annual financial undertaking in its continuing disclosure undertaking entered into pursuant to Rule 15c2–12. Several commentators noted various adjustments that are uniquely required to be made for governmental entities or conduit borrowers after the end of the fiscal year that make meeting the 120 day timeframe difficult or impossible.[23] Tennessee reviewed various statistics on timing of preparation of audited statements and concluded that ''[s]electing a timeframe of 120 days without understanding the differences in reporting environments appears arbitrary and may unnecessarily limit the municipal market volume.'' Tennessee further noted that states have met to discuss ''timeliness barriers and ways of reducing the timeframe of financial reporting'' and requests that further study be undertaken. NAHEFFA noted that, since there are apparently no legal ramifications for failing to meet the deadline in an issuer's voluntary annual filing undertaking, nothing would ''preclude the issuer from effectively advertising the undertaking on EMMA, and as a result receiving preferred

[17] *See* Brookfield, Connecticut, GFOA, Greendale, Inland, Joint Issuer Groups, Lower Merion, Michigan, NABL, NAHEFFA, NAST, OMFOA, Portland, Rock Hill, Rutherford, Tennessee, UGFOA and VGFOA.

[18] *See* Brookfield, Connecticut, Greendale, Inland, Joint Issuer Groups, Lower Merion, Michigan, NABL, NAHEFFA, NAST, OMFOA, Portland, Rock Hill, Rutherford, Tennessee, UGFOA and VGFOA.

[19] *See* Brookfield, Connecticut, Inland, Joint Issuer Groups, NAHEFFA, NAST and VGFOA.

[20] *See* Brookfield, Connecticut, GFOA, Greendale, Inland, Joint Issuer Groups, NAHEFFA, NAST, OMFOA, Portland, UGFOA and VGFOA.

[21] *See* Brookfield, Greendale, Inland, NAHEFFA, OMFOA, Portland, Rock Hill, Rutherford, UGFOA and VGFOA.

[22] *See* Inland, Michigan, Portland and UGFOA.

[23] *See* GFOA, Inland, Joint Issuer Groups, NAHEFFA, NAST, Rock Hill, Tennessee, UGFOA and VGFOA.

status, irrespective of actual compliance.''

Hinsdale, however, noted that ''the proposed 120 day period for submitting annual financial information is a good start toward meeting the objective of making financial statements of governments timely and useful in the public securities market.'' GFOA stated that it ''certainly could support a voluntary disclosure field indicating that a government was, in fact, in compliance with its continuing disclosure agreement obligations.''

The ICI stated that it is ''particularly supportive'' of the voluntary annual filing undertaking proposal, although it continued to press for ''the establishment of a meaningful, mandatory timeframe for filing financial reports.'' ICI recommended, with regard to a mandatory standard, a 180-day deadline as an incremental improvement over the current industry practice of 270 days. SIFMA also supported the voluntary annual filing undertaking.

The MSRB acknowledges and appreciates the detailed explanations provided by commentators on the original proposed rule change with respect to the existing difficulties and barriers to meeting the 120 day timeframe of the voluntary annual filing undertaking as proposed in the original proposed rule change. The MSRB understands that a significant portion of the issuer and obligated person community is likely unable to make such a 120 day undertaking at this time and that such inability does not necessarily reflect problems with the issuer's or obligated person's credit or the quality of disclosures they make. As the MSRB had previously noted, this voluntary undertaking was originally proposed after consultation between the MSRB and Commission staff.[24] After a careful review of the comments and further discussions with Commission staff on the voluntary annual filing undertaking, the MSRB understands that the Commission staff strongly believes that, given its voluntary nature, the undertaking to provide annual financial information within the originally proposed 120 day timeframe remains the appropriate undertaking for display on the EMMA Web portal.

In light of the commentators' widespread concerns regarding the attainability of the 120 day timeframe, the MSRB has determined to provide a transitional option for issuers and obligated persons to elect a 150 day undertaking as an alternative to the 120 day undertaking. This alternative election would provide issuers and obligated persons seeking to make the voluntary annual filing undertaking, but that are not currently able to meet a 120 day timeframe, with a reasonable opportunity to overcome existing barriers to more rapid dissemination of financial information in an orderly and cost-effective manner. Commission staff has indicated that an alternative election of 150 days after fiscal year end would be an appropriate transitional alternative but that this option should be available only on a temporary basis to provide a pathway toward achieving the 120 day timeframe.

The MSRB has accordingly modified the original proposed rule change to allow the election, through December 31, 2013, of a transitional 150 day alternative, which election would be displayed on the EMMA Web portal through June 30, 2014 unless the issuer or obligated person changes or rescinds such undertaking. On and after January 1, 2014, the transitional 150 day undertaking option would no longer be available for selection. An issuer or obligated person that makes a transitional 150 day undertaking could convert such election to a 120 day undertaking at any time. Of course, an issuer or obligated person that believes it is able to meet the 120 day timeframe could make the 120 day undertaking immediately upon the effectiveness of the proposed rule change. The fact that an issuer or obligated person has entered into such an undertaking, including the timeframe elected, would be prominently disclosed on the EMMA Web portal as a distinctive characteristic of the securities to which such undertaking applies. The EMMA Web portal would not include information regarding the availability or existence of the voluntary annual filing undertaking in those cases where an issuer or obligated person does not make a voluntary annual filing undertaking.

The MSRB reiterates that the voluntary annual filing undertaking would in fact be voluntary and that an issuer or obligated person that makes a voluntary annual filing undertaking may later rescind such undertaking. The MSRB contemplates that the making of a voluntary annual filing undertaking through EMMA by an issuer or obligated person would reflect the bona fide intent of issuer or obligated person to perform as undertaken but would not, by itself, necessarily create a contractual obligation of such issuer or obligated person. Unless the issuer or obligated person incorporates the 120 day undertaking or transitional 150 day undertaking as an obligation under its continuing disclosure agreement, the MSRB would view the issuer's or obligated person's performance pursuant to such undertaking as distinct from any performance obligations under its continuing disclosure agreement entered into consistent with Rule 15c2–12. By making a voluntary annual filing undertaking, an issuer that has a contractual obligation under its continuing disclosure agreement to provide its annual financial information within a longer timeframe would be indicating its intent to make a good faith effort to submit its annual financial information to EMMA more rapidly than it is otherwise obligated under the continuing disclosure agreement.

The MSRB would include an explanation of the nature of the voluntary annual filing undertaking on the EMMA Web portal. In particular, the MSRB would disclose that the voluntary annual filing undertaking is voluntary, is solely indicative of the timing by which the annual financial information is intended to be made available and is not indicative of the accuracy or completeness of the annual financial information or of the financial health of the issuer or obligated person. Further, the MSRB would disclose that a decision by an issuer or obligated person not to make such an undertaking does not raise a negative inference in regard to the accuracy or completeness of its annual financial information or of the financial health of the issuer or obligated person.

Voluntary GAAP Undertaking

The original proposed rule change would amend the EMMA continuing disclosure service to permit issuers and obligated persons to undertake, on a voluntary basis, to prepare audited financial statements pursuant to GAAP as established by GASB. This would consist of a voluntary undertaking by an issuer or obligated person (in the case of an obligated person that is a state or local governmental entity), either at the time of a primary offering or at any time thereafter, that the issuer or obligated person will prepare its audited financial statements in accordance with GAAP as established by GASB. This undertaking could be included within the continuing disclosure undertaking entered into consistent with Rule 15c2–12 or could be made in a separate agreement. Issuers and obligated persons would indicate the existence of such an undertaking through a data input election on EMMA. No document would be required to be submitted to EMMA in connection with this undertaking. The fact that an issuer or obligated person has entered into such an undertaking would be prominently disclosed on the EMMA

[24] *See* MSRB Notice 2009–44 (July 15, 2009).

Web portal as a distinctive characteristic of the securities to which such undertaking applies and the MSRB would include an explanation of the undertaking on the EMMA Web portal. If an issuer or obligated person that has made an undertaking later rescinds such undertaking, the issuer or obligated person would be able to disclose such action through EMMA. The MSRB would not confirm the accuracy of this undertaking and would not review or confirm the conformity of submitted audited financial statements to GAAP.

Commentators generally supported permitting issuers to make an undertaking with respect to their use of GAAP according to GASB, although several commentators provide suggestions. GFOA supported a voluntary submission with regard to preparation of financial statements according to GAAP but did not support stating the standard used, noting that some submitters may be subject to FASB standards instead. The Joint Issuer Groups and NAST agreed with GFOA. NAHEFFA also noted that FASB standards, rather than GASB standards, are applicable to 501(c)(3) entities.

The MSRB agrees that many obligated persons may be subject to FASB standards rather than GASB standards and therefore has modified the voluntary GAAP undertaking to permit the submitter to select either the GASB or FASB standard for GAAP.

NABL expressed concern that an issuer that does not elect a voluntary GAAP undertaking will be stigmatized as less creditworthy even where they follow other standards, including statutory standards, and notes that financial statements are accompanied by a statement of the accounting principles applied. NAHEFFA stated that the EMMA Web site should be organized so that no improper inference is drawn by a charitable organization, as a conduit borrower, not making the voluntary GAAP undertaking. While not opposing the voluntary GAAP undertaking, Connecticut questioned the usefulness of this element and stated that use of GASB GAAP may not always be answerable on a yes-or-no basis and that, since it prepares its information on a modified GAAP basis, it would probably not be able to make this undertaking.

The MSRB believes that permitting investors to understand the standards applied to the preparation of an issuer's or obligated person's financial statements would be valuable but acknowledges that it is important that information about the nature of the voluntary GAAP undertaking should be disclosed. The fact that an issuer or obligated person has entered into a voluntary GAAP undertaking, including whether the financial statements are to be prepared pursuant to GASB or FASB standards, would be prominently disclosed on the EMMA Web portal as a distinctive characteristic of the securities to which such undertaking applies. The EMMA Web portal would not include information regarding the availability or existence of the voluntary GAAP undertaking in those cases where an issuer or obligated person does not make a voluntary GAAP undertaking. The MSRB would include an explanation of the nature of the voluntary GAAP undertaking on the EMMA Web portal. In particular, the MSRB would disclose that the voluntary GAAP undertaking is voluntary, is solely indicative of the accounting standards that the issuer or obligated person intends to use in preparing its financial statements and is not indicative of the accuracy or completeness of the financial statements or of the financial health of the issuer or obligated person. Further, the MSRB would disclose that a decision by an issuer or obligated person not to make such an undertaking does not raise a negative inference in regard to the accuracy or completeness of its financial statements or of the financial health of the issuer or obligated person. The MSRB contemplates that the making of a voluntary GAAP undertaking through EMMA by an issuer or obligated person would reflect the bona fide intent of the issuer or obligated person to perform as undertaken but would not, by itself, necessarily create a contractual obligation of such issuer or obligated person.

Issuer/Obligated Person URL

The original proposed rule change would amend the EMMA continuing disclosure service to permit issuers and obligated persons to post the URLs for their Internet-based investor relations or other repository of financial/operating information. The URL of an issuer's or obligated person's investor relations or other repository of financial/operating information would be entered through a text/data input field on EMMA and no document would be required to be submitted to EMMA.

Commentators generally supported permitting issuers and obligated persons to provide a hyperlink to their investor relations or similar Web page, with Connecticut noting that this hyperlink may be more useful to the general public than CUSIP-based EMMA filings for general financial information that is not issue-specific. GFOA observed the importance of guidance being provided on responsibilities with regard to posting of hyperlinks on EMMA and that issuers be given an ability to correct or withdraw URLs as necessary. SIFMA supported the posting of URLs for continuing disclosures but expresses concerns about their use during a primary offering due to potential liability issues.

The MSRB has determined to retain this element as proposed. Issuers and obligated persons will be able to make appropriate changes to the URLs posted through EMMA. The hyperlinks will be posted in a manner designed to segregate access to the URL from postings of official statements for new issues.

GFOA's CAFR Certificate

The original proposed rule change would amend the EMMA continuing disclosure service to permit issuers to submit the Certificate of Achievement for Excellence in Financial Reporting awarded by GFOA in connection with the preparation of its CAFR. The original proposed rule change noted that GFOA awards this certificate to a government if, based on a review process, its CAFR substantially complies with both GAAP and GFOA's CAFR program policy. According to current GFOA eligibility requirements, financial reports must include all funds and component units of the governmental entity, in accordance with GAAP, in order to be considered a CAFR. If an issuer were to submit a copy of the GFOA certificate to EMMA, the EMMA Web portal would prominently disclose the issuer's receipt thereof as a distinctive characteristic of the applicable securities and the MSRB would include an explanation of the certificate on the EMMA Web portal. The MSRB would not confirm the validity of any such certificate submitted to EMMA.

GFOA recommended that EMMA disclose the basis for the certificate and provide a link to the GFOA's Web pages describing the CAFR program. GFOA also encouraged the MSRB to consider permitting a similar submission for issuers that have received GFOA's Distinguished Budget Presentation Award. NABL questioned whether investors would understand that this certificate recognizes the issuer's application of accounting principles but is not an affirmation of its creditworthiness. NABL also noted that some issuers that have received the GFOA certificate have been the subject of Commission enforcement actions for misleading disclosure, including misleading financial statements covered by such certificate. NAHEFFA noted

that the GFOA certificate is generally inapplicable to conduit borrowings. While not opposing the disclosure of the GFOA certificates, Connecticut questioned the usefulness of this element.

The MSRB has determined not to proceed with this element of the original proposed rule change at this time. The MSRB notes that CAFRs are already frequently submitted to EMMA by issuers as the audited financial statements element of their annual financial information filings, and in most cases the issuers include the GFOA certificate in the submitted CAFR. As part of the MSRB's standard EMMA update and maintenance process, the MSRB expects to modify the input process for all continuing disclosure submissions to permit issuers and obligated persons to input specific document titles and/or subcategories, which would permit submitters of CAFRs to indicate that their submitted audited financial statements are CAFRs. This document title/subcategory would be displayed on the EMMA Web portal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended by Amendment No. 1, 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–MSRB–2009–10 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–MSRB–2009–10. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission,[25] 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 MSRB. 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–MSRB–2009–10 and should be submitted on or before January 26, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–31206 Filed 1–4–10; 8:45 am]

BILLING CODE 8011–01–P

[25] The text of Amendment No. 1 to the proposed rule change is available on the Commission's Web site at *http://www.sec.gov/.*

[26] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61238; File No. SR–MSRB–2009–09]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Amendment No. 1 to Proposed Rule Change Relating to Rule G–32, on Disclosures in Connection With Primary Offerings, Form G–32, and the Primary Market Disclosure and Primary Market Subscription Services of the MSRB's Electronic Municipal Market Access System (EMMA®)

December 23, 2009.

On July 14, 2009, the Municipal Securities Rulemaking Board (''MSRB'') 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 relating to Rule G–32, on disclosures in connection with primary offerings, Form G–32, and the primary market disclosure and primary market subscription services of the MSRB's Electronic Municipal Market Access System (EMMA®). The proposed rule change was published for comment in the **Federal Register** on July 22, 2009.[3] On December 18, 2009, the MSRB filed with the Commission Amendment No. 1 to the proposed rule change. The Commission is publishing this notice of Amendment No. 1 to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The MSRB has filed with the Commission the amendment to File No. SR–MSRB–2009–09, originally filed on July 14, 2009 (the ''original proposed rule change''). The amendment amends and restates the original proposed rule change relating to Rule G–32, on disclosures in connection with primary offerings, Form G–32, and the primary market disclosure and primary market subscription services of the MSRB's Electronic Municipal Market Access system (''EMMA'') (as amended, the ''proposed rule change''). The proposed rule change would require brokers, dealers and municipal securities dealers (''dealers'') acting as underwriters, placement agents or remarketing agents for primary offerings of municipal

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 60314 (July 15, 2009), 74 FR 36300.

securities (''underwriters'') to provide to EMMA, and to make available on the EMMA web portal and through the EMMA primary market subscription service, information about whether the issuer or other obligated person has undertaken to provide continuing disclosures, the identity of any obligated persons other than the issuer, and the timing by which such issuers or obligated persons have agreed to provide annual financial and operating data. The MSRB requests an effective date for the proposed rule change of a date to be announced by the MSRB in a notice published on the MSRB Web site, which date shall be no later than nine months after Commission approval of the proposed rule change and shall be announced no later than sixty (60) days prior to the effective date.

The text of the proposed rule change is available on the MSRB's web site at *http://www.msrb.org/msrb1/sec.asp*, at the MSRB'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 MSRB 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 MSRB 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

This amendment makes certain modifications to the original proposed rule change based on comments received on the original proposed rule change, as described below.

The proposed rule change would amend Rule G–32 and Form G–32 to require underwriters of primary offerings of municipal securities to submit to the MSRB's EMMA system, as part of their primary offering submission obligation under Rule G–32(b), certain key items of information relating to continuing disclosure undertakings made by issuers and other obligated persons in connection with such primary offerings. These items of information would be made available to the public through the EMMA web portal and are intended to inform investors in advance whether continuing disclosures will be made available with respect to a particular municipal security, from and about whom such continuing disclosures are expected to be made, and the timing by which such disclosures should be made available.

The items of information regarding continuing disclosure undertakings to be provided by underwriters through Form G–32 would include:

- Whether the issuer or other obligated persons have agreed to undertake to provide continuing disclosure information as contemplated by Securities Exchange Act Rule 15c2–12;
- The name of any obligated person, other than the issuer of the municipal securities, that has or will undertake, or is otherwise expected to provide, continuing disclosure as identified in the continuing disclosure undertaking; [4]
- The timing set forth in the continuing disclosure undertaking, pursuant to Rule 15c2–12(b)(5)(ii)(C) or otherwise, for the submission of annual financial information each year by the issuer and/or any obligated persons to the EMMA system, either as a specific date or as the number of days or months after a specified end date of the issuer's or obligated person's fiscal year.[5]

This amendment modifies the original proposed rule change by eliminating the proposed requirement to submit contact information for a representative of the issuer and/or any obligated persons for purposes of establishing continuing disclosure submission accounts for such issuer and/or obligated persons in connection with their submissions to the EMMA system. Underwriters currently are able to provide contact information for issuer or obligated person representatives with respect to current and past primary offerings through EMMA on a voluntary basis and the MSRB believes that this process has been effective.

The name or names of obligated persons to be provided would be of the entity acting as an obligated person identified in the continuing disclosure undertaking, not an individual at such entity, unless the obligated person is in fact an individual. The timing for submission of annual financial information could be provided either as a specific date each year (*i.e.,* month and day, such as June 30) or the number of days or months after the end of the fiscal year (*i.e.,* 120 days after the end of the fiscal year). The underwriter could use the day/month count alternative only if the underwriter also submits the day on which the issuer's or obligated person's fiscal year ends (*i.e.,* month and day, such as June 30). If annual financial information is expected to be submitted by more than one entity and such information is expected to be submitted by different deadlines, each such deadline would be provided matched to the appropriate issuer and/or obligated person.

The underwriter would be required to provide information regarding whether the issuer or other obligated persons has agreed to undertake to provide continuing disclosure information as contemplated by Rule 15c2–12 by no later than the date of first execution of transactions in municipal securities sold in the primary offering. The remaining items of information would be required to be provided by the closing date of the primary offering. Until closing, the underwriter would be required to update promptly any information it has previously provided on Form G–32 which may have changed or to correct promptly any inaccuracies in such information, and would be responsible for ensuring that such information provided by it is accurate as of the closing date. So long as the underwriter has provided such information accurately as of the closing date, it would not be obligated to update the information provided if there are any subsequent changes to such information, such as additions, deletions or modifications to the identities of obligated persons or changes in the timing for providing annual financial information. Issuers and obligated persons will be able to make changes to such information through their submission accounts established in connection with EMMA's continuing disclosure service.

Information regarding whether an offering is subject to a continuing disclosure undertaking, the names of obligated persons and the deadlines for providing annual financial information would be displayed on the EMMA Web portal and also would be included in EMMA's primary market disclosure subscription service. These items are

[4] In response to the comments received on the original proposed rule change, as discussed below, this amendment modifies the original proposed rule change by conforming the definition of obligated person more closely with the definition used in Rule 15c2–12 and by making clear that the obligated persons to be identified are those that are specifically identified in the continuing disclosure undertaking.

[5] In response to comments previously received by the MSRB, as discussed below, this amendment modifies the original proposed rule change by permitting this information to be provided as the number of days or months after the end of the fiscal year, if the fiscal year end date is also submitted, as an alternative to submission of the specific deadline date as provided in the original proposed rule change.

intended to provide investors and others with information on the expected availability of disclosures following the initial issuance of the securities. In particular, users of the EMMA Web portal would be able to determine which obligated persons are expected to submit annual financial information, audited financial statements and material event notices on an on-going basis, as well as the date each year by which they should expect to have access to the annual financial information.

As noted above, the MSRB has requested an effective date for the proposed rule change of a date to be announced by the MSRB in a notice published on the MSRB Web site, which date shall be no later than nine months after Commission approval of the proposed rule change and shall be announced no later than sixty (60) days prior to the effective date.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with the provisions of Section 15B(2)(C) of the Act,[6] which requires, among other things, that MSRB rules must be 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 municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.

The MSRB believes that the proposed rule change is consistent with the Act in that it serves to remove impediments to and help perfect the mechanisms of a free and open market in municipal securities and would serve to promote the statutory mandate of the MSRB to protect investors and the public interest. The information that underwriters would provide and that would be made available to the public with regard to the continuing disclosure undertakings of issuers and obligated persons would assist investors to understand whether and when they should expect to have access to key continuing disclosure information in the future. Investors and other market participants would be able to include such assessment of on-going access to information in the mix of factors upon which they may evaluate their investment decisions.

B. Self-Regulatory Organization's Statement on Burden on Competition

The MSRB does not believe the proposed rule change would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The additional items of information submitted by underwriters to the EMMA system for public dissemination would be available to all persons simultaneously. In addition to making such information available for free on the EMMA Web portal to all members of the public, the MSRB would make such documents and information available by subscription on an equal and non-discriminatory basis. Further, the proposed rule change would apply equally to all underwriters. Specifically, the addition of these items of information to the existing EMMA primary market submission process would not compete with other information providers and, to the extent other information providers were to seek to make such information available to the public, such providers could obtain the information from the MSRB through the subscription service on an equal and non-discriminatory basis. The proposed rule change also would not impose any additional burdens on competition among issuers of municipal securities since the proposed rule change does not impose any direct or indirect obligations on issuers but merely provides for disclosure of information by underwriters regarding continuing disclosure undertakings entered into under Rule 15c2–12.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

In a notice published by the MSRB on January 31, 2008, the MSRB described its plan for implementing a continuing disclosure service that would be integrated into other services to be offered through EMMA (the ''MSRB Notice'').[7] In particular, the MSRB stated its plan to institute the continuing disclosure service to accept submissions of continuing disclosure information in a designated electronic format directly from issuers, obligated persons and their designated agents acting on their behalf. Among other things, the notice sought comment on whether underwriters for new issues should be required to submit to the MSRB information about (i) whether a continuing disclosure undertaking exists, (ii) the identity of any obligated persons other than the issuer, and (iii) the date identified in the continuing disclosure undertaking by which annual financial information is expected to be disseminated. Such information would be provided by underwriters through the same information submission process as, and simultaneously with, the information to be provided in connection with official statement submissions. The notice also asked whether other items of information should be required, such as the identify of designated agents for submitting continuing disclosure or the criteria for identifying obligated persons subject to the continuing disclosure obligations.

In addition, the original proposed rule change was published by the Commission for comment in the **Federal Register** and the Commission received comments from six commentators.[8]

General

Four commentators on the MSRB Notice provided comments on the issue of underwriter submission of information relating to the issuer's continuing disclosure obligations.[9] First Southwest supported requiring the submission of the three items of information identified in the MSRB Notice and stated that no other information in addition to the three items listed in the notice should be required. NABL, NAHEFFA and SIFMA provided comments on the items relating to identification of obligated persons and the date on which annual financial information is expected to be disseminated.

In connection with the original proposed rule change, Connecticut, ICI and VGFOA were generally supportive. Connecticut stated that the original proposed rule change would make municipal disclosure more transparent, efficient, consistent, comparable and accessible to investors, including individual investors in particular. ICI stated that the original proposed rule change would ensure the accessibility and improve the utility of continuing disclosure information for investors and

[6] 15 U.S.C. 78*o*–4(b)(2)(C).

[7] *See* MSRB Notice 2008–05 (January 31, 2008).

[8] *See* Securities Exchange Act Release No. 60314 (July 15, 2009) (File No. SR–MSRB–2009–09), 74 FR 36300 (July 22, 2009). The Commission received comments from the Connecticut State Treasurer (''Connecticut''); Investment Company Institute (''ICI''); National Association of Bond Lawyers (''NABL''); Regional Bond Dealers Association (''RBDA''); Securities Industry and Financial Markets Association (''SIFMA''); and Virginia Government Finance Officers' Association (''VGFOA''). The comment letters received by the Commission are posted on the Commission's Web site at *http://www.sec.gov/comments/sr-msrb-2009–09/msrb200909.shtml.*

[9] National Association of Health and Educational Facilities Finance Authorities (''NAHEFFA''); First Southwest Company (''First Southwest''); NABL; and SIFMA.

would further enhance transparency in the municipal securities market.

RBDA was supportive of the goal of the original proposed rule change but suggested that underwriters be required to submit a copy of the continuing disclosure undertaking rather than to input fielded information. SIFMA opposed the original proposed rule change. Both RBDA and SIFMA expressed concern that requiring underwriters to extract information from documents could result in admission of erroneous information to EMMA and would be an undue burden and risk on underwriters. ICI stated, however, that it believes that the benefits to investors stemming from the original proposed rule change would outweigh the perceived costs and risks. RBDA distinguished the type of fielded information currently required to be submitted by underwriters to EMMA, characterized as data necessary to create such basic record of the new issue, from the type of information proposed to be collected through the original proposed rule change, which RBDA characterized as unnecessary for creating the record in EMMA. SIFMA stated that the continuing disclosure undertaking is already required to be summarized in the official statement available through EMMA and that extracting information from the official statement would effectively discourage investors from having to read the official statement itself. SIFMA further stated that, if the MSRB wants to highlight issuers' continuing disclosure obligations, this can be done by creating a best practices standard. Finally, SIFMA urged the MSRB to commit to making EMMA compatible with information underwriters are providing to the Depository Trust and Clearing Corporation's New Issue Information Dissemination System (''NIIDS'').

NABL did not state a position regarding the original proposed rule change but cautioned that the ''reasonable determination'' standard of Rule 15c2–12 with regard to whether a continuing disclosure undertaking in conformity with the rule has been entered into should not be altered by the original proposed rule change. NABL also suggested that a more complete analysis of the MSRB's statutory authority for adopting the original proposed rule change be provided.

The MSRB continues to believe that collecting and displaying on the EMMA web portal the existence of a continuing disclosure obligation, the names of any obligated persons other than the issuer, and the deadline for submission of annual financial and operating data, all as fielded information rather than merely as information provided within documents, would provide significant benefits to investors and other market participants. The close proximity of this information to the links to posted continuing disclosure documents on the EMMA web portal would assist investors with understanding whether and when they should expect to have access to key continuing disclosure information in the future and about whom such information is expected to be provided. Investors and other market participants would be able to include an assessment of on-going access to information along with other factors upon which they may evaluate their investment decisions. The MSRB is firmly of the belief that the proposed rule change is within its statutory authority and notes that an MSRB rule change or system requirement would not have the effect of altering any obligations or standards under Rule 15c2–12 or any other Commission rule.

Existence of Continuing Disclosure Obligation

The original proposed rule change would require the underwriter to provide, on amended Form G–32, information on whether the issuer or other obligated persons have agreed to undertake to provide continuing disclosure information as contemplated by Rule 15c2–12. None of the commentators expressly opposed disclosure of whether a continuing disclosure undertaking has been entered into in connection with a primary offering, although RBDA preferred that such information be conveyed through a filing of the document by the underwriter and SIFMA preferred that EMMA users determine this information by reading the official statement.

This amendment does not modify this proposed requirement.

Identification of Obligated Persons

With respect to identification of obligated persons, NABL and SIFMA noted in their comments on the MSRB Notice that only those obligated persons for whom financial or operating data is provided in the official statement are relevant. NABL suggested only requiring underwriters ''to identify those persons expressly specified in the continuing disclosure undertaking who will be required to make continuing disclosure filings or to state that such persons will be determined by the functional descriptions contained in the continuing disclosure undertaking.'' SIFMA stated that a requirement for the underwriter to provide such information is ''unnecessarily complicated since the official statement itself, which is on the portal, has a summary paragraph stating who will be filing continuing disclosure and where it will be filed.''

The original proposed rule change would require the underwriter to provide, on amended Form G–32, the name of any obligated person, other than the issuer of the municipal securities, that has or will undertake, or is otherwise expected to provide, continuing disclosure pursuant to the continuing disclosure undertaking. The original proposed rule change made clear that underwriters would be required to provide the name of only those obligated persons that would be providing continuing disclosures pursuant to the continuing disclosure undertaking, rather than all obligated persons regardless of whether such obligated persons will be providing disclosure information. Connecticut noted that, for some issues, obligated persons can change over time and that it is unclear whether the original proposed rule change accommodates this possibility. NABL supported the MSRB's formulation that the rule would require only that underwriters provide the name of any obligated person (other than the issuer) that would be providing continuing disclosures pursuant to the continuing disclosure undertaking, rather than all obligated persons regardless of whether such obligated persons will be providing disclosure information. NABL recommended that this requirement be viewed as a mechanical reporting provision requiring the underwriter to report which persons are identified in the continuing disclosure agreement as being responsible for providing continuing disclosures (or that such persons will be determined by the functional descriptions in the continuing disclosure undertaking) and that underwriters not be required to make a legal determination as to whether any such person is an obligated person within the meaning of Rule 15c2–12. NABL also recommended that the definition of obligated person more closely mirror the definition thereof in Rule 15c2–12.

The MSRB believes that collecting the identity of obligated persons in a fielded manner that permits automated indexing and search functions is an important feature that would make the EMMA web portal considerably more useful for users. Such indexed information would assist EMMA web users in finding some or all of the offerings for a particular obligated person, thereby allowing the user to review the continuing disclosure undertakings that more fully spell out

how the continuing disclosure obligations will be fulfilled.

The MSRB has determined to modify the definition of obligated person in proposed Rule G–32(d)(xiii) to more closely conform to the definition thereof in Rule 15c2–12(f)(10) to avoid any definitional ambiguity. Furthermore, this amendment would modify Form G–32 to explicitly provide that the obligated persons to be identified are those that are specifically identified in the continuing disclosure undertaking. The MSRB emphasizes that the underwriter's obligation is solely to provide the identities of those obligated persons who have a specific commitment under the continuing disclosure agreement to provide continuing disclosures. Underwriters would not be required to undertake any independent analysis of what other persons might be covered, to submit descriptions of bases for determining future obligated persons, or to maintain the currency of the list of obligated persons beyond the closing date.[10]

Deadline for Annual Filing and End of Fiscal Year

With respect to the expected date of filing of annual financial information as described in the MSRB Notice, NABL and SIFMA questioned the value of providing this information. NABL noted that the information is already provided in the official statement's description of the continuing disclosure undertaking and can become confusing if several obligated persons are required to file annual filings on different dates, while SIFMA noted that the information can be vague, often based on a stated period of time following the end of a fiscal year, and will become readily apparent based on the pattern of posting over time. NAHEFFA sought clarification of the purpose for requiring this date and requested that the data entry be flexible enough to reflect a deadline measured from the end of a fiscal year or other milepost, rather than a date certain.

The original proposed rule change would require the underwriter to provide, on amended Form G–32, the date or dates identified in the continuing disclosure undertaking, pursuant to Rule 15c2–12(b)(5)(ii)(C) or otherwise, by which annual financial information is expected to be submitted each year by the issuer and/or any obligated persons to the EMMA system. Other than RBDA's and SIFMA's concerns about extraction of information from the continuing disclosure undertaking or the official statement, none of the commentators on the original proposed rule change expressly opposed disclosure of the submission date for the filing of annual financial information.

The MSRB believes that there is considerable value in providing the deadline for submission of annual financial information in a manner that is extracted from the official statement. This would permit investors and the general public to readily identify when such disclosures should become available from each issuer or obligated person expected to provide the annual filings. Issuers and obligated persons would be able to update the timing requirement, as well as the identity of any obligated persons, through EMMA as appropriate.

The MSRB has further considered the comments on the MSRB Notice with respect to potential difficulties in specifying a date certain for the filing of annual financial information in certain circumstances. As a result, the MSRB has determined to modify this provision to provide a new alternative method for reporting the deadline for submissions of annual financial and operating data based on the disclosed end of fiscal year, so that underwriters could disclose as the submission deadline either a specific date each year (*i.e.,* month and day, such as June 30) or the number of days or months after the end of the fiscal year (*i.e.,* 120 days after the end of the fiscal year). The underwriter could use the day/month count alternative only if the underwriter also submits the day on which the issuer's or obligated person's fiscal year ends (*i.e.,* month and day, such as June 30). Form G–32 would be modified to allow for submission of this new data element.

Issuer/Obligated Person Contact Information

The original proposed rule change would require the underwriter to provide, on amended Form G–32, contact information for a representative of the issuer and/or any obligated persons for purposes of establishing continuing disclosure submission accounts for such issuer and/or obligated persons in connection with their submissions to the EMMA system. Connecticut requested that the current voluntary process for providing contact information for representatives of the issuer or obligated person for purposes of establishing EMMA submission accounts not be made mandatory.

The MSRB believes that its current voluntary process has been effective and therefore this amendment would eliminate from Form G–32 the requirement that underwriters provide the contact information for a representative of the issuer and/or any obligated person.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended by Amendment No. 1, 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–MSRB–2009–09 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–MSRB–2009–09. 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,[11] all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written

[10] Issuers and obligated persons will be able to make changes to such information through their submission accounts established in connection with EMMA's continuing disclosure service.

[11] The text of Amendment No. 1 to the proposed rule change is available on the Commission's Web site at *http://www.sec.gov/*.

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 MSRB. 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–MSRB–2009–09 and should be submitted on or before January 26, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–31205 Filed 1–4–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61249; File No. SR–DTC–2009–17]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing of Proposed Rule Change To Allow The Depository Trust Company To Provide Settlement Services to European Central Counterparty Limited for U.S. Securities Traded on European Trading Venues

December 29, 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 December 17, 2009, The Depository Trust Company (''DTC'') 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 primarily by DTC. 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 the Substance of the Proposed Rule Change

The purpose of this proposed rule change is to allow DTC to provide settlement services to European Central Counterparty Limited (''EuroCCP'') for U.S. securities traded on European trading venues (''EuroCCP's U.S. Program'').

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC 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. DTC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[3]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

EuroCCP is a clearing house recognized by the United Kingdom and regulated by the Financial Services Authority (''FSA''). It provides central counterparty clearance and settlement services to participants executing securities transactions on or through European trading venues. Several of the trading platforms EuroCCP services are asking EuroCCP to begin clearing and settling trades in U.S. equities, Exchange Traded Funds (''ETFs''), and American Depositary Receipts (''ADRs'').[4] Trades in these securities would be routed to EuroCCP through existing interfaces with the trading platforms and would be novated and netted in accordance with EuroCCP's Rules and Procedures. EuroCCP would employ its current trade day netting methodology to produce a single settlement obligation each day.[5]

EuroCCP would like to use DTC's settlement services for these U.S. securities transactions by opening and operating an account at DTC. EuroCCP participants in the EuroCCP's U.S. Program would be required to appoint U.S. settlement agents[6] to settle obligations on their behalf,[7] and EuroCCP would be subject to the same net debit cap[8] and collateral[9] controls as any other DTC participant.

DTC proposes modifying its Settlement Service Guide in three ways to maximize settlement efficiencies for DTC participants acting as U.S. settlement agents in the EuroCCP U.S. Program. First, matched reclaims to EuroCCP's account would not be allowed. A reclaim is an instruction from a participant to DTC to return a delivery. It is generally used in the event of an error where a participant does not recognize the delivery. DTC's systems attempt to identify a corresponding original transaction for every reclaim presented for processing. If the system identifies a corresponding original transaction, it processes the reclaim as a match.[10]

Under DTC's existing Settlement Service Guide procedures, a receiving participant that requests a reclaim to EuroCCP for less than $15 million could override DTC's risk management controls for EuroCCP's account and create a consequent debit in the EuroCCP account. If DTC processed matched reclaims in this fashion, EuroCCP would run the risk of overriding its net debit cap, exceeding it liquidity resources, and being unable to complete settlement with DTC. To avoid

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Commission has modified the text of the summaries prepared by OCC.

[4] The platforms would support trading activity of U.S. issues in U.S. dollars. The platforms currently operate from 8 a.m. London time to 4:30 p.m. London time.

[5] The single settlement obligation calculated by EuroCCP is per issue per participant and would settle at DTC on T+3.

[6] These settlement agents would have to be DTC participants.

[7] EuroCCP would be given a reason code for the transactions it processes through its DTC account. As part of this filing, DTC proposes updating its Settlement Service Guide to reflect this reason code. In addition, DTC is proposing that the language in the Memo Segregation section of the Settlement Service Guide and the reason codes that receive Memo Segregation treatment be updated to reflect this reason code and to reflect certain other technical, non-substantive changes to the reason codes.

[8] The net debit cap helps ensure that DTC can complete settlement even if a participant fails to settle. Before completing a transaction in which a participant is the receiver, DTC calculates the resulting effect the transaction would have on such participant's account and determines whether the resulting net balance would exceed the participant's net debit cap. Any transaction that would cause the net settlement debit to exceed the net debit cap is placed on a pending queue that recycles until another transaction creates credits in such participant's account.

[9] DTC tracks collateral in a participant's account through its Collateral Monitor (''CM''). At all times, the CM reflects the amount by which the collateral in the account exceeds the net debit in the account. When processing a transaction, DTC verifies that the deliverer's and receiver's CMs will not become negative when the transaction completes. If the transaction would cause either party to have a negative CM, the transaction will recycle until the deficient account has sufficient collateral.

[10] The following seven elements must be consistent for the system to process a reclaim as a match: receiver, deliverer, CUSIP, quantity, dollar amount, shares, and settlement date.

this outcome, DTC proposes changing its procedures so that reclaims under $15 million would not override DTC's risk management controls. Instead, such reclaims would recycle until the reclaim can settle without violating EuroCCP's net debit cap and collateral controls or until the reclaim drops at the recycle cutoff.[11] This is how DTC currently treats reclaims that are over $15 million dollars.

Second, DTC proposes modifying its Settlement Service Guide so that pending valued and free transactions to or from the EuroCCP account would fail to settle or ''drop'' at 3:10 p.m.[12] Items that would drop include deliveries to EuroCCP failing due to lack of position by the delivering participant and items failing DTC's risk management controls. This cutoff time would allow EuroCCP to close its business day.

Third, the Receiver Authorized Delivery (''RAD'') cutoff time would be 3:30 p.m. for both valued and free delivery transactions. DTC's current RAD[13] deadline for valued transactions is 3:30 p.m., but the RAD deadline for free delivery transactions is 6:30 p.m. To allow EuroCCP to halt transaction processing in the EuroCCP account and end its processing day, DTC would require a synchronized RAD cutoff time of 3:30 p.m. for valued and free delivery transactions.

DTC believes the proposed rule changes are consistent with the requirements of Section 17A of the Act[14] and the rules and regulations thereunder because the proposed changes would facilitate prompt and accurate clearance and settlement of securities transactions by leveraging DTC settlement systems to process transactions in U.S. securities that are traded on European trading venues.

(B) Self-Regulatory Organization's Statement on Burden on Competition

DTC does not believe that the proposed rule change would impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed rule change have not been solicited or received. DTC will notify the Commission of any written comments received by DTC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five 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 ninety 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.

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–DTC–2009–17 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–DTC–2009–17. 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 20549–1090, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filings will also be available for inspection and copying at the principal office of the DTC and on DTC's Web site at *http://www.dtcc.com/downloads/legal/rule_filings/2009/dtc/2009-17.pdf*. 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–DTC–2009–17 and should be submitted on or before January 26, 2010.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–31204 Filed 1–4–10; 8:45 am]

BILLING CODE 8011–01–P

[11] If the reclaim drops at the recycle cutoff, then the receiving participant will retain the securities and the debit for the delivery it received from EuroCCP.

[12] DTC's current cutoff time for pending valued transactions is 3:10 p.m. and for pending free transactions is 6:35 p.m.

[13] RAD is a control mechanism which allows a participant to review transactions prior to completion of processing. It limits the exposure from misdirected or erroneously entered deliver orders, payment orders, and pledges.

[14] 15 U.S.C. 78q–1.

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61248; File No. SR–CBOE–2009–097)

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt Reserve Orders

December 29, 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 December 17, 2009, the Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') 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 Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6)

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt reserve orders. The text of the proposed rule change is available on the Exchange's website (*http://www.cboe.org/Legal*), on the Commission's Web site at *http://www.sec.gov,* at the Exchange's Office of the Secretary 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 CBOE 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

This filing seeks to adopt the reserve order-type which is already available on other exchanges. A ''Reserve Order'' permits orders to be entered with both displayed and non-displayed amounts. Both portions may be executed against incoming marketable orders. The displayed portion of a reserve order will be executed first, while the non-displayed portion will only be executed after all displayed interest (from other orders) at that price has been executed. Once the displayed portion of a reserve order has been executed and all displayed interest from other orders at that price has also been executed, the displayed portion will be replenished from the non-displayed portion up to the original display amount. Each time the display portion is replenished from the non-displayed portion, that new display portion will be given a new timestamp, while the reserve, non-displayed portion will retain the timestamp of its original entry. With respect to the non-displayed portion of a reserve order, the exposure requirement of Rule 6.45A.01 and .02 and 6.45B.01 and.02 are satisfied if the displayable portion of the reserve order is displayed at its displayable price for one second (this mirrors provisions in place at other options exchanges that utilize reserve orders). These exposure provisions only apply to reserve orders that are electronically handled by the system.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'')[5] and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change will give market participants greater flexibility to manage and display their orders, encouraging such participants to bring further liquidity to the market.

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 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 neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9] Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for thirty 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[10] and Rule 19b–4(f)(6)[11] thereunder.

At any time within 60 days of the filing of such 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–2009–097 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–2009–097. 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

[4] 17 CFR 240.19b–4(f)(6).

[5] 15 U.S.C. 78s(b)(1).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied the pre-filing requirement.

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 CBOE. 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–2009–097 and should be submitted on or before January 26, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–31342 Filed 1–4–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61257; File No. SR–NYSE–2009–116]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving a Proposed Rule Change To Increase the Ceiling on Its Equity Ownership Interest in BIDS Holdings L.P. to Less Than 10%

December 30, 2009.

On November 18, 2009, the New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] proposing to increase the ceiling on the Exchange's equity ownership interest in BIDS Holdings L.P. (''BIDS'') to less than 10% from the current level of less than 9%. The proposed rule change was published for comment in the **Federal Register** on November 27, 2009.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

On January 22, 2009, the Commission approved the formation of New York Block Exchange (''NYBX''), an electronic trading facility of the Exchange for NYSE-listed securities, established as a joint venture between the Exchange and BIDS.[4] The governance structure as approved is reflected in the Limited Liability Company Agreement (''LLC Agreement'') of New York Block Exchange LLC (''Company''), the entity that owns and operates NYBX. Pursuant to the LLC Agreement, the Exchange and BIDS each own a 50% economic interest in the Company. In addition, the Exchange, through its wholly-owned subsidiary, NYSE Market, Inc., owns less than 9% of the aggregate limited partnership interest in BIDS. BIDS, through its subsidiary, BIDS Trading, L.P. (''BIDS Trading''), operates BIDS Alternative Trading System (ATS). In connection with the establishment of NYBX, BIDS Trading became a member of the Exchange.

Absent prior Commission approval, the foregoing ownership arrangements would violate NYSE Rule 2B[5] for two reasons. First, the Exchange's indirect ownership interest in BIDS Trading violates the prohibition in Rule 2B against the Exchange maintaining an ownership interest in a member organization. Second, BIDS Trading is an affiliate of an affiliate of the Exchange,[6] which violates the prohibition in Rule 2B against a member of the Exchange having such affiliation.

Consequently, in the Approval Order, the Commission permitted an exception to NYSE Rule 2B, subject to a number of limitations and conditions. One of the conditions for Commission approval of the ownership arrangements was that the proposed exception from NYSE Rule 2B to permit NYSE's indirect interest in BIDS Trading and BIDS Trading's affiliation with the Company would be for a pilot period of 12 months.[7] Another condition for Commission approval was that NYSE, or any of its affiliates, would not directly or indirectly increase its equity interest in BIDS without prior Commission approval.[8]

The Exchange proposes to increase the ceiling of its equity ownership in BIDS from the current limit of less than 9% to less than 10%. BIDS is offering its members the opportunity to invest, on a pro rata basis, in a new class of preferred equity interests, and the Exchange wishes to participate in the new round of capital raising by BIDS without inadvertently exceeding the current limit. The Exchange represents that, based on its expectations, the participation of the Exchange in the capital raising could slightly increase its percentage ownership in BIDS to between 9% and 10%. Other than this increase in the Exchange's equity ownership, all of the other limitations and conditions required by the terms of the Approval Order for the exception to NYSE Rule 2B would continue to apply during the pilot period.[9] Further, the Exchange and its affiliates do not, and would continue not to, have any voting or other control arrangement with any of the other limited partners or general partner of BIDS.[10]

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.[11] In particular, the Commission finds that the proposed rule change furthers the objectives of Section 6(b)(1) of the Act,[12] which requires a national securities exchange to be so organized and have the capacity to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the provisions of the Act. The Commission also finds that the proposed rule change is consistent with, and furthers the objectives of Section 6(b)(5) of the Act,[13] 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 facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Act Exchange Release No. 61043 (November 20, 2009), 74 FR 62612.

[4] *See* Securities Exchange Act Release No. 59281 (January 22, 2009), 74 FR 5014 (January 28, 2009) (order approving SR–NYSE–2008–120) (''Approval Order'').

[5] NYSE Rule 2B provides, in relevant part, that: ''[w]ithout prior SEC approval, the Exchange or any entity with which it is affiliated shall not, directly or indirectly, acquire or maintain an ownership interest in a member organization. In addition, a member organization shall not be or become an affiliate of the Exchange, or an affiliate of any affiliate of the Exchange. * * * The term affiliate shall have the meaning specified in Rule 12b–2 under the Act.''

[6] Specifically, the Company is an affiliate of the Exchange, and BIDS Trading is an affiliate of the Company. The affiliation in each case is the result of the 50% ownership interest in the Company by each of the Exchange and BIDS.

[7] *See* Approval Order, 74 FR at 5018.

[8] *See id.*

[9] *See id.*

[10] *See id.,* n. 69.

[11] 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).

[12] 15 U.S.C. 78f(b)(1).

[13] 15 U.S.C. 78f(b)(5).

In the Approval Order, the Commission determined that the exception from NYSE Rule 2B to permit NYSE's indirect interest in BIDS Trading and BIDS Trading's affiliation with an affiliate of the Exchange is consistent with the Act, because the limitations and conditions stipulated appear reasonably designed to mitigate concerns about potential conflicts of interest and unfair competitive advantage. Further, the Commission determined that these conditions appear reasonably designed to promote robust and independent regulation of BIDS Trading.

The Commission has consistently expressed concern that an affiliation of an exchange with, or an ownership of, one of its members could raise a potential conflict of interest and impede its self-regulatory responsibilities with respect to such member. Although the Exchange proposes a small increase in the ceiling of its equity ownership of BIDS, the Commission notes that all of the other limitations and conditions would continue to apply, and the exceptions to NYSE Rule 2B would continue to be on a pilot basis. Further, the increase in the Exchange's equity ownership does not appear sufficiently large to raise additional or new concerns. Therefore, the Commission continues to find that the exception from NYSE Rule 2B described above would continue to be consistent with the Act.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[14] that the proposed rule change (SR–NYSE–2009–116) is hereby approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–31343 Filed 1–4–10; 8:45 am]

BILLING CODE 8011–01–P

[14] 15 U.S.C. 78s(b)(2).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61258; File No. SR–Phlx–2009–107]

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to a Technical Change to the Exchange's Complex Order Program

December 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 December 29, 2009, NASDAQ OMX PHLX, Inc. (''Phlx'' 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 Exchange. The Phlx filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to terminate a feature of its complex order program.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/Filings/*, on the Commission's Web site at *http://www.sec.gov*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to discontinue a feature of the Exchange's complex orders system, sometimes called ''NBBO protection.'' This feature enables a complex order to be designated as ineligible for execution at a price that is inferior to the NBBO for the individual components of the order. Otherwise, the existing rules permit COLA-eligible orders (defined in the rule) to be executed without consideration of any prices that might be available on other exchanges trading the same options contracts.[5]

This feature is mentioned several times in the rules, referring to various points in the Exchange's complex order processing where an order is executable but for this designation. In the original proposal adopting complex orders, the Exchange stated that the purpose of this provision is to provide a method to protect each component of a Complex Order from trading through the National Best Bid and/or Offer (''NBBO'') in that option series, until such time that the order is placed on the complex order book.[6] The Exchange believes that the feature has never been used. Accordingly, the Exchange believes that the proposal is a simple change to eliminate a feature.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act[7] in general, and furthers the objectives of Section 6(b)(5) of the Act[8] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by removing a feature that the Exchange believes has not been taken advantage of by users.

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

No comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change is designated by the Exchange as a ''non-controversial'' rule pursuant to Section

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See e.g.,* Rule 1080.08(e)(i)(B).

[6] Securities Exchange Act Release No. 58099 (July 3, 2008), 73 FR 39769 (July 10, 2008) (SR–Phlx–2008–50) (Notice of Filing of Proposed Rule Change Relating to Complex Orders). The description of how this feature operates during the Complex Order Live Auction (''COLA'') appears at 73 FR 39772.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

19(b)(3)(A) of the Act[9] and subparagraph (f)(6) of Rule 19b–4 thereunder,[10] because the 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) 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, provided that the Exchange has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change.[11] Consequently, the rule is being filed for immediate effectiveness.

At any time within 60 days of the filing of such 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–Phlx–2009–107 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–Phlx–2009–107. 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, 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–Phlx-2009–107 and should be submitted on or before January 26, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–31344 Filed 1–4–10; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6).

[11] As required under Rule 19b–4(f)(6)(iii), the Exchange has provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the filing date of this proposal.

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61259; File No. SR–CBOE–2009–025]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Approving Proposed Rule Change, as Modified by Amendment No. 1, Related to the Simple Auction Liaison (SAL)

December 30, 2009.

I. Introduction

On May 4, 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 CBOE Rule 6.13A to revise the Designated Primary Market-Maker (''DPM'')/Lead Market-Maker (''LMM'') participation entitlement formula that is applicable to Simple Auction Liaison (''SAL'') executions in Hybrid 3.0 classes on a one-year pilot basis. On November 13, 2009, CBOE filed Amendment No. 1 to the proposed rule change, which replaced the original filing in its entirety. The proposed rule change, as modified by Amendment No. 1, was published for comment in the **Federal Register** on November 24, 2009.[3] The Commission received no comment letters on the proposal. This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposal

CBOE Rule 6.13A governs the operation of the Exchange's SAL system. SAL is a feature within CBOE's Hybrid System that auctions marketable orders for price improvement over the national best bid or offer (''NBBO''). For Hybrid 3.0 Classes in which SAL is activated,[4] the Exchange determines, on a class-by-class basis, which electronic matching algorithm from CBOE Rule 6.45B shall apply to SAL executions (*e.g.,* pro-rata, price-time, UMA priority with public customer, participation entitlement and/or market turner priority overlays).[5]

The Exchange also may establish, on a class-by-class basis, a DPM/LMM participation entitlement that is applicable only to SAL executions.[6] Pursuant to CBOE Rules 8.15B and 8.87, the participation entitlement generally is 50% when there is one other Market-Maker also quoting at the best bid/offer on the Exchange, 40% when there are two Market-Makers also quoting at the best bid/offer on the Exchange, and 30% when there are three or more Market-Makers also quoting at the best bid/offer on the Exchange. In addition, the participation entitlement must be in compliance with Rule 6.45B(a)(i)(2).[7] In relevant part, Rule 6.45B(a)(i)(2) provides that the DPM or LMM may not be allocated a total quantity greater than the quantity that it is quoting (including orders not part of quotes) at that price.[8] Further, if pro-rata priority is in effect and the DPM or LMM's allocation of an order pursuant to its participation entitlement is greater than its percentage share of quotes/orders at the best price at the time that the participation

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 61024 (November 18, 2009), 74 FR 61395.

[4] Currently, SPX (options on the S&P 500 Index) is the only Hybrid 3.0 class. Telephone call between Angelo Evangelou, Assistant General Counsel, CBOE, and Sara Hawkins, Special Counsel, Division of Trading and Markets, Commission, on December 14, 2009.

[5] *See* CBOE Rule 6.13A, Interpretation .04(ii).

[6] *Id.*

[7] *Id.*

[8] *See* CBOE Rule 6.45B(a)(i)(2)(B).

entitlement is granted (the ''pro-rata share''), the DPM or LMM shall not receive any further allocation of that order.[9] The rule also provides that the participation entitlement shall not be in effect unless public customer priority is in effect in a priority sequence ahead of the participation entitlement and then the participation entitlement shall only apply to any remaining balance.[10] In addition, responses to SAL auctions are capped to the size of the Agency Order for allocation purposes pursuant to Rule 6.13A.[11]

The Exchange is now proposing to modify the DPM/LMM entitlement when the pro-rata algorithm is in effect for SAL in selected Hybrid 3.0 classes as part of a pilot program that will operate on a one-year basis. For such pro-rata classes, after all public customer orders in the book at the best bid/offer and the DPM/LMM participation entitlement have been satisfied, the DPM/LMM shall be eligible to participate in any remaining balance on a pro-rata basis (regardless of whether its participation entitlement is greater than its pro-rata share).[12]

As part of the pilot program, on a quarterly basis the Exchange will evaluate the number of SAL executions in each pilot class where the DPM/LMM participation entitlement was applied and the allocation was greater than what it would have been under the pre-pilot allocation algorithm. The Exchange will reduce the DPM/LMM participation entitlement for the class if the number of SAL executions that exceeded the benchmark is more than 1% of the total number of SAL executions in the class evaluated during the quarter. This evaluation will be based on a random sampling of three days for each month in each quarter. The ''benchmark'' will be 60% where there is one Market-Maker also quoting at the best bid/offer on the Exchange; 40% where there are two Market-Makers also quoting at the best bid/offer on the Exchange; and 40% where there are three or more Market-Makers also quoting at the best bid/offer on the Exchange. The benchmark percentages, which in some instances are greater than CBOE's DPM/LMM participation entitlement percentages contained in Rules 8.15B and 8.87, are based on the market-maker participation entitlement percentages that are available on other options exchanges.[13] During the pilot, the Exchange will submit a quarterly report containing certain data related to this evaluation to the Commission.[14]

III. Discussion and Findings

The Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[15] Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[16] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission has closely scrutinized proposals which would provide participation entitlements to specialists or market makers or would increase any such existing entitlements.[17] The Commission has recognized that such entitlements to specialists, market makers, or other members that ''lock up'' a certain portion of each affected order reduce the number of contracts for which other members and market participants can compete.[18] Eventually, if particular exchange members ''lock up'' a large share of customer orders, competing members would have less incentive to compete by offering better prices on an exchange and competition could diminish. As a result, the disseminated quotations, and the other trading interest available on a market, could deteriorate, ultimately harming investors.[19]

As noted, CBOE's proposal will permit DPMs and LMMs to execute a larger share of a SAL order than under the current allocation algorithm, as DPMs and LMMs will now be permitted to receive their DPM/LMM participation entitlement as well as a pro-rata share of the remaining balance on an order (after all public customer orders in the book at the best bid/offer and the DPM/LMM participation entitlement have been satisfied). However, the Commission believes that any potential concerns regarding the increased allocation to DPMs/LMMs, as discussed above, are mitigated by the terms and conditions of the pilot program. Specifically, during the pilot program, the Exchange will be required to closely monitor a random sampling of the SAL executions and evaluate executions in which the DPM/LMM allocation is greater than what it would have been under the previous allocation algorithm. These SAL executions will be evaluated against a ''benchmark'' that is based on market-maker participation entitlement percentages that have been approved by the Commission for other options exchanges.[20] If the number of SAL executions that exceeds the benchmark amounts to more than 1% of the total number of SAL executions in the class evaluated during the quarter, the Exchange must reduce the DPM/LMM participation entitlement for that class. As such, the Commission believes that the proposal will permit only DPM/LMM allocations that are generally consistent with the level of participation entitlement that the Commission has previously approved for other options exchanges.

Further, the Exchange will submit quarterly reports to the Commission providing data on SAL executions evaluated during the relevant time period. In evaluating the pilot program, the Commission will consider, among other things, how often the allocation percentage exceeds the benchmark and by what amount. The Commission will closely scrutinize the pilot program to ensure that the DPM/LMM allocations under the proposed rule change are

[9] *Id.*

[10] *See* CBOE Rule 6.45B(a)(i)(2)(D). CBOE Rule 6.45B(a)(i)(2) also provides that, to be entitled to their participation entitlement, the DPM/LMM's order and/or quote must be at the best price on the Exchange. For purposes of SAL executions, the Exchange noted that it interprets this to mean that the DPM/LMM must be at the best price at both the start and the conclusion of the SAL auction.

[11] *See* Notice, *supra* note 3, for an example of an allocation of a SAL order.

[12] *See* Notice, *supra* note 3, for an example of an allocation of a SAL order under the proposed rule change.

[13] *See, e.g.,* International Securities Exchange Rule 7.13.01(b) (provides a 60% participation right if there is only one other Professional Order or market maker quotation at the best price) and NYSE Arca, Inc. Rule 6.76A(a)(1)(A)(i) (provides a 40% participation right regardless of the number of other market participants at the best price).

[14] *See* Notice, *supra* note 3, for further detail on the data to be provided in the reports submitted to the Commission. Such data will be provided by CBOE on a confidential basis.

[15] 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).

[16] 15 U.S.C. 78f(b)(5).

[17] *See* Securities Exchange Act Release No. 49068 (January 13, 2004), 69 FR 2775 (January 20, 2004) (establishing trading rules for the Boston Options Exchange Facility) and Securities Exchange Act Release No. 42455 (February 24, 2000), 65 FR 11388, 11395 (March 2, 2000) (order approving the registration of the International Securities Exchange LLC as a national securities exchange).

[18] *Id.*

[19] *Id.*

[20] *See supra* note 13. Specifically, the ''benchmark'' will be 60% where there is one Market-Maker also quoting at the best bid/offer on the Exchange; 40% where there are two Market-Makers also quoting at the best bid/offer on the Exchange; and 40% where there are three or more Market-Makers also quoting at the best bid/offer on the Exchange.

generally in line with the maximum participation entitlement percentages that the Commission has previously approved.

For these reasons, the Commission finds that the proposed rule change is consistent with the Act.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[21] that the proposed rule change (SR–CBOE–2009–025), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–31345 Filed 1–4–10; 8:45 am]

BILLING CODE 8011–01–P

[21] 15 U.S.C. 78s(b)(2).

[22] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 6859]

In the Matter of the Review of the Designation of Kahane Chai (aka American Friends of the United Yeshiva Movement aka American Friends of Yeshivat Rav Meir aka Committee for the Safety of the Roads aka Dikuy Bogdim aka DOV aka Forefront of the Idea aka Friends of the Jewish Idea Yeshiva aka Jewish Legion aka Judea Police aka Judean Congress aka Kach aka Kahane aka Kahane Lives aka Kahane Tzadak aka Kahane.org aka Kahanetzadak.com aka Kfar Tapuah Fund aka KOACH aka Meir's Youth aka New Kach Movement aka newkach.org aka No'ar Meir aka Repression of Traitors aka State of Judea aka Sword of David aka The Committee Against Racism and Discrimination (CARD) aka The Hatikva Jewish Identity Center aka The International Kahane Movement aka The Jewish Idea Yeshiva aka The Judean Legion aka The Judean Voice aka The Qomemiyut Movement aka The Rabbi Meir David Kahane Memorial Fund aka The Voice of Judea aka The Way of the Torah aka The Yeshiva of the Jewish Idea aka Yeshivat HaRav Meir) As a Foreign Terrorist Organization pursuant to Section 219 of the Immigration and Nationality Act, as amended

Based upon a review of the Administrative Record assembled in these matters pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) (''INA''), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the 2004 re-designation of the aforementioned organization as foreign terrorist organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation.

Therefore, I hereby determine that the designation of the aforementioned organization as foreign terrorist organizations, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained.

This determination shall be published in the **Federal Register.**

Dated: December 22, 2009.

James B. Steinberg,

Deputy Secretary of State, Department of State.

[FR Doc. E9–31305 Filed 1–4–10; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF STATE

[Public Notice 6255]

U.S. Department of State Advisory Committee on Private International Law: Organization of American States (OAS) Specialized Conference on Private International Law (CIDIP) Study Group

The OAS CIDIP Study Group will hold another public meeting to continue the discussion started at the December 15, 2009 meeting. *This is not a meeting of the full Advisory Committee.*

In the context of the Seventh Inter-American Specialized Conference on Private International Law (CIDIP–VII), the Committee on Juridical and Political Affairs (CJAP) of the Permanent Council of the OAS is carrying out work on consumer rights as part of its program on private international law. Three proposals have been put forward: a revised Brazilian draft convention on applicable law that has recently been expanded to include jurisdiction, a Canadian draft model law on applicable law and jurisdiction, and a United States proposal (with several components) for legislative guidelines/model laws/rules to promote consumer redress mechanisms such as small claims tribunals, collective procedures, on-line dispute resolution, and government actions. The U.S. is considering the possibility of expanding its existing proposal.

The United States is also considering whether to pursue ratification of the Inter-American Convention on the Law Applicable to International Contracts (known as the Mexico City Convention), which was adopted at the Fifth Inter-American Specialized Conference on Private International Law (CIDIP–V). The United States is exploring the process for obtaining official corrections to the English text of the Convention to conform to the Spanish version. Copies of proposed corrections to the English text can be obtained through the contact points listed below. Other developments which may be relevant to work at the OAS include the proposal at UNCITRAL for future work on on-line dispute resolution and the establishment by the Permanent Bureau of the Hague Conference on Private International Law of an experts group to consider development of a non-binding instrument on choice of law in international commercial contracts.

Time and Place: The public meeting of the Study Group will take place at the Federal Trade Commission, 600 Pennsylvania Ave., NW., Room H–481, Washington, DC on January 15, 2010, from 10 a.m. EST to 2 p.m. EST. If you are unable to attend the public meeting and would like to participate from a remote location, teleconferencing will be available.

Public Participation: Advisory Committee Study Group meetings are open to the public. Persons wishing to attend must contact Trisha Smeltzer at smeltzertk@state.gov or 202–776–8423 and provide their name, e-mail address, and affiliation(s) if any. Please contact Ms. Smeltzer for additional meeting information, any of the documents referenced above, or dial-in information on the conference call. A member of the public needing reasonable accommodation should advise those same contacts not later than January 8th. Requests made after that date will be considered, but might not be able to be fulfilled. Persons who cannot attend or participate by conference call but who wish to comment on any of the topics referred to above are welcome to do so by e-mail to Michael Dennis at *DennisMJ@state.gov* or Hugh Stevenson at hstevenson@ftc.gov.

Dated: December 23, 2009.

Michael Dennis,

Attorney-Adviser, Office of Private International Law, Office of the Legal Adviser, Department of State.

[FR Doc. E9–31335 Filed 1–4–10; 8:45 am]

BILLING CODE 4710–08–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Generalized System of Preferences (GSP): Notice Regarding the Acceptance of Petitions To Grant a Competitive Need Limitation (CNL) Waiver

AGENCY: Office of the United States Trade Representative.

ACTION: Solicitation of comments and notice of public hearing.

SUMMARY: The Office of the United States Trade Representative (USTR) has received petitions in connection with the 2009 GSP Annual Review to waive the competitive need limitations (CNLs) on imports of certain products that are eligible for duty-free treatment under the GSP program. USTR also has received petitions to determine that certain products were not produced in the United States as of January 1, 1995. This notice announces those petitions that have been accepted for further review. All other petitions have been rejected. This notice also sets forth the schedule for submitting comments and the public hearing on the petitions, filing requests to participate in the hearing, submitting pre-hearing and post-hearing briefs, and commenting on the U.S. International Trade Commission (USITC) report on probable economic effects. The list of petitions for CNL waivers and petitions for determinations that products were not produced in the United States that were submitted for review is available at: *http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp/current-review-1.*

FOR FURTHER INFORMATION CONTACT: Tameka Cooper, GSP Program, Office of the United States Trade Representative, 1724 F Street, NW., Washington, DC 20508. The telephone number is (202) 395–6971, the fax number is (202) 395–2961, and the e-mail address is *Tameka_Cooper@ustr.eop.gov.*

DATES: The GSP regulations (15 CFR part 2007) provide the schedule of dates for conducting an annual review unless otherwise specified in a notice in the **Federal Register**. The current schedule with respect to the review of the accepted CNL waiver petitions is set forth below. Notice of any other changes will be given in the **Federal Register.**

January 21, 2010—Pre-hearing briefs and comments, requests to testify at the GSP Subcommittee Public Hearing, and hearing statements must be submitted by 5 p.m.

February 11, 2010—GSP Subcommittee Public Hearing on the CNL waiver petitions accepted for the 2009 GSP Annual Review in Rooms 1 and 2, 1724 F St., NW., Washington, DC 20508, beginning at 9:30 a.m.

March 4, 2010—Post-hearing briefs and comments must be submitted by 5 p.m.

April 2010—USITC scheduled to publish its report on the product for which CNL waiver petitions have been accepted for inclusion in the 2009 GSP Annual Review (case 2009–08). Comments on the USITC's report on this product are due 10 calendar days after the publication date of the USITC report.

June 30, 2010—Modifications to the list of articles eligible for duty-free treatment under the GSP resulting from the 2009 Annual Review will be announced on or about June 30, 2010, and any changes will be effective as of the date announced.

SUPPLEMENTARY INFORMATION: The GSP program provides for the duty-free importation of eligible articles when imported from designated beneficiary developing countries. The GSP program is authorized by Title V of the Trade Act of 1974 (19 U.S.C. 2461, *et seq.*), as amended (the ''1974 Act' ''), and is implemented in accordance with Executive Order 11888 of November 24, 1975, as modified by subsequent Executive Orders and Presidential Proclamations.

In **Federal Register** notices dated May 28, 2009, and November 3, 2009, USTR announced that the deadline for the filing of petitions requesting CNLs and determinations that products were not produced in the United States for the 2009 GSP Annual Review was November 17, 2009 (74 FR 25605 and 74 FR 56908). The GSP Subcommittee of the Trade Policy Staff Committee (TPSC) has reviewed the petitions and is accepting for review petitions for a CNL waiver with respect to new pneumatic radial tires, of rubber, of a kind used on motor cars (including station wagons and racing cars) from Thailand (HTS4011.10.10).

Additional information regarding the petitions with respect to this article is provided in the ''List of CNL Waiver Submissions Accepted in the 2009 GSP Annual Review'' that is posted on the USTR web site. Acceptance of a petition for review does not indicate any opinion with respect to the disposition on the merits of the petition. Acceptance indicates only that the listed petitions have been found eligible for review and that such review will take place.

Notice of Public Hearing

The GSP Subcommittee of the TPSC will hold a hearing on February 11, 2010, on the CNL waiver product petitions accepted for the 2009 GSP Annual Review, beginning at 9:30 a.m. at the Office of the U.S. Trade Representative, Rooms 1 and 2, 1724 F Street, NW., Washington, DC 20508. The hearing will be open to the public, and a transcript of the hearing will be subsequently available on *http://www.regulations.gov.* No electronic media coverage of the public hearing will be allowed.

Submission of Requests To Testify at the Public Hearing and Hearing Statements

All interested parties wishing to testify at the hearing must submit, by 5 p.m., January 21, 2010, a ''Notice of Intent to Testify'' and ''Hearing Statement'' to *http://www.regulations.gov* (following the procedures indicated in ''Requirements for Submissions''), the witness' or witnesses' name, address, telephone number, fax number, e-mail address, pertinent Case Number and eight-digit HTSUS subheading number. Oral testimony by each panel before the GSP Subcommittee will be limited to one five-minute presentation in English. If those testifying intend to submit a longer ''Hearing Statement'' for the record, it must be in English and accompany the ''Notice of Intent to Testify''.

Opportunities for Public Comment and Inspection of Comments

In addition to holding a public hearing, the GSP Subcommittee of the TPSC invites briefs and comments in support of or in opposition to the CNL waiver petitions that have been accepted for the 2009 GSP Annual Review. Parties not wishing to appear at the public hearing, but wishing to submit pre-hearing briefs or statements, in English, must do so by 5 p.m., January 21, 2010. Post-hearing briefs or statements will be accepted if they conform with the ''Requirements for Submissions'' cited below and are submitted, in English, by 5 p.m., March 4, 2010.

In accordance with sections 503(d)(1)(A) of the 1974 Act and the authority delegated by the President, pursuant to section 332(g) of the Tariff Act of 1930, the U.S. Trade Representative has requested that the USITC provide its advice on the probable economic effect on U.S. industries producing like or directly competitive articles and on consumers of the waiver of the CNL for the specified GSP beneficiary country, with respect to the article that is specified in the ''List of CNL Waiver Submissions

Accepted in the 2009 GSP Annual Review.'' Comments by interested persons on the USITC Report prepared as part of the product review should be submitted by 5 p.m., 10 calendar days after the date the publication date of the USITC's report. These submissions are to be submitted using *http://www.regulations.gov* in accordance with ''Requirements for Submissions.''

Submissions should comply with 15 CFR part 2007, except as modified below. All submissions should identify the subject article in terms of the case number and eight digit HTSUS subheading number, if applicable, as shown in the ''List of CNL Waiver Submissions Accepted in the 2009 GSP Annual Review'' available at: *http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp/current-review-1.*

Requirements for Submissions

Submissions in response to this notice (including requests to testify, written comments, and pre-hearing and post-hearing briefs, and all business confidential submissions), must be submitted electronically by the relevant deadline listed above using *http://www.regulations.gov*, docket number USTR–2009–0037. Instructions for submitting business confidential versions are provided below. Hand-delivered submissions will not be accepted. Submissions must be submitted in English to the Chairman of the GSP Subcommittee, Trade Policy Staff Committee, by the applicable deadlines set forth in this notice.

To make a submission using *http://www.regulations.gov*, enter docket number USTR–2009–0037 on the home page and click ''Search.'' The site will provide a search-results page listing all documents associated with this docket. Locate the reference to this notice by selecting ''Notices'' under ''Document Type''. Locate the reference to this notice by selecting ''Notices'' under ''Document Type'' on the left side of the search-results page, and click on the link entitled ''Submit a Comment''. (For further information on using the *http://www.regulations.gov* Web site, please consult the resources provided on the website by clicking ''How to Use This Site'' on the left side of the home page.)

The *http://www.regulations.gov* Web site offers the option of providing comments by filling in a ''Type Comment and Upload File'' 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 ''Type Comment and Upload File'' field.

Comments must be in English, with the total submission not to exceed 30 single-spaced standard letter-size pages in 12-point type, including attachments. Any data attachments to the submission should be included in the same file as the submission itself, and not as separate files.

Any person or party making a submission is strongly advised to review the GSP regulations and GSP Guidebook (available at: *http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp/gsp-program-inf*).

Business Confidential Submissions

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, the submission must be marked ''BUSINESS CONFIDENTIAL'' at the top and bottom of the cover page and each succeeding page, and the submission should indicate, via brackets, the specific information that is confidential. Additionally, ''Business Confidential'' should be included in the ''Type comment & Upload file'' field. Anyone submitting a comment containing business confidential information must also submit as a separate submission a non-confidential version of the confidential submission, indicating where confidential information has been redacted. The non-confidential summary will be placed in the docket and open to public inspection.

Carmen Suro-Bredie,

Assistant U.S. Trade Representative for Policy Coordination, Office of the U.S. Trade Representative.

[FR Doc. E9–31378 Filed 1–4–10; 8:45 am]

BILLING CODE 3190–W0–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary of Transportation

[FHWA Docket No. FHWA–2009–0123]

Notice of Funding Availability for Applications for Credit Assistance Under the Transportation Infrastructure Finance and Innovation Act (TIFIA) Program; Clarification of TIFIA Selection Criteria; and Request for Comments on Potential Implementation of Pilot Program To Accept Upfront Payments for the Entire Subsidy Cost of TIFIA Credit Assistance

AGENCY: Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), Federal Transit Administration (FTA), Maritime Administration (MARAD), Office of the Secretary of Transportation (OST), U.S. Department of Transportation (DOT).

ACTION: Notice of extension of deadline and comment period.

SUMMARY: The FHWA is extending the deadline and comment period for a notice of funding availability (NOFA), which was published on December 3, 2009, at 74 FR 63497. The original comment period is set to close on December 31, 2009. The extension is based on concern expressed by DOT stakeholders that the December 31 closing date does not provide sufficient time for submission of the solicited Letter of Interest and a subsequent comprehensive response to the docket. The FHWA agrees that the deadline and the comment period should be extended. Therefore, the closing date for submission of Letters of Interest and comments is extended to March 1, 2010, which will provide others interested in commenting additional time to prepare the Letter of Interest, and submit responses to the docket.

DATES: Comments must be received on or before March 1, 2010.

ADDRESSES: Submit all Letters of Interest to the attention of Mr. Duane Callender via e-mail at: *TIFIACredit@dot.gov.* Submitters should receive a confirmation e-mail, but are advised to request a return receipt to confirm transmission. Only Letters of Interest received via e-mail, as provided above, shall be deemed properly filed.

Mail or hand deliver comments to the U.S. Department of Transportation, Dockets Management Facility, Room PL–401, 1200 New Jersey Avenue, SE., Washington, DC 20590 or fax comments to (202) 493–2251. Provide two copies of comments submitted by mail or

courier. Alternatively, comments may be submitted via the Federal eRulemaking Portal at *http://www.regulations.gov.* All comments must include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., *e.t.,* Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically. Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, Pages 19477–78).

FOR FURTHER INFORMATION CONTACT: For further information regarding this notice please contact Duane Callender via e-mail at *TIFIACredit@dot.gov* or via telephone at 202–366–9644. A TDD is available at 202–366–7687. Substantial information, including the TIFIA Program Guide and application materials, can be obtained from the TIFIA Web site: *http://tifia.fhwa.dot.gov.*

SUPPLEMENTARY INFORMATION:

Background

On December 3, 2009, at 74 FR 63497, the FHWA published in the **Federal Register** a notice of availability of funding for applications for credit assistance under the TIFIA Program.

In lieu of accepting applications on a first-come first-served basis, the NOFA established due dates for submitting letters of interest and applications to compete for available funding. Additionally, the NOFA provided expanded information on the TIFIA selection criteria and requests comments on a proposed pilot program for allowing TIFIA applicants to pay an upfront fee that will fully offset the Government's subsidy cost of making credit assistance available.

The original comment period for the NOFA closes on December 31, 2009. However, DOT stakeholders have expressed concern that this closing date does not provide sufficient time for submission of the solicited Letter of Interest and a subsequent comprehensive response to the docket. To allow time for interested parties to submit Letters of Interest and comprehensive comments, the closing date is changed from December 31, 2009, to March 1, 2010.

Authority: 23 U.S.C. 601–609; 49 CFR 1.48(b)(6); 23 CFR Part 180; 49 CFR Part 80; 49 CFR Part 261; 49 CFR Part 640.

Issued on: December 29, 2009.

Victor M. Mendez,

Administrator.

[FR Doc. E9–31225 Filed 1–4–10; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2008–0132]

Dorel Juvenile Group; Denial of Appeal of Decision on Inconsequential Noncompliance

Dorel Juvenile Group (DJG or Cosco), of Columbus, Indiana, has appealed a decision by the National Highway Traffic Safety Administration (NHTSA) that denied its petitions for determinations that the noncompliance of the tether and harness webbing in some child restraint systems (CRS) that it manufactured and sold with Federal Motor Vehicle Safety Standard (FMVSS) No. 213, ''Child Restraint Systems,'' is inconsequential to safety. DJG had applied to be exempt from the notification and remedy (collectively, recall) requirements of 49 U.S.C. Chapter 301—''Motor Vehicle Safety'' (Vehicle Safety Act). This notice announces and explains our denial of DJG's appeal.

I. Webbing Strength Requirements of FMVSS No. 213

FMVSS No. 213, S5.4.1(a) [1] requires that the webbing of belts provided with a child restraint system, after being subjected to abrasion as specified in S5.1(d) or S5.3(c) of FMVSS No. 209, ''Seat Belt Assemblies,'' have a breaking strength of not less than 75 percent of the strength of the unabraded webbing when tested by the procedure specified in S5.1(b) of FMVSS No. 209. The test is referred to as an abrasion test and the requirement is referred to as a percent-of-strength requirement.

FMVSS No. 213, S5.4.1(b) requires that the webbing of belts provided with a child restraint system shall meet the requirements of S4.2(e) of FMVSS No. 209, which requires a breaking strength of not less than 60 percent of the strength before exposure to carbon arc light when tested by the procedure specified in S5.1(e) of FMVSS No. 209. The test is referred to as a light exposure test and the requirement is referred to as a percent-of-strength requirement.

Webbings used in child restraints may deteriorate from abrasion or exposure to sunlight or both. When they deteriorate, they lose strength. A webbing with insufficient strength will not restrain a child in a crash. The purpose of both the abrasion and light exposure requirements is to ''ensure the safe performance of the belts and associated hardware used to attach the child restraint to the vehicle.'' *Child Restraint Systems; Seat Belt Assemblies and Anchorages: Proposed Rulemaking and Invitation for Applications for Financial Assistance,* 43 FR 21470, 21475 (May 18, 1978) (Docket No. 74–9). The purpose of FMVSS No. 213 is to ''reduce the number of children killed or injured in motor vehicle crashes.'' 49 CFR 571.213 S2.

II. The Noncompliance

The noncompliant tether webbing [2] on certain DJG child restraints failed to meet the percent-of-strength requirement of FMVSS No. 213 when subjected to the abrasion test. The tether webbing had an initial strength of 19,803 Newtons (N), and a post-abrasion strength of 10,903 N. The tether webbing thus retained only 55 percent of its new webbing strength; 75 percent is required by the standard. Affected are a total of 39 models and 3,957,826 units, manufactured between January 2000 and September 30, 2001.

The noncompliant harness webbing on certain DJG child restraints failed to meet the percent-of-strength requirement of FMVSS No. 213 when exposed to a carbon arc light. Upon testing, the new harness webbing had a strength of 12,371 N, and the light-exposed webbing a strength of 4,539 N. The harness webbing thus retained only 37 percent of its new webbing strength; 60 percent is required by the standard. A total of 14 models and 54,400 units, manufactured between March 15, 2002 and August 1, 2002, are affected by this non-compliance.

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[1] Throughout this Notice, references to FMVSS No. 213 are, unless otherwise noted, based on the version of the standard in effect at the time DJG manufactured the child restraints with the noncompliant webbing.

[2] ''Tether webbing'' refers to the strip of fabric that is secured to the seat back of a CRS, and is connected to a tether hook that transfers the load from the CRS to the tether anchorage.

III. DJG's Inconsequentiality Petitions, Subsequent Rulemaking and NHTSA's Denial

1. DJG's Petitions

DJG petitioned for relief from the recall provisions of the Vehicle Safety Act with respect to both the tether webbing noncompliance and the harness webbing noncompliance. *See* 49 U.S.C. 30118(d), 30120(h); 49 CFR part 556. NHTSA published receipt of DJG's applications for determination of inconsequential non-compliance regarding the tether webbing and the harness webbing on July 30, 2002 and December 3, 2002, in the **Federal Register** (67 FR 49387 and 67 FR 72025, respectively).

DJG argued that the noncompliance of the tether webbing was inconsequential to safety because the absolute strength of the abraded webbing was sufficiently high. DJG also argued that the abrasion test in effect at the time the tethers were manufactured was flawed: Since it lacked a minimum breaking strength requirement, webbing with a relatively low unabraded strength was subject to a correspondingly low abraded strength requirement, while webbing with a relatively high unabraded strength—such as that in child restraints manufactured by DJG—was subject to a proportionately higher post-abrasion strength requirement. Thus, DJG argued that the noncompliance with the abrasion test was inconsequential because, even though the abraded webbing retained only 55 percent of the strength of the new webbing, the post-abrasion strength was nonetheless adequate due to the relatively high strength of the new webbing. To support this contention, DJG argued that the strength of the abraded webbing (10,903 N) exceeded the anchor strength requirements of FMVSS No. 225, *Child Restraint Anchorage Systems* (5,296 N). DJG further argued that testing, both by it and in connection with the FMVSS No. 225 rulemaking, demonstrated that the strength of the abraded webbing exceeded both the loading on tethers observed in dynamic testing (between 3,400 N and 5,800 N) and the tether assembly break strength as determined in tensile strength tests (about 9,800 N). DJG asserted that, since the design of the tether assembly uses two belt slides that act as a manual adjuster, the tether strap is not exposed to abrasion in ordinary and reasonably foreseeable use.

With respect to the harness webbing noncompliance, DJG again argued that the absence of a minimum strength requirement in the exposure test penalized manufacturers of child restraints with webbing with a high pre-exposure strength. DJG argued that the noncompliance of its webbing was inconsequential to safety because the strength of the webbing, even after exposure, exceeded the loads observed in dynamic tests. DJG maintained that the absence of a minimum strength requirement would allow manufacturers to produce compliant webbing with low pre-exposure strength. DJG also asserted that while the webbing was noncompliant when exposed to carbon arc light filtered by a Corex-D filter, the webbing was compliant when exposed to xenon arc light.[3] DJG argued that carbon arc light does not have the same spectral characteristics as sunlight and delivers excessive relative photon energy to the test specimen in the ultraviolet and low visual spectrum which is more damaging than natural sunlight. However, it noted that xenon arc light systems more closely resemble natural sunlight characteristics. DJG also contended that carbon arc light systems are now obsolete since they have been replaced by xenon arc systems.

With respect to the first petition, one comment was received from Advocates for Highway and Auto Safety (Advocates) in support of a minimum breaking strength requirement. With respect to the second petition, no comments were received.

2. The 2006 Rule

NHTSA gave considerable attention to the statements and comment suggesting a minimum breaking strength requirement. In 2005, NHTSA initiated a rulemaking with respect to minimum breaking strength for webbing in child restraints. In 2006, NHTSA published a final rule that amended FMVSS No. 213 to include a minimum breaking strength of 15,000 N for new webbing used to secure a child restraint system to the vehicle (including the tether and lower anchorages of a child restraint anchorage system). *Child Restraint Systems; Final Rule,* 71 FR 32855 (June 7, 2006), codified at 49 CFR 571.213 S5.4.1.2(a). NHTSA noted that without a specified initial breaking strength requirement, the percentage-of-strength requirement alone did not provide an effective floor for acceptable performance. 71 FR 32858; *see* 49 CFR 571.213 S5.4.1.2(b). The rule maintained the minimum percentage-of-strength of new webbing requirement, as a means of limiting degradation. 71 FR 32858. The agency concluded that ''[a]n excessive degradation rate (e.g., over 25% when subjected to the abrasion test) indicates a problem with the quality and/or durability of the selected material.'' 71 FR 32858. The agency expressed its desire to prevent the use of webbing that degraded more than 25 percent when abraded, or 40 percent when exposed to light, because it may not last as long as necessary to protect children using the restraint (including for second-hand use).[4]

3. NHTSA's Decision on Dorel's Inconsequentiality Petitions

On July 18, 2008, NHTSA published a notice in the **Federal Register** denying both of DJG's petitions (73 FR 41397), stating that the petitioner had not met its burden of persuasion that the noncompliances were inconsequential to motor vehicle safety. In its denial of the petitions, NHTSA noted that at the time of receiving these petitions, NHTSA had undertaken a rulemaking to consider whether to amend FMVSS No. 213 to require a minimum breaking strength for CRS webbing. NHTSA had postponed final determinations on these petitions in order to obtain the benefit of public comments responding to the proposed breaking strength requirements. After completing this rulemaking action—specifying both a minimum breaking strength and a percentage-of-strength retention after abrasion and light exposure (discussed above)—NHTSA addressed these two DJG petitions for determination of inconsequential noncompliance.

In its denial of the petition relating to the tether webbing, NHTSA explained that both the unabraded webbing strength and the degradation rate requirements are important from a safety perspective. NHTSA stated that the lack of sufficient breaking strength retention after the abrasion test signals a distinct probability that the webbing strength would be insufficient throughout a lifetime of use. The high degradation rate of the DJG tether webbing meant that, over time, the webbing could abrade to the point where the webbing strength is lower than the tether anchor strength, providing for an unsafe connection to the vehicle. NHTSA also noted that, under the 2006 rule, the minimum strength for new webbing is 15,000 N. That rule did not change the 75 percent strength retention requirement.

[3] DJG also argued that the webbing was compliant when exposed to carbon arc light filtered by a soda-lime glass filter, but does not reassert this argument on appeal.

[4] Information available at the time of a decision on an inconsequentiality petition may be considered in making the decision; this includes information in rulemakings that post dated the violation. However, the motor vehicle equipment would not be in violation of a rule that was adopted after the equipment was manufactured.

In its denial of the petition relating to the harness webbing, NHTSA stated that DJG's concern that under a standard that lacks a specific minimum strength requirement, manufacturers could produce webbing with very low after-exposure strength if the pre-exposure strength was also low, was theoretical; NHTSA also noted that minimum breaking strengths were added to the standard in 2006. NHTSA also stated that carbon arc light filtered by a soda-lime glass is not in accordance with FMVSS No. 213 requirements and is not appropriate for light exposure testing of nylon webbing. Requirements for carbon arc light exposure testing with a soda-lime glass filter are clearly specified only for polyester materials. NHTSA also stated that its rulemaking to use xenon arc light for weathering tests of glazing material does not mean that the carbon arc is not indicative of the sunlight spectral power distribution or that it produces invalid weathering results for webbing materials. In response to DJG's argument regarding dynamic testing, NHTSA pointed out that the test conditions in FMVSS No. 213 reflect the concern that child restraint systems will withstand even the most severe crashes which are well above 30 mph. Therefore, DJG's assertion was not persuasive evidence of the noncompliance being inconsequential to safety.

IV. DJG's Appeal

On August 1, 2008, DJG appealed NHTSA's denials of both petitions. Notice of the appeal with an opportunity for comment was published in the **Federal Register** on Wednesday, November 26, 2008 (73 FR 72111).

Tether Webbing

In its appeal, DJG reiterates the arguments it made in its initial petition that the strength of the abraded webbing is sufficiently higher than reasonably foreseeable crash forces, since the strength of the abraded webbing exceeded both the loading on tethers observed in dynamic testing and the break strength of the tether assembly (particularly the tether hook) as determined in tensile strength tests. DJG's appeal goes on to note that NHTSA's initial decision relied on a concern that the webbing might not retain sufficient strength throughout a lifetime of use. DJG makes several arguments in response to this concern.

DJG argues that NHTSA has recognized that a child restraint system should not be used beyond its useful life and that a NHTSA Tip (as well as a Juvenile Products Manufacturers Association guideline) for the useful life of child restraints is 6 years. DJG notes that most of the noncompliant CRSs are already beyond this useful life given the passage of time between the filing of DJG's petition and the denial decision. DJG further points out that there have been no complaints of tether webbing degradation or failure in crashes. Accordingly, it asserts, since the purpose of the regulation is to protect children throughout the useful life of the restraint, this performance demonstrates that it has been adequate. Moreover, DJG argues that this performance resolves NHTSA's concern.

DJG also asserts that the noncompliance is inconsequential to safety because the degradation allowed for CRS webbing is identical to that for vehicle seat belts, even though, DJG argues, vehicle seat belts are expected to last longer and are subject to more use than is CRS webbing. DJG claims that the vehicle seat belt assembly is expected to last the life of the vehicle which, DJG asserts, is up to twice as long as the useful life of a CRS. DJG also maintains that the tether webbing is subject to less-frequent use than is seat belt webbing, because there will always be a driver when a CRS is used in a vehicle, but the reverse is not true. DJG argues that this is particularly true in the case of the convertible restraints at issue in its appeal, where the tether is not used when the restraint is installed in the rear-facing position or when used as a booster seat. DJG concludes, based on these arguments, that it is unreasonable for the agency to conclude that the noncompliant tether webbing creates a consequential safety risk because it ''degrades somewhat more than 75 percent'' in the abrasion test.

Next, DJG argues that, in everyday use, the noncompliant webbing is not subject to the severe abrasion simulated in the test. DJG provides tether webbing strength data for a small sample of compliant and noncompliant used child restraints showing that the tether webbing strength after 6 to 8 years of use ranges from 82.4 to 99.6 percent of initial breaking strength. DJG argues that these test results show that the tether webbing from compliant and noncompliant child restraints performed comparably, and demonstrate that NHTSA need not be concerned about degradation. In addition, on December 26, 2008, DJG submitted supplemental data from eight used noncompliant child restraints (8–9 years old) that showed that tether strength, after being used in the field, ranged from 15,168 N (3,410 pounds) to 19,038 N (4,280 pounds) (76.6 to 96.1 percent of new tether webbing strength). DJG argues that the strength of these used tethers is greater than the current minimum breaking strength requirement of 15,000 N for new tether webbing. DJG also argues that the location and two-belt slide design of the tether guarantee that it is not exposed to abrasion in ordinary and reasonably foreseeable use.

DJG also contends that the noncompliance does not significantly increase the risk of harm to children in crashes, compared to compliant webbing, because the post-abrasion strength of the non-compliant webbing is just 3 percent below what DJG argues is the ''effective minimum'' required by the current standard. The revision of FMVSS No. 213, effective September 2007, requires that new (unabraded) webbing have a minimum breaking strength of at least 15,000 N. DJG argues that 75 percent of 15,000 implies what DJG terms an ''effective minimum'' of 11,250 N. DJG further argues that since the tether's post-abrasion strength (10,903 N) is just 3 percent less than this ''effective minimum,'' the noncompliance is inconsequential to safety.

Then, DJG maintains that its petition is analogous to an inconsequentiality petition for tether webbing that degraded on certain Evenflo child restraints that NHTSA did grant. DJG states that the Evenflo grant was based on both dynamic testing and a favorable evaluation of the webbing under the regulations in effect from 1971–1979 for a Type 3 belt. DJG argues that its petition was supported with similar dynamic test data demonstrating that the noncompliant tether webbing exceeded measured maximum tensile loads in dynamic testing. DJG also argues that the webbing would have satisfied the prior version of NHTSA's regulations for a Type 3 belt.

Finally, DJG asserts that compliance test results in connection with NHTSA's rulemaking on minimum breaking strength requirements (docket no. NHTSA–2005–21243–0002) demonstrate that DJG's tether webbing post-abrasion breaking strength was higher than the post-abrasion breaking strength for at least one Britax model in the marketplace at the time. DJG asserts that since this Britax webbing complied with the FMVSS No. 213 requirements, its noncompliant tether webbing with a post-abrasion tether breaking strength of more than two times that of the Britax webbing poses no safety risk.

Harness Webbing

DJG also argues that the harness webbing noncompliance is inconsequential to safety.

First, DJG argues that a xenon arc lamp is a better surrogate of sunlight

exposure than a carbon arc lamp, and that the carbon arc lamp is obsolete. DJG argues that while the webbing (made of nylon fabric) was noncompliant when exposed to carbon arc light filtered by a Corex-D filter (tested according to the standard's specifications), the harness webbing retained 93.5 percent of its initial breaking strength when it was exposed to a xenon arc lamp for 300 hours (3 times longer than that required by the standard). DJG also notes that FMVSS No. 205 specifies a xenon arc lamp to test glazing materials, and notes NHTSA's discussion of the use of xenon arc lamps in this context.

Second, DJG asserts that the breaking strength of its light-exposed harness webbing exceeded the corresponding harness loads in 30 mph sled tests. The median dynamic load in the 30 mph sled tests was 1,138 N, which DJG estimates corresponds to a load of 4,552 N in a 60 mph crash. DJG argues that this is virtually identical to the breaking strength of the exposed DJG webbing (4,539 N), and no child restraint is expected to afford protection in a 60 mph crash. DJG states that while NHTSA's initial decision stated that a 30 mph test is not indicative of the upper limit of safety, NHTSA granted three separate petitions in which a 30 mph dynamic test was wholly, or in part, stated as a reason for granting the petition.

Third, on December 26, 2008, DJG provided supplemental data from four used noncompliant child restraints showing that the harness webbing strength, after real world use, ranged from 8,665 N (1,948 pounds) to 11,000 N (2,473 pounds). DJG notes that all these values exceed 60 percent of the breaking strength of the original new harness webbing. DJG also references the 2006 rule's minimum breaking strength for new webbing and states that a post-exposure strength of 60 percent of this is allowable. DJG argues that this data shows that no safety problem exists.

Fourth, DJG maintains that its post-exposure webbing strength is greater than that of compliant Safeline webbing, which had low initial breaking strength. (NHTSA Docket 2005–21243–0002, Table 4). DJG argues that its webbing cannot pose a consequential risk to safety if webbing with a lower post-exposure strength is compliant.

Fifth, DJG argues that NHTSA's concerns about degradation are belied by an absence of consumer complaints.

V. Comments Submitted on the Notice of Appeal

In response to DJG's appeal, Joe Colella of Traffic Safety Projects commented that requiring the repair of child restraints that were manufactured more than 6 years ago conflicts with the consistent educational messaging that NHTSA and other organizations try to maintain regarding the use of older child restraints. NHTSA includes on its website a recommendation developed by child restraint manufacturers that a second-hand child safety restraint is recommended for use only if it is less than 6 years old. According to Mr. Colella, requiring the repair of these affected seats would potentially keep them in use for several more years, which the commenter believes could place child occupants at increased risk of injury. Mr. Colella also reiterates the comment made by Advocates, and states that NHTSA should fully evaluate whether there are real safety implications for the actual abraded or exposed webbing.

VI. NHTSA's Consideration of DJG's Inconsequentiality Petition

A. General Principles

Manufacturers may not sell motor vehicles or equipment unless they comply with the applicable motor vehicle safety standards. 49 U.S.C. 30112(a)(1). Manufacturers whose products fail to comply with these standards are normally required to conduct a safety recall under which they must notify owners, purchasers, and dealers of the noncompliance and provide a remedy without charge. 49 U.S.C. 30118–30120. A manufacturer may, however, petition for exemption from these notification and remedy requirements on the grounds that the noncompliance is inconsequential to motor vehicle safety. 49 U.S.C. 30118(d); 30120(h); 49 CFR 556.4(a). The petitioner bears the burden of demonstrating that the noncompliance is inconsequential to safety. *See General Motors Corp; Ruling on Petition for Determination of Inconsequential Noncompliance,* 69 FR 19897 (April 14, 2004) (NHTSA 2002–12366). NHTSA must publish a notice of the petition in the **Federal Register** and allow an opportunity for members of the public to present information, views, and arguments on the petition. § 556.5. An absence of opposing argument and data, however, does not require the agency to grant the petition. *General Motors Corp,* 69 FR 19899.

In order to demonstrate inconsequentiality, the petitioner must demonstrate that the noncompliance ''do[es] not create a significant safety risk.'' *Cosco, Inc.: Denial of Application for Decision of Inconsequential Noncompliance,* 64 FR 29408, 29409 (June 1, 1999) (NHTSA–98–4033). The relevant issue is whether an occupant who is affected by the noncompliance is likely to be exposed to a significantly greater risk than an occupant using a compliant vehicle or equipment. *GM Corp.,* 69 FR 19900; *Cosco, Inc.,* 64 FR 29409. The number or percentage of vehicles or equipment affected by the noncompliance is not relevant to the issue of consequentiality. *GM Corp.,* 69 FR 19900; *Cosco, Inc.,* 64 FR 29409. Further, a consequentiality petition is not the appropriate means to challenge the methodology of a specific test specified in a FMVSS, or to argue that the specified test is unreasonable because of a low likelihood of encountering, in actual use, the problem the test is designed to prevent. *Int'l Truck and Engine Corp.; Denial of Application for Inconsequential Noncompliance,* 68 FR 20043, 20044 (April 23, 2003) (NHTSA 2002–12005). The appropriate venue for such arguments is a petition for rulemaking to amend the current safety standard. *Id.*

The agency rarely grants inconsequentiality petitions for noncompliance with performance standards. *GM Corp.,* 69 FR 19899 (and decisions cited therein). *See also Cosco, Inc.,* 64 FR 29408. In *GM Corp.* the agency denied, in part, an inconsequentiality petition by GM regarding non-compliance with FMVSS No. 209. There, a number of models of seat belt retractors did not comply with the performance requirements pertaining to emergency locking. GM supported its petition with a risk analysis—which estimated that very few occupants would be exposed to noncomplying equipment—and with the results of dynamic tests. *Id.* at 19899. The agency found that the risk analysis was not compelling because ''the percentage of potential occupants that could be adversely affected by a noncompliance is irrelevant'' to the inconsequentiality analysis. *Id.* at 19900. The agency did, however, consider the dynamic test data provided by GM. GM used the tests to evaluate the safety-related performance of the compliant and noncompliant retractors. The agency found that for one class of vehicles in which certain noncompliant retractors were installed, there were extremely small differences between the compliant and noncompliant retractors with respect to seat belt payout and locking time. Since the noncompliant retractors did not expose a vehicle occupant to a significantly greater risk, the agency granted the petition with respect to retractors in that class of vehicles. However, for other retractors

in a different class of vehicles, there was a significant difference in the performance of the compliant and noncompliant retractors. Accordingly, the agency denied the petition with respect to retractors installed in that class of vehicles.

B. Assessment of DJG's Arguments in Support of Its Petitions

The agency has determined that DJG has not met its burden of persuasion that the noncompliances are inconsequential to safety. The agency is thus denying the appeals with respect to both the tether and harness webbing. The agency's reasons for the denial of each appeal are discussed below.

Tether Webbing

The agency finds that the arguments DJG reasserts from its original petition, as well as its new arguments, are unpersuasive.

DJG argues that the strength of the abraded webbing is sufficiently higher than reasonably foreseeable crash forces, since the strength of the abraded webbing as measured after the abrasion test exceeded both the loading on tethers observed in dynamic testing, and the break strength of the tether assembly (particularly the tether hook) as determined in tensile strength tests. DJG's argument amounts to an assertion that from a safety perspective, all that matters is whether webbing that has been subjected to the abrasion test is stronger than some minimum strength. This approach is inconsistent with the two-faceted regulatory structure that NHTSA adopted in the 2005–2006 rulemaking.

In the 2005–2006 rulemaking that amended FMVSS No. 213, NHTSA explicitly considered—and ultimately rejected—DJG's approach. The 2005 NPRM proposed amending FMVSS No. 213 so that webbing, before and after abrasion, would have to meet or exceed specified minimum breaking strengths. 70 FR 37732, 37739. As specified in the proposed rule, the regulatory gauge would be breaking strength. The agency ''tentative[ely] conclude[d]'' that the percent of strength requirement that had been in the rule up to that point was no longer necessary, and that holding abraded webbing to this minimum strength requirement was sufficient to ensure adequate webbing strength, and thus, safety. 70 FR 37732.

However, after receiving comments on this proposed rule, the agency concluded that the final rule should have two facets: It should retain the historical percent of strength requirement for abraded webbing, and add a minimum strength requirement for new webbing. *See* 49 CFR 571.213 S5.4.1.2(a), (b). One commenter that manufactures child restraints (Britax) pointed out that the proposed rule ''potentially permits a greater percentage of degradation'' and that this ''wider window of degradability'' could lead to an increased safety risk. 71 FR 32858. The agency concluded, in the final rule, that the proposed minimum strength requirement for abraded webbing ''did not sufficiently limit the degradation rate of webbing material and thus did not adequately fulfill the second of the agency's goals for the rulemaking.'' 71 FR 32858. As the agency explained, the fact that webbing has a particular strength after being subjected to the abrasion test does not mean that further degradation is not possible. *See* 71 FR 32858–32859. The abrasion test is intended to be a measure of material durability and performance, but, is ''not intended to and [does] not assess how strong a particular tested specimen will be at the end of its life.'' 71 FR 32859. Rather, the test is an accelerated aging test which measures how the webbing performs after prolonged—but not necessarily lifetime—exposure to environmental conditions. *Id.* Accordingly, the fact that the strength of the webbing, after being subjected to the abrasion test, exceeds the required or actual strength of the tether assembly or the tether loads observed in dynamic tests, is not dispositive. Over an entire lifetime of actual use the webbing strength could degrade to levels even lower than observed after the abrasion test, and the degradation rates are indicative of further degradation: ''Exceeding the degradation rates of the standard indicates a quality problem with the webbing material selection and raises concern that the webbing may not satisfactorily perform at the end of its product life as it did at the beginning, even if the exposed webbing has a breaking strength that is higher in magnitude than a competitor's webbing that met the percent-of-strength requirement.'' 71 FR 32859. Accordingly, the 2006 final rule retained the 75 percent of strength requirement for abraded webbing.

The noncompliant DJG webbing degraded to 55 percent of its unabraded strength in the abrasion test. The high degradation rate of the DJG webbing gives significant justification for concerns that the webbing could further abrade to the point where the webbing strength is lower than the tether anchor strength or the tether loads observed in dynamic tests, providing for an unsafe connection to the vehicle.[5]

DJG, in response to NHTSA's degradation concerns, asserts that most of the child restraints at issue are now more than seven years old and beyond their useful life. DJG adds that there have been no complaints of tether webbing abrasion or failure in crashes. DJG concludes in its appeal that this proves that the noncompliance of the tether and harness webbing is inconsequential to safety. Similarly, Mr. Colella argues that requiring recall of the noncompliant restraints would potentially keep them in use for several more years, perhaps placing children occupants at increased risk of injury.

The assertion by DJG that the majority of the subject noncompliant restraints are already beyond their useful life is essentially a claim that only a small number or percentage of child restraints actually in use would be noncompliant. This type of argument is not relevant to the inconsequentiality analysis. *See GM Corp.,* 69 FR 19899; *Costco, Inc.,* 64 FR 29408. Even assuming, however, that this assertion, if proved, would provide sufficient grounds for granting an inconsequentiality petition, the agency has concluded that DJG has not shown that the restraints could not and would not be used by a parent to restrain a child. Current industry practice is to place an expiration date on new child restraints. However, the noncompliant DJG child restraints lack such labeling so that a person owning a noncompliant DJG restraint might not be aware that the age of the restraint exceeded the recommended retirement age. Additionally, despite the recommendation of JPMA and consumer organizations for a 6 year useful lifespan, even consumers that hear

[5] DJG asserts that NHTSA has provided no evidence for its concern about webbing degradation. As NHTSA pointed out in the preamble to the 2006 final rule, the use of a degradation rate for material selection and performance is standard industry practice and is supported by the engineering literature. 71 FR 32858. And, more specifically, the 75% post-abrasion strength retention requirement, expressed as a percentage of the webbing's pre-abrasion strength, was based on ''an SAE standard (Motor Vehicle Seat Belt Assemblies SAE J4C, 1966) whose requirements were originally adopted into FMVSS No. 209, and subsequently into FMVSS No. 213.'' *Child Restraint Systems; Notice of proposed Rulemaking,* 70 FR 37733 (June 30, 2005) (NHTSA–2005–21243). There is also empirical evidence that webbing strength degrades after being exposed to the abrasion test. See Louise Robinson, Health and Safety Laboratory, Assessment of the effects of different types of abrasion on the tensile strength of safety harness and lanyard webbings (2007), at *http://www.hse.gov.uk/research/hsl_pdf/2007/hsl0712.pdf* (last visited Sept. 9, 2009) (study finding that webbing subjected to 5,000 cycles of the FMVSS No. 209 hexagonal bar abrasion test had lower tensile strength than webbing subjected to 1,000 cycles of the test).

about these recommendations might not heed them—particularly in tough economic times—and continue, instead, to use the noncompliant child restraints. In any event, NHTSA does not accept the assertion that an industry recommendation on product life span terminates a manufacturer's recall responsibilities.

DJG goes on to argue that not only are the noncompliant restraints past their ''useful lives,'' there also have been no complaints of tether webbing abrasion or failure during the entire time the restraints have been in use. NHTSA, however, does not consider the absence of complaints to show that the noncompliances are inconsequential to safety. The overall concern with the abrasion test is the degradation of the strength of the webbing. The degradation of the abraded tethers was very high. Particularly on older products, which may have been handed down, the absence of a complaint does not mean there have not been any problems or failures. And it does not mean that there will not be failures in the future.

DJG's comparison of the safety standard for tether webbing to the similar standard for vehicle seat belt webbing does not meet its burden. This argument challenges the reasonableness of the standard, and, as such, is inapt for an inconsequentiality petition. Child restraint manufacturers, such as DJG, had opportunity to challenge the incorporation of the FMVSS No. 209 requirements into FMVSS No. 213 during the rulemaking process and they did not. Even assuming that these arguments are relevant, the agency does not accept them. DJG's argument that it is unreasonable to subject CRS webbing to the same degradation requirement as seat belt webbing because the ''useful life'' of seatbelts is longer than that of the CRS webbing is unpersuasive because, as discussed above, the agency is not persuaded that the real-world use of the noncompliant child restraints will be limited to six years. DJG's related argument that the CRS webbing is subject to less-frequent use than seat-belt webbing is unpersuasive because it does not fairly address seat belt use and is unsupported. DJG focuses on the seat belt used by the driver, but ignores seat belts for other designated seating positions—such as passengers—which, if anything, are subject to less use than the driver's seat belt. DJG also ignores the fact that vehicle seat belt webbing is subject to the same abrasion test requirement in FMVSS No. 209 regardless of where the belt is located in the vehicle. The agency's vehicle seat belt webbing requirements do not vary based on probable use patterns; instead, because of the crucial safety function of the webbing, the agency subjects all vehicle webbing to the same high standard. Indeed, when the agency established FMVSS No. 213, it explicitly adopted some of the buckle and belt requirements of FMVSS No. 209 such as those relating to abrasion and resistance to light, and the adoption of these requirements was not opposed by any of the commenters. *Child Restraint Systems Seat Belt Assemblies and Anchorages: Final Rule,* 44 FR 72136 (Dec. 13, 1979). Additionally, DJG's argument that CRS webbing is subject to less-frequent use than is seat belt webbing, particularly in the case of the convertible restraints, ignores hand-me-down use of child restraints by children other than the first user.

DJG's arguments that, in actual use, the restraints are not subject to the severe abrasion reflected in the test, are also unavailing. These arguments challenge the validity of the test methodology in the standard; as noted above, a petition for rulemaking, not an inconsequentiality petition, is the appropriate means for such an argument. And, even if these arguments were relevant, the agency does not find them persuasive. NHTSA has examined the limited test data of used child restraints (between 6–9 years old) submitted by DJG, including the supplemental submission of December 26, 2008, and notes that although the restraints were from the affected population of noncomplying restraints, the precise history of their use is unknown. DJG did not make a showing that these restraints have seen many years of hard, real world use. Therefore, DJG's data showing that the tether webbing on these used restraints retained more than the minimum strength required by the standard for new webbing is not compelling evidence that the noncompliance is inconsequential to safety. The supplemental DJG data reflects substantial degradation. Of the 8 restraints tested, one (#7B) was 77 percent of the strength of new webbing (15,168 N [3,410 pounds]/19,803 N [4,452 pounds]) and another (#2B) was 78 percent of the strength of new webbing (15,489 N [3,482 pounds]/19,803 N [4,452 pounds]). The standard is 75 percent. DJG's other argument that the location and two-belt slide design of the tether guarantee that it is not exposed to abrasion in typical use is also unpersuasive. DJG did not provide any additional information or data to support this claim. Therefore, the agency finds this claim to be unsubstantiated. In addition, there have been complaints about tether webbing fraying.[6] These documented complaints undermine DJG's claim of the lack of abrasion during actual use.

DJG's argument that the tether's post-abrasion strength is inconsequential to safety because it is just 3 percent below what DJG calls the new ''effective minimum'' is also unpersuasive. The current standard contains a minimum breaking strength requirement for new webbing, and retains the pre-2006 standard's 75 percent-of-strength requirement. 49 CFR 571.213 S5.4.1.2 (2009). The percent-of-strength requirement is calculated as a percentage of the strength of the new (unabraded) tether, not as a percentage of the minimum breaking strength requirement. The current standard thus does not require or imply an ''effective minimum'' post-abrasion strength of 11,250 N.[7] The abraded DJG tether webbing retained only 55 percent of its unabraded breaking strength—20 percentage points below the allowable minimum. DJG's argument that the post-abrasion strength of its tether should be evaluated relative to the required minimum breaking strength ignores the safety concerns reflected in the standard—that a diminution in webbing strength of more than 25 percent when abraded in testing ''indicates a problem with the quality and/or durability of the selected material,'' such that the webbing ''may not last as long as necessary to protect children using the restraint (including for second-hand restraint use).'' 71 FR 32858–32859.

The agency's resolution of the Evenflo petition is not controlling, as it was based on dated considerations. *Evenflo Co., Inc.; Grant of Application for Decision of Inconsequential Noncompliance,* 67 FR 21798 (May 1, 2002) (NHTSA Docket 2000–7818). Prior to NHTSA's 2006 amendments to FMVSS No. 213, NHTSA granted an inconsequentiality petition by Evenflo regarding child restraint tether straps that did not comply with the abrasion test. The noncompliant webbing retained 67.1 percent of its unabraded strength. The child restraint performance requirements in effect at the time of this grant did not specify a minimum breaking strength requirement, and the agency, as it noted in its decision, had come to believe that the absence of such a requirement was inappropriate. 67 FR 21799. The agency

[6] *See* DJG letter to NHTSA dated August 24, 2001.

[7] In the 2005 NPRM, the agency did propose calculating the post-abrasion strength in this manner, but, in the 2006 final rule, explicitly declined to do so. Compare 70 FR 37734 with 71 FR 32858–32859.

also noted that it planned to initiate rulemaking to amend the standard. During this time frame when the agency had not resolved what strength would be required, the agency considered the Evenflo webbing in light of a version of FMVSS Nos. 213 and 209 in effect from 1971 to 1979 that included a minimum breaking strength requirement for child seat webbing. Evenflo's webbing would have complied with this earlier standard. The agency also considered the results of dynamic testing, which showed that the tensile strength of abraded Evenflo tethers was greater than the measured maximum tensile loads. After the Evenflo petition was granted, the agency initiated rulemaking to amend FMVSS No. 213. In the NPRM, the agency proposed to include a minimum breaking strength requirement for new (unabraded) tether webbing. 70 FR 37731. The agency also proposed replacing the percent of unabraded strength degradation requirement with a minimum breaking strength requirement for exposed webbing. 70 FR 37731. However, in its final rule the agency concluded that the proposed rule did not sufficiently limit the degradation rate of webbing material. Accordingly, the final rule retained the percent of unabraded strength degradation requirement.

The agency now considers DJG's inconsequentiality appeal in light of its safety concerns based on both the strength of the unabraded webbing and the percent of unabraded strength degradation requirement. It is thus inappropriate to apply the 1971–1979 version of the standard—which did not specify a percent of strength requirement based on the unabraded webbing—because the agency has concluded that exposed webbing should be required to maintain a minimum percentage of its unabraded strength. 71 FR 32858.

In any event, if DJG's noncompliant tethers were evaluated using the reasoning laid out in the resolution of the Evenflo petition, DJG's noncompliance would still not be inconsequential to safety. There are three main reasons for this.

First, DJG's tether webbing is not compliant if evaluated under the 1971–1979 FMVSS No. 213. From 1971–1979, FMVSS No. 213 required that child restraint webbing meet the webbing requirements for Type 3 seat belt assemblies [8] specified in FMVSS No. 209. During this period, FMVSS No. 209 specified webbing breaking strength requirements for various elements and configurations of Type 3 seat belt assemblies. FMVSS No. 213 required that child restraint webbing meet the post-abrasion strength requirement contained in FMVSS No. 209 S4.2(d). Section 4.2(d) specified that webbing retain a post-abrasion strength of not less than 75 percent of the minimum breaking strength required of new webbing for that particular type of belt assembly.[9] The minimum breaking strength requirements were specified in FMVSS No. 209 S4.2(b), which specified different new webbing minimum breaking strengths for each element and configuration of Type 3 seat belt assembly. The most stringent of these minimum breaking strength requirements for new webbing was 17,793 N [10] and the agency referenced this requirement in considering the Evenflo petition. Multiplying the 75 percent post-abrasion strength requirement with this most stringent new webbing strength requirement yields a post-abrasion strength requirement of 13,345 N. Evenflo's tether—with an unabraded strength of 20,426 N, and an abraded strength of 13,706 N—met both the abraded and unabraded strength requirements for this most stringent Type 3 webbing breaking strength under the 1971–1979 version of FMVSS No. 213.

DJG argues that its noncompliant tethers should be evaluated using the less stringent breaking strength requirement for the Type 3 seat belt configuration consisting of ''webbing connecting pelvic and upper torso restraint to attachment hardware when assembly has two or more webbing connections.'' S4.2(b) (1979). DJG notes that since its noncompliant restraints are not equipped with lower LATCH anchors,[11] they are secured to the vehicle by means of both the tether and vehicle safety belt, and that this less stringent requirement is therefore appropriate. The breaking strength requirement for new webbing having this Type 3 configuration was 3,000 pounds (13,345 N), and the post-abrasion strength requirement was 75 percent of this, or 2,250 pounds (10,008 N). DJG concludes that since its noncompliant tethers satisfy the less stringent abraded and unabraded strength requirements for this Type 3 configuration, the noncompliance is inconsequential to safety.

While we do not agree that the old Type 3 provisions are the appropriate frame of reference, if one were considered, the most stringent Type 3 requirement would be considered in reviewing DJG's restraint, as it was to Evenflo's. Since both Evenflo and DJG's noncompliant restraints pre-date LATCH, neither is equipped with lower anchors. *See* 49 CFR 571.225 S9.1 *et seq*. The restraints at issue in both petitions are therefore secured to the vehicle in the same manner—by means of the seat belt and tether. Since the restraints are attached to the vehicle in the same manner, a similar application of the Evenflo analysis to DJG's petition would require that the same—more stringent—strength requirement also be applied. As noted earlier, the post-abrasion strength requirement associated with the most stringent Type 3 webbing requirement was 13,345 N. Since the post-abrasion strength of DJG's tethers was only 10,903 N, they would not satisfy the prior standard.

Second, the agency notes that while Evenflo's noncompliant restraints retained 67 percent of their strength after being subjected to the abrasion test, DJG's restraints retained only 55 percent. This is a significant difference.

Third, for Evenflo, the sled tests alone were not sufficient to establish inconsequentiality—it was only in conjunction with the fact that the Evenflo tether webbing surpassed the previous requirements for Type 3 webbing in both the unabraded and abraded condition.

The performance of DJG's webbing is also distinguishable from that of a Britax restraint cited by DJG. DJG cited information docketed in connection with NHTSA's rulemaking to add a minimum breaking strength requirement to FMVSS No. 213, which showed that the webbing of at least one Britax child restraint model had a lower post-abrasion strength than DJG's noncompliant tethers. NHTSA–2005–21243–0002 (Table 1). NHTSA notes that the 2006 final rule amended FMVSS No. 213 to include a minimum breaking strength of 15,000 N for new webbing used to secure a child restraint

[8] A Type 3 seat belt assembly was defined as ''a combination pelvic and upper torso restraint for persons weighing not more than 50 pounds or 23 kilograms and capable of sitting upright by themselves, that is children in the approximate age range of 8 months to 6 years.'' FMVSS No. 209 S3 (1979).

[9] This specification of the post-abrasion strength requirement—in terms of the minimum breaking strength requirement—differs from the specification set out in the versions of FMVSS No. 213 in effect currently, and when DJG's noncompliant webbing was manufactured, which requires that post-abrasion strength be calculated as a percentage of the strength of the new (unabraded) webbing.

[10] This was the requirement for a Type 3 seat belt assembly with ''webbing in seat back retainer and for webbing connecting pelvic and upper torso restraints to attachment hardware when assembly has single webbing connection.'' FMVSS No. 209 S4.2(b) (1979). The standard was 4000 pounds. The conversion from pounds to Newtons is 1 pound force = 4.448 N.

[11] *See* FMVSS No. 213 S5.9(a) (2008); FMVSS No. 225 S9.1 (2008) *et seq*.

system to the vehicle (including the tether and lower anchorages of a child restraint anchorage system). In addition, the 2006 final rule affirmed that retaining control over webbing material degradation rates is critical to ensure sufficient webbing strength over time. The Britax child restraint referenced by DJG showed literally no signs of degradation after being abraded, and therefore does not present the same degradation risks associated with the subject DJG restraints. While the Britax CRS complied with the standard in effect at the time of manufacture, the DJG CRS neither complied with the standard in effect at the time of manufacture nor does it comply with the new requirements established in the 2006 Final Rule. The agency notes that in the course of the rulemaking that resulted in the 2006 Final Rule, the agency looked at tether webbing abrasion compliance test data for 20 child restraints. See NHTSA–2005–21243–0002. The average strength for new tether webbing was 17,153 N and the median was 18,156 N. The average strength for tether webbing after being subjected to the abrasion test was 15,689 N and the median was 16,287 N. The average percentage of strength retained was thus 92 percent, and the median was 96 percent. The noncompliant DJG webbing retained only 55 percent of its new webbing strength after the abrasion test—the lowest retention percentage of any of the 20 child restraints examined in these compliance tests. A concern with the DJG tether webbing is the high degradation in its breaking strength after the abrasion test. This lack of breaking strength retention signals a distinct probability that the webbing strength would be insufficient throughout a lifetime of use and therefore, may pose a safety risk with long term usage.

Harness Webbing

The agency finds similarly unpersuasive the arguments that DJG reasserts from its original petition, as well as its new arguments, regarding the inconsequentiality of the harness webbing noncompliance.

First, as to DJG's disagreement with NHTSA's reliance on a carbon arc lamp as provided by the standard, instead of a xenon arc lamp which DJG now prefers, NHTSA's regulations require and NHTSA's position is that the carbon arc light is to be used in exposure tests for webbing materials. As noted earlier, an inconsequentiality petition is not the appropriate means for challenging testing methodology. Nevertheless, as NHTSA noted in its initial denial, the use of xenon arc light, which is used in weathering tests of glazing material under FMVSS No. 205, and is favored by DJG, does not invalidate the use of carbon arc light for webbing materials. The xenon arc light has not been evaluated adequately by the agency to justify its use with respect to webbing materials. The agency does not have adequate testing information regarding the effect of xenon arc light on different webbing materials to develop an appropriate test while ensuring sufficient safety performance requirements are maintained. It is common for child restraint webbing to be produced from polyester or nylon materials. Preliminary studies of carbon arc and xenon arc light exposure testing of polyester and nylon webbing materials conducted by NHTSA showed that while carbon arc testing was more severe (i.e., resulted in higher strength degradation rates) for nylon webbing materials as compared to xenon arc testing, the opposite result was observed for polyester webbing materials. NHTSA can not simplistically conclude, as DJG would have it, that xenon arc light testing adequately assures safety. Carbon arc testing is specified in the standard and the agency continues to adhere to the standard for evaluation of webbing materials.[12]

Second, DJG's reliance on sled test results, which DJG refers to as dynamic tests, is also unavailing. In the course of the rulemaking that resulted in the 2006 rule, NHTSA looked at harness webbing compliance test data for 109 child seats, spanning several different manufacturers and years. 70 FR 37735–37736; Docket NHTSA–2005–21243–2. The average strength for new harness webbing was 13,519 N and the median was 12,594 N. The average strength for harness webbing after exposure to light was 11,287 N and the median was 10,636 N. The average percentage of strength retained was thus 83 percent, and the median was 84 percent. The noncompliant DJG harness webbing retained only 37 percent of its new webbing strength after exposure to light, falling from a pre-exposure strength of 12,371 N to a post-exposure strength of only 4,539 N. 60 percent was required. Even more, the DJG harness webbing's 37 percent retention was the lowest of any of the 109 different child seats examined in these compliance tests. Docket NHTSA–2005–21243–2. DJG offers dynamic test data at 30 mph. DJG has not shown that this data supports its contention that the noncompliant harness webbing does not pose a significant safety risk. Crucially, DJG's dynamic test analysis does not address the agency's concern with possible further loss in webbing strength with continued long term use. Moreover, DJG does not describe the deceleration pulse or measurement technique in the tests. DJG's argument that the noncompliant webbing is virtually strong enough to withstand crash forces even greater than those generated in a 30 mph crash is also flawed. DJG notes that the median load measured in its 30 mph dynamic tests (1,138 N) would yield a load of approximately 4,552 N in a 60 mph test, which is approximately the same as the post-light exposure webbing strength. DJG bases its 60 mph load calculations on the median measured webbing load. However, if the maximum measured load (1,432 N) is instead used to calculated the 60 mph-equivalent load, the resulting load (5,728 N) is, in fact, in excess of the post-exposure strength of the noncompliant webbing.

DJG cites NHTSA's granting of certain petitions for inconsequential noncompliance as supporting use of a 30 mph sled test. Those grants are not controlling.

The first petition, from Evenflo (67 FR 21799) was previously discussed. This petition was granted when safety concerns were not as developed as they are today (see discussion above). Also, the agency's grant focused on the fact that the noncompliant Evenflo webbing met the most stringent of the 1971–1979 Type 3 webbing strength requirements.

The second petition cited by DJG, also from Evenflo, concerned a noncompliance with the tether hook dimensional requirements of FMVSS No. 213. See 69 FR 39545. FMVSS No. 213 section 5.9(b) (2003) requires that the height of the tether hook shall not exceed 20 millimeters. The maximum Evenflo tether hook height measured by NHTSA was 20.38 millimeters. The dimensional requirements were intended to minimize the chances of incompatibility between the seat and the vehicle. 62 FR 7873. Evenflo supported its petition with testing evidence showing that actual users would not have difficulty attaching the tether hook to the anchorage, as well as the results 30 mph dynamic test data to show that there was no failure and the slight noncompliance in the tether hook dimension was inconsequential to motor vehicle safety. DJG's reliance on the agency's grant of the Evenflo petition is unpersuasive because the two noncompliances are dissimilar. There was no concern that the noncompliant Evenflo tether hook would degrade over time; thus, Evenflo's user test data, as

[12] DJG also argues that it is unable to purchase carbon arc lamps meeting NHTSA requirements. Carbon arc lights are available for purchase. One supplier is Atlas Material Testing, 4114 North Ravenswood Ave., Chicago, IL 60613.

well as the dynamic tests, sufficed to demonstrate inconsequential noncompliance. On the other hand, as discussed previously, one of the agency's concerns with DJG's noncompliant harness webbing is that it will further degrade over time so that its strength would be insufficient to withstand the forces in crashes. In addition, the Evenflo noncompliance involved a small—.38 millimeters, or 2 percent—dimensional difference between the compliant and non-compliant equipment; in contrast, the post-exposure strength of DJG's harness webbing was 23 percentage points less than the required minimum.

The third petition relied on by DJG came from Baby Trend regarding the head foam compression-deflection resistance (i.e., stiffness) in their rear facing infant seat. 69 FR 59302 (October 4, 2004). Baby Trend's head foam had a measured stiffness of 0.3 pounds per square inch. FMVSS No. 213 requires a head foam stiffness of between 0.5 and 10 pounds per square inch. Prior to NHTSA granting Baby Trend's petition, FMVSS No. 213 was amended to use a CRABI test dummy to directly measure Head Injury Criteria (HIC) in lieu of the head foam stiffness test. Baby Trend provided dynamic test data showing compliance with the new FMVSS No. 213 dynamic test requirements using the CRABI dummy. The noncompliance was determined inconsequential to safety. Thus, with the noncompliant head foam, the child restraint would comply with the requirement that became effective after the date on which Baby Trend's noncompliant head foam was manufactured. DJG's harness webbing, on the other hand, manufactured in 2002, is not compliant with FMVSS No. 213, as amended by the 2006 final rule. This final rule retained the percent-of-strength requirement, while adding a minimum breaking strength for new (unexposed) webbing. DJG's harness webbing does not satisfy the percent-of-strength requirement. Accordingly, DJG's petition is distinguishable from Baby Trend's petition.

Third, the argument advanced by DJG in its supplemental submission of December 26, 2008 that the strength of the harness webbing on certain used restraints shows that no safety problem exists is also unavailing. This argument essentially claims that the restraints are not subject to the severe degradation reflected in the compliance test; as such, it challenges the validity of the test methodology in the standard. However, as noted earlier regarding the tether webbing, a petition for rulemaking, not an inconsequentiality petition, is the appropriate means for such an argument. In any case, NHTSA has examined this limited test data on four restraints, and notes that although the webbing was from the affected population of noncomplying restraints, the precise history of their use is unknown. DJG did not provide evidence showing that these restraints have seen many years of exposure to sunlight. Therefore, DJG's data showing that the harness webbing on these used restraints retained more than the minimum strength required by the standard is not compelling evidence that the noncompliance is inconsequential to safety. DJG further suggests that the fact that the strength of the webbing on these used restraints exceeds 60 percent of the new webbing minimum breaking strength requirement of 11,000 N in the 2006 regulation also shows that the noncompliance is inconsequential to safety. This argument is similar to the argument DJG makes, in connection with its tether webbing appeal, that the standard adopted in 2006 instituted an ''effective minimum'' based on the minimum breaking strength requirement for new webbing. As discussed in detail above, the agency finds this argument unpersuasive.

Fourth, DJG's assertion that the noncompliance is inconsequential to safety because the post-exposure strength of its webbing was higher than that of certain Safeline child restraints that did comply with the exposure test, is similarly not persuasive. These Safeline restraints, manufactured from 2000–2002, had harness webbing post-exposure strengths ranging from 4,005 N to 5,563 N, and strength retentions between 62 percent to 81 percent. *See* Docket NHTSA–2005–21243–002. These restraints were required to comply with the version of FMVSS No. 213 in effect at the time these restraints were manufactured. As discussed previously, the version of FMVSS No. 213 in effect from 2000–2002 did not have a minimum breaking strength requirement for new webbing. Accordingly, these Safeline restraints complied with the standard because they retained at least 60 percent of their strength after being exposed to light, even though the strength of the new webbing was relatively low—and, would have been too low to have complied with the minimum breaking strength requirement that was added to the standard in 2006.

DJG points out that the post-exposure strength of its webbing was greater than the post-exposure strength of the Safeline webbing, and goes on to argue that the Safeline webbing was compliant because it had a low initial breaking strength. DJG cites this result as confirmation of its argument that the noncompliance of its harness webbing is inconsequential to safety. NHTSA does not find this argument persuasive. As discussed above, the 2006 rulemaking codified and highlighted the agency's two concerns regarding webbing strength—that it be sufficiently strong when new, and suffer limited diminution in strength after being exposed to environmental conditions such as light and abrasion. DJG's comparison of its noncompliant webbing to Safeline's compliant webbing addresses the agency's concern that new webbing be sufficiently strong, but does not address the agency's concerns about the degradation of DJG's webbing. While DJG points out that the Safeline webbing had a low initial breaking strength and that the post-exposure strength of its webbing was greater than that of Safeline's, this argument does not address NHTSA's concern that the extremely high degradation rate of DJG's webbing—almost double that of the Safeline webbing—indicates that the webbing strength could be insufficient throughout a lifetime of use and expose child occupants to a risk that increased with long-term usage. While it is true that the strength of the unexposed Safeline webbing would not comply with FMVSS No. 213 as amended in 2006, the fact that another manufacturer's webbing complied with a standard that the Agency later determined to insufficiently protect against certain safety risks does not excuse DJG's noncompliance. This is especially true when the amended version of the standard re-affirms the requirement—namely, the post-exposure percent-of-strength requirement—with which DJG's webbing was noncompliant.

Finally, as discussed above, the agency finds that the absence of consumer complaints is insufficient evidence of an inconsequential effect on safety of the webbing.

VII. Conclusion

After carefully considering the arguments presented on this matter, NHTSA has decided that the petitioner has not met its burden of persuasion in establishing that the noncompliances described are inconsequential to motor vehicle safety. Accordingly, Dorel Juvenile Group's appeal of NHTSA's decision on its inconsequential noncompliance petitions is hereby denied. This decision constitutes final agency action, and the petitioner has no further administrative review of NHTSA's denial.

(Authority: 49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.50 and 501.8).

Issued on: December 30, 2009.

Ronald L. Medford,

Acting Deputy Administrator.

[FR Doc. E9–31334 Filed 1–4–10; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–290 (Sub-No. 311X)]

Norfolk Southern Railway Company—Petition for Exemption—in Baltimore City and Baltimore County, MD

On December 16, 2009, Norfolk Southern Railway Company (NSR) filed with the Surface Transportation Board a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon its rail freight operating rights and freight service operations over a 13.26-mile dead-end segment (''Line'') of a line of railroad commonly known in recent years as the Cockeysville Industrial Track (''CIT''). The Line is located between railroad milepost UU–1.00 (located just north of Wyman Park Drive, formerly Cedar Avenue) and the end of the CIT line south of the bridge at railroad milepost UU–15.44 in the City of Baltimore and in Baltimore County, MD.

In addition to an exemption from the prior approval requirements of 49 U.S.C. 10903, NSR seeks exemption from 49 U.S.C. 10904 [offer of financial assistance procedures] and 49 U.S.C. 10905 [public use conditions]. In support, NSR states that, following abandonment of the freight service operating rights and freight service operations, the Line will remain in use for a public purpose as a passenger rail transit line of railroad operated by the Maryland Transportation Administration (MTA) and owned by the Maryland Department of Transportation (MDOT). This request will be addressed in the final decision.

The line does not contain Federally granted rights-of-way. Any documentation in NSR's possession concerning this matter will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line R. Co.–Abandonment–Goshen*, 360 I.C.C. 91 (1979).

By issuing this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by April 5, 2010.

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each OFA must be accompanied by a $1,500 filing fee. *See* 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use.[1] Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than [20 DAYS AFTER SERVICE DATE]. Each trail use request must be accompanied by a $250 filing fee. *See* 49 CFR 1002.2(f)(27).

All filings in response to this notice must refer to STB Docket No. AB–290 (Sub-No. 311X), and must be sent to: (1) Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001; and (2) James R. Paschall, Senior General Attorney, Norfolk Southern Railway Corporation, Three Commercial Place, Norfolk, VA 23510. Replies to NSR's petition are due on or before [20 DAYS AFTER SERVICE DATE].

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0238 or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis (SEA) at (202) 245–0305. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by SEA will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Other interested persons may contact SEA to obtain a copy of the EA (or EIS). EAs in these abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA will generally be within 30 days of its service.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

[1] In the petition, NSR states that it does not have a sufficient property interest in the right-of-way that NSR could convey to a third party for additional public use. NSR therefore claims that the Line's right-of-way property is not suitable for additional public use.

Decided: December 24, 2009.

By the Board.

Rachel D. Campbell,

Director, Office of Proceedings.

Andrea Pope-Matheson,

Clearance Clerk.

[FR Doc. E9–31041 Filed 1–4–10; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–290 (Sub-No. 311X)]

Norfolk Southern Railway Company—Petition for Exemption—in Baltimore City and Baltimore County, MD

On December 16, 2009, Norfolk Southern Railway Company (NSR) filed with the Surface Transportation Board a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon its rail freight operating rights and freight service operations over a 13.26-mile dead-end segment (''Line'') of a line of railroad commonly known in recent years as the Cockeysville Industrial Track (''CIT''). The Line is located between railroad milepost UU–1.00 (located just north of Wyman Park Drive, formerly Cedar Avenue) and the end of the CIT line south of the bridge at railroad milepost UU–15.44 in the City of Baltimore and in Baltimore County, MD.

In addition to an exemption from the prior approval requirements of 49 U.S.C. 10903, NSR seeks exemption from 49 U.S.C. 10904 (offer of financial assistance Procedures) and 49 U.S.C. 10905 (public use conditions). In support, NSR states that, following abandonment of the freight service operating rights and freight service operations, the Line will remain in use for a public purpose as a passenger rail transit line of railroad operated by the Maryland Transit Administration (MTA) and owned by the Maryland Department of Transportation (MDOT). This request will be addressed in the final decision.

The line does not contain federally granted rights-of-way. Any documentation in NSR's possession concerning this matter will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979).

By issuing this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by April 5, 2010.

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each OFA must be accompanied by a $1,500 filing fee. *See* 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use.[1] Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than January 25, 2010. Each trail use request must be accompanied by a $250 filing fee. *See* 49 CFR 1002.2(f)(27).

All filings in response to this notice must refer to STB Docket No. AB–290 (Sub-No. 311X), and must be sent to: (1) Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001; and (2) James R. Paschall, Senior General Attorney, Norfolk Southern Railway Corporation, Three Commercial Place, Norfolk, VA 23510. Replies to NSR's petition are due on or before January 25, 2010.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0238 or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis (SEA) at (202) 245–0305. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by SEA will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Other interested persons may contact SEA to obtain a copy of the EA (or EIS). EAs in these abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA will generally be within 30 days of its service.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

[1] In the petition, NSR states that it does not have a sufficient property interest in the right-of-way that NSR could convey to a third party for additional public use. NSR therefore claims that the Line's right-of-way property is not suitable for additional public use.

Decided: December 24, 2009.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. E9–31264 Filed 1–4–10; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

Release of Waybill Data

The Surface Transportation Board has received a request from John C. Martin Associates, LLC (WB10–014—12/08/09), for permission to use certain data from the Board's 2008 Carload Waybill Samples. A copy of this request may be obtained from the Office of Economics, Environmental Analysis, and Administration.

The waybill sample contains confidential railroad and shipper data; therefore, if any parties object to these requests, they should file their objections with the Director of the Board's Office of Economics, Environmental Analysis, and Administration within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

Contact: Scott Decker, (202) 245–0330.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. E9–31232 Filed 1–4–10; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Community Development Financial Institutions Fund

Proposed Collection; Comment Request

ACTION: Notice and request for comments.

SUMMARY: The U.S. Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed information collections, as required by the Paperwork Reduction Act of 1995, Public Law No. 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the Community Development Financial Institutions Fund (the CDFI Fund), an office within the Department of the Treasury, is soliciting comments concerning the Bank Enterprise Award (BEA) Program Awardee Reporting Form.

DATES: Written comments should be received on or before March 8, 2010 to be assured of consideration.

ADDRESSES: Direct all comments to Jodie Harris, Associate Program Manager, Community Development Financial Institutions Fund, U.S. Department of the Treasury, 601 13th Street, NW., Suite 200 South, Washington, DC 20005, by e-mail to *cdfihelp@cdfi.treas.gov* or by facsimile to (202) 622–7754. Please note that this is not a toll free number.

FOR FURTHER INFORMATION CONTACT: The BEA Program Awardee Reporting Form may be obtained from the BEA Program page of the CDFI Fund's Web site at *http://www.cdfifund.gov.* Requests for additional information should be directed to Jodie Harris, Associate Program Manager, Community Development Financial Institutions Fund, U.S. Department of the Treasury, 601 13th Street, NW., Suite 200 South, Washington, DC 20005, or call (202) 622–6355. Please note that this is not a toll free number.

SUPPLEMENTARY INFORMATION:

Title: Bank Enterprise Award (BEA) Program Awardee Reporting Form.

Abstract: The purpose of the BEA Program is to provide an incentive to insured depository institutions to increase their activities in the form of loans, investments, services, and technical assistance within distressed communities and provide financial assistance to community development financial institutions through grants, stock purchases, loans, deposits, and other forms of financial and technical assistance. Applicants submit applications and are evaluated in accordance with statutory and regulatory requirements (12 CFR part 1806). Beginning in the FY 2009 funding round, the CDFI Fund will require BEA awardees to use an amount equivalent to the BEA Award amount for BEA Qualified Activities, as defined in the BEA Program regulations. Awardees with awards over $50,000 will be required to report to the CDFI Fund on these Qualified Activities.

Current Actions: New collection.

Type of Review: Regular Review.

Affected Public: Insured depository institutions that receive a BEA Program award.

Estimated Number of Respondents: 40.

Estimated Annual Time per Respondent: 1 hour.

Estimated Total Annual Burden Hours: 40 hours.

Requests for Comments: Comments submitted in response to this notice will

be summarized and/or included in the request for Office of Management and Budget approval. All comments will become a matter of public record and will be published on the CDFI Fund Web site at *http://www.cdfifund.gov.* Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collections of information displays a valid OMB control number.

Authority: 12 U.S.C. 1834a, 4703, 4713, 4717; 12 CFR part 1806.

Dated: December 28, 2009.

Donna J. Gambrell,

Director, Community Development Financial Institutions Fund.

[FR Doc. E9–31332 Filed 1–4–10; 8:45 am]

BILLING CODE 4810–70–P

DEPARTMENT OF THE TREASURY

Community Development Financial Institutions Fund

Proposed Collection; Comment Request

AGENCY Department of the Treasury.

ACTION: Notice; correction.

SUMMARY: The Community Development Financial Institutions Fund (CDFI) published a document in the **Federal Register** on November 9, 2009, inviting comments for the continued collection of information under the CDFI Fund's Quarterly Institutional Level Report for Awardees under the American Recovery and Reinvestment Act of 2009. This document contained an incorrect reference.

Correction:

In the **Federal Register** of November 9, 2009, in FR Doc. E9–26872, on page 57735, in the second column, under **SUPPLEMENTARY INFORMATION**, make the following correction:

(1) Replace OMB Number ''1559–0035'' with ''1559–0033''.

Dated: December 29, 2009.

Donna J. Gambrell,

Director, Community Development Financial Institutions Fund.

[FR Doc. E9–31330 Filed 1–4–10; 8:45 am]

BILLING CODE 4810–70–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Designation of One Entity Pursuant to Executive Order 13438

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 13438 of July 17, 2007, ''Blocking Property of Certain Persons Who Threaten Stabilization Efforts in Iraq.''

DATES: The designation by the Secretary of the Treasury of the entity and individual identified in this notice pursuant to Executive Order 13438 is effective on December 22, 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/ofac*) or via facsimile through a 24-hour fax-on-demand service, tel.: 202/622–0077.

Background

On July 17, 2007, the President issued Executive Order 13438 (the ''Order'') pursuant to the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.,* the National Emergencies Act, 50 U.S.C. 1601 *et seq.,* and section 301 of title 3, United States Code. In the Order, the President declared a national emergency to address the threat to the national security and foreign policy of the United States posed by acts of violence threatening the peace and stability of Iraq and undermining efforts to promote economic reconstruction and political reform in Iraq and to provide humanitarian assistance to the Iraqi people.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, including any overseas branch, of the following persons: Persons who are determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Secretary of Defense, (1) to have committed, or to pose a significant risk of committing, an act or acts of violence that have the purpose or effect of threatening the peace or stability of Iraq or the Government of Iraq, or undermining efforts to promote economic reconstruction and political reform in Iraq or to provide humanitarian assistance to the Iraqi people; (2) to have materially assisted, sponsored, or provided financial, material, or technical support for, or goods or services in support of, such an act or acts of violence or any person whose property and interests in property are blocked pursuant to the Order; or (3) to be owned or controlled by, or to have acted or purported 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 December 22, 2009, the Secretary of the Treasury, in consultation with the Secretary of State and the Secretary of Defense, designated, pursuant to one or more of the criteria set forth in the Order, one entity whose property and interests in property are blocked pursuant to Executive Order 13438.

The designee is as follows:

JAYSH RIJAL AL-TARIQ AL-NAQSHABANDI (a.k.a. ARMED MEN OF THE NAQSHABANDI ORDER; a.k.a. NAQSHABANDI ARMY; a.k.a. ''AMNO''; a.k.a. ''JRN''; a.k.a. ''JRTN''), Iraq; Web site: *www.alnakshabandia-army.org; www.alnakshabndia-army.com* [IRAQ3]

Dated: December 22, 2009.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. E9–31313 Filed 1–4–10; 8:45 am]

BILLING CODE 4811–45–P

UNITED STATES INSTITUTE OF PEACE

Notice of Meeting

AGENCY: United States Institute of Peace.

DATE/TIME: Thursday, January 14, 2010, 9 a.m.–3:30 p.m.

LOCATION: 1200 17th Street, NW., Suite 200, Washington, DC 20036–3011.

STATUS: Open Session—Portions may be closed pursuant to Subsection (c) of Section 552(b) of Title 5, United States Code, as provided in subsection 1706(h)(3) of the United States Institute of Peace Act, Public Law 98–525.

AGENDA: January 14, 2010 Board Meeting; Approval of Minutes of the One Hundred Thirty-Fifth Meeting (October 13, 2009) of the Board of Directors; Chairman's Report; President's Report; Review of Major Achievements 2009; Budget and Congressional Updates; Updates on Afghanistan/Pakistan and Iraq; Other General Issues.

CONTACT: Tessie F. Higgs, Executive Office, Telephone: (202) 429–3836.

Dated: December 29, 2009.

Tara Sonenshine,

Executive Vice President, United States Institute of Peace.

[FR Doc. E9–31145 Filed 1–4–10; 8:45 am]

BILLING CODE 6820–AR–M

Federal Register

Tuesday,
January 5, 2010

Part II

Environmental Protection Agency

40 CFR Part 63

National Emission Standards for Hazardous Air Pollutants: Area Source Standards for Prepared Feeds Manufacturing; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2008–0080; FRL–9095–2]

RIN 2060–AO98

National Emission Standards for Hazardous Air Pollutants: Area Source Standards for Prepared Feeds Manufacturing

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is issuing national emission standards for control of hazardous air pollutants (HAP) for the Prepared Feeds Manufacturing area source category. The emissions standards for new and existing sources are based on EPA's determination as to what constitutes the generally available control technology or management practices for the area source category.

DATES: This final rule is effective on January 5, 2010.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2008–0080. All documents in the docket are listed in the Federal Docket Management System index at *http://www.regulations.gov.index*. Although listed in the index, some information is not publicly available, *e.g.*, confidential business information (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 form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the EPA Docket Center, Public Reading Room, 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.

FOR FURTHER INFORMATION CONTACT: Ms. Jan King, Outreach and Information Division, Office of Air Quality Planning and Standards (C404–05), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number: (919) 541–5665; fax number: (919) 541–7674; e-mail address: *king.jan@epa.gov*.

SUPPLEMENTARY INFORMATION: The supplementary information in this preamble is organized as follows:

I. General Information
A. Does This Action Apply to Me?
B. Where Can I Get a Copy of This Document?
C. Judicial Review
II. Background Information for This Final Rule
III. Summary of Changes Since Proposal
A. Applicability
B. Standards and Compliance Requirements
C. Reporting and Recordkeeping Requirements
D. Definitions
IV. Summary of Final Standards
A. What Are the Applicability Provisions and Compliance Dates?
B. What Are the Final Standards?
C. What Are the Compliance Requirements?
D. What Are the Notification, Recordkeeping, and Reporting Requirements?
V. Summary of Comments and Responses
A. Rulemaking Process
B. Applicability
C. Emission Standards
D. Inspections and Compliance Provisions
E. Reporting and Recordkeeping Requirements
F. Definitions
G. Impacts Assessment
H. Title V Requirements
VI. Impacts of the Final Standards
VII. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act

I. General Information

A. Does This Action Apply to Me?

The regulated categories and entities potentially affected by the final standards are prepared feeds manufacturers who add chromium compounds or manganese compounds to their product. In general, the facilities potentially affected by the rule are covered under the North American Industrial Classification System (NAICS) code listed in the following table.

Category	NAICS code [1]	Examples of regulated entities
Industry:		
Other Animal Foods Manufacturing	311119	Animal feeds, prepared (except dog and cat), manufacturing.

[1] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. To determine whether your facility would be regulated by this action, you should examine the applicability criteria in 40 CFR 63.11619 of subpart DDDDDDD (NESHAP for Area Sources: Prepared Feeds Manufacturing). If you have any questions regarding the applicability of this action to a particular entity, consult either the air permit authority for the entity or your EPA regional representative as listed in 40 CFR 63.13 of subpart A (General Provisions).

B. Where Can I Get a Copy of This Document?

In addition to being available in the docket, an electronic copy of this final action will also be available on the Worldwide Web (WWW) through EPA's Technology Transfer Network (TTN). A copy of this final action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/oarpg*. The TTN provides information and technology exchange in various areas of air pollution control.

C. Judicial Review

Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of this final rule is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit by March 8, 2010. Under section 307(b)(2) of the CAA, the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings

brought by EPA to enforce these requirements.

Section 307(d)(7)(B) of the CAA further provides that ''[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.'' This section also provides a mechanism for EPA to convene a proceeding for reconsideration, ''[i]f the person raising an objection can demonstrate to EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.'' Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

II. Background Information for This Final Rule

Section 112(d) of the CAA requires EPA to establish national emission standards for hazardous air pollutants (NESHAP) for both major and area sources of HAP that are listed for regulation under CAA section 112(c). A major source emits or has the potential to emit 10 tons per year (tpy) or more of any single HAP or 25 tpy or more of any combination of HAP. An area source is a stationary source that is not a major source.

Section 112(k)(3)(B) of the CAA calls for EPA to identify at least 30 HAP which, as the result of emissions from area sources, pose the greatest threat to public health in the largest number of urban areas. EPA implemented this provision in 1999 in the Integrated Urban Air Toxics Strategy, (64 FR 38715, July 19, 1999). Specifically, in the Strategy, EPA identified 30 HAP that pose the greatest potential health threat in urban areas, and these HAP are referred to as the ''30 urban HAP.'' Section 112(c)(3) requires EPA to list sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the emissions of the 30 urban HAP are subject to regulation. We implemented these requirements through the Integrated Urban Air Toxics Strategy (64 FR 38715, July 19, 1999). A primary goal of the Strategy is to achieve a 75 percent reduction in cancer incidence attributable to HAP emitted from stationary sources.

Under CAA section 112(d)(5), we may elect to promulgate standards or requirements for area sources ''which provide for the use of generally available control technologies or management practices (GACT) by such sources to reduce emissions of hazardous air pollutants.'' Additional information on GACT is found in the Senate report on the legislation (Senate Report Number 101–228, December 20, 1989), which describes GACT as:

> * * * methods, practices and techniques which are commercially available and appropriate for application by the sources in the category considering economic impacts and the technical capabilities of the firms to operate and maintain the emissions control systems.

Consistent with the legislative history, we can consider costs and economic impacts in determining GACT. This is particularly important when developing regulations for source categories, like this one, that have many small businesses, as defined by the Small Business Administration.

Determining what constitutes GACT involves considering the control technologies and management practices that are generally available to the area sources in the source category. We also consider the standards applicable to major sources in the same industrial sector to determine if the control technologies and management practices are transferable and generally available to area sources. In appropriate circumstances, we may also consider technologies and practices at area and major sources in similar categories to determine whether such technologies and practices could be considered generally available for the area source category at issue. Finally, as noted above, in determining GACT for a particular area source category, we consider the costs and economic impacts of available control technologies and management practices on that category.

We are promulgating these national emission standards in response to a court-ordered deadline that requires EPA to sign final rules establishing emission standards for two source categories listed pursuant to section 112(c)(3) and (k) by December 16, 2009 (*Sierra Club* v. *Johnson*, no. 01–1537, D.D.C., March 2006). We intend to publish a separate rulemaking in the **Federal Register** for the other source category due in December 2009.

III. Summary of Changes Since Proposal

This final rule contains several changes to the proposed rule as a result of public comments. The following sections present a summary of the changes to the proposed rule. We explain the reasons for these changes in detail in the summary of comments and responses (section V of this preamble).

A. Applicability

The final rule applies to any prepared feeds manufacturing facility that produces animal feed products (not including cat and dog feed products) and uses a material containing chromium or a material containing manganese. In light of questions raised concerning the scope of sources covered by this area source rule, we revised several definitions in the rule and added other definitions. The prepared feeds manufacturing area source category is identified by NAICS code 311119, ''Other Animal Food Manufacturing.'' This NAICS code includes establishments primarily engaged in manufacturing animal feed (except dog and cat) from ingredients, such as grains, oilseed mill products, and meat products. The NAICS definition also contains a list of over 40 specific animal feed processes that are included in the NAICS code. First, we added a definition of ''animal feed,'' and defined that term to include all of the products in NAICS code 311119. This definition also clarifies that dog and cat feed products are not considered animal feed, consistent with the NAICS definition. The final rule, therefore, applies not only to ''traditional'' feed products, but also to animal feed ingredients, supplements, premixes, concentrates, and other products included in the definition of NAICS code 311119. Second, we revised the definition of a ''prepared feed manufacturing facility'' to include the concept of ''primarily engaged.'' To meet the definition of a prepared feeds manufacturing facility, a facility must be ''primarily engaged'' in the production of animal feed. We identified that primarily engaged in the production of animal feed means that the animal feed makes up at least half of the facility's annual production of all products. The definition of prepared feed manufacturing facility explicitly states that facilities primarily engaged in feeding animals are not prepared feed manufacturing facilities. We also added definitions for ''a material containing chromium'' and ''a material containing

manganese.'' ''A material containing chromium'' is defined as any material that contains chromium in an amount greater than 0.1 percent by weight, and ''a material containing manganese'' is defined as any material that contains manganese in an amount greater than 1 percent by weight. We added a requirement to provide for the situation where a facility starts using a material containing chromium or manganese after the applicable compliance date. Specifically, facilities that are not subject to the rule but start adding materials containing chromium or manganese in the future become subject to the rule at the time they begin adding these HAP. While the rule does not apply to prepared feeds manufacturing facilities that do not use any materials containing chromium or manganese, we added provisions that make it clear that facilities that stop using all materials containing chromium and manganese at a later date are no longer subject to the rule.

B. Standards and Compliance Requirements

The final rule retains the specific housekeeping management practices discussed in the proposed rule. Those management practices must reduce dust (use industrial vacuum, remove dust from walls and ledges, keep doors shut). The only change we made to these provisions was to require that doors be kept shut except during normal ingress and egress, rather than the proposed requirement to keep doors shut ''as practicable.''

The final rule requires that a device be installed and operated at the loadout end of each bulk loader that loads products containing chromium or manganese to lessen fugitive emissions by reducing the distance between the loading arm and the truck or railcar. This is a change from the proposed requirements, which specified that ''drop filter socks'' be used on bulk loaders.

The final rule requires that emissions from the pelleting process at facilities with an average daily feed production level exceeding 50 tons per day (tpd) be collected and routed to a cyclone designed to achieve 95 percent or greater reduction in particulate matter (PM) emissions. This is a change from the proposed rule, which required a cyclone designed to achieve a 95 percent reduction in particulate matter emissions less than 10 microns in diameter (PM10). To demonstrate that your cyclone is designed to achieve a 95 percent reduction in PM emissions, the final rule provides three different options: (1) Manufacturer's specifications certifying that the cyclone is designed to achieve 95 percent PM reduction, (2) certification by a professional engineer or responsible official that the cyclone is designed to achieve a 95 percent reduction in PM emissions, or (3) a Method 5 performance test to demonstrate that the cyclone can achieve a 95 percent reduction in PM emissions.

The proposed rule required that the pressure drop across the cyclone be monitored to demonstrate that the device was in good condition and operating properly. The final rule expands the monitoring options to include other measures that indicate proper flow through the cyclone. Specifically, the final rule allows monitoring of inlet flow rate, inlet velocity, pressure drop, or fan amperage.

C. Reporting and Recordkeeping Requirements

The final rule requires that all sources that have an average daily feed production level of 50 tpd or less to keep production records. These facilities must also submit their initial average daily feed production level in the Notification of Compliance Status report.

We added recordkeeping and reporting requirements associated with the new options on demonstrating cyclone performance efficiency (certification by professional engineer or responsible official, or testing). We also added provisions that require facilities that discontinue the use of all materials containing chromium and manganese to notify the Agency that they are no longer subject to the rule.

D. Definitions

As discussed above, definitions for animal feed, a material containing chromium, a material containing manganese, and prepared feeds manufacturing facility were added or modified. The definition of filter drop sock was removed, as this term is no longer used in the final rule.

IV. Summary of Final Standards

A. What Are the Applicability Provisions and Compliance Dates?

Subpart DDDDDDD standards apply to each new or existing prepared feeds manufacturing facility that is an area source and uses a material containing chromium or a material containing manganese. A prepared feeds manufacturing facility is a facility where animal feed (as defined in the rule) makes up at least half of the facility's annual production of all products. A material containing chromium is any material that contains chromium in an amount greater than 0.1 percent by weight, and a material containing manganese is any material that contains manganese in an amount greater than 1 percent by weight.

All existing area source facilities subject to this rule are required to comply with the rule requirements no later than January 5, 2012. A new source is any affected source that commenced construction or reconstruction after July 27, 2009. All new sources are required to comply with the rule requirements by January 5, 2010 or upon startup, whichever is later.

Prepared feeds manufacturing facilities that do not use any materials containing chromium or manganese are not subject to this rule. If a facility starts using a material containing chromium or manganese after the applicable compliance date, they will be required to comply at the time that they start using such materials. Also, if a facility stops using all materials containing chromium and manganese, they are no longer subject to the rule and should notify EPA or the delegated authority of the change.

B. What Are the Final Standards?

The final requirements, which apply to all new and existing sources, consist of equipment standards and management practices. There are two general management practices that apply in all areas where materials containing chromium or manganese are stored, used, or handled. The first is to perform housekeeping measures to minimize excess dust that could contain chromium or manganese. The specific measures required by the rule are: (1) Use either an industrial vacuum system or manual sweeping to reduce the amount of dust, (2) at least once per month, remove dust from walls, ledges, and equipment using low pressure air or by other means, and then sweep or vacuum the area, and (3) keep doors shut except during normal ingress and egress.

The second general management practice is the requirement to maintain and operate all process equipment that stores, processes, or contains chromium or manganese in accordance with manufacturers' specifications and in a manner to minimize dust creation.

There are also requirements that are specific to certain areas of the plant or processes at all new and existing sources. These requirements are:

- For the storage area, all raw materials containing chromium or manganese must be stored in closed containers.

• For mixing operations, materials containing chromium or manganese must be added to the mixer in a manner to reduce emissions, and the mixer must be covered at all times when mixing is occurring, except when materials are being added.

• For bulk loading processes where prepared feeds products containing chromium or manganese are loaded into trucks or railcars, you must use a device at the loadout end of each bulk loader to lessen fugitive emissions by reducing the distance between the loading arm and the truck or railcar.

In addition to the above requirements that apply to all facilities, new and existing facilities with average daily feed production levels exceeding 50 tpd are required to install and operate a cyclone to reduce emissions from pelleting and pellet cooling operations. The average daily feed production level means the average amount of prepared feed product produced each operating day over an annual period. The initial determination of the average daily feed production level is based on the one-year period prior to the compliance date for existing sources, or the design rate for new sources. Subsequent average daily feed production levels are then determined annually and are based on the amount of animal feed product produced in the calendar year divided by the number of days in which the production processes were in operation. Facilities with average daily feed production levels of 50 tpd or less are required to submit production information in their Notification of Compliance Status report and keep records documenting their animal feed production levels.

For the pelleting operations at facilities with daily pelleting production levels exceeding 50 tpd, the final rule requires that PM emissions be collected and routed to a cyclone that is designed to achieve 95 percent or greater reduction in PM. There are three ways you can demonstrate that your cyclone is designed to achieve 95 percent reduction in PM: (1) Manufacturer specifications that certifying the cyclone is designed to achieve 95 percent reduction in PM emissions; (2) certification by a professional engineer or responsible official that the cyclone is designed to achieve a 95 or greater percent reduction in PM emissions; or (3) a one-time Method 5 performance test to demonstrate that the cyclone can achieve a 95 percent or greater reduction in PM emissions.

In addition, the final rule requires that you establish an operating parameter range that indicates proper operation of the cyclone and then monitor this parameter at least once per day. The specific parameters allowed to be monitored are inlet flow rate, inlet velocity, pressure drop, or fan amperage. The range that represents proper operation of the cyclone must be provided by the manufacturer, determined as part of the engineering calculations demonstrating the design efficiency, or determined based on monitoring conducted during the performance test.

The final rule also requires that you maintain the cyclone in accordance with manufacturer specifications. If manufacturer specifications are not available, you must develop and follow standard maintenance procedures.

C. What Are the Compliance Requirements?

For all new and existing sources, compliance with the final regulation is demonstrated through installation of the required equipment, adherence to the management practices specified in the rule, and keeping the required records and submitting the required notifications and reports described below.

To ensure that the cyclone for the pelleting and pellet cooling process is operated properly at facilities with average daily feed production levels exceeding 50 tpd, the final rule requires that the cyclone be inspected quarterly for corrosion, erosion, or any other damage that could result in air in-leakage, and that the inlet flow rate, inlet velocity, pressure drop, or fan amperage be monitored and recorded daily to ensure that it is being operated in accordance with specified proper operating range.

The final rule also requires that the devices required at the loadout end of a bulk loader to lessen fugitive emissions by containing the unloaded product within the device be inspected monthly to ensure that they are in good condition.

D. What Are the Notification, Recordkeeping, and Reporting Requirements?

All new and existing sources are required to comply with some requirements of the General Provisions (40 CFR part 63, subpart A), which are identified in Table 1 of the final rule. The General Provisions include specific requirements for notifications, recordkeeping, and reporting. Each facility is required to submit an Initial Notification and a one-time Notification of Compliance Status according to the requirements in 40 CFR 63.9 in the General Provisions. The Initial Notification, which is required to be submitted by affected sources not later than May 5, 2010, or 120 days after you become subject to the rule, whichever is later, must contain basic information about the facility and its operations. The Notification of Compliance Status, which is required to be submitted 120 days after the compliance date, must contain a statement that the source has complied with all relevant standards. The Notification of Compliance Status also must include the inlet flow rate, inlet velocity, pressure drop, or fan amperage range that constitutes proper operation of the cyclone used to reduce emissions from the pelleting and pellet cooling operations. Facilities not required to install and operate cyclones on their pelleting operations are required to submit documentation of their initial average daily feed production level.

The final rule requires that records be kept of all notifications of compliance. The rule requires that records be kept documenting each inspection of a cyclone and each inspection of a device at the loadout end of a bulk loader. It also requires that the daily reading of cyclone inlet flow rate, inlet velocity, pressure drop, or fan amperage be recorded. In addition, records are required of any actions taken in response to findings of the inspections or monitoring results outside the proper operating range. Facilities with average daily feed production levels of 50 tpd or less are required to keep records of the annual production and the number of days of operation.

The final rule includes the requirement to prepare, by March 1 of each year, and submit an annual compliance certification, a copy of which will need to be maintained on site. This report must contain a statement of whether the source has complied with all relevant standards and other requirements of the final rule. If a deviation from the standard occurred during the annual reporting period, or if an instance occurred where the cyclone inlet flow rate, inlet velocity, pressure drop, or fan amperage was outside of the proper operating range submitted in the Notification of Compliance Status report, this information is required to be included in the annual report and the report needs to be submitted to the EPA Administrator or the designated authority. All records are required to be maintained in a form suitable and readily available for expeditious review, and kept for at least five years, the first two of which must be onsite.

V. Summary of Comments and Responses

EPA received 16 public comment letters on the proposed rule. Five of these comment letters were requests for an extension to the comment period,[1] leaving 11 comment letters that provided comments on the proposed rule. These comments were received from industry representatives, trade associations, state agencies, and an environmental organization. Sections V.A through V.G of this preamble provide responses to the public comments received on the proposed NESHAP.

A. Rulemaking Process

Comment: Several commenters requested that the comment period be extended by 90 days. The commenters had concerns about the inputs to the impacts analysis and requested additional time to collect and provide factual information to the agency about the proposed rule's provisions and their potential impact.

Response: Due to a court-ordered deadline for promulgation of this rule (which at the time of proposal was November 16, 2009), we were unable to extend the comment period in response to these requests. Moreover, CAA section 307(d) requires that EPA provide a minimum of 30 days for public comment, and we provided that period for public comment. Furthermore, consistent with section 307(d), the proposed rule provided the public an opportunity to request a public hearing, and no party requested such a hearing. *See* 307(d)(5) (record remains open 30 days after the date of the public hearing).

Comment: One commenter expressed their concerns about the process that EPA used to develop its proposed national emission standard for prepared feeds manufacturers. The commenter believes that EPA did not provide ample due process in developing the proposed rule. The commenter pointed out that they requested a 90-day extension to the proposed rule's comment period so that accurate information could be obtained to respond to the assumptions and estimates made by the agency. In this request, the commenter indicated that they highlighted five major areas of the proposed rule in which they believed EPA lacked critical information that directly affects the provisions within the proposed rule and its impact on prepared feeds manufacturers. Since EPA denied their request for extension of the comment period, the commenter indicated that they were left with what they believe was an inappropriately short 30-day comment period to respond to a proposed rule that, if promulgated as drafted, would have very significant operational and economic impacts on prepared feeds manufacturers. While cognizant of EPA's court-ordered mandate to issue this national emission standard, the commenter believes that the agency's actions related to gathering industry information, timing of the proposed rule and its response to their request for extension of the comment period are not indicative of a constructive or meaningful rulemaking process.

Response: EPA complied with the requirements of 307(d) during this rulemaking process. We engaged industry prior to proposal by meeting and by telephone to discuss our rulemaking process and the information we intended to obtain through the 114 survey. EPA strongly disagrees with the commenters' assertion that EPA did not provide ample due process in developing the rule.

CAA 307(d) requires EPA to publish a notice of proposed rulemaking and provide a minimum of 30 days for the public to comment on the proposal, and EPA complied with this requirement. EPA also identified a date for public hearing, if such hearing was requested by any member of the public. No member of the public requested a hearing, and therefore, a public hearing was not held.

In conclusion, we believe that lines of communication with the industry were well established and open throughout the rulemaking process, and that the commenters had ample opportunity to participate.

B. Applicability

Comment: Two commenters stated that the rule should clarify that a prepared feeds manufacturing facility is a facility that produces feeds, and not a facility that manufactures feed ingredients. One of the commenters explained that although feed ingredient companies may predominantly manufacture ingredients for animal feed and be classified under the NAICS Code defining the Prepared Feeds Manufacturing source category (NAICS 311119), they may also produce feed ingredients for human and/or companion animal consumption.

Response: EPA would like to clarify that, in addition to facilities that produce animal feed, facilities that manufacture feed ingredients are part of the prepared feeds manufacturing area source category. The category was identified in the original section 112(k) emissions inventory through the use of the Standard Industrial Classification (SIC) code 2048, Prepared Feeds Manufacturing, except cat and dog feed. As noted by the commenter, the NAICS code that covers this area source category is 311119, which is equivalent to the SIC code used in the original source category definition. The SIC/NAICS code for the source category includes many segments of the prepared feed industry, including the production of feed ingredients. Specifically, in addition to many other segments of the industry, NAICS code 311119, and thus the prepared feeds manufacturing area source category, includes:

- Feed concentrates, animal, manufacturing;
- Feed premixes, animal, manufacturing;
- Feed supplements, animal (except cat, dog), manufacturing;
- Micro and macro premixes, livestock, manufacturing;
- Mineral feed supplements (except cat, dog) manufacturing; and
- Mineral supplements, animal (except cat, dog), manufacturing.

Therefore, since facilities that manufacture feed ingredients are subject to the rule, we did not make the change suggested by the commenter. We did, however, make changes to the applicability provisions and definitions to clarify the various segments of the prepared feeds industry that are included in the source category and, therefore, subject to the rule (provided they use chromium or manganese). These changes include adding a definition of ''animal feed,'' which includes a list of all the products included under NAICS code 311119. While we recognize that chromium and manganese are not used in the production of many of the animal feed products in the definition, we believe that a complete listing eliminates the confusion of what types of processes are included in the source category. We would point out, however, that, even if a facility produces a listed animal feed product (*e.g.,* earthworm feed and bedding), it is not subject to the rule if no chromium or manganese is used.

One of the commenters raised the issue of a facility that produces a product covered by the rule along with other similar products that would not be covered by the rule. Specifically, the commenter mentions a facility that produces animal feed ingredients along with feed ingredients for humans and/or cats and dogs. First, the NAICS code only includes establishments ''primarily engaged in'' manufacturing animal feed.

[1] We denied the requests for extension by letter, copies of which are in the docket. These letters explain the reasons for the denial. These reasons are also provided in section V.A.

We have revised the definition of ''prepared feed manufacturing facility'' to incorporate this concept. Specifically, the final rule contains the following definition.

Prepared feeds manufacturing facility means a facility that is primarily engaged in manufacturing animal feed. A facility is primarily engaged in manufacturing animal feed if the production of animal feed comprises greater than 50 percent of the total production of the facility on an annual basis. Facilities primarily engaged in raising or feeding animals are not considered prepared feeds manufacturing facilities.

Thus, a facility would be a prepared feeds manufacturing facility subject to the rule if the animal feed ingredients (not including ingredients for dog, cat, or human feed) make up more than half of its production. In addition, the final rule specifies that an affected source at a prepared feeds manufacturing facility only includes the collection of equipment and activities necessary to produce animal feed containing chromium or manganese. Therefore, if the ingredients for human and/or dog and cat feed at a facility primarily engaged in manufacturing animal feed were produced in equipment that is never used to produce ''animal feed,'' those production processes would not be part of the affected source and would not be subject to the requirements in the rule. While not specifically mentioned by the commenters, consideration of these applicability issues, along with comments related to the number of facilities in the source category, caused us to clarify that prepared feeds manufacturing at farms and animal feed lots is not part of this source category. Facilities ''primarily engaged'' in raising or feeding animals are listed under different NAICS codes (*e.g.,* 112210—Hog and Pig Farming, 112112—Cattle Feedlots, 112111—Beef Cattle Ranching and Farming) and were not part of the sources that formed the basis for the listing of the prepared feed manufacturing area source category.

Comment: Five commenters stated that the rule should only apply to prepared feeds manufacturing facilities that use or emit chromium compounds or manganese compounds above a specified threshold. The commenters claimed that such an approach would focus attention on facilities that are more significant emitters of chromium and manganese and will avoid requiring extremely small facilities to comply with the rule with little environmental benefit. The commenters suggested several different threshold levels. One commenter recommended a threshold based on established Superfund Amendments and Reauthorization Act of 1986 (SARA) Tier II threshold quantities (10,000 pounds per year), while another suggested 2,000 pounds per year based on levels determined to be insignificant under the title V program. Another commenter noted that Toxics Release Inventory (TRI) regulations require a covered facility to report only if it manufactures or processes non-exempt chromium and/or manganese compounds in quantities exceeding 25,000 pounds per year, and suggested that a threshold be established at this 25,000 pounds per year level. Still another commenter suggested a level of 1,000 pounds per day. One of the commenters recommended that, if such a threshold is established, compounds having a concentration of less than 1 percent of the chromium compounds or manganese compounds need not be counted by a facility when determining whether it has used a sufficient quantity to reach the threshold use level that establishes whether a facility is subject to the rule's provisions.

Response: Although several commenters advocated for a usage threshold for chromium compounds and manganese compounds, below which a facility would be exempt, we are not adopting any exemptions. Prepared Feeds Manufacturing is one of the area source categories needed to meet the section 112(c)(3) requirement that we subject to regulation, (*i.e.,* area source categories representing 90 percent of the emissions of chromium and manganese). We reviewed the listing decision for this area source category and did not identify any information suggesting that small sources were not included in the listing decision. As such, we do not believe we can satisfy our requirement to regulate sources representing 90 percent of the emissions of Prepared Feeds Manufacturing urban HAP unless we subject all sources that emit those HAP to the rule.

We recognize that the Prepared Feeds Manufacturing source category is comprised of a large number of relatively small facilities. Although area sources individually may be considered low-emitting sources, collectively, they are not. The commenter's suggestion fails to address the requirement of section 112(c)(3), and, as discussed above, we previously determined that we need to subject the Prepared Feeds Manufacturing area source category to regulations in order to meet the requirement that EPA regulate area sources accounting for 90 percent of the emissions of the 30 urban HAP.

Comment: One commenter suggested that the applicability be changed to only include facilities that utilize pelletizing operations. The commenter noted that this would more adequately match the original group of prepared feeds manufacturers who were surveyed and those in the same class. The commenter also pointed out that the pelleting and pellet cooling process is the most significant source of pollutants, as it is estimated to emit 90 percent or more of the total chromium and manganese.

Response: The basis for the listing of the area source category was not limited to emissions from pelleting. Thus, we conclude that the applicability should remain as proposed.

C. Emission Standards

1. General

Comment: One commenter stated that EPA based the proposed standard on erroneous and misguided assumptions and estimates of emissions of chromium compounds and manganese compounds. This commenter had numerous objections to the impacts analyses (*see* section V.G) and how these analyses impacted EPA's decision to regulate this category and specific emission points.

Response: In section 112(c)(3) of the CAA, EPA is required to list ''sufficient categories or subcategories of area sources to ensure that area source representing 90 percent of the emissions of the 30 urban HAP are subject to regulation.'' An area source emissions inventory was compiled for each of the 30 urban HAP and the area source categories identified that comprised 90 percent of the emissions of each of these HAP. For the prepared feeds manufacturing source category, this inventory was based on data from the 1990 TRI. The TRI is an EPA inventory of annual emissions self-reported by industry. Based on this information, EPA determined that chromium compounds emissions and manganese compounds emissions from prepared feeds manufacturing area sources needed to be regulated to achieve the 90 percent requirement in CAA section 112(c)(3). Therefore, the decision to regulate emissions of chromium compounds and manganese compounds from the prepared feeds manufacturing industry was based on emissions data *submitted directly by the industry.* The information and analyses referred to by the commenter were prepared to evaluate potential impacts of regulatory options. This information had no bearing on the basic decision to develop regulations for the prepared feeds manufacturing area source category.

The commenter is also incorrect with respect to how emission points were identified for regulation. They assume that the information compiled for the

impacts analyses was used as the basis to identify emission points for regulation. Rather, chromium and manganese emission points were identified primarily based on information submitted directly by the industry. Specifically, we conducted a survey of the industry, and responses were received for over 100 prepared feeds manufacturing facilities. In the responses to this survey, prepared feeds manufacturing facilities identified potential emission sources and reported controls and management practices that were being used. This information formed the basis for the decisions regarding the emission points and process areas for which standards were proposed.

In conclusion, the commenter raised several issues on the impacts analyses (*see* section V.G below). However, the issues associated with these analyses did not influence the basic decision to regulate this source category or the decisions on the specific emission sources that would be regulated.

Comment: One commenter asserted that, ''* * * The legislative history of § 112 explains that Congress intended GACT standards to reflect 'methods, practices and techniques which are commercially available and appropriate for application by sources in the category considering economic impacts and technical capabilities of the firms to operate and maintain emission control systems'.''

The commenter also asserted that, although EPA used its discretion to issue GACT standards and that § 112(d)(5) authorizes EPA to do so, that decision is subject to administrative law requirements. The commenter asserted that EPA's decision is arbitrary and capricious because that decision was not supported with a rational explanation.

Response: As the commenter recognizes, in CAA section 112(d)(5), Congress gave EPA explicit authority to issue alternative emission standards for area sources. Specifically, CAA section 112(d)(5), which is entitled ''Alternative standard for area sources,'' provides:

> With respect *only* to categories and subcategories of area sources listed pursuant to subsection (c) of this section, the Administrator *may,* in lieu of the authorities provided in paragraph (2) and subsection (f) of this section, elect to promulgate standards or requirements applicable to sources in such categories or subcategories which provide for the use of generally available control technologies or management practices by such sources to reduce emissions of hazardous air pollutants.

See CAA section 112(d)(5) (*Emphasis added*).

There are two critical aspects to CAA section 112(d)(5). First, CAA section 112(d)(5) applies only to those categories and subcategories of area sources listed pursuant to CAA section 112(c). The commenter does not dispute that EPA listed the area source category noted above pursuant to CAA section 112(c)(3). Second, CAA section 112(d)(5) provides that, for area sources listed pursuant to CAA section 112(c), EPA ''*may, in lieu of*'' the authorities provided in CAA section 112(d)(2) and 112(f), elect to promulgate standards pursuant to CAA section 112(d)(5). CAA Section 112(d)(2) provides that emission standards established under that provision ''require the maximum degree of reduction in emissions'' of HAP (also known as maximum achievable control technology or MACT). CAA section 112(d)(3), in turn, defines what constitutes the ''maximum degree of reduction in emissions'' for new and existing sources. *See* CAA section 112(d)(3).[2] Webster's dictionary defines the phrase ''in lieu of'' to mean ''in the place of'' or ''instead of.'' *See* Webster's II New Riverside University (1994). Thus, CAA section 112(d)(5) authorizes EPA to promulgate standards under CAA section 112(d)(5) that provide for the use of GACT, *instead of* issuing MACT standards pursuant to CAA section 112(d)(2) and (d)(3). The statute does not set any condition precedent for issuing standards under CAA section 112(d)(5) other than that the area source category or subcategory at issue must be one that EPA listed pursuant to CAA section 112(c), which is the case here.[3]

We disagree with the commenter's assertion that we must provide a rationale for issuing GACT standards under section 112(d)(5), instead of MACT standards. Had Congress intended that EPA first conduct a MACT analysis for each area source category, Congress would have stated so expressly in section 112(d)(5). Congress did not require EPA to conduct any MACT analysis, floor analysis or beyond-the-floor analysis before the Agency could issue a section 112(d)(5) standard. Rather, Congress authorized EPA to issue GACT standards for area source categories listed under section 112(c), and that is precisely what EPA has done in this rulemaking.

Although EPA has no obligation to justify why it is issuing a GACT standard for an area source category as opposed to a MACT standard, we did explain at proposal that being able to consider costs and economic impacts is important when establishing standards for a category like this with many small sources. Furthermore, EPA must set a GACT standard that is consistent with the requirements of CAA section 112(d)(5) and have a reasoned basis for its GACT determination. As explained in the proposed rule and below. The legislative history supporting section 112(d)(5) provides that GACT is to encompass:

> ''* * * methods, practices and techniques which are commercially available and appropriate for application by the sources in the category considering economic impacts and the technical capabilities of the firms to operate and maintain the emissions control systems.''

The discussion in the Senate report clearly provides that EPA may consider costs in determining what constitutes GACT for the area source category. Congress plainly recognized that area sources differ from major sources, which is why Congress allowed EPA to consider costs in setting GACT standards for area sources under section 112(d)(5), but did not allow that consideration in setting MACT floors for major sources pursuant to section 112(d)(3). This important dichotomy between section 112(d)(3) and section 112(d)(5) provides further evidence that Congress sought to do precisely what the title of section 112(d)(5) states, *i.e.*, provide EPA the authority to issue ''alternative standards for area sources.''

Notwithstanding the commenter's claim, EPA properly issued standards for the area source categories at issue here under section 112(d)(5), and in doing so provided a reasoned basis for its selection of GACT for these area source categories. As explained in the proposed rule, EPA evaluated the control technologies and management practices that reduce HAP emissions at Prepared Feeds Manufacturing area source facilities. In its evaluation, EPA used information on pollution

[2] Specifically, CAA section 112(d)(3) sets the minimum degree of emission reduction that MACT standards must achieve, which is known as the MACT floor. For new sources, the degree of emission reduction shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source, and for existing sources, the degree of emission reduction shall not be less stringent than the average emission limitation achieved by the best performing 12 percent of the existing sources for which the Administrator has emissions information. CAA Section 112(d)(2) directs EPA to consider whether more stringent emission reductions (so called beyond-the-floor limits) are technologically achievable considering, among other things, the cost of achieving the emission reduction.

[3] CAA Section 112(d)(5) also references CAA section 112(f). *See* CAA section 112(f)(5) (entitled ''Area Sources'' and providing that EPA is not required to conduct a review or promulgate standards under CAA section 112(f) for any area source category or subcategory listed pursuant to CAA section 112(c)(3), and for which an emission standard is issued pursuant to CAA section 112(d)(5)).

prevention from industry trade associations, and reviewed operating permits to identify the emission controls and management practices that are currently used to control volatile and particulate HAP emissions. We also considered technologies and practices at major and area sources in similar categories.

Finally, even though not required, EPA did provide a rationale for why it set a GACT standard in the proposed rule. In the proposal, we explained that the facilities in the source categories at issue are already well controlled for the urban HAP for which the source category was listed pursuant to section 112(c)(3). Consideration of costs and economic impacts proves especially important for the well-controlled area sources at issue in this final action. Given the current, well controlled emission levels, a MACT floor determination, where costs cannot be considered, could result in only marginal reductions in emissions at very high costs for modest incremental improvement in control for the area source category.

Comment: One commenter questioned why EPA was not considering regulation for all HAP emissions. The commenter explained that, as documented in the record for this rulemaking, that Prepared Feed Manufacturing facilities often generate emissions other than manganese, such as arsenic and arsenic compounds, benzene, beryllium and beryllium compounds, cadmium and cadmium compounds, chlorine, cobalt and cobalt compounds, formaldehyde, hexane, hydrochloric acid, hydrogen fluoride, lead and lead compounds, mercury and mercury compounds, naphthalene, nickel and nickel compounds, polycyclic organic matter, selenium and selenium compounds, and toluene. The commenter acknowledged that management practices and PM controls required by the rule will likely reduce other metal HAP emissions to some degree; however they indicated that the Agency failed to quantify this benefit. The commenter also indicated that EPA should consider controls for other HAPs that will not be co-controlled with the manganese and chromium.

Response: Section 112(k)(3)(B) of the CAA requires EPA to identify at least 30 HAP emitted from area sources that pose the greatest threat to public health in the largest number of urban areas (the ''Urban HAP'') and identify the area source categories emitting such pollutants that are or will be listed pursuant to section 112(c)(3). Section 112(c)(3), in relevant part, provides:

> The Administrator shall * * *, pursuant to subsection (k)(3)(B) of this section, list, based on actual or estimated aggregate emissions of a listed pollutant or pollutants, sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas are subject to regulation under this section.

Thus, section 112(c)(3) requires EPA to list sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source emissions of the 30 urban HAP are subject to regulation. Section 112(d)(1) requires the Administrator to promulgate regulations establishing emissions standards for each area source category of HAP listed for regulation pursuant to section 112(c).

EPA identified the 30 Urban HAP that posed the greatest threat to public health in the Integrated Urban Air Toxics Strategy (Strategy). In the Strategy and subsequent **Federal Register** notices, EPA listed the area source categories necessary to meet the 90 percent requirement in section 112(c)(3) and (k)(3)(B), and one of those categories was the Prepared Feeds Manufacturing area source category.

We have interpreted sections 112(c)(3) and 112(k)(3)(B) together to require EPA to regulate only those Urban HAP emissions for which an area source category is listed pursuant to section 112(c)(3), not all urban HAP or all section 112(b) HAP emitted from a listed area source category. As stated above, section 112(k)(3)(B) addresses the strategy to control HAP from area sources in urban areas and the focus of the strategy as it relates to control of area sources is on the 30 HAP that pose the greatest threat to public health in the largest number of urban areas. Section 112(c)(3) specifically references section 112(k)(3)(B) as the basis for selecting area sources for listing to satisfy the Agency's responsibility for regulating urban HAP emissions from area sources. Under these provisions, area sources categories are listed because they emit one or more of the 30 listed Urban HAP and the Agency has identified the category as one that is necessary to satisfy the requirement to subject area sources representing 90 percent of the area source emissions of the 30 urban HAP to regulation.

EPA listed the Prepared Feeds Manufacturing area source category pursuant to sections 112(c)(3) and 112(k)(3)(B). We must regulate only the chromium and manganese emissions from the Prepared Feeds Manufacturing area source category, as these are the urban HAP emissions for which the category was listed to meet the 90 percent requirement in sections 112(c)(3) and (k)(3)(B). *See* 112(c)(3) (EPA must ''ensure that area sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants * * * are subject to regulation.''). We recognize that the source category emits other section 112(b) HAP, including other urban HAP; however, as stated above, sections 112(c)(3) and 112(k)(3)(B) do not require the Agency to regulate the area source category for any HAP other than those for which the category was listed. As to the other urban HAP emitted from this category, we have identified other area source categories that emit these urban HAP and subjecting those area source categories to regulation will satisfy the requirement to subject to regulation area sources that account for 90 percent of the area source emissions of those urban HAP.

While the Agency is not required to regulate all section 112(b) HAP from area sources listed pursuant to section 112(c)(3) and 112(k)(3)(B), section 112 of the CAA does not preclude EPA from regulating other HAP from these area sources at our discretion and in appropriate circumstances. Section 112(d)(5) states that, for area sources listed pursuant to section 112(c), the Administrator may, in lieu of section 112(d)(2) ''MACT'' standards, promulgate standards or requirements ''applicable to sources'' which provide for the use of GACT or management practices ''to reduce emissions of hazardous air pollutants.'' This provision does not limit EPA's authority to regulate only those urban HAP emissions for which the category is needed to achieve the 90 percent requirement in sections 112(k)(3)(B) and 112(c)(3). In fact, in two other area source rules, in addition to regulating the urban HAP that were necessary to satisfy the 90 percent requirement in sections 112(k)(3)(B) and 112(c)(3), we regulated additional section 112(b) HAP. Specifically, in the chemical manufacturing area source rule and the paint and allied products area source rule, although not required, we exercised our discretion to regulate other section 112(b) HAP beyond the urban HAP for which the categories were listed under section 112(c)(3) and (k)(3)(B), including non-urban section 112(b) HAP. The chemical manufacturing area source rule and the paints and allied products area source rule both involve specific circumstances which EPA believes justify regulating organic and metal section 112(b) HAP in

addition to the specific urban HAP needed to meet the 90 percent requirement in section 112(c)(3) and (k)(3)(B), which served as the basis for the listing of the categories. In the chemical manufacturing area source rule, which establishes standards for 9 area source categories, we regulated such HAP because the emission standards designed to control the urban HAP for which the categories were listed were equally effective at removing other urban and non-urban metal and organic HAP, and demonstrating compliance for total HAP was less burdensome than demonstrating compliance for speciated HAP for those sources required to install add-on controls. In the paint and allied products area source rule, we included emission standards for HAP beyond the urban HAP for which the category was listed because the emission standards designed to control those urban HAP would also control other urban and non-urban metal and organic HAP.

In conclusion, we believe that we have appropriately exercised our discretion in regulating only the chromium and manganese emissions from the prepared feeds manufacturing area source category. Therefore, we did not make any changes in the final rule based on this comment.

2. Housekeeping Management Practices

Comment: One commenter claimed that the Agency's proposed housekeeping practices are ''overreaching,'' ''unfounded,'' and ''unnecessary.'' The commenter believed that EPA had no basis for correlating housekeeping practices with ambient air concentrations of chromium compounds or manganese compounds.

The commenter also had concerns with regard to two of the specific plant-wide housekeeping requirements proposed. The commenter argued that the requirement that dust be removed from walls, ledges and equipment at least once per month is not performance-orientated and fails to consider individual facility operations or existing management practices. The commenter also disagreed with the Agency's assertion that air flow through open doors 'stirs-up' dust and causes chromium compounds and manganese compounds to be emitted into the atmosphere. Therefore, the commenter opposed the proposed requirement that affected facilities keep doors shut, as practicable. In addition, the commenter also expressed concern over the facilities ability to comply with this requirement as they questioned what would be the parameters set/used to determine that having a door shut is not practicable.

The commenter noted that prepared feeds manufacturing facilities already comply with Occupational Safety and Health Administration's (OSHA) Grain Handling Standard (29 CFR 1910.272) and the Food and Drug Administration's (FDA's) Current Good Manufacturing Practices (CGMPs) for Medicated Feeds (21 CFR part 225), and that they are regularly inspected by Federal and State authorities. Because of this, the commenter believed that EPA's proposed housekeeping practices are unnecessary. The commenter provided more detailed descriptions of these two programs.

> Occupational Safety and Health Administration's (OSHA) Grain Handling Standard (29 CFR 1910.272): This standard requires facilities to ''develop and implement a written housekeeping program that establishes the frequency and method(s) determined best to reduce accumulations of fugitive grain dust on ledges, floors, equipment and other exposed surfaces'' throughout the entire facility. OSHA's housekeeping requirements are performance-oriented, allowing facilities the flexibility to design housekeeping programs to achieve compliance through methods that are most effective for individual facilities and operations.
>
> FDA's Current Good Manufacturing Practices (CGMPs) for Medicated Feeds (21 CFR 225): The vast majority of prepared feed manufacturers are mandated to comply with CGMPs that require buildings and equipment be maintained and kept in a reasonably clean and orderly manner to avoid the potential adulteration of feed products. Regarding this provision, FDA's compliance program guidance states, ''Accumulated dust or residue will be considered objectionable when there is a likelihood that the material could contribute to significant contamination of animal feed.'' Similar to the OSHA requirement, FDA's housekeeping standard also is performance-orientated. The CGMP regulations allow facilities to implement those housekeeping practices that are effective for their individual operations and achieve compliance with the standard.

Another commenter recommended that instead of the specific requirements, facilities be required to maintain a management plan to minimize excess dust. The commenter said that this plan can be maintained on site, available for review by the delegated authority.

Response: The commenter claimed that EPA has no basis for correlating housekeeping practices with ambient air concentrations. Under section 112(k)(3)(B) of the CAA, EPA determined that chromium and manganese were 2 of the 30 HAP which, as the result of emissions from area sources, pose the greatest threat to public health in the largest number of urban areas. Section 112(c)(3) of the CAA requires EPA to list sufficient categories or subcategories of area sources to ensure that there are sources representing 90 percent of the emissions of each of the 30 urban HAP are subject to regulation. We determined that the chromium and manganese emissions from prepared feeds manufacturing area sources need to be subject to regulation to meet this 90 percent requirement for these two HAP. Additionally, under CAA section 112(d)(5), we may elect to promulgate standards that represent GACT. As cited above, the legislative history supporting section 112(d)(5) provides that GACT is to encompass:

> ''* * * methods, practices and techniques which are commercially available and appropriate for application by the sources in the category considering economic impacts and the technical capabilities of the firms to operate and maintain the emissions control systems.''

Section 112(d)(5) calls for EPA to establish GACT standards that are designed to reduce HAP emissions. Nothing in these provisions requires EPA to justify GACT regulations based on a correlation between ambient concentrations and emissions from a specific emissions source.

We based our GACT determinations on methods, practices, and techniques commonly employed in the prepared feeds manufacturing industry. Based on the available information, we concluded that every prepared feeds manufacturing facility performed general housekeeping practices and maintained equipment in an effort to reduce dust and thus, particulate emissions. We appreciate the information provided by the commenter that confirms this conclusion, along with the details of the regulatory programs that require these measures.

We disagree with the commenter that including GACT housekeeping practices is unnecessary. As noted above, section 112(d)(5) requires EPA to establish national standards. The fact that OSHA and FDA have similar requirements has no relevance here, especially since they allow facilities to establish individual (and potentially dissimilar) standards. Therefore, the final rule maintains specific housekeeping requirements to minimize dust and does not include a requirement to develop site-specific management practices.

As noted above, we had information prior to proposal that made it clear that housekeeping practices to minimize dust were widespread. We concluded that GACT was ''continual housekeeping practices to reduce dust that can contain chromium compounds

and manganese compounds.'' (74 FR 36985) However, we did not have information from a good cross section of the industry on specific practices employed. We solicited information from one of the major prepared feeds manufacturers to identify some specific practices employed in the industry, and included them in the proposed rule. At proposal, we acknowledged the potential limitations of the examples of practices proposed, and specifically requested comment on these measures. We also requested additional general management practices commonly employed throughout the industry.

The commenter expressed concerns with regard to the proposed housekeeping practices, but they were not responsive to our request for additional practices used throughout the industry. While the commenter did not provide any suggestions to address their concerns (other than the suggestion to remove the practices entirely), we recognize the issues raised in the comments provided on the specific management practices and have considered them.

The commenter stated that the requirement that dust be removed from walls, ledges and equipment at least once per month is not performance-orientated and fails to consider individual facility operations or existing management practices. It is clear that all prepared feeds manufacturing facilities must remove dust from walls, ledges, and equipment periodically in order to comply with the OSHA requirement. The commenter did not provide any alternative to the monthly requirement, and our follow-up calls to feed manufacturing facilities indicated that monthly is a reasonable time frame. In fact, these calls show that many areas of the plant are cleaned more frequently than monthly. Therefore, the final rule retains the requirement to remove dust from walls, ledges, and equipment on a monthly basis.

The proposed requirement to keep doors closed was the result of a recommendation from a prepared feeds manufacturer. However, we appreciate the concerns regarding potential compliance confusion with the proposed requirement to keep doors closed ''as practicable.'' Therefore, the final rule states that doors must remain closed ''except during normal ingress and egress.''

Comment: One commenter expressed concern that the general housekeeping requirements would apply to all areas of the affected facility, even though all areas of the affected facility may not be involved with the storage and/or use of chromium compounds or manganese compounds.

Response: We agree with the commenter that there is no need to perform these management practices in areas where chromium or manganese are never present. Therefore, we have changed this language in the final rule to specify that the general management practices apply in ''all areas of the affected source where materials containing chromium or manganese are stored, used, or handled.''

3. Mixers

Comment: One commenter urged the Agency to eliminate the requirement that affected facilities cover the mixer where materials containing chromium compounds or manganese compounds are added at all times when mixing is occurring, except when the materials are being added to the mixer. The commenter suggested that this requirement implies that chromium compounds or manganese compounds are being emitted into the atmosphere directly from the mixer when mixing occurs, and they do not believe that this is true. The commenter stated that if chromium and manganese are released from a mixer, they are captured within the facility in which the mixer is operating and not directly released to the atmosphere. The commenter explained that the facilities themselves are control devices. The commenter claimed that there was a lack of sufficient and compelling data to support a contention that openings in mixers are a source of emissions of chromium compounds or manganese compounds. The commenter believed that the technical background information considered by EPA in this rulemaking produced an unfounded correlation between mixer operation and chromium and manganese emissions. The commenter cited EPA's 2002 National Emissions Inventory (NEI) and noted that the data reviewed indicated no emissions of chromium compounds or manganese compounds from source classification codes 31227 through 31237, which encompass mixing/blending operations at feed manufacturers.

Response: The commenter stated that when chromium compounds or manganese compounds are released from the mixer they are not emitted to the atmosphere because the facilities themselves are control devices. We do not disagree that there may be situations where direct releases to the atmosphere from the mixing operations do not occur. In fact, of the facilities that reported information for mixing in response to our industry survey, over 60 percent indicated that their processes are ''closed'' without direct vents to the atmosphere. However, the general ventilation of the building can allow chromium- and manganese-containing dust from the building to be emitted. Chromium and manganese dust created in the mixer that accumulates in the building could be emitted. Therefore, any measures to reduce the amount of dust in the building impacts emissions. We believe that the proposed measures to reduce dust generation from mixing will result in lower dust levels and, thus, lower emissions.

The commenter further claimed that there was no evidence that openings in mixers are a source of emissions of chromium compounds or manganese compounds, and that the technical background information considered by EPA in this rulemaking produced an unfounded correlation between mixer operation and chromium and manganese emissions. However, we identified mixers as a source of emissions due to information submitted directly by the industry. Specifically, prepared feeds manufacturing facilities identified mixing as a potential emission source and reported associated add-on control devices and management practices in response to our industry survey. We reviewed the material submitted via this survey and agree that it is accurate and representative.

Since some prepared feeds manufacturing facilities reported that emissions from mixing were vented to a control device, we evaluated whether add-on controls were GACT for mixing operations. The commenter is correct that no emissions were assigned directly to mixing in the 2002 NEI. However, we would note that over 60 percent of the manganese emissions in the 2002 NEI, and 90 percent of the chromium emissions, were not assigned to any specific operation, thus raising the possibility that some of these emissions are occurring from mixing operations.

In order to evaluate whether it was cost effective to select add-on control as GACT, it was necessary to make assumptions based on engineering judgment to estimate emissions from mixing. While the commenter may disagree with the assumptions that were used to estimate these emissions, the result was the rejection of add-on control as GACT for mixing.

To reiterate, the emission estimates that the commenter objects to were not a factor in establishing the proposed management practices as GACT. That determination was directly based on the information submitted in response to the survey.

In conclusion, the commenter provided no information to suggest that the proposed measures were not generally available and commonly used by the facilities to reduce chromium- or manganese-containing dust from mixing operations at prepared feeds manufacturing facilities. The commenter also provided no information challenging our conclusion that the costs of the GACT standards in the final rule are reasonable. Therefore, no changes were made to the proposed requirements for mixing.

4. Pelleting and Pellet Cooling

Comment: One commenter supported requiring the option to select add-on control (cyclones) as GACT for facilities that produce less than 50 tpd of prepared feeds. The commenter points out that EPA determined that approximately 20 percent of existing facilities already had cyclones installed, and that the agency estimated that the cost effectiveness of requiring the remaining 80 percent to install controls would be around $1 million per ton of chromium and manganese compound emission reduction, $4,000 per ton of PM emission reduction, and $20,000 per ton of PM2.5 reduction, and that the annual cost of installing and operating a cyclone at one of these facilities would be around $58,000 per year. The commenter recognizes that EPA performed an economic impact assessment, which indicated that these annual costs could represent over 5 percent of the total annual sales for a small facility, and that EPA concluded that ''the adverse economic impacts do not justify a determination requiring cyclones for the small prepared feeds manufacturing subcategory.'' The commenter states that, although this economic impact analysis is more instructive than mere reliance on cost effectiveness figures, the 5 percent of total annual sales threshold is arbitrary. The commenter states that EPA does not explain why the benefits of further reductions in PM, PM2.5, manganese compounds and chromium compounds, as well as other metal HAP emissions, are not sufficient to justify the costs of the controls. The commenter stated their belief that the GACT provision's requirement of cost considerations does not preclude the need to consider the environmental benefits of the proposed rule in determining whether those costs are justified.

Response: As noted by the commenter, we performed an economic impact assessment that indicated that the annual costs for fabric filters for bagging could represent over 5 percent of the total annual sales for a facility with less than 5 employees. We strongly disagree that a decision to reject controls that would result in costs that represent 5 percent of the total annual sales is arbitrary. This 5 percent value was a direct calculation of the small model plant cyclone costs divided by the average shipments per facility for facilities with less than 5 employees. While each GACT decision includes a variety of factors to take into account, we generally consider costs in excess of 3 percent of sales to be significant and potentially economically damaging. Further, since we believe all of the facilities in the small facility subcategory are small businesses, we are even more sensitive to potentially detrimental economic impacts. We also disagree that we did not consider the environmental benefits. For this option, we estimated and considered the emission reductions of chromium, manganese, PM, and PM2.5. However, we determined that these emission reductions are not justified given the economic impacts. In conclusion, we believe our decision to reject the option to require add-on controls for pelleting operations at prepared feed manufacturers with daily production rates of 50 tpd or less is justified.

Comment: Two commenters recommended that, since the 50 tpd production level determines if emissions must be controlled from the pelleting and pellet cooling operations, this level should be related to the amount of feed pelletized and not the total amount of feed produced by the entire facility. One of the commenters indicated that they are aware of several prepared feeds manufacturing facilities that do not pelletize feed, or that only pelletize a small percentage of the feed produced.

Response: Under section 112(d)(1) of the CAA, EPA ''may distinguish among classes, types, and sizes within a source category or subcategory in establishing such standards''. As discussed at proposal (74 FR 36985), we observed differences between prepared feeds manufacturing facilities based on production levels and subcategorized the Prepared Feeds Manufacturing source category into ''small'' and ''large'' facilities. The threshold used to distinguish between these subcategories was an average feed production level of 50 tpd. We then independently determined GACT standards for each subcategory. Therefore, our subcategorization and GACT determinations were based on the separation of facilities according to total feed production levels, not pelleting feed production. Since the change suggested by the commenter is inconsistent with our subcategorization decision and analyses, we retained the proposed definition of the small and large subcategories based on total feed production levels.

Comment: One commenter recommended that the 50 tpy threshold be on an annual, rather than daily, basis. The commenter said that this could be the production level in a calendar year or a rolling 12-month production level. The commenter points out that an annual production level of 13,000 tons per year would be equivalent to 50 tpd, assuming an operating schedule of 260 days per year. The commenter noted that the proposed daily rate did not appear to have any special significance, as it was calculated as an average of annual production. The commenter believed that an annual production rate would achieve the same objectives and would be easier than a daily production rate for facilities and for regulatory agencies to track.

Response: We did not incorporate the commenters' suggestion to change the threshold to an annual basis. In our determination of GACT, the data on the existence of controls were related to daily production levels. To determine an annual threshold from these data would require an assumption regarding the number of days of operation per year. We do not believe that calculating an annual rate based on a ''typical'' production schedule is reflective of varying production schedules that exist in the industry. Therefore, the final rule maintains the daily production level concept. Requiring owners and operators to maintain annual production data and the number of operating days, and then dividing the annual production by the number of operating days is no more difficult or burdensome for facilities or regulatory agencies than the approach recommended by the commenter.

Comment: Two commenters maintained that the pelleting cyclones would not be able to reach the proposed design efficiency of 95 percent for PM10. The commenters believed that this level of efficiency would not be attainable under the conditions of the pelleting process. One commenter suggested the efficiency requirement be changed to 95 percent for total PM (up to 35 micron). The commenter included a chart from a cyclone manufacturer that showed the efficiency in removal of PM10 by a cyclone estimated at 90 percent. The commenter continued that this level would not be expected to be reached under the conditions of the pelleting process with its high moisture and high temperature conditions. The commenter stated that a second control

device such as a baghouse or a wet scrubber would be necessary to reach a capture efficiency of 95 percent for PM10.

Response: In the proposed rule, GACT for the pelleting operation was determined to be the use of a cyclone to control emissions of chromium and manganese. We did not specify GACT as a specific control efficiency, concentration, or operating parameter. However, in order to establish criteria that represent a properly designed, operated, and maintained control device, it was necessary to establish requirements in the proposed rule on how the cyclone is designed and operated. Many respondents to the industry survey stated they use high efficiency cyclones to control the pelleting operations. The result is reduced emissions to the air and the capture of lost product that can be returned to the manufacturing operation.

As a follow up to the industry survey responses, we contacted an industry representative (Docket No. EPA–HQ–OAR–2008–0080–0010) that responded to our survey for several prepared feeds manufacturing facilities and asked about the level of efficiency that would be expected with high efficiency cyclones reported to be used to control the pelleting process. The representatives indicated that today's high efficiency cyclones can be expected to get 99 percent control of particulates, while older ones can be expected to achieve efficiencies in the ''mid 90 percent'' range. While background material gathered prior to proposal from vendors (Docket No. EPA–HQ–OAR–2008–0080–0034) show that high efficiency cyclones should be able to reach the proposed 95 percent efficiency level for PM10, we understand that the conditions of the pelleting process are not optimum. We contacted additional cyclone manufacturers after proposal, and some agreed with the commenters that cyclones designed to achieve 95 percent efficiency level for PM10 for pelleting operations are not available. All of those contacted indicated that many older cyclones still being used in the industry would not meet the proposed 95 percent PM10 design requirement. It was not our intent to force prepared feeds manufacturers to replace older, well designed and properly operating cyclones with new high efficiency cyclones, particularly since the incremental emission reduction would be very low and the costs would be high (our estimates are that the capital cost of a new cyclone is between $50,000 to $100,000). The available information suggests that a 95 percent efficiency design requirement is achievable for total PM. Therefore, we have changed the criterion in the final rule to require cyclones designed to achieve a 95 percent efficiency level for total PM, rather than for PM10.

Comment: A commenter recommended that the final rule provide explicit compliance alternatives to the requirement to operate a 95 percent control efficient cyclone. The commenter cites that other area source NESHAP, such as the Nonferrous Foundry NESHAP (Subpart ZZZZZZ), establish a limit of either 99.0 percent control for PM or an emission limit of 0.01 grains per dry standard cubic foot (gr/dscf). The commenter is concerned that having 95 percent control efficient cyclone as the only compliance option for pelletizing operations would unfairly penalize a facility that has a pelletizing process with low uncontrolled emissions or a facility that uses other control equipment to achieve emissions reductions.

Response: The proposed rule required that emissions from pelleting operations be captured and routed to a cyclone designed to reduce PM10 emissions by 95 percent. The format of the rule is an equipment standard, and the 95 percent criterion is a design value, not an emission limitation. Therefore, there is no penalty for a facility with low uncontrolled emissions, provided that they have a cyclone designed to achieve 95 percent reduction that is operated and maintained properly.

Comment: A commenter requested clarification of whether PM or PM10 emissions is considered a surrogate for HAP emission in the proposed rule. The commenter notes that the proposed rule requires that pelletizing operations at feed preparation facilities with daily production levels greater than 50 tpd be controlled by a cyclone designed to reduce PM10 emissions by 95 percent or greater, and that in several places in the preamble to the proposed rule that EPA indicates that PM emissions will be considered the surrogate for chromium and manganese. The commenter asked whether PM or PM10 is the surrogate pollutant for the proposed rule. The commenter points out that several other area source NESHAP consider PM to be the surrogate pollutant for HAP emissions such as Subpart ZZZZZZ (Aluminum, Copper, Nonferrous Foundries) and Subpart ZZZZZ (Iron and Steel Foundries). The commenter recommends that EPA clarify in the final rule whether the surrogate pollutant is PM or PM10 and include a justification for the choice of surrogate. Further, the commenter recommends that, if EPA elects to use PM10 as the surrogate, EPA evaluate the required control efficiency for the cyclone control equipment.

Response: As stated in the preamble to the proposed rule, PM is the surrogate for chromium and manganese emitted from this source category. However, when specifying compliance conditions, the proposed rule used the measure of collection efficiency of PM10. Due to other comments received (*see* above), the final rule uses PM as the metric for cyclone collection efficiency rather than PM10, which should remove any confusion about the surrogate.

Comment: A commenter notes that the proposed rule requires the owner of a cyclone at a feed preparation facility with a daily production level of greater than 50 tpd to keep a record from the cyclone's manufacturer of the control efficiency. The commenter asks what EPA's expectations are for facilities if the manufacturer's specifications are not available or do not show compliance with the control efficiency? The commenter also asked whether an owner or operator would have the option of demonstrating compliance with the rule by testing the inlet/outlet concentrations of the cyclone for determining the control efficiency. Finally, the commenter asked whether other particulate control devices, such as a baghouse or fabric filter, or control equipment in series, such as a cyclone and a baghouse, would be allowed? The commenter indicated that if these options are allowed that this should be made clear in the final rule.

Response: The commenter asked what EPA's expectations are for facilities in showing compliance with the rule if the cyclone manufacturer's design control efficiency and operating and maintenance procedures are not available. We acknowledge that this could be a problem, and have included in the final rule options for documenting that the cyclone is designed to achieve 95 percent PM reduction. The first option is to obtain certification from the manufacturer, as proposed. Under Option 2, the owner or operator could have a registered professional engineer or responsible official certify that the cyclone is designed in a manner capable of achieving 95 percent or greater PM reduction and keep a record of the information used to make this determination. The third option is to conduct PM testing at the inlet and outlet of the cyclone(s) to demonstrate that an efficiency of 95 percent or greater PM reduction is actually being achieved. If either the certification or testing option is used, the owner or operator would be required to identify

a parameter (inlet flow rate, inlet velocity, pressure drop, or fan amperage) operating range that constitutes proper operation of the device, and develop site-specific cyclone maintenance procedures.

5. Bulk Loading

Comment: Several commenters objected to the proposed requirement that emissions from bulk loading be reduced through the use of drop filter socks. Two of the commenters believe that this is too costly and should not be considered as GACT. One of the commenters explained that, in order to meet the proposed requirements, one of their facilities would need to redesign and purchase equipment for the entire bin and bin loading system and potentially redesign the entire mill, which could cost hundreds of thousands of dollars. Two commenters disagreed with EPA's claim that every facility uses drop filter socks to reduce dust and the loss of product during the loading of railcars and trucks. One of the commenters argued that EPA's conclusion that every affected facility already uses drop filter socks to reduce dust and the loss of product during the loading of railcars and trucks contradicts the background technical information in the docket, which indicates that the use of drop filter socks was reported for around 70 percent of the plants. The commenter noted that they conducted a survey of 41 prepared feed manufacturing companies representing 306 plants to identify how many facilities currently use drop filter socks. The commenter's survey results were as follows:

1. The average number of loading-discharge points is 14.3 per facility.
2. Only 53 percent of the responding industry facilities currently have drop filter socks installed at discharge points where prepared feed products are loaded into trucks or railcars.
3. The estimated average cost to install each drop filter sock is $295.
4. The estimated average annual cost to maintain each drop filter sock is $215.

The commenter indicated that, based on their survey results and the assumption that there would be approximately 6,300 affected facilities, the cost to install drop filter socks at loading discharge points would be $12.5 million for the entire industry, with an annual cost of $9.1 million per year. The commenter notes the stark contrast in these estimates and EPA's claim that the proposed requirement to install drop filter socks would not create additional associated costs for facilities.

Three of the commenters point out other alternative methods that are equally effective in reducing emissions and should be allowed. One commenter explained that many facilities have discharge-loading points that already are designed to limit the distance between the feed-discharge point and the conveyance, thereby minimizing potential dust emissions. All three of these commenters note that many load-out operations are conducted in enclosed areas, which minimizes emissions and eliminates the need for drop filter socks. One of the commenters asked that, if the requirements did not apply to truck load-outs that occur inside a building, EPA should clarify this in the final rule.

Response: At proposal, we determined that filter drop socks (or drop filter socks, as we inadvertently used the terms interchangeably) represented GACT for bulk loading. As evident in the definition of ''filter drop sock,'' we intended that this term represent any ''device at the loadout end of a bulk loader that lessens fugitive emissions by containing the unloaded product within the device thus preventing windblown and drop caused fugitive emissions.'' We are confident in our assumption that every prepared feeds manufacturing facility uses some device that meets the proposed broad definition of filter drop sock. However, these comments make it apparent that the industry recognizes one specific technology as filter drop socks, or drop socks, and that it would not be accurate to assume that every facility utilizes this technology. Therefore, in order to avoid confusion, we have removed the definition of filter drop sock and revised the standard to require that, for the bulk loading process where prepared feeds products containing chromium or manganese are loaded into trucks or railcars, a device must be used at the loadout end of each bulk loader to lessen fugitive emissions. Examples of these devices include drop socks, flexible spouts, and any device that reduces the distance between the loading arm and the truck or railcar to a degree that avoids dust. We believe it is important that these technologies be used for all bulk loaders, whether they are inside or outside. Therefore, this requirement applies to all bulk loaders that load products containing chromium or manganese.

6. Bagging

Comment: One commenter disagreed with the decision to reject add-on controls for emissions from bagging operations based solely on the cost effectiveness of installing and operating those controls. The commenter explained that the Agency's decision was made despite the widespread use of these controls, as around 30 percent of the smaller facilities and over 90 percent of the larger facilities controlled emissions from bagging. The commenter points out that EPA did not disagree or reject the notion that control options are appropriate or that the economic impacts are too great. Rather, the commenter points out that the decision to reject the option was based solely on the cost-effectiveness, and that no economic analysis was performed. The commenter indicated that basing this GACT decision solely on cost effectiveness was unlawful. The commenter stated that the Agency is not directed, under Section 112(d)(5), to set standards based on what the agency believes is cost effective. The commenter noted that the Agency themselves stated, ''GACT must reflect the 'methods, practices and techniques which are commercially available and appropriate for application by the sources in the category considering economic impacts.' 74 FR 36982 (quoting S. REP. NO. 101–228, at 171–72).''

Response: We disagree with the commenter, as we believe that cost effectiveness is an appropriate measure to consider in the evaluation of GACT, and that considering cost effectiveness is not unlawful. We believe that by rejecting add-on controls for bagging operations because the cost effectiveness was ''too high to be considered GACT,'' clearly indicates that we concluded the economic impacts are too great. In the preamble to the proposed rule (74 FR 36986), we presented the estimates for both sizes of facilities. For the facilities with daily production levels of 50 tpd or less, the estimates were over $7 million for the total capital costs and over $16 million per year for the total annual costs, resulting in cost effectiveness estimates for these controls of around $255 million per ton of chromium and manganese reduction, over $750,000 per ton of PM emission reduction, and $3.3 million per ton of PM2.5 reduction. For the facilities with daily production levels greater than 50 tpd, the estimates were over $10 million for the total capital costs and over $13 million per year for the total annual costs, resulting in cost effectiveness estimates of around $37 million per ton of chromium and manganese reduction, over $100,000 per ton of PM emission reduction, and around $500,000 per ton of PM2.5 reduction. Therefore, no changes were made as a result of this comment.

D. Inspections and Compliance Provisions

Comment: Two commenters stated that monitoring pressure drop would not be the best way to ensure the proper functioning of the pelleting cyclones. The commenters noted that, due to high moisture conditions (always near dew point) of the dust laden air passing through the cyclones on the pellet cooler air system, accurately measuring the pressure drop is problematic. The commenters stated that moisture and particulates in the duct (especially those ''upstream'' of the collectors) will constantly compromise the accuracy of the static pressure indicating equipment. Secondly, the commenters state that the collectors are quite inaccessible and would require remote readouts, which add to the cost and maintenance of this equipment. One commenter believed the best way to ensure the proper functioning of their collectors is to simply monitor the amp-load of the fan. The commenter states that if the amp-load on the fan motor stays within the proper range then the system is functioning properly. The commenter also stated that, in their operation, the cyclones are located between the cooler and the fan and the duct work is fully contained and sealed. According to the commenter, consequently, all the air that is discharged from the fan has passed through the collectors. The commenter stated that, additionally, the fans on their cooler air systems are electrically interlocked with the pelleting system (*i.e.,* the pellet mill feeder will not operate unless the fan is operating); consequently, if the pelleting system is operating, the fan will be operating and the continuous monitoring of the fan amps will ensure the collectors are operating in the proper range.

One of these commenters believed that the cost to industry to install pressure-drop gauges and to monitor cyclone pressure drop would be extremely high. According to the commenter, given the limited time provided by EPA to respond to this proposed requirement, they were unable to receive actual price quotes from vendors on the cost to install a pressure-drop gauge on a cyclone at various types of facilities. The commenter anticipated that such prices could vary depending upon a facility's equipment and physical layout. However, according to the commenter, based upon best estimates from vendors, they believed that an average conservative cost to install a pressure-drop gauge is $1,500 to $2,000 per cyclone. This commenter suggested that the rule be revised to include alternative management practices and equipment controls as follows:

1. Pellet cooling cyclones are to be operated in accordance with the parameters authorized by air-operating permits issued by appropriate legal authorities.
2. Pellet cooling cyclones are to be maintained and operated in accordance with the manufacturer's recommendations.
3. Once per day, affected facilities are to perform a visual inspection of the operating cyclone and the discharge air stream to observe emissions.
4. Should an affected facility observe an emission discharge that is not in accordance with the parameters authorized within its air-operating permit, corrective actions are to be taken immediately to correct the discharge and bring it into compliance with its air-operating permit. The details of such occurrences, if any, are to be recorded in the facility's maintenance records as required by rule's recordkeeping and notification requirements.

Response: We believe that it is necessary to have a reasonably frequent indication that the cyclones are operating properly. Cyclones are relatively simple devices and generally have no moving parts. A cyclone uses an induced draft fan to move the gas stream through the device. These fans are sized to provide the maximum inlet velocity possible for high separation without excessive turbulence. The primary indicators of the performance of cyclones are the outlet opacity and inlet velocity.

The commenter suggested the use of outlet opacity to monitor performance; however, monitoring outlet opacity would require that trained off-site contractors be used, or more likely, that individuals at the plant be trained and certified in determining opacity using Method 9. We have estimated that a single Method 9 test by an off-site contractor costs around $2,000. While the costs to train and certify on-site employees to perform these required daily tests would result in costs less than $2,000 per day, we still believe that the cost of using outlet opacity as an indicator of performance would be too high. Therefore, we elected to require monitoring which provides an indication of inlet velocity. Pressure drop across the cyclone is a surrogate for inlet velocity, and, contrary to the commenters' claims, it is an appropriate measure to indicate proper operation of a cyclone. Many cyclone manufacturers link the design efficiency with a specific pressure drop. However, other parameters are appropriate surrogates for the inlet velocity. In particular, monitoring either inlet flow rate, inlet velocity, or fan amperage are acceptable alternatives to monitoring pressure drop. As a result of these comments, we have added alternatives to the final rule that allow an owner or operator to monitor pressure drop on a daily basis, or monitor either the inlet flow rate, inlet velocity, or amperage load to the fan, on a daily basis to show that the cyclone is performing consistent with its design specifications. The commenter did not provide any information to support their estimated costs of monitoring equipment.

One of the commenters suggested that cyclones be operated in accordance with parameters authorized by operating permits issued by appropriate legal authorities. We disagree with the commenter's suggested approach. As an initial matter, section 112(d)(5) requires that the Administrator establish national emission standards. To assure compliance with these national emission standards, EPA develops monitoring, recordkeeping and reporting requirements, as it did in this rule. Indeed, one of the reasons supporting EPA's exemption of the prepared feed manufacturing area source category from the requirements of title V is that this rule contains sufficient monitoring, recordkeeping and reporting requirements to assure compliance with the requirements of the final rule. Thus, section 112 contemplates not only that EPA will establish national emission standards, but that EPA will establish appropriate monitoring, recordkeeping and reporting requirements to assure compliance with those requirements. Furthermore, the monitoring and other compliance provisions in State permits can vary considerably, and some prepared feeds manufacturing facilities may not even have permits. If a source would like to use an alternative monitoring approach allowed by a state permit, it should follow the requirements of 40 CFR 63.8(f). Therefore, we reject the commenter's suggestion to remove any specific monitoring requirements from the rule.

Comment: Two commenters expressed concern over the frequency of record keeping for the pelleting control devices. One of these commenters suggested that weekly, rather than daily, pressure drop readings would be adequate. This commenter stated that, while a monthly maintenance check on the cyclone is a reasonable requirement, daily pressure drop readings are excessive because the pressure drop readings would not be expected to vary widely. The commenter also noted that

many cyclones are installed in areas that are not easily accessible so daily checks can be time consuming to collect data that they describe as a ''maintenance indicator.'' The other commenter stated that weekly recording of readings would be adequate and that daily recordkeeping was ''overkill'' (although the commenter provided justification for reduced recordkeeping specific to a baghouse rather than the proposed requirement for a cyclone).

Response: We proposed using the maintenance indicator of pressure drop in order to ensure that the cyclones are operating correctly as an indicator of compliance with the rule that can be readily checked by an inspector. As discussed above, the final rule includes the option to daily monitor inlet flow rate, inlet velocity, pressure drop, or fan amperage. By providing multiple options to indicate compliance, we believe the facility will find an option that can be completed from an accessible area. Daily readings of these parameters are considered appropriate because, while a cyclone may be a rather simple control device in terms of moving parts, the system of ductwork and fans impact the efficiency of the unit. Each cyclone is designed for a specific inlet velocity in order to maximize the collection efficiency. We believe that daily checks are necessary to ensure the ductwork is not entraining outside air and/or that the fan is operating in the designed manner. As a result, we have not changed the requirement for daily monitoring and recording of cyclone performance measures.

Comment: A commenter also asked that the rule specify which cyclone is expected to have a pressure drop gauge installed in cases where multiple cyclones are installed in a line. Specifically, would pressure drop monitoring be required for the initial cyclone, subsequent cyclones, or all cyclones?

Response: The answer is dependent on the design reduction efficiency of the cyclones. If one cyclone in a series is designed to achieve 95 percent or greater PM removal, then monitoring would only be necessary for that one device. However, if the design efficiencies for all the individual cyclones in the series are less than 95 percent, but the combined design efficiency is 95 percent or greater, then the inlet flow rate, inlet velocity, pressure drop, or fan amperage for all the cyclones would need to be monitored.

Comment: One commenter recommended that the Agency consider revising the proposed monitoring to specify that the pressure drop must be monitored at least once per day *when the cyclone is in operation.*

Response: We agree with the concept of this comment. However, we want to make clear that the cyclone is required to be used at all times when the pelleting process is in operation. Therefore, the rule has been revised to state that monitoring of the cyclone operating parameters is required at least once per day when the pelleting process is in operation.

E. Reporting and Recordkeeping Requirements

Comment: One commenter stated that § 63.11619(e)(1) of the proposed rule indicated that facilities that do not add any materials containing chromium or manganese compounds are not subject to the rule. The commenter interpreted this to mean that facilities that do not use chromium- or manganese-containing materials would be excluded from all aspects of the NESHAP, including the requirement to submit an Initial Notification. However, the commenter noted that, during the August 4, 2009 webinar (Docket Item No. EPA–HQ–OAR–2008–0080–44), it was suggested that these facilities would be required to submit an initial notification. The commenter indicated that it seems unnecessary to require submittal of initial notification from facilities that do not use chromium or manganese compounds, and requested that EPA clarify whether this report is required of these facilities.

Response: The commenter's interpretation is correct. Facilities that do not add any materials containing chromium or manganese to any product manufactured at the facility are not subject to the rule, including the requirement to submit an initial notification.

Comment: One commenter recommended that the proposed requirement to submit an annual compliance certification report be omitted from the final rule. The commenter said that annual reporting is burdensome and difficult for small businesses to do year after year. The commenter believes that annual reporting creates excessive paperwork for the facility and the delegated authority with little environmental benefit. The commenter also recommended that the monthly record certifying that a facility has complied with the dust minimization management practices be omitted, as they believe it is very excessive.

Response: Provided that the facility is in compliance, this annual compliance certification report only needs to indicate that compliance has been achieved. In the event that a noncompliance event has occurred, this report will need to provide information about this event. We believe it is important that there is clear accountability regarding compliance with the regulation, and we believe that this is best accomplished by having a responsible official certify that the facility has complied with the requirements in the rule. We disagree with the commenter that this once per year report is difficult and overly burdensome. Therefore, the final rule has retained the requirement to submit annual certification reports.

However, we considered the commenter's request regarding the monthly certifications and have determined that they are not necessary. We believe that accountability can be maintained via the annual certifications and required records. Therefore, the proposed requirement to keep a monthly record certifying compliance with the management practices was not maintained in the final rule.

Comment: One commenter pointed out that the proposed rule did not require a facility to keep records to show that it was below or above the 50 tpd production level that determines whether controls are required for emissions from the pelleting and pellet cooling operation. The commenter also noted that the rule did not explain what happens when a facility with a daily production level less than 50 tpd increases production such that they would have a daily production level greater than 50 tpd. The commenter recommended that provisions be added to eliminate these deficiencies.

Response: We agree with the commenter, and added recordkeeping and reporting requirements related to the average daily feed production level. We also clarified how this level is to be determined. The final rule specifies that the initial determination of the average daily feed production level is based on the one-year period prior to the compliance date for existing sources, or the design rate for new sources. The final rule also requires that facilities with average daily feed production levels below 50 tpd report their initial average daily feed production level in their Notification of Compliance Status report. These facilities would be required to maintain average daily feed production level records to demonstrate that they do not exceed the 50 tpd threshold in the future. At the end of each calendar year, the facility will be required to re-calculate the average daily feed production level for the previous year. If the average daily feed

production level exceeds 50 tpd, the facility would have to comply with the requirement to collect emissions from the pelleting and pellet cooling operations and route them to a cyclone by July 1 of that year.

Prepared feed mill owners or operators with average daily feed production levels less than 50 tpd that elect to comply with the requirement to collect emissions from the pelleting and pellet cooling operations and route the emissions to a cyclone would not be required to maintain production records.

F. Definitions

Comment: Three commenters suggested that the EPA establish definitions for chromium compounds and manganese compounds. One of the commenters suggested using criteria consistent with that found within the Agency's TRI reporting requirements, and noted that these regulations state that: (1) Chromium compounds and manganese compounds are exempt from the TRI reporting requirements when the concentration of such chemicals is less than 1 percent of the total compound; and (2) such an exemption applies whether the facility received or produced the compound. One of the other commenters pointed out that, in other area source NESHAP, materials containing HAP are defined as materials that contain chromium in amounts greater than 0.1 percent by weight or manganese in amounts greater than 1.0 percent by weight. The commenter cited the definition of ''Material containing MFHAP'' in § 63.1522 (40 CFR part 63, subpart XXXXXX) as an example.

Response: The commenters are confusing two concepts. A ''chemical compound'' is a basic chemistry term to indicate a substance composed of two or more elements united chemically in definite proportions by mass. Therefore, any chemical compound containing the element chromium would be a ''chromium compound.'' For example, chromic oxide, chromium trioxide, and potassium chromate are all chromium compounds. Similarly, any compound containing the element manganese is a ''manganese compound.'' Manganese dioxide and manganese chloride are examples of manganese compounds. In the CAA, ''chromium compounds'' and ''manganese compounds'' two of the 30 Urban HAP. *See* Integrated Air Toxics Strategy; *see also* CAA 112(b). Therefore, any chemical compound that contains chromium or manganese is considered a HAP. We do not believe that it is necessary to add language in the rule to explain this standard chemistry terminology.

However, we agree with the commenter that the addition of definitions of ''a material containing chromium'' and ''a material containing manganese'' are appropriate. As we have pointed out in several other area source rulemakings, the CAA section 112(k) inventory was primarily based on the 1990 TRI, and that is the case for the Prepared Feeds Manufacturing source category as well. The reporting requirements for the TRI do not include de minimis concentrations of toxic chemicals in mixtures; therefore, the CAA section 112(k) inventory would not have included emissions from operations involving chemicals below these concentration levels. *See* 40 CFR 372.38, Toxic Chemical Release Reporting: Community Right-To-Know (Reporting Requirements). Accordingly, the percentages noted above define the scope of the listed source category; they are not exemptions.

Therefore, we believe that it is also appropriate to incorporate this into the prepared feeds manufacturing area source NESHAP. Specifically, we have added the following definitions to the final rule:

A *material containing chromium* means a material that contains chromium (Cr, atomic number 24) in amounts greater than or equal to 0.1 percent by weight.

A *material containing manganese* means a material that contains manganese (Mn, atomic number 25) in amounts greater than or equal to 1.0 percent by weight.

We also revised the applicability provisions in § 63.11619(a) to specify that the rule applies to prepared feeds manufacturing facilities that use a material containing chromium or a material containing manganese and is an area source of emissions of HAP.

Comment: One commenter suggested that the EPA add the following definition for prepared animal feeds: ''a mixture of ingredients and supplements fortified with essential minerals, intended to be fed directly to animals to meet or exceed total daily nutrient requirements.'' The commenter also suggested that the definition of prepared feeds manufacturing facility be changed to specify that the feeds produced must be ''fortified with essential minerals.''

Response: As discussed earlier in section B, the prepared feeds area source category extends beyond those facilities manufacturing only products intended to be fed directly to animals. Additionally, this definition is not consistent with the NAICS code that forms the basis for this source category. Therefore, we did not incorporate the changes suggested by the commenter.

Comment: One commenter requested that drop filter sock should be defined and that it needs to specify the materials of construction and how far into the railcar or truck it needs to extend. Another commenter recommended that the Agency amend the term ''drop filter sock'' to ''drop sock, since the device does not filter potential emissions in any manner.''

Response: As discussed in section V.C.5, we have eliminated the use of the term ''filter drop sock'' in the final rule. Therefore, this definition has been removed.

G. Impacts Assessment

Comment: One commenter believes that EPA's estimated number of prepared feeds manufacturers affected by the proposed rule is inaccurately low. The commenter points out that EPA states that approximately 1,800 area-source prepared feed manufacturing facilities currently operating add chromium compounds or manganese compounds to their products and therefore would be subject to the proposed area source standards. In contrast, the commenter believes that the actual number of affected facilities exceeds 6,300. The commenter notes that the FDA's bovine spongiform encephalopathy inspection database currently lists more than 6,300 feed mills in which FDA has conducted inspections. The commenter points out that the actual number of facilities subject to the proposed rule has a direct impact on the agency's stated benefits and costs of the rule.

Response: We agree that the number of facilities subject to the rule is a key component in the assessment of impacts. Ideally, we would not only have an estimate of the number of facilities in a source category for which we are developing regulations, but we would also have a list of those facilities. During our information gathering efforts, it was clear that the industry was not well represented in the two national emissions databases (TRI and NEI) that we typically use to characterize an industry and their emissions. We also did not identify any other source of information that would provide a list of specific prepared feed manufacturing facilities in the U.S. Therefore, we based our estimate of 1,800 prepared feed manufacturing facilities on the 2002 U.S. Economic Census of Manufacturers. Prior to proposal, we consulted with the commenter on this topic, and the commenter agreed that 1,800 was a reasonable estimate. However, we appreciate that the commenter has now obtained other information that they believe indicates

that the number of facilities may be higher than originally estimated. We investigated the FDA inspections database mentioned by the commenter and found that this database includes many more types of facilities than just prepared feed mills. The FDA Web site says the following: ''Inspections of renderers, feed mills, ruminant feeders, protein blenders, pet feed manufacturers, pet feed salvagers, animal feed distributors and transporters, ruminant feeders, and others have been conducted to determine compliance with the BSE/Ruminant Feed regulations.'' Clearly this includes many types of facilities that are not in the Prepared Feeds Manufacturing area source category.

Facilities in the Prepared Feeds Manufacturing Source Category are classified under NAICS 311119, which includes ''establishments primarily engaged in manufacturing animal food (except dog and cat) from ingredients, such as grains, oilseed mill products, and meat products.'' The proposed applicability of the rule was taken directly from this NAICS definition, except that it limited applicability to those animal feed manufacturers that use chromium or manganese. The 2002 U.S. Economic Census of Manufacturers reports 1,567 establishments under NAICS 311119. The census reports 1,811 establishments under the broader NAICS 31111. While NAICS 31111 likely includes establishments that would not be included in the source category, we chose to place our estimate of the number of prepared feed facilities at 1,800 to be conservative. As noted above, we sought input on this estimate and the commenter deemed it as a ''reasonable estimate'' (Docket No. EPA–HQ–OAR–2008–0080–0010).

The commenter did not provide any explanation why the Census data were incorrect for these NAICS codes. The commenter also did not provide evidence that establishments counted under other NAICS codes would be subject to the rule. As discussed in section V.B, we revised the applicability provisions to ensure that it is clear that the rule only applies to the types of facilities that formed the basis for the source category listing. Since this listing was based on NAICS 311119, and no evidence has been submitted that the Census information for NAICS is incorrect, we did not change our estimate of the population of prepared feed manufacturing facilities in the U.S.

Comment: One commenter pointed out that data reported within the TRI, which were used as a basis for EPA's baseline emission estimates, are not solely an indication of emissions to the atmosphere. The commenter stated that, by definition, the reported release may result from spilling, leaking, pouring, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of the reported chemical into the environment.

Response: The commenter is correct that a variety of types of releases are reported in the TRI. However, for our analysis, we only used releases reported as ''Fugitive Air Emissions'' and ''Point Source Air Emissions.'' Therefore, we disagree with the comment, as these releases clearly represent an indication of emissions to the atmosphere.

Comment: One commenter expressed concerns about the methodology used to estimate emission levels of chromium compounds, manganese compounds, and total PM. The commenter stated their belief that this analysis lacked a sound statistical basis, and that the baseline emission estimates and corresponding estimated potential emission reductions used by EPA within its proposed rule are erroneous and do not support EPA's proposed management practices and equipment controls.

In particular, the commenter believed that it was inappropriate to extrapolate the chromium compound and manganese compound emissions for the entire industry based on average emission rates from only 22 facilities represented in EPA's 2006 TRI. The commenter pointed out that this problem was exacerbated by the fact that only a fraction of these 22 facilities reported emissions of chromium or manganese compounds. Further, the commenter also stated that facilities reporting the majority of these emissions produce trace mineral premixes subsequently used by other feed manufacturers, and that they do not have pelleting operations, which EPA identifies as the largest emission source at prepared feed mills.

With regard to the estimated PM emissions, the commenter indicated that they believe that the average PM emission level calculated from the NEI was inaccurate. In particular, the commenter believes that the 70 facilities in the NEI with PM emissions represent a number of the highest production volume feed manufacturers in the United States. Therefore, the commenter states that using the average PM emissions for these larger facilities significantly overestimates the PM emissions for the entire industry.

Response: The information questioned by the commenter was considered by EPA in the selection of GACT. As discussed above in section V.D, this information did not impact the decision to regulate chromium and manganese from the prepared feeds source category or the decision which emission sources to regulate. Further, the emission reductions estimated by this analysis were only one of the considerations that make up the GACT decision.

With regard to the specific concerns offered by the commenter, the technical memorandum describing the estimation of baseline emissions discussed the lack of facility-specific emissions data for the prepared feeds industry. Given this lack of data, the approach selected was to develop ''model plants'' to represent the industry. The use of model plants with ''average'' parameters is a sound technical approach that EPA has long used when facility-specific information is not available for the entire industry. Therefore, we reject the argument by the commenter that the use of average emission levels is inappropriate.

However, we do recognize the concerns of the commenters with regard to the specific average emission levels utilized and the manner in which they were created. For instance, the average chromium compound emission level was based on a single facility's emissions in the 2006 TRI, and the average manganese compound emissions level was based on emissions from eight facilities. The commenter did not provide any suggestions on how to improve the analysis using the existing or other readily available information. However, in light of the concerns, we reexamined the available data and the approaches used.

After this review, relatively significant changes were made to five specific areas of our impacts analysis. Each of these is discussed below. There is a technical memorandum in the docket that discusses these changes further and presents the detailed updated results.

1. Changes to Analyses

Percentage of Industry in Small Facility Subcategory. The proposal analysis estimated the number of prepared feed manufacturing facilities with average daily feed production values of 50 tpd or less based on information submitted by the industry in response to an EPA questionnaire. Around 11 percent of the facilities responding to this questionnaire had daily production levels of 50 tpd or less. Following the completion of the baseline emissions and impacts analyses, EPA conducted an economic impact analysis. As part of this analysis, EPA collected detailed data from the 2002 Economic Census of Manufacturers that broke down the

industry based on the number of employees. This information suggested that the profile of the industry based on the industry questionnaire responses may have been biased slightly toward larger facilities (*i.e.*, a larger percentage of the industry would have average daily feed production rates of 50 tpd or less than originally estimated). Therefore, this new information was used, along with correlation between production and revenues provided by a commenter, to reassess this profile. The revised analyses assume that 29 percent of the facilities in the industry have average daily feed production levels of 50 tpd or less.

Number of Facilities Emitting Chromium. In the proposal analysis, it was assumed that every facility in the industry added chromium-containing nutrients to their products. However, in response to follow-up questions asked by EPA on their public comments, the industry trade organizations stated that: ''The use of chromium compounds among feed manufacturers is not as prevalent as the use of manganese compounds. Until a recent FDA-approval for use in dairy feeds earlier this year, chromium compounds had been approved for use only in swine feeds. Only about 2 to 3 percent of feed mills in the U.S. use a chromium compound, and only two compounds, chromium proprionate and chromium tripicolinate, are approved by FDA for use in swine feed.'' Based on this information, the revised impacts analysis assumes that only 3 percent of the prepared feed manufacturing facilities in the United States use and emit chromium.

Facility Average Chromium and Manganese Emission Rates. Because the national databases considered prior to proposal contained data for such a limited number of prepared feed manufacturing facilities, a model plant approach was used to estimate nationwide emissions and impacts for the source category. This model plant approach used facility average emission levels from the 2006 Toxics Release Inventory (TRI) for chromium and manganese. The commenter criticized the development of average emission rates from such a limited data set. To broaden the data set, TRI data were obtained for every facility reporting NAICS code 311119 and/or SIC 3048 for the years 1990 through 2007. There were over 10,000 facilities reporting these NAICS/SIC codes over these 18 years, averaging just over 570 facilities per year. On average, there were 134 facilities reporting manganese emissions each year and 2 reporting chromium. These data were used to calculate new facility average manganese and chromium emission rates, which were used in the revised analyses.

Production Level To Calculate PM Emission Factor. In the proposal analyses, the facility average PM emission rate from the 2002 NEI for emission sources after the point in the process when chromium or manganese would be added was divided by the average production rate from the facilities that responded to the EPA questionnaire to obtain an emission factor in units of tons per year PM emissions per tpd production level. The commenter indicated that this average production level used, 177 tpd, was not representative of the facilities in the NEI. They ''conservatively estimated that the average production that occurred at those facilities listed in the 2002 NEI exceeded 500 tpd.'' In the revised analysis, the PM emissions factor was calculated based on the production level of 500 tpd provided by the commenter.

Cyclone Efficiency for $PM_{2.5}$. The impacts analysis for the proposed rule assumed that cyclones would achieve a 95 percent reduction efficiency for $PM_{2.5}$. An efficiency chart provided by a commenter shows cyclone efficiencies of approximately 30 percent for $PM_{2.5}$. This value was used in the revised analysis.

2. Summary of Revised Results

The results of the revised impacts analysis showed a decrease in the PM emissions and increases in the manganese, chromium, and $PM_{2.5}$ emissions. The revised emissions levels prior to the implementation of this regulation are 8.2 tons per year of chromium, 195 tons per year of manganese, around 11,000 tons per year of both PM and $PM_{2.5}$.

The revised analysis also shows higher levels of chromium and manganese emission reductions and lower levels of both PM and $PM_{2.5}$ reductions. Since the costs were not impacted by the changes to the analyses, the cost effectiveness of the controls were lower for the chromium and manganese and higher for the PM and $PM_{2.5}$. Cost effectiveness values are discussed further in the revised impacts memo which is in the docket. Based on the comments, we did change the impacts, but none of these conclusions affect our choice of GACT.

H. Title V Requirements

Comment: Several commenters agreed with the proposed title V permit exemption, noting such factors as the adequacy of existing state programs to ensure compliance, the additional economic and other burdens imposed by title V permitting, and the lack of technical resources to comply with permitting requirements for facilities that are mostly small businesses.

Response: We acknowledge the commenters' support for the exemption from title V permitting requirements in this rule.

Comment: One commenter argued that the agency's proposal to exempt the area source category from title V requirements is unlawful and arbitrary. The commenter states that section 502(a) of the CAA authorizes EPA to exempt area source categories from title V permitting requirements if the Administrator finds that compliance with such requirements is ''impracticable, infeasible or unnecessarily burdensome.'' 42 U.S.C. 7661a(a). The commenter notes that EPA did not claim that title V requirements are impracticable or infeasible for the source category it proposes to exempt, but that EPA instead relied entirely on its claim that title V would be ''unnecessarily burdensome.''

Response: Section 502(a) of the CAA states, in relevant part, that:

> * * * [t]he Administrator may, in the Administrator's discretion and consistent with the applicable provisions of this chapter, promulgate regulations to exempt one or more source categories (in whole or in part) from the requirements of this subsection if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, except that the Administrator may not exempt any major source from such regulations. *See* 42 U.S.C. section 7661a(a).

The statute plainly vests the Administrator with discretion to determine when it is appropriate to exempt non-major (*i.e.*, area) sources of air pollution from the requirements of title V. The commenter correctly notes that EPA based the proposed exemptions solely on a determination that title V is ''unnecessarily burdensome,'' and did not rely on whether the requirements of title V are ''impracticable'' or ''infeasible'', which are alternative bases for exempting area sources from title V.

To the extent the commenter is asserting that EPA must determine that all three criteria in CAA section 502 are met before an area source category can be exempted from title V, the commenter misreads the statute. The statute expressly provides that EPA may exempt an area source category from title V requirements if EPA determines that the requirements are ''impracticable, infeasible *or*

unnecessarily burdensome.'' *See* CAA section 502 (emphasis added). If Congress had wanted to require that all three criteria be met before a category could be exempted from title V, it would have stated so by using the word ''and,'' in place of ''or''.

Comment: One commenter stated that, in order to demonstrate that compliance with title V would be ''unnecessarily burdensome,'' EPA must show, among other things, that the ''burden'' of compliance is unnecessary. According to the commenter, by promulgating title V, Congress indicated that it viewed the burden imposed by its requirements as necessary as a general rule. The commenter maintained that the title V requirements provide many benefits that Congress viewed as necessary. Thus, in the commenter's view, EPA must show why, for any given category, special circumstances make compliance unnecessary. The commenter believed that EPA has not made that showing for the category it proposes to exempt.

Response: EPA does not agree with the commenter's characterization of the demonstration required for determining that title V is unnecessarily burdensome for an area source category. As stated above, the CAA provides the Administrator discretion to exempt an area source category from title V if he determines that compliance with title V requirements is ''impracticable, infeasible, or unnecessarily burdensome'' on an area source category. *See* CAA section 502(a). In December 2005, in a national rulemaking, EPA interpreted the term ''unnecessarily burdensome'' in CAA section 502 and developed a four-factor balancing test for determining whether title V is unnecessarily burdensome for a particular area source category, such that an exemption from title V is appropriate. *See* 70 FR 75320, December 19, 2005 (''Exemption Rule''). In addition to interpreting the term ''unnecessarily burdensome'' and developing the four-factor balancing test in the Exemption Rule, EPA applied the test to certain area source categories.

The four factors that EPA identified in the Exemption Rule for determining whether title V is unnecessarily burdensome on a particular area source category include: (1) Whether title V would result in significant improvements to the compliance requirements, including monitoring, recordkeeping, and reporting, that are proposed for an area source category (70 FR 75323); (2) whether title V permitting would impose significant burdens on the area source category and whether the burdens would be aggravated by any difficulty the sources may have in obtaining assistance from permitting agencies (70 FR 75324); (3) whether the costs of title V permitting for the area source category would be justified, taking into consideration any potential gains in compliance likely to occur for such sources (70 FR 75325); and (4) whether there are implementation and enforcement programs in place that are sufficient to assure compliance with the NESHAP for the area source category, without relying on title V permits (70 FR 75326).[4]

In discussing the above factors in the Exemption Rule, we explained that we considered on ''a case-by-case basis the extent to which one or more of the four factors supported title V exemptions for a given source category, and then we assessed whether considered together those factors demonstrated that compliance with title V requirements would be 'unnecessarily burdensome' on the category, consistent with section 502(a) of the Act.'' *See* 70 FR 75323. Thus, we concluded that not all of the four factors must weigh in favor of exemption for EPA to determine that title V is unnecessarily burdensome for a particular area source category. Instead, the factors are to be considered in combination and EPA determines whether the factors, taken together, support an exemption from title V for a particular source category.

The commenter asserts that ''EPA must show * * * that the ''burden'' of compliance is unnecessary.'' This is not, however, one of the four factors that we developed in the Exemption Rule in interpreting the term ''unnecessarily burdensome'' in CAA section 502, but rather a new test that the commenter maintains EPA ''must'' meet in determining what is ''unnecessarily burdensome'' under CAA section 502. EPA did not re-open its interpretation of the term ''unnecessarily burdensome'' in CAA section 502 in the July 27, 2009 proposed rule for the category at issue in this rule. Rather, we applied the four-factor balancing test articulated in the Exemption Rule to the source category for which we proposed title V exemption. Had we sought to re-open our interpretation of the term ''unnecessarily burdensome'' in CAA section 502 and modify it from what was articulated in the Exemption Rule, we would have stated so in the July 27, 2009 proposed rule and solicited comments on a revised interpretation, which we did not do. Accordingly, we reject the commenter's attempt to create a new test for determining what constitutes ''unnecessarily burdensome'' under CAA section 502, as that issue falls outside the purview of this rulemaking.[5]

Furthermore, we believe that the commenter's position that ''EPA must show * * * that the 'burden' of compliance is unnecessary'' is unreasonable and contrary to Congressional intent concerning the applicability of title V to area sources. Congress intended to treat area sources differently under title V, as it expressly authorized the EPA Administrator to exempt such sources from the requirements of title V at her discretion. There are several instances throughout the CAA where Congress chose to treat major sources differently than non-major sources, as it did in CAA section 502. Moreover, although the commenter espouses a new interpretation of the term 'unnecessarily burdensome' in CAA section 502 and attempts to create a new test for determining whether the requirements of title V are 'unnecessarily burdensome' for an area source category, the commenter does not explain why EPA's interpretation of the term 'unnecessarily burdensome' is arbitrary, capricious or otherwise not in accordance with law. We maintain that our interpretation of the term 'unnecessarily burdensome' in section 502, as set forth in the Exemption Rule, is reasonable.

Comment: One commenter stated that exempting a source category from title V permitting requirements deprives both the public generally and individual members of the public who would obtain and use permitting information from the benefit of citizen oversight and enforcement that Congress plainly viewed as necessary. According to the commenter, the text and legislative history of the CAA provide that Congress intended ordinary citizens to be able to get emissions and compliance information about air toxics sources and

[4] In the Exemption Rule, in addition to determining whether compliance with title V requirements would be unnecessarily burdensome on an area source category, we considered, consistent with the guidance provided by the legislative history of section 502(a), whether exempting the area source category would adversely affect public health, welfare or the environment. *See* 72 FR 15254–15255, March 25, 2005. As discussed in the proposed rule and below, after conducting the four-factor balancing test and determining that title V requirements would be unnecessarily burdensome on the area source categories at issue here, we examined whether the exemption from title V would adversely affect public health, welfare and the environment, and found that it would not.

[5] If the commenter objected to our interpretation of the term ''unnecessarily burdensome'' in the Exemption Rule, it should have commented on, and challenged, that rule. Any challenge to the Exemption Rule is now time barred by CAA section 307(b). Although we received comments on the title V Exemption Rule during the rulemaking process, no one sought judicial review of that rule.

to be able to use that information in enforcement actions and in public policy decisions on a state and local level. The commenter stated that Congress did not think that enforcement by states or other government entities was enough; if it had, Congress would not have enacted the citizen suit provisions, and the legislative history of the CAA would not show that Congress viewed citizens' access to information and ability to enforce CAA requirements as highly important both as an individual right and as a crucial means to ensuring compliance. According to the commenter, if a source does not have a title V permit, it is difficult or impossible—depending on the laws, regulations and practices of the state in which the source operates—for a member of the public to obtain relevant information about its emissions and compliance status. The commenter stated that, likewise, it is difficult or impossible for citizens to bring enforcement actions. The commenter continued that EPA does not claim—far less demonstrate with substantial evidence—that citizens would have the same ability to obtain compliance and emissions information about sources in the category it proposes to exempt without title V permits. The commenter also said that, likewise, EPA does not claim—far less demonstrate with substantial evidence—that citizens would have the same enforcement ability. Thus, according to the commenter, the exemption EPA proposes plainly eliminates benefits that Congress thought necessary. The commenter claimed that to, justify its exemption, EPA would have to show that the informational and enforcement benefits that Congress intended title V to confer—benefits which the commenter argues are eliminated by the exemptions—are for some reason unnecessary with respect to the category it proposes to exempt. The commenter concluded that EPA does not even acknowledge these benefits of title V, far less explain why they are unnecessary, and that for this reason alone, EPA's proposed exemptions are unlawful and arbitrary.

Response: Once again, the commenter attempts to create a new test for determining whether the requirements of title V are ''unnecessarily burdensome'' on an area source category. Specifically, the commenter argues that EPA does not claim or demonstrate with substantial evidence that citizens would have the same access to information and the same ability to enforce under these NESHAP, absent title V. The commenter's position represents a significant revision of the fourth factor that EPA developed in the Exemption Rule in interpreting the term ''unnecessarily burdensome'' in CAA section 502. For all of the reasons explained above, the commenter's attempt to create a new test for EPA to meet in determining whether title V is ''unnecessarily burdensome'' on an area source category cannot be sustained. Moreover, EPA's interpretation of the term ''unnecessarily burdensome'' in CAA section 502 is reasonable.

EPA reasonably applied the four factors to the facts of the category at issue in this rule, and the commenter has not identified any flaw in EPA's application of the four factor test to the area source category at issue here. Moreover, as explained in the proposal, we considered implementation and enforcement issues in the fourth factor of the four-factor balancing test. Specifically, the fourth factor of EPA's unnecessarily burdensome analysis provides that EPA will consider whether there are implementation and enforcement programs in place that are sufficient to assure compliance with the NESHAP without relying on title V permits. *See* 70 FR 75326.

In applying the fourth factor here, EPA determined that there are adequate enforcement programs in place to assure compliance with the CAA. As stated in the proposal, we believe that state-delegated programs are sufficient to assure compliance with the NESHAP and that States must have adequate programs to enforce section 112 requirements and provide assurances that they will enforce the NESHAP before EPA will delegate the program. In addition, EPA retains authority to enforce this NESHAP under the CAA. *See* 74 FR 36988. The commenter does not challenge the conclusion that there are adequate state and Federal programs in place to ensure compliance with and enforcement of the NESHAP. Instead, the commenter provides an unsubstantiated assertion that information about compliance by the area sources with this NESHAP will not be as accessible to the public as information provided to a State pursuant to title V. The commenter does not, however, provide any information that States will treat information submitted under these NESHAP differently than information submitted pursuant to a title V permit.

Even accepting the commenter's assertions that it is more difficult for citizens to enforce the NESHAP absent a title V permit, which we dispute, in evaluating the fourth factor in EPA's balancing test, EPA concluded that there are adequate implementation and enforcement programs in place to enforce the NESHAP. The commenter has provided no information to the contrary or explained how the absence of title V actually impairs the ability of citizens to enforce the provisions of these NESHAP.

Furthermore, the fourth factor is one factor that we evaluated in determining if the title V requirements were unnecessarily burdensome. As explained above, we considered that factor together with the other factors and determined that it was appropriate to finalize the proposed exemption at issue in this rule.

Comment: One commenter explained that title V provides important monitoring benefits, and, according to the commenter, EPA assumes that title V monitoring would not add any monitoring requirements beyond those required by the regulations for the category. The commenter said that in its proposal EPA proposed to require ''continuous parameter monitoring and periodic recording of the parameter for the required control device to assure compliance. 74 FR at 36987.'' The commenter further states that ''EPA argues that its proposed standard, by including these requirements, provides monitoring 'sufficient to assure compliance' with the requirements of the proposed rule. Id.'' The commenter maintains that EPA made conclusory assertions and that the Agency failed to provide any evidence to demonstrate that the proposed monitoring requirements will assure compliance with the NESHAP for the exempt sources. The commenter stated that, for this reason as well, its claim that title V requirements are ''unnecessarily burdensome'' is arbitrary and capricious, and its exemption is unlawful and arbitrary and capricious.

Response: As noted in the earlier comment, EPA used the four-factor test to determine if title V requirements were unnecessarily burdensome. In the first factor, EPA considers whether imposition of title V requirements would result in significant improvements to the compliance requirements that are proposed for the area source categories. *See* 74 FR 36987. It is in the context of this first factor that EPA evaluates the monitoring, recordkeeping and reporting requirements of the proposed NESHAP to determine the extent to which those requirements are consistent with the requirements of title V. *See* 70 FR 75323.

The commenter asserts that ''EPA argues that its proposed standard, by including these requirements, 'provides monitoring sufficient to assure

compliance with the proposed rule.' *See* Fed Reg. 74 At 36987.'' In the proposal, we stated:

The proposed rule requires direct monitoring of control device parameters, recordkeeping that also may serve as monitoring, and deviation and other annual reporting to assure compliance with the requirements.

The monitoring component of the first factor favors title V exemption. For the management practices, this proposed standard provides monitoring in the form of recordkeeping that would assure compliance with the requirements of the proposed rule. Monitoring by means other than recordkeeping for the management practices is not practical or appropriate. Records are required to ensure that the management practices are followed. The rule requires continuous parameter monitoring and periodic recording of the parameter for the required control device to assure compliance. The proposed rule requires the owner or operator to record the date and results of periodic control device inspections, as well as any actions taken in response to findings of the inspections. *See* 74 FR 36987.

As the above excerpt states, we required continuous parameter monitoring and periodic records of the parameter for new and existing affected sources when the rule requires the installation of such controls. This monitoring is in addition to the recordkeeping that serves as monitoring for the management practices. The commenter does not provide any evidence that contradicts the conclusion that the proposed monitoring requirements are sufficient to assure compliance with the standards in the rule.

Based on the foregoing, we considered whether title V monitoring requirements would lead to significant improvements in the monitoring requirements in the proposed NESHAP and determined that they would not. We believe that the monitoring, recordkeeping and reporting requirements in this area source rule can assure compliance.

For the reasons described above and in the proposed rule, the first factor supports exempting this area source category from title V requirements. Assuming, for arguments sake, that the first factor alone cannot support the exemption, the four-factor balancing test requires EPA to examine the factors in combination and determine whether the factors, viewed together, weigh in favor of exemption. *See* 74 FR 36987. As explained above, we determined that the factors, weighed together, support exemption of the area source categories from title V.

Comment: One commenter believes that EPA cannot justify exempting the source from title V by asserting that compliance with title V requirements poses a ''significant burden.'' According to the commenter, regardless of whether EPA regards the burden as ''significant,'' the Agency may not exempt a category from compliance with title V requirements unless compliance is ''unnecessarily burdensome.'' Or in the commenter's words, that ''the compliance burden is especially great.'' The commenter stated that in any event, EPA's claims about the alleged burden of compliance are entirely conclusory and could be applied equally to any major or area source category; therefore, the commenter claims that EPA has not justified why this source category should be exempt from title V permitting as opposed to any other category.

Response: The commenter appears to take issue with the formulation of the second factor of the four-factor balancing test. Specifically, the commenter states that EPA must determine that title V compliance is ''unnecessarily burdensome'' and not a ''significant burden,'' as expressed in the second factor of the four-factor balancing test.

As we have stated before, we found the burden placed on the prepared feed manufacturing area source category in complying with title V requirements is unnecessarily burdensome when we applied the four-factor balancing test. We did not re-open EPA's interpretation of the term ''unnecessarily burdensome'' in this rule. As explained above, we maintain that the Agency's interpretation of the term ''unnecessarily burdensome,'' as set forth in the Exemption Rule and reiterated in the proposal to this rule, is reasonable.

In applying the four-factor test, we properly analyzed the second factor, *i.e.,* will title V permitting impose a significant burden on the area source, and will that burden be aggravated by any difficulty that the source may have in obtaining assistance from the permitting agency. *See* 74 FR 36988. EPA found that the sources would have a significant burden because we estimated that the average cost of obtaining and complying with a title V permit in general was $65,700 per source for a 5-year permit period. 74 FR 36988. In addition, EPA found that most of the sources affected by this rule are small businesses. Small businesses often lack the technical resources to comply with the permitting requirements and the financial resources needed to hire the necessary staff or outside consultants. EPA found that not only is the individual cost of permitting significant for this source category (*i.e.,* $65,700) but also that the cost to this source category with approximately 1,800 sources as a whole is significant. Furthermore, given the number of affected sources in this source category (*i.e.,* approximately 1,800), it would likely be difficult for them to obtain assistance from the permitting authorities. These specific factors for the affected sources alone justify that EPA has properly exempted the source category from title V. However, as discussed in the proposal and above, EPA analyzed all of the four factors in making its determination that these sources should be exempt from title V permitting requirements; and we found that the totality of these factors weighs heavily in favor of the exemption.

Comment: According to one commenter, EPA argued that compliance with title V would not yield any gains in compliance with underlying requirements in the relevant NESHAP (74 FR 36988). The commenter stated that EPA's conclusory claim could be made equally with respect to any major or area source category. According to the commenter, the Agency provides no specific reasons to believe that the additional informational, monitoring, reporting, certification, and enforcement requirements that exist in title V, but not in this NESHAP, would not provide additional compliance benefits. The commenter also stated that the only basis for EPA's claim is, apparently, its beliefs that those additional requirements never confer additional compliance benefits. According to the commenter, by advancing such argument, EPA merely seeks to elevate its own policy judgment over Congress' decisions reflected in the CAA's text and legislative history.

Response: The commenter takes out of context certain statements in the proposed rule concerning the factors used in the balancing test to determine if imposition of title V permit requirements is unnecessarily burdensome for the prepared feeds manufacturing area source category. The commenter also mischaracterizes the first of the four-factor balancing test with regard to determining whether imposition of title V would result in significant improvements in compliance. In addition, the commenter mischaracterizes the analysis in the third factor of the balancing test which instructs EPA to take into account any gains in compliance that would result from the imposition of the title V requirements.

First, EPA nowhere states, nor does it believe, that title V never confers additional compliance benefits as the commenter asserts. While EPA recognizes that requiring a title V permit offers additional compliance options, the statute provides that EPA must assess whether compliance with title V would be unnecessarily burdensome to the specific area sources at issue. For the source category subject to this rulemaking, EPA concluded that requiring title V permits would be unnecessarily burdensome.

Second, the commenter mischaracterizes the first factor by asserting that EPA must demonstrate that title V will provide no additional compliance benefits. The first factor calls for a consideration of ''whether title V would result in significant improvements to the compliance requirements, including monitoring, recordkeeping, and reporting, that are proposed for an area source category.'' Thus, contrary to the commenter's assertion, the inquiry under the first factor is not whether title V will provide any compliance benefit, but rather whether it will provide significant improvements in compliance requirements.

The monitoring, recordkeeping and reporting requirements in the rule are sufficient to assure compliance with the requirements of this rule, consistent with the goal of title V permitting. For example, in the Initial Notification, the source must include information about the facility and its operations. The source must also certify how it is complying and that it has complied with the required management practices and associated recordkeeping requirements. The source must further certify that it has installed controls, if necessary to meet the final standards and that it is monitoring the controls, as required by the final rule and keeping all necessary records regarding the inspections of the controls and any corrective actions taken as a result of seeing changes in the operation of the control equipment. *See* section 63.11624 in the final rule. The source must also keep records and conduct inspections to document that it is complying with the management practices finalized in this rule. *See* section 63.11624 in the final rule. The source must monitor and demonstrate cyclone performance efficiency and, if applicable, must begin corrective action and record the specifics about the corrective action upon seeing any deviation in the pressure drop or fan amperage in the control equipment. The source must also submit deviation reports to the permitting agency in the annual report if there has been a deviation in the requirements of the rule. *See* section 63.11624 in the final rule. EPA believes that these requirements in the rule itself provide sufficient basis to assure compliance with the final emission standards, and does not believe that the title V requirements, if applicable to these sources, would offer significant improvements in the compliance of the sources with the rule.

Third, the commenter incorrectly characterizes our statements in the proposed rule concerning our application of the third factor. Under the third factor, EPA evaluates ''whether the costs of title V permitting for the area source category would be justified, taking into consideration any potential gains in compliance likely to occur for such sources.'' Contrary to what the commenter alleges, EPA did not state in the proposed rule that compliance with title V would not yield any gains in compliance with the underlying requirements in the relevant NESHAP, nor does factor three require such a determination. Instead, consistent with the third factor, we considered whether the costs of title V are justified in light of any potential gains in compliance. In other words, EPA must view the costs of title V permitting requirements, considering any improvement in compliance above what the rule requires. EPA reviewed the area source category at issue and determined that the vast majority of the approximately 1,800 sources that would be subject to the rule currently do not have a title V permit. As stated in the proposal, EPA estimated that the average cost of obtaining and complying with a title V permit was $65,700 per source for a 5-year permit period, including fees. *See* Information Collection Request for Part 70 Operating Permit Regulations, 72 FR 32290, June 12, 2007, EPA ICR Number 1587.07. Based on this information, EPA determined that there is a significant cost burden to the industry to require title V permitting for all the sources subject to the rule. In addition, in analyzing factor one, EPA found that imposition of the title V requirements offers no significant improvements in compliance. In considering the third factor, we stated in part that, ''Because the costs of compliance with title V are so high, and the potential for gains in compliance is low, title V permitting is not justified for this source category. Accordingly, the third factor supports the proposed title V exemptions for this area source category.'' *See* 74 FR 36988. Most importantly, EPA considered all four factors in the balancing test in determining whether title V was unnecessarily burdensome on the prepared feeds manufacturing area source category. EPA found it reasonable after considering all four factors to exempt this source category from the permitting requirements in title V. Because the commenter's statements do not demonstrate a flaw in EPA's application of the four-factor balancing test to the specific facts of the source category at issue here, the comments provide no basis for the Agency to reconsider its proposal to exempt this area source category from title V.

Comment: According to one commenter, ''[t]he agency does not identify any aspect of any of the underlying NESHAP showing that with respect to these specific NESHAP—unlike all the other major and area source NESHAP it has issued without title V exemptions—title V compliance is unnecessary.'' Instead, according to the commenter, EPA merely pointed to existing State requirements and the potential for actions by States and EPA that are generally applicable to all categories (along with some small business and voluntary programs). The commenter said that, absent a showing by EPA that distinguishes the sources it proposes to exempt from other sources, however, the Agency's argument boils down to the claim that it generally views title V requirements as unnecessary. The commenter stated that, while this may be EPA's view, it was not Congress' view when Congress enacted title V, and a general view that title V is unnecessary does not suffice to show that title V compliance is unnecessarily burdensome.

Response: The commenter again takes issue with the Agency's test for determining whether title V is unnecessarily burdensome, as developed in the Exemption Rule. Our interpretation of the term ''unnecessarily burdensome'' is not the subject of this rulemaking. In any event, as explained above, we believe the Agency's interpretation of the term ''unnecessarily burdensome'' is a reasonable one. To the extent the commenter asserts that our application of the fourth factor is flawed, we disagree. The fourth factor involves a determination as to whether there are implementation and enforcement programs in place that are sufficient to assure compliance with the rule without relying on the title V permits. In discussing the fourth factor in the proposal, EPA states that prior to delegating implementation and enforcement to a State, EPA must ensure that the State has programs in place to enforce the rule. EPA believes that these programs will be sufficient to assure

compliance with the rule. EPA also retains authority to enforce this NESHAP anytime under CAA sections 112, 113 and 114. EPA also noted other factors in the proposal that together are sufficient to assure compliance with this area source.

The commenter argues that EPA cannot exempt this area source category from title V permitting requirements because ''[t]he agency does not identify any aspect of any of the underlying NESHAP showing that with respect to these specific NESHAP—*unlike all the other major and area source NESHAP it has issued without title V exemptions*—title V compliance is unnecessary'' (emphasis added). As an initial matter, EPA cannot exempt major sources from title V permitting. 42 U.S.C. 502(a). As for area sources, the standard that the commenter proposes—that EPA must show that ''title V compliance is unnecessary''—is not consistent with the standard the Agency established in the Exemption Rule and applied in the proposed rule in determining if title V requirements are unnecessarily burdensome for the source category at issue.

Furthermore, we disagree that the basis for excluding the area source prepared feeds manufacturing category from title V requirements is generally applicable to any source category. As explained in the proposal preamble and above, we balanced the four factors considering the facts and circumstances of the source category at issue in this rule. For example, in assessing whether the costs of requiring the sources to obtain a title V permit was burdensome, we concluded that because the vast majority of the sources did not have a title V permit, the costs imposed on the source category were significant compared to the additional compliance benefits offered by the title V permitting process.

Comment: One commenter stated that the legislative history of the CAA shows that Congress did not intend EPA to exempt source categories from compliance with title V unless doing so would not adversely affect public health, welfare, or the environment. *See* 74 FR 36988. Nonetheless, according to the commenter, EPA does not make any showing that its exemption would not have adverse impacts on health, welfare and the environment. The commenter stated that, instead, EPA offered only the conclusory assertion that ''the level of control would remain the same'' whether title V permits are required or not 74 FR 36988–89. The commenter continued by stating that EPA relied entirely on the conclusory arguments advanced elsewhere in its proposal that compliance with title V would not yield additional compliance with the underlying NESHAP. The commenter stated that those arguments are wrong for the reasons given above, and therefore EPA's claims about public health, welfare and the environment are wrong too. The commenter also stated that Congress enacted title V for a reason: To assure compliance with all applicable requirements and to empower citizens to get information and enforce the CAA. The commenter said that those benefits—of which EPA's proposed rule deprives the public—would improve compliance with the underlying standards and thus have benefits for public health, welfare and the environment. According to the commenter, EPA has not demonstrated that these benefits are unnecessary with respect to any specific source category, but again simply rests on its own apparent belief that they are never necessary. The commenter concluded that, for the reasons given above, the attempt to substitute EPA's judgment for Congress' is unlawful and arbitrary.

Response: Congress gave the Administrator the authority to exempt area sources from compliance with title V if, in his or her discretion, the Administrator ''finds that compliance with [title V] is impracticable, infeasible, or unnecessarily burdensome.'' *See* CAA section 502(a). EPA has interpreted one of the three justifications for exempting area sources, ''unnecessarily burdensome'', as requiring consideration of the four factors discussed above. EPA applied these four factors to the area source category subject to this rule and concluded that requiring title V for this area source category would be unnecessarily burdensome. In addition to determining that title V would be unnecessarily burdensome on the prepared feed manufacturing area source category, EPA also considered whether exempting the area source category would adversely affect public health, welfare or the environment. As explained in the proposal preamble, we concluded that exempting the area source category at issue in this rule would not adversely affect public health, welfare or the environment because the level of control would be the same even if title V applied. We further explained in the proposal preamble that the title V permit program does not generally impose new substantive air quality control requirements on sources, but instead requires that certain procedural measures be followed, particularly with respect to determining compliance with applicable requirements. The commenter has not provided any information that exemption of this area source category from title V will adversely affect public health, welfare or the environment.

VI. Impacts of the Final Standards

We project that the baseline PM emissions from the estimated 1,800 facilities in the prepared feeds source category are approximately 11,000 tons/yr, with approximatley 11,000 tons/yr of $PM_{2.5}$, 195 tons/yr of manganese and just over 8 tons/yr of chromium. We believe that management practices are already being implemented throughout the industry. Therefore, we do not expect any additional reductions in chromium compound, manganese compound, or general PM emissions from these measures. We estimate that the requirement to install cyclones on the pelleting processes at the facilities with average daily feed production levels exceeding 50 tpd will result in emission reductions of around 1,100 tons/yr of PM, 100 tons/yr of $PM_{2.5}$, and approximately 20 tons/yr of manganese and chromium emissions. While cyclones do remove PM from the air stream, these solids are typically recycled back to the process. Therefore, we do not anticipate any significant indirect or secondary air impacts of this rule as proposed. In addition, we do not expect any non-air health, environmental, or energy impacts.

As noted above, we believe all prepared feed manufacturing facilities already implement the proposed management practices. Therefore, there will be no additional costs for these measures. We estimate that the nationwide capital costs for the installation of cyclones on the pelleting cooling operations at the large facilities will be around $2.5 million. The associated annual costs are estimated to be just over $3 million/year.

Many of the plants in this analysis have fewer than 500 employees, which is the threshold to be considered ''small'' by the Small Business Administration. It is currently estimated that under 2 percent of the facilities (26 facilities) in the category would potentially need to install new cyclones under the proposed regulatory alternative. The potential impact on the industry as a percentage of the value of shipments is small. Under the proposed regulatory alternative, the largest potential impact is estimated as 0.96 percent of shipments for a subset of firms with an overall impact of 0.94 percent of shipments for the industry as a whole. As a result, this action is not expected to have a significant impact on

a substantial number of small entities or the economy as a whole, regardless of whether or not the firms in the industry are able to pass along any increases in their costs to the consumers.

VII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) because it may raise novel legal or policy issues and is, therefore, subject to review under the Executive Order. Accordingly, EPA submitted this action to OMB for review under Executive Order 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

The information collection requirements in this final rule have been submitted for approval to OMB under the Paperwork Reduction Act, 44 U.S.C. 501 *et seq.* The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 2354.02.

The recordkeeping and reporting requirements in this final rule are based on the requirements in EPA's NESHAP General Provisions (40 CFR part 63, subpart A). The recordkeeping and reporting requirements in the General Provisions are mandatory pursuant to section 114 of the CAA (42 U.S.C. 7414). All information other than emissions data submitted to EPA pursuant to the information collection requirements for which a claim of confidentiality is made is safeguarded according to CAA section 114(c) and the Agency's implementing regulations at 40 CFR part 2, subpart B.

This NESHAP requires Prepared Feeds Manufacturing area sources to submit an Initial Notification and a Notification of Compliance Status according to the requirements in 40 CFR 63.9 of the General Provisions (subpart A). The annual burden for this information collection averaged over the first three years of this ICR is estimated to be a total of 27,000 labor hours per year at a cost of $1.7 million or approximately $980 per facility.

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 in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule would not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

For the purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business that meets the Small Business Administration size standards for small businesses found at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This rule is estimated to impact a total of almost 1,800 area source prepared feeds manufacturing facilities. We estimate that all these facilities may be small entities. We have determined that small entity compliance costs, as assessed by the facilities' cost-to-sales ratio, are expected to be less than 0.004 percent for the estimated 26 facilities that would not initially be in compliance. Although this final rule contains requirements for new area sources, we are not aware of any new area sources being constructed now or planned in the next three years, and consequently, we did not estimate any impacts for new sources.

Although this final rule will not have a significant economic impact on a substantial number of small entities, EPA nonetheless has tried to reduce such impact. The standards represent practices and controls that are common throughout the prepared feeds manufacturing industry. The standards also require only the essential recordkeeping and reporting needed to demonstrate and verify compliance. These standards were developed in consultation with small business representatives on the State and national level and the trade associations that represent small businesses.

D. Unfunded Mandates Reform Act

This final rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or to the private sector in any one year. This rule is not expected to impact State, local, or Tribal governments. The nationwide annualized cost of this rule for affected industrial sources is around $3 million/yr. Thus, this rule would not be subject to the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act (UMRA).

This final rule would also not be subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The rule would not apply to such governments and would impose no obligations upon them.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule does not impose any requirements on State and local governments. Thus, Executive Order 13132 does not apply to this final rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have Tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This final rule imposes no requirements on Tribal governments; thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This action is not subject to EO 13045 because it is based solely on technology performance.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This final rule is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this rule is not likely to have any adverse energy effects. Existing energy requirements for this industry would not be significantly impacted by the additional controls or other equipment that may be required by this rule.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The rulemaking involves technical standards. Therefore, the Agency conducted a search to identify potentially applicable voluntary consensus standards. However, we identified no such standards, and none were brought to our attention in comments. Therefore, EPA has decided to use technical standard Method 5 of 40 CFR part 60, Appendix A in the National Emissions Standards for Hazardous Air Pollutants for Area Sources: Prepared Feeds Manufacturing—40 CFR part 63, subpart DDDDDDD.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule would not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. This rule establishes national standards for the Prepared Feeds Manufacturing area source category; this will reduce HAP emissions, therefore decreasing the amount of emissions to which all affected populations are exposed.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801, *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of Congress and to the Comptroller General of the United States. EPA will submit a report containing this final rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register.** A major rule cannot take effect until 60 days after it is published in the **Federal Register.** This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This final rule will be effective on January 5, 2010.

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Reporting and recordkeeping requirements.

Dated: December 16, 2009.

Lisa P. Jackson,

Administrator.

■ For the reasons stated in the preamble, title 40, chapter I, part 63 of the Code of Federal Regulations is amended as follows:

PART 63—[AMENDED]

■ 1. The authority citation for part 63 continues to read as follows:

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

Subpart A—[Amended]

■ 2. Part 63 is amended by adding subpart DDDDDDD to read as follows:

Subpart DDDDDDD—National Emission Standards for Hazardous Air Pollutants for Area Sources: Prepared Feeds Manufacturing

Applicability and Compliance Dates

Sec.
63.11619 Am I subject to this subpart?
63.11620 What are my compliance dates?

Standards, Monitoring, and Compliance Requirements

63.11621 What are the standards for new and existing prepared feeds manufacturing facilities?
63.11622 What are the monitoring requirements for new and existing sources?
63.11623 What are the testing requirements?
63.11624 What are the notification, reporting, and recordkeeping requirements?

Other Requirements and Information

63.11625 What parts of the General Provisions apply to my facility?
63.11626 Who implements and enforces this subpart?
63.11627 What definitions apply to this subpart?
63.11628—63.11638 [Reserved]

Tables to Subpart DDDDDDD of Part 63

Table 1 to Subpart DDDDDDD of Part 63—Applicability of General Provisions to Prepared Feeds Manufacturing Area Sources

Subpart DDDDDDD—National Emission Standards for Hazardous Air Pollutants for Area Sources: Prepared Feeds Manufacturing

Applicability and Compliance Dates

§ 63.11619 Am I subject to this subpart?

(a) You are subject to this subpart if you own or operate a prepared feeds manufacturing facility that uses a material containing chromium or a material containing manganese and is an area source of emissions of hazardous air pollutants (HAP).

(b) The provisions of this subpart apply to each new and existing prepared feeds manufacturing affected source. A prepared feeds manufacturing affected source is the collection of all equipment and activities necessary to produce animal feed from the point in the process where a material containing chromium or a material containing manganese is added, to the point where the finished animal feed product leaves the facility. This includes, but is not limited to, areas where materials containing chromium and manganese are stored, areas where materials

containing chromium and manganese are temporarily stored prior to addition to the feed at the mixer, mixing and grinding processes, pelleting and pellet cooling processes, packing and bagging processes, crumblers and screens, bulk loading operations, and all conveyors and other equipment that transfer the feed materials throughout the manufacturing facility.

(1) A prepared feeds manufacturing affected source is existing if you commenced construction or reconstruction of the facility on or before July 27, 2009.

(2) A prepared feeds manufacturing affected source is new if you commenced construction or reconstruction of the facility after July 27, 2009.

(3) A collection of equipment and activities necessary to produce animal feed at a prepared feeds manufacturing facility becomes an affected source when you commence using a material containing chromium or a material containing manganese.

(c) An affected source is no longer subject to this subpart if the facility stops using materials containing chromium or manganese.

(d) This subpart does not apply to the facilities identified in paragraphs (d)(1) and (2) of this section.

(1) Prepared feeds manufacturing facilities that do not add any materials containing chromium or manganese to any product manufactured at the facility.

(2) Research or laboratory facilities as defined in section 112(c)(7) of the Clean Air Act (CAA).

(e) You are exempt from the obligation to obtain a permit under 40 CFR part 70 or 40 CFR part 71, provided you are not otherwise required by law to obtain a permit under 40 CFR 70.3(a) or 40 CFR 71.3. Notwithstanding the previous sentence, you must continue to comply with the provisions of this subpart.

§ 63.11620 What are my compliance dates?

(a) If you own or operate an existing affected source, you must achieve compliance with the applicable provisions of this subpart by no later than January 5, 2012.

(b) If you own or operate a new affected source, you must achieve compliance with the applicable provisions of this subpart by January 5, 2010, or upon startup of your affected source, whichever is later.

(c) If you own or operate a facility that becomes an affected source in accordance with § 63.11619 after the applicable compliance date in paragraphs (a) or (b) of this section, you must achieve compliance with the applicable provisions of this subpart by the date that you commence using a material containing manganese or a material containing chromium.

(d) If the average daily feed production level exceeds 50 tons per day for a calendar year for a facility not complying with the requirement in § 63.11621(e) to install and operate a cyclone to control emissions from pelleting operations, you must comply with § 63.11621(e) and all associated requirements by July 1 of the year following the one-year period.

Standards, Monitoring, and Compliance Requirements

§ 63.11621 What are the standards for new and existing prepared feed manufacturing facilities?

You must comply with the management practices and standards in paragraphs (a) through (f) of this section at all times.

(a) In all areas of the affected source where materials containing chromium or manganese are stored, used, or handled, you must comply with the management practices in paragraphs (a)(1) and (2) of this section.

(1) You must perform housekeeping measures to minimize excess dust. These measures must include, but not be limited to, the practices specified in paragraphs (a)(1)(i) through (iii) of this section.

(i) You must use either an industrial vacuum system or manual sweeping to reduce the amount of dust;

(ii) At least once per month, you must remove dust from walls, ledges, and equipment using low pressure air or by other means, and then sweep or vacuum the area;

(iii) You must keep doors shut except during normal ingress and egress.

(2) You must maintain and operate all process equipment in accordance with manufacturer's specifications and in a manner to minimize dust creation.

(b) You must store any raw materials containing chromium or manganese in closed containers.

(c) The mixer where materials containing chromium or manganese are added must be covered at all times when mixing is occurring, except when the materials are being added to the mixer. Materials containing chromium or manganese must be added to the mixer in a manner that minimizes emissions.

(d) For the bulk loading process where prepared feed products containing chromium or manganese are loaded into trucks or railcars, you must use a device at the loadout end of each bulk loader to lessen fugitive emissions by reducing the distance between the loading arm and the truck or railcar.

(e) For the pelleting operations at prepared feeds manufacturing facilities with an average daily feed production level exceeding 50 tons per day, you must capture emissions and route them to a cyclone designed to reduce emissions of particulate matter by 95 percent or greater. You must also comply with the provisions in paragraphs (e)(1) through (3) of this section.

(1) You must demonstrate that the cyclone is designed to reduce emissions of particulate matter by 95 percent or greater using one of the methods specified in paragraphs (e)(1)(i) through (iii) of this section.

(i) Manufacturer specifications;

(ii) Certification by a professional engineer or responsible official; or

(iii) A performance test conducted in accordance with § 63.11623 of this section.

(2) You must establish an inlet flow rate, inlet velocity, pressure drop, or fan amperage range that represents proper operation of the cyclone in accordance with the applicable requirement in paragraphs (e)(2)(i), (ii), or (iii) of this section.

(i) If you demonstrate the cyclone design efficiency using manufacturer specifications in accordance with paragraph (e)(1)(i) of this section, the inlet flow rate, inlet velocity, pressure drop, or fan amperage range that represents proper operation of the cyclone must be provided by the manufacturer.

(ii) If you demonstrate the cyclone design efficiency using certification by a professional engineer or responsible official in accordance with paragraph (e)(1)(ii) of this section, this certification must include calculations to establish an inlet flow rate, inlet velocity, pressure drop, or fan amperage range that represents proper operation of the cyclone.

(iii) If you demonstrate the cyclone design efficiency using a performance test in accordance with paragraph (e)(1)(iii) of this section, you must monitor the inlet flow rate, inlet velocity, pressure drop, or fan amperage during the test and establish a range that represents proper operation of the cyclone based on the data obtained during the test.

(3) You must maintain and operate the cyclone in accordance with manufacturer's specifications. If manufacturer's specifications are not available, you must develop and follow standard maintenance and operating

procedures that ensure proper operation of the cyclone.

§ 63.11622 What are the monitoring requirements for new and existing sources?

(a) If you own or operate an affected source required by § 63.11621(d) to use a device at the loadout end of a bulk loader that reduces fugitive emissions from a bulk loading process, you must perform monthly inspections of each device to ensure it is in proper working condition. You must record the results of these inspections in accordance with § 63.11624(c)(4) of this subpart.

(b) If you own or operate an affected source required by § 63.11621(e) to install and operate a cyclone to control emissions from pelleting operations, you must comply with the inspection and monitoring requirements in paragraphs (b)(1) and (2) of this section.

(1) You must perform quarterly inspections of the cyclone for corrosion, erosion, or any other damage that could result in air in-leakage, and record the results in accordance with § 63.11624(c)(5)(ii).

(2) You must monitor inlet flow rate, inlet velocity, pressure drop, or fan amperage at least once per day when the pelleting process is in operation. You must also record the inlet flow rate, inlet velocity, pressure drop, or fan amperage in accordance with § 63.11624(c)(5)(iii).

§ 63.11623 What are the testing requirements?

(a) If you are demonstrating that the cyclone required by § 63.11621(e) is designed to reduce emissions of particulate matter by 95 percent or greater by the performance test option in § 63.11621(e)(1)(iii), you must conduct a test in accordance with paragraph (b) of this section and calculate the percent reduction in accordance with paragraph (c) of this section.

(b) You must use Method 5 in Appendix A to part 60 to determine the particulate matter mass rate at the inlet and outlet of the cyclone. You must conduct at least three runs at the cyclone inlet and three runs at the cyclone outlet. Each run must have a sampling time of at least 60 minutes and a sample volume of at least 0.85 dscm (30 dscf).

(c) You must calculate the percent particulate matter reduction using Equation 1.

$$PM\ RED = \left(\frac{M_{INLET} - M_{OUTLET}}{M_{INLET}} \right) x\,100 \qquad \text{Equation 1}$$

Where:

PM RED = particulate matter reduction, percent;

M_{INLET} = Mass of particulate matter at the inlet of the cyclone, dry basis, corrected to standard conditions, g/min;

M_{OUTLET} = Mass of particulate matter at the outlet of the cyclone, dry basis, corrected to standard conditions, g/min;

§ 63.11624 What are the notification, reporting, and recordkeeping requirements?

(a) *Notifications.* You must submit the notifications identified in paragraphs (a)(1) and (2) of this section.

(1) *Initial Notification.* If you are the owner of an affected source you must submit an Initial Notification no later than May 5, 2010, or 120 days after you become subject to this subpart, whichever is later. The Initial Notification must include the information specified in paragraphs (a)(1)(i) through (iv) of this section.

(i) The name, address, phone number and e-mail address of the owner and operator;

(ii) The address (physical location) of the affected source;

(iii) An identification of the relevant standard (*i.e.,* this subpart); and

(iv) A brief description of the operation.

(2) *Notification of Compliance Status.* If you are the owner of an existing affected source, you must submit a Notification of Compliance Status in accordance with § 63.9(h) of the General Provisions on or before May 4, 2012. If you are the owner or operator of a new affected source, you must submit a Notification of Compliance Status within 120 days of initial startup, or by May 4, 2012, whichever is later. If you own or operate an affected source that becomes an affected source in accordance with § 63.11619(b)(3) after the applicable compliance date in § 63.11620 (a) or (b), you must submit a Notification of Compliance Status within 120 days of the date that you commence using materials containing manganese or chromium. This Notification of Compliance Status must include the information specified in paragraphs (a)(2)(i) through (iv) of this section.

(i) Your company's name and address;

(ii) A statement by a responsible official with that official's name, title, phone number, e-mail address and signature, certifying the truth, accuracy, and completeness of the notification and a statement of whether the source has complied with all the relevant standards and other requirements of this subpart;

(iii) If you own or operate an affected source required by § 63.11621(e) to install and operate a cyclone to control emissions from pelleting operations, the inlet flow rate, inlet velocity, pressure drop, or fan amperage range that constitutes proper operation of the cyclone determined in accordance with § 63.11621(e)(2).

(iv) If you own or operate an affected source that is not subject to the requirement in § 63.11621(e) to install and operate a cyclone to control emissions from pelleting operations because your initial average daily feed production level was 50 tpd or less, documentation of your initial daily pelleting production level determination.

(b) *Annual compliance certification report.* You must, by March 1 of each year, prepare an annual compliance certification report for the previous calendar year containing the information specified in paragraphs (b)(1) through (b)(6) of this section.

(1) Your company's name and address.

(2) A statement by a responsible official with that official's name, title, phone number, e-mail address and signature, certifying the truth, accuracy, and completeness of the notification and a statement of whether the source has complied with all the relevant standards and other requirements of this subpart.

(3) If the source is not in compliance, include a description of deviations from the applicable requirements, the time periods during which the deviations occurred, and the corrective actions taken.

(4) Identification of all instances when the daily inlet flow rate, inlet velocity, pressure drop, or fan amperage is outside range that constitutes proper operation of the cyclone submitted as part of your Notification of Compliance Status. In these instances, include the time periods when this occurred and the corrective actions taken.

(5) If you own or operate an affected source that is not subject to the requirement in § 63.11621(e) to install

and operate a cyclone to control emissions from pelleting operations because your average daily feed production level was 50 tpd or less, notification if your average daily feed production level for the previous year exceeded 50 tpd.

(6) If you own or operate an affected source that was subject to the requirement in § 63.11621(e) to install and operate a cyclone to control emissions from pelleting operations, notification if your average daily feed production level for the previous year was 50 tpd or less and that you are no longer complying with § 63.11621(e).

(c) *Records.* You must maintain the records specified in paragraphs (c)(1) through (5) of this section in accordance with paragraphs (c)(6) through (8) of this section.

(1) As required in § 63.10(b)(2)(xiv), you must keep a copy of each notification that you submitted to comply with this subpart in accordance with paragraph (a) of this section, and all documentation supporting any Initial Notification or Notification of Compliance Status that you submitted.

(2) You must keep a copy of each Annual Compliance Certification prepared in accordance with paragraph (b) of this section.

(3) For each device used to comply with the requirements in § 63.11621(d), you must keep the records of all inspections including the information identified in paragraphs (c)(3)(i) through (iii) of this section.

(i) The date, place, and time of each inspection;

(ii) Person performing the inspection;

(iii) Results of the inspection, including the date, time, and duration of the corrective action period from the time the inspection indicated a problem to the time of the indication that the device was replaced or restored to operation.

(4) For each cyclone used to comply with the requirements in § 63.11621(e), you must keep the records in paragraphs (c)(4)(i) through (v) of this section.

(i) If you demonstrate that the cyclone is designed to reduce emission of particulate matter by 95 percent or greater by manufacturer's specifications in accordance with § 63.11621(e)(1(i), you must keep the records specified in paragraphs (c)(4)(i)(A) through (C) of this section.

(A) Information from the manufacturer regarding the design efficiency of the cyclone,

(B) The inlet flow rate, inlet velocity, pressure drop, or fan amperage range that represents proper operation of the cyclone,

(C) The operation and maintenance procedures to ensure proper operation of the cyclone.

(ii) If you demonstrate that the cyclone is designed to reduce emissions of particulate matter by 95 percent or greater by certification by a professional engineer in accordance with paragraph § 63.11621(e)(1)(ii), you must keep the records specified in paragraphs (c)(4)(ii)(A) through (C) of this section.

(A) Certification regarding the design efficiency of the cyclone, along with supporting information,

(B) The inlet flow rate, inlet velocity, pressure drop, or fan amperage range that represents proper operation of the cyclone,

(C) The standard maintenance and operating procedures that ensure proper operation of the cyclone.

(iii) If you demonstrate that the cyclone is designed to reduce emissions of particulate matter by 95 percent or greater by a performance in accordance with paragraph § 63.11621(e)(1)(iii), you must keep the records specified in paragraphs (c)(4)(iii)(A) through (C) of this section.

(A) Results of the testing conducted in accordance with § 63.11623,

(B) The inlet flow rate, inlet velocity, pressure drop, or fan amperage range that represents proper operation of the cyclone,

(C) The standard maintenance and operating procedures that ensure proper operation of the cyclone.

(iv) Records of all quarterly inspections including the information identified in paragraphs (c)(4)(iv)(A) through (C) of this section.

(A) The date, place, and time of each inspection;

(B) Person performing the inspection;

(C) Results of the inspection, including the date, time, and duration of the corrective action period from the time the inspection indicated a problem to the time of the indication that the cyclone was restored to proper operation.

(v) Records of the daily inlet flow rate, inlet velocity, pressure drop, or fan amperage measurements, along with the date, time, and duration of the correction action period from the time the monitoring indicated a problem to the time of the indication that the cyclone was restored to proper operation.

(5) If you own or operate an affected source that is not subject to the requirement in § 63.11621(e) to install and operate a cyclone to control emissions from pelleting operations because your average daily feed production level is 50 tpd or less, feed production records to enable the determination of the average daily feed production level.

(6) Your records must be in a form suitable and readily available for expeditious review, according to § 63.10(b)(1).

(7) As specified in § 63.10(b)(1), you must keep each record for 5 years following the date of each recorded action.

(8) You must keep each record onsite for at least 2 years after the date of each recorded action according to § 63.10(b)(1). You may keep the records offsite for the remaining 3 years.

(d) If you no longer use materials that contain manganese or chromium after January 5, 2010, you must submit a Notification in accordance with § 63.11619(c) which includes the information specified in paragraphs (d)(1) and (2) of this section.

(1) Your company's name and address;

(2) A statement by a responsible official indicating that the facility no longer uses materials that contain chromium or manganese. This statement should also include an effective date for the termination of use of materials that contain chromium or manganese, and the responsible official's name, title, phone number, e-mail address and signature.

Other Requirements and Information

§ 63.11625 What parts of the General Provisions apply to my facility?

Table 1 of this subpart shows which parts of the General Provisions in §§ 63.1 through 63.16 apply to you.

§ 63.11626 Who implements and enforces this subpart?

(a) This subpart can be implemented and enforced by EPA or a delegated authority such as your State, local, or Tribal agency. If the EPA Administrator has delegated authority to your State, local, or Tribal agency, then that agency has the authority to implement and enforce this subpart. You should contact your EPA Regional Office to find out if implementation and enforcement of this subpart is delegated to your State, local, or Tribal agency.

(b) In delegating implementation and enforcement authority of this subpart to a State, local, or Tribal agency under 40 CFR part 63, subpart E, the authorities contained in paragraph (c) of this section are retained by the EPA Administrator and are not transferred to the State, local, or Tribal agency.

(c) The authorities that cannot be delegated to State, local, or Tribal agencies are specified in paragraphs (c)(1) through (5) of this section.

(1) Approval of an alternative nonopacity emissions standard under § 63.6(g).

(2) Approval of an alternative opacity emissions standard under § 63.6(h)(9).

(3) Approval of a major change to test methods under § 63.7(e)(2)(ii) and (f). A ''major change to test method'' is defined in § 63.90.

(4) Approval of a major change to monitoring under § 63.8(f). A ''major change to monitoring'' is defined in § 63.90.

(5) Approval of a major change to recordkeeping and reporting under § 63.10(f). A ''major change to recordkeeping/reporting'' is defined in § 63.90.

§ 63.11627 What definitions apply to this subpart?

Terms used in this subpart are defined in the CAA, in § 63.2, and in this section.

Animal feed includes: Dehydrated alfalfa meal; alfalfa prepared as feed for animals; cubed alfalfa; prepared animal feed; chopped, crushed, or ground barley feed; prepared bird feed; blended animal feed; bone meal prepared as feed for animals and fowls; cattle feeds, supplements, concentrates, and premixes; prepared chicken feeds; cattle feed citrus pulp; complete livestock feed; custom milled animal feed; dairy cattle feeds supplements, concentrates, and premixes; earthworm food and bedding; animal feed concentrates; animal feed premixes; animal feed supplements; prepared animal feeds; specialty animal (*e.g.,* guinea pig, mice, mink) feeds; fish food for feeding fish; custom ground grains for animal feed; cubed hay; kelp meal and pellets animal feed; laboratory animal feed; livestock feeds, supplements, concentrates and premixes; alfalfa meal; bone meal prepared as feed for animals and fowls; livestock micro and macro premixes; mineral feed supplements; animal mineral supplements; pet food; poultry feeds, supplements, and concentrates; rabbit food; shell crushed and ground animal feed; swine feed; swine feed supplements, concentrates, and premixes; and prepared turkey feeds. Feed products produced for dogs and cats are not considered animal feed for the purposes of this subpart.

Average daily feed production level means the average amount of animal feed products produced each day over an annual period. The initial determination of the average daily feed production level is based on the one-year period prior to the compliance date for existing sources, or the design rate for new sources. The subsequent average daily feed production levels are determined annually and are based on the amount of animal feed products produced in a calendar year divided by the number of days in which the production processes were in operation.

Cyclone means a mechanically aided collector that uses inertia to separate particulate matter from the gas stream as it spirals through the cyclone.

Material containing chromium means a material that contains chromium (Cr, atomic number 24) in amounts greater than or equal to 0.1 percent by weight.

Material containing manganese means a material that contains manganese (Mn, atomic number 25) in amounts greater than or equal to 1.0 percent by weight.

Pelleting operations means all operations that make pelleted animal feed, including but not limited to, steam conditioning, die-casting, drying, cooling, and crumbling, and granulation.

Prepared feeds manufacturing facility means a facility that is primarily engaged in manufacturing animal feed. A facility is primarily engaged in manufacturing animal feed if the production of animal feed comprises greater than 50 percent of the total production of the facility on an annual basis. Facilities primarily engaged in raising or feeding animals are not prepared feed manufacturing facilities. Facilities engaged in the growing of agricultural crops that are used in the manufacturing of feed are not considered prepared feeds manufacturing facilities.

§ 63.11628–63.11638 [Reserved]

Tables to Subpart DDDDDDD of Part 63

Table 1 to Subpart DDDDDDD of Part 63—Applicability of General Provisions to Prepared Feeds Manufacturing Area Sources

As required in § 63.11619, you must meet each requirement in the following table that applies to you.

Citation	Subject	Applies to Subpart DDDDDDD?
63.1	Applicability	Yes.
63.2	Definitions	Yes.
63.3	Units and Abbreviations	Yes.
63.4	Prohibited Activities and Circumvention	Yes.
63.5	Preconstruction Review and Notification Requirements.	No.
63.6(a),(b)(1)–(b)(5), (b)(7), (c), (f)(2)–(3), (g), (i), and (j).	Compliance with Standards and Maintenance Requirements.	Yes.
63.6(e)(1), (e)(3), (f)(1), and (h)	Startup, shutdown, and malfunction requirements and opacity/visible emission standards.	No. Standards apply at all times, including during startup, shutdown, and malfunction events.
63.7	Performance Testing Requirements	Yes.
63.8	Monitoring Requirements	Yes.
63.9(a), (b), (c), (d), (h), (i), and (j)	Notification Requirements	Yes.
63.9(e), (f), (g)		No.
63.10(a),(b)(1), (b)(2)(i)–(iii), (b)(2)(vi)–(xiv), (c), (d)(1), (e), and (f).	Recordkeeping and Reporting Requirements	Yes.
63.10(b)(2)(iv)–(v), (b)(3), and (d)(2)–(5)	Recordkeeping and Reporting Requirements	No.
63.11	Control Device Requirements	No.

Citation	Subject	Applies to Subpart DDDDDDD?
63.12	State Authorities and Delegations	Yes.
63.13	Addresses	Yes.
63.14	Incorporations by Reference	Yes.
63.15	Availability of Information and Confidentiality	Yes.
63.16	Performance Track Provisions	Yes.
63.1(a)(5), (a)(7)–(9), (b)(2), (c)(3)–(4), (d), 63.6(b)(6), (c)(3), (c)(4), (d), (e)(2), (e)(3)(ii), (h)(3), (h)(5)(iv), 63.8(a)(3), 63.9(b)(3), (h)(4), 63.10(c)(2)–(4), (c)(9).	Reserved	No.

[FR Doc. E9–30498 Filed 1–4–10; 8:45 am]

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Part III

Department of Commerce

National Oceanic and Atmospheric Administration

15 CFR Part 902; 50 CFR Parts 300 and 679

Pacific Halibut Fisheries; Limited Access for Guided Sport Charter Vessels in Alaska; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 902

50 CFR Parts 300 and 679

[Docket No. 080630798–91430–02]

RIN 0648–AW92

Pacific Halibut Fisheries; Limited Access for Guided Sport Charter Vessels in Alaska

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

ACTION: Final rule.

SUMMARY: NMFS issues regulations creating a limited access system for charter vessels in the guided sport fishery for Pacific halibut in waters of International Pacific Halibut Commission Regulatory Areas 2C (Southeast Alaska) and 3A (Central Gulf of Alaska). This limited access system limits the number of charter vessels that may participate in the guided sport fishery for halibut in these areas. NMFS will issue a charter halibut permit to a licensed charter fishing business owner based on his or her past participation in the charter halibut fishery and to a Community Quota Entity representing specific rural communities. All charter halibut permit holders are subject to limits on the number of permits they may hold and on the number of charter vessel anglers who may catch and retain halibut on permitted charter vessels. This action is necessary to achieve the approved halibut fishery management goals of the North Pacific Fishery Management Council. The intended effect is to curtail growth of fishing capacity in the guided sport fishery for halibut.

DATES: February 4, 2010, except for § 300.66(b), (i), and (o), and § 300.66(r) through (v), and § 300.67(a), which will be effective on February 1, 2011.

ADDRESSES: Electronic copies of the Environmental Assessment (EA), Regulatory Impact Review (RIR), and Final Regulatory Flexibility Analysis (FRFA) (collectively, Analysis) prepared for this action may be obtained from *http://www.Regulations.gov* or from the Alaska Region, NMFS on the Alaska Region Web site at *http://www.alaskafisheries.noaa.gov*.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted by mail to NMFS, Alaska Region, P.O. Box 21668, Juneau, AK, 99802–1668, Attn: Ellen Sebastian, Records Officer; in person at NMFS, Alaska Region, 709 West 9th Street, Room 420A, Juneau, AK; and by e-mail to *David_Rostker@omb.eop.gov* or fax to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Rachel Baker, 907–586–7228.

SUPPLEMENTARY INFORMATION: The International Pacific Halibut Commission (IPHC) and National Marine Fisheries Service (NMFS) manage fishing for Pacific halibut (*Hippoglossus stenolepis*) through regulations established under authority of the Northern Pacific Halibut Act of 1982 (Halibut Act). The IPHC promulgates regulations governing the Pacific halibut fishery under the Convention between the United States and Canada for the Preservation of the Halibut Fishery of the North Pacific Ocean and Bering Sea (Convention), signed at Ottawa, Ontario, on March 2, 1953, as amended by a Protocol Amending the Convention (signed at Washington, DC, on March 29, 1979). Regulations developed by the IPHC are subject to approval by the Secretary of State with concurrence from the Secretary of Commerce (Secretary). After approval by the Secretary of State and the Secretary, the IPHC regulations are published in the **Federal Register** as annual management measures pursuant to 50 CFR 300.62. The most recent IPHC regulations were published March 19, 2009, at 74 FR 11681. IPHC regulations affecting sport fishing for halibut and charter vessels in Areas 2C (Southeast Alaska) and 3A (Central Gulf of Alaska) may be found in sections 3, 25, and 28 (74 FR 11681, March 19, 2009).

The Halibut Act, at sections 773c(a) and (b), provides the Secretary with general responsibility to carry out the Convention and the Halibut Act. In adopting regulations that may be necessary to carry out the purposes and objectives of the Convention and the Halibut Act, the Secretary is directed to consult with the Secretary of the department in which the U.S. Coast Guard (USCG) is operating.

The Halibut Act, at section 773c(c), also provides the North Pacific Fishery Management Council (Council) with authority to develop regulations, including limited access regulations, that are in addition to, and not in conflict with, approved IPHC regulations. Such Council-developed regulations may be implemented by NMFS only after approval by the Secretary. The Council has exercised this authority most notably in the development of its Individual Fishing Quota (IFQ) Program, codified at 50 CFR part 679, and subsistence halibut fishery management measures, codified at 50 CFR 300.65. The Council also has been developing a regulatory program to manage the guided sport charter vessel fishery for halibut. This action is a step in the development of that regulatory program and has been approved by the Secretary pursuant to section 773c(c).

Background and Need for Action

A comprehensive history of management of the guided sport fishery for halibut was presented in the proposed rule for this action published April 21, 2009 (74 FR 18178). This description focused on the history and rationale leading to the Council's development of limited access management for the charter vessel fishery and its recommendation of this limited access system in 2007. In brief, the principal concern was overcrowding of productive halibut grounds due to the growth of the charter vessel sector. The Council found that the charter vessel sector was the only halibut harvesting sector that was exhibiting growth in IPHC Areas 2C and 3A. Other harvesting sectors have specified catch limits that cause fishery closures when reached or are relatively stable over time. The Council recommended this limited access system to provide stability for the guided sport halibut fishery and decrease the need for regulatory adjustments affecting charter vessel anglers while the Council continues to develop a long-term policy of allocation between the commercial and charter vessel sectors.

The Council adopted its limited access policy on March 31, 2007, and submitted it for review to the Secretary pursuant to section 773c(c). By publishing this rule, NMFS announces Secretarial approval of this Council recommendation. A proposed rule for the recommended limited access system was published April 21, 2009 (74 FR 18178) soliciting public comments on the proposal until June 5, 2009. All comments received during this comment period are summarized and responded to below. Some changes from the proposed rule are made as a logical outgrowth from the proposed rule. These changes also are described below.

Following is a summary description of the charter halibut limited access system and how it is designed to operate. A more thorough description of the action is presented in the preamble to the proposed rule published April 21, 2009 (74 FR 18178). Additional detail is presented in responses to comments below.

Charter Halibut Limited Access System—Operational Aspects

General

This action limits the entry of charter vessels into the guided sport fishery for halibut in waters of IPHC Regulatory Areas 2C (Southeast Alaska) and 3A (Central Gulf of Alaska). After the effective date of this rule (*see* **DATES**), any person operating a charter vessel engaged in halibut fishing in Areas 2C or 3A is required to have on board the vessel a charter halibut permit designated for that area. Qualifications for a charter halibut permit in each area are determined independently. A charter halibut permit can be either transferable or non-transferable depending on the qualifications of permit applicants. Each permit will have an angler endorsement that specifies the maximum number of anglers authorized to catch and retain halibut under the authority of the permit under which the vessel is operating. In addition, this action provides for two special permits—a community charter halibut permit and a military charter halibut permit.

Qualifications for Charter Halibut Permit

To receive an initial allocation of a charter halibut permit, an applicant must demonstrate participation in the charter halibut fishery during an historic qualifying period and during a recent participation period. The historic qualifying period is the sport fishing season established by the IPHC in 2004 and 2005. The sport fishing season in both of those years was February 1 through December 31. Minimum participation criteria need be met in only one of these years—2004 or 2005. The recent participation period is the sport fishing season established by the IPHC in 2008. This year was selected as the recent participation period because it is the most recent year for which NMFS has a complete record of saltwater charter vessel logbook data from the State of Alaska Department of Fish and Game (ADF&G).

The minimum participation qualifications include documentation of at least five logbook fishing trips during one of the qualifying years—2004 or 2005—and at least five logbook fishing trips during 2008. Meeting these minimum participation qualifications could qualify an applicant for a non-transferable charter halibut permit. The minimum participation qualifications for a transferable charter halibut permit include at least 15 logbook fishing trips during one of the qualifying years—2004 or 2005—and at least 15 logbook fishing trips during 2008.

The basic unit of participation for receiving a charter halibut permit will be a logbook fishing trip. A ''logbook fishing trip'' is a bottomfish logbook fishing trip during the qualifying years, 2004 and 2005, and as a halibut logbook fishing trip in 2008. A logbook fishing trip is an event that was reported to ADF&G in a logbook in accordance with the time limit required for reporting such a trip that was in effect at the time of the trip.

Number of Permits

If an applicant for a charter halibut permit meets the minimum participation requirements during a qualifying year and the recent participation year, NMFS will determine how many permits the applicant will receive and how many of those, if any, will be transferable permits. If an applicant qualifies for any permits, NMFS will issue to the applicant the number of permits equal to (a) the applicant's total number of bottomfish logbook fishing trips in a qualifying year, divided by 5, or (b) the number of vessels that made those trips, whichever number is lower. The applicant will select which year in the qualifying period—2004 or 2005—NMFS will use in making this calculation.

For example, an applicant in its selected qualifying year reported 23 logbook trips using three vessels. One vessel made 16 trips, another vessel made five trips, and another vessel made only two trips. Under the rule, NMFS will calculate $23 \div 5 = 4.6$ which will be rounded down to four. But this number of permits will be limited by the number of vessels that made all the logbook trips in the applicant-selected year which was three. Hence, the applicant will be awarded three permits.

Transferable Permits

After determining the total number of permits, NMFS will determine which permits are transferable and which are nontransferable. An applicant will receive a transferable permit for each vessel that made at least 15 trips in the applicant-selected year (2004 or 2005) and at least 15 trips in the recent participation year (2008). The same vessel must have made all the trips within a year; however, the same vessel did not have to be used in the qualifying year and the recent participation year. The rest of the applicant's permits, if any, will be non-transferable permits. Applicants that do not have the minimum of 15 logbook fishing trips from the same vessel in each period but qualify for one or more permit(s) with a minimum of five logbook fishing trips, will receive only non-transferable permit(s). Hence, in the example above of an applicant with 23 logbook trips using three vessels, that applicant will receive three permits. Based on the 15-trip minimum criterion, however, this applicant will receive only one transferable permit and the other two permits will be non-transferable.

Angler Endorsements

Each charter halibut permit will have an angler endorsement number. The angler endorsement number on the permit is the maximum number of charter vessel anglers that may catch and retain halibut on board the vessel. The angler endorsement does not limit the number of passengers that an operator may carry, only the number that may catch and retain halibut. The angler endorsement will be equal to the highest number of anglers that the applicant reported on any logbook fishing trip in 2004 or 2005, subject to a minimum endorsement of four.

The term ''charter vessel angler'' is defined by this action to include all persons, paying or non-paying, who use the services of the charter vessel guide. The charter halibut permit, once issued with its angler endorsement, will limit the number of charter vessel anglers authorized to catch and retain halibut on the permitted vessel.

A vessel operator will be able to stack permits to increase the number of charter vessel anglers on board. For example, if a vessel operator has two charter permits on board, one with an angler endorsement of four and one with an endorsement of six, then the vessel operator can have a maximum of 10 charter vessel anglers on board who are catching and retaining halibut if the operator is otherwise authorized to carry 10 passengers. If other provisions of law, such as safety regulations or for-hire operation regulations, prevent 10 anglers from being on board the vessel, the charter halibut permits will not authorize the vessel operator to violate those provisions of law.

Initial Allocation Process

Several basic standards are required to initially receive a charter halibut permit. These standards include (1) timely application for a permit, (2) documentation of participation in the charter vessel fishery during the qualifying and recent participation periods by ADF&G logbooks, and (3) ownership of a business that was licensed by the State of Alaska to conduct the guided sport fishing reported in the logbooks.

Timely application. To be an initial recipient of a charter halibut permit, an applicant must apply for the permit during the application period. An application period of no less than 60 days will be announced in the **Federal Register.** Applications submitted by mail, hand delivery, or facsimile will be accepted if postmarked, hand delivered, or received by fax no later than the last day of the application period. Electronic submissions other than facsimile will not be acceptable. A finite application period of reasonable length is necessary to resolve potential claims for permits by two or more persons for the same logbook fishing trip history. NMFS will not credit the same logbook fishing trip to more than one applicant and will not allow the participation history of one business owner to support issuance of a permit(s) to more than one applicant.

Application forms will be available through ADF&G and NMFS offices and on the NMFS, Alaska Region, Web site at *http://www.alaskafisheries.noaa.gov/*. Electronic submission of the application will not be acceptable, however, because a signature on the application will be required. The application form will include a statement that, by signature, the applicant attests that legal requirements were met and all statements on the application are correct under penalty of perjury.

Documentation of participation. The principal documentation necessary to prove qualifying participation in the charter halibut fishery will be limited to saltwater charter vessel logbooks issued by the ADF&G. There are several reasons for relying only on the ADF&G charter vessel logbook database. First, ADF&G has regulated saltwater charter fishing in the State of Alaska through registrations, licenses, and logbooks since 1998. These requirements apply to all charter fishing, including vessels targeting halibut. Second, ADF&G supplied aggregated charter vessel logbook data to the Council to assist it in its analysis of past participation in the charter halibut fishery in Areas 2C and 3A. Third, the Council relied on these data in part to make its decision to recommend limiting entry into this fishery and NMFS, in turn, has relied on the Council's Analysis of alternatives and on subsequent ADF&G charter vessel logbook data to approve this action.

As stated above, the basic unit of participation for receiving a charter halibut permit will be a logbook fishing trip, which is a trip that was reported to ADF&G in a saltwater charter logbook in accordance with the time limit required for reporting such a trip that was in effect at the time of the trip. If a trip was not reported within those time limits, NMFS will not consider it a logbook fishing trip for purposes of a charter halibut permit application.

NMFS will use the same method of counting logbook fishing trips that was used by the Council in developing its recommendation for this action. Each trip in a multi-trip day will count as one logbook fishing trip, and each day on a multi-day trip will count as one logbook fishing trip. For example, if an operator documented two trips in one day, NMFS will consider that as two logbook fishing trips. Another operator that documented a trip that lasted two days also will be considered to have made two logbook fishing trips. This accounting of trips deviates from the ADF&G method of counting logbook trips when fishing continues over multiple days. The same issue does not exist for half-day trips. Consistent with ADF&G logbook data and the Council's Analysis, NMFS will consider a half day trip as one trip.

A halibut logbook fishing trip also can be a logbook fishing trip where the business owner, within ADF&G time limits, reported ''boat hours that the vessel engaged in bottomfish fishing.'' An applicant may use such a report as one way to document a halibut logbook fishing trip. The logbook data for ''boat hours'' that a business had to report in 2007 and 2008 was ''No. of Boat Hours Fished this Trip'' with bottomfish as a targeted species. ADF&G instructions for the 2007 and 2008 logbooks state that bottomfish include halibut. Documentation of boat hours fishing for bottomfish would capture trips where charter vessel anglers were targeting halibut but did not catch any. Hence, this action defines a halibut logbook fishing trip as a logbook fishing trip in which the applicant reported the number of halibut kept or released or the boat hours that the vessel engaged in bottomfish fishing.

Documentation of participation will be recorded in the official record of charter vessel participation in Areas 2C and 3A during the qualifying and recent participation years. The official record will be based on data from ADF&G and will link each logbook fishing trip to an ADF&G Business Owner License and to the person—individual, corporation, partnership, or other entity—that obtained the license. Thus, the official record will include information from ADF&G on the persons that obtained ADF&G Business Owner Licenses in the qualifying period and the recent participation period; the logbook fishing trips in those years that met the State of Alaska's legal requirements; the Business Owner License that authorized each logbook fishing trip; and the vessel that made each logbook fishing trip.

NMFS will compare all timely applications to the official record. If an applicant submits a claim that is not consistent with the official record, NMFS will allow the applicant to submit documentation or further evidence in support of the claim during a 30-day evidentiary period. If NMFS accepts the applicant's documentation as sufficient to change the official record, NMFS will change the official record and issue charter halibut permit(s) accordingly. If NMFS does not agree that the further evidence supports the applicant's claim, NMFS will issue an initial administrative determination (IAD). The IAD will describe why NMFS is initially denying some or all of an applicant's claim and will provide instructions on how to appeal the IAD.

An applicant may appeal the IAD to the Office of Administrative Appeals (OAA) pursuant to 50 CFR 679.43. NMFS will issue interim permits to applicants that filed timely applications and whose appeal is accepted by OAA. NMFS will limit interim permits on appeal to applicants who applied for charter halibut permits within the application period specified in the **Federal Register.** This means that an applicant that is denied a permit because its application was late would not receive an interim permit. All permits issued during an appeal will be interim, non-transferable permits. Until NMFS makes a final decision on the appeal, the permit holder will not be able to transfer any permits.

Licensed business owners. Charter halibut permits will be issued to persons that were the ADF&G licensed business owners that met the minimum qualifications. The term ''person'' includes an individual, corporation, firm, or association (50 CFR 300.61). Hence, on successful application, NMFS will issue a charter halibut permit to the entity—individual, corporation, partnership, or other entity—that held the ADF&G Business Owner License that authorized the logbook fishing trips that met the participation requirements. NMFS has no obligation to determine the owners of a corporation or members of a partnership that successfully applied for a permit. NMFS will follow the form of ownership—individual or otherwise—that the business used to obtain legal authorization from the State of Alaska for its past participation in the charter halibut fishery.

Generally, the entity that applies for one or more charter halibut permits will be the same entity that held the ADF&G Business Owner License that authorized the trips that met the participation

requirements in the qualifying period and in the recent participation period. The only exception to this requirement is if the entity that held these licenses is an individual who has died, or a non-individual entity, such as a corporation or partnership, that has dissolved.

NMFS will not determine percentage of ownership of a dissolved partnership or corporation. If a dispute exists among former partners or shareholders as to how they should share ownership of a permit or permits, that dispute is properly resolved as a civil matter by a court.

NMFS will apply a guiding principle in evaluating applications for charter halibut permits; the logbook fishing trip activity of one person that is used for permit qualification cannot lead to more than one person receiving a charter halibut permit. The only possible exception is when NMFS might award a permit to successors-in-interest to a dissolved entity. Even then, NMFS will not issue a permit to each successor-in-interest, but will issue the number of permits for which the dissolved entity qualified in the names of all successors-in-interest. Subject to that exception, this guiding principle prohibits NMFS from crediting more than one applicant for the same logbook fishing trip, from crediting more than one applicant for logbook fishing trips made pursuant to the same ADF&G Business Owners License, and from issuing permits to more than one applicant for participation by one person in the charter halibut fishing business.

Unavoidable circumstances. NMFS recognizes that certain unavoidable circumstances could have prevented an applicant from participating in either the qualifying period or recent participation period despite the applicant's intention. In developing a limited exception to allow for unavoidable circumstances, NMFS was guided in part by the unavoidable circumstance provisions in the License Limitation Program for groundfish and crab fisheries at 50 CFR 679.4(k). Basically, an applicant must demonstrate that—

- It participated during either the qualifying period or the recent participation period;
- It had a specific intent to participate in the period, either the qualifying period or the recent participation period, that the applicant missed;
- The circumstance that thwarted the intended participation was (a) unavoidable, (b) unique to the applicant, (c) unforeseen and unforeseeable;
- The applicant took all reasonable steps to overcome the problem; and
- The unavoidable circumstance actually occurred.

The unavoidable circumstance exception will be limited to persons that will be excluded from the fishery entirely unless their unavoidable circumstance is recognized. The unavoidable circumstance exception is not intended to upgrade the number or type of permits an applicant could receive. For example, NMFS will not accept an unavoidable circumstance claim to upgrade a non-transferable permit to a transferable permit based on an anticipated 15 logbook trips in 2005 that did not occur. NMFS intends a narrow interpretation of the unavoidable circumstance exception, and that, if an applicant can get any charter halibut permit based on the applicant's actual participation, then the applicant will be limited to that permit.

This rule also recognizes a particular type of unavoidable circumstance, military service. The military exemption is designed to benefit persons that will otherwise be completely excluded from receiving any charter halibut permits despite their intention to meet the participation requirement during the qualifying period. If a military exemption applicant can receive any permits based on the applicant's actual participation in the qualifying period, the applicant will be limited to that number and type of permits and cannot use the military exemption. An applicant may not claim a military exemption to excuse lack of participation in the qualifying period and an unavoidable circumstance to excuse a lack of participation in the recent participation period. The successful military exemption applicant will receive one non-transferable permit with an angler endorsement of six unless the applicant can demonstrate that it likely would have met participation requirements for a transferable permit or a higher angler endorsement.

Transfers

A person holding a transferable charter halibut permit may transfer the permit to another person (individual or non-individual entity) with certain limitations. Non-transferable charter halibut permits may not be transferred. Transferability of permits will allow limited new entry into the charter halibut fishery while preventing an uncontrolled expansion of the charter halibut fishery.

NMFS expects consolidation in the charter halibut fishery as holders of non-transferable permits leave the fishery and as charter halibut operators acquire multiple permits by transfer. Excessive consolidation will be prevented by imposing an excessive share limit of five charter halibut permits.

Two important exceptions to this excessive share limit, however, will allow a person to hold more than five permits. First, a person that is the initial recipient of more than five permits will be able to continue to hold all of the permits for which the person initially qualified. Such a person will be prevented from receiving transfers of additional permits. This exception will not apply if an individual permit holder dies or a corporate permit holder dissolves or changes its ownership by adding one or more new owner(s) or partner(s). In this event, NMFS will consider a successor-in-interest or a changed corporate structure to be a different entity from the one that was the initial recipient of the permits and the exception to the excessive share limit will not apply to the new entity. Upon notification of a change, NMFS would (1) invalidate transferable charter halibut permits held by the permit holder and provide notification that the permit holder must divest themselves of the permit; and (2) revoke non-transferable charter halibut permits held by the permit holder.

The second exception will allow a transfer that results in the person receiving the transfer holding more than five permits if the person meets the following three conditions:

- The existing permit holder that holds more than five permits under the first exception will be transferring all of the transferable permits that were initially issued;
- The existing permit holder will be transferring all assets—such as vessels owned by the business, lodges, and fishing equipment—of its charter vessel fishing business along with the permits; and
- The person that will receive the permits in excess of the excessive share limit does not hold any permits at the time of the proposed transfer.

Although no citizenship standards will apply to the initial allocation of charter halibut permits, a person receiving a charter halibut permit by transfer must be a United States (U.S.) citizen. Issuance of charter halibut permits to non-U.S. citizens is not authorized by section 773c(c) of the Halibut Act. The Secretary, however, has general responsibility and authority to adopt regulations as may be necessary under section 773c(a) and (b) of the Halibut Act. Therefore, the Secretary is exercising this authority in not applying citizenship standards for the initial allocation of charter halibut permits. A

transfer to an individual will be approved only if the individual is a U.S. citizen, and a transfer to a corporate entity will be approved only if it is a U.S. business with at least 75 percent U.S. citizen ownership of the business. This rule adopts the 75 percent U.S. ownership criterion for a U.S. business from the American Fisheries Act (111 Stat. 2681, Oct. 21, 1998), which is a key piece of Federal legislation designed to Americanize the fleet fishing off American waters.

A nontransferable permit cannot be transferred from the name of the individual once the individual dies. A nontransferable permit cannot be transferred from a non-individual permit holder (a corporation, partnership, or other entity) if the non-individual permit holder dissolves or changes. This rule incorporates the definition of ''change'' in a corporation or partnership from the IFQ program at 50 CFR 679.42(j)(4)(i). This paragraph in the IFQ regulations defines ''a change'' for corporations, partnerships, or other non-individual entity to mean ''the addition of any new shareholder(s) or partner(s), except that a court appointed trustee to act on behalf of a shareholder or partner who becomes incapacitated is not a change in the corporation, partnership, association, or other non-individual entity.''

These limitations on the transfer of charter halibut permits will be made effective by a requirement for NMFS approval for all transfers. No transfer of a permit will be effective unless it is first approved by NMFS. A transfer application provided by NMFS is required to be completed by the person transferring and the person receiving the transferred permit. Completion of the transfer application and examination of it by NMFS will assure that the excessive share and citizenship requirements of this rule are maintained, and that non-transferable permits are dissolved on the death or change of the permit holder and will not be transferred to a new entity.

Special Permits

Two types of special permits are provided by this action for limited guided sport fishing for halibut outside of the requirements for charter halibut permits. First, community charter halibut permits are intended to allow development of a charter vessel fishery in certain rural communities that do not have a developed charter vessel industry. Second, a military charter halibut permit will exempt from this limited access system charter vessels operated by the U.S. Military's Morale, Welfare and Recreation (MWR) programs for recreational use by service members.

Community charter halibut permit. One or more community charter halibut permits may be issued to Community Quota Entities (CQEs) representing specified communities that do not currently have a fully developed charter halibut fleet. The CQE concept was developed by the Council originally to help rural communities become more involved in the commercial fisheries for halibut and sablefish (84 FR 23681, April 30, 2004). CQEs are defined in existing regulations at 50 CFR 679.2.

A CQE representing a community or communities in Area 2C can receive a maximum of four community charter halibut permits for each eligible community the CQE represents. A CQE representing a community or communities in Area 3A can receive a maximum of seven community charter halibut permits for each eligible community it represents. The larger number of community permits allowed in Area 3A reflects the larger resource base in that area. A community charter halibut permit will have an angler endorsement of six and will be non-transferable.

In addition to community charter halibut permits, a CQE may acquire charter halibut permits by transfer. A unique excessive share limit will apply to each CQE in Area 2C of a maximum of four charter halibut permits for each eligible community the CQE represents in that area. The combined permit limit for a CQE in Area 2C is four community charter halibut permits plus four charter halibut permits for an overall limit of eight permits per eligible community. Similarly, the excessive share limit for a CQE in Area 3A is a combined permit limit of seven community charter halibut permits plus seven charter halibut permits for an overall limit of 14 permits per eligible community.

A charter vessel fishing trip for halibut that is authorized by a community charter halibut permit is required to either begin or end within the community designated on the community charter halibut permit. This requirement will apply only to community charter halibut permits and not to any additional charter halibut permits that a CQE may acquire by transfer.

The Council intended to limit the benefits of community charter halibut permits to rural communities that have an emerging but not a fully developed charter vessel fleet. Instead of listing in regulations the criteria used by the Council in selecting community eligibility, this rule simply specifies those communities in Areas 2C and 3A (*see* Table 21 to part 679) that meet the Council's criteria and will qualify for community charter halibut permits issued to CQE(s) representing them. To add or subtract a community from the proposed list will require separate Council action and a regulatory amendment.

Military charter halibut permit. This action provides for special permits for charter vessels operated by any U.S. Military MWR program in Alaska. The only MWR program in Alaska that currently offers recreational charter halibut fishing to service members is the Seward Resort based at Fort Richardson in Anchorage, Alaska. To operate a charter vessel, the MWR program must obtain a military charter halibut permit by application to NMFS. Each military charter halibut permit will be non-transferable and valid only in the regulatory area designated on the permit. NMFS reserves the right to limit the number of these permits.

Consistency With Halibut Act

As described at the beginning of this preamble, this action is authorized by the Halibut Act at section 773c. Section 773c(c) specifically authorizes the Council to develop and the Secretary to approve limited access regulations applicable to nationals or vessels of the United States or both. Such regulations are required by this section of the Halibut Act to be consistent with four basic standards. The following discussion summarizes these statutory standards and the rationale used by the Secretary in approving the Council's recommendation and this rule implementing a limited access system for charter vessels in the guided sport fishery for halibut in IPHC regulatory Areas 2C and 3A.

Section 773c(c) of the Halibut Act requires limited access regulations to be—

- In addition to and not in conflict with regulations adopted by the IPHC;
- Non-discriminatory between residents of different States;
- Consistent with the limited entry criteria set forth in 16 U.S.C 1853(b); and
- Fair and equitable to all fishermen, based on the rights and obligations in Federal law, reasonably calculated to promote conservation, and carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of halibut fishing privileges.

No Conflict With IPHC Regulations

Regulations governing halibut fisheries that are recommended by the IPHC are accepted or rejected on behalf

of the United States by the Secretary of State, with the concurrence of the Secretary, pursuant to section 773b of the Halibut Act. Accepted IPHC regulations are published as annual management measures pursuant to 50 CFR 300.62. The current annual management measures were published in the **Federal Register** on March 19, 2009 (74 FR 11681). IPHC regulations affecting sport fishing for halibut and charter vessels in Areas 2C and 3A may be found in sections 3, 25, and 28 of the IPHC regulations (74 FR 11681, March 19, 2009).

The IPHC regulations at section 3 of the annual management measures include definitions of terms, some of which are related to this action, such as ''charter vessel'' and ''sport fishing.'' This action removes a different definition of ''charter vessel'' from 50 CFR 300.61 that could have raised a conflict question. The definition of the term ''charter vessel'' at 50 CFR 300.61 resulted from a final rule published September 24, 2008 (73 FR 54932), for purposes of a prohibition against using a charter vessel for subsistence fishing for halibut. This action integrates the definition into the prohibition language to which it directly applies at 50 CFR 300.66(i) to clarify that the definition does not apply universally. The universal definition of ''charter vessel'' will continue to be that used by the IPHC and appearing in the annual management measures. Hence, no conflict is found between this action and the IPHC regulations concerning this definition.

The IPHC regulations at section 25 of the annual management measures specify the legal gear for sport fishing for halibut, specify which halibut count toward the daily bag limit, and prohibit possession of halibut on board a vessel while fishing in a closed area and when other fish or shellfish on board the vessel are intended for commercial use. Section 25 also prohibits halibut caught by sport fishing from being offered for sale, sold, traded, or bartered. Finally, section 25 makes an operator of a charter vessel liable for any violation of the IPHC regulations by a passenger on board the vessel. Regulations in this action are in addition to, and not in conflict with, the IPHC regulations at section 25.

The IPHC regulations at section 28 of the annual management measures establish sport fishing rules specific to Convention waters in and off of Alaska. Specifically, these regulations specify the sport fishing season, daily bag limit of halibut per person, the possession limit, and a prohibition against filleting halibut to support enforcement of the daily bag and possession limits. Exceptions to the filleting prohibition also are provided at section 28. Regulations in this action are in addition to, and not in conflict with, the IPHC regulations at section 28.

No Discrimination Between Residents of Different States

Regulations in this action do not discriminate between residents of different states. All charter business owners are treated the same regardless of their residency with respect to their eligibility to receive an initial allocation of a charter halibut permit or a transfer of a charter halibut permit. Likewise, neither the community charter halibut permit nor the military charter halibut permit is restricted in terms of the State of residency of the person who will use the permit. Charter vessel anglers who receive sport fishing guide services from businesses affected by this rule also are not discriminated against in terms of the State of their residence. Such anglers will have the same opportunity to contract with businesses that possess charter halibut permits regardless of the location of the angler's residence.

Consistency With Limited Entry Criteria

The limited entry criteria referred to in section 773c(c) of the Halibut Act appear at section 303(b)(6) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.*). These criteria appear under the heading of discretionary provisions for the Council and Secretary, and they read, and are discussed in turn, as follows:)

(b) Discretionary provisions. [The Council or Secretary] with respect to any fishery, may—

(6) Establish a limited access system for the fishery in order to achieve optimum yield if, in developing such a system, the Council and the Secretary take into account—

(A) Present participation in the fishery;

(B) Historical fishing practices in, and dependence on, the fishery;

(C) The economics of the fishery;

(D) The cultural and social framework relevant to the fishery and any affected fishing communities;

(F) The fair and equitable distribution of access privileges in the fishery; and

(G) Any other relevant considerations.

Optimum yield. This term is defined in the Magnuson-Stevens Act at section 3(33) in terms of providing the greatest overall benefit to the Nation, and prescribed on the basis of maximum sustainable yield as reduced by any relevant economic, social, or ecological factor. Also, at section 301(a)(1), the Magnuson-Stevens Act states that conservation and management measures must prevent overfishing while achieving optimum yield. This is one of ten national standards established by the Magnuson-Stevens Act with which any fishery management plan (FMP) or regulation implementing an FMP must be consistent.

The U.S. halibut fisheries are not managed under an FMP because the halibut fisheries are governed under the authority of the Halibut Act, not the Magnuson-Stevens Act. The Halibut Act does not require the U.S. halibut fisheries to be managed under an FMP. Therefore, specification of optimum yield for halibut is not required by statute and has not been determined. Nevertheless, the IPHC takes a conservative approach in setting the commercial fishery catch limits for the areas in and off Alaska while leaving economic and social balance questions to the Council. In essence, IPHC biologists determine a biologically acceptable level of harvest from all sources of halibut mortality, estimate the anticipated harvest from all non-commercial sources of fishing mortality, subtract the latter from the former, and set a commercial fishery catch limit based on the remainder. The overall harvest rate targeted by the IPHC is 20 percent of the exploitable biomass. The realized rate in recent years, however, has been substantially above the targeted harvest rate. Therefore, to the extent that the limited access system established by this rule can stabilize the halibut harvest by the charter halibut fishery, it will contribute to the achievement of the overall target harvest rate of halibut.

Present participation. The Council took into account present participation in the charter halibut fisheries as it considered alternative participation criteria. The Council took its action to recommend this rule to the Secretary on March 31, 2007. At that time, the most recent information on participation in these fisheries was from 2004 and 2005 ADF&G saltwater charter vessel logbooks. Logbook data from participation in 2006 was not yet available for the Council's Analysis (*see* **ADDRESSES**). In addition, the ADF&G logbook data were not specific to charter vessel fishing trips targeting halibut, *per se,* but indicated ''bottomfish'' fishing instead. However, the predominate bottomfish targeted in Alaska saltwater sport fisheries is halibut. Hence, bottomfish was assumed to be a reasonable proxy for halibut fishing. Further, the Council chose to accept any ADF&G saltwater logbook entry indicating a bottomfish statistical area, rods, or boat hours as evidence of participation during 2004 and 2005. The

Council was aware that this would result in a liberal estimate of participation in the charter halibut fisheries, but this decision was reasonably based on the best available information. With this understanding, the Council proceeded to consider alternative levels of participation, in terms of numbers of logbook fishing trips ranging from 1 to 20 trips or more, as an indication of participation during 2004 and 2005.

The Council has recommended, and the Secretary has approved, several other limited access systems before this action, and the Council knew that two or three years could pass before its recommendation for this limited access system was fully reviewed, approved, and implemented. In developing this limited access system, the Council addressed the potential of a rush of new entrants into the charter halibut fishery during the period of time the Council and the Secretary worked to develop and implement the system by specifying a minimum participation criterion in a recent participation period. The Council referred to this recent participation period as the ''year prior to implementation.'' In 2007, the year of Council action, the year prior to implementation was an unknown year in the future. In the proposed rule (April 21, 2009, 74 FR 18178), NMFS interpreted the ''year prior to implementation'' for practical purposes to mean the most recent year for which participation data are available. The most recent year for which ADF&G saltwater log book data are available now is 2008. Therefore, the Council's original Analysis of participation patterns was supplemented with 2008 logbook data indicating participation in the most recent year. This is currently the best information available on present participation in the charter halibut fisheries in IPHC Areas 2C and 3A.

The Council's policy recommendation to grant charter halibut permits based in part on participation in at least two years—one of the qualifying years, 2004 or 2005, and the recent participation year, 2008—served several purposes. One was to comply with the Magnuson-Stevens Act 303(b)(6) criteria of taking into account present and historical participation.

The second purpose was to stabilize growth in the charter halibut fisheries, a long-term objective of this limited access system. Due to the length of time needed to develop a limited access policy, conduct analyses of alternative policies, consider public comments, review and approve (or disapprove) a Council recommendation, and (if approved) implement the recommendation with Federal regulations, the entry of new charter halibut fishing effort during this time could significantly change the halibut harvesting capacity from when the Council's policy decision was made in March 2007. Specifying minimum participation criteria in a recent participation year in addition to a qualifying year served the purpose of discouraging new entry into the affected charter halibut fisheries during the intervening years.

The Council and the Secretary provided further public notice to discourage prospective new entry into the charter halibut fisheries when the Council acted to establish a control date of December 9, 2005. The Council determined that anyone entering the charter halibut fishery in and off Alaska after this date would not be assured of future access to that fishery if a limited access system of management was developed and implemented under authority of the Halibut Act. In addition to public announcement of this action at its meeting in December 2005, the Council also published this date in its December 2005 and February 2006 newsletters (*http://www.alaskafisheries.noaa.gov/npfmc/newsletters/newsletters.htm*). The Secretary also published a notice of this date in the **Federal Register** on February 8, 2006 (71 FR 6442).

The third purpose served by the Council's choice of present and historical participation years to qualify for an initial allocation of a charter halibut permit is to establish an objective and measurable indicator of dependence on the fishery. The Council reasoned in developing this and several other limited access systems that participation is a good indication of dependence on the fishery. Fishermen with a relatively greater participation in a fishery likely have a relatively greater dependence on the fishery for their livelihood than do other fishermen with relatively less participation. The difficult policy choice for the Council and Secretary is to determine where on the range, from little to large amount of participation, a decision should be made affecting future participation in the fishery. The Analysis of the potential effects of alternative decisions supports the ultimate policy choice (*see* **ADDRESSES**).

For commercial fisheries, participation is often measured in pounds of the targeted fish species landed. Charter vessel businesses, however, primarily market a sport fishing experience rather than pounds of fish caught. Logbook fishing trips are a better measure of participation in the charter halibut fisheries than are pounds of halibut caught and retained. Hence, the Council used logbook fishing trips as a measure of participation in the charter halibut fisheries.

Further, the Council determined the level of minimum participation in both years—the historical, 2004 or 2005, and present participation, 2008—indicated a reasonable dependence on the charter halibut fishery. Using participation in a past and a recent year together demonstrates dependence on the fishery to a greater extent than using only one year of participation as a qualifying criterion. A charter halibut business with a record of at least minimal participation in both years likely participated also in the intervening years, and likely continues to participate now. Therefore, these are the businesses that the Council decided should receive an initial allocation of charter halibut permits. On the other hand, charter halibut businesses that participated only in the historical period but not in the recent participation period likely exited the charter halibut industry before the recent participation period and, therefore, are no longer dependent on the fishery. Conversely, charter halibut businesses that participated only in the recent period but not in the historical period likely entered the fishery after the control date. These businesses comprise a group of charter halibut participants that the Council and Secretary specifically discouraged from entry by announcing that their participation would not necessarily be recognized (71 FR 6442, February 8, 2006).

The Secretary has approved and adopted this rational basis for taking into account present participation.

Historical fishing practices. The Analysis took into account historical fishing practices in and dependence on the charter halibut fisheries (*see* **ADDRESSES**). The Council examined the potential effects of several alternative minimum qualifying logbook trips during this period before making its recommendation. As explained above, the choice of minimum qualifying logbook trips during this historical participation period in combination with those during the recent participation period (2008) was critical to a determination of dependence on the charter halibut fishery. Those charter halibut businesses that met the minimum logbook trip criteria were determined to be sufficiently dependent on the charter halibut industry to warrant them receiving an initial allocation of one or more charter halibut

permits. The Secretary has approved and adopted the Council's rational basis for taking into account historical fishing practices in and dependence on the charter halibut fisheries.

Economics. The Council and the Secretary have taken into account the economics of the charter halibut fishery. The Analysis prepared by the Council and supplemented and approved by the Secretary includes a Regulatory Impact Review (RIR) and Final Regulatory Flexibility Analysis (FRFA) (*see* **ADDRESSES**). These documents respectively include analysis of potential costs and benefits and analysis of potential impacts on small entities as defined by the Regulatory Flexibility Act. This Analysis contains information describing the principal sectors that fish for halibut and incorporates earlier descriptions by reference. Each of the components of the preferred alternative is analyzed separately in the RIR. The impacts of the preferred alternative, and two other significant alternatives, on user industry and consumer groups in the commercial and charter halibut fisheries are compared in the RIR. A FRFA provides an analysis of the impacts of the preferred alternative on small entities. The Council accepted testimony from the public, much of which addressed economic concerns. NMFS has supplemented the Analysis, prepared for the Council's decision-making and to accompany the publication of the proposed rule, with an updated analysis of the impacts of the preferred alternative in light of specification of the recent participation period (*see* **ADDRESSES**). This information was not previously available. NMFS accepted and evaluated comments on the proposed rule, many of which raised economic issues. The summary of public comments and NMFS's responses to them may be found below.

Capability to engage in other fisheries. The Council and the Secretary have taken into account the capability of vessels used in the guided sport fishery for halibut to engage in other fisheries. The Analysis prepared by the Council, supplemented and approved by the Secretary, includes a description of the affected fleet and industry. In brief, the charter halibut industry provides marine transportation and sport fishing guide services to anglers wishing to catch halibut. Charter vessel businesses provide these services also to anglers wishing to catch salmon, rockfish, lingcod, and other bottomfish. In addition, charter vessel businesses may provide marine transportation for bird watching, whale watching, and general sightseeing. Passengers using these services may be independent tourists, guests at lodges, or travelers on cruise ships. Charter vessel businesses may focus their business plan on sport anglers wishing to catch halibut, but other business plans are possible given the variety of reasons why an individual may want to engage the services of a charter vessel.

Cultural and social framework. The Council and the Secretary have taken into account the cultural and social framework relevant to the charter halibut fishery and affected fishing communities. The Council received substantial public testimony during the early development of this rule which influenced the design of elements included for Secretarial consideration. The Secretary in turn has received public comments on cultural and socioeconomic aspects of this rule, has considered these comments and responded to them below. The Analysis of alternatives (*see* **ADDRESSES**) reflects this consideration by finding numerous communities with little charter vessel activity while a few communities have a well-established charter vessel industry, as indicated by the numbers of vessels that terminated charter vessel trips in coastal communities during the qualifying years. Hence, this action supports limited development of a charter halibut fishery in specific rural communities through a special community charter halibut permit program.

Community charter halibut permits will be issued under this rule at no cost to CQEs representing communities that do not currently have a fully developed charter halibut fleet. The CQE provision was previously developed by the Council for the IFQ program to help certain rural communities become more involved in the commercial fisheries for halibut and sablefish. In this action, the CQE provision serves the same purpose for the development of the charter vessel industry based in any of 18 rural communities in Area 2C and 14 rural communities in Area 3A. The purpose and design of the CQE provision is more fully described in the proposed rule published April 21, 2009 (74 FR 18178).

The Council also recommended, and the Secretary approved, another special permit for military recreation purposes. This took into account the existence of morale, welfare, and recreation (MWR) programs operated by the U.S. military and their importance to the recreational opportunities afforded to military services.

The Council and Secretary also have taken into account unique social and cultural aspects of the charter halibut fishery by providing for certain hardships or unavoidable circumstances in qualifying for a charter halibut permit. The design and conditions for a charter halibut permit based on unavoidable circumstances are fully described in the proposed rule published April 21, 2009 (74 FR 18178).

Fair and equitable distribution of access privileges. The Council and the Secretary have taken into account the fair and equitable distribution of access privileges to the halibut resource. Although this action may cause some restructuring within the charter vessel industry, no individual sport angler will be prevented from having access to the halibut resource for sport fishing. Sport fishermen wishing to fish for halibut on a charter vessel likely will be able to hire an operator or guide with a charter halibut permit as easily after the implementation of this rule as was done before that time.

Further, persons wishing to enter the charter vessel industry will be able to do so. This rule does not prevent any person from entering the charter vessel industry or becoming an operator of a charter vessel. An operator or business with a halibut fishing clientele, but that does not qualify for an initial allocation of one or more charter halibut permits, would have to obtain a transferable charter halibut permit by transfer. Alternatively, a charter vessel business that had such minimal participation that it does not qualify for a charter halibut permit under the Council's qualification criteria could change its business model to one that does not involve fishing for halibut. Although this rule does not prevent most persons from entering the charter halibut fishery, those persons that receive an initial allocation of charter halibut permits will have a competitive advantage over those that will have to pay for transfer of these permits. The rationale for making a distinction between these two groups is to end the opportunities for unlimited growth in charter vessel operations that may fish for halibut by establishing a finite number of charter vessels authorized for guided sport halibut fishing based on the historical and present participation criteria outlined above. This action is intended to support the Council's approved policy of allocating the halibut resource among all fishing sectors and providing continued participation by those operations most dependent on the halibut resource.

Other relevant considerations. The Council and the Secretary have taken into account other factors to allow limited additional participation in the charter halibut fisheries than would otherwise be allowed without certain

exceptions to the qualifying criteria. First, an initial allocation of non-transferable charter halibut permits will be allocated to persons with a low level of participation. The minimum number of logbook fishing trips in one of the qualifying years—2004 or 2005—and in the recent participation year—2008—is five. Dependence on the halibut resource will be difficult to demonstrate for charter vessel businesses that made only 5 to 14 logbook fishing trips, relative to those businesses that made 15 or more trips. These low-participation charter businesses likely are small and operate part time, but together they supply a significant market for charter vessel anglers. Excluding the low-participation charter businesses from initial allocation of charter halibut permits could have constrained charter vessel angler opportunities. Allowing low-participation charter businesses to qualify for transferable charter halibut permits, however, would have created a large latent capacity to expand charter vessel angler opportunities. Hence, these low-participation charter businesses are allowed to qualify for non-transferable charter halibut permits to continue their current operations but not provide a source for significant expansion of charter halibut fishing in the future.

Second, consideration of unavoidable circumstances is specifically recognized by the Council and the Secretary. Such circumstances must have been unique to a particular person, unforeseen and unavoidable, and must have prevented a potential participant in the charter halibut fishery from participation as intended during either the qualifying or recent participation years. This hardship provision allows for an appeals process that may result in the potential allocation of non-transferable or transferable charter halibut permits that would otherwise be denied. A special military service hardship provision was included for a charter halibut permit applicant that meets the participation requirement during the recent participation period but not during the qualifying period due to U.S. military service.

Finally, the Council and Secretary allowed an exemption for charter vessels operated by any U.S. Military MWR program in Alaska. A special non-transferable military charter halibut permit will be issued to a MWR program without regard for previous participation in the charter halibut fisheries. NMFS reserves the right to limit the number of these permits.

Fair and Equitable, Promotes Conservation, and Avoids Excessive Share

The Halibut Act at 16 U.S.C. 773c(c) states the following:

> If it becomes necessary to allocate or assign halibut fishing privileges among various United States fishermen, such allocation shall be fair and equitable to all such fishermen, based upon the rights and obligations in Federal law, reasonably calculated to promote conservation, and carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of halibut fishing privileges.

The following discusses the consistency of this action with each of these three standards.

Fair and equitable. The ''fair and equitable'' requirement in the Halibut Act quoted above is substantially the same as the ''fair and equitable'' requirement found at 16 U.S.C. 1851(a)(4), *i.e.,* National Standard 4 of the Magnuson-Stevens Act. The only difference is the addition of the word ''halibut'' before ''fishing privileges'' in the provision in 16 U.S.C. 773c(c). Because of this similarity, the National Standard 4 guidelines promulgated by NMFS help to illustrate why this action, even though it is taken under the Halibut Act and not the Magnuson-Stevens Act, meets the statutory requirement. An allocation of fishing privileges should be rationally connected to the achievement of optimum yield or the furtherance of a legitimate fishery management objective under the guidelines to National Standard 4 (50 CFR 600.325(c)(3)(i)(A)). The Council and NMFS have articulated a legitimate objective for this action, that is, to be a step toward establishing a comprehensive program of allocating the halibut resource among the various halibut fisheries (guided and unguided recreational, commercial, and subsistence). To accomplish this objective, the Council and NMFS found a need to stabilize growth in the charter halibut sector.

Further, the guidelines to National Standard 4 acknowledge that inherent in an allocation is the advantaging of one group to the detriment of another. The motive for taking a particular allocation should be justified in terms of fishery management objectives; otherwise, the disadvantaged user groups or individuals will suffer without cause (50 CFR 600.325(c)(3)(i)(A)). The fishery management objective of this action has been articulated by the Council and NMFS, starting with the 1995 problem statement by the Council and continuing through this final rule (cf., history of charter vessel fishery management concerns and limited access development published on February 8, 2006 [71 FR 6442], and April 29, 2009 [74 FR 18178]). These statements demonstrate that the Council was concerned about overcrowding of productive halibut grounds due to the growth of the charter vessel sector and that expansion of this sector may affect ''the Council's ability to maintain the stability, economic viability, and diversity of the halibut industry, the quality of the recreational experience, the access of subsistence users, and the socioeconomic well-being of the coastal communities dependent on the halibut resource.''

Finally, the guidelines to National Standard 4 state that an allocation may impose a hardship on one group if it is outweighed by the total benefits received by another group or groups. ''An allocation need not preserve the status quo in the fishery to qualify as 'fair and equitable,' if a restructuring of fishing privileges would maximize overall benefits'' (50 CFR 600.325(c)(3)(i)(B)). In this action, the Council and NMFS found that the total benefits to the charter halibut fishery will be increased relative to the status quo. The hardship of not qualifying for an initial allocation of a charter halibut permit will be borne by those who entered the charter halibut fishery after 2005 despite the Council's control date notice that such persons would not be assured of future access to this fishery if a limited access system is implemented (71 FR 6442, February 8, 2006). Overall benefits of this rule, however, will accrue to those businesses in the charter halibut fishery that were established and participating during the qualifying and recent participation years.

Promotes conservation. Although biological conservation of the halibut resource is not the principal purpose of this rule, it will promote conservation by fostering a more easily managed charter halibut fishery. When any fishery resource is fully subscribed among the various fishery sectors using it, the uncontrolled growth in one sector will disadvantage the other sectors. The Analysis (*see* **ADDRESSES**) indicates that the charter sector is the second largest (after the commercial fishery) of all the sectors using the halibut resource in the two IPHC regulatory areas to which this rule applies. Whereas growth of the commercial fishery sector is constrained by the IFQ program and catch limits stipulated by the IPHC, growth in the non-commercial sectors is not similarly constrained. This presents no fishery management problem provided that all

of the non-commercial sectors exhibit relatively static growth over time such that year-to-year assumptions about their harvest prove to be correct. The charter halibut fishery has grown in recent years, however, depending on the demand for halibut by charter vessel anglers. Although this rule is not designed primarily to limit the harvest by the charter halibut fisheries, it will make existing and future harvest restrictions more effective because conservation gains from individual harvest restrictions will not be eroded by unlimited growth in the fleet of charter vessels fishing for halibut. In this manner, this rule will contribute to the achievement of the overall target harvest rate of halibut established by the IPHC.

Avoids excessive share. An excessive share of halibut fishing privilege is not defined in either the Halibut Act or in the National Standard 4 guidelines. The latter states simply that an allocation must deter any entity from acquiring an excessive share of fishing privileges, and avoid creating conditions that foster inordinate control by buyers and sellers (50 CFR 600.325(c)(3)(iii)).

This rule sets an excessive share standard of five charter halibut permits. Existing businesses that initially qualify for more than five permits will be able to continue business at levels above this excessive share standard; however, they will be prevented from acquiring more permits than their initial allocation. Transfers of a permit or permits that will result in the person, business, or other entity receiving the permit(s) holding more than five permits will not be approved by NMFS with limited exception.

Some consolidation of charter halibut permits may occur under this rule, but will be limited by the five-permit excessive share standard. Further, the number of businesses that are allowed an initial allocation of permits in excess of this standard will not increase. A 10 percent ownership criterion will apply to prevent a corporation from exceeding the excessive share standard by owning or controlling subsidiary businesses each holding the maximum number of permits. The 10 percent ownership criterion is the same as that used for implementing the American Fisheries Act and defined at 50 CFR 679.2. Under this definition, two entities are considered the same entity if one owns or controls 10 percent or more of the other. Hence, an excessive share of privileges to operate charter vessels fishing for halibut is prevented and the dominance of any businesses in the charter halibut fishery will not be allowed to increase any more than it is at the time of initial allocation of permits.

Comments and Responses

This action was published as a proposed rule on April 21, 2009 (74 FR 18178), and public comments on it were solicited until June 5, 2009. NMFS received 166 comment submissions containing 157 unique comments. These comments were reviewed, organized into seven topical categories, and responded to as follows:

Fairness and Legal Authority

Comment 1: The proposed rule does not meet the National Standards for Fishery Conservation and Management as defined in the Magnuson-Stevens Act (16 U.S.C. 1851(a)(4)).

Response: This action is authorized by the Halibut Act at section 773c, not the Magnuson-Stevens Act. Section 773c(c) of the Halibut Act provides the requirements that must be met by the Council and the Secretary when developing and implementing regulations for halibut. The Secretary has found this rule to be consistent with this requirement of the Halibut Act as explained above under the heading ''Consistency with Halibut Act.''

Comment 2: The Halibut Act of 1982, (at section 773c(c)) states that rules shall be fair and equitable and they shall not discriminate among participants.

Response: The Halibut Act at the section cited actually prohibits discrimination between residents of different States. This rule does not discriminate between residents of different States as the criteria for an initial allocation of charter halibut permits applies to all applicants regardless of the State in which they reside. This action complies with the requirements of the Halibut Act, as discussed in the ''Consistency with Halibut Act'' section above.

Comment 3: Several comments stated that the proposed rule is not fair and equitable because it requires applicants to demonstrate participation in the halibut charter fisheries in 2004 or 2005 (historical participation period). The comments note that the historical participation requirement illegally discriminates against businesses that are currently in operation because:

- The proposed rule would impose *ex post facto* regulations, contrary to the Constitution of the United States;
- The Magnuson-Stevens Act at 16 U.S.C. 1853(b)(6) states that when implementing a limited entry program, present participation and historical practices must be considered. It does not say anything about historical participation on which NMFS is basing this rule;
- While obtaining all relevant licenses and permits to operate a charter business, there was no notification by the licensing agencies that rules were being made that would retroactively disallow charter operators from continuing to operate their businesses;
- Many small business owners will not have the right to appeal under the unavoidable circumstances provision as the proposed rule states that an applicant must demonstrate that it had a specific intent to participate in the qualifying period; and
- The proposed rule clearly shows the Council's intention to act favorably towards the charter vessels that operated during 2004 and 2005 by excluding charter businesses that started operating between 2006 and 2009.

Response: This rule is not illegal or contrary to the U.S. Constitution. An *ex post facto* law is a law passed after the occurrence of an event or action which retrospectively changes the legal consequences of the event or action. That is not the case with this rule. This rule does not make charter halibut fishing that was legally performed after 2005 and before the effective date of this rule illegal, but instead establishes specific eligibility criteria for receiving a harvest privilege. Hence, this rule does not change the legal consequences of past participation in the charter halibut fishery. Persons who entered the fishery after 2005, however, had constructive notice, published February 8, 2006 (71 FR 6442), that they were not assured of future access to the charter halibut fishery if a management regime, such as the one implemented by this rule, were implemented.

The Council and the Secretary considered historical practices in the charter halibut fisheries in Areas 2C and 3A by looking at the number of charter vessel businesses and vessels participating in these fisheries, the range in the number of logbook fishing trips made, and the number and distribution of communities in which these fishing trips terminated in 2004 and 2005. These factors are reasonable measures of dependence on the charter halibut fisheries. *See also* the discussion of historical fishing practices above under the heading ''Consistency with Halibut Act.''

Prior to this rule, NMFS has not implemented any licensing requirements for operators of vessels with one or more charter anglers onboard. However, the Council has a long history of developing management measures for the charter halibut fishery, as described in the preamble to the

proposed rule (74 FR 18178, April 21, 2009), and the control date notice published February 8, 2006 (71 FR 6442). Persons entering the charter halibut fishery for the first time after 2005 were on notice that their future access to that fishery was not assured.

Regarding an appeal, all charter halibut permit applicants have a right to an appeal under § 300.67(h)(6) of this rule. However, if a charter vessel business was not started until 2006 or later and cannot demonstrate that it intended to participate in prior years, it will not be able to meet the criteria for the unavoidable circumstance exception. *See* the response to Comment 109 for a discussion of the unavoidable circumstances exception to the charter halibut permit qualification requirements.

The Council selected 2004 and 2005 as the qualifying years because those were the most recent years for which the Council had information on participation in the charter halibut fishery when it acted in early 2007. The Council did not select a larger number of qualifying years because the normal entry and exit from the charter halibut fishery from year to year could result in more charter halibut permits than vessels participating in any one year with a qualifying period of too many years. The choice of combining minimum participation during a qualifying year and the recent participation year further serves the purpose of limiting charter halibut permits to those businesses that have demonstrated a long-term commitment to the charter halibut fishery and gives consideration to present participation and historical dependence, factors that must be considered pursuant to the Halibut Act.

Before developing eligibility criteria for the charter halibut limited access system, the Council announced a control date of December 9, 2005, to provide notice to any person contemplating entry into the charter halibut fishery after that date. A control date notice published in the **Federal Register** on February 8, 2006 (71 FR 6442), further indicated that future access to the charter halibut fishery was not necessarily assured to persons entering the fishery for the first time after that date.

Comment 4: One commenter proposed changes to the moratorium to make it fair, equitable, and non-discriminatory. These changes included revising the charter halibut permit qualification criteria to require participation only in more recent years and making all charter halibut permits transferable to allow established businesses to grow by purchasing permits.

Response: Although alternative programs might be found to be fair and equitable and non-discriminatory, as required by the Halibut Act, this rule was developed by the Council to meet its stated objectives. The Council intended to recognize historical and recent participation by granting permits to charter businesses that demonstrate consistent participation in and dependence on the charter halibut fisheries. The Council also recommended a higher participation requirement for transferable permits than for non-transferable permits to balance its objective to reduce fishing effort and its objective to minimize disruption to the charter fishing industry. The Council's recommended qualifying criteria for transferable charter halibut permits will allow businesses to grow by purchasing additional permits up to the excessive share limit of five charter halibut permits, which is consistent with the commenter's suggestion. NMFS finds that this rule meets the requirements of the Halibut Act (*see* discussion above under the heading ''Consistency with Halibut Act'').

Comment 5: The Council does not have the authority to ban charter businesses that began operating between 2006 and 2009 from operating a guided halibut fishing business, or to include rules that merely allocate the harvest level among users rather than reduce the harvest level as required by agency goals.

Response: The Halibut Act, at section 773c(c), provides authority to the Council and the Secretary to ''develop regulations governing the United States portion of Convention waters, including limited access regulations, applicable to nationals or vessels of the United States or both'' The Halibut Act, at 16 U.S.C. 773c(a) and (b), also provides the Secretary with general responsibility to carry out the Convention, the Halibut Act, and to adopt such regulations as may be necessary. In reviewing this rule, the Secretary has found that the Council's recommendation for this limited access system is consistent with the Halibut Act (*see* the discussion above under the heading ''Consistency with Halibut Act'').

Fishery management generally, and management of the halibut fisheries in particular, is not necessarily limited to the direct control of harvests. Allocation of fishing privileges also is specifically authorized by the Halibut Act if the regulations that allocate fishing privileges meet certain criteria. *See* the ''Consistency with Halibut Act'' section above for further discussion of how this rule is consistent with all Halibut Act requirements.

Comment 6: A limited access program on charter vessels is not a conservation measure to protect the halibut but an attempt to limit individuals from the resource. Since halibut is a resource that belongs to all citizens, it is only reasonable that they should have the first opportunity to harvest what is rightfully theirs. Charter operators afford citizens a reasonable opportunity to catch fish. The people should have the first opportunity to gather, and the remains of the annual surplus can then be opened to commercial harvesting. Citizens should not be limited from harvesting their resource until there is a conservation concern.

Response: This rule is reasonably calculated to promote conservation as described above under the heading ''Consistency with Halibut Act.'' NMFS agrees that halibut are a public resource; however, the limited access system established by this rule does not limit individual anglers from opportunities to access the halibut resource. This rule limits the number of charter vessels in the guided sport fishery for halibut in only two of the 10 IPHC regulatory areas. The Analysis prepared for this action (*see* **ADDRESSES**) estimates that charter vessel capacity will be sufficient to meet the demand for the number of anglers who took guided charter vessel trips in 2008 in Areas 2C and 3A (*see* also response to Comments 21 and 43).

Although charter vessels provide an important means of access to the halibut resource, they are not the only way that the public can access the resource. The commercial fishery provides access to halibut to those who prefer to purchase it in grocery stores or restaurants. The subsistence fishery provides access to the halibut resource by those who qualify to conduct subsistence halibut fishing. Non-guided recreational fishing also is a source of public access to the halibut resource. This rule does not constrain or limit any of these other means of public access to the halibut resource. In fact, the catch limits specified annually for the commercial halibut fishery by the IPHC for areas in and off of Alaska are set after estimated harvests by all other non-commercial removals are subtracted from the constant exploitation yield (*see* discussion under ''Management of the Halibut Fisheries'' in the preamble to the proposed rule (74 FR 18178, April 21, 2009).

Comment 7: Commenter urged you to pass the proposed rule for the guided halibut fishery. All businesses need stable, predictable regulation to plan

and prosper. To foster socioeconomic stability in our coastal communities and for the benefit of all Americans and the resource, I urge you to proceed forward now with implementation of a long-term, market-based solution that will put commercial setline and charter sectors on the same playing field with equitable rules.

Response: NMFS agrees that this action establishing a limited access system for the charter halibut fisheries in Areas 2C and 3A will contribute to stabilizing these charter halibut fisheries and communities with charter vessel activity. NMFS supports long-term market based solutions to allocation problems, such as this program.

Comment 8: The Council should develop an FMP for halibut and NMFS should explain the legal basis behind the absence of an FMP for halibut. An FMP would assist the Council in recognizing the differences among user groups and treating all user groups equally.

Response: The legal basis for not having an FMP for Pacific halibut fisheries is that Pacific halibut fisheries are managed under the Halibut Act and the Halibut Act does not require the Council to develop an FMP. The comment correctly points out that section 773c(c) of the Halibut Act also provides authority to develop regulations to the regional fishery management councils, but that this is limited to regulations ''which are in addition to and not in conflict with regulations adopted by the [IPHC].'' Hence, the Halibut Act speaks only to the development of regulations, and not to the development of an FMP. NMFS agrees that the Halibut Act's reference to the limited entry criteria at 16 U.S.C. 1853(b)(6) applies to all halibut fishery regulations developed by the Council and approved by the Secretary under authority of the Halibut Act. These criteria are essential when contemplating any regulatory scheme that would allocate a fishery resource among competing users. However, an FMP is not required to make these criteria effective in the regulatory process.

An FMP is not needed to recognize differences among user groups and to treat all those groups fairly and equitably. Regardless of an FMP, halibut fishery regulations must have a rational basis for their effects. In developing this rule, the Council and the Secretary provided a rational basis which in part is summarized as follows.

First, this rule recognizes that, although there are communities with highly developed charter halibut fisheries, there are also communities with unrealized development potential and has provided for special community charter halibut permits. These special permits are intended for start-up charter vessel operations in communities that do not have highly developed charter fisheries and do not have the same participation criteria as transferable and non-transferable charter halibut permits. Hence, this rule recognizes variations in charter halibut fishing effort among communities and provides for communities with potential for charter industry growth.

Second, this rule focuses on the guided charter halibut fisheries in Areas 2C and 3A instead of the non-guided sport fisheries in these areas because the harvests of the former have been persistently greater and growing over time relative to the latter. However, recreational anglers remain free to choose between guided and unguided sport fishing. *See also* the response to Comments 6, 21, and 43.

Comment 9: Several comments noted that a limited entry program being promulgated under the Halibut Act must meet the section 303(b)(6) standards of the Magnuson-Stevens Act. To ensure that the standards are met, the comments recommended that NMFS explicitly address each standard and explain how each standard is met in the final rule.

Response: NMFS agrees and addresses each standard as part of the discussion above under the heading ''Consistency with Halibut Act.''

Comment 10: There is a commercial bias in the IPHC and the Council. The IPHC and Council have supported the commercial sector to the detriment of the charter fleet. This creates concerns about the impartiality of the Council and raises questions as to whether the Council is making decisions solely to benefit the commercial sector. The commercial sector has so many representatives on the Council that it is impossible for guided charter operators to get the Council to acknowledge their suggestions, comments, or proposals to work with the commercial sector. Only the commercial sector is in favor of the moratorium for the guided charter sector.

Response: This action is being taken by NMFS based on a recommendation by the Council. Actions by the IPHC are evaluated and approved under a different process. The process for selecting Council members is set in statute and employs mechanisms to assure representation of the various States represented on the Council and fair and balanced apportionment to the extent practicable. The Council makes decisions through a public process, and in a manner that is consistent with the requirements of the relevant statutes. The Council has the authority to develop regulations to address allocation issues among different domestic sector users of halibut in and off the waters of Alaska, including the commercial and guided sport fisheries.

This final rule does not unfairly favor the commercial sector. In December 2005 the Council appointed a Charter Halibut Stakeholder Committee to address alternatives for long-term management of the charter halibut fishery. The committee had representation from the sport guided, unguided, and commercial sectors. The Council recommended a charter halibut permit program that was based, in large part, on recommendations from the Charter Halibut Stakeholder Committee. Additionally, the draft EA/RIR/IRFA prepared for the charter halibut moratorium (*see* **ADDRESSES** was available for public review throughout program development and Council meetings are open to the public. The Council received oral and written testimony on the charter halibut moratorium. Some of the testimony in support of the charter halibut moratorium came from charter operators. Furthermore, NMFS reviewed the Council's recommendations for consistency with the Halibut Act, the Convention, and other applicable law and found the current program to be consistent with those requirements.

Comment 11: An IFQ or quota for halibut charter fishing is not an appropriate management solution.

Response: This rule does not implement an IFQ program for halibut charter fishing nor does it establish a quota allocation for the guided charter vessel sector or individual charter operators. This action establishes a limited access system that limits the number of persons engaged in the charter halibut fishery in Area 2C and Area 3A.

Comment 12: The allocation of halibut between the commercial and charter sectors is not fair and equitable. The percentage allocation of the halibut guideline harvest level (GHL) to the recreational fisherman in Alaska is grossly unfair. If this percentage were increased there would not be a need for a limited charter fleet.

Response: Adjustments to the GHL are outside the scope of this action. *See* the response to Comments 34 and 35. This rule is fair and equitable as required by the Halibut Act (*see* discussion above under heading ''Consistency with Halibut Act''). Also, harvest amounts by all sectors do not have to be equal for

regulations to meet the fair and equitable standard.

Comment 13: NMFS should limit commercial halibut catch instead of limiting the number of charter operators. According to the Council's problem statement, ''overcrowding of productive halibut grounds [is] due to the growth of the charter vessel sector.'' However, a majority of the productive halibut grounds in Areas 2C and 3A are currently open to commercial halibut harvesting. A 15 percent reduction in the commercial catch limit within 12 miles of shore could relieve the Council's concerns with overharvest. Instead of focusing on limiting the sport/charter industry, get the commercial boats that set miles of gear offshore where they belong and restrict the large IFQ longliners from fishing near coastal Alaska communities so they don't deplete near-shore halibut stocks that subsistence and sport users depend on.

Response: This rule is intended to curtail growth of fishing capacity in the guided sport fishery for halibut, which is consistent with the Council's problem statement. Limited access systems are commonly used to limit the capacity of fishing fleets that are in need of management to meet conservation and socioeconomic objectives as determined by the Council.

Further restrictions on the commercial halibut fishery are outside the scope of this action. The problem statement referenced in the comment refers to a problem statement adopted by the Council that guided its decision making during the 1995 through 2000 period. The statement was provided in the proposed rule for this action to demonstrate that the Council has discussed and considered the expansion of the guided sport charter vessel fishery for halibut since 1995. The problem statement adopted by the Council that led to this action can be found in the executive summary of the Analysis (**ADDRESSES**) and speaks to stabilizing the growth in the charter sector and addressing allocation issues; it does not mention overcrowding of productive halibut grounds.

Comment 14: Several comments noted that this action is an allocation, and the Halibut Act requires that allocations of fishing privileges must be fair and equitable. The comments assert that the proposed rule would limit the number of halibut charter operators in order to benefit the commercial sector by reducing the amount of halibut taken by the charter sector. This is in direct conflict with the fair and equitable standard applicable to the allocation of fishing privileges.

Response: NMFS agrees that this rule has an allocation effect which the Council and the Secretary see as necessary and which is authorized by the Halibut Act at section 773c(c). According to the proposed rule (at 74 FR 18178, April, 21, 2009), the intended effect of this rule is to ''curtail growth of fishing capacity in the guided sport fishery for halibut.'' NMFS does not expect growth curtailment to result in harvest curtailment, at least in the short term. Any reduction in the harvest by the charter halibut sector during the short term more likely will result from direct harvest controls, such as the daily bag limit reduction for charter vessel anglers in Area 2C this year (74 FR 21194, May 6, 2009). Hence, increasing the halibut harvest by the commercial setline fishery is not the intent or expected outcome of this rule.

The Council's Charter Halibut Stakeholder Committee developed most elements of the charter vessel moratorium program and recommended it to Council. These elements were designed to respond to the Council's problem statement. The Council developed the program further after hearing public testimony on the subject. The Council subsequently recommended it to the Secretary under its Halibut Act authority to do so.

Comment 15: Charter boats should be limited in Southeast Alaska. Too many vessels and operations are not owned by Alaskans and these operations grew quickly while fishing opportunities were available. This is particularly true for operations with six to 30 vessels (large operations) rather than small operations with one to three vessels. The large operations have no regard for the resource and hire help from down south and pay low wages. As most of their captains are from down south as well, and I question whether they are qualified to be guiding in a very unforgiving environment. Why are we rewarding this behavior by giving them ''forever'' rights and exclusivity to the fishery?

Response: Sport fishing lodge operations with a large number of charter vessels are as legitimately in business as are operations with a small number of charter vessels. Both types of charter vessel operations provide a recreational service. The growth in operations referred to by the comment may have been associated with growth in tourism and cruise ship visits to Southeast Alaska; however, NMFS does not have information that identifies the specific reasons for growth in charter vessel operations.

The assertion that many charter vessel operations are not owned by Alaskans or that some operations hire non-Alaska residents is not relevant to this final rule. The Halibut Act prohibits the Secretary from approving halibut regulations that discriminate between residents of different States. This rule applies to all applicants for charter halibut permits and permit holders, regardless of their place of residence. Wages paid to the staff of charter vessel operations and the required qualifications for operators of vessels with one or more charter anglers onboard are outside the scope of this action.

Finally, this rule does not create permanent exclusive rights to operate in the charter halibut fishery. A permit is a privilege that can be revoked if the permit holder violates specified conditions of the law. In addition, holders of transferable charter halibut permits are expected to transfer some permits to new entrants to the charter halibut fisheries. NMFS expects that over time, transferable permits will migrate to those operators and areas where they will be most efficiently used. Non-transferable permits may be used by the business owner(s) to whom they are initially issued but may not be transferred to another business or operator. These permits will expire when an individual permit holder dies. If the permit holder is a non-individual entity, non-transferable permits issued to the business will expire when the business changes as defined in regulation at § 679.42(j)(4)(i).

Comment 16: The proposed halibut charter moratorium is unfair to the charter boat captains and to the clients that spend money to come to Alaska and fish. The prices of charters have gone up significantly in the past two years because of high fuel prices. Now the government will collect money for the proposed halibut charter moratorium permit. I am a small operator trying to make a living taking people out fishing. The limited entry permit for halibut charter operators is just another way for the government to collect money.

Response: This rule does not establish any fee on halibut charter businesses or operators to participate in the charter halibut moratorium program. Under this action applicants for a charter halibut permit are not required to submit a fee with their application nor will a fee be charged to issue or transfer a charter halibut permit. If such fees are charged in the future, they will be established by a separate regulatory action.

This rule, however, does not affect the requirements for permits or other certifications by other State or Federal agencies that charter halibut businesses must obtain to operate in Areas 2C or

3A and for which fees may be charged. NMFS does not have information to estimate the number of charter business owners that may purchase charter halibut permits, a private transaction. Also, NMFS does not have information to estimate the cost of such transactions, or the effect of those costs on the prices the charter operators will charge for their services (*see also* Section 2.8 of the Analysis at **ADDRESSES**).

Comment 17: The moratorium is legally vulnerable.

Response: As indicated above, NMFS finds this rule to be consistent with applicable law (*see* discussion above under the heading ''Consistency with Halibut Act''). This rule was developed through a public process used by the Council and NMFS to formulate and implement fishery management policy. In doing so, the Council and NMFS heard from members of the public, including representatives of the charter vessel sector. Some members of the public were in favor of this action, others were not. NMFS respectfully understands that some charter business owners are opposed to this rule.

Comment 18: The Analysis states on page 153, paragraph 2 that ''[t]he moratorium is not expected to limit the number of halibut charter trips in the near future.'' Wasn't the ''growing number of charter fleets'' the main reason this moratorium was being pushed by the Council and NOAA?

Response: As stated in the Analysis (*see* **ADDRESSES**), NMFS does not expect the limited access system established by this rule, by itself, to limit the growth in charter halibut trips, charter halibut harvest, or charter vessel anglers over the short term. Instead, this rule is expected to stabilize the charter halibut sector by curtailing the growth in numbers of charter vessels in Areas 2C and 3A and thereby improve the effectiveness of other management measures, now and in the future, to control the rate of halibut harvest.

Comment 19: The Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) states on page 58,

> ''It is possible that commercial IFQ halibut fishermen could also benefit, if the constraint slows the growth in charter catches in the future. However, given the excess capacity that is likely to exist in the fleet after implementation of the moratorium, this outcome is unlikely, all else equal.''

If the Council is attempting to limit the fleets then how could this scenario be unlikely? If the Council is attempting to limit the fleets then why do they anticipate excess capacity in charter fleets after the implementation of the proposed rule? If this proposed rule is not expected to constrain harvests, why is it being proposed?

Response: It is not possible to determine the optimal amount of capacity in the charter vessel sector with available data. The intended effect of this action is to curtail growth in capacity. Although limited entry on the number of vessels is a commonly used fishery management tool to limit capacity growth, it is an imprecise tool because individual operators can increase capacity to increase effort over historical levels. For example, charter vessels operating under this rule may increase the number of fishing trips they make, increase the average number of anglers they carry, or improve their ability to find halibut. All of these outcomes and others are possible under this limited access system, in which case the actual harvest of halibut by the charter vessel sector may actually increase over current levels.

Limited entry provides a basis for the development of a long-term comprehensive effort limitation program for the charter halibut fishery, if it is determined that such a program is needed in the future. The RIR (at page 46) prepared for this action determined that limited entry could serve to better stabilize fishing effort than the status quo, because only permitted vessels would be capable of increased effort. Further, a reduction in fishing capacity will occur as non-transferable permits are eliminated as their holders leave the fishery.

Comment 20: The Federal Government has a duty to not discriminate. The summary of costs and benefits table in the EA/RIR/IRFA presents the reasons why the Council chose Alternative 2. However, this table is extremely biased. For example, in columns 3 and 4, the table states, ''Limiting the number of vessels that may operate would help limit competition. * * *'' Why limit competition, especially if that may lead to business failure for some operations?

Response: NMFS has a duty to not discriminate based on constitutional and statutory rights. The response to Comment 2 describes why this action is not discrimination against charter operators that do not receive a charter halibut permit on initial allocation.

The quote from Table 42 on page 156 of the EA/RIR/IRFA (*see* **ADDRESSES**) presented in the comment is incomplete. The complete sentence reads, ''Limiting the number of vessels that may operate would help limit competition from new entrants in the fishery, but competition from existing permit holders is expected to keep businesses from earning above normal profits.'' The statement makes clear that although the charter halibut permit program will reduce competition from new entrants, the program is not expected to prevent competition within the charter halibut sector. As discussed in the response to Comments 21 and 43, NMFS anticipates that permit holders will have sufficient opportunities to ensure that capacity meets demand for halibut charters in Areas 2C and 3A.

Comment 21: The rule unfairly restricts guided access to the resource while not considering unguided access. The Halibut Act requires that ''if it becomes necessary to allocate or assign halibut fishing privileges among various U.S. fishermen, such allocation shall be fair and equitable to all such fishermen.'' Many anglers require guided services for financial, health, safety, or other practical reasons. This restriction violates the ''fair and equitable'' provisions of the Halibut Act because guided recreational anglers are being restricted while there is no such limitation proposed for unguided recreational anglers.

Response: This rule is consistent with the fair and equitable requirement of the Halibut Act (*see* discussion above under the heading ''Consistency with Halibut Act''). The fair and equitable requirement of the Halibut Act does not require that different sectors of the halibut fisheries be managed using the same tools or restrictions. In Areas 2C and 3A, the charter halibut fishery is the second largest, in terms of volume of halibut, after the commercial setline fishery. The non-guided sport fishery has the third largest harvest in both areas. Of these three harvesting sectors, the charter halibut fishery has demonstrated growth in participation over time while the commercial and non-guided recreational sectors have declined or remained relatively steady. This information was in the Analysis (*see* **ADDRESSES**) considered by the Council and the Secretary when taking this action.

This rule will not unreasonably restrict guided angler access to the halibut resource. NMFS estimates that 502 charter halibut permits will be issued to charter businesses operating in Area 2C, of which 347 (or 69.1 percent) will be transferable, and 418 charter halibut permits will be issued to charter businesses operating in Area 3A, of which 319 (or 76.3 percent) will be transferable. In Area 2C, the estimated total (for transferable and non-transferable permits combined) angler endorsements on all charter halibut permits is 3,028 of which 2,152 will be associated with transferable permits. In Area 3A, the estimated total angler

endorsement on all charter halibut permits is 3,577 of which 2,834 will be associated with transferable permits.

Available data indicate that charter vessels in the guided sport fishery for halibut in 2008 averaged 36 trips per season in Area 2C and 38 trips per season in Area 3A. Using all endorsements prior to the expiration of non-transferable permits, charter vessels under this rule would have to average 52 trips in Area 2C and 56 trips in Area 3A to supply the aggregate number of fishing trips supplied in 2008. This estimate does not include the potential supply from the community charter halibut permits and endorsements associated with the CQE program. In Area 2C, a potential total of 72 permits and 432 angler endorsements may be added, and in Area 3A, a potential total of 98 permits and 588 angler endorsements may be added under the CQE program. These figures indicate that the charter halibut industry will be able to meet recent charter vessel angler demand levels with the number of permits expected to be issued under this rule. Hence, no restriction in guided angler access to the halibut resource is expected under this rule.

Comment 22: Two of my charter vessel captains will come up a year short of the 2004–2005 qualification period. I truly feel my history in this business is long enough to warrant receiving a moratorium permit.

Response: The limited access system established by this rule allocates charter halibut permits to the person that meets the eligibility requirements during the qualifying and recent participation years. If a sport fishing business meets the eligibility requirements, then it likely would receive one or more charter halibut permits and could continue to hire charter vessel captains as it has in the past. Hence, charter vessel captains who do not meet these requirements would not be eligible for an initial allocation of a charter halibut permit although the businesses that they worked for may be eligible for a permit(s). Nevertheless, persons not eligible for an initial allocation of a charter halibut permit(s), may be eligible to receive a transfer of a charter halibut permit from a person with a transferable permit.

Conservation

Comment 23: The Alaska charter fleet has become overcapitalized in the last decade and is rapidly expanding. The fleet should not be allowed to grow and negatively impact current users and endanger the sustainability of the fishery by exceeding the GHL. Charter operators must become a part of the conservation effort and regulations limiting access are long overdue. NMFS should limit the number of participants in the commercial sport halibut industry and reduce the number of fish they catch. Too many charter businesses are competing for too few customers, which results in overcrowding, a lower quality Alaskan experience for travelers, and increased pressure on local halibut populations.

Response: This rule limits the number of charter vessels that may participate in the charter halibut fishery and the number of charter vessel anglers that may catch and retain halibut on charter vessels. This rule is not intended, by itself, to reduce the charter harvest of halibut or the number of fish each angler may catch and retain.

The IPHC takes into account halibut removals by all user groups in establishing the constant exploitation yield (CEY). Past increases in charter halibut harvests have created conservation and allocation concerns that the Council and NMFS have taken steps to address, but the halibut resource in Area 2C and 3A is being managed in a sustainable manner. NMFS does not have information to verify or refute the claims that charter businesses are competing for too few customers, that halibut fishing grounds are overcrowded, or that charter vessel anglers are experiencing low quality charter fishing trips. Finally, NMFS does not have scientific information to discern local depletion or attribute it to any particular user group.

Comment 24: Near-shore depletion of halibut and gear conflicts have increased since the implementation of the IFQ program for commercial setline fishermen. Before the IFQ program, large commercial vessels fished farther from shore than they do today. Now, under the IFQ program, commercial fishermen do not have to go as far offshore to fish for halibut and there is always some form of gear in our near shore areas off Sitka. Protection of halibut would be improved with short specified open seasons for commercial halibut fishing. Charter fishing is not the problem.

Response: Further restrictions on the commercial fishery would not achieve the objective of this action and are outside the scope of this rule. NMFS does not have sufficient scientific information to discern localized depletion of halibut or, if it exists, to attribute it to a particular user group in Area 2C or 3A.

Comment 25: This rule has nothing to do with conservation or management of the resource and concerns allocation only. Page 18191 of the proposed rule states that, ''the NMFS Assistant Administrator has determined that this proposed rule is necessary for the conservation and management of the halibut fishery.'' The rule places no direct restrictions on guided anglers or their overall harvest, only limits on the number of boats available to transport guided anglers to the fishing grounds. The Environmental Assessment states, ''[t]he proposed action addresses access to the Pacific Halibut resource. There are no expected impacts on the halibut subsistence, personal use, or unguided sport fisheries because these takes are not limited and are not affected by any allocation decisions in other sectors * * * [t]here are no significant impacts on the halibut stock expected from the proposed action.'' National Standard 5 states that ''Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.'' How does this action meet National Standard 5?

Response: The National Standards in the Magnuson-Stevens Act (section 301) do not apply directly to this rule because it is authorized under the Halibut Act. Two connections exist between the Halibut Act and the Magnuson-Stevens Act, however. First, the Halibut Act references section 303(b)(6) of the Magnuson-Stevens Act, and second, the Halibut Act uses virtually the same language as National Standard 4 (section 301(a)(4)) of the Magnuson-Stevens Act. The language at National Standard 4 is particularly relevant to this comment in that it requires conservation and management measures that allocate or assign fishing privileges (as this action does) to be ''reasonably calculated to promote conservation'' among other things. The discussion above under the heading ''Consistency with Halibut Act'' describes how this rule meets this conservation standard. In brief, this action is intended to stabilize the charter vessel industry, which will enhance the effectiveness of existing and potential future harvest restrictions. This will assist the IPHC to meet its overall harvest rate targets.

The EA finds that the action will not have significant environmental impacts. The purpose of the EA is to determine whether the action will have a significant impact on the human environment, and whether an environmental impact statement is necessary. The Analysis for this action evaluated the environmental impacts of the action and found that it would not have a significant environmental

impact. This conclusion is not inconsistent with the statement that this action is generally necessary for conservation and management purposes.

Comment 26: NMFS inaccurately implies that this is a conservation measure in the proposed rule. It simply is not. American sportsmen and women have one of the best records when it comes to conservation. Reducing recreational angler access will not increase conservation or reduce the total allowable catch. Those available fish will only be reallocated and harvested by other sectors, primarily the commercial sector.

Response: As discussed above under the heading ''Consistency with Halibut Act,'' this action is reasonably calculated to promote conservation, as required by the Halibut Act. Although biological conservation is not its principal purpose, the effectiveness of other biological conservation measures will be enhanced over time by this action. Conservation and allocation management measures often are inextricably linked. Hence, although the intent of this action is not to directly reduce the halibut harvest by charter vessel anglers in Areas 2C and 3A in the short term, it will enhance conservation of the halibut resource in the long term. *Also see* the response to Comments 21 and 43.

Comment 27: The proposal for the charter limited entry program has been written to specifically list numbers relating to the charter GHL yet leaves out that the longliners receive a larger amount of the halibut quota than charter and private anglers. These numbers would show the imbalance between the charter fleet and the commercial fleet and highlight that limiting the charter fleet is not about conservation.

Response: The IPHC is generally responsible for the conservation of the halibut resource. In Area 2C, the IPHC preliminary estimate of the halibut harvest in 2008 was that the commercial setline fishery harvested 59 percent of the total removals by all sectors (IPHC 2009 Annual Meeting ''bluebook'' Table 1). The second largest harvest in Area 2C in 2008 was made by the sport fishery (guided charter and non-guided combined) at 30 percent of the total halibut removals. Of that 30 percent, over half is harvested by charter vessel anglers. Hence, in Area 2C, about 89 percent of the total halibut removals can be attributed to the combined commercial and sport sectors. By comparison, in Area 3A, the commercial setline fishery for halibut in 2008 was estimated to harvest 70 percent and the combined sport fishery was estimated to harvest 16 percent of the total halibut removals. These fisheries account for about 86 percent of the total halibut removals in Area 3A. Hence, the regulatory burden justifiably falls mostly on the commercial and sport (charter vessel) harvesting sectors. The commercial setline sector has been managed under a limited access system since 1995. Although it is less than the commercial setline fishery, the combined sport harvest (comprised predominately by the charter vessel sector) is not trivial in Areas 2C and 3A.

Comment 28: There is no mention of the amount of wastage and incidental bycatch of halibut caused by the commercial fleet. The issue of bycatch in the commercial setline fishery is important also because the numbers of yelloweye rockfish and lingcod that are pulled off a single commercial set significantly exceed the numbers taken by charter or private anglers, who are only allowed two per person.

Response: The comment raises several different bycatch issues. One is the bycatch of rockfish and lingcod in the commercial setline fishery directed at halibut. The commercial setline fishery is managed under the IFQ program. Regulations implementing this program generally prohibit the discard of rockfish and Pacific cod when IFQ halibut or IFQ sablefish are on board the vessel (§ 679.7(f)(8)). These regulations create an incentive for commercial setline fishermen to avoid areas of high rockfish bycatch. Although bycatch of lingcod is not addressed by the IFQ regulations, a similar incentive exists unless an IFQ fisherman has a market for lingcod. Ideally the bycatch of these species should be adequately controlled by economic incentives. However, this issue is beyond the scope of this rule.

The second issue raised is waste of halibut in the commercial setline fishery for halibut. The preliminary estimate of wastage in 2008 in Areas 2C and 3A amounts to about two percent and three percent, respectively, of the total halibut removals in each area. Wasted halibut have no value to the commercial halibut fishery, which already has a strong economic incentive to minimize this source of halibut mortality.

The third issue concerns the incidental removals of halibut in commercial fisheries targeting other species. The bycatch of halibut in Area 2C fisheries for other species is estimated to account for only three percent of the total removals from that area, and in Area 3A, bycatch was estimated to account for about nine percent of the total removals from that area.

Comment 29: Four comments support the charter halibut moratorium, but suggest that further restrictions are needed to limit charter angler harvest in Southeast Alaska to address localized depletion.

Response: NMFS notes the support for the charter halibut permit program. NMFS does not have sufficient scientific information to discern localized depletion of halibut or, if it exists, to attribute it to a particular user group in Area 2C or 3A. This rule is not designed primarily to limit the harvest by the charter halibut fisheries, but it will make existing and future harvest restrictions more effective because harvest restrictions in other regulations will not be eroded by unlimited growth in the fleet of charter vessels fishing for halibut. In this manner, this rule will contribute to the achievement of the overall target harvest rate of halibut established by the IPHC.

Comment 30: I support limited access as it will help limit over-fishing in the charter sector. The proposed limited entry program provides part of the sustainable management equation. As the proposed rule indicates, the charter sector has exceeded its guideline harvest level in Area 2C for the past 5 years and in Area 3A for the past 3 years. Charter overharvest is contributing to resource declines at both the local and the area-wide level, yet charter operators object that their businesses will be unsustainable if conservation measures are implemented. This downward spiral can only result in resource depletion unless both capacity and effort are curtailed.

Response: This action is not intended to limit charter angler harvest to the GHL in Areas 2C and 3A. By stabilizing growth in the charter industry, however, this rule will enable other harvest control regulations to be more effective.

Comment 31: Charter sport fishing is a very effective form of commercial fishing. The charter sector continues to overfish its quota every year, which is hurting the stocks and is unfair to all halibut fishermen. It is irresponsible resource management to allow this fishery to continue to grow while the commercial setline fishery is limited. Southeast Alaska commercial setline halibut fishermen have seen quotas cut in half the past four years. The annual excessive harvest by the charter sector reduces future harvests of both the commercial setline fishery and of local residents doing sport or subsistence fishing for halibut to feed their families. The charter fishermen should acknowledge their responsibility for conservation. If both the commercial

and charter fleets do not work together, the future of halibut fishing in Southeast Alaska is in jeopardy.

Response: NMFS agrees that cooperation among all fishermen and management agencies is essential to assure sustainable fisheries. The charter industry does not have a catch limit quota as does the commercial setline industry. Instead, the GHL serves as a benchmark for monitoring the charter vessel fishery's harvests of Pacific halibut in Areas 2C and 3A. By itself, the GHL does not limit harvests by charter vessel anglers.

This rule is designed to limit the number of charter vessels that may participate in the charter halibut fishery. Although this rule is not designed primarily to limit the harvest of the charter halibut fisheries, it will make existing and future harvest restrictions more effective because conservation gains from individual harvest restrictions will not be eroded by unlimited growth in the fleet of charter vessels fishing for halibut.

Comment 32: The charter halibut fishermen are fishing during the summer for the most part, a time when the large female halibut (males seldom reach a size over 30 pounds) are in shallow water. Instead of harvesting a cross-section of the biomass as the commercial fleet does, the charter halibut fleet targets the large females that are the future of this resource. This causes great concern for the health of halibut stocks. The biologists have noted the truncated age class structure and lack of large females in the Southeast Alaska halibut stocks.

Response: This comment presumes that large halibut generally are females that contribute disproportionately to the reproductive potential of the stock, and that harvest of these females will substantially decrease future juvenile halibut abundance. To test this presumption in 1999, the IPHC reviewed options for a maximum size limit of 60 inches (150 cm) in the commercial setline fishery and concluded, based on the research at the time, that preservation of large halibut in the setline fishery did not add substantial production to the stock. Applying the limit to the sport fishery would have an even smaller benefit (if any) because the sport fishery harvest is smaller than commercial harvest. Suggestions for a maximum size limit in both fisheries, commercial and sport, could be considered again by the IPHC but are beyond the scope of this rule.

Comment 33: Virtually every fishery in Alaska is sustainably managed under a State ''limited entry'' program. All are viable and allow for new entrants as others choose to leave the fishery. Long term stability in these fisheries has been achieved since the inception of this management plan by Alaska in the 1970s, and world-class fisheries have resulted from the ability of fishery managers to exercise conservation measures through the State's limited entry program. It is inconceivable that any fishery can be efficiently or sustainably managed without all user groups exercising restraint to avoid over-utilization of its resource. There are numerous examples worldwide of fisheries, which can be shown to exemplify the depletion of fish stocks because of over-harvesting practices.

Response: NMFS acknowledges the comment and notes that limited entry has been used as a fishery management tool in Alaska since 1973. Pacific halibut fisheries, however, are not managed by the State of Alaska. The Halibut Act authorizes the Council, with respect to halibut fisheries in and off Alaska, to develop limited access regulations and for the Secretary to approve and implement them, as is done by this action.

Comment 34: We oppose the proposed limited access system to cap the number of halibut charter boats and anglers. Instead, we support an increase in the GHL for the charter fleet in IPHC Areas 2C and 3A.

Response: Changes to the GHL in Areas 2C and 3A are not within the scope of this action and would not achieve the objective of this rule. Changes to the GHL should be suggested to the Council for potential recommendation to the Secretary.

Comment 35: The proposed rule indicates that the Council's policy is that the charter vessel fisheries should not exceed the GHLs; however, no constraints were initially recommended by the Council or imposed on the charter vessel fisheries for exceeding a GHL. Examination of the GHL final rule reveals that the GHL is advisory in nature, requiring no action by the Council, NMFS, or the Secretary other than its annual publication in the **Federal Register**. Since the GHL is not an allocation, there has never been analysis by NMFS or subsequent determination by the Secretary of the fairness and equity of the GHL as an allocation. Until an allocation has been set in compliance with the requirements of the Halibut Act, the limited access program described in the proposed rule is premature and contrary to the law.

Response: The GHLs developed by the Council and approved by the Secretary represent an allocation policy. A final rule implementing that policy was published August 8, 2003 (68 FR 47256). The rule implementing the GHLs was determined to be consistent with the Halibut Act including its ''fair and equitable'' provision. The potential effects of this allocation policy were addressed in an analysis that supported that action.

As explained in the preamble to the proposed rule (74 FR 18178, April 21, 2009) on page 18179, the Council's policy is that the charter halibut fisheries should not exceed the GHLs established for Areas 2C and 3A. However, the GHLs themselves do not limit the harvest of the charter halibut fishery. A separate regulatory action is necessary to impose such a harvest restriction. NMFS promulgated a harvest restriction on the charter halibut fishery in Area 2C most recently on May 6, 2009 (74 FR 21194). That action was determined to be consistent with the ''fair and equitable'' standard of the Halibut Act. Although not directly related to that harvest restriction, this rule also is determined to be consistent with the Halibut Act (*see* discussion above under heading ''Consistency with Halibut Act'').

Comment 36: The claim in the proposed rule that the fishery CEY is the maximum catch for an area's directed commercial fixed gear fishery is false. The fishery CEY is not the maximum catch for an area's directed fishery. The fishery CEY is the basis for IPHC staff recommendations that result from application of a buffering algorithm known as ''Slow-Up Fast Down'' (SUFD) to the fishery CEY in a predictable fashion for each IPHC regulatory area. At the IPHC annual meeting, IPHC commissioners review staff recommendations as well as Conference Board and Processor Advisory Group recommendations. The commissioners then decide on catch limits, which rarely if ever equal the fishery CEY. SUFD also buffers any change in the fishery CEY, be it from a decrease in biomass or an increase in non-commercial removals, in both Slow-Up and Fast-Down years. The statement should be corrected in the final rule.

Response: NMFS agrees with this explanation. The preamble to the proposed rule did not elaborate on the SUFD policy because it is an additional complexity to the IPHC process that is irrelevant to this limited access action. Moreover, the preamble to the proposed rule never stated that the fishery CEY was equal to the commercial catch limit. The principal message in that part of the proposed rule preamble was that the IPHC takes into account all non-commercial sources of halibut mortality in setting the catch limit for the commercial setline fishery. NMFS

acknowledges that the SUFD policy technically is part of this fundamental process.

Economic Impacts

Comment 37: This action seeks to limit the guided angler catch when it should be limiting the commercial catch. This rule limits guided angler catch, leaving commercial longliners with minimal limits.

Response: This rule is not designed to limit the harvest of halibut by charter vessel anglers, but rather to curtail the growth of fishing capacity by the charter halibut fishery. Commercial harvests are heavily regulated by the IPHC and NMFS through the IFQ program. Commercial fishermen have made contributions to resource conservation and, for example, have had their catch limit cut by just over half in Area 2C between 2005 and 2009.

Comment 38: Several comments expressed concerns about the impacts of the growth of the charter halibut fishery on Pelican, Petersburg, and Gustavus in Southeast Alaska (IPHC Area 2C). These comments indicated that growth of the guided sport fishery destabilized the local economy in various ways and in some cases expressed support for this limited entry program. Destabilizing impacts cited include localized depletion, use of community resources by lodges located outside city limits and thus beyond city taxation, displacement of local residents from dock facilities in the summer by heavy charter vessel activity, sliming of docks, and environmental concerns as guided operations began to operate in Glacier Bay National Park in May through September. These concerns included habituating the bears and sea lions and endangering the food source of the killer whale resident population.

Response: Charter industry harvest levels have remained well above the GHL in Area 2C. NMFS acknowledges that the growth of the charter halibut fishery since the late 1990s has led to changes, competition with other resource user groups, and social tension in Southeast Alaska communities. This action does not address all of these concerns. The purpose of this action is to stabilize the charter halibut fishery by limiting the future growth in numbers of charter vessels that may participate in the fishery. NMFS notes, however, that the charter halibut fishery is a legitimate resource user that provides economic benefits to Alaskan coastal communities and to the Nation. Further, this program will not by itself limit the number of charter vessel anglers that may use sport fishing guide services or their harvest of halibut. Instead, this program will define and limit the number of charter operators. Potential future regulations to address the issues raised by this comment will be easier to implement because of this program.

Comment 39: My community has a community quota entity program and is entitled to use it under the final rule but does not have the financial resources to use it effectively.

Response: Specified Area 2C communities may receive up to four community charter halibut permits per community and specified Area 3A communities may receive up to seven permits per community issued to CQEs at no cost. Some costs are likely, however, in establishing and administering CQEs. Growth of a charter halibut fishery beyond the CQE permits provided by this rule, however, would require the purchase of transferable charter halibut permits. When NMFS originally authorized CQEs to acquire commercial halibut or sablefish quota share under the IFQ program, the State of Alaska responded by modifying its fisheries loan programs to provide financing for the purchase of halibut and sablefish quota share by CQEs. The State may adapt this program for loans to allow CQEs to acquire charter halibut permits. Also, CQEs eligible to receive community charter halibut permits may consider joint venture arrangements with private sector partners to share the costs of forming and operating a CQE.

Comment 40: For many years there has been significant discussion and motions regarding charter IFQs, moratoriums, limited entry programs, *etc.* These discussions and motions, in some cases passed and rescinded, have caused confusion in the charter halibut industry. This confusion has likely caused charter operators to hold on to businesses that they would have retired from or would have sold long ago. This affected the natural management of charter operations and is a factor that you have not considered.

Response: The Council and NMFS considered speculative participation in the charter vessel industry when developing this rule. Uncertainty about the intent of the Council and uncertainty about the potential criteria may have led some individuals to participate in the fishery at levels that they hoped would qualify them for a future permit, when they might otherwise not have operated. This type of speculative activity could have led to increased effort levels in the guided sport fishery. The publication of a control date of December 9, 2005 (71 FR 6442, February 8, 2006), was intended to discourage such speculative behavior. The use of minimum participation thresholds to qualify for permits and for transferable permits should further reduce the control of permits by speculative operators.

The Council subsequently developed and recommended this limited access system using 2005 as the last year in which at least minimal participation in the charter halibut fishery will qualify a person for a charter halibut permit. The Council took over a year to develop this program and listened to substantial public testimony. Anyone entering the charter halibut fishery during this time should have been well aware of the speculative risk of doing so.

Comment 41: There has been a steady decline in the number of halibut charter vessels in Valdez. For example, in 1995 there were approximately 35 halibut charter boats operating out of Valdez. Last summer there were fewer than 20. This is not due to the lack of customers, but to the long distances we are being forced to travel to find quality halibut fishing grounds for our clients, and the cost to operate a vessel under these circumstances. The proposed moratorium will cripple the economy for seasonal businesses that rely on tourists and locals alike to come to Valdez and go fishing. If anything you should make provisions to allow a small expansion of charter vessels in Valdez. Similarly, another comment stated that aside from the CQE provision, some growth, particularly in places like Kodiak, Yakutat, and Whittier, should be allowed.

Response: Valdez, Kodiak, Yakutat, and Whittier, Alaska, are in IPHC Area 3A. A charter halibut permit endorsed for Area 3A may be used anywhere within that area. This rule allows for market-based responses to changing fishing conditions in different parts of Area 3A. As halibut fishing conditions or business conditions fluctuate, holders of Area 3A charter halibut permits could enter or leave the charter halibut fishery based in any Area 3A community. Hence, no special allowance for expansion of the charter halibut business is necessary as this rule will not inhibit such expansion. NMFS expects also that holders of charter halibut permits will shift their operations to the communities where the demand for guided angling is greatest and can be served most profitably.

Comment 42: The proposed action will suppress private enterprise and competition, creating monopoly power that will trigger anti-trust laws. The Council, dominated by commercial fisheries interests, is privatizing a public resource by prohibiting free enterprise and allowing selected individuals or

companies to own a part of the public resource to which they are not entitled.

Response: A monopoly is exclusive control of a commodity or service in a particular market that makes possible the manipulation of prices. This action does not create a monopoly in the charter vessel industry. NMFS estimates that about 231 businesses will qualify for charter halibut permits in Area 2C and 296 businesses will qualify for charter halibut permits in Area 3A. These qualifying businesses likely will receive a total of about 502 transferable and non-transferable permits in Area 2C and 418 transferable and non-transferable permits in Area 3A. With this number of businesses competing to provide sport fishing guide services for halibut fishing in each area, none is likely to be able to control the market for these services or manipulate prices. Further, this rule has an excessive share provision that prevents any one business or individual from acquiring more than five permits by transfer (*see* discussion above under the heading ''Consistency with Halibut Act''). Although more than five permits may be initially allocated to a business, consolidation within the charter halibut fishery will be no more than it was during the qualifying and recent participation years. Thus NMFS expects that the charter industries in Areas 2C and 3A will be competitive, and no anti-trust issues are expected.

This rule does not privatize the halibut resource. A charter halibut permit creates no right, title, or interest in any halibut before the halibut is harvested by a charter vessel angler on the vessel for which the operator holds a permit. A charter halibut permit confers no right of compensation to the holder of the permit if it is revoked, limited, or modified. A charter halibut permit is considered a grant of permission to the holder of the permit to engage in the charter halibut fishery by allowing charter vessel anglers on the vessel operated by the permit holder to catch and retain halibut. Anglers may continue accessing the halibut resource through non-guided sport fishing which is not affected by this rule.

This action does not interfere with free enterprise. It provides use privileges that, with respect to transferable charter halibut permits, create a climate for the effective functioning of a free enterprise market for sport fishing guide services. Markets function well when they are founded on clearly defined rules that explain the nature of the privileges each market participant has to the scarce resources needed to operate their businesses. This rule creates permits that will provide fishing privileges and provide the charter halibut fishery stability necessary for effective conservation and management of the halibut resource.

Comment 43: This action will limit the number of guided charter operations and the ability of this industry to meet the demand for guided charter fishing. The limit on supply of guided angling opportunities will mean that fewer persons will be able to take advantage of guided services and that the cost of these services will increase. This will reduce the benefits to anglers and prompt some anglers, who would otherwise have used guide services, to substitute less attractive guided or non-guided fishing activity. Reduced guided angler activity will have adverse economic impacts on the guided industry and on regions of Alaska where guides are based. There will be fewer jobs and less income, and this will hurt local businesses that depend on revenue generated by charter operations.

Response: Although the number of vessels with charter halibut permits operating under this rule is limited, their passenger carrying capacity exceeds current 2008 levels of participation. The numbers of charter halibut permits and associated endorsements issued under this rule create significant opportunities for charter halibut operations to expand their capacity to meet existing and higher levels of angler demand for guided halibut fishing.

Opportunities likely exist for operators to increase the number of anglers they carry under this rule. NMFS expects that, if charter vessel angler demand warrants, operators will increase investments in their fishing vessels to increase their fishing efficiency, the average number of clients they carry (subject to the endorsement and other licensing restrictions), and the number of days each season that their vessels operate.

The Analysis (*see* **ADDRESSES**) indicates that the number of permits issued under this rule will allow permitted vessels to meet 2008 levels of charter trips by increasing the average number of trips they make in Area 2C from 36 to 52, and in Area 3A from 38 to 56. These levels of increased activity are within the capacity of the charter halibut fleet that will have permits under this rule. Further increases in numbers of trips also are possible. Members of the charter vessel industry indicated in public testimony to the Council that the charter fishing season lasts for about 100 days. Many of these trips would be half day trips so that multiple trips might be made per day. Even after assuming for days off due to bad weather and mechanical breakdown, it is likely that the number of days fished could double. Hence, it is not apparent that this rule will result in constraining operations of charter vessels with charter halibut permits or in constraining guided angling opportunities (*see* also response to Comment 21).

As discussed in the Analysis, NMFS expects, over a wide range of demand conditions, that increasing the number of passengers in a trip, or increasing the number of trips in a season, can be done at relatively constant incremental cost. This suggests that charter halibut permits under this rule can meet demand without price increases.

Comment 44: Halibut are a common property resource and everyone is entitled to make a living off a resource that belongs to no one person or group. Management is necessary but it should not stifle capitalism. This limited entry program is solely about taking more away from the general public who have a right to this resource. Guided angler caught halibut are worth five times as much to the State and fisherman as a commercial fish. Management should seek to maximize the value of the fish.

Response: NMFS agrees that the Pacific halibut resource in Areas 2C and 3A is a common property resource. As such, all resource users should be benefitted by fishery management policies implemented by NMFS. This action does not change the allocation of halibut between sport or commercial users. The U.S. Government is authorized to regulate access to this resource consistent with the Halibut Act and other applicable law. This action creates a limited set of access rights or privileges for a resource that cannot support unlimited access. Any citizen of the United States will be free to enter the guided angling business in Alaska and to guide charter vessel anglers in harvesting halibut by purchasing the relevant permits. NMFS estimates that about 231 charter vessel businesses will qualify for charter halibut permits in Area 2C and about 296 charter vessel businesses will qualify for charter halibut permits in Area 3A. Many of these businesses will qualify for transferable charter halibut permits, and a robust market for these permits is expected to develop. Therefore, this rule is not likely to stifle capitalism.

The public's access to the halibut resource is not diminished by this rule. The general public may access this resource as it does now through purchases of halibut in commercial markets (*e.g.*, grocery stores, restaurants), and through non-guided and guided sport fishing. The intent of

this rule is to stabilize the growth of charter vessel operations in the guided sport fishery for halibut. Relative to the present, this rule will not diminish charter vessel angler opportunity in the foreseeable future. Instead, it is designed to restrict the entry of additional charter halibut operations.

Comment 45: The analysis in the EA/RIR/IRFA is inadequate. There is no information about the adverse impacts this action will impose on a large percentage of the operations in the fleet. It does not include information about operations that entered the business in the years from 2006 to 2009. The IRFA does not provide adequate information on the impact to operations that will not receive permits under this rule. It should include information on lost revenue or expenses to all entities involved. Not allowing small businesses starting after 2005 to compete in the fishery is inconsistent with the Regulatory Flexibility Act.

Response: The Analysis (*see* **ADDRESSES**) estimates numbers of operations affected by this action, and examines the costs and benefits of the action accruing to different sectors. Much of the Analysis is qualitative, reflecting the limited information that exists on the charter vessel business generally and on the angler demand.

The Council's recommendation to the Secretary looked primarily at charter vessel businesses that were active during the qualifying years of 2004 and 2005. These were the participants that the Council sought to confirm in their business patterns when it made its decision to recommend this action in 2007. An ''Active'' charter business was determined to be one that made at least five logbook trips in at least one of the two qualifying years and at least five logbook trips in the recent participation year (2008). This two-tier qualification requirement was designed to assure that limited access permits were allocated to historically active charter businesses that were still active when the program was implemented. The five-logbook-trip minimum was chosen in part because it is a relatively low standard of activity. A charter vessel business with less than five logbook trips in a year is not likely in most instances to generate a significant annual income. The Council's Analysis that was made available to the public for review with the proposed rule (74 FR 18178, April 21, 2009) did not consider the effect of the participation requirement in 2008 because that year had not yet occurred at the time of Council action. However, the Council was aware that the numbers of businesses receiving permits under this rule would be no more than those that were active in 2004 or 2005, and likely would be somewhat less as some firms active in 2004 and 2005 left the charter business during 2006 and 2007.

The Council and Secretary reasonably assumed that the number of businesses that would enter the fishery during 2006 through 2009 would be small. Such businesses contemplating entry into the charter halibut fishery during those years should have been aware of the control date of December 9, 2005, set by the Council and published by the Secretary on February 8, 2006 (71 FR 6442). Being put on notice of potentially not qualifying for initial allocation of charter halibut permit(s), businesses entering the fishery after the control date should have structured their operations on the assumption that they may be in the charter halibut business temporarily. Alternatively, these businesses could have planned on purchasing one or more transferable charter halibut permits after they were issued. Other than assuming this outcome, no basis existed for estimating the number of businesses that would make a post-control date entry decision.

More recently, NMFS has prepared a supplementary analysis, with estimates of the number of businesses that are expected to qualify for charter halibut permits based on the 2004 and 2005 qualifying years and the recent participation year of 2008. The RIR and RFA analyses have been updated to reflect this new information (*see* **ADDRESSES**). In summary, the updated analyses indicate that about 231 businesses are expected to qualify for charter halibut permits in Area 2C and about 296 are expected to qualify in Area 3A. An estimated 115 businesses were active (*i.e.*, at least five logbook trips) in Area 2C in 2008 but not during either of the qualifying years indicating that these businesses may have entered the charter halibut fishery during the period 2006 through 2008. The comparable estimate of new entry businesses in Area 3A is 111.

Comment 46: Will the government offer a compensation package of vocational retraining, financial aid, or other compensation to guided charter operators who will not be able to continue in this business? This compensation may be appropriate since these persons will no longer be able to honor private agreements with clients, and will lose the value of vessels purchased for the fishery.

Response: No compensation is planned or provided in this rule for persons that do not qualify for a charter halibut permit. No legitimate investment-backed expectations exist for businesses that profit from free access to a public fishery resource.

Comment 47: By designating certain permits as non-transferable, the proposed rule seeks to create a second class of charter operators who can operate but cannot transfer their permit. No analysis has been made of the losses involved in selling surplus charter halibut fishing assets without a permit. A regulation designed solely to benefit the commercial sector to the disadvantage of a small number of charter operators is unconscionable. This classification of charter permit holders does not meet the requirements of the Halibut Act and should be removed from the rule.

Response: As discussed under the heading ''Consistency with Halibut Act,'' this rule was determined to meet the requirements of the Halibut Act. The purpose and rational basis of this rule are described above and in the preamble of the proposed rule published April 21, 2009 (75 FR 18178).

The non-transferable permits provision of this rule provides a temporal buffer to reduce the overall impact of this rule on persons that demonstrated relatively low levels of activity. Qualifying businesses will be issued transferable permits for vessels that made 15 or more logbook trips in one of the qualifying period years and in 2008. Participation in the charter halibut fishery during these years at between five and 15 logbook trips indicates a relatively low level of participation in the guided charter business. However, these businesses will qualify for non-transferable charter halibut permit(s). Businesses that receive an initial allocation of non-transferable permits will be able to continue their charter halibut operations as they previously had done, or may increase their participation in the charter halibut fishery by acquiring additional permits by transfer.

Holding non-transferable permits does not destroy the total value of business assets. A person or business with non-transferable permits may transfer ownership of vessels, fishing equipment, and real estate associated with the business to other persons that wish to enter the business and acquire charter halibut permits by transfer. Alternatively, the assets of a charter business could have value to persons that do not need charter halibut permits because their business plan does not involve the harvest of halibut. A business issued non-transferable permits may also purchase transferable permits.

Comment 48: If this proposal is approved it will set a precedent and

could potentially affect thousands in the charter industry. I have been told by NMFS that there are no other charter limited entry programs currently in effect in the United States.

Response: This rule does not establish the first limited entry management of charter vessels. A moratorium for charter vessels and headboats operating in Federal waters of the Gulf of Mexico was effective beginning on June 16, 2003 (67 FR 43558, June 28, 2002).

Comment 49: I believe that this limited entry program is going to be a ''free'' government retirement package for many who have just held on for this permit and will immediately sell it. Their business will become more valuable overnight while other businesses will not. To illustrate this point, the State of Alaska issued a Legislative Resolve No. 5 in 1983 that stated ''a share system could result in the concentration of ownership of the fishery resource in the hands of a few fishermen,'' that it ''could encourage speculation and the making of exorbitant profits at the expense of Alaska fishermen,'' and that it ''could tend to eliminate competition among halibut fishermen.'' The State Constitution does not support a limitation on charter vessels.

Response: Some persons may have participated in the charter halibut fishery before 2005, solely in a speculative effort to acquire permits should a limited entry program with transferable permits be adopted. Speculative entry is a common concern when limited entry programs are under consideration. The Council addressed this concern in two ways. First, to discourage speculative entry during program development, the Council adopted a control date of December 9, 2005, at the start of its deliberations. Announcement of this control date by the Council and Secretary (71 FR 6442, February 8, 2006) notified the public that anyone entering the charter sport fishery for halibut after the control date would not be assured of future access to the fishery if a management regime that limits the number of participants is developed and implemented. The Council continued to publicize this control date through the development of this rule.

Secondly, the Council adopted a minimum participation standard for initial allocation of charter halibut permits. A qualifying business may receive a transferable permit only if the business has a record of making at least 15 logbook trips in one year of the 2004–2005 qualifying period, and in 2008. The reasons that each person has for participating in the guided sport fishery are highly subjective, and NMFS does not have information available to discriminate among resource users on the basis of their reasons for participation.

This rule is being implemented under the authority of the Halibut Act, not the Alaska Constitution. Legislative resolutions by the Alaska legislature are not legally binding on this action. However, allowing excessive shares of halibut fishing privileges to be acquired is prohibited by the Halibut Act. The excessive share provision in this rule that limits persons to five permits (with some exceptions) assures that excessive consolidation will not occur and competition among operators will remain.

Comment 50: The proposed rule states the intended effect of this program is to curtail growth of fishing capacity in the guided sport fishery for halibut. This rule will not only curtail growth, it will eliminate it without compensation. Based on the qualifying criteria, the immediate effect will reduce the fleet size by an estimated 10 percent now, and over time as non-transferable permits are retired, an additional 15 percent of the current fleet will cease to exist. This does not include the ''private agreement'' and ''same vessel'' clauses that will eliminate even more vessels. Although there may be enough capacity in the fleet to meet current demand, with such a large reduction during peak periods anglers in the future may not be able to find an available charter.

Response: NMFS has supplemented the Council's earlier analyses using new information on charter halibut participation levels in 2008, the recent participation year (*see* Section 2.8 of the Analysis at **ADDRESSES**). The supplementary analysis takes into account the anticipated effect of the recent participation year reducing the number of charter halibut permits issued below a number based solely on participation in the qualifying years of 2004 and 2005.

Based on the earlier analysis and its supplement, the charter halibut industry will have sufficient capacity to meet existing angler demand and to meet some increases in that demand (*see* responses to Comments 21 and 43).

Comment 51: The proposed control date for qualifying for the limited entry halibut charter vessels is December 9, 2005. I respectfully request the control date be moved up until at least 2008 so companies that started after 2005 can qualify for a permit. If our company is unable to obtain a limited entry halibut permit for our charter vessel, our lodge would be forced to go out of business. Presently we have employees, vendors, and tourists from around the world and that would all be adversely affected if we were forced to close. Local, State, and Federal governments would also be adversely affected due to the loss of revenue from utilities fees, fuel taxes, payroll taxes, bed taxes, various license fees, and of course payroll taxes. With the present economic conditions, a number of charter fishing boat and lodge operators will be forced out of business this year regardless of the limited entry proposal. The 2004–2005 qualifying period is not only damaging to the economy, but is also extremely damaging to the charter businesses that have started operating since 2006. All charter operations already vested in the industry should remain in business.

Response: The control date, December 9, 2005, was recommended by the Council and published by NMFS in the **Federal Register** on February 8, 2006 (71 FR 6442). The purpose of the control date announcement was to announce that anyone entering the charter sport fishery for halibut in and off Alaska after the control date will not be assured of future access to that fishery if a management regime that limits the number of participants is developed and implemented. The Council and NMFS intent in making the control date announcement was to discourage speculative entry into the charter halibut fishery while potential entry or access control rules were being developed by the Council and, if approved, implemented by the Secretary.

The notification of a control date does not compel the Council or the Secretary to use that date. In this case, the Council used the date in part by recommending a two-year qualifying period that ran through the end of 2005. The Secretary has approved the Council's recommended charter halibut moratorium recommendation which includes this qualifying period. The comment actually is seeking a new, more recent qualifying period. This cannot be done under the approved policy of 2004 and 2005 as the qualifying period without revising the entire Council recommendation. A more recent qualifying period would be a significant change to the recommended charter halibut moratorium policy and this rule. NMFS has determined that such a significant change is not warranted and the approved policy and this rule are consistent with the Halibut Act and other applicable law.

Moratorium Elements

Comment 52: If limited entry is adopted, the permits should not be allowed to be sold when they are no

longer used. A lottery should be held and the winner would then have the same opportunity as the first person.

Response: This rule does not include a lottery to distribute charter halibut permits when they are no longer used or on a periodic basis. Such a lottery would be a substantial change from the policy recommended by the Council and approved by the Secretary. However, this suggestion could be made to the Council for its consideration as an amendment to this rule in the future. This rule implements the Council's original recommendation to establish a market-based system for permit transfers. The Council and Secretary determined that this would be more reasonable and efficient than to have a continual permit-application and permit-award process by the government.

Comment 53: I recommend that a permit be used for five years before it can be sold. This would keep people from hanging on so they can get a permit to sell. This would thin out the crowd and a new business would be forced to use the permit before it gains any value. Any charter business that is over five years old would be exempt.

Response: The proposal to require some use of a charter halibut permit before transferring would inhibit the exit and entry of charter halibut businesses and could increase costs of doing so. Requiring some permit use before transfer also would add administrative costs to this program. However, this suggestion could be made to the Council for its consideration as an amendment to this rule in the future.

Comment 54: Several comments requested clarification of how NMFS will determine the number of transferable moratorium permits each charter business will receive if they operated different vessels in the qualification period and the recent participation period. Many charter operators have replaced older vessels with newer ones for safety or other business reasons. The proposed rule provided that an applicant would receive a transferable permit for each vessel that made at least 15 trips in the applicant selected year and at least 15 trips in the recent participation year. However, the proposed regulatory text would require these minimum number of logbook trips to be made on the ''same vessel.'' It would be inconsistent with Council intent for NMFS to require that the same vessel be used in both the qualifying and recent participation periods. The Council did not intend to exclude a charter operator from the moratorium for upgrading or replacing a vessel for safety reasons as long as it did not increase capacity. Requiring the same vessel to be used in the qualifying period and the recent participation period also could result in these businesses not meeting the qualifications for a moratorium permit. In the final rule, NMFS should provide clarifying language for this statement and in the proposed regulations.

Response: NMFS agrees that the ''same vessel'' language in the proposed rule at § 300.67(b)(2)(ii) and (iii) should be clarified. NMFS has added text to § 300.67(b)(2)(iii) stating that the vessel used to meet the 15-trip criterion during the recent participation period (2008) need not be the same vessel used to meet the 15-trip criterion during the qualifying period (2004 or 2005) (*see* discussion below under ''Changes from the Proposed Rule''). NMFS agrees that the Council did not intend to disadvantage charter businesses for upgrading or replacing vessels.

The same vessel does not need to be used in both years—a qualifying year and the recent participation year—to meet the fishing trip criteria for a transferable charter halibut permit. However, the minimum 15-trip criterion in at least one of the qualifying years had to be met by a single vessel and the 15-trip criterion in 2008 had to be met by a single vessel (either the same or different vessel as used in 2004 or 2005). Upgrading a vessel, whether for safety or other reasons, will not prevent a person from qualifying for a transferable permit under this rule if the 15-trip criteria are met.

NMFS will rely on the ADF&G Saltwater Logbook record of fishing trips by each charter vessel to determine the qualifications for transferable or non-transferable charter halibut permits during the qualifying and recent participation period years. A major breakdown of a charter vessel within one of those years could prevent a business from qualifying for a transferable or non-transferable permit. Such cases may be appealed pursuant to 50 CFR 679.43.

Comment 55: What if a business replaced a vessel between 2004 and 2005? Does the applicant still have the ability to choose its ''best year'' in the qualifying period if it used different vessels in the qualifying period and the recent participation period?

Response: Yes. The Council used the term ''best year,'' but the proposed rule used the term ''applicant-selected year.'' NMFS determined that the applicant should choose between 2004 or 2005 for purposes of determining the applicant's number of transferable or non-transferable permits.

Comment 56: The proposed rule regarding non-transferable and transferable permits uses the phrase ''same vessel'' for transferable permits, but not for non-transferable permits. What is the reason for this?

Response: The Council specified a higher standard of participation for charter businesses to qualify for a transferable permit. This standard requires that a charter business demonstrate its participation in the charter halibut fishery by operating a vessel that made at least 15 bottomfish logbook trips in a qualifying year and a (potentially different) vessel that made at least 15 halibut logbook trips in the recent participation year. This ''same vessel'' standard is not required, however, to meet the minimum logbook fishing trips criterion needed for a non-transferable permit. For example, a charter halibut business that used five separate vessels that made one logbook trip each in 2005 and again in 2008, will qualify for one non-transferable charter halibut permit. A different charter halibut business that used three separate vessels that made five logbook trips each in 2005 and again in 2008 (totaling 15 trips in each year), will not qualify for one transferable charter halibut permit because at least 15 logbooks the trips were not made on the same vessel in 2005 and another single vessel in 2008. This business will qualify, however, for three non-transferable charter halibut permits. Meeting the ''same vessel'' standard for a transferable permit demonstrates a higher level of participation in the charter halibut fishery than is required for a non-transferable permit, which appropriately reflects the higher value of a transferable permit.

Comment 57: Will NMFS still look at both qualifying years (2004 and 2005) for the angler endorsement number if the applicant used different vessels in the qualification period and the recent participation period?

Response: Yes. This rule stipulates that a charter halibut permit will be endorsed for the highest number of charter vessel anglers reported on any logbook fishing trip in the qualifying period, except as provided at 50 CFR 300.67(e). The qualifying period is the sport fishing season in 2004 and 2005. Hence, the angler endorsement is determined regardless of the recent participation period (2008). Using a vessel in 2008 that is different from the one used in one or both of the qualifying years will have no effect on the angler endorsement determination.

Comment 58: All permits should be transferable.

Response: NMFS disagrees. The two-tiered qualification criteria is designed to allow a business with relatively less participation in the charter halibut fishery to continue its operation while reducing potential harvesting capacity over time by not allowing that permit to be transferred to another entity. On the other hand, a business with relatively more participation in the charter halibut fishery is allocated a transferable permit that allows new charter halibut businesses to enter the fishery by allowing the market for charter halibut permits to allocate access to the fishery in the future.

This policy reflects the intent of the Council and Secretary to balance the objective to reduce fishing capacity in the charter halibut fishery and its objective to minimize disruption to the charter fishing industry. If only transferable permits were initially allocated based on a relatively high minimum number of logbook fishing trips, the sudden reduction of charter halibut operations would be too disruptive to the industry. On the other hand, if only transferable permits were initially allocated based on a relatively low minimum number of logbook fishing trips, then little or no reduction in fishing capacity would be realized. Over time, as the non-transferable permits exit the fishery, only transferable permits will remain.

Comment 59: Eligibility considerations should be established for those who may be interested in purchasing a transferable permit after the limited entry program is established. This would be compatible with the seven factors in section 303(b)(6) of the Magnuson-Stevens Act, which the Secretary must consider in approving a limited entry program. These seven points could be used to establish ''eligibility criteria'' for receiving a transferred permit. The criteria could give priority to those who have committed themselves to the industry and may have a history in running or crewing on vessels for charter businesses. This group of people often gets lost in resource rationalization programs; this needs to be avoided as new rationalization plans develop. The criteria can also be tailored to help tie owners and operators to the Alaskan community they are based in, improve local economics for the industry, and still provide fair and equitable access based on intentional rather than passive participation that comes with absentee ownership.

Response: This rule establishes some criteria to qualify for receiving a transferred charter halibut permit. These criteria are listed at § 300.67(i)(2) of this rule. In brief, the criteria require U.S. citizenship (or 75 percent U.S. ownership of a business); a complete transfer application; a determination that the transfer will not cause the person receiving the permit(s) to exceed the excessive share limitation (unless an exception applies); the parties to the transfer do not owe NMFS any fines, civil penalties, or any other payments; and the transfer is not inconsistent with any sanctions. This rule includes no Alaska residency requirement because the Halibut Act prohibits discrimination between residents of different States. The Council could consider further criteria for transferring permits to achieve socioeconomic objectives in future actions.

Comment 60: The April 25, 2008, EA/RIR/IRFA analyzed 1, 5, 10, 15, and 20 minimum logbook trips but suggests that a five logbook-trip minimum requirement would allow up to 35 more vessels to operate in Area 2C over 2005 levels. Although it is unknown how many of these vessels would meet the recent participation requirement, this permit qualification criterion may not immediately meet the NMFS stated objective to ''limit the number of participating charter vessels.'' Moreover, with no limit on the number of trips a permitted business can take within a season once permitted, permitting those businesses that meet the minimum criteria of five logbook trips during the qualifying period and five logbook trips during the recent participation period will likely allow for increased fishing capacity given increasing client demand. We request that NMFS implement the option for a minimum of 10 logbook trips for permit qualification in lieu of the five logbook trip minimum.

Another commenter suggested that 30 to 50 days of logged halibut trips would be a more appropriate requirement.

Response: The design of the limited access system established by this rule will likely reduce the number of vessels in the charter halibut fleet relative to the fleet size in 2005, despite the relatively low participation standard of five logbook trips for a non-transferable permit. Table 46 in Section 2.8 of the Analysis (*see* **ADDRESSES**) indicates that 646 vessels participated in the charter halibut fisheries in Area 2C during 2005. Under this rule, a total of 502 charter halibut permits are expected to be issued for vessels in Area 2C. This represents a decrease in the potential charter halibut fleet size in Area 2C of about 22 percent. Comparable estimates for Area 3A are that 564 vessels participated in the charter halibut fisheries during 2005, and a total of 418 charter halibut permits are expected to be issued under this rule. This represents a decrease in the potential charter halibut fleet size in Area 3A of about 26 percent. A higher participation standard would reduce the fleet too fast and be too disruptive to these fisheries.

Comment 61: Leaving paid skippers out of the permitting issuance is wrong. An independent contractor who has operated vessels in all the proposed qualifying years for more than 50 days should qualify for a permit.

Response: The proposed rule for this action (74 FR 18178, April 21, 2009) described the rationale for limiting eligibility to receive a charter halibut permit to charter business owners that were licensed by the State of Alaska. In brief, eligibility for charter halibut permits is limited to the holder of an ADF&G business owner license because information on participation in the charter vessel fishery is organized by this license. Also, paid charter vessel skippers or guides will continue to be in the same position they were in before this rule by being able to hire their services to charter businesses.

Comment 62: The charter halibut moratorium provisions for small communities will not benefit some of these businesses due to the complexity of the provisions and the qualifying requirements. The comment offered alternative community qualifying criteria and suggested that NMFS remove the requirement for communities to form a Community Quota Entity to qualify for a community charter halibut permit.

Response: NMFS appreciates alternative suggestions to promote charter vessel businesses that operate in rural communities. However, the proposed community provisions in the proposed rule are unchanged in the final rule. This rule meets the intent of removing a new economic barrier for small isolated communities with undeveloped or underdeveloped charter industry to participate in the charter halibut fishery.

The rationale that governed the development of the community provisions is one of balance. The Council and the Secretary are attempting to balance the economic development interests of rural communities with the overall intent of this action to curtail growth of fishing capacity in the charter halibut fishery. A more lenient policy could allow too many charter businesses to enter the fishery and a more restrictive policy could allow too few. If the Council's approved community policy needs to be adjusted in the future, it can entertain proposals to do so and make regulatory

amendment recommendations to the Secretary.

Comment 63: My concern is fairness related to urban and rural businesses in deciding who receives a transferable permit. A rural charter business faces much more difficulty in maintaining and operating a business than their urban counterpart. The rule for participation in the charter halibut fishery should be revised to allow for transferable permits to be issued to rural charter businesses.

Response: This rule is not revised based on this comment. This rule allows a market-based system of allocating access to the fishery after the initial allocation of permits. With the exception of community charter halibut permits, transferable and non-transferable charter halibut permits may be used anywhere within the IPHC area for which they are designated. Insufficient information exists to distinguish between rural and non-rural charter businesses for purposes of transferable permit qualifying criteria. Hence, these criteria are the same for rural and non-rural charter businesses.

Comment 64: I strongly oppose this proposal and ask that you reject it or restructure it to include anyone that was licensed during the qualifying period. I am a crab fisherman and a charter boat owner and captain with a very large investment, both in money and time, in my business. The business is my livelihood. I do not take enough halibut charters in the year to qualify under the proposed rule. I take people out for a variety of things, including guided fishing, and I will lose business without the ability to offer halibut fishing. I need both crab and halibut charter incomes or my business will fail.

Response: The minimum participation number of logbook trips was the second lowest participation standard considered by the Council and the Secretary. Participation in the charter halibut fishery at lower levels is not indicative of a significant commitment to this fishery, and including participants at lower levels would run counter to the objectives of this rule. Businesses that do not qualify for an initial allocation of a charter halibut permit may choose to alter their charter vessel business plan to focus on other species, acquire a transferable permit to expand operation in the charter halibut fishery, or leave the charter industry to focus on other commercial fisheries or ventures. Alternatively, the business could seek a special community charter halibut permit.

Comment 65: The eligibility years are unfair and reward certain people. I would qualify for the moratorium but I do not think it is right.

Response: NMFS has determined that this rule is fair and equitable as discussed above under the heading ''Consistency with Halibut Act.''

Comment 66: I am in favor of limited entry with the 2004 and 2005 qualifying years, but opposed to the recent participation period. That is why I bought my business. My two sons have completed the required time to get their captain's licenses and are working toward the day they can take over the business. All my planning and their hard work will come to naught if this plan is adopted. Please reject the 2008 qualifying date and keep with the original 2004 and 2005 dates, so we can maintain our business and support the community.

Response: The Council chose the qualifying period and recent participation period in consideration of historical dependence and recent participation in the charter fishery, two factors that the Council and Secretary must take into account pursuant to the Halibut Act. Demonstrating at least minimal participation during both periods is critical to the design of this limited access system. Persons not eligible to be an initial recipient of a charter halibut permit may obtain permit(s) through transfer.

Comment 67: Two comments questioned the description of the charter halibut permit program in the proposed rule as a moratorium. The comments cite several instances where Council language refers to its action as a moratorium and in one case refers to it as an interim measure of stability in the guided sport halibut sector during the step-wise process toward a long-term solution. Why, if the Council submitted a moratorium to be published as an interim solution, is the Secretary proposing a permanent program in its proposed rule?

Response: The proposed rule (74 FR 18178, April 21, 2009) at page 18182 speaks to this point. In essence, a moratorium on entry into a fishery limits entry into that fishery. Hence, a moratorium is a limited access system in which permits are initially limited to those participants that meet specified criteria. This rule implements such a limited access system and it will remain in effect until it is changed or replaced through subsequent Council and Secretarial action. Such subsequent action may involve refinements to this limited access system or it may remove or replace this limited access system with a different limited access system. The Council has indicated that this rule is an important step toward a comprehensive scheme to allocate the halibut resource among users of the resource. It is intended to have a stabilizing effect on the charter halibut industry while a comprehensive system is developed and implemented that will work in concert with other management measures.

Comment 68: This program should have a sunset clause. The proposed rule should not be passed or should have the control date changed to a sunset clause. Also, logbooks were changed in 2006 to allow for the collection of data specific to halibut. This will help capture the necessary data to keep the Council and NMFS informed regarding charter fleets and harvest levels.

Response: A date for ending this limited access system—commonly called a sunset date—was never contemplated by the Council or Secretary because the system is perceived as necessary now and in the future. Changes to the system, including removing it, are possible through the development of a separate regulatory recommendation by the Council for the Secretary to review. A control date was published by the Council and the Secretary on February 8, 2006 (71 FR 6442). The control date notice announced to the public that no person was assured of future access to the charter halibut fishery if that person entered the fishery after December 9, 2005. A control date and a sunset date are not the same. The former signals the start of a potential limited access system, and the latter refers to a future expiration date for a regulation or program. This rule is not intended to end at a predetermined date. Instead, it is designed to be a step toward establishing a comprehensive program of allocating the halibut resource among resource users.

NMFS is aware of the change in logbook reporting required by ADF&G. This is explained in the preamble to the proposed rule (74 FR 18178, April 21, 2009) on page 18185. In 2004 and 2005, ADF&G required charter businesses to report bottomfish effort for each logbook trip. ADF&G further instructed logbook users that bottomfish fishing effort included effort targeting halibut.

Comment 69: Limits should be based on fleet size per community and limit fleet size generally for Area 2C. In Gustavus, nine seasons ago there were 19 operating charter boats; now there are 24. While our growth has been very small over 10 years, other areas have increased significantly. Some areas within Area 2C may need to be capped, whereas other areas should have a maximum capacity ceiling for halibut guide boats. Another concern is

absentee ownership. Many of the charter business owners do not even fish. A community-based cap would prevent more people like this, or new people, from overwhelming specific communities.

Response: With the exception of the community charter halibut permits, the Council did not specify how many permits should be allocated to individual communities. Permit limits for specific communities would be more complex and more expensive to administer than this rule because it contemplates a separate limited access system for each community. However, such proposals could be made to the Council.

Comment 70: The ''recent participation period'' should be fixed as either 2007 or 2008. Another comment suggested that 2007 should be used for the recent participation period because the nationwide economic downturn caused a number of cancellations in 2008 and recorded logbook trips fell over 50 percent for that year.

Response: This rule establishes 2008 as the recent participation period, or recent participation year, for purposes of qualifying for a charter halibut permit. The purpose of this requirement, along with the qualification years of 2004 and 2005, is to ensure that both historical dependence and recent participation are recognized, two factors that must be taken into account under the Halibut Act. The approved Council recommendation contemplated that either 2007 or 2008 could be the recent participation year, but refers to the ''year prior to implementation.'' NMFS interpreted this phrase to mean the most recent year for which a full year of logbook fishing trip data are available, and therefore established 2008 as the recent participation year.

Comment 71: I support the proposed regulations. The tremendous growth of the guided sport charter industry over the past decade has put serious pressure on fish stocks. I would like to see more reduction in permits than proposed but allowing special consideration for lodge operators who have a larger investment and contribute more to the economy. Perhaps a buy-back program makes sense for reducing the total outstanding permits or increasing the minimum number of trips in the qualifying years.

Response: This action stabilizes the guided charter fleet by capping the number of separate vessels that may be operated. The Council recommended the use of non-transferable permits to reduce the numbers of charter halibut permits over time. NMFS estimates that 502 permits will initially be issued in Area 2C, and that this will eventually decline to 347 permits as non-transferable permits expire. An additional 72 permits may be issued to CQE groups in Area 2C. In Area 3A, an initial 418 permits should decline to 319 as non-transferable permits expire. An additional 98 permits may be issued for CQEs in Area 3A.

The Council's use of non-transferable permits was meant to lead to the withdrawal from the fleet of operations that had only minimal participation without imposing a serious burden on their traditional operations in the short run. Allowing non-transferable permits to expire over time will prevent these operations from increasing participation in the long run. This rule accommodates the special needs of lodge operations by (a) issuing permits to businesses, (b) allowing them to hold multiple permits up to the five-permit excessive share limit, (c) allowing businesses to hold initially allocated permits in excess of the excessive share limit, and (d) allowing businesses to hire guides and vessel operators to use the permits.

This rule lays the groundwork for future management measures, which might include buyback, individual quotas, or further measures to modify the numbers of permits. Such proposals should be made to the Council. After Council development and analysis of such proposals, changes may be recommended to the Secretary for a separate regulatory amendment.

Comment 72: A commenter has noted an apparent conflict between text in the preamble to the rule stating that charter halibut permits would not be awarded to persons who purchased a charter fishing business that met some or all of the participation requirements but who themselves did not meet that participation requirement, and text stating that NMFS would have no obligation to determine the owners of a corporation or members of a partnership that successfully applied for a permit. The commenter points out that a person could have bought a business after the 2004–2005 qualifying period, and before the 2008 recent participation period. Without checking business ownership, it would be impossible to know if the business owners were the same in both periods.

Response: This apparent conflict is due to confusing a business with its owners. The initial allocation of permits is to businesses, and the criterion for a continuous business is not the continuity of the owners but the continuity of the business. The term ''person'' has been previously defined in § 300.61 to include an individual, corporation, firm, or association. This rule makes clear that NMFS will not recognize agreements that allow two businesses to match their logbook history to qualify for one or more charter halibut permits. For example, charter business ''A'' may have the necessary logbook trips for the qualifying period but not the recent participation period and charter business ''B'' may have the necessary logbook trips for the recent participation period but not the qualifying period. Charter business ''A'' agrees to sell its logbook history to charter business ''B.'' NMFS will not recognize this agreement. In this case, neither business will qualify for a charter halibut permit.

NMFS will issue a charter halibut permit to the person or entity—individual, corporation, firm, or association—that held the ADF&G Business Owner License that authorized the logbook fishing trips that met the participation requirements in both participation periods, qualifying and recent. NMFS does not intend to determine the individual owners of charter vessel businesses in part to avoid dividing permits among the owners or partners of dissolved corporations or partnerships. *See also* the response to Comment 105.

Comment 73: It would be very helpful for full-time residents of rural communities (the same that qualify for subsistence) to be able to get a non-transferable permit to run one boat for halibut if they captained a boat during the qualifying years. Most of the commercial fishermen would support this as they are opposed to the bigger charter operators, not the one-boat local operators. It would be very good for the small town economies, and it would provide opportunities in towns where opportunities are scarce.

Response: This rule includes provisions to assist the development of the charter halibut fishery in small rural communities (*see* § 300.67(k)). In addition, some charter halibut permits are transferable, and persons in rural areas will be able to acquire them in the market if it makes economic sense for the permits to migrate to those areas. If the Council determines that rural communities need further assistance to develop small scale charter halibut fisheries, it could develop a regulatory amendment to recommend to the Secretary.

Comment 74: Our industry is facing very uncertain times and the stocks of halibut have been declining. Controlling growth of the charter industry is critical for both the health of the halibut biomass and all users of the resource. NMFS needs to make provisions for these permits to be eligible for financing

through the NMFS Financial Services Loan Division. This important rule has been a long time coming.

Response: NMFS Financial Services Division does not have the statutory authority to make loans for this purpose. Congressional action would be necessary to provide this authority.

Comment 75: Is it possible to assign a cost recovery fee to each limited access permit to recover enforcement costs and will that be a part of this program?

Response: Cost recovery is not authorized for this program as it is not a limited access privilege program or a community development quota program as defined by the Magnuson-Stevens Act. A limited access privilege is a Federal permit issued as part of a limited access system to harvest a specific quantity of fish. A charter halibut permit is a Federal permit issued as part of a limited access system but it does not provide a privilege to harvest a specific quantity of halibut. Hence a cost recovery fee for charter halibut permits is not authorized under section 304(d)(2) of the Magnuson-Stevens Act.

Comment 76: Although the Analysis states that the Council intended to curtail the growth of the charter sector, the ''recent participation'' and ''same vessel'' clauses of the rule will effectively eliminate 40 percent of current operators. Moreover, the Council intention to curtail the growth seems to be inconsistent with the provision to provide for 192 new CQE permits. The Analysis states that it is the purpose of this action to place a moratorium on ''new'' entry; however, this action actually limits any entry since 2005.

Response: ''New'' in this context refers to entry into the charter halibut fishery in Areas 2C or 3A after December 2005 (*see* response to Comments 40 and 45 concerning the control date). Hence, this action limits entry to operations that were active in the fishery during the qualifying period and that continued to operate with at least minimal logbook fishing trips in 2008. This potential outcome was published in the **Federal Register** on February 8, 2006 (71 FR 6442), and in the Council newsletter and other media. This notice specifically stated that anyone entering the charter halibut fishery after the control date of December 9, 2005, will not be assured of future access to that fishery if a limited access system is established that limits participation in the fishery.

The ''recent participation'' requirement is an important element in this rule as it serves to initially allocate charter halibut permits to businesses that were participating in the fishery during the historical qualifying years and are still participating during the most recent year for which NMFS has complete logbook information. This also demonstrates that the Council and Secretary have taken into account present participation as required by the Magnuson-Stevens Act section 303(b)(6). The ''same vessel'' requirement is clarified in response to Comments 54 and 56 and by the change in this rule from the proposed rule (*see* ''Changes from the Proposed Rule'' below).

This rule may allow up to 72 community charter halibut permits to be issued to CQEs representing communities in Area 2C and up to 98 in Area 3A, for a total of 170. These are the maximum number of community charter halibut permits allowed under this rule and they may not all be issued.

Comment 77: It is difficult to comment on the proposed rule because it is confusing and ambiguous in several places. The proposed rule has many stated objectives depending on the agency providing information. The Analysis (at page 2) states that the purpose and need for action is due to the reallocation of halibut harvest to the charter sector from the commercial sector. Since 1997, the commercial sector has been trying to protect their fisheries by submitting different proposals from quota share programs to limited entry programs. This proposal begins with an inaccurate statement and continues with inaccuracies throughout including the data used for this proposal.

Response: The problem statement on page 3 of the Analysis (*see* **ADDRESSES**), describes the evolution of the issue and then succinctly states the problem:

> ''To address the potential rush of new entrants into the charter fishery, the Council is considering establishing a moratorium on the charter sector. The moratorium is to provide an interim measure of stability in the guided sport halibut sector during the step-wise process toward a long-term solution. In doing so, however, the Council is also concerned with maintaining access to the halibut charter fishery by small, rural, coastal communities. To address this, the Council is considering establishing a separate program to allow these communities to enter the halibut charter fishery.''

The Analysis accurately points to a *de facto* allocation of the halibut resource over the years from the commercial fishery to the charter fishery as the charter fishery expanded its activity. The Analysis states that the Council began to consider methods to cap the growth of charter halibut harvests in 1993. The historical information presented in the Analysis is accurate. Further, the Analysis incorporates the best scientific information available.

Comment 78: I am in favor of limited access for the charter fishery for halibut similar to the commercial program. I am a small stakeholder in both fisheries and have seen my small commercial IFQ for halibut cut in half from its original allocated poundage. My only concern is that I will not have enough years in the charter business to qualify for an allocation. I would like to see a provision in the new regulations that would allow a commercial fisherman to use his allocation as a charter fisherman.

Response: This rule makes no connection between the commercial IFQ halibut fishery and the charter halibut fishery. A charter halibut permit under this rule does not specify an amount of halibut that may be harvested as does an IFQ permit. The Council has adopted a new recommendation for a catch sharing plan that contains a proposal for a limited transfer of IFQ halibut to a charter halibut permit holder. A future proposed rule may be developed that will describe this proposal.

Comment 79: Is the definition of a ''halibut logbook fishing trip'' in the proposed rule consistent with the Council motion? Footnote 8 in the motion specifies that, for the year prior to implementation, evidence of participation includes ''actual halibut statistical area, rods, or boat hours.'' We presume that this means that a bottomfish statistical area or bottomfish boat-hours must be reported along with at least one halibut kept or released for that boat-trip. The definition of a halibut logbook fishing trip in the proposed rule, however, appears to exclude the requirement that a bottomfish statistical area be reported if bottomfish boat-hours are not reported. It is common for vessels targeting salmon to catch halibut. Charter operators targeting salmon were instructed in 2007 and 2008 to report the statistical area and boat-hours under the salmon target category. Therefore, the proposed definition of ''halibut logbook fishing trip'' might include some unknown number of trips without bottomfish effort as long as at least one halibut was reported kept or released. This suggests that the Council's intent was that the boat had to have reported a bottomfish statistical area or bottomfish boat-hours along with any halibut kept or released as evidence of participation.

Response: Credit for participation in 2008 (the recent participation year) depends on the number of halibut logbook fishing trips in that year. A

halibut logbook fishing trip will be a trip for which a business owner reported, within ADF&G time limits, the number of halibut kept or released, the number of boat hours that the vessel engaged in bottomfish fishing, or the statistical area(s) where the halibut fishing occurred. Footnote 8 in the Council's motion explains that evidence of participation includes ''[a]ctual halibut statistical areas, rods, or boat hours as reported in ADF&G logbooks * * *.''

The Council's motion uses the conjunction ''or'' indicating that actual halibut statistical areas and boat hours are alternative ways to meet this requirement. This parallels the use of the word ''or'' in the paragraph on ''Evidence of participation.'' This rule uses the same construction in the definition of ''halibut logbook fishing trip'' at § 300.67(f)(3) and specifies that any one of the pieces of information—the number of halibut kept, the number of halibut released, the boat hours that the vessel engaged in bottomfish fishing, or the statistical area(s) where halibut fishing occurred—would be sufficient.

The Council's motion language may lead to some businesses qualifying for charter halibut permits because their charter vessels anglers caught halibut incidentally to salmon catches. The 2008 logbook did not include information on the number of rods, but did include information on the number of halibut kept and released, and NMFS used this information along with the statistical area and boat hours information. NMFS interprets the Council's reference to boat hours as a reference to bottomfish target boat hours. While the number of rods might have been included in the definition of halibut logbook fishing trip to be consistent with the Council's motion, it would not make sense because that data field was not included in 2008 logbooks.

Comment 80: The definition of a charter vessel angler is in conflict with the definition of sport fishing guide services, since a non-paying angler included in the first definition is not receiving ''assistance for compensation.'' This definition should be replaced with ''charter vessel client'' and not include non-paying anglers. Also, the definition of charter vessel operator should be changed to specify that the operator is in ''physical control of the vessel'' in order to distinguish this from other types of control (*e.g.,* financial).

Response: No change is made to the definition of charter vessel angler or sport fishing guide services. NMFS intends the definition of ''charter vessel angler'' at § 300.61 of this rule to include non-paying anglers. The definition of ''sport fishing guide services'' is not limited to situations where charter vessel anglers are directly compensating someone for services. If someone is compensated in any manner by any person to provide sport fishing assistance, then that person is providing sport fishing guide services according to this definition. NMFS acknowledges the need to clarify the proposed definition of charter vessel operator. *See* discussion below under the heading ''Changes from the Proposed Rule.''

Comment 81: Revise § 300.66(b) ''Fish for halibut except in accordance * * *'' to read ''Catch and retain halibut except in accordance * * *.'' This change is suggested to ensure that limited entry permit requirement prohibitions are not applied to vessels that may incidentally catch, but not retain, halibut. Likewise, most of the bulleted descriptions of prohibitions on page 18190 of the proposed rule refer to vessels fishing for halibut, when in fact these prohibitions are only in effect for vessels with anglers catching and retaining halibut. It is virtually impossible to define a vessel or angler that is ''fishing for halibut'' because the gear and fishing technique used for halibut are similar to that used for other bottomfish species.

Response: No change is made. The prohibition at § 300.66(b) previously read, ''fish for halibut except * * *.'' The only change proposed in the proposed rule published April 21, 2009 (74 FR 18178), and made final by this rule is to add a reference to § 300.67. The phrase ''fish for halibut'' existed previously and was not proposed. It is used deliberately, so that the prohibition will apply to vessels fishing for halibut. Vessels fishing for halibut may not be successful, but if they are successful, they may not retain the halibut unless authorized to do so.

Only one of the prohibitions on page 18190 of the proposed rule refers to ''fishing for halibut.'' This bulleted point is actually more general than the corresponding changes to regulations in § 300.66. Most of the prohibitions in the regulatory text at § 300.66 refer to vessels ''with one or more charter vessel anglers on board catching and retaining halibut.''

Comment 82: The requirement to have a logbook on board is not consistent with current ADF&G regulations, nor is it necessary to enforce logbook reporting. ADF&G regulations and instructions do not currently require that the logbook be carried on board the vessel, only that it be completed before offloading any fish (or clients, if no fish kept), or if operating a trailer boat, that it be completed before offloading any fish and departing the launch site. This is because some guides that operate small skiffs keep the logbook in the vehicle pulling the boat trailer to protect the logbook from the elements. This prohibition should be revised to say: ''Operate a vessel in Area 2C or Area 3A with one or more charter vessel clients on board that are catching and retaining halibut without completing a State of Alaska Department of Fish and Game saltwater charter logbook that specifies the following * * *.''

Response: The saltwater charter logbook needs to be onboard the charter vessel during a fishing trip, similar to the commercial IPHC logbook requirements. NOAA Office of Law Enforcement and USCG enforcement personnel depend on being able to review the logs while the vessel is engaged in fishing. The optimum time to enforce charter halibut regulations is either at sea during the fishing trip or dockside when the fishing trip is terminating. Effective enforcement is compromised if the logbook is not available to an authorized officer during these encounters. A logbook may be kept in a dry bag or dry container to protect it from the weather or sea spray while onboard a small open boat. NMFS acknowledges that ADF&G regulations and instructions do not currently require that the ADF&G saltwater charter logbook be carried on board the vessel. As this erroneous information was not in the proposed regulatory text, no change is made in this rule.

Comment 83: All references to ''licensed business owners'' or ''business owner licenses'' during the qualifying years (2004–2005) should be replaced with ''registered or licensed business owner'' or ''business owner license or registration.'' There was no business license in 2004, only a business registration.

Response: NMFS acknowledges the need for this correction. *See* discussion below under the heading ''Changes from the Proposed Rule.''

Comment 84: The final rule needs to clarify if there will be an annual permitting process. Page 18192 of the proposed rule states that there would be a start of the program application process and then no additional application would be required. In the next paragraph it states NMFS would require additional reports only when the structure of the business owning the permit changes or the permit is transferred. The executive summary of the Analysis, on page xxv, under business ownership information, states that persons would need to annually disclose affiliation and ownership through an application and affidavit to

NMFS and that enforcement of this provision would require NMFS to have the authority to suspend a permit until the business provides the necessary annual documentation.

Response: The proposed rule is correct; no change is made in this rule. This rule at § 300.67(h) provides for a single application period for an initial allocation of charter halibut permit(s). The permit(s) will not expire annually. A charter halibut permit will cease to be valid, as stated at § 300.67(j)(3), if the permit holder is an individual and the individual dies, or if the permit holder is a non-individual entity and the entity dissolves or changes as defined at § 300.67(j)(5). NMFS must be notified within 30 days of the death of an individual who holds a transferable or non-transferable permit. For a non-individual entity, NMFS must be notified within 15 days of the effective date of a change as required at § 300.67(j)(5)(ii). A ''change'' is defined at § 300.67(j)(5). The purpose of this requirement is to monitor and enforce the expiration of non-transferable permits and the excessive share limit and its exceptions under § 300.67(j). NMFS determined that an annual statement of ownership or affiliation is not necessary and would save administrative costs for affected business and NMFS. Most other limited access systems administered by NMFS for Alaska fisheries do not require annual permit applications. Compliance with the notification requirement when there is a ''change'' in the status of the permit holder as defined at § 300.67(j)(5) should be sufficient to monitor and enforce the excessive share limit and its exceptions under § 300.67(j).

Comment 85: Absentee ownership of access privileges has been identified by Congress as a significant threat to fishery dependent communities. However, this rule seeks only to discourage, not prohibit, leasing. If implemented as written, this program will allow limited entry permit holders to divest themselves of all aspects of a charter business except the permit, then lease owned permits to active charter boat operators. Entities with no working connection to the charter industry and fishery dependent communities will be authorized to draw rents from the resource. The prospect of permit leasing raises concerns about the impact on transferable permit prices, the potential for permit concentration with individual owners, the potential for permits to become concentrated in ports with the greatest number of summer visitors (exacerbating identified fishing ground congestion and localized depletion in those areas), undercutting commitment to stewardship often associated with the receipt of a permit in a limited access program. The impacts of leasing on communities and the resource have not been adequately addressed. Various proposals were made for reducing the potential for leasing, including requiring (except in limited circumstances) permit holders to be on board when permit-authorized fishing takes place, limiting leasing operations by geographic area, limiting pure leasing without full investment in the capital or operations of the business, and requiring the charter permit holder to be present in the Alaska community where the charters originate.

Response: This rule does not have an explicit prohibition against leasing, although the Council recommended one, for the reasons discussed in the proposed rule (74 FR 18178, April 21, 2009) at page 18191. The charter industry has a variety of business models, and the way some of these business models function is substantially similar to a lease between the permit holder and the vessel operator. For example, the owner of a charter business or of a business such as a wilderness lodge, that also provides charter services, employs hired skippers and guides to operate one or more vessels. The charter business may or may not own the vessels. The rules governing the identification of qualified businesses and the number of permits they would receive did not require vessel ownership by the qualified business. Operations by these businesses may be difficult to distinguish from leasing. There is no bright line between how these types of businesses operate and what would be considered leasing arrangements. For this reason, enforcement of a prohibition on leasing would be difficult, time consuming, and costly. NMFS determined that the benefits derived from a leasing prohibition did not justify the costs of enforcement and the disruption to existing business operations.

Comment 86: Several comments requested clarification on what an angler endorsement authorizes. Specifically, does it apply only to the number of halibut clients (presumably paying but not non-paying halibut fishermen) and does not govern the total number of people on board?

Response: Each charter halibut permit will have an angler endorsement number. The angler endorsement number on the permit is the maximum number of charter vessel anglers that may catch and retain halibut on board the vessel authorized by the permit (*see* 50 CFR 300.66(s) and (t)). The angler endorsement does not limit the number of passengers that an operator may carry, only the number that may catch and retain halibut. The term ''charter vessel angler'' is defined in this rule (50 CFR 300.61) to include all persons, paying or non-paying, who use the services of the charter vessel guide. The charter halibut permit, once issued with its angler endorsement, would limit the number of charter vessels anglers who can catch and retain halibut on the permitted vessel.

Comment 87: The proposed rule is not clear about how angler endorsements will be determined for an applicant who qualifies for more than one permit. Does that applicant receive an endorsement for the highest number of anglers in any one logbook for all of their vessels being issued to that applicant or is each vessel permit issued an angler endorsement based on its own individual history?

Response: Charter halibut permits under this rule are issued to individuals or businesses which held ADF&G Business Owner Licenses (or registration) that authorized logbook fishing trips during the qualifying and recent participation periods. Hence, this rule is oriented toward the charter vessel activity of a qualifying business rather than the activity of specific vessels. The regulatory text at 50 CFR 300.67(e) states simply that, ''a charter halibut permit will be endorsed for the highest number of charter vessel anglers reported on any logbook fishing trip in the qualifying period'' (except as provided at 50 CFR 300.67(e)(1) and (2)). Therefore, a qualifying charter vessel business will receive charter halibut permit(s) with an angler endorsement based on the highest number of charter vessel anglers reported by that business on any logbook trip in the qualifying period regardless of the number of vessels involved. The same endorsement will apply to all permits initially issued to the qualifying business. As explained in the preamble of the proposed rule (74 FR 18178, April 21, 2009) at page 18184, this action is designed to limit the number of charter vessels participating in the charter halibut fishery, not to prevent all expansion of fishing effort. Of course, any such expansion would be constrained by safety, USCG licensing, and other regulations that limit the number of anglers that may be on board a vessel.

Comment 88: Angler endorsements should be based on the year chosen by the applicant for determining the number of permits. This might work out as more permits and less anglers per boat, or they might choose to go with less permits but the permit would have

a higher angler endorsement. They should not receive the highest endorsement value unless earned within the same year or you add additional latent capacity to the program that is not necessary.

Response: This rule implements the Council's recommendation with regard to angler endorsements. Other more constraining alternatives are possible and may be necessary in the future. Proposals for such alternatives could be made to, and developed by, the Council for recommendation to the Secretary.

Comment 89: Under the section ''Angler endorsement on permits'' the proposed rule states ''that the angler endorsement number on an applicant's permits would be the highest number of clients that the applicant reported on any logbook fishing trip in 2004 or 2005, subject to minimum endorsement of four.'' In some cases charter owners, including myself, have upgraded our vessels after the ''applicant selected year'' from traditional four angler configurations to more environmentally efficient six or more angler configurations. We should not be penalized for investing in and upgrading our equipment to be more environmentally friendly, safer, more cost effective, and remain competitive in our industry. I suggest grandfathering consideration be given to such situations, especially for those of us that have been in this business for a decade or more.

Response: The Council's motion was meant to reflect the fleet composition and practices as they were in the qualifying period (2004 and 2005). The recent participation year was meant to screen out operations that had not continued to be active in recent years and is not included to reflect capacity upgrades since the qualifying period. As a result, permit endorsements reflect business activity levels in 2004 and 2005. The endorsement provisions are relatively liberal, reflecting the highest number of clients included on a trip taken by a qualifying business during the two year qualifying period. This endorsement is applied to all the permits received by the qualifying business. To the extent that a qualifying business does not receive charter halibut permits with endorsements that match its increased carrying capacity, the business could enter the permit market and obtain by transfer one or more permits with the appropriate number of endorsements, or ''stack'' two or more permits on a vessel.

Comment 90: The angler endorsement system is cumbersome and inflexible. Special identification cards equal to the number of angler endorsements should be issued to each halibut charter permit holder. The permit holder may fish, lease, or sell any or all of the angler endorsements. The proper number of angler endorsement cards must be on the vessels when engaged in the catching and retention of halibut equal to halibut anglers. All angler endorsements will have the proper identifying information, and this information will be entered into the ADF&G logbooks. The maximum number of angler endorsements per permit should be capped at six and the minimum at one. Allowing halibut charter permit holders to buy and sell individual angler endorsements will provide flexibility and a more affordable means for new entrants into the fisheries. The present proposal allows only for the buying or stacking of four, five, or six angler endorsements with a halibut charter permit. The buying and selling of angler endorsement cards will be similar to the process of buying and selling transferable halibut charter permits and can only be engaged in by entities that presently own halibut charter permits.

Response: This is not the approach to endorsements recommended by the Council and implemented by this rule. Alternative approaches to angler endorsements are possible. Proposals for such alternatives could be made to, and developed by, the Council for recommendation to the Secretary.

Comment 91: The types of permits proposed in the moratorium are unacceptable. The six-person and four-person permits will only allow operators to take six or four charter anglers, depending upon which permit is granted. Our vessel is certified for four to six anglers, and the number of anglers we carry varies by trip. We cannot run a profitable business with this restriction.

Response: The angler endorsement represents the maximum number of anglers that may catch and retain halibut. This rule does not require that the number of charter vessel anglers on a vessel operating under a charter halibut permit exactly equal the angler endorsement on the permit.

Comment 92: The proposed rule uses the term ''angler'' rather than ''client,'' and states, ''The term 'angler' includes all persons, paying or non-paying, who use the services of the charter vessel guide.'' This is problematic for two reasons.

First, in 2004 and 2005 the ADF&G logbook required charter operators to report only the number of ''clients and crew that fished.'' Anglers that fished from a charter vessel without compensating the operator (comps) were not, and currently are not, considered ''clients'' or ''guided anglers'' because the operator was not compensated for services. Limiting charters to a number of anglers (including non-paying) equal to the number of paying clients in the past is inconsistent.

Second, the proposed definition of ''charter vessel angler'' is not consistent with the proposed definition of ''sport fishing guide services.'' This is because the definition of ''charter vessel angler'' includes non-paying anglers that use the services of a charter vessel guide. The definition of a charter vessel guide includes a person that ''provides sport fishing guide services'' and the definition of ''sport fishing guide services'' requires that assistance is provided ''for compensation.'' Therefore, a non-paying angler cannot be using the services of a charter vessel guide if that angler is not providing compensation.

NMFS should consider defining charter clients as anglers that receive assistance for compensation (including any compensation, not just ''paying'' clients). There should also be a distinction between charter clients and anglers that fish on private boats but share the cost of bait and fuel with the owner, as this is a common practice.

Response: The comment is correct that logbooks from 2004 and 2005 did not explicitly request information on non-paying anglers or ''comps.'' Reporting in this period is likely to have differed among businesses, with some including non-paying anglers under the heading of ''comps'' and others not. The Council recommendation was for the number of endorsements to be the highest number of reported anglers on any trip conducted by the guide business in 2004 and 2005. In some instances, the number of endorsements may be lower than they would have been if the trip with the most anglers had included comps, and the operator had not reported comps under the client heading.

A charter vessel angler includes the non-paying anglers that use sport fishing guide services. The definition of ''sport fishing guide services'' at 50 CFR 300.61 does not require each angler to be individually compensating the person providing sport fishing assistance for this definition to be applicable. This definition applies if there is any compensation from any source for assistance to a person who is sport fishing. Hence, no conflict exists between this definition and the definition for charter vessel angler.

NMFS agrees that a distinction exists between a charter vessel angler and a non-guided angler. The former uses the

services of a charter vessel guide (pursuant to the definitions at 50 CFR 300.61) and the latter does not. Several friends in a boat sport fishing for halibut and sharing the costs of bait, fuel, or other supplies are not charter vessel anglers unless one of them is providing sport fishing guide services.

Comment 93: The proposed rule talks about stacking permits. There is no mention of not being able to split a permit between boats. This would best fit our business plan as most operators may only need one or two more endorsements to add to a permit with four endorsements. (In Southeast Alaska, the maximum number of lines fishing per vessel is six.)

Response: Stacking permits in this action means having more than one permit on a charter vessel to use the total number of angler endorsements. For example, an operator could hold two charter halibut permits, one with an endorsement of four and another with an endorsement of six. Both of these permits combined, or ''stacked,'' would authorize this operator to have up to 10 charter vessel anglers on board the vessel, unless this number of passengers is prohibited by USCG licensing or other safety rules or regulations. This rule does not provide for splitting permits as this would potentially multiply the number of permits initially allocated contrary to the intent of this rule.

Comment 94: NMFS should issue permits only to charter businesses which have been in full compliance with the law. NMFS should require charter businesses to show proof of enrollment in a random drug testing program (as required by the USCG) in the qualifying as well as recent participation years, and proof of paying city sales tax in these years.

Response: Enforcement of drug testing and sales tax rules is beyond the scope of this action.

Comment 95: Why is Area 3A being treated the same as Area 2C? The proposed rule states that ''the Council recommended no change in management of the charter vessel fishery in Area 3A because that fishery appeared stable.''

Also, a comparison of the number of active vessels and the level of harvest shows cases where the number of vessels appears to be inversely related to the level of harvest. The proposed rule states that ''the intended effect is to curtail growth of fishing capacity in the guided sport fishery for halibut'' and that ''open access in the charter vessel fleet has resulted in virtual unlimited increases in charter harvests.'' The vessel and harvest data cited refute this.

Response: The first quote in the comment is from the preamble to the proposed rule published April 21, 2009 (74 FR 18178) in the third column on page 18180 in a discussion of Council actions in 2007 with respect to the GHL. In fact, the quoted sentence has additional text the reads, ''* * * appeared stable at about its GHL.'' In developing and implementing this rule, the Council and Secretary determined that applying a limited access system in Area 2C only would quickly result in excessive charter capacity in the adjacent Area 3A. Hence, applying this limited access system to both areas at the same time avoids a disjointed step-wise approach which would be more disruptive to the charter industry than this rule. While, the highest growth rate in the charter halibut fishery has been observed in Area 2C, the charter halibut fishery also has exhibited growth between 1999 and 2007 in Area 3A. Elements of this rule accommodate different circumstances in Area 2C and 3A. Large lodges with multiple permits are more common in Area 2C. This rule accommodates this by allowing businesses to hold multiple permits, meeting lodge owners' needs. Large party boats are more common in Area 3A. This rule accommodates this by allowing stacking of permits and angler endorsements that vary on permits.

The long-term trend in halibut harvests by the charter vessel sector does not refute the quoted statements. The trend in charter halibut fishery harvests between 2003 and 2007 in Area 3A is one of slow but steadily increasing halibut harvests from 2,724,000 pounds (1,235.6 mt) in 2002 to 4,002,000 pounds (1,815.3 mt) in 2007. A slight decline in the charter halibut harvest in 2006 is not significant.

Comment 96: Community charter halibut permits are inconsistent with the purpose of this program. Issuing permits to communities is also unfair to persons who recently participated in the fishery but will not qualify for a permit under the program.

Response: The Council recommended using the CQE program to help develop the charter vessel sector in certain rural communities. The Council balanced the objectives of stabilizing the guided charter sector and its rural development objectives. There will be constraints on CQE permits; they will be anchored in the rural communities. The Council has consistently included the objective of providing for the development of rural communities through the use of fishery resources. This is consistent with requirements of the Halibut Act. The Bering Sea Community Development Quota Program and the IFQ CQE programs are similar examples. All of these programs involve tradeoffs between rural communities and other user groups.

The community charter halibut permits will be issued to CQEs, not directly to businesses. It is possible that, under agreement with the CQEs that hold community charter halibut permits, some of these permits will be used by businesses that entered the charter halibut fishery after 2005 and do not otherwise qualify for an initial allocation of charter halibut permit(s).

Also, acquiring a transferable charter halibut permit through the market, contracting with another business that holds a charter halibut permit, arranging to use a community charter halibut permit, or changing the business plan to avoid targeting halibut are all alternatives for a person that does not qualify for an initial allocation of a charter halibut permit.

Comment 97: The CQE program would allow expansion of the guided charter fleet and undercut the stabilization objectives of the program. Limits should be placed on the community permit program including: (a) No more than four permits be allowed in a community; (b) charter boats should be required to begin and end their trips in the community designated on the permit; (c) community eligibility should be based on whether or not 10 charter vessels terminated trips in the community in the qualifying years, not on whether or not 10 charter businesses did; (d) impose a recency qualification requirement on CQE groups (10 charter vessel businesses terminate charter trips in the year prior to implementation).

Response: While other management schemes can be envisioned, the Council indicated that stability in the charter halibut fishery was one of the principal objectives of this action. The Council also sought to support rural development objectives similar to those addressed in other Council programs. Although community charter halibut permits may allow for some increased effort, this rule also is designed to reduce overall effort over time. The elements that provide for such reduction in effort include minimum participation criteria to receive an initial allocation of a charter halibut permit, and the reduction in effort as non-transferable permits expire. With respect to the specific proposals:

(a) No more than four community charter halibut permits per eligible community are permitted in Area 2C, while seven are permitted in Area 3A. The larger number of permits permitted

in Area 3A reflects the larger resource base available in that area.

(b) This rule requires all charter vessel fishing trips authorized by a community charter halibut permit begin or end within the boundaries of the community designated on the permit. This is meant to ensure that charter vessel anglers on the vessel have an opportunity to use the goods and services available in the community.

(c) The approved Council recommendation clearly states that eligible communities are those ''in which 10 or fewer active charter businesses terminated trips'' in each of the qualifying years (2004 and 2005). Regardless of this condition, this rule specifically names the eligible communities.

(d) The approved Council recommendation does not include a recent participation requirement for community charter halibut permits. Such a requirement would be a substantive change to the proposed rule and will require a separate Council action and regulatory amendment to this rule.

Comment 98: The Organized Village of Kake Council would like to see the Kake area be left open for local six-pack charter boats that would like to enter into the guided sport halibut fishery. Although the amount of sport charters in Kake is limited, the dozen that enrolled in the six-pack license class this past winter indicates an interest in guided sport halibut in our small town and should be given a chance to enter. We have witnessed the large number of charter businesses in the larger cities and can see that they need to be limited, but to shut down all of Southeast Alaska, including rural areas, to a limited license on sport halibut fisheries is too extensive and favors larger communities over rural villages. NOAA should study Kake to see what we are doing to develop a sustainable economy, which includes developing six pack charter boats that will help sustain the two or three lodges that we have in our community.

Response: This rule has a special provision for rural communities like Kake through its CQE program. Kake is specifically listed in this rule as an Area 2C community that is eligible to receive community charter halibut permits (50 CFR 300.67(k)(2)(i)). As such, a CQE representing Kake can receive a maximum of four community charter halibut permits at no charge and can acquire a maximum of four additional charter halibut permits through the market for transferable charter halibut permits. Hence, a CQE representing Kake can hold a maximum of eight permits. Individual businesses in Kake are not limited by this provision from acquiring additional charter halibut permits.

Comment 99: The CQE-eligible communities within the Gulf of Alaska would have preferred, under optimal conditions, an open access system. Given the current conditions which render an open access management system completely inappropriate, the measures provided for CQE communities in the proposed rule are fair and equitable. It has been previously demonstrated that the Halibut and Sablefish IFQ program disadvantaged these 42 communities. The resulting Amendment 66 to the Halibut and Sablefish Program created the CQE program and made CQEs eligible to purchase halibut and sablefish quota share. The proposed community charter halibut permit will help to provide much needed economic opportunity to the eligible CQE communities.

Response: NMFS acknowledges the support for the CQE program.

Comment 100: Special permits for U.S. Military Morale, Welfare, and Recreation vessels should be limited to the number of vessels that were operated by the military for morale, welfare, and recreational purposes during the qualification periods. Also, the vessels authorized by these permits should allow participation only to active military personnel and their immediate family. The stakeholder committee was provided information that indicated that an extensive list of qualified people go on military morale vessels including YMCA members, guests, and a wide variety of others that did not have anything to do with active military personnel and their immediate family.

Response: This rule is designed, based on Council recommendation, to have a minimal effect on a Moral, Welfare and Recreation Program of the U.S. Armed Services. A special military charter halibut permit issued to such a program is non-transferable and restricted to the regulatory area designated on the permit. NMFS is aware of only one of these programs in Alaska currently offering recreational charter halibut fishing to service members. If it is determined that additional restrictions are needed on the use of military charter halibut permits, NMFS can issue a rule with those restrictions.

Comment 101: The commenter supports the prohibition on operating a charter vessel in Area 2C and Area 3A during a single charter vessel trip.

Response: NMFS acknowledges the support.

Comment 102: The commenter supports the excessive share limit section as written. This issue was debated and the Council recommended that larger businesses retain their grandfather rights if the business is sold with all assets and permits. NMFS did a good job of writing this section to provide the balance that was recommended by the stakeholder committee and chosen by the Council as the preferred alternative.

Response: NMFS acknowledges the support.

Comment 103: The proposed rule ''grandfathers'' current participants that qualify for more than five permits to receive and operate more than five permits while restricting all other entities to five. Grandfathering in this manner has become an accepted practice in Alaska's quota share programs; however, other programs do not allow the grandfather rights (*i.e.*, access privileges in excess of the excessive share cap defined for the fishery) to be sold in total as is proposed in this rule. Allowing grandfathering to continue after a business is sold raises serious social equity issues. While a case can be made for allowing large operations to continue to operate above the cap for a given amount of time, providing the opportunity for those licenses to all be sold to one entity perpetuates the inequity. We recommend that NMFS modify the proposed regulations to restrict purchasers of halibut guided sport limited entry permits to the defined excessive share limit of five permits.

At a minimum we strongly recommend that NMFS remove the requirement that transfer of more than five permits be contingent upon the transfer of all assets, including lodges, vessels, and other assets. This provision will inflate the overall value of businesses holding more than five permits, providing them with a windfall. There is simply no need for NMFS to tie all business assets to the transfer of more than five permits; this is a market decision between buyer and seller, and is outside of NMFS's purview. This provision does not seem to be administratively feasible or appropriate.

Response: The approved Council recommendation specifically provides for a conditional exception to the excessive share limit of five charter halibut permits. This provision, commonly called the ''grandfather'' provision, applies only to an initial recipient of charter halibut permits that initially qualifies for more than five permits. The Secretary has approved

this recommendation and it is implemented in this rule.

One condition to this grandfather provision is that it applies as long as the initial recipient of more than five charter halibut permits continues to exist as it does at the time it is initially issued the permits. If the initial recipient is an individual and dies, then the exception stops and the individual's successor-in-interest may not hold more than five permits. If the initial recipient is a non-individual corporate entity that dissolves or changes, then the exception also stops and the new or changed entity may not hold more than five permits. This rule refers to 50 CFR 679.42(j)(4)(i) for the meaning of ''change'' for a non-individual entity.

The other condition allows grandfathered permits in excess of the five-permit limit to be transferred to a new person (*i.e.*, individual or non-individual entity) without application of the five-permit limit providing, among other things, that the person transferring its grandfathered permits also is transferring its entire charter vessel fishing business, including all assets of that business, to the person designated to receive the permits. The language of the Council recommendation stated that ''grandfathered permits that are sold in total when a business owner sells his entire business/fleet maintain that grandfathered status.'' This rule implements this language by stating that ''NMFS may approve a permit transfer application that would result in the person that would receive the transferred permit(s) holding more than five (5) * * * permits if * * * [t]he person transferring its permits also is transferring its entire charter vessel fishing business, including all assets of that business, to the designated person that would receive the transferred permits'' (50 CFR 300.67(j)(6)).

These exceptions are designed to balance the need to apply the excessive share limit to the charter halibut fishery in these areas with the need to recognize that some charter vessel businesses will qualify for more than five permits and should be allowed to continue business with the same number of charter vessels for which they initially qualified. The Council and Secretary intend, however, to have more charter vessel businesses comply with the excessive share limit over time than may do so at the time of initial allocation of permits. As charter businesses change, exit, and enter the charter halibut fishery over time, the number of businesses holding grandfathered permits should decrease relative to the number that received them at initial allocation. This outcome is encouraged to the extent that costs of transferring grandfathered permits are increased by the ''all assets'' requirement at 50 CFR 300.67(j)(6)(iv).

NMFS will require applicants for transfers of charter halibut permits in excess of the excessive share limit to attest that (1) the existing permit holder that holds more than five permits will be transferring all of the transferable permits that were initially issued together, (2) the current permit holder will be transferring all assets of its charter vessel fishing business along with the permits, and (3) the person that will receive the permits in excess of the excessive share limit does not hold any permits at the time of the proposed transfer. NMFS also will require applicants to submit a copy of the charter vessel fishing business sale contract with the application for transfer of charter halibut permits. The comment is correct that NMFS does not define or describe all of the assets that will have to be included in the sale of a charter vessel fishing business because each sale will be unique. NMFS may require additional documentation of the items included in the sale of the business.

Comment 104: The excessive share limit section in the proposed rule limits any charter owner from growing beyond five vessels or its current size. We understand the desire to limit consolidation of permits to only a few owners; however, this provision is overly restrictive. Further it would prevent a permit holder from selling to another entity that has any permits thus limiting market value. An alternative needs to be developed.

Response: An excessive share limit to prevent excessive consolidation under a limited access system is a requirement of the Halibut Act (*see* discussion above under the heading ''Consistency with Halibut Act''). Determining what is excessive is a public policy judgment of the Council that is based on the current structure of the charter halibut fishery. Alternative excessive share limits should be suggested to the Council for development and potential recommendation to the Secretary. Also, permit holders would be prevented from receiving permits by transfer only if the transfer would result in that person holding more than five permits.

Comment 105: Several comments stated that charter businesses had been purchased between the qualifying period (2004 or 2005) and the recent participation period (2008). Page 18182 of the proposed rule (74 FR 18178) states that ''[c]harter halibut permits would not be awarded to persons who purchased a charter fishing business that met some or all of the participation requirements but who themselves do not meet the participation requirements.'' The proposed rule specifies that NMFS would not recognize private business purchase agreements when issuing permits because the Council did not recommend it.

The comments disagree with the proposal to not recognize private business purchase agreements when issuing permits, stating that they purchased charter businesses that had sufficient participation in the qualifying period and continued to operate the business in the recent participation period. Some comments specified that their business purchases included the fishing history of the business's vessels, rights to any limited entry program benefits, and in some cases, the purchasers have taken possession of the business's logbooks from the qualifying period. One comment requested analysis of the impacts of either including or excluding a number of potential initial recipients due to private agreements to transfer participation history with a business. Another commenter stated that he consulted a lawyer when drafting the contract of sale to prevent problems with the transfer of the future limited entry permit and any future IFQs and notified NOAA General Counsel of the sale. Another commenter stated a belief that the Council intended for persons that purchased rights and operating histories and met other application criteria (*e.g.*, operated the year prior to implementation) to be eligible for permits. One comment suggested that NMFS should change the rule to specify that if a charter operation met the minimum qualifications in 2004 or 2005 but was sold after 2005 and kept the same name, that charter company will qualify for a permit if it met the minimum requirements in the recent participation period. The comment suggests that NMFS establish an appeal process to address this issue if the rule is not changed.

Response: NMFS did not propose to recognize private agreements for several reasons that were stated in the proposed rule preamble. Prominent among these was that the Council did not recommend this policy. The Council has expressed its intent to recognize private agreements that transfer participation history in the establishment of other limited access systems, but not for this action. Because the Council did not recommend to recognize private agreements for this action, NMFS did not include such a provision in the rule implementing this program.

Notwithstanding the narrative in the proposed rule (74 FR 18178, April 21,

2009) preamble on page 18182, the proposed rule also makes clear on page 18186 that NMFS will issue a charter halibut permit to the entity that held the ADF&G Business Owner License that authorized the logbook fishing trips that met the participation requirements. Further, the proposed rule at page 18186, states that NMFS will follow the form of ownership that the business used to obtain legal authorization from the State of Alaska for its past participation in the charter halibut fishery. NMFS will not determine the owners of a corporate entity or the members of a partnership that held the appropriate license. An applicant that receives an initial administrative determination finding that the applicant does not qualify for a permit may appeal that determination as specified in this rule at 50 CFR 300.67(h)(6) and described in the proposed rule on page 18186 and 18195.

Comment 106: The criteria for a permit should be based on currently licensed guides' total catch records. Do not allow any newcomers to qualify for charter halibut permits but grandfather current charter operators into the program.

Response: The Council could have chosen alternative qualifying criteria for demonstrating participation in the charter halibut fishery. The Council noted in its problem statement that it had previously considered other options including awarding quota share based on catch records. In this action, however, the Council selected 2004 and 2005 as the qualifying period which is consistent with the problem statement and the Halibut Act as described above under the heading ''Consistency with Halibut Act.'' Anyone who started a charter halibut fishing business after the December 9, 2005, control date (71 FR 6442, February 8, 2006) was on notice that they may not qualify for participation under a future moratorium on new entry or other limited access program.

Comment 107: Magnuson Stevens 1853(b)(6)(A) requires that a limited access system take into account present participation in the fishery. With 2004 or 2005 being the qualifying years for participation in the proposed limited access fishery and 2009 being the year of promulgation, we are looking at data that is four to five years old being used to establish who gets a permit. In *Alliance Against IFQs* v *Brown*, while upholding the agency decision, the Ninth Circuit held that, the three-year delay ''pushed the limits of reasonableness,'' but did not constitute arbitrary and capricious agency action. Reliance on data four to five years old may exceed the limits referenced by the Court. If NMFS chooses to press forward with the rule, it should drop the qualifying year requirement and consider only the year prior to implementation.

Response: As discussed above under the heading ''Consistency with Halibut Act,'' the Council is required to consider present participation in the fishery and historical fishing practices in, and dependence on, the fishery when developing a limited access system. The charter halibut permit program is consistent with this requirement. The Council intended to require active participation in the qualifying period (historical) and the recent participation period (present) because it determined a business that participated in both periods demonstrates an acceptable level of dependence on the charter halibut fishery.

Comment 108: If qualification for a charter halibut permit is based on the 2004 and 2005 logbooks, many charter captains will be adversely affected. Although some may have the funds to buy the limited entry permits they need to keep operating, I am not likely to be able to afford to buy any permits.

Response: At the beginning of the development of this rule, the Council announced a control date of December 9, 2005, to alert potential businesses of the possibility of a limited access system for the charter halibut fishery. This announcement was made by a **Federal Register** notice published February 8, 2006 (71 FR 6442). This notice informed any business entering the charter halibut fishery in Areas 2C and 3A after 2005 that they were not be assured of future access to the fishery if a limited access system was developed and implemented.

Comment 109: Two separate comments noted that their participation in the charter halibut fishery during the qualifying period was prevented because of problems with vessels.

Response: The Council recognized that certain unavoidable circumstances could prevent a permit applicant from participating in either the qualifying period or recent participation period. The preamble to the proposed rule (74 FR 18178, April 21, 2009) on page 18187 contains a detailed description of the unavoidable circumstances exception to the qualification requirements. To qualify for the unavoidable circumstances exception in the charter halibut permit program, an applicant must demonstrate that (1) it participated in either the qualifying period or the recent participation period, (2) it had a specific intent to participate in the period the applicant missed, (3) the circumstance that thwarted participation was unavoidable, unique to the applicant, and unforeseen and unforeseeable, (4) the applicant took all reasonable steps to overcome the problem, and (5) the unavoidable circumstance actually occurred. Permit applicants that are initially denied a charter halibut permit may make an unavoidable circumstances appeal through the NOAA Office of Administrative Appeals.

Comment 110: Please rewrite the rule to include regular active duty soldiers. Under the proposed rule, those who volunteered for active military duty in 2004 and 2005 do not qualify for the military exemption, unlike those called up from the reserves. The proposed rule states that volunteers will not qualify for a charter halibut permit since they chose to serve this country instead of staying home and fishing. As stated under Military Exemptions: ''This exemption would not apply to persons in the regular armed forces. The rationale for not including persons in the regular armed forces is that a person's decision to enlist in the regular armed services is a voluntary career choice and is not unavoidable.''

In the Council motion, the military exemption in footnote 10 reads: ''The military exemption refers to an individual who was assigned to active military duty during 2004 or 2005, who qualifies as 'active' during the year prior to implementation, and who demonstrated an intent to participate in the charter fishery in Area 2C or 3A (prior to the qualifying period).'' What is NMFS's interpretation of ''active duty''? As stated above, it does not address active duty or reserve components specifically.

Response: NMFS agrees that it misinterpreted the Council's motion. Regulatory text at 50 CFR 300.67(g)(3)(i) is changed in this rule to add ''active U.S. military'' to active service in the National Guard or military reserve (*see* discussion below under the heading ''Changes from the Proposed Rule''). The approved Council recommendation, as correctly quoted in the comment, does not limit ''active military duty'' to service in the National Guard or military reserve. The proposed rule misinterpreted this phrase to apply only to the National Guard or military reserve due to experience with a different exception for service in the National Guard or military reserve that applies to the IFQ fisheries for halibut and sablefish (73 FR 28733, May 19, 2008). In this rule, however, active military duty is functionally the same regardless of what military unit a person is assigned. NMFS understands that

enlistment in a regular branch of the U.S. military is not necessarily a career choice due to the fact that enlistment periods are short relative to a typical career of 20 or 30 years.

Comment 111: The halibut stocks would be better protected if the qualifying years (2004 and 2005) were moved back at least one year.

Response: NMFS determined that the halibut stocks are adequately protected under this rule. The selection of the qualifying years involved consideration of participation in the charter halibut fishery as required by the Halibut Act.

Comment 112: Two comments noted that representatives of the charter industry took part in developing the charter halibut permit program and held different views on its rationale.

Response: The history of management of the charter halibut fishery generally, and limited access management, in particular, was summarized in the preamble to the proposed rule (74 FR 18178, April 21, 2009) on pages 18179 to 18182. That summary references the Council's charter halibut stakeholder committee. Although this committee made specific recommendations to the Council regarding the elements and options under consideration, the Council's development of this rule also was influenced by its problem statement, analysis of alternatives (*see* **ADDRESSES**), and extensive public testimony.

Comment 113: We support the criteria for awarding permits and anticipate that most charter operators in our area will qualify under the number of vessels. This should effectively reduce fleet size and fishing capacity from current levels for charter businesses that have overcapitalized in recent years. Charter operators will still be able to lease additional vessels beyond those for which they receive permits under the limited access program or will eventually procure additional permits.

Response: NMFS acknowledges the support for this rule.

Other Management Measures

Comment 114: The charter industry should support scientific research on the halibut resource. This scientific research can be funded in part by a percentage of charter businesses' earnings going to the halibut and salmon commissions for the studies that are necessary to sustain these stocks. There is enough room in the fishery for the commercial and charter businesses to exist. Let's work together to assure that this natural resource will remain abundant forever. We all want healthy abundant stocks.

Response: This rule does not establish a fee on the distribution or use of charter halibut permits, nor does it establish cost recovery fees for holding charter halibut permits. Cost recovery fees are not authorized for this rule because charter halibut permits do not allocate a percentage of the total allowable catch to each permit holder.

Comment 115: Does paragraph 300.66(i) of the proposed rule mean only the vessel owner and immediate family can use the vessel for subsistence fishing, or does it mean the vessel owner or immediate family must be onboard, and any other individual is allowed as long as he or she has a subsistence permit? We are strongly against the former interpretation, as it restricts the use of our vessel when we are not chartering.

Response: The prohibition at 50 CFR 300.66(i) was established by the rule published September 24, 2008, at 73 FR 54932. This paragraph is amended in this rule to include a unique definition of the term ''charter vessel'' that pertains only to this prohibition. This prohibition was developed by the Council in 2004 to allow an individual who holds a subsistence halibut registration certificate (SHARC) and also owns a charter vessel to use the vessel for subsistence fishing for halibut. This can be done only if the vessel's owner of record and his/her immediate family are on board and each individual engaging in subsistence fishing on board the charter vessel holds a SHARC. Hence, the prohibition at 50 CFR 300.66(i) prohibits any person other than the charter vessel's owner of record and immediate family from being on board a charter vessel if anyone on board the vessel is engaged in subsistence fishing for halibut.

Subsistence halibut regulations, published April 15, 2003 (68 FR 18145), prohibited retention of any subsistence halibut that were harvested using a charter vessel. The Council and Secretary subsequently authorized an exception for individuals who owned a charter vessel and also held a SHARC to use the vessel for their harvest of subsistence halibut. The exception does not apply if anyone other than the owner and his/her immediate family is on board the vessel. This rule simply adds a unique definition of ''charter vessel'' for purposes of this prohibition.

Comment 116: Subsistence and commercial halibut participation rights should be changed. Subsistence use should be based on need, not where you live. A return to the old two hook subsistence gear would be nice, as would having to adhere to sport fishing regulations on daily limits. There is no need for allowing one individual to take 15 or 30 halibut a day just because he or she lives in a ''rural'' community. Also, since the implementation of the IFQ program for commercial halibut fisheries, there has been an increase in commercial fishing gear in areas that traditionally were free of this gear.

Response: This rule does not make any changes to fishery management regulations for the subsistence or commercial setline fisheries. Suggestions for such changes should be directed to the Council for recommendation to the Secretary.

Comment 117: Ban all charter fishing in the area for all time.

Response: Prohibiting the charter halibut fishery was not considered as an option or alterative to this rule. Guided sport fishing for halibut is a legitimate use of the Pacific halibut resource and the second largest fishery (after the commercial setline fishery) for halibut in Areas 2C and 3A. Prohibiting the charter halibut fishery in these areas would severely diminish economic benefits to Alaska and other States. Moreover, prohibiting the charter halibut fishery would not achieve the objectives of this action.

Comment 118: I disagree with the limited entry program. Could NMFS allow only Alaska residents to fish for halibut and keep the money with Alaskans?

Response: The Halibut Act prohibits discrimination between residents of different States when making allocations of the halibut resource. Regulations established by this action apply to all permit holders, regardless of their business location or place of residence.

Comment 119: Why limit charter operations? Why not also limit sport fishing permits and commercial operating permits for halibut fishing? When limits are placed on halibut for all entities involved, there are fewer boats on the water and fewer fish removed, and everyone is subject to the same rules.

Response: Additional restrictions on the commercial setline and unguided sport fisheries for halibut are outside the scope of this action. The commercial setline fishery for halibut already operates under a limited access system. Since its implementation in 1995, the IFQ program for commercial setline fishery for halibut and sablefish limits entry to quota share and IFQ permit holders. A market for the distribution of these permits has developed just as is expected for charter halibut permits. In addition, the commercial setline fishery has taken large reductions in its catch limits in recent years.

The unguided sport fishery for halibut is different from either the commercial setline fishery or the commercial charter halibut fishery. Participation and harvest levels have remained relatively steady in the unguided sport fishery for over 10 years (1995 to 2007) and amount to roughly seven percent of total halibut removals. By comparison, the harvest and participation levels in the guided sport sector have increased over the same period and amount to roughly 14 percent of total removals. This growth in estimated halibut removals by the charter halibut fishery prompted action by the Council and NMFS. For now, the IPHC regulations governing unguided sport fishing for halibut appear to be sufficient for managing this relatively small fishery.

Comment 120: The moratorium ignores the rapid and recent growth of the unguided recreational fishery and growth in the subsistence fishery. State of Alaska annual harvest estimates show that unguided halibut harvest in Area 2C increased from 122,562 pounds in 2006 to 1.131 million pounds in 2007. The commercial catch limit is set by subtracting all other removals from the total CEY (constant exploitation yield); therefore, an allocation decision should not be made without taking into consideration the present participation in not only the commercial quota share and guided recreational fisheries but also the unguided recreational fisheries.

Response: Actually, the ADF&G annual harvest estimates indicate that the unguided fishery in Area 2C harvested about 723,000 pounds (328.0 mt) in 2006, 1,131,000 pounds (513.0 mt) in 2007, and 1,265,000 pounds (573.8 mt) in 2008. These estimates are point estimates at the midpoint of a range of possibilities. For example, the 95 percent confidence interval for the estimated harvest by the private unguided sport fishery in 2007 ranges between 987,000 pounds (447.7 mt) and 1,274,000 pounds (577.9 mt). In addition, a growth trend is not apparent in the long-term harvest estimates of the unguided sport fishery. For example, over the 10-year period 1997 through 2006, the ADF&G estimated unguided sport harvest of halibut ranged from a low of 723,000 pounds (328.0 mt) in 2001 and 2006 to a high of 1,187,000 pounds (538.4 mt) in 2004. The average estimated unguided sport harvest of halibut over this period was 922,400 pounds (418.4 mt). With this perspective, the single year estimate of 1,131,000 pounds (513.0 mt) in 2007 does not appear to be a significant increase. The Council considered the unguided recreational fishery harvest levels when it developed this rule (*see* Table 3 of the EA/RIR/IRFA prepared for this action [*see* **ADDRESSES**]). It did not recommend any restrictions on the unguided sport harvest of halibut because that did not appear to be necessary from the relatively stable long-term trend in estimated harvests by this sector. If this trend changes in the future, the Council or the IPHC may consider further restrictions on the unguided sport harvest of halibut in Areas 2C and 3A.

Comment 121: Some rural Southeast Alaska communities are heavily dependent on commercial and subsistence fishing. Residents in rural Southeast Alaska, where there is no store and transportation in and out is by boat or seaplane service, must live off the surrounding land and seas. The moratorium must be limited to the guided sport charter sector only. Any extension to subsistence users would be an added hardship on the local economy already suffering from regulations that have unforeseen long-term effects on rural fishing towns.

Response: This rule directly affects only the charter halibut fisheries in Areas 2C and 3A. No changes are made by this action to restrict commercial setline fishing or subsistence halibut fishing opportunity.

Comment 122: I support the idea of limiting the number of participants in the charter halibut fleet. However, as an operator who runs trips that do not return to port for 7 to 10 days at a time, compliance with some rules is difficult. These include the requirement to save carcasses, not being able to skin halibut, not being able to freeze halibut on board, and having different size limits for a second halibut. Implementing such complicated rules should be avoided in the future, and the needs of operations that do not return to port each day should be considered.

Response: NMFS acknowledges the support for this rule. No restrictions exist on freezing sport-caught halibut on board a vessel. The comment is referring to an allowance under ADF&G regulations that discounts sport-caught fish preserved for human consumption from any daily bag limit that may apply to that fish. These ADF&G regulations do not apply to sport-caught halibut, however. All halibut on board a vessel are counted toward the daily bag and possession limits that apply in the regulatory area in which the vessel is operating. Hence, sport-caught halibut possessed onboard a vessel must not be filleted, mutilated, or otherwise disfigured in any manner. An exception allows cutting halibut into two dorsal pieces, two ventral pieces, and two cheek pieces, with skin on all pieces (*see* section 28(2) of the annual management measures published March 19, 2009 (74 FR 11681)). If charter operators and sport fishermen have freezers on their vessels large enough to accommodate such pieces of halibut, no regulation prohibits them from being frozen.

A requirement to save halibut carcasses is not included in this rule and is not currently in effect. The requirement that limits the extent to which sport-caught halibut may be cut and to leave the skin on is necessary to enforce the existing daily bag and possession limits. Because this regulation is needed to enforce other restrictions, it is not designed to discriminate against any particular charter vessel business model or sector of the industry. The current configuration of the charter sector fleet was considered by the Council and the Secretary when this rule was developed and implemented.

Comment 123: I support limited access as it will help limit over fishing in the charter sector. Also, I believe that NMFS and the Council should continue to pursue an IFQ program for halibut charter operators. Commercial setline fishermen understand that lower quotas are due to stress on the stocks, but it is hard to see the commercial quota lowered due to continued pressure on the stocks by commercial sport charter operators who have consistently exceeded their harvest guidelines. The only fair way to resolve this is to develop an IFQ system for the charter fleet. This is the only way to protect the resource for all users—commercial, subsistence, and guided and unguided sport fishermen—and minimize conflicts between the sectors.

Response: NMFS acknowledges the support for this rule. The preamble to the proposed rule for this action (74 FR 18178, April 21, 2009) and the notice for the December 9, 2005, control date for the guided sport fishery for halibut (71 FR 6442, February 8, 2006) describe the development of a charter vessel IFQ program and the reasons why it was not implemented. The Council may revisit this type of limited access system in the future. If so, the Council will develop regulations for such a system and recommend them to the Secretary as a separate action.

Comment 124: I do not support establishing an IFQ program for the charter halibut fishery in IPHC Areas 2C and 3A.

Response: This action does not implement an IFQ program for the charter halibut fishery. The preamble to the proposed rule for this action (74 FR 18178, April 21, 2009) and the notice for

the December 9, 2005, control date for the guided sport fishery for halibut (71 FR 6442, February 8, 2006) describe the development of a charter vessel IFQ program and the reasons why it was not implemented at that time.

Comment 125: I support the one-halibut daily bag limit to protect the halibut resource. It is very frustrating to watch the Area 2C halibut charter industry consistently over fish its GHL every year while the commercial setline fishermen must quit fishing when their quota is met. The same requirement should be placed on the charter sector. Please keep the one-halibut daily bag limit in place.

Response: The one-halibut daily bag limit that was implemented in 2009 on charter vessel anglers in Area 2C (74 FR 21194, May 6, 2009) is designed to keep the overall harvest of charter vessel anglers in Area 2C close to the GHL for that area. That action is different from this rule.

Comment 126: I generally support the necessity to conserve the halibut fishery. However, my concern is to the impact on the sports fisherman and the guided sport charter vessel as a small entity in a vast industry. The one-fish bag limit in Area 2C will virtually end charter fishing for halibut and reduce the guided angler harvest to the lowest level in the last 10 years.

Please reconsider not only the stated intent to ''* * * limit the harvest of Pacific halibut by guided sport charter vessel anglers * * *'' but reassess this action's impact to the non-resident fisherman and the industry that provides this service. There are other means to accomplish conservation objectives without targeting or destabilizing one halibut fishery in favor of another.

Response: This comment appears to be a reaction to the final rule published on May 6, 2009 (74 FR 21194). That action reduced the daily bag limit of halibut for charter vessel anglers from two halibut per day to one halibut per day. This rule to establish a limited access system for the charter halibut fishery in Areas 2C and 3A does not affect the earlier one-halibut bag limit rule.

Comment 127: I believe the goal of the Council is to put the charter operations out of business. The Council is considering an option of having the tourist buy the second fish from the commercial side. If IFQs are being sold at $25 per pound, my guests will have to pay $2,500 for a 100-pound fish.

Response: The objective of this rule is not to put charter vessel operations out of business. NMFS has estimated that about 527 charter vessel businesses (231 in Area 2C and 296 in Area 3A) will qualify for initial allocation of charter halibut permits under this rule. Those businesses that do not qualify for initially allocated permits may acquire them by transfer. The option the comment refers to is a component of the Catch Sharing Plan adopted by the Council in October 2008. A proposed rule that would implement the Catch Sharing Plan, if it is approved, will be published by NMFS for public comment.

Comment 128: One comment suggested that if NMFS intends to limit recreational removals of halibut, it should establish a fair and equitable baseline allocation for the recreational sector, establish a near real-time recreational harvest accounting method, and implement harvest control measures for recreational harvest effort to ensure that the recreational sector does not exceed its allocation.

Response: The intended effect of this rule is to curtail growth of fishing capacity in the guided sport fishery for halibut, not to directly limit recreational removals of halibut. The suggestions provided in the comment are beyond the scope of this action. These suggestions could be made to the Council, IPHC, or ADF&G with respect to timely estimation of recreational harvests.

Comment 129: Supply and demand will limit the charter fleet. If a charter service cannot compete, it will and should be forced out by market forces. When the economy, tourism, weather, or other factors impact businesses, operations will close; consequently, there will be fewer people fishing and fewer fish caught. Those who work hard will likely survive and those who do not will fail; it does not matter how long they have been chartering. This is a service industry and businesses will generally succeed or fail based on their service.

Response: NMFS agrees that charter vessel operations provide a service and that they operate in a competitive market. However, NMFS disagrees that supply and demand alone will sufficiently control harvesting capacity in the charter halibut fleet to the desired levels. Experience in Area 2C demonstrates that under profitable price and cost considerations, excessive capacity will occur in the fishery. This is due primarily to the fact that access to the fish is free in an open access fishery.

Comment 130: The Analysis stated that for enforcement the number of harvested halibut on the vessel should not exceed the client endorsement through the ''gifting'' of skipper and crew fish. For this reason, retention of halibut by skipper and crew needs to be eliminated. The final rule should include a permanent prohibition against retention of halibut by skipper and crew for 3A and 2C (if necessary) as part of this action. A prohibition on skipper and crew retaining halibut was enacted in 2009 in the one-fish bag limit for Area 2C.

Response: NMFS will enforce the daily bag limit for sport-caught halibut based on the area being fished and whether the anglers are charter vessel anglers or non-guided anglers. For example, under current regulations, the daily bag limit for charter vessel anglers in Area 2C is one halibut per day (50 CFR 300.65(d)(2)), while non-guided anglers in that area and all anglers in Area 3A may catch and retain two halibut per day (section 28(1)(b) of the annual management measures published March 19, 2009, at 74 FR 11681). Under this rule and current bag limit regulations, a charter vessel with three charter vessel anglers on board in Area 2C will be limited to three halibut per day, regardless of whether the charter halibut permit on board the vessel was endorsed for a larger number of anglers.

Currently, the guide and crew on a charter vessel in Area 2C are prohibited from catching and retaining halibut during a charter fishing trip, and the number of lines used to fish for halibut are limited to the number of charter vessel anglers on board or six, whichever is less (50 CFR 300.65(d)(2)). In 2009, and in several previous years, ADF&G also prohibited skipper and crew retention of all fish and limited the number of rods to the number of (paying) charter vessel anglers onboard in Area 3A (Emergency Order No. 2–R–3–03–09). The Council could recommend to the Secretary that the same guide/crew and line limit applied currently in Area 2C also apply in Area 3A. That change is outside the scope of this action.

Comment 131: The final rule should limit the number of rods a charter vessel may fish to the number of angler endorsements on the charter halibut permit. This should be added to the rule so that a charter vessel could not fish extra rods if the number of passengers on board exceeds the number of angler endorsements. It would also prevent fishing by skipper and crew fishing under the claim that they are fishing for another species.

Response: Current NMFS regulations (at 50 CFR 300.65(d)(2)(iii)) already limit the number of lines used to fish for halibut in Area 2C to six or the number of charter vessel anglers on board,

whichever is less. This action limits the number of charter vessel anglers catching and retaining halibut to the angler endorsement specified on the charter halibut permit.

Comment 132: Localized moratoria within local area management plan (LAMP) areas could also be implemented to achieve sustainable halibut harvests without having to limit halibut charter operators.

Response: One LAMP currently exists for Sitka Sound and no others are being considered. Although alternative means may be found that would achieve the objectives of this rule, the Council and NMFS found that this limited access system best fit the Council's objectives and is consistent with the requirements of the Halibut Act.

Comment 133: A 100-pound fish limit for the charter fisherman will do little to protect the spawning population of halibut. It would be a waste of time to put a limit on the sport fish size and not the size of fish caught in the commercial fishery.

Response: No weight limit exists on fish caught by charter vessel anglers in either Area 2C or 3A. This rule does not establish a weight limit on halibut harvested by charter vessel anglers in these areas. The comment is irrelevant to this rule.

Comment 134: Several comments suggested that NMFS should implement harvest restrictions instead of the limited access system. Suggestions included (1) a one halibut per day rule with an annual limit of four to six fish for charter anglers, (2) regulations similar to Oregon's one fish per day, minimum size 32 inches, and the first fish you catch over 32 inches is your limit for the day, (3) limit the size of halibut to a number of inches or to a weight under 100 pounds, and (4) a slot limit.

Response: This rule does not impose additional catch limit restrictions because the objective of this action is to curtail growth in the capacity of the charter halibut fishery, not to control charter angler harvest. None of the suggested alternatives would achieve the objective of this action and are outside the scope of this rule.

Comment 135: A moratorium by itself will not stabilize the charter vessel industry. The charter industry does not need in-season closures or a one-fish limit. A larger GHL with a moratorium would work, however, as it would guarantee an amount of fish that could be caught. That would help create a stable business plan.

As I understand the moratorium, each charter boat will be given a permit which is good for the highest number of trips that were taken in 2004 or 2005, multiplied by the most people that were taken fishing on that boat. Issuing permits for trips would not work because you cannot always fill the seats. It would be preferable if the permits were issued with a yearly amount of fish that can be retained. Each permit should be issued with the number of fish stamped on it. There would be no need to renew the permits yearly; they could be permanent, with a transferable option. The permit should not be limited to the type of boat that it is issued to. If a person runs a six pack boat and wanted to run a larger boat and take more fishermen per trip, then it should be allowed to do that, as long as it stays within the overall fish issued for that permit.

There would be concerns about tracking the amount of fish caught per boat to make sure no one is cheating. The best thing may be to eliminate logbooks and issue punch cards. They could be generic with a line on them for the captain to write the date that fish were caught, and once they are punched, they become void. The punch cards could be thrown out the following day. When you are out of punch cards, you are done for the year.

Response: Under this rule, charter halibut permits will be issued to qualifying businesses, not to individual vessels. Each charter halibut permit will have an angler endorsement number specifying the largest number of charter vessel anglers that may be catching and retaining halibut on a vessel carrying the permit. The angler endorsement number on the permit will be based on the highest number of charter vessel anglers that the applicant reported on any logbook fishing trip in 2004 or 2005, subject to a minimum endorsement of four. The number of halibut that may be retained by charter vessel anglers is limited by the daily bag limits in regulation for the area in which the vessel is operating, not by the charter halibut permit. In-season closures of the charter halibut fishery were not proposed and are not implemented by this rule. A charter halibut permit will not limit the permit holder to any number of fishing trips, and does not limit the type of charter vessel on which the permit is used. A one-halibut daily bag limit for charter vessel anglers in Area 2C was effective on June 5, 2009 (74 FR 21194, May 6, 2009), and is not affected by this action.

Comment 136: Two comments raised safety concerns. One stated that guides have to meet high standards, have local experience and knowledge, and have a good safety record. Unguided (either outfitted or completely independent sport fishing) sport fishing is less safe. Therefore this action may lead to increased levels of injury and possibly death among recreational anglers. Magnuson-Stevens Act National Standard 10, which requires that conservation and management measures promote the safety of human life at sea to the extent practicable, should not be ignored.

The other comment recalled the safety comment that NMFS responded to in the final rule establishing the Area 2C one-halibut daily bag limit (Comment 124 on page 21222 published May 6, 2009 at 74 FR 21194). In its response, NMFS claimed to be unable to confirm when the last charter fatality in Alaskan saltwater occurred. NMFS should contact USCG Alaska and ask them specifically for this information. The information is available and it is the responsibility of NMFS to secure it from the USCG, especially when the issue in question is safety.

Response: This rule will not create new safety risks. The number of charter halibut permits that NMFS expects to issue under this rule, and the numbers of associated endorsements, create significant opportunities for operators to meet existing levels of angler demand for guided halibut fishing, as well as expanded demand. Although National Standard 10 does not apply to this rule because it is authorized under the Halibut Act, not the Magnuson-Stevens Act, promoting the safety of human life at sea is a good standard for all fishery regulations. This rule adheres to this standard by not creating new safety risks and by stabilizing the charter halibut fishery. In its analysis of the potential effects of this rule the Council and NMFS found no safety concern.

Data Quality

Comment 137: Logbooks are not a good source of information for issuing charter halibut permits. The government has no way to verify the accuracy of a logbook. The IRS should do an extensive audit to see if the money reported to the IRS matches what was put in the logbook. If the business is legitimate, then they could receive a valuable limited entry permit.

Response: Charter halibut permits allocated under this rule will be based solely on logbook fishing trips; not the amount of halibut reported as harvested in the logbooks. The Council chose to rely on the fishing trip data in ADF&G Saltwater Charter Logbooks as the best available source of information on participation in the charter fishery. NMFS expects that the logbook trip information recorded is reasonably accurate for purposes of this action.

Comment 138: A non-resident but frequent visitor to Southeast Alaska expressed concern that more halibut regulations would be necessary. The commenter encouraged implementation of a solid regulatory foundation based on good science that would provide healthy halibut populations for future generations. The commenter wanted to see only regulations that are necessary to ensure a healthy population for the years to come and to rest on a solid foundation of good science.

Response: NMFS agrees that fishery management policy and the regulations implementing that policy should be based on the best scientific information available. This rule is not designed to directly control the biological condition of the halibut population. To the extent that this rule will stabilize the fishing capacity of the charter halibut fishery, it may indirectly enhance the effectiveness of other regulations that are designed to control halibut harvests and thereby support conservation of the stock.

Comment 139: Halibut is a finite resource and needs to be managed very carefully using the most accurate data possible. I strongly support a halibut charter limited entry program for the guided charter sector.

Response: NMFS agrees that the best scientific information available should be used in fishery management and acknowledges support for this rule.

Comment 140: The reason stated for the moratorium is to curtail growth of a particular industry. However, there is insufficient information to prove that by passing this moratorium the desired outcome will be achieved. We can only assume the desired outcome (based on this statement) is fewer charter fleet vessels. But other statements by NMFS indicate that the permits available to the charter industry will allow for continued growth. Further, any charter vessels removed from the fleet will be replaced by unguided vessels. This proposed rule does not support the desired outcome. It only succeeds in putting charter operations out of business, and placing more financial burden on the economy of all Southeast Alaska communities and on individual families that rely on charter industry businesses and jobs. It also places unguided, unsafe, non-certified drivers on boats in the same area. Any client visiting one of the many charter resorts can use his or her sport fishing license to fish for halibut, but instead of hiring a safe, trained, USCG-licensed captain to operate the boat, he or she can rent the same boat from the same charter resorts and go to the same spot and fish for the same fish. How does allowing this behavior address the objectives of this action?

Response: The intended effect of this rule is to curtail growth of fishing capacity in the guided sport fishery for halibut. This rule does not directly control the harvest of halibut nor does it reduce this harvest. Under this rule, NMFS will issue charter halibut permits to sport fishing businesses that were authorized by ADF&G to conduct logbook fishing trips. The number of logbook fishing trips that will be conducted by these qualifying businesses under this rule will be roughly the same as those taken in recent years immediately prior to this rule. These businesses will be able to grow to meet potentially increased charter vessel angler demand in the future by increasing their average number of trips per season, increasing the average number of anglers carried on each trip, and other operational efficiencies. Charter halibut fishing opportunity will be enhanced under this rule through the community charter halibut permits. Hence, NMFS does not expect a shortage of charter halibut fishing opportunities. Sport fishermen may freely choose whether to use a charter vessel or a unguided vessel to fish for halibut. *See also* responses to Comments 21 and 136.

Comment 141: The data used to establish permit criteria is based on secondhand data with no level of accuracy. The catch record system in place does not have a recorded weight for the species being reviewed. If the intent is to better manage the halibut fishery, reporting a certified scale weight in the round should be required in the bottomfish logbooks. This would assist in having the best scientific information for making management decisions.

Response: NMFS agrees that fishery management should be based on the best scientific information available. However, the intended effect of this rule is to curtail growth of fishing capacity in the guided sport fishery for halibut. This rule does not directly control the harvest of halibut. Therefore, highly precise and accurate estimates of the weight of each halibut harvested by charter vessel anglers are not necessary. Charter halibut permits will be allocated under this rule based on the participation of businesses in the charter halibut fishery using logbook fishing trips as evidence of participation. The numbers of halibut harvested in the past or their weight will have no bearing on the initial distribution of charter halibut permits. The ADF&G saltwater charter logbook data for the qualifying period (2004 and 2005) and the recent participation period (2008) are the best available information for purposes of this rule.

Comment 142: The proposed rule discriminates against any charter operation that began operating between 2006 and 2009. The RIR does not contain any numbers on charters from 2006 to 2009. The data in the Secretarial Review Draft EA/RIR/IRFA only demonstrate activity from the charter fleets from 1999 to 2005.

Response: The Council announced a control date of December 9, 2005. NMFS published that control date in the **Federal Register** on February 8, 2006 (71 FR 6442). The purpose of this control date announcement was to provide notice to persons entering the charter halibut fishery after the control date that they would not be assured of future access to the charter halibut fishery if a limited access system were developed and implemented. Because the Council decided to develop this limited access system based on the control date, it did not give participation credit to charter businesses that entered after that date as eligible. Moreover, when the Council finally decided to recommend its charter halibut moratorium to the Secretary on March 31, 2007, the most recent information on participation in the charter halibut fishery was from 2005. Saltwater charter logbook data for 2006 through the present was not available at that time. Since the Secretarial Review Draft EA/RIR/IRFA was made available for public comment, NMFS has supplemented the Analysis using ADF&G logbook data from 2008. This updated Analysis is contained within the final EA/RIR/FRFA (*see* **ADDRESSES**) and that information was considered when NMFS approved this action and published this rule.

Comment 143: There exists neither proper analysis identifying the number of vessels excluded nor a remedy for those that have made substantial investments.

Response: NMFS recently supplemented the Analysis using ADF&G logbook data from 2008. This updated Analysis is contained within the final EA/RIR/FRFA (*see* **ADDRESSES**). This rule does not compensate charter businesses that do not qualify for any charter halibut permits. One reason compensation is not necessary is that the control date announcement (71 FR 6442, February 8, 2006) provided notice to businesses about the risk of entering the charter halibut fishery after the control date. Another reason compensation is not provided is that businesses have value even without charter permits. Charter vessel assets

may be used in fishing for species other than halibut or for other endeavors. Also, a market for transferable charter halibut permits is expected to emerge under this rule that will allow acquisition of permit(s).

Comment 144: The proposed rule is based on inadequate or projected data. IPHC clearly acknowledges the lack of recent accurate data to determine the harvest levels for sport fishing. It has recently posted comments from its 2009 annual meeting stating that it will work with sport representatives to review Alaska sport regulations and determine if changes are necessary and will work with ADF&G and NMFS staff to provide clearer documentation of the Alaska sport regulations. They noted support for clearer data collection for accuracy and timely accounting and have recommended lowering the harvest rate in Area 2, which will permit rebuilding of the exploitable biomass in this area.

Response: This rule relies on ADF&G saltwater charter logbook data to determine participation in the charter halibut fishery during the qualifying period (2004 and 2005) and recent participation period (2008), which was determined by the Council and NMFS to be the best available information on which to base the qualifying criteria. This participation is determined by numbers of logbook fishing trips; not by numbers or weight of halibut harvested. The IPHC projected sport harvest estimates are not pertinent to this rule. However, NMFS supports improved accuracy and timeliness of recreational harvest estimates of halibut and all other species.

Comment 145: Several comments contend that the Council's previous attempts at developing limited access for the charter halibut fishery failed due to poor data. The Secretarial Review Draft EA/RIR/IRFA indicates that other Council attempts at curtailing charter halibut vessels were rejected primarily due to the lack of adequate data for individual charter businesses. The proposed rule also provides a lengthy history of the Council's consideration of limited entry for charter vessels indicating that its 1997 control date and 2001 charter IFQ program failed because of poor data. Those data have not changed in respect to this proposal; the Council has used the same inaccurate data throughout this process. The data used to create the GHL is between 5 and 15 years old. It is impossible to address the present participation in the fishery and to determine the dependence on and the economics of the fishery using old data.

Response: The history of the Council's work to develop a limited access system for the charter halibut fishery is described in the proposed rule (74 FR 18178, April 21, 2009) beginning on page 18181. The Council's earlier attempts, especially that to develop an IFQ program for the charter halibut fishery relied heavily on charter logbook data to determine the historical harvest of halibut by individual operators. In contrast, this rule is based on logbook fishing trips—not pounds of halibut harvested—as a measure of participation in the charter halibut fishery.

The evidence of a logbook fishing trip is not so rigorous that highly accurate reporting is essential. For example, during the qualifying period, an ADF&G saltwater charter logbook that shows the statistical areas where bottomfish fishing occurred, or boat hours that the vessel engaged in bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing, will serve as evidence of a bottomfish logbook fishing trip. Using the ADF&G saltwater charter logbook as the basis for this information is the best available information for purposes of this rule and is consistent with the historical and present participation requirements of the Halibut Act.

Comment 146: Several comments concerned the fact that halibut, as a species, were not required to be reported by ADF&G in logbooks during 2004 and 2005. Some confusion resulted about whether and how to report halibut harvested on charter vessel trips. ADF&G stopped having halibut harvest recorded in the logbooks after the 2001 season; therefore, halibut harvest was not recorded during 2004 and 2005. Many charter operators recorded ''bottomfishing'' information when conducting halibut charters and others recorded the ADF&G area fished, the number of rods used, and the number of hours fished for my halibut charter trips after 2001. There was no ADF&G record of harvest. Many charter operators did not record any halibut fishing activity because there was no place in the logbook to record it. When the ADF&G was asked how to handle halibut charter trips, some charter operators were told by ADF&G personnel that they did not have to record halibut charter trips. Consequently, for those operators who conducted halibut charters during the qualifying time but did not record them in the ADF&G logbooks, NMFS should consider alternative qualifying documentation such as personal log books, fishing license records, and affidavits from clients.

Response: As discussed in the preamble to the proposed rule (74 FR 18178, April 21, 2009) on page 18185, the basic unit of participation for purposes of this rule is a logbook fishing trip. During the qualifying period of 2004 and 2005, participation will be measured by bottomfish logbook fishing trips because ADF&G did not require halibut kept or released to be reported as a distinct species. Halibut were considered to be bottomfish during that period. ADF&G attached instructions to each logbook that stated that bottomfish fishing effort included effort targeting halibut. Reporting of any one of three types of bottomfish effort data would qualify a trip as a bottomfish logbook trip for purposes of this rule.

In 2006, ADF&G changed its required logbook report to specify halibut data for each logbook fishing trip. If a business owner did not comply with specified reporting requirements, then the fishing trip will not be counted as either a bottomfish logbook fishing trip during the qualifying period or a halibut logbook fishing trip during the recent participation period for purposes of this rule. Regardless of what any particular ADF&G personnel may say to an operator, each operator or business is responsible for complying with applicable Federal halibut fishery regulations and ADF&G reporting requirements.

Comment 147: NMFS should consider implementing or being prepared to implement its own logbook program for halibut to gather the information needed to manage the fishery and for development of any long term management programs. The Alaska State Legislature had legislation in front of it to repeal the sunset date in the current guide licensing program, which is the authorizing legislation for the logbook program, and at the last minute what passed extended the sunset date for one year to January 1, 2010. Another piece of legislation was introduced that again will extend the sunset date for only one year; therefore we are concerned about the advisability of relying on the State logbook program.

Response: The NMFS, IPHC, and Council have relied, and continue to rely, on ADF&G to collect recreational fishing information regarding halibut. This information is essential to the management policies and regulations developed respectively by the IPHC and Council. The Paperwork Reduction Act of 1995 (Pub. L. 104–13) requires Federal agencies to minimize the paperwork burden on individuals and small businesses, to minimize the cost to the Federal government of information collection, and to strengthen the partnership between Federal and State governments by minimizing the burden and maximizing the utility of data collection. ADF&G has

a sport fishing data collection program, staff, and infrastructure to collect recreational fishing data. The Alaska Region, NMFS, by comparison does not have a sport fisheries division and data collection system. Establishing a system to monitor the sport harvest of one species would be costly.

Comment 148: NMFS lacks sufficient information to establish a moratorium because there was no accurate logbook data on charter halibut harvests by charter vessels in 2004 and 2005.

Response: The limited access system established by this rule does not rely on an accurate accounting of halibut harvests by charter vessel anglers during 2004 and 2005. During those years, ADF&G did not require charter vessel business to report the number of halibut that were kept or released. Instead, businesses were required to report bottomfish effort for each logbook fishing trip. ADF&G attached instructions to each logbook stating that bottomfish fishing effort included effort targeting halibut. Hence, the bottomfish logbook fishing trip data are sufficiently accurate as evidence of participation in the fishery for purposes of this rule. *See also* responses to Comments 145 and 146.

Comment 149: A couple of comments expressed concern about the sport halibut harvest estimates based on the mail survey conducted by ADF&G. One comment noted the time lag in the survey that delayed estimates of harvests in one year until close to the end of the following year. The other comment noted that data published on the Council's Web site did not match ADF&G records, and that the mail survey conducted by ADF&G in 2007 had less than 50 percent of the survey forms returned. When determining any action on a proposed rule in regard to the harvest levels, all data must be accurate.

Response: The annual estimate of recreational halibut harvests is based on the statewide harvest survey, a mail survey conducted by ADF&G to assess the harvest of all species of fish taken from freshwater and saltwater in sport fishing. It provides a reasonably accurate estimate of these sport harvests and is especially useful for revealing long-term trends. This rule, however, does not rely on the statewide harvest survey data. The limited access system established by this rule is based on participation in the charter halibut fisheries during certain years as indicated by logbook fishing trips. The statewide harvest survey does not rely on a high percent of survey returns to produce reasonably accurate and precise estimates of sport fishing harvests. Moreover, these surveys are not being used to establish the limited access system under this rule. Because the intended effect of this rule is to curtail growth of fishing capacity in the guided sport fishery for halibut in Areas 2C and 3A, the exact number of halibut harvested in any one area in any one year is of less concern than the growth trend in harvests and fishing capacity over time.

Comment 150: The Council and NMFS have completely failed to gather or evaluate data relative to the charter sector. The Council states that the need for implementing a moratorium is to manage the fisheries within the GHL policy, which the commenter asserts is unfair and outdated. Despite the Council failing to present economic data supporting its supposition, NOAA Web site data clearly show increases in quota share equity and ex-vessel value between 300 percent and 400 percent statewide and within areas. This massive increase in profitability does not lend credence to the need for wiping out the charter sector.

Response: NMFS estimates that a total of 527 charter businesses will qualify for an initial allocation of either a transferable or non-transferable charter halibut permit. The Analysis (*see* **ADDRESSES**) indicates this number of businesses is sufficient to accommodate market demand for guided sport fishing for halibut. This rule is designed to curtail growth of fishing capacity in the charter halibut fishery as intended by the Council and based on its problem statement. The GHL policy implemented in 2003 (68 FR 47256, August 8, 2003) was designed to establish an amount of halibut harvest by the charter halibut sector that will be monitored annually. The purpose of the GHL is different from this rule.

Other Issues

Comment 151: The public received insufficient information about the moratorium and its impact on recently started charter halibut businesses. Uncertainty over whether or when a fishery is going to be managed under a limited access system adversely affects business activity. Investment-backed expectations need to be protected. Council control dates and final action twice before (April 1997 and April 2001) but neither of these rules were signed into law. This is probably why charter businesses started in later years.

Response: A control date notice is not by itself a Federal rule. The control date notice published in advance of this action on February 8, 2006 (71 FR 6442), stated that it did not commit the Council or the Secretary to any particular management regime or criteria for entry to the charter halibut fishery. All previous control date notices also have language to this effect. Similarly, the public is not required by a control date notice to invest or not invest in a fishing business that may be affected by the development and implementation of a limited access rule in the future. That decision is left to the business owner. The primary purpose of a control date notice is to give notice to persons contemplating an investment in a business that may be affected by a future limited access system that such a system may be developed and implemented. Affected persons can then incorporate the risk of potentially not receiving an initial allocation of permit(s) into their investment decision making. Risk-averse persons may decide to delay their investment pending potential regulatory changes; risk-taking persons may not let this information affect their investment decisions. In either case, the control date notice provides the public with information that a limited access system may be developed for a fishery and, if so, that entering the fishery after the control date may not lead to an initial allocation of a limited access permit.

Comment 152: Use of the government Web site to submit comments is too complicated. It was difficult to find and I required 30 minutes of assistance from a very patient NOAA employee on the phone to navigate to this URL to provide comments.

Response: The Web site, ''Regulations.gov'' is a Federal government Web site serving many agencies. Currently the Web site is operating successfully, and NMFS has received thousands of letters of comment through it. A person experiencing problems with Regulations.gov should contact Regulations.gov directly. In addition, help can be provided by contacting the individual listed under the preamble heading **FOR FURTHER INFORMATION CONTACT** and comments may be submitted by mail, fax, or hand delivery if the electronic alternative proves too difficult.

Comment 153: The current Administration fully supports recreational fishing and its benefits to the Nation, and calls for efforts to allocate a fair percentage of managed coastal fisheries to sport fishing.

Response: NMFS acknowledges that sport fishing in general and guided sport fishing in particular generates substantial economic benefits for the Nation. This action addresses the problem identified by the Council in its problem statement and has been

determined to be fair and equitable as required by the Halibut Act (*see* discussion above under the heading ''Consistency with Halibut Act'').

Comment 154: This action violates Executive Order 12962. The primary intent of the E.O. is ''to provide for increased recreational fishing opportunities nationwide.'' Reducing and eliminating access to a public resource is not consistent with the language contained in E.O. 12962.

Response: This final rule is consistent with E.O. 12962. This action limits the number of charter vessels that may carry anglers catching and retaining halibut in Areas 2C and 3A. This action does not reduce or eliminate charter vessel angler access to the Pacific halibut resource. Under this rule, an estimated 502 charter halibut permits will be issued in Area 2C and 418 permits will be issued in Area 3A. Each permit will have an angler endorsement that specifies the maximum number of charter vessel anglers that may be harvesting halibut on the vessel. Multiplying the average angler endorsement level in each area by the number of permits expected in the area yields an estimate of the total number of charter vessel anglers that may be served on any day. For Area 2C this estimate is 3,028 anglers and for 3A it is 3,577 anglers. In other words, this rule will allow a total of 6,605 charter vessel anglers to have access to the halibut resource on any day. To the extent that some charter vessel operations, particularly in Area 2C, offer half-day trips, this estimate is conservative. In addition, this estimate of charter vessel angler opportunity does not include the potential additional community charter halibut permits that may be available to CQEs.

Another way of judging whether charter vessel angler opportunity for access to the resource is constrained under this rule is to compare the average number of logbook fishing trips per vessel per season in 2008 with the average number of trips per vessel per season that will be needed under this rule to serve the same number of charter vessel anglers that fished in 2008. Charter halibut vessels in Area 2C averaged 36 trips per season in 2008. Based on the total number of permits expected to be initially issued under this rule, charter vessels will need to make 52 trips in Area 2C to serve the same number of charter vessel anglers that fished in 2008. In Area 3A, charter vessels took an average of 38 trips during the season in 2008. Under this rule, the same number of anglers could be served by 56 trips. Based on a practical halibut fishing season of 100 days, opportunity exists for permitted charter vessels under this rule to increase their average number of trips per season in response to increased angler demand. Hence, this action is not expected to reduce or eliminate charter vessel angler access to the halibut resource in Alaska, as suggested by the comment.

Comment 155: Several comments expressed general support for the limited access system for the charter halibut fishery and urged implementation of it as soon as possible. One comment asserted that the administrative record proves a long history of trying to address the unchecked growth of the halibut charter industry and that the charter community has unfortunately resisted these efforts as proven by their litigation efforts to challenge regulatory limits. Another comment expressed the view that guided sport charter operations are commercial endeavors with substantial and growing impacts on halibut populations that Federal managers have for too long failed to control. Continued growth of the charter fleet is especially damaging because it occurs without effective means to accurately account for the catch and without an effective enforcement mechanism to hold the fleet within its GHL. Limited access may improve the ability of the charter sector to maintain a two-fish bag limit without excessive pressure on the resource and other user groups. Another comment stated that the rapid growth of the charter boat industry and its catch of halibut in these areas is out of control and not sustainable and that NMFS should implement this moratorium in Areas 2C and 3A because the halibut stocks, particularly in Area 2C, are in desperate need of rebuilding. This view was expressed also by a recreational angler who wrote that this is an important step toward controlling the continued over utilization of the near shore resource and that this step to limit the number of halibut charters is long overdue. The angler strongly urged the Secretary of Commerce to approve the charter halibut moratorium and to implement it as soon as possible.

Other comments from participants in the charter vessel and commercial setline sectors indicated that the program will be a first step in developing a long-term solution to ongoing conservation concerns and allocation disputes between the two sectors. The comments indicated that the program will stabilize the fishery and provide a foundation for additional market-based management programs such as individual quotas. The charter halibut permit program fairly balances past and current participation, limits new entry to businesses that buy permits from persons exiting in the fishery, and provides appropriate opportunities for small coastal communities to enter the charter vessel fishery through community charter halibut permits. The program also establishes appropriate standards for transferable versus non-transferable permits. The commenters supported the rule because it will in their view ultimately curtail fishing capacity growth in the charter vessel sector.

Response: NMFS acknowledges the support for this rule. Stakeholders from all halibut user groups have provided useful information during the Council development and rulemaking process for this action. Although litigation can slow this process, plaintiffs have the right to challenge government rules. This fosters the development of robust rulemaking that ultimately benefits all participants in the fishery management process.

With regard to accounting for sport harvests of halibut, the best available information on the recreational harvest of halibut is derived from ADF&G sport fishing data sources including the Statewide Harvest Survey of sport fishermen, the Saltwater Sport Fishing Charter Logbook, and creel census surveys. NMFS finds that the recreational harvest estimates provided by ADF&G from these data sources are reasonably accurate.

This rule is not designed to directly limit the amount of halibut harvested in the charter halibut fishery, nor is it designed to limit the sport harvest of halibut in localized areas. Scientific information does not exist that would discern localized depletion at a scale smaller than an IPHC area or attribute it to a particular gear group within Area 2C or Area 3A. The purpose of this action is to curtail growth of fishing capacity in the charter halibut fishery. By stabilizing the number of vessels participating in this fishery, other regulations that restrict the harvest of charter vessel anglers may have improved effectiveness.

Comment 156: As a halibut charter operator, I have been adversely affected by the publicity and rumors of reduced halibut harvests and draconian measures such as a one-fish bag limit that confuse recreational anglers about their opportunities to access to the halibut resource. The limited access system may help alleviate some of this uncertainty for business owners. The length of time the Council and NMFS have taken to get to this point has made it difficult for those in the fishery to make business decisions. Unfortunately, there has been significant charter

turnover and new businesses have started or existing businesses have expanded. Support for the program is declining because many of these new businesses say they will not qualify for the program.

Response: NMFS acknowledges the time that has transpired between the Council action to adopt the charter halibut moratorium and Secretarial action to promulgate this rule. During this time, NMFS also implemented a one-halibut daily bag limit for charter vessel anglers in Area 2C (74 FR 21194, May 6, 2009). Limited access systems including this one typically are complicated to implement. NMFS acknowledges also that the entry and exit rate of charter vessel fishing businesses may be high relative to other businesses. Publication of the December 9, 2005, control date (71 FR 6442; February 8, 2006), however, announced that persons entering the charter halibut fishery after the control date will not be assured of future access to the fishery if a limited access system is implemented. With the intended stability that this rule will bring to the charter halibut fishery, confusion among recreational anglers should dissipate.

Comment 157: Halibut charter fishery participation rules should be simple, easy to implement, and easy to enforce. I like the idea of a limited number of permits awarded to established fishing guides on a seniority basis. Limiting the number of boats fishing seems like a straightforward way to control the harvest of halibut taken by sports charter.

Response: This action is intended to curtail growth of fishing capacity in the guided sport fishery for halibut. This action, by itself, is not designed to limit the number of charter vessel anglers who may use sport fishing guide services or their harvest of halibut. However, by stabilizing the number of vessels participating in this fishery, the effectiveness of other regulations that limit the harvest of halibut by charter vessel anglers may be improved.

Changes From the Proposed Rule

This action was proposed and public comments were solicited for 45 days beginning on April 21, 2009 (74 FR 18178), and ending June 5, 2009. By the end of the comment period 166 public submissions were received. All comments received by the comment ending date are summarized and responded to above under the heading ''comments and responses.'' The following 24 changes are made from the proposed rule in this final rule.

1. In § 300.61, a reference to § 300.65(d) is added to the definition of charter vessel angler. On June 5, 2009, NMFS implemented regulations limiting charter vessel anglers in Area 2C to catching and retaining one halibut per day (May 6, 2009, 73 FR 21194). These regulations added a definition of charter vessel angler to § 300.61 for purposes of § 300.65(d). The proposed rule to implement a charter halibut permit program (April 21, 2009, 74 FR 18178), proposed a revision to the definition of charter vessel angler that inadvertently excluded the reference to § 300.65(d). To maintain the current definition of charter vessel angler in § 300.61, the reference to § 300.65(d) is added in this final rule.

2. In § 300.61, the definition of charter vessel operator is not revised. The current definition of charter vessel operator is for purposes of § 300.65(d), and the proposed rule would have applied the definition for purposes of § 300.67 in addition to § 300.65(d). On further examination of the proposed rule text, NMFS determined that the definition of charter vessel operator is not needed for purposes of § 300.67. This final rule, at §§ 300.66 and 300.67 (*see* changes 3, 6, and 9 from the proposed rule), references the definition of operator in § 300.2. Operator means, with respect to any vessel, the master or other individual aboard and in charge of that vessel. This definition is consistent with the intended definition of charter vessel operator in the proposed rule. This change is also consistent with the suggestion in Comment 80 to clarify the proposed definition of charter vessel operator.

3. In § 300.61, the definition of crew member is revised. This final rule changes the reference to ''charter vessel operator'' from the proposed rule to ''operator of a vessel with one or more charter vessel anglers on board''. This change reflects NMFS's determination to replace charter vessel operator with operator, as defined in § 300.2, for purposes of § 300.67. This determination is described in change 2 from the proposed rule.

4. In § 300.61, a definition of ''valid'' is added to clarify its meaning with respect to a charter halibut permit. For purposes of §§ 300.66 and 300.67, a valid charter halibut permit is the permit currently in effect.

5. In § 300.66(p), text is added to clarify that a person is prohibited from submitting inaccurate information to an authorized officer as defined in § 300.2. The paragraph at § 300.66(p) currently prohibits a person from failing to submit or submitting inaccurate information on any report, license, catch card, application or statement required under § 300.65. The proposed rule for this action proposed to apply this prohibition to §§ 300.65 and 300.67. The change in § 300.66(p) from the proposed to final rule clarifies that persons are also prohibited from submitting inaccurate information to an authorized officer.

6. In § 300.66, the word ''operate'' is changed to ''be an operator of'' in paragraphs (r), (s), (t), (u), and (v). This change from the proposed rule is made to ensure consistency with the definition of operator in § 300.2, as described in change 2 from the proposed rule.

7. In § 300.66(r) and § 300.67(a)(1), the word ''original'' is added before ''valid charter halibut permit''. This addition clarifies that an operator of a vessel with one or more charter vessel anglers catching and retaining Pacific halibut on board must have on board an original valid charter halibut permit. A copy or facsimile of a valid charter halibut permit would not meet the requirements of §§ 300.66 and 300.67.

8. In § 300.66, paragraph (w) is not included in the final rule. On further examination of the proposed rule text, NMFS determined that regulations in § 300.67 regarding crew member compliance would be unnecessarily redundant. The prohibition on crew members catching and retaining halibut during a charter fishing trip at § 300.65(d)(ii) is not changed with this final rule.

9. In § 300.67(a)(1), general permit requirements, ''charter vessel operator'' is changed to ''operator''. This change is made for consistency with the definition of operator in § 300.2, as described in change 2 from the proposed rule.

10. In § 300.67(a)(1), text is added at the end of the paragraph to clarify that a charter halibut permit holder must insure that the operator of the permitted vessel complies with all requirements of §§ 300.65 and 300.67.

11. In § 300.67(a)(1) and (a)(3), text is added to clarify that the angler endorsement on a charter vessel permit(s) must be equal to or greater than the number of charter vessel anglers who are catching and retaining halibut. In paragraph (a)(1) the phrase ''at least'' is added to the last phrase of the sentence to read, ''* * * endorsed for at least the number of charter vessel anglers who are catching and retaining Pacific halibut.'' The language of the proposed rule, without the ''at least'' phrase, implied that a charter halibut permit endorsement had to be equal to the number of charter vessel anglers on board. This implied meaning was not intended. For the same reason, in paragraph (a)(3), the phrase ''up to'' is substituted for the word ''only'' to

clarify that the angler endorsement does not require a charter vessel to have the maximum number of anglers on board to make the charter halibut permit valid. Rather, the number of charter vessel anglers on board a charter vessel must not exceed the angler endorsement on its permit. These clarifying words also respond in part to a question raised in Comment 86.

12. In § 300.67, paragraphs (b) and (d), are revised to clarify the order of determining whether an applicant for one or more charter halibut permits is eligible for any permits, and if so, how many, and whether any will be designated as transferable. The organization of paragraph (b) may have confused qualifying criteria for a transferable permit with the determination of how many permits could qualify for a transferable designation and whether the same logbook fishing trips that qualified an applicant for a transferable permit(s) could be used also to qualify for a non-transferable permit(s). The revised paragraphs also better reflect the explanation in the preamble to the proposed rule than did the proposed rule regulatory text in paragraphs (b) and (d). The revised paragraphs make no substantive changes in the qualifying criteria, but rather reorganize the proposed rule text of these paragraphs to make clear the following sequence. First, to qualify for any type of permit—non-transferable or transferable—an applicant must apply within the application period and meet the logbook fishing trip requirements described in paragraph (b)(1). Second, if the applicant meets the standards described in paragraph (b), then the number of permits will be determined as described in paragraph (c), which is unchanged from the proposed rule. Finally, the designation of one or more of the permits as transferable will require meeting the standards described in paragraph (d).

13. In § 300.67(b)(2)(ii) (previously paragraph (b)(5)(ii) in the proposed rule), a minor technical edit is made to remove the word ''the'' and to change the word ''owners'' to its singular form ''owner.'' These minor changes correct an editorial oversight in the proposed rule and make the word ''owner'' in its singular form consistent throughout the regulatory text.

14. In § 300.67(b), a new paragraph (3) is added to clarify that the term ''ADF&G Business Owner License'' includes an ''ADF&G business owner registration.'' The latter term was used by ADF&G in 2004; however, the former term was used in 2005 and 2008. The term ''ADF&G Business Owner License'' also includes ''sport fish business owner license,'' ''sport fish business license,'' and ''ADF&G business license.'' The proposed rule (at page 18185) discussed the various terms used to describe this authority from the State of Alaska, ADF&G, granted as a registration or license that authorized every charter vessel fishing trip. Although discussed in the proposed rule preamble, this clarification did not appear in the proposed rule text. This oversight was pointed out in Comment 83.

15. In § 300.67(d)(1)(iii), a sentence is added to clarify that the vessel used to qualify for a transferable permit during one of the qualifying years (2004 or 2005) does not have to be the same vessel used to qualify during the recent participation year (2008). The proposed rule regulatory text at paragraph (b)(2)(ii) and (iii) stated that qualifying for a transferable permit would require meeting the minimum of 15 logbook fishing trips with the same vessel in each year (qualifying and recent participation year). This text could be interpreted to mean that the logbook trips had to have been made on the same vessel in both years (*See* Comments 54 through 57). This is not the intended interpretation. What is intended, as clarified in this change, is that the minimum 15 bottomfish logbook fishing trips had to have been made from the same vessel in either 2004 or 2005. Also, the minimum 15 halibut logbook fishing trips during 2008 had to have been made from the same vessel during that year, but the vessel used in 2008 is not required to be the same vessel that was used in either 2004 or 2005.

16. In § 300.67(d), paragraph (d)(2) is added for consistency with the qualifications for a transferable permit described in the preceding paragraph (d)(1) (previously paragraph (b)(2) in the proposed rule), the preamble to the proposed rule, and the Analysis. The proposed rule language suggested that the number of transferable permits would be equal to the number of vessels that met the minimum logbook trip criterion of 15 during only the applicant-selected year of the qualifying period. NMFS found several inconsistencies between this language and other statements in the proposed rule and in the Analysis. First, a permit designation of transferable requires that the 15-trip minimum criteria be met in one year of the qualifying period and in the recent participation year. Second, the preamble to the proposed rule at page 18183 states that the minimum participation criteria in both years would be taken into account in designating a charter halibut permit as transferable. Finally, in the Analysis (**ADDRESSES**) section 2.5.5 makes clear that the Council intended that the number of permits designated transferable would be controlled by the lesser of the number of vessels that met the 15-trip minimum criteria in one year of the qualifying period or the number of vessels that met the 15-trip minimum criteria in the recent participation year.

17. In § 300.67(f)(3), the information element, ''the statistical area(s) where bottomfish fishing occurred,'' is added to correct an oversight of not including this information element in the proposed rule. The proposed rule preamble, on page 18185, discussed the various information elements that would be required as evidence of a halibut logbook fishing trip during the recent participation period (2008). The proposed rule proposed a definition of ''halibut logbook fishing trip'' to include information about the number of halibut kept or released or the number of boat hours that the vessel engaged in bottomfish fishing. The 2008 ADF&G saltwater sport fishing charter trip logbook required the recording of the primary ADF&G statistical area fished when boat hours fished for bottomfish were recorded. Hence, reporting the statistical area(s) where bottomfish fishing occurred as optional evidence of participation is consistent the 2008 logbook reporting procedures. Adding statistical area(s) also is consistent with the logbook fishing trip information elements in § 300.67(f)(2) and with the evidence of participation recommendation by the Council (Issue 9 in the March 31, 2007, motion adopted by the Council). The number of rods used from the vessel in bottomfish fishing is not included in § 300.67(f)(3) because it was not required to be reported in 2008 logbooks. Moreover, any guided bottomfish fishing in 2008 should have been reported in terms of boat hours and bottomfish statistical area, which would be the requisite evidence of participation.

18. In § 300.67(f)(7), the year ''2008'' is substituted for the proposed rule place holder text that read, ''[insert the recent participation year].'' As explained in the proposed rule on page 18182 of the proposed rule, specifying the year that would be the recent participation period was held pending a NMFS determination of the most recent year for which ADF&G charter logbook data would be available. In adopting its charter halibut moratorium recommendation to the Secretary, the Council contemplated that the recent participation period or ''year prior to implementation'' would be either 2007 or 2008. Based on the availability of

logbook data, NMFS has determined that 2008 is the recent participation period.

19. In § 300.67(g), language is added at the beginning to clarify certain limitations on the use of the unavoidable circumstance exception. These limitations were discussed in the preamble to the proposed rule (74 FR 18178, April 21, 2009) on page 18188, but were omitted from the regulatory text by oversight. The new regulatory text makes clear, first, that unavoidable circumstance claims must be made on appeal pursuant to § 300.67(h)(6). Second, the new text clarifies that the Office of Administrative Appeals will not accept an unavoidable circumstance claim unless the person making the claim would be excluded from the charter halibut fishery entirely unless their unavoidable circumstance was recognized. Finally, the new text clarifies that unavoidable circumstance claims to increase the number of permits issued or to change a non-transferable permit into a transferable permit will not be accepted.

20. In § 300.67(g)(3)(i), language is added to clarify that proof of active military service during the 2004 and 2005 qualifying period will qualify an applicant for the unavoidable circumstance, military service provision. This provision will not be limited only to service in the National Guard or military reserve as indicated in the proposed rule. This change is being made in response to Comment 110. The comment correctly noted that in adopting its charter halibut moratorium recommendation to the Secretary, the Council intended that the military exemption apply to an individual who was assigned to active military duty during 2004 or 2005. The proposed rule text interpreted the Council's recommendation too narrowly in limiting the military service provision to service only in the National Guard or military reserve. Hence, the final rule text is revised to accurately reflect the Council's approved recommendation. In addition, a new paragraph (g)(3)(iii) is added to clarify that the criteria to be used in determining the number and type (transferable or non-transferable) of charter halibut permit(s) initially allocated under this military service provision is in paragraph (g)(2)(v)(B), immediately preceding paragraph (g)(3). The proposed rule presumed that NMFS will be guided by the criteria in paragraph (g)(2)(v)(B), but the added text makes this explicit. Finally, the added text makes clear that all permits issued under this military service provision will receive angler endorsements of six by cross reference to paragraph (e)(2).

21. In § 300.67(h)(3), language is added to authorize NMFS to issue non-transferable interim permit(s) for undisputed permit claims. On further examination of the proposed regulatory text, NMFS determined that without this explicit authority, a dispute over any one permit would prevent issuing any charter halibut permit(s) for which an applicant appeared to qualify. For example, an applicant may claim three charter halibut permits; however, the official charter halibut record support issuing only two permits. The proposed rule regulatory text at § 300.67(h) suggests that NMFS may not issue any permits to the applicant until after the 30-day evidentiary period, an IAD is issued, and OAA accepts the applicant's appeal regarding the third disputed permit. In this example, the applicant may eventually win the appeal for the third disputed permit, but lose an entire fishing season waiting for the disputed claim to be resolved. This change from the proposed rule will allow NMFS to issue interim permits for undisputed permit claims, allowing an applicant to continue charter halibut operations while disputed permit claims are processed and adjudicated.

22. In § 300.67(i)(1), a reference to paragraph (b)(2) in the proposed rule is changed to paragraph (d)(2) in the final rule. This change is necessary to update a reference to regulatory text in § 300.67(b) in the proposed rule, which is revised in this final rule as described in changes 12 and 16.

23. In § 300.67(k)(4), the maximum permit limitations on a CQE is clarified by removing the word ''following'' and instead referring specifically to the maximum number of charter halibut and community charter halibut permits specified in paragraphs (k)(4)(i) and (k)(4)(ii).

24. In § 679.2, the definition of ''community quota entity (CQE)'' is revised by removing the parenthetical phrase ''for purposes of the IFQ program.'' After further examination of the proposed rule text, NMFS determined that this phrase could cause confusion by suggesting that the CQE definition applies only to the IFQ program. This rule establishes another potential purpose for a CQE, which is to hold community charter halibut permits. This expanded role for CQEs that represent communities identified in this rule does not require a substantive change to the CQE definition. This clarification is consistent with the proposed rule that thoroughly described the potential role for CQEs in the charter halibut fishery.

Classification

Regulations governing the U.S. fisheries for Pacific halibut are developed by the International Pacific Halibut Commission (IPHC), the Pacific Fishery Management Council, the North Pacific Fishery Management Council (Council), and the Secretary of Commerce. Section 5 of the Northern Pacific Halibut Act of 1982 (Halibut Act, 16 U.S.C. 773c) provides the Secretary of Commerce with the general responsibility to carry out the Convention between Canada and the United States for the management of Pacific halibut, including the authority to adopt regulations as may be necessary to carry out the purposes and objectives of the Convention and Halibut Act. This final rule is consistent with the Secretary of Commerce's authority under the Halibut Act.

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

A FRFA was prepared that describes the economic impact that this action has on small entities. The RIR/FRFA prepared for this final rule is available from NMFS (*see* **ADDRESSES**). The FRFA for this action explains the need for, and objectives of, the rule, summarizes the public comments on the initial regulatory flexibility analysis and agency responses, describes and estimates the number of small entities to which the rule will apply, describes projected reporting, recordkeeping and other compliance requirements of the rule, and describes the steps the agency has taken to minimize the significant economic impact on small entities, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency that affect the impact on small entities was rejected.

The need for and objectives of this action; a summary of the comments and responses; a description of the action, its purpose, and its legal basis; and a statement of the factual, policy, and legal reasons for selecting the alternative embodied in this action are described elsewhere in this preamble and are not repeated here.

The proposed rule was published in the **Federal Register** on April 21, 2009 (74 FR 18178). An Initial Regulatory Flexibility Analysis (IRFA) was prepared and described in the classification section of the preamble to the rule. The public comment period ended on June 5, 2009. NMFS received 166 communications containing 157 separate comments. Comments 45 and

143 address the IRFA. Comments 39–41, 43, 45–47, 51, and 143 address the economic impact of the rule on small entities.

Two classes of entities are directly regulated by this action: (1) guided charter businesses active in IPHC Areas 2C and 3A, and (2) CQE-qualified communities and CQE groups formed by those communities in Areas 2C and 3A. Almost all of the guided charter businesses are believed to be small entities. This conclusion is based on a Small Business Administration (SBA) threshold of $7.0 million in gross revenues on an annual basis for facilities offering recreational services, including guided fishing services (NAICS 713990). The largest of these entities, which are lodges, may be considered large entities under SBA standards, but that cannot be confirmed. The 32 communities in Area 2C and 3A directly regulated as part of this action would be considered small entities under the SBA definitions because they have populations under 50,000 persons.

Under this action, NMFS will issue permits to an estimated 231 businesses in Area 2C and to 296 businesses in Area 3A. In Area 2C, 173 of the guided businesses that show evidence of bottomfish fishing in 2008 will not qualify to receive an Area 2C guided charter permit under the limited entry program. In Area 3A, 154 of the guided businesses that show evidence of bottomfish fishing in 2008 will not qualify to receive an Area 3A guided charter permit.

Businesses that do not qualify to receive a charter halibut permit do not meet activity thresholds during the qualifying period (2004–2005) or do not meet the 2008 thresholds in the recency provisions of the Council's motion.

This action seeks to help 32 small, remote communities in Areas 2C and 3A develop charter businesses by mitigating the economic barrier associated with purchasing a charter halibut permit and creating a number of non-transferable permits that can be held only by the non-profit entity representing the eligible community.

Under this action, 18 qualifying Area 2C communities are eligible to each receive up to four community halibut charter permits per community at no cost; 14 Area 3A communities are eligible to each receive up to seven community halibut charter permits per community at no cost. Guided halibut fishing trips made with these permits must either begin or end within the boundaries of the eligible community designated on the permit. In addition, each of these community CQE programs will be able to buy additional transferable permits equal in number to its allocation of community halibut charter permits. This authority to acquire by transfer additional transferable charter halibut permits makes it possible for CQEs representing eligible communities to hold a maximum of eight permits per community in Area 2C or a maximum of 14 permits per community in Area 3A. These potential permit numbers are different from the excessive share limits imposed on other entities (a five-permit limit unless initially allocated more).

Of the directly regulated entities, only currently active guided charter operations that will not receive a permit to continue to participate in this fishery will suffer significant adverse economic impacts. These operations must enter the market for transferable charter halibut permits to remain active in the charter halibut fishery.

Permit applications must be submitted prior to the start of the program. The application will require information about the business applying for the permit, including the ownership structure of the business (U.S. citizenship papers for individuals) and information on the charter activities of the business. After submitting the initial permit application, additional applications will be required only for transfer of permits. NMFS will require additional reports when the structure of the business holding the permit changes or the permit is transferred. The initial application for a charter permit could take an estimated two hours to complete, depending on the amount of additional information the applicant needs to provide. The application for transfer of a charter permit is estimated to take two hours to complete, based on previous experience with the groundfish License Limitation Program.

Persons applying for a community charter permit or a military charter halibut permit must submit applications for these special permits. In addition, CQEs representing communities eligible to receive community charter halibut permits will be required to identify the person that will use the permit. The application for a community charter halibut permit or a military charter halibut permit is estimated to take two hours to complete. In all cases, basic reading and writing skills are required to complete the application forms.

The Council and NMFS have taken several steps to minimize the burden on directly regulated small entities. The Council published information about the control date frequently during its deliberations. The Council adopted this control date at its December 2005 meeting. In April 2006, it received a recommendation from its Charter Halibut Stakeholder Committee that it initiate an analysis of an entry moratorium using the December 9, 2005, control date. At its April 2006 meeting it requested staff to prepare an analysis of moratorium options based on the December 9, 2005, control date. The Council received a discussion paper from staff, based on this control date in December 2006. It adopted a preliminary preferred alternative based on this control date in February 2007, and it recommended a limited access system that included this control date in April 2007. Newsletters for each of these Council meetings contained information on the Council action and mentioned this control date. NMFS published a notice in the **Federal Register** in February 2006 stating that the Council had adopted this control date (71 FR 6442, February 8, 2006) and the Council devoted a paragraph to this notice in its February 2006 newsletter.

This action creates a class of non-transferable permits to ease the transition from an open access fishery for a large class of businesses participating at relatively low levels of activity. Thus, any business that reported more than five logbook trips in the qualifying and in the recent participation period, but that had no vessel with at least 15 trips in one of the two years, 2004 or 2005, and in 2008, will receive non-transferable permits. These permits will allow that operation to continue its activity until the operator leaves the fishery, at which time they will expire. Thus, a transitional mechanism is provided for many operations that otherwise would have been forced to withdraw from the fishery immediately.

The Council and NMFS created transferable permits to allow the market to reallocate permits among recipients. This makes it possible for businesses that were active in 2008 but not during the qualifying period to continue their activity by purchasing permits.

The Council has created a class of community halibut charter permits. These will be issued without charge to qualifying communities. If qualified communities in Area 2C take full advantage of this program, an additional 72 permits may be issued for guided charter vessels. If qualified communities in Area 3A take full advantage, an additional 98 permits may be available. These permits were created to provide development opportunities for rural communities, but they should offer opportunities for businesses that do not receive transferable or non-transferable permits, and that are willing to enter a

joint venture with a qualified community to utilize these permits.

The Council and Secretary considered a no-action alternative, but this was rejected because it would not accomplish the objective of this action, which is to stabilize the businesses in this fishery by controlling entry, while providing opportunities for rural community development. The Council also considered an option that only required a single landing in 2008 to meet the recency requirement. This option was rejected because this action was originally taken to stabilize the businesses in the charter halibut fishery with respect to active participants in 2004 and 2005. The recency requirement was adopted because the Council was aware that implementation would take several years, and it wanted to limit qualifying businesses to those businesses active during the qualification period and still active close to the time the program was implemented. Therefore, the Council elected to require the same level of participation in the qualification period and in the recency period.

Paperwork Reduction Act Collections of Information

This rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by OMB under control number 0648–0592. Public reporting burden estimates per response for these requirements are two hours for charter halibut permit application, two hours for community charter halibut permit application, two hours for military charter halibut permit application, two hours for transfer of a charter halibut permit, and four hours for appeal of permit denial. These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection-of-information. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (*see* **ADDRESSES**) and by e-mail to *David_Rostker@omb.eop.gov*, or fax to 202–395–7285.

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

List of Subjects

15 CFR Part 902

Recordkeeping and reporting requirements.

50 CFR Part 300

Fisheries, Fishing, Reporting and recordkeeping requirements, Treaties.

50 CFR Part 679

Alaska, Fisheries.

Dated: December 18, 2009.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

■ For the reasons set out in the preamble, NMFS amends 15 CFR Chapter IX, and 50 CFR Chapters III and VI as follows:

15 CFR Chapter IX

PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT: OMB CONTROL NUMBERS

■ 1. The authority citation for part 902 continues to read as follows:

Authority: 44 U.S.C. 3501 *et seq.*

■ 2. In § 902.1, in the table in paragraph (b), under the entry ''50 CFR'', add entries for ''300.67(h), (i), (k), and (l)'', in alphanumeric order to read as follows:

§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) * * *

CFR part or section where the information collection requirement is located	Current OMB control number (all numbers begin with 0648–)
* * * * *	
50 CFR	
* * * * *	
300.67(h), (i), (k), and (l)	–0592
* * * * *	

50 CFR Chapter III

PART 300—INTERNATIONAL FISHERIES REGULATIONS

Subpart E—Pacific Halibut Fisheries

■ 3. The authority citation for part 300, subpart E continues to read as follows:

Authority: 16 U.S.C. 773–773k.

■ 4. In § 300.61, definitions are amended by:

■ A. Removing the definition for ''Charter vessel''.

■ B. Revising definitions for ''Charter vessel angler'', ''Charter vessel fishing trip'', ''Charter vessel guide'', ''Crew member'', and ''Sport fishing guide services''.

■ C. Adding definitions for ''Charter halibut permit'', ''Community charter halibut permit'', ''Military charter halibut permit'', and ''Valid'' in alphabetical order.

The revisions and additions read as follows:

§ 300.61 Definitions.

* * * * *

Charter halibut permit means a permit issued by the National Marine Fisheries Service pursuant to § 300.67.

Charter vessel angler, for purposes of §§ 300.65(d), 300.66, and 300.67, means a person, paying or non-paying, using the services of a charter vessel guide.

Charter vessel fishing trip, for purposes of §§ 300.65(d), 300.66, and 300.67, means the time period between the first deployment of fishing gear into the water from a vessel after any charter vessel angler is onboard and the offloading of one or more charter vessel anglers or any halibut from that vessel.

Charter vessel guide, for purposes of §§ 300.65(d), 300.66 and 300.67, means a person who holds an annual sport guide license issued by the Alaska Department of Fish and Game, or a person who provides sport fishing guide services.

* * * * *

Community charter halibut permit means a permit issued by NMFS to a Community Quota Entity pursuant to § 300.67.

Crew member, for purposes of §§ 300.65(d), and 300.67, means an assistant, deckhand, or similar person who works directly under the supervision of, and on the same vessel as, a charter vessel guide or operator of a vessel with one or more charter vessel anglers on board.

* * * * *

Military charter halibut permit means a permit issued by NMFS to a United States Military Morale, Welfare and Recreation Program pursuant to § 300.67.

* * * * *

Sport fishing guide services, for purposes of §§ 300.65(d) and 300.67, means assistance, for compensation, to a person who is sport fishing, to take or attempt to take fish by being onboard a vessel with such person during any part of a charter vessel fishing trip. Sport fishing guide services do not include services provided by a crew member.

* * * * *

Valid, with respect to a charter halibut permit for purposes of §§ 300.66 and 300.67, means the charter halibut permit that is currently in effect.

* * * * *

■ 5. In § 300.66, revise paragraphs (b), (i), (o), and (p), and add paragraphs (r), (s), (t), (u), and (v) to read as follows:

§ 300.66 Prohibitions.

* * * * *

(b) Fish for halibut except in accordance with the catch sharing plans and domestic management measures implemented under §§ 300.63, 300.65, and 300.67.

* * * * *

(i) Fish for subsistence halibut from a charter vessel or retain subsistence halibut onboard a charter vessel if anyone other than the owner of record, as indicated on the State of Alaska vessel registration, or the owner's immediate family is aboard the charter vessel and unless each person engaging in subsistence fishing onboard the charter vessel holds a subsistence halibut registration certificate in the person's name pursuant to § 300.65(i) and complies with the gear and harvest restrictions found at § 300.65(h). For purposes of this paragraph (i), the term ''charter vessel'' means a vessel that is registered, or that should be registered, as a sport fishing guide vessel with the Alaska Department of Fish and Game.

* * * * *

(o) Fail to comply with the requirements of §§ 300.65 and 300.67.

(p) Fail to submit or submit inaccurate information on any report, license, catch card, application, or statement required or submitted under §§ 300.65 and 300.67, or submit inaccurate information to an authorized officer.

* * * * *

(r) Be an operator of a vessel with one or more charter vessel anglers on board that are catching and retaining halibut without an original valid charter halibut permit for the regulatory area in which the vessel is operating.

(s) Be an operator of a vessel with more charter vessel anglers on board catching and retaining halibut than the total angler endorsement number specified on the charter halibut permit or permits on board the vessel.

(t) Be an operator of a vessel with more charter vessel anglers on board catching and retaining halibut than the angler endorsement number specified on the community charter halibut permit or permits on board the vessel.

(u) Be an operator of a vessel in Area 2C and Area 3A during one charter vessel fishing trip.

(v) Be an operator of a vessel in Area 2C or Area 3A with one or more charter vessel anglers on board that are catching and retaining halibut without having on board the vessel a State of Alaska Department of Fish and Game Saltwater Charter Logbook that specifies the following:

(1) The person named on the charter halibut permit or permits being used on board the vessel;

(2) The charter halibut permit or permits number(s) being used on board the vessel; and

(3) The name and State issued boat registration (AK number) or U.S. Coast Guard documentation number of the vessel.

■ 6. Add § 300.67 to subpart E to read as follows:

§ 300.67 Charter halibut limited access program.

This section establishes limitations on using a vessel on which charter vessel anglers catch and retain Pacific halibut in International Pacific Halibut Commission (IPHC) regulatory areas 2C and 3A.

(a) *General permit requirements.* (1) In addition to other applicable permit and licensing requirements, any operator of a vessel with one or more charter vessel anglers catching and retaining Pacific halibut on board a vessel must have on board the vessel an original valid charter halibut permit or permits endorsed for the regulatory area in which the vessel is operating and endorsed for at least the number of charter vessel anglers who are catching and retaining Pacific halibut. Each charter halibut permit holder must insure that the operator of the permitted vessel complies with all requirements of §§ 300.65 and 300.67.

(2) *Area endorsement.* A charter halibut permit is valid only in the International Pacific Halibut Commission regulatory area for which it is endorsed. Regulatory areas are defined in the annual management measures published pursuant to § 300.62.

(3) *Charter vessel angler endorsement.* A charter halibut permit is valid for up to the maximum number of charter vessel anglers for which the charter halibut permit is endorsed.

(b) *Qualifications for a charter halibut permit.* A charter halibut permit for IPHC regulatory area 2C must be based on meeting participation requirements in area 2C. A charter halibut permit for IPHC regulatory area 3A must be based on meeting participation requirements in area 3A. Qualifications for a charter halibut permit in each area must be determined separately and must not be combined.

(1) NMFS will issue a charter halibut permit to a person who meets the following requirements:

(i) The person applies for a charter halibut permit within the application period specified in the **Federal Register** and completes the application process pursuant to paragraph (h) of this section.

(ii) The person is the individual or non-individual entity to which the State of Alaska Department of Fish and Game (ADF&G) issued the ADF&G Business Owner Licenses that authorized logbook fishing trips that meet the minimum participation requirements described in paragraphs (b)(1)(ii)(A) and (b)(1)(ii)(B) of this section for one or more charter halibut permits, unless the person is applying as a successor-in-interest.

(A) Reported five (5) bottomfish logbook fishing trips or more during one year of the qualifying period; and

(B) Reported five (5) halibut logbook fishing trips or more during the recent participation period.

(iii) If the person is applying as a successor-in-interest to the person to which ADF&G issued the Business Owner Licenses that authorized logbook fishing trips that meet the participation requirements described in paragraphs (b)(1)(ii) of this section for one or more charter halibut permits, NMFS will require the following written documentation:

(A) If the applicant is applying on behalf of a deceased individual, the applicant must document that the individual is deceased, that the applicant is the personal representative of the deceased's estate appointed by a court, and that the applicant specifies who, pursuant to the applicant's personal representative duties, should receive the permit(s) for which application is made; or

(B) If the applicant is applying as a successor-in-interest to an entity that is not an individual, the applicant must document that the entity has been dissolved and that the applicant is the successor-in-interest to the dissolved entity.

(iv) If more than one applicant claims that they are the successor-in-interest to a dissolved entity, NMFS will award the permit or permits for which the dissolved entity qualified in the name(s) of the applicants that submitted a timely application and proved that they are a successor-in-interest to the dissolved entity.

(2) Notwithstanding any other provision in this subpart, and except as provided in paragraph (b)(1)(iv) of this section,

(i) One logbook fishing trip shall not be credited to more than one applicant;

(ii) One logbook fishing trip made pursuant to one ADF&G Business Owner License shall not be credited to more than one applicant; and

(iii) Participation by one charter halibut fishing business shall not be allowed to support issuance of permits to more than one applicant.

(3) For purposes of this section, the term ''ADF&G Business Owner(s) License(s)'' includes a ''business registration,'' ''sport fish business owner license,'' ''sport fish business license,'' and ''ADF&G business license''.

(c) *Number of charter halibut permits.* An applicant that meets the participation requirements in paragraph (b) of this section will be issued the number of charter halibut permits equal to the lesser of the number of permits determined by paragraphs (c)(1) or (c)(2) of this section as follows:

(1) The total number of bottomfish logbook fishing trips made pursuant to the applicant's ADF&G Business License in the applicant-selected year divided by five, and rounded down to a whole number; or

(2) The number of vessels that made the bottomfish logbook fishing trips in the applicant-selected year.

(d) *Designation of transferability.* Each permit issued to an applicant under paragraph (c) of this section will be designated as transferable or non-transferable.

(1) Minimum participation criteria for a transferable permit are described in paragraphs (d)(1)(i) and (d)(1)(ii) of this section as follows:

(i) Reported fifteen (15) bottomfish logbook fishing trips or more from the same vessel during one year of the qualifying period; and

(ii) Reported fifteen (15) halibut logbook fishing trips or more from the same vessel during the recent participation period.

(iii) The vessel used during the recent participation period is not required to be the same vessel used during the qualifying period.

(2) The number of transferable charter halibut permits issued to an applicant will be equal to the lesser of the number of vessels that met the minimum transferable permit qualifications described in paragraphs (d)(1)(i) or (d)(1)(ii) of this section.

(e) *Angler endorsement.* A charter halibut permit will be endorsed for the highest number of charter vessel anglers reported on any logbook fishing trip in the qualifying period except that:

(1) The angler endorsement number will be four (4) if the highest number of charter vessel anglers reported on any logbook fishing trip in the qualifying period is less than four (4) or no charter vessel anglers were reported on any of the applicant's logbook fishing trips in the applicant-selected year; and

(2) The angler endorsement number will be six (6) on a charter halibut permit issued pursuant to military service under paragraph (g)(3) of this section.

(f) For purposes of this section, the following terms are defined as follows:

(1) *Applicant-selected year* means the year in the qualifying period, 2004 or 2005, selected by the applicant for NMFS to use in determining the applicant's number of transferable and nontransferable permits.

(2) *Bottomfish logbook fishing trip* means a logbook fishing trip in the qualifying period that was reported to the State of Alaska in a Saltwater Charter Logbook with one of the following pieces of information: The statistical area(s) where bottomfish fishing occurred, the boat hours that the vessel engaged in bottomfish fishing, or the number of rods used from the vessel in bottomfish fishing.

(3) *Halibut logbook fishing trip* means a logbook fishing trip in the recent participation period that was reported to the State of Alaska in a Saltwater Charter Logbook within the time limit for reporting the trip in effect at the time of the trip with one of the following pieces of information: The number of halibut that was kept, the number of halibut that was released, the statistical area(s) where bottomfish fishing occurred, or the boat hours that the vessel engaged in bottomfish fishing.

(4) *Logbook fishing trip* means a bottomfish logbook fishing trip or a halibut logbook fishing trip that was reported as a trip to the State of Alaska in a Saltwater Charter Logbook within the time limits for reporting the trip in effect at the time of the trip, except that for multi-day trips, the number of trips will be equal to the number of days of the multi-day trip, *e.g.,* a two day trip will be counted as two trips.

(5) *Official charter halibut record* means the information prepared by NMFS on participation in charter halibut fishing in Area 2C and Area 3A that NMFS will use to implement the Charter Halibut Limited Access Program and evaluate applications for charter halibut permits.

(6) *Qualifying period* means the sport fishing season established by the International Pacific Halibut Commission (February 1 through December 31) in 2004 and 2005.

(7) *Recent participation period* means the sport fishing season established by the International Pacific Halibut Commission (February 1 through December 31) in 2008.

(g) *Unavoidable circumstance.* Unavoidable circumstance claims must be made pursuant to paragraph (h)(6) of this section, and will be limited to persons who would be excluded from the charter halibut fishery entirely unless their unavoidable circumstance is recognized. This unavoidable circumstance provision cannot be used to upgrade the number of permits issued or to change a non-transferable permit to a transferable permit, and is limited to the following circumstances.

(1) *Recent participation period.* An applicant for a charter halibut permit that meets the participation requirement for the qualifying period, but does not meet the participation requirement for the recent participation period, may receive one or more charter halibut permits if the applicant proves paragraphs (g)(1)(i) through (iv) of this section as follows:

(i) The applicant had a specific intent to operate a charter halibut fishing business in the recent participation period;

(ii) The applicant's specific intent was thwarted by a circumstance that was:

(A) Unavoidable;

(B) Unique to the owner of the charter halibut fishing business; and

(C) Unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business;

(iii) The circumstance that prevented the applicant from operating a charter halibut fishing business actually occurred; and

(iv) The applicant took all reasonable steps to overcome the circumstance that prevented the applicant from operating a charter halibut fishing business in the recent participation period.

(v) If the applicant proves the foregoing (*see* paragraphs (g)(1)(i) through (iv) of this section), the applicant will receive the number of transferable and non-transferable permits and the angler endorsements on these permits that result from the application of criteria in paragraphs (b), (c), (d), (e), and (f) of this section.

(2) *Qualifying period.* An applicant for a charter halibut permit that meets the participation requirement for the recent participation period but does not meet the participation requirement for the qualifying period, may receive one or more permits if the applicant proves paragraphs (g)(2)(i) through (iv) of this section as follows:

(i) The applicant had a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period;

(ii) The applicant's specific intent was thwarted by a circumstance that was:

(A) Unavoidable;

(B) Unique to the owner of the charter halibut fishing business; and

(C) Unforeseen and reasonably unforeseeable by the owner of the charter halibut fishing business;

(iii) The circumstance that prevented the applicant from operating a charter halibut fishing business actually occurred; and

(iv) The applicant took all reasonable steps to overcome the circumstance that prevented the applicant from operating a charter halibut fishing business in at least one year of the qualifying period.

(v) If the applicant proves the foregoing (*see* paragraphs (g)(2)(i) through (iv) of this section), the applicant will receive either:

(A) One non-transferable permit with an angler endorsement of four (4); or

(B) The number of transferable and non-transferable permits, and the angler endorsement on those permits, that result from the logbook fishing trips that the applicant proves likely would have taken by the applicant but for the circumstance that thwarted the applicant's specific intent to operate a charter halibut fishing business in one year of the qualifying period and the applicant did not participate during the other year of the qualifying period.

(3) *Military service.* An applicant for a charter halibut permit that meets the participation requirement in the recent participation period, but does not meet the participation requirement for the qualifying period, may receive one or more permits if the applicant proves the following:

(i) The applicant was ordered to report for active duty military service as a member of a branch of the U.S. military, National Guard, or military reserve during the qualifying period; and

(ii) The applicant had a specific intent to operate a charter halibut fishing business that was thwarted by the applicant's order to report for military service.

(iii) The number of transferable and non-transferable charter halibut permit(s) that an applicant may receive under paragraph (g)(3) of this section will be based on the criteria in paragraph (g)(2)(v)(B) of this section. Angler endorsements on all such charter halibut permits will be pursuant to paragraph (e)(2) of this section.

(h) *Application for a charter halibut permit.* (1) An application period of no less than 60 days will be specified by notice in the **Federal Register** during which any person may apply for a charter halibut permit. Any application that is submitted by mail and postmarked, or submitted by hand delivery or facsimile, after the last day of the application period will be denied. Electronic submission other than by facsimile will be denied. Applications must be submitted to the address given in the **Federal Register** notice of the application period.

(2) *Charter halibut permit.* To be complete, a charter halibut permit application must be signed and dated by the applicant, and the applicant must attest that, to the best of the applicant's knowledge, all statements in the application are true and the applicant complied with all legal requirements for logbook fishing trips in the qualifying period and recent participation period that were reported under the applicant's ADF&G Business Owner Licenses. An application for a charter halibut permit will be made available by NMFS. Completed applications may be submitted by mail, hand delivery, or facsimile at any time during the application period announced in the **Federal Register** notice of the application period described at paragraph (h)(1) of this section.

(3) *Application procedure.* NMFS will create the official charter halibut record and will accept all application claims that are consistent with the official charter halibut record. If an applicant's claim is not consistent with the official charter halibut record, NMFS will issue non-transferable interim permit(s) for all undisputed permit claims, and will respond to the applicant by letter specifying a 30-day evidentiary period during which the applicant may provide additional information or argument to support the applicant's claim for disputed permit(s). Limits on the 30-day evidentiary period are as follows:

(i) An applicant shall be limited to one 30-day evidentiary period; and

(ii) Additional information received after the 30-day evidentiary period has expired will not be considered for purposes of the initial administrative determination.

(4) After NMFS evaluates the additional information submitted by the applicant during the 30-day evidentiary period, it will take one of the following two actions.

(i) If NMFS determines that the applicant has met its burden of proving that the official charter halibut record is incorrect, NMFS will amend the official charter halibut record and use the official charter halibut record, as amended, to determine whether the applicant is eligible to receive one or more charter halibut permits, the nature of those permits and the angler and area endorsements on those permits; or

(ii) If NMFS determines that the applicant has not met its burden of proving that the official charter halibut record is incorrect, NMFS will notify the applicant by an initial administration determination, pursuant to paragraph (h)(5) of this section.

(5) *Initial Administration Determination (IAD).* NMFS will send an IAD to the applicant following the expiration of the 30-day evidentiary period if NMFS determines that the applicant has not met its burden of proving that the official charter halibut record is incorrect or that other reasons exist to initially deny the application. The IAD will indicate the deficiencies in the application and the deficiencies with the information submitted by the applicant in support of its claim.

(6) *Appeal.* An applicant that receives an IAD may appeal to the Office of Administrative Appeals (OAA) pursuant to § 679.43 of this title.

(i) If the applicant does not apply for a charter halibut permit within the application period specified in the **Federal Register**, the applicant will not receive any interim permits pending final agency action on the application.

(ii) If the applicant applies for a permit within the specified application period and OAA accepts the applicant's appeal, the applicant will receive the number and kind of interim permits which are not in dispute, according to the information in the official charter halibut record.

(iii) If the applicant applies for a permit within the specified application period and OAA accepts the applicant's appeal, but according to the information in the official charter halibut record, the applicant would not be issued any permits, the applicant will receive one interim permit with an angler endorsement of four (4).

(iv) All interim permits will be non-transferable and will expire when NMFS takes final agency action on the application.

(i) *Transfer of a charter halibut permit*—(1) *General.* A transfer of a charter halibut permit is valid only if it is approved by NMFS. NMFS will approve a transfer of a charter halibut permit if the permit to be transferred is a transferable permit issued under paragraph (d)(2) of this section, if a complete transfer application is submitted, and if the transfer application meets the standards for approval in paragraph (i)(2) of this section.

(2) *Standards for approval of transfers.* NMFS will transfer a transferable charter halibut permit to a person designated by the charter halibut

permit holder if, at the time of the transfer the following standards are met:

(i) The person designated to receive the transferred permit is a U.S. citizen or a U.S. business with a minimum of 75 percent U.S. ownership;

(ii) The parties to the transfer do not owe NMFS any fines, civil penalties or any other payments;

(iii) The transfer is not inconsistent with any sanctions resulting from Federal fishing violations;

(iv) The transfer will not cause the designated recipient of the permit to exceed the permit limit at paragraph (j) of this section, unless an exception to that limit applies;

(v) A transfer application is completed and approved by NMFS; and

(vi) The transfer does not violate any other provision in this part.

(3) For purposes of paragraph (i)(2) of this section, a U.S. business with a minimum of 75 percent U.S. ownership means a corporation, partnership, association, trust, joint venture, limited liability company, limited liability partnership, or any other entity where at least 75 percent of the interest in such entity, at each tier of ownership of such entity and in the aggregate, is owned and controlled by citizens of the United States.

(4) *Application to transfer a charter halibut permit.* To be complete, a charter halibut permit transfer application must have notarized and dated signatures of the applicants, and the applicants must attest that, to the best of the applicants' knowledge, all statements in the application are true. An application to transfer a charter halibut permit will be made available by NMFS. Completed transfer applications may be submitted by mail or hand delivery at any time to the addresses listed on the application. Electronic or facsimile deliveries will not be accepted.

(5) *Denied transfer applications.* If NMFS does not approve a charter halibut permit transfer application, NMFS will inform the applicant of the basis for its disapproval.

(6) *Transfer due to court order, operation of law or as part of a security agreement.* NMFS will transfer a charter halibut permit based on a court order, operation of law or a security agreement, if NMFS determines that a transfer application is complete and the transfer will not violate an eligibility criterion for transfers.

(j) *Charter halibut permit limitations*—(1) *General.* A person may not own, hold, or control more than five (5) charter halibut permits except as provided by paragraph (j)(4) of this section. NMFS will not approve a transfer application that would result in the applicant that would receive the transferred permit holding more than five (5) charter halibut permits except as provided by paragraph (j)(6) of this section.

(2) *Ten percent ownership criterion.* In determining whether two or more persons are the same person for purposes of paragraph (j)(1) of this section, NMFS will apply the definition of an ''affiliation for the purpose of defining AFA entities'' at § 679.2 of this title.

(3) A permit will cease to be a valid permit if the permit holder is:

(i) An individual and the individual dies; or

(ii) A non-individual (*e.g.,* corporation or partnership) and dissolves or changes as defined at paragraph (j)(5) of this section.

(iii) A transferable permit may be made valid by transfer to an eligible recipient.

(4) *Exception for initial recipients of permits.* Notwithstanding the limitation at paragraph (j)(1) of this section, NMFS may issue more than five (5) charter halibut permits to an initial recipient that meets the requirements described in paragraphs (b), (d), and (e) of this section for more than five (5) charter halibut permits, subject to the following limitations:

(i) This exception applies only to an initial recipient as the recipient exists at the time that it is initially issued the permits;

(ii) If an initial recipient of transferable permit(s) who is an individual dies, the individual's successor-in-interest may not hold more than five (5) charter halibut permits;

(iii) If an initial recipient permit holder that is a non-individual, such as a corporation or a partnership, dissolves or changes, NMFS will consider the new entity a new permit holder and the new permit holder may not hold more than five (5) charter halibut permits.

(5) For purposes of this paragraph (j), a ''change'' means:

(i) For an individual, the individual has died, in which case NMFS must be notified within 30 days of the individual's death; and

(ii) For a non-individual entity, the same as defined at § 679.42(j)(4)(i) of this title, in which case the permit holder must notify NMFS within 15 days of the effective date of the change as required at § 679.42(j)(5) of this title.

(6) *Exception for transfer of permits.* Notwithstanding the limitation at paragraph (j)(1) of this section, NMFS may approve a permit transfer application that would result in the person that would receive the transferred permit(s) holding more than five (5) transferable charter halibut permits if the parties to the transfer meet the following conditions:

(i) The designated person that would receive the transferred permits does not hold any charter halibut permits;

(ii) All permits that would be transferred are transferable permits;

(iii) The permits that would be transferred are all of the transferable permits that were awarded to an initial recipient who exceeded the permit limitation of five (5) permits; and

(iv) The person transferring its permits also is transferring its entire charter vessel fishing business, including all the assets of that business, to the designated person that would receive the transferred permits.

(k) *Community charter halibut permit*—(1) *General.* A Community Quota Entity (CQE), as defined in § 679.2 of this title, representing an eligible community listed in paragraph (k)(2) of this section, may receive one or more community charter halibut permits. A community charter halibut permit issued to a CQE will be designated for area 2C or area 3A, will be non-transferable, and will have an angler endorsement of six (6).

(2) *Eligible communities.* Each community charter halibut permit issued to a CQE under paragraph (k)(1) of this section will specify the name of an eligible community on the permit. Only the following communities are eligible to receive community charter halibut permits:

(i) For Area 2C: Angoon, Coffman Cove, Edna Bay, Hollis, Hoonah, Hydaburg, Kake, Kassan, Klawock, Metlakatla, Meyers Chuck, Pelican, Point Baker, Port Alexander, Port Protection, Tenakee, Thorne Bay, Whale Pass.

(ii) For Area 3A: Akhiok, Chenega Bay, Halibut Cove, Karluk, Larsen Bay, Nanwalek, Old Harbor, Ouzinkie, Port Graham, Port Lyons, Seldovia, Tatitlek, Tyonek, Yakutat.

(3) *Limitations.* The maximum number of community charter halibut permits that may be issued to a CQE for each eligible community the CQE represents is as follows:

(i) A CQE representing an eligible community or communities in regulatory area 2C may receive a maximum of four (4) community charter halibut permits per eligible community designated for Area 2C.

(ii) A CQE representing an eligible community or communities in regulatory area 3A may receive a maximum of seven (7) community charter halibut permits per eligible community designated for Area 3A.

(4) NMFS will not approve a transfer that will cause a CQE representing a community or communities to hold more than the total number of permits described in paragraphs (k)(4)(i) and (k)(4)(ii) of this section, per community, including community charter halibut permits granted to the CQE under this paragraph (k) and any charter halibut permits acquired by the CQE by transfer under paragraph (i) of this section.

(i) The maximum number of charter halibut and community charter halibut permits that may be held by a CQE per community represented by the CQE in regulatory area 2C is eight (8).

(ii) The maximum number of charter halibut and community charter halibut permits that may be held by a CQE per community represented by the CQE in regulatory area 3A is fourteen (14).

(5) *Limitation on use of permits.* The following limitations apply to community charter halibut permits issued to a CQE under paragraph (k)(1) of this section.

(i) Every charter vessel fishing trip authorized by such a permit and on which halibut are caught and retained must begin or end at a location(s) specified on the application for a community charter halibut permit and that is within the boundaries of the eligible community designated on the permit. The geographic boundaries of the eligible community will be those defined by the United States Census Bureau.

(ii) Community charter halibut permits may be used only within the regulatory area for which they are designated to catch and retain halibut.

(6) *Application procedure.* To be complete, a community charter halibut permit application must be signed and dated by the applicant, and the applicant must attest that, to the best of the applicants' knowledge, all statements in the application are true and complete. An application for a community charter halibut permit will be made available by NMFS and may be submitted by mail, hand delivery, or facsimile at any time to the address(s) listed on the application. Electronic deliveries other than facsimile will not be accepted.

(l) *Military charter halibut permit.* NMFS will issue a military charter halibut permit without an angler endorsement to an applicant provided that the applicant is a Morale, Welfare and Recreation Program of the United States Armed Services.

(1) *Limitations.* A military charter halibut permit is non-transferable and may be used only in the regulatory area (2C or 3A) designated on the permit.

(2) *Application procedure.* An applicant may apply for a military charter halibut permit at any time. To be complete, a military charter halibut permit application must be signed and dated by the applicant, and the applicant must attest that, to the best of the applicants' knowledge, all statements in the application are true and complete. An application for a military charter halibut permit will be made available by NMFS and may be submitted by mail, hand delivery, or facsimile at any time to the address(s) listed on the application. Electronic deliveries other than facsimile will not be accepted.

50 CFR Chapter VI

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 7. The authority citation for part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.;* 1801 *et seq.;* 3631 *et seq.;* Pub. L. 108–447.

■ 8. In § 679.2, revise the introductory text for the definition of ''community quota entity (CQE)'' to read as follows:

§ 679.2 Definitions.

* * * * *

Community quota entity (CQE) means a non-profit organization that:

* * * * *

[FR Doc. E9–30662 Filed 1–4–10; 8:45 am]

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Federal Register

Tuesday,
January 5, 2010

Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Listing Foreign Bird Species in Peru and Bolivia as Endangered Throughout Their Range; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R9-IA-2009-0059]
[96100-1671-0000-B6]

[RIN 1018-AV77]

Endangered and Threatened Wildlife and Plants; Listing Foreign Bird Species in Peru and Bolivia as Endangered Throughout Their Range

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list the following six South American bird species (collectively referred to as ''species'' for purposes of this proposed rule) as endangered under the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*): ash-breasted tit-tyrant (*Anairetes alpinus*), Junín grebe (*Podiceps taczanowskii*), Junín rail (*Laterallus tuerosi*), Peruvian plantcutter (*Phytotoma raimondii*), royal cinclodes (*Cinclodes aricomae*), and white-browed tit-spinetail (*Leptasthenura xenothorax*)—all native to Peru. The ash-breasted tit-tyrant and royal cinclodes are also native to Bolivia. 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 March 8, 2010. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by February 19, 2010.

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

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments on Docket No. FWS-R9-IA-2009-0059.
- U.S. mail or hand-delivery: Public Comments Processing, Attn: FWS-R9-IA-2009-0059; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept comments by e-mail or fax. 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), 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 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) Additional 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 such 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 at *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 a species to, remove a species from, or reclassify a species on the Federal Lists of Endangered and Threatened Wildlife and Plants has presented substantial information indicating that the requested action may be warranted. To the maximum extent practicable, we make the finding within 90 days following receipt of the petition and publish our finding 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 (''12–month finding'') on whether the requested action is warranted, not warranted, or warranted but precluded by higher priority listing actions. 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 review (ANOR) of findings on resubmitted petitions for all foreign species for which listings were previously found to be warranted but precluded.

Previous Federal Actions

On May 6, 1991, we received a petition (the 1991 petition) from the International Council for Bird Preservation (ICBP) to add 53 foreign bird species to the List of Endangered and Threatened Wildlife, including the six Peruvian bird species that are the subject of this proposed rule. In response to the 1991 petition, we published a substantial 90–day finding on December 16, 1991 (56 FR 65207), for all 53 species and initiated 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 (which included 15 species from the 1991 petition). In that

document, we announced our finding that listing the remaining 38 species from the 1991 petition, including the six Peruvian bird species that are the subject of this proposed rule, was warranted but precluded by higher priority listing actions. We made a subsequent warranted–but-precluded finding for all outstanding foreign species from the 1991 petition, including the six Peruvian bird species that are the subject of this proposed rule, as published in our ANOR on May 21, 2004 (69 FR 29354).

Per the Service's listing priority guidelines (September 21, 1983; 48 FR 43098), our 2007 ANOR identified the listing priority numbers (LPNs) (ranging from 1 to 12) for all outstanding foreign species. The six Peruvian bird species that are the subject of 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 actions. A listing priority of 2 indicates that the subject species face imminent threats of high magnitude. With the exception of the listing priority ranking of 1, which addresses monotypic genera that face imminent threats of high magnitude, categories 2 and 3 represent the Service's highest priorities.

On July 29, 2008 (73 FR 44062), we published in the **Federal Register** a notice announcing our annual petition findings for foreign species. In that notice, we announced listing to be warranted for 30 foreign bird species, including the six Peruvian bird species which are the subject of this proposed rule, and stated that we would ''promptly publish proposals to list these 30 taxa.'' In selecting these six species from the list of warranted-but-precluded species, we took into consideration the magnitude and immediacy of the threats to the species, consistent with the Service's listing priority guidelines.

On September 8, 2008, the Service received a 60–day notice of intent to sue from the Center for Biological Diversity (CBD) and Peter Galvin over violations of section 4 of the Act for the Service's failure to promptly publish listing proposals for the 30 ''warranted'' species identified in our 2008 ANOR. Under a settlement agreement approved by the U.S. District Court for the Northern District of California on June 15, 2009, (CBD, *et al.* v. *Salazar*, 09-cv-02578-CRB), the Service must submit to the **Federal Register** proposed listing rules for the ash-breasted tit-tyrant, Junín grebe, Junín rail, Peruvian plantcutter, royal cinclodes, and white-browed tit-spinetail by December 29, 2009.

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. Listing actions may be warranted based on any of the above threat factors, singly or in combination.

Below is a species-by-species analysis of the five factors. The species are considered in alphabetical order, beginning with the ash-breasted tit-tyrant, followed by the Junín grebe, Junín rail, Peruvian plantcutter, royal cinclodes, and the white-browed tit-spinetail.

I. Ash-breasted tit-tyrant (*Anairetes alpinus*)

Species Description

The ash-breasted tit-tyrant, locally known as ''*torito pechicenizo*,'' is a small New World tyrant flycatcher in the Tyrannidae family that is native to high-altitude woodlands of the Bolivian and Peruvian Andes (BirdLife International (BLI) 2000, p. 392; Collar *et al.* 1992, p. 753; del Hoyo *et al.* 2004, pp. 170, 281; Fjeldså and Krabbe 1990, pp. 468-469; InfoNatura 2007, p. 1; Supreme Decree No. 034-2004-AG 2004, p. 276854). The sexes are similar, with adults approximately 5 inches (in) (13 centimeters (cm)) in length, with dark gray, inconspicuously black-streaked upperparts (BLI 2009o, p. 1; del Hoyo *et al.* 2004, p. 281). Two subspecies (see Taxonomy) are distinguished by their underbelly color, which is yellowish-white in the nominate subspecies and white in the other (BLI 2009o, p. 1) (see Taxonomy). Juvenile plumage is duller in appearance, but otherwise similar to the adult coloration (del Hoyo *et al.* 2004, p. 281).

Taxonomy

When the species was first taxonomically described by Carriker (1933, pp. 27-29), it was placed in its own genus, *Yanacea*; this decision was soon questioned by Zimmer (1940, p. 10). It was not until the 1960s that *Yanacea* was merged into *Anairetes* (a genus long-known as *Spizitornis*) by Meyer de Schauensee (1966, p. 376). Some contemporary researchers have suggested retaining the species within *Yanacea* (Fjeldså and Krabbe 1990, p. 468). Smith (1971, pp. 269, 275) and Roy *et al.* (1999, p. 74) confirmed that the ash-breasted tit tyrant is a valid species based on its phylogenetic placement and degree of genetic divergence from other species of *Anairetes*, and recent texts continue to place it in *Anairetes* (e.g., del Hoyo *et al.* 2004, p. 281). Therefore, we accept the species as *Anairetes alpinus*, which also follows the Integrated Taxonomic Information System (ITIS 2009, p. 1). Two subspecies are recognized, including, *A. alpinus alpinus* (the nominate subspecies) and *A. alpinus bolivianus*. These subspecies occur in two disjunct (widely separated) areas (see Current Range) (BLI 2000, p. 392; del Hoyo *et al.* 2004, p. 281; ITIS 2009, p. 1) and are distinguished by the color of their underbellies (see Taxonomy) (BLI 2009o, p. 1).

Habitat and Life History

The ash-breasted tit-tyrant is restricted to semihumid *Polylepis* or *Polylepis - Gynoxys* woodlands, where the species is found at elevations between 12,139 and 15,092 feet (ft) (3,700 and 4,600 meters (m)) above sea level (BLI 2000, p. 392; Collar *et al.* 1992, p. 753; del Hoyo *et al.* 2004, p. 281; Fjeldså and Krabbe 1990, pp. 468-469; InfoNatura 2007, p. 1). The genus *Polylepis* (no English common name; locally referred to as ''*queuña*'') (Aucca and Ramsay 2005, p. 1), in the Rosaceae family, comprises approximately 20 species of evergreen bushes and trees (De la Via 2004, p. 10; Kessler 1998, p. 1; Kessler and Schmidt-Lebuhn 2006, pp. 1-2), 19 of which occur in Peru (Chutas *et al.* 2008, p. 3). In Bolivia, the ash-breasted tit-tyrant is associated only with *P. pepei* forests, but the bird is found among a greater variety of *Polylepis* species in Peru (Chutas *et al.* 2008, p. 16; I. Gómez, National Museum of National History-Ornithology Section-Bolivian Fauna Collection, La Paz, Bolivia, e-mail to Division of Scientific Authority, in litt. December 4, 2007, p. 1). On average, *Polylepis* species are 10-33 ft (3-10 m) tall, but may grow to a height of 118 ft (36 m) (Purcell *et al.* 2004, p. 455).

Polylepis woodlands occur as dense forests, as open-canopied stands with more arid understories, or as shrubland with scattered trees (De la Via 2004, pp. 10-11; Fjeldså and Kessler 1996, as cited in Fjeldså 2002a, p. 113; Lloyd and

Marsden in press, as cited in Lloyd 2008, p. 532). Ash-breasted tit-tyrants prefer dense *Polylepis* forests (Fjeldså 2002a, p. 114; Smith 1971, p. 269), which often include a mixture of *Gynoxys* trees (no common name), in the Asteraceae family (De la Via 2004, pp. 10; International Plant Names Index (IPNI) 2009, p. 1). Dense *Polylepis* woodlands are characterized by moss- or vine-laden vegetation, with a shaded understory and a rich diversity of insects, making good feeding grounds for insectivorous birds (De la Via 2004, p. 10), such as the ash-breasted tit-tyrant (BLI 2009o, p. 1; Lloyd 2008, p. 535).

There is little information about the ecology and breeding behavior of the ash-breasted tit-tyrant. The species' territory ranges from 2.5–5 acres (ac) (1–2 hectares (ha)) (BLI 2009o, p. 1). The breeding season appears to occur during late dry season (Collar *et al.* 1992, p. 754)—November and December (BLI 2009o, p. 1). Juveniles have been observed in March and July (Collar *et al.* 1992, p. 754; del Hoyo *et al.* 2004, p. 281). Although species-specific information is not available, tit-tyrant nests are generally finely woven, open cups, built in a bush (Fjeldså and Krabbe 1990, p. 468). The species may share in rearing responsibilities, as pairs of ash-breasted tit-tyrants have been observed feeding young (BLI 2009o, p. 1; Collar *et al.* 1992, p. 754).

The ash-breasted tit-tyrant forages alone, in family groups, and sometimes in mixed-species flocks. The bird takes short flights, either hovering or perching to consume invertebrates near the tops and outer edges of *Polylepis* shrubs and trees (BLI 2009o, p. 1; del Hoyo *et al.* 2004, p. 281; Engblom *et al.* 2002, p. 58; Fjeldså and Krabbe 1990, p. 468; Lloyd 2008, p. 535). In winter, when invertebrate populations diminish, tit-tyrants may also forage on seeds (Fjeldså and Krabbe 1990, p. 468).

Historical Range and Distribution

The ash-breasted tit-tyrant may once have been well-distributed throughout previously dense and contiguous *Polylepis* high-Andes woodlands of Peru and Bolivia. Researchers believe that these woodlands were historically contiguous with lower-elevation cloudforests and widespread above 9,843 ft (3,000 m) (Collar *et al.* 1992, p. 753; Fjeldså 2002a, pp. 111-112, 115; Herzog *et al.* 2002, p. 94; Kessler 2002, pp. 97-101). Today, *Polylepis* woodlands are found only at elevations of 11,483 to 16,404 ft (3,500 to 5,000 m) (Fjeldså 1992, p. 10). Researchers consider the reduction in *Polylepis* forest habitat to be the result of historical human activities, including burning and grazing, which have prevented regeneration of the woodlands and resulted in the fragmented habitat distribution seen today (Fjeldså and Kessler 1996, Kessler 1995a, Kessler 1995b, and Lægaard 1992, as cited in Fjeldså 2002a, p. 112; Herzog *et al.* 2002, p. 94; Kessler 2002, pp. 97-101; Kessler and Herzog 1998, pp. 50-51). Modeling studies by Fjeldså (2002a, p. 116) indicate that this habitat reduction was accompanied by a loss in species richness. It is estimated that only 2-3 and 10 percent of the original forest cover still remain in Peru and Bolivia, respectively (Fjeldså and Kessler 1996, as cited in Fjeldså 2002a, p. 113). Of this amount, only 1 percent of the remaining *Polylepis* woodlands are found in humid areas, where denser stands occur (Fjeldså and Kessler 1996, as cited in Fjeldså 2002a, p. 113) and which are preferred by the ash-breasted tit-tyrant (BLI 2009o, p. 1; Fjeldså 2002a, p. 114; Lloyd 2008, p. 535; Smith 1971, p. 269) (see Factor A).

Current Range and Distribution

The current range of the ash-breasted tit-tyrant is estimated to be 4,595 square miles (mi^2) (11,900 square kilometers (km^2)) (BLI 2009o, p. 1). However, BirdLife International (2000, pp. 22, 27) defines a species' ''Range'' as the ''Extent of Occurrence,'' which is ''the area contained within the shortest continuous imaginary boundary which can be drawn to encompass all the known, inferred, or projected sites of present occurrence of a species, excluding cases of vagrancy.'' Given that the species is known to occur in two disjunct locations, this range estimate, therefore, includes a large area of habitat where the species is not known to occur.

The species is restricted to patches of high-elevation semihumid *Polylepis* or *Polylepis - Gynoxys* woodlands of Peru and Bolivia, where ash-breasted tit-tyrant is found only at 12,139–15,092 ft (3,700–4,600 m) (BLI 2000, p. 392; Collar *et al.* 1992, p. 753; del Hoyo *et al.* 2004, pp. 170, 281; Fjeldså and Krabbe 1990, pp. 468-469; InfoNatura 2007, p. 1). The ash-breasted tit-tyrant is known only in two disjunct areas: one location in west-central Peru and another ranging from southern Peru into northern Bolivia (BLI 2000, p. 392; del Hoyo *et al.* 2004, p. 281; ITIS 2009, p. 1).

In west-central Peru, the northern subspecies (*A. alpinus alpinus*) occurs in the Cordilleras Central and Occidental (in the Peruvian Administrative Regions of Ancash, Huánuco, La Libertad, and Lima) (BLI 2007, p. 1; BLI 2009g, p. 1; BLI 2009i, p. 1; BLI 2009l, p. 1; BLI 2009o, p. 1; Collar *et al.* 1992, p. 753; del Hoyo *et al.* 2004, p. 281). Until 1992, the taxon in this locality was highly localized and known only in Ancash Region (Collar *et al.* 1992, p. 753). The species was subsequently reported in Huánuco Region, in 2003 (BLI 2007, p. 5; BLI 2009i, p. 1); La Libertad Region, in 2004 (del Hoyo *et al.* 2004, p. 281); and Lima Region and again in Huánuco Region, in 2007 (BLI 2007, pp. 1, 5). Also in 2007, the ash-breasted tit-tyrant was also observed in a new locality in Ancash Region, Corredor Conchucos (Chutas 2007, pp. 4, 8), where a *Polylepis* reforestation project is under way to connect two protected areas where ash-breasted tit-tyrants were already known to occur, Parque Nacional Huascarán and Zona Reservada de la Cordillera Huayhuash (Antamina Mine 2006, p. 5; MacLennan 2009, p. 1) (see Factor A).

The second location spans the Peruvian-Bolivian border—in the Peruvian Administrative Regions of Apurímac, Cusco, Puno, and Arequipa (from north to south) and in the Bolivian Department of La Paz. Here, the southern subspecies (*A. alpinus bolivianus*) occurs in Cordillera Oriental (Apurímac and Cusco), Cordilleras Vilcanota and Vilcabamba (Cusco), and Cordillera de Carabaya (Puno)—in Peru—and ranges into Bolivia, where it is found in the Cordillera Real and the Cordillera Apolobamba (La Paz) (BLI 2000, p. 392; BLI 2009a, p. 1; BLI 2009b, p. 1; BLI 2009c, p. 1; BLI 2009d, p. 1; BLI 2009e, p. 1; BLI 2009f, p. 1; BLI 2009k, p. 1; BLI 2009m, p. 1; BLI 2009n, p. 1; BLI 2009o, p. 5; Chutas 2007, p. 8; Collar *et al.* 1992, p. 753; del Hoyo *et al.* 2004, p. 281; Fjeldså and Krabbe 1990, pp. 468-469; InfoNatura 2007, p. 1). The ash-breasted tit-tyrant was only recently (in 2008) reported in Arequipa Region, Peru (BLI 2009j, p. 1).

The ash-breasted tit-tyrant is highly localized (Collar *et al.* 1992, p. 753) and has been described as ''very rare and local, with usually only 1–2 pairs per occupied woodland'' (Fjeldså and Krabbe 1990, p. 469). It exists at such low densities in some places that it goes undetected (Collar *et al.* 1992, p. 753). The species appears to be unable to persist in forest remnants smaller than 2.5 ac (1 ha) (BLI 2009o, p. 1).

Population Estimates

Population information is presented first on the range country level and then in terms of a global population estimate. The range country estimates begin with Peru, where the majority of the population resides.

Local population estimate, Peru: Chutas (2007, p. 8) surveyed five

disjunct *Polylepis* forest patches in Peru and estimated that 461 ash-breasted tit-tyrants were located there. This included 30 birds in Corredor Conchucos (Ancash Region); 181 birds and 33 birds in Cordilleras Vilcanota and Vilcabamba, respectively (Cusco Region); 22 birds in Cordillera de Carabaya (Puno Region); and 195 birds in a study site called ''Cordillera del Apurímac'' (Apurímac Region) (Chutas 2007, pp. 4, 8), referring to an area within the Runtacocha highlands. Other research in the Runtacocha highlands has indicated that the ash-breasted tit-tyrant is ''relatively common'' there (BLI 2007, p. 1; BLI 2009o, p. 1), with an estimated 100 pairs of birds found in approximately 40 forest patches (Fjeldså in litt. 1990, as cited in Collar *et al.* 1992, p. 753). ''Small numbers'' of birds are reported in La Libertad Region (del Hoyo *et al.* 2004, p. 281). There are no population estimates within Arequipa, Huánuco, or Lima Regions, where the ash-breasted tit-tyrant is also reported to occur (BLI 2009g, p. 1; BLI 2009i, p. 1; BLI 2009j, p. 1; BLI 2009o, p. 1).

Local population estimate, Bolivia: Although BirdLife International reports an estimated population size of 150–300 ash-breasted tit-tyrants in Bolivia (Gómez in litt., 2003 and 2007, as cited in BLI 2009o, p. 1), recent surveys indicate that the estimate is smaller. Over a six-year period, Gómez (in litt. 2007, p. 1) conducted intensive searches throughout 80 percent of the suitable habitat in Bolivia in the Cordillera Real and the Cordillera Apolobamba (La Paz Department), using song playback and point census, to detect the presence of the ash-breasted tit-tyrant. From this work, researchers inferred or observed the presence of 2–10 individuals in each of four forest patches and estimated that approximately 180 ash-breasted tit-tyrants occur in Bolivia.

Global population estimate: BirdLife International, a global organization that consults with and assimilates information from species experts, categorizes the ash-breasted tit-tyrant as having a population size between 250 and 999 individuals, with an estimated actual population size to be in the mid- to upper-hundreds (BLI 2000, p. 392; BLI 2007, p. 1; BLI 2009o, p. 1). Combining the estimated number of ash-breasted tit-tyrants in Peru and Bolivia, the total population consists of at least 641 individuals (Chutas 2007, pp. 4, 8; Gómez in litt. 2007, p. 1), consistent with the BirdLife International category of 250–999 individuals.

However, the total population size, which includes immature individuals, is not an accurate reflection of the species' effective population size (the number of breeding individuals that contribute to the next generation) (Shaffer 1981, pp. 132-133; Soulé 1980, pp. 160-162). Because the ash-breasted tit-tyrant exists as two subspecies (BLI 2000, p. 392; BLI 2009a, p. 1; BLI 2009b, p. 1; BLI 2009c, p. 1; BLI 2009d, p. 1; BLI 2009e, p. 1; BLI 2009f, p. 1; BLI 2009k, p. 1; BLI 2009m, p. 1; BLI 2009n, p. 1; BLI 2009o, p. 5; Chutas 2007, p. 8; Collar *et al.* 1992, p. 753; del Hoyo *et al.* 2004, p. 281; Fjeldså and Krabbe 1990, pp. 468-469; InfoNatura 2007, p. 1; ITIS 2009, p. 1), it is reasonable to conclude that there is little or no gene flow between the two subspecies and that the species does not breed as a single population. Therefore, even if all 641 individuals were mature, they would not breed as a single population, such that the species' effective population size is less than 641.

There are also constraints to determining the effective population size on a subspecies level. According to International Union for Conservation of Nature (IUCN) criteria, it is estimated that there are no more than 250 mature individuals in any single subpopulation of the ash-breasted tit-tyrant (IUCN 2001, pp. 8-12). However, the parameters of a subpopulation are not provided in existing research. For instance, while ash-breasted tit-tyrants occupy territories of 2.5–5 ac (1–2 ha) (BLI 2009o, p. 1), there is no information as to the taxon's ability or tendency to travel between territories or forest patches. Research on Bolivian localities indicates that gene flow occurs between some subpopulations, but not all (Gómez 2005, p. 86). In Bolivia, where only 1 subspecies occurs, the birds are distributed in 2 metapopulations, with at least 5 subpopulations in one location and 14 subpopulations in the other (Gómez 2005, p. 86). Peruvian population estimates are incomplete, with no estimates for the ash-breasted tit-tyrants occurring in Arequipa, Huánuco, La Libertad or Lima (BLI 2009g, p. 1; BLI 2009i, p. 1; BLI 2009j, p. 1; BLI 2009o, p. 1; del Hoyo *et al.* 2004, p. 281). Therefore, we can conclude that gene flow occurs at the subspecies level, but there is not sufficient information to determine the extent to which subpopulations interbreed.

The species has experienced a population decline of between 10 and 19 percent in the past 10 years, and this rate of decline is predicted to continue (BLI 2009o, pp. 1, 4). The population is considered to be declining in close association with continued habitat loss and degradation (see Factors A and E) (BLI 2007, pp. 1, 4; BLI 2009o, p. 5).

Conservation Status

The ash-breasted tit-tyrant is considered ''endangered'' by the Peruvian Government under Supreme Decree No. 034-2004-AG (2004, p. 276855). The IUCN considers the ash-breasted tit-tyrant to be ''Endangered'' because it has a very small population that is undergoing continued decline in the number of mature individuals and is confined to a habitat that is severely fragmented and is also undergoing a continuing decline in extent, area, and quality (BLI 2008, p. 1; BLI 2009o, p. 4; IUCN 2001, pp. 8-12). The ash-breasted tit-tyrant occurs within the following Peruvian protected areas: Parque Nacional Huascarán, in Ancash, and Santuario Histórico Machu Picchu, in Cusco, and Zona Reservada de la Cordillera Huayhuash, spanning Ancash, Huánuco, and Lima (BLI 2009i, p. 1; BLI 2009l, p. 1; BLI 2009n, p. 1; Chutas *et al.* 2008, p. 16). In La Paz Department, Bolivia, the species is found in Parque Nacional y área Natural de Manejo Integrado Madidi, Parque Nacional y área Natural de Manejo Integrado Cotapata, and the co-located protected areas of Reserva Nacional de Fauna de Apolobamba, área Natural de Manejo Integrado de Apolobamba, and Reserva de la Biosfera de Apolobamba (Auza and Hennessey 2005, p. 81; BLI 2009a, p. 1; BLI 2009b, p. 1; BLI 2009c, p. 1; BLI 2009e, p. 1; BLI 2009i, p. 1; Chutas *et al.* 2008, p. 16).

Summary of Factors Affecting the Ash-breasted Tit-tyrant

A. The Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

The ash-breasted tit-tyrant is dependent upon high-elevation semihumid *Polylepis* or *Polylepis - Gynoxys* woodlands (BLI 2000, p. 392; Collar *et al.* 1992, p. 753; del Hoyo *et al.* 2004, pp. 281; Fjeldså and Krabbe 1990, pp. 468-469; InfoNatura 2007, p. 1). Researchers believe that this habitat was historically contiguous with lower-elevation cloudforests and widespread above 9,843 ft (3,000 m) (Collar *et al.* 1992, p. 753; Fjeldså 2002a, pp. 111, 115), but *Polylepis* woodlands occur today only between 11,483–16,404 ft (3,500–5,000 m) (Fjeldså 1992, p. 10). As described above (see Habitat and Life History), the species prefers dense woodlands (Fjeldså 2002a, p. 114; Smith 1971, p. 269), where the best foraging habitat occurs (De la Via 2004, p. 10), and ash-breasted tit-tyrant occurs at altitudes of 12,139–15,092 ft (3,700–4,600 m) (BLI 2000, p. 392; Collar *et al.* 1992, p. 753; del Hoyo *et al.* 2004, pp.

170, 281; Fjeldså and Krabbe 1990, pp. 468-469; InfoNatura 2007, p. 1).

High-Andean *Polylepis* woodlands are considered by experts to be the most threatened habitat in Peru and Bolivia (Purcell *et al.* 2004, p. 457), throughout the Andean region (BLI 2009a, p. 2), and one of the most threatened woodland ecosystems in the world (Renison *et al.* 2005, as cited in Lloyd 2009, p. 10). The IUCN has listed several *Polylepis* species as ''Vulnerable,'' including two species that occur within the ash-breasted tit-tyrant's range, *Polylepis incana* and *P. pepei* (WCMC 1998a, p. 1; WCMC 1998b, p. 1). Peruvian and Bolivian *Polylepis* woodlands today are highly fragmented. In the late 1990s, Fjeldså and Kessler (1996, as cited in Fjeldså 2002a, p. 113) conducted comprehensive ground surveys and analyzed maps and satellite images of the area. They estimated that the current range of *Polylepis* woodlands had been reduced from historical levels by 97–98% in Peru and 90 percent in Bolivia. Contemporary *Polylepis* woodlands are dispersed and sparse, covering an estimated area of 386 mi^2 (1,000 km^2) and 1,931 mi^2 (5,000 km^2) in Peru and Bolivia, respectively (Fjeldså and Kessler 1996, as cited in Fjeldså 2002a, p. 113). Of the remaining *Polylepis* woodlands, only 1 percent are found in humid areas, where denser *Polylepis* forests tend to occur (Fjeldså and Kessler 1996, as cited in Fjeldså 2002a, p. 113). Dense habitat is preferred by the ash-breasted tit-tyrant (BLI 2009o, p. 1; Fjeldså 2002a, p. 114; Lloyd 2008, p. 535; Smith 1971, p. 269).

Habitat loss, conversion, and degradation throughout the ash-breasted tit-tyrant's range have been and continue to occur as a result of ongoing human activity, including (1) Clearcutting and burning; (2) extractive activities; (3) human encroachment; and (4) unpredictable climate fluctuations that exacerbate the effects of habitat fragmentation. Clearcutting and burning are among the most destructive activities, and are a leading cause for *Polylepis* habitat loss (WCMC 1998a, p. 1; WCMC 1998b, p. 1). Forested areas are cleared for agriculture and to create pastureland for cattle, sheep, and camels (BLI 2009a, p. 2; BLI 2009c, pp. 1-2; BLI 2009d, pp. 1-2; BLI 2009e, pp. 1, 5; BLI 2009h, p. 1; BLI 2009m, p. 1; BLI 2009n, p. 4). Grazing lands situated amongst remaining forest patches are regularly burned in order to maintain the grassland vegetation (locally known as, ''*chaqueo*''). Regular burning prevents regeneration of native forests and is considered the key factor limiting the distribution of *Polylepis* forests (BLI 2009f, p. 1; BLI 2009n, p. 4; Fjeldså 2002b, p. 8; WCMC 1998a, p. 1; WCMC 1998b, p. 1). In some areas, the burns escape control, causing further habitat destruction (BLI 2009a, p. 2; BLI 2009e, pp. 1, 5). Burning and clearcutting occur throughout the ash-breasted tit-tyrant's range, including in Ancash (BLI 2009h, p. 1), Apurímac (BLI 2009m, p. 1), and Cusco (BLI 2009n, p. 4), in Peru; and La Paz, Bolivia (BLI 2009a, p. 2; BLI 2009c, pp. 1-2; BLI 2009d, pp. 1-2; BLI 2009e, pp. 1, 5). These activities are also ongoing within protected areas, including Parque Nacional Huascarán, Santuario Histórico Machu Picchu, and Zona Reservada de la Cordillera Huayhuash (Barrio 2005, p. 564; BLI 2009l, p. 4; BLI 2009n, p. 2) (see Factor D).

As a result of the intensity of burning and grazing, *Polylepis* species are restricted to areas where fires cannot spread, and where cattle and sheep do not normally roam—in stream ravines and on boulders, rock ledges, and sandy ridges (Fjeldså 2002a, p. 112; Fjeldså 2002b, p. 8). Grazing and trampling by domesticated animals further limit forest regeneration (Fjeldså 2002a, p. 120) and contribute to the degradation of remaining forest patches. Sheep and cattle have solid, sharp hooves that churn up the earth, damaging vegetation and triggering erosion (Engblom *et al.* 2002, p. 56; Purcell *et al.* 2004, p. 458). The loss of nutrient-rich soils leads to habitat degradation, which reduces the ability of the habitat to support dense stands of *Polylepis* woodlands (Fjeldså 2002b, p. 8; Jameson and Ramsay 2007, p. 42; Purcell *et al.* 2004, p. 458).

Ash-breasted tit-tyrant habitat is also subject to conversion, degradation, or destruction caused by extractive activities, such as firewood collection, timber harvest, and mining. Cutting wood for fuel has a consistent and ongoing impact throughout the species' range (BLI 2009a, p. 2; BLI 2009b, pp. 1-2; BLI 2009c, pp. 1-2; BLI 2009d, pp. 1-2; BLI 2009f, p. 1; BLI 2009l, p. 1; WCMC 1998a, p. 1). The high-altitude zones where *Polylepis* occurs have long been inhabited by subsistence farmers, who rely on *Polylepis* wood for firewood and charcoal production (Aucca and Ramsay 2005, p. 287). Many locals manage woodlands for firewood extraction (Engblom *et al.* 2002, p. 56), and community-based *Polylepis* conservation programs fostered by the Peruvian nongovernmental organization Asociación Ecosistemas Andinos (ECOAN) have been under way in Peru and Bolivia since 2004, encompassing Cordilleras Vilcanota and Vilcabamba (Cusco Region), highlands of the Apurímac Region (Aucca and Ramsey 2005, p. 287; ECOAN no date (n.d.), p. 1; Lloyd 2009, p. 10), and in the Ancash Region (MacLennan 2009, p. 2). Known as the ''Vilcanota Project'' or ECOAN Projects (Aucca and Ramsey 2005, p. 287; ECOAN n.d., p. 1), local communities enter into and enforce management agreements aimed at the primary causes for *Polylepis* deforestation: burning, grazing, and wood-cutting. These projects foster local, sustainable use of resources (Aucca and Ramsay 2005, p. 287; ECOAN n.d., p. 1; Engblom *et al.* 2002, p. 56), such as the use of more fuel-efficient wood-burning stoves that require half the amount of wood fuel (MacLennan 2009, p. 2) (see the Factor A analyses for royal cinclodes and white-browed tit-spinetail for additional examples).

Polylepis wood is also harvested for local commercial use, including within protected areas (BLI 2009a, p. 2; WCMC 1998a, p. 1) (Factor D). At one site, near Abra Málaga (Cusco Region), wood is harvested for sale to local hotels in the towns of Urubamba and Ollantaytambo to support tourism activity (Engblom 2000, p. 1). Engblom (2000, p. 1) documented felling for firewood at this site in Cusco over a 2–day period that significantly reduced the size and quality of the forest patch. Purcell *et al.* (2004, p. 458) noted a positive correlation between habitat destruction and increased demand for (and the concomitant rise in the price of) fuel. *Polylepis* is also harvested for construction, fencing, and tool-making (Aucca and Ramsey 2005, p. 287; BLI 2009a, p. 2). Commercial-scale activities, such as clearcutting, logging, tourism, and infrastructure development, are ongoing throughout this species' range, and alter otherwise sustainable resource use practices (Aucca and Ramsay 2005, p. 287; Engblom 2000, p. 2; Engblom *et al.* 2002, p. 56; MacLennan 2009, p. 2; Purcell and Brelsford 2004, pp. 156-157; Purcell *et al.* 2004, pp. 458-459; WCMC 1998a, p. 1). Commercial-scale resource use is exacerbated by ongoing human encroachment, discussed below.

Mining in *Polylepis* habitat occurs in the Peruvian Regions of Ancash and Huánaco and in the Bolivian Department of La Paz (BLI 2009b, p. 1; BLI 2009d, p. 1; BLI 2009g, p. 1). Ancash (Peru) is home to the largest zinc and copper mine ''in the world,'' with a monthly average production rate of 231,485 pounds (105,000 metric tons) of minerals per day and a 186-mile (mi) (300 kilometer (km)) pipeline that stretches from the mine to the port of Punta Lobitos along the coast (Antamina Mine 2006, pp. 4, 9; *www.antamina.com/02_operacion/*

En_puerto.html). Mining occurs in ash-breast tit-tyrant habitat in La Paz, Bolivia, where there are active gold, tin, silver, and tungsten mines, in addition to gravel excavation for cement production (USGS Minerals Yearbook 2005, pp. 4-7). Antamina Mine has undertaken habitat conservation programs within the areas affected by mineral extraction, similar to the ECOAN *Polylepis* conservation programs, investing millions of dollars in programs ranging from education and tourism, to organic agriculture and sustainable development. However, tourism has had negative effects in other areas where the ash-breasted tit-tyrant occurs, including Ancash, Huánuco, and Lima, Peru, and La Paz, Bolivia (Barrio 2005, p. 564; BLI 2009e, p. 5) (see below). The Antamina Mining Company conservation program also supports the planned reforestation of 123,552 ac (50,000 ha) of *Polylepis* forest that will connect two protected areas, Parque Nacional Huascarán and Zona Reservada de la Cordillera Huayhuash (Antamina Mine 2006, p. 5). To date, the project has succeeded in restoring 371 ac (150 ha) of forest, with a 95 percent survival rate (MacLennan 2009, p. 1). Known as Corredor Conchucos, at least 30 ash-breasted tit-tyrants have recently been observed there (Chutas 2007, p. 8).

Human encroachment and concomitant increasing human population pressures exacerbate the destructive effects of ongoing human activities throughout the ash-breasted tit-tyrant's habitat. Mining and hydroelectric projects open new areas to exploitation and attract people seeking employment (Purcell *et al.* 2004, p. 458). Increased urbanization and mining have led to increased infrastructure development. Road building and mining projects further facilitate human access to remaining *Polylepis* forest fragments, throughout the ash-breasted tit-tyrant's range (Purcell *et al.* 2004, pp. 458-459; Purcell and Brelsford, 2004, pp. 156-157), including protected areas. In the Bolivian Department of La Paz, one of the most transited highways in the country is located a short distance from the Parque Nacional y área Natural de Manejo Integrado Cotapata (BLI 2009b, p. 2) (see Factor D). Road building, mining, and other large-scale resource exploitations are considered to have major impacts on the habitat, as compared to exploitation by local communities (Purcell and Brelsford 2004, p. 157).

Ecotourism within protected areas where the ash-breasted tit-tyrant occurs (such as in the Zona Reservada de la Cordillera Huayhuash in Peru, and in the Apolobamba protected areas in Bolivia) is considered a growing problem (Barrio 2005, p. 564; BLI 2009e, p. 5) (see Factor D). In the Department of La Paz, Bolivia, which encompasses Bolivia's largest urban area, most of the *Polylepis* forest had been eliminated prior to the late 1990s (Purcell and Brelsford 2004, p. 157). Recently, an accelerated rate of *Polylepis* forest destruction has been attributed to clearcutting for road building and industrialization projects, such as mining and construction of hydroelectric power stations (Purcell and Brelsford 2004, pp. 156-157). Between 1991 and 2003, approximately 494 ac (200 ha) of *Polylepis* habitat was destroyed. Thus, nearly two-thirds of the forest cover that existed in the 1990s no longer existed in 2003 (Purcell and Brelsford 2004, p. 155). With this research, it was estimated that only 1,285 ac (520 ha) of *Polylepis* forest remain in the Bolivian Department of La Paz, representing approximately a 40 percent rate of habitat loss in just over one decade. The researchers inferred that thisrate of destruction could result in extirpation of the remaining *Polylepis* forest in La Paz within the next 30 years (Purcell and Brelsford 2004, pp. 157).

Larger concentrations of people put greater demand on the natural resources in the area. Increasing demand for firewood upsets informal and otherwise sustainable community-based forest management traditions (Purcell and Brelsford, 2004, p. 157). Increasing human populations in the high-Andes of Bolivia and Peru have also resulted in a scarcity of arable land. This has led many farmers to burn down additional patches of *Polylepis* forests to plant crops, even on steep hillsides not suitable for cultivation (BLI 2009b, p. 2; BLI 2009h, p. 1; Hensen 2002, p. 199). These ongoing farming practices result in the rapid loss of *Polylepis* forests from Bolivia to Peru.

Habitat destruction is often caused by a combination of human activities that promote habitat degradation. In the Cordillera de Vilcanota (Cusco, Peru), where an estimated 181 birds are found (Chutas 2007, pp. 4, 8), the rate of habitat loss was studied by comparing forest cover between 1956 and 2005. This study revealed a rate of habitat loss averaging only 1 percent. However, remaining patches of *Polylepis* woodland were small, with a mean patch size of 7.4 ac (3 ha); four forest patches had disappeared completely; and no new patches were located within the study area (Jameson and Ramsay 2007, p. 42). Lloyd (2008, p. 532) studied bird foraging habits at three *Polylepis* woodland sites in the Cordillera Vilcanota during 2003–2005. The sites were described as highly fragmented, consisting of many small remnant patches (less than 2.5 ac (1 ha)) and scattered trees, separated from larger woodland tracts (greater than 25 ac (10 ha)) by distances of 98–4,921 ft (30–1,500 m) (Lloyd and Marsden in press, as cited in Lloyd 2008, p. 532). Given that the species territory ranges from 2.5–5 ac (1–2 ha) and that the ash-breasted tit-tyrant appears to be unable to persist in forest remnants smaller than 2.5 ac (1 ha) (BLI 2009o, p. 1), these patch sizes have met or are approaching the lower threshold of the species' ecological requirements. Moreover, 10 percent of the remaining forest patches showed a decline in forest density over this time-period.

Thus, habitat degradation also has serious impacts in *Polylepis* woodlands (Jameson and Ramsay 2007, p. 42), especially given the species' preference for dense woodlands (Fjeldså 2002a, p. 114; Smith 1971, p. 269). The fact that no new *Polylepis* forest patches had become established between 1956 and 2005 underscores the long-term ramifications of ongoing burning, clearing, grazing, and other habitat-altering human activities that are pervasive throughout the ash-breasted tit-tyrant's range (BLI 2009f, p. 1; BLI 2009n, p. 4; Fjeldså 2002b, p. 8; WCMC 1998a, p. 1; WCMC 1998b, p. 1). These activities are considered to be key factors both in preventing regeneration of *Polylepis* woodlands (Fjeldså 2002a, p. 112, 120; Fjeldså 2002b, p. 8) and in the historical decline of *Polylepis* -dependent bird species, including the ash-breasted tit-tyrant (Fjeldså 2002a, p. 116). Researchers consider the species' population to be declining in close association with the continued habitat loss and degradation (BLI 2007, pp. 1, 4; BLI 2008, p. 1; BLI 2009o, p. 1). Therefore, further habitat loss will continue to impact the species' already small population size (see Factor E).

Peru is subject to unpredictable climate fluctuations that exacerbate the effects of habitat fragmentation, such as those that are related to the El Niño Southern Oscillation (ENSO). According to the U.S. Dept. of Commerce–National Oceanic and Atmospheric Administration (NOAA), the term ENSO refers to a range of variability associated with the southern trade winds in the eastern and central equatorial Pacific Ocean. El Niño events are characterized by unusual warming of the ocean, while La Niña events bring cooler ocean temperatures (Tropical Atmosphere Ocean (TAO) Project no date (n.d.), p. 1). Generally speaking, extreme ENSO events alter weather patterns, so that

precipitation increases in normally dry areas, and decreases in normally wet areas. During an El Niño event, rainfall dramatically increases, whereas a La Niña event brings near-drought conditions (Holmgren *et al.* 2001, p. 89).

If we consider that wildlife habitat is not only defined by substrates (vegetation, soil, water), but also atmospheric conditions, then changes in air temperature and moisture can effectively change a species' habitat. Climate change is characterized by variations in the earth's temperature and precipitation, causing changes in atmospheric, oceanic, and terrestrial conditions (Parmesan and Mathews 2005, p. 334). Global climate change and other periodic climatic patterns (e.g., El Niño and La Niña) can cause or exacerbate such negative impacts on a broad range of terrestrial ecosystems and Neotropical bird populations (England 2000, p. 86; Holmgren *et al.* 2001, p. 89; Plumart 2007, pp. 1-2; Timmermann 1999, p. 694).

Unpredictable climate fluctuations negatively impact populations undergoing habitat fragmentation. In the face of an unpredictable climate, the risk of population decline due to habitat fragmentation is heightened. Mora *et al.* (2007, p. 1027) found that the combined effects of habitat fragmentation and climate change (in this case, warming) had a synergistic effect, rather than additive. In other words, the interactive effects of both climate fluctuation and habitat fragmentation led to a greater population decline than if either climate change or habitat fragmentation were acting alone on populations. Jetz *et al.* (2007, p. 1211) investigated the effects of climate change on 8,750 land bird species, including the ash-breasted tit-tyrant, that are exposed to ongoing manmade land cover changes (i.e., habitat loss). They determined that a narrow endemic, such as the ash-breasted tit-tyrant, is likely to suffer greater impacts from climate change, especially where projected range contractions are driven by manmade land conversion activities (Jetz *et al.* 2007, p. 1213). This is due to the species' already small population size, specialized habitat requirements, and heightened risk of extinction from stochastic demographic processes (see also Factor E). According to this study, by 2050, up to 18 percent of the ash-breasted tit-tyrant's current remaining range is likely to be unsuitable for this species due to climate change; and, by 2100, it is predicted that about 18 to 42 percent of the species' range is likely to be lost as a direct result of global climate change (Jetz *et al.* 2007, Supplementary Table 2, p. 73).

In 1999, Timmermann (1999, p. 694) predicted that climate change events would increase the periodicity and severity of droughts and excessive rainfalls, such as those caused by El Niño and La Niña events. Evidence suggests that this is the case in Peru (Richter 2005, p. 24-25). Over the past decade, there have been four El Niño events (1997–1998, 2002–2003, 2004–2005, and 2006–2007) and three La Niña events (1998-2000, 2000-2001, and 2007-2008) (National Weather Service (NWS) 2009, p. 2). In Peru, the Andean highlands, and *Polylepis* species in particular, are strongly influenced by ENSO events (Christie *et al.* 2008, p. 1). Christie *et al.* (2008, p. 1) found that tree growth in *P. tarapacana* is highly influenced by ENSO events because ENSO cycles on the Peruvian Coast are strongest during the growing season (December–February). ENSO-related droughts can increase tree mortality and dramatically alter age structure within tree populations, especially where woodlands have undergone disturbance, such as fire and grazing (Villalba and Veblen 1997, pp. 121-123; Villalba and Veblen 1998, pp. 2624, 2637).

With years of extremely high rainfall followed by years of extremely dry weather (Block and Richter 2007, p. 1), fire hazard is increased from the biomass accumulated during the wet period that dries and adds to the fuel load in the dry season (Block and Richter 2007, p. 1; Power *et al.* 2007, p. 898). Evidence suggests that the fire cycle in Peru has shortened, particularly in coastal Peru and west of the Andes (Power *et al.* 2007, pp. 897-898). Changes in the fire-regime can have broad ecological consequences (Block and Richter 2007, p. 1; Power *et al.* 2007, p. 898). In the case of the ash-breasted tit-tyrant, burning is considered to be a key factor preventing *Polylepis* regeneration (Fjeldså 2002a, p. 112, 120; Fjeldså 2002b, p. 8). Research in Ecuadorian *Polylepis - Gynoxys* mixed woodlands indicated a strong reduction in *P. incana* adult and seedling survival following a single fire. This indicates that the species does not recover well from even a single fire event (Cierjacks *et al.* 2007, p. 176). An accelerated fire cycle would exacerbate this situation.

Activities that destroy and alter habitat are ongoing within protected areas. This is further discussed under Factor D.

Summary of Factor A

The ash-breasted tit-tyrant is dependent on *Polylepis* habitat, with a preference for dense woodlands. *Polylepis* habitat throughout the ash-breasted tit-tyrant's range has been and continues to be altered and destroyed as a result of human activities, including clearcutting and burning for agriculture, grazing lands, tourism, and industrialization; extractive activities, including firewood, timber, and mineral extraction; and human encroachment and concomitant increased pressure on natural resources. Researchers estimate that 1 percent of the dense woodlands preferred by the species remains, and that all remaining habitat is fragmented and degraded. The ash-breasted tit-tyrant currently occupies an area of approximately 4,595 mi^2 (11,900 km^2) and appears to be unable to persist in forest remnants smaller than 2.5 ac (1 ha). Forest fragments in some portions of the ash-breasted tit-tyrant's range are approaching the lower threshold of the species' ecological requirements. The historical decline of habitat suitable for this species is attributed to the same human activities that are causing habitat loss today. Ongoing and accelerated habitat destruction of the remaining *Polylepis* forest fragments in Peru and Bolivia continues to reduce the quantity, quality, distribution, and regeneration of remaining patches. Human activities that degrade, alter, and destroy habitat are ongoing throughout the species' range, including within protected areas (see also Factor D). Current research indicates that climate fluctuations exacerbate the risks to species that are already undergoing range reduction due to habitat alteration. Climate models predict that this species' habitat will continue to decline. Experts consider the species' population decline to be commensurate with the declining habitat (Factor E). Therefore, we find that destruction and modification of habitat are threats to the continued existence of the ash-breasted tit-tyrant throughout its range.

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

We are not aware of any information currently available that indicates that overutilization of the species for commercial, recreational, scientific, or educational purposes has occurred or is occurring at this time. As a result, we are not considering overutilization to be a threat to the continued existence of the ash-breasted tit-tyrant.

C. Disease or Predation

We are not aware of any scientific or commercial information that indicate disease or predation poses a threat to this species. As a result, we are not considering disease or predation to be a

threat to the continued existence of the ash-breasted tit-tyrant.

D. Inadequacy of Existing Regulatory Mechanisms

This analysis of regulatory mechanisms is discussed on a country-by-country basis, beginning with Peru.

Peru: The ash-breasted tit-tyrant is considered ''endangered'' by the Peruvian Government under Supreme Decree No. 034-2004-AG (2004, p. 276855). This Decree prohibits hunting, take, transport, and trade of protected species, except as permitted by regulation. As hunting, take, transport, and trade are not currently threats to the ash-breasted tit-tyrant (Factor B), this regulation does not mitigate any current threats to this species.

The Peruvian national protected area system includes several categories of habitat protection. Habitat may be designated as any of the following: (1) Parque Nacional (National Park, an area managed mainly for ecosystem conservation and recreation); (2) Santuario (Sanctuary, for the preservation of sites of notable natural or historical importance); (3) Reserva Nacional (National Reserve, for sustainable extraction of certain biological resources); (4) Bosque de Protección (Protection Forest, to safeguard soils and forests, especially for watershed conservation); (5) Zona Reservada (Reserved Zone, for temporary protection while further study is under way to determine their importance); (6) Bosque Nacional (National Forest, to be managed for utilization); (7) Reserva Comunal (Communal Reserve, for local area use and management, with national oversight); and (8) Cotos de Caza (Hunting Reserve, for local use and management, with national oversight) (BLI 2008, p. 1; Rodríguez and Young 2000, p. 330). National reserves, national forests, communal reserves, and hunting reserves are managed for the sustainable use of resources (IUCN 1994, p. 2). The designations of National Parks, Sanctuaries, and Protection Forests, are established by supreme decree that supersedes all other legal claim to the land and, thus, these areas tend to provide more habitat protection. All other protected areas are established by supreme resolution, which is viewed as a less powerful form of protection (Rodríguez and Young 2000, p. 330).

Protected areas have been established through regulation in at least three sites occupied by the ash-breasted tit-tyrant in Peru: Parque Nacional Huascarán (Ancash), and Santuario Histórico Machu Picchu (Cusco); and Zona Reservada de la Cordillera Huayhuash (spanning Ancash, Huánuco, and Lima) (Barrio 2005, p. 563; BLI 2009i, p. 1; BLI 2009l, p. 1; BLI 2009n, p. 1). Habitat destruction and alteration, including burning, cutting, and grazing are ongoing within Parque Nacional Huascarán and Santuario Histórico Machu Picchu (BLI 2009l, p. 4; BLI 2009n, p. 2; Engblom *et al.* 2002, p. 58), where resources are supposed to be managed for conservation (Rodríguez and Young 2000, p. 330). Reserved zones are intended to be protected pending further study (Rodríguez and Young 2000, p. 330). However, burning for habitat conversion and maintenance of pastures for grazing and increasing ecotourism are ongoing within Zona Reservada de la Cordillera Huayhuash (Barrio 2005, p. 564). Therefore, the occurrence of the ash-breasted tit-tyrant within protected areas in Peru does not protect the species, nor does it mitigate the threats to the species from ongoing habitat loss (Factor A) and concomitant population decline (Factor E).

Recent studies by the Peruvian Society for Environmental Law (SPDA) have concluded that there are approximately 5,000 laws and regulations directly or indirectly related to environmental protection and natural resource conservation in Peru. However, many of these are not effective because of limited implementation and/or enforcement capability (Muller 2001, pp. 1-2).

Bolivia: The 1975 Law on Wildlife, National Parks, Hunting and Fishing (Decree Law No. 12,301 1975, pp. 1-34) has the fundamental objective of protecting the country's natural resources. This law governs the protection, management, utilization, transportation, and selling of wildlife and their products; the protection of endangered species; habitat conservation of fauna and flora; and the declaration of national parks, biological reserves, refuges, and wildlife sanctuaries, tending to the preservation, promotion, and rational use of these resources (Decree Law No. 12,301 1975, pp. 1-34; eLAW 2003, p. 2). Although this law designates national protection for all wildlife, there is no information as to the actual protections this confers to ash-breasted tit-tyrants. Law No. 12,301 (1975, pp. 1-34) also placed into public trust all national parks, reserves, refuges, and wildlife sanctuaries. However, there is no specific information as to the governmental protections afforded within the protected areas to either the ash-breasted tit-tyrant or its habitat. Given the ongoing habitat destruction throughout the species' range in Bolivia, this law does not protect the species, nor does it mitigate the threats to the species from ongoing habitat loss (Factor A) and concomitant population decline (Factor E).

Bolivia passed an overarching environmental law in 1992 (Law No. 1,333 1992), with the intent of protecting and conserving the environment and natural resources. However, there is no specific legislation to implement these laws (eLAW 2003, p. 1). Therefore, we cannot determine that this law protects the species or mitigates the threats to the species from ongoing habitat loss (Factor A) and concomitant population decline (Factor E).

In Bolivia, habitat is protected either on the national or departmental level through the following designations: (1) Parque (Park, for strict and permanent protection of representative of ecosystems and provincial habitats, as well as plant and animal resources, along with the geographical, scenic and natural landscapes that contain them); (2) Santuario (Sanctuary, for the strict and permanent protection of sites that house endemic plants and animals that are threatened or in danger of extinction); (3) Monumento Natural (Natural Monument, to preserve areas such as those with distinctive natural landscapes or geologic formations, and to conserve the biological diversity contained therein); (4) Reserva de Vida Silvestre (Wildlife Reserve, for protection, management, sustainable use and monitoring of wildlife); (5) Area Natural de Manejo Integrado (Natural Area of Integrated Management, where conservation of biological diversity is balanced with sustainable development of the local population; and (6) Reserva Natural de Inmovilización (''Immobilized'' Natural Reserve, a temporary (5–year) designation for an area that requires further research before any official designations can be made and during which time no natural resource concessions can be made within the area) (Supreme Decree No. 24,781 1997, p. 3). Within parks, sanctuaries and natural monuments, extraction or consumption of all resources are prohibited, except for ''scientific research, eco-tourism, environmental education, and activities of subsistence of original towns, properly described and authorized.'' National protected areas are under the management of the national government, while departmental protected areas are managed at the department level (eLAW 2003, p. 3; Supreme Decree No. 24,781 1997, p. 3).

The ash-breasted tit-tyrant occurs within several protected areas in the Department of La Paz, Bolivia: Parque Nacional y área Natural de Manejo

Integrado Madidi, Parque Nacional y área Natural de Manejo Integrado Cotapata, and the co-located protected areas of Reserva Nacional de Fauna de Apolobamba, área Natural de Manejo Integrado de Apolobamba, and Reserva de la Biosfera de Apolobamba (Auza and Hennessey 2005, p. 81; BLI 2009a, p. 1; BLI 2009b, p. 1; BLI 2009c, p. 1; BLI 2009e, p. 1). Although national parks are intended to be strictly protected, the two parks in which the species occurs (Parque Nacional y área Natural de Manejo Integrado Madidi and Parque Nacional y área Natural de Manejo Integrado Cotapata) are also designated as areas of integrated management, which are managed for the biological conservation balanced with the sustainable development of the local population (Supreme Decree No. 24,781 1997, p. 3). Grazing and firewood extraction are ongoing within Parque Nacional y área Natural de Manejo Integrado Cotapata (BLI 2009b, p. 2; BLI 2009c, p. 2). Commercial logging has occurred within Parque Nacional y área Natural de Manejo Integrado Madidi (BLI 2009a, p. 2; WCMC 1998a, p. 1). Uncontrolled clearing, extensive agriculture, grazing, and ''irresponsible'' tourism are ongoing within the Apolobamba protected areas (Auza and Hennessey 2005, p. 81; BLI 2009e, p. 5). Habitat degradation and destruction from grazing, forest fires, and timber extraction are ongoing in other protected areas, such as Tunari National Park (Department of Cochabamba, Bolivia), where suitable habitat exists for this species (De la Vie 2004, p. 7). Therefore, the occurrence of the ash-breasted tit-tyrant within protected areas in Bolivia does not protect the species, nor does it mitigate the threats to the species from ongoing habitat loss (Factor A) and concomitant population decline (Factor E).

Summary of Factor D

Peru and Bolivia have enacted various laws and regulatory mechanisms to protect and manage wildlife and their habitats. The ash-breasted tit-tyrant is ''endangered'' under Peruvian law and occurs within several protected areas in Peru and Bolivia. As discussed under Factor A, the ash-breasted tit-tyrant prefers dense woodlands, which have been reduced by an estimated 99 percent in Peru and Bolivia, and the remaining habitat is fragmented and degraded. Habitat throughout the species' range has been and continues to be altered as a result of human activities, including clearcutting and burning for agriculture, grazing lands, and industrialization; extractive activities, including, firewood, timber, and mineral extraction; and human encroachment and concomitant increased pressure on natural resources. Despite the species' ''endangered'' status in Peru and Bolivian laws intended to protect all wildlife and natural resources, these activities are ongoing within protected areas, indicating that the laws governing wildlife and habitat protection in both countries are either inadequate or inadequately enforced to protect the species or to mitigate ongoing habitat loss (Factor A) and population declines (Factor E). Therefore, we find that the existing regulatory mechanisms are inadequate to mitigate the current threats to the continued existence of the ash-breasted tit-tyrant throughout its range.

E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

An additional factor that affects the continued existence of the ash-breasted tit-tyrant is the species' small population size. As discussed above (see Population Estimates), the global population estimate is not an accurate reflection of the species' effective population size because gene flow does not occur between the subspecies. At the same time, there is insufficient information on the subspecies or subpopulation level (in terms of numbers of individuals and breeding structure) to estimate the effective population size at the subspecies level. However, with an estimated global population size in the mid- to upper-hundreds (BLI 2000, p. 392; BLI 2007, p. 1; BLI 2009o, p. 1), and the most recent estimate of 641 individuals (Chutas 2007, pp. 4, 8; Gómez in litt. 2007, p. 1), the ash-breasted tit-tyrant is considered to have a ''very small population'' size (BLI 2000, p. 392; BLI 2008, p. 1; BLI 2009o, p. 1).

Small population size renders a species vulnerable to any of several risks, including inbreeding depression, loss of genetic variation, and accumulation of new mutations. 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 (harmful gene sequences) or by reducing the overall fitness of individuals in the population (Charlesworth and Charlesworth 1987, p. 231; Shaffer 1981, p. 131). Small, isolated wildlife populations are also more susceptible to environmental fluctuations and demographic shifts (Pimm *et al.* 1988, pp. 757, 773-775; Shaffer 1981, p. 131), such as reduced reproductive success of individuals and chance disequilibrium of sex ratios. Species tend to have a higher risk of extinction if they occupy a small geographic range and occur at low density (Purvis *et al.* 2000, p. 1949).

The ash-breasted tit-tyrant population declined at a rate between 10 and 19 percent in the past 10 years, and this decline is expected to continue in close association with continued habitat loss and degradation (see Factor A) (BLI 2009o, p. 1). Extinction risk is heightened in small, declining populations by an increased vulnerability to the loss of genetic variation due to inbreeding depression and genetic drift (changes in relative frequency of gene sequences). This, in turn, compromises a species' ability to adapt genetically to changing environments (Frankham 1996, p. 1507) and reduces fitness, thus increasing extinction risk (Reed and Frankham 2003, pp. 233-234). 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).

Complications arising from the species' small population size are exacerbated by the species' fragmented distribution. The ash-breasted tit-tyrant is currently confined to restricted and severely fragmented forest patches in the high Andes of Peru and Bolivia (BLI 2000, p. 392; BLI 2007, pp. 1; BLI 2008, p. 1; BLI 2009o, p. 1; Collar *et al.* 1992, p. 753; Fjeldså and Kessler 1996, as cited in Fjeldså 2002a, p. 113; del Hoyo *et al.* 2004, p. 281; InfoNatura 2007, p. 1) , where it is estimated that only 1 percent of the dense woodlands preferred by the species remain (Fjeldså 2002a, p. 114; Smith 1971, p. 269) (see Habitat and Life History). Habitat fragmentation can cause genetic isolation and heighten the risks to the species associated with short-term genetic viability. Species with a small population size, combined with a restricted and severely fragmented range, are exposed to increased vulnerability to adverse natural events and manmade activities that destroy individuals and their habitat (Holsinger 2000, pp. 64-65; Primack 1998, pp. 279-308; Young and Clarke 2000, pp. 361-366).

Summary of Factor E

The ash-breasted tit-tyrant has a small population size that renders it vulnerable to genetic risks that negatively impact the species' viability. The species occurs in two disjunct

populations, where habitat is highly fragmented and continues to be altered by human activities (Factor A). The restricted and fragmented range, as well as its small population size, increases the species' vulnerability to extinction, through demographic or environmental fluctuations. Based on its small population size and fragmented distribution, we have determined that the ash-breasted tit-tyrant is particularly vulnerable to the threat of adverse natural events (e.g., genetic, demographic, or environmental) and human activities (e.g., deforestation, habitat alteration, and infrastructure development) that destroy individuals and their habitat. The genetic and demographic risks associated with small population sizes are exacerbated by ongoing human activities that continue to curtail the species' habitat throughout its range. The species' population has declined and is predicted to continue declining commensurate with ongoing habitat loss (Factor A). Therefore, we find that the species' small population size, in concert with its fragmented distribution and its heightened vulnerability to adverse natural events and manmade activities, are threats to the continued existence of the ash-breasted tit-tyrant throughout its range.

Status Determination for the Ash-Breasted Tit-Tyrant

The ash-breasted tit-tyrant, a small New World tyrant flycatcher, exists in two disjunct areas in Peru and Bolivia. Preferring dense, semihumid *Polylepis* or *Polylepis* -mixed woodlands, the ash-breasted tit-tyrant occupies a narrow range of distribution, at elevations between 12,139 and 15,092 ft (3,700 and 4,600 m). The species has a highly restricted and severely fragmented range (approximately 4,595 mi^2 (11,900 km^2)), and is known only in two disjunct areas: one location in west-central Peru (in the Peruvian Administrative Regions of Ancash, Huánuco, La Libertad, and Lima) and another location ranging from southern Peru (Apurímac, Cusco, Puno, and Arequipa Regions) into northern Bolivia (in the Department of La Paz). The known population of the ash-breasted tit-tyrant is estimated to be 641 individuals.

We have carefully assessed the best available scientific and commercial information regarding the past, present, and potential future threats faced by the ash-breasted tit-tyrant and have concluded that there are three primary factors that threaten the continued existence of the ash-breasted tit-tyrant: (1) Habitat destruction, fragmentation, and degradation; (2) limited size and isolation of remaining populations; and (3) inadequate regulatory mechanisms.

Human activities that degrade, alter, and destroy habitat are ongoing throughout the ash-breasted tit-tyrant's range. Widespread deforestation and the conversion of forests for grazing, agriculture, and human settlement have led to the fragmentation and degradation of habitat throughout the range of the ash-breasted tit-tyrant (Factor A). Researchers estimate that only 1 percent of the dense *Polylepis* woodlands preferred by the species remain extant. Limited by the availability of suitable habitat, the species occurs today only in some of these fragmented and disjunct locations. Ash-breasted tit-tyrant habitat continues to be altered by human activities, such as burning, grazing, extractive activities, and human encroachment, which result in the continued degradation, conversion, and destruction of habitat and reduce the quantity, quality, distribution, and regeneration of remaining forest patches.

The ash-breasted tit-tyrant population is small, rendering the species particularly vulnerable to the threat of adverse natural events (e.g., genetic, demographic, or environmental) and human activities (e.g., deforestation and habitat alteration) that destroy individuals and their habitat. Ongoing human activities that curtail the species' habitat throughout its range exacerbate the genetic and demographic risks associated with small population sizes (Factor E). The population has declined 10–19 percent in the past 10 years (see Population Estimates), and is predicted to continue declining commensurate with ongoing habitat loss (Factor A). Habitat loss was a factor in the ash-breasted tit-tyrant's historical population decline (see Historical Range and Distribution), and the species is considered to be declining today in association with the continued reduction in habitat (Factors A and E). Moreover, current research indicates that narrow endemics, such as the ash-breasted tit-tyrant, are especially susceptible to climate fluctuations, because of the synergistic effect these fluctuations have on declining populations that are also experiencing range reductions due to human activities (Factor A).

Despite the species' ''endangered'' status in Peru and its occurrence within several protected areas in Peru and Bolivia (Factor D), human activities that degrade, alter, and destroy habitat are ongoing throughout the species' range, including within protected areas. Therefore, regulatory mechanisms are either inadequate or ineffective at curbing the threats to the ash-breasted tit-tyrant of habitat loss (Factor A) and corresponding population decline (Factor E).

Section 3 of the Act defines an ''endangered species'' as ''any species which is in danger of extinction throughout all or a significant portion of its range'' and a ''threatened species'' as ''any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' Based on the immediate and ongoing threats to the ash-breasted tit-tyrant throughout its entire range, as described above, we determine that the ash-breasted tit-tyrant is in danger of extinction throughout all of its range. Therefore, on the basis of the best available scientific and commercial information, we are proposing to list the ash-breasted tit-tyrant as an endangered species throughout all of its range.

II. Junín grebe (*Podiceps taczanowskii*)

Species Description

The Junín grebe is a highly social, flightless water bird in the *Podicipedidae* family that is endemic to a single location (Lake Junín) in Peru. Other common names for the species (in English) are: Junín flightless grebe, puna grebe, and Taczanowski's grebe. This species is also known by two Spanish names: ''*zampullín del Junín*'' or ''*zambullidor de Junín*'' (del Hoyo *et al.* 1992, p. 195; Fjeldså 2004, p. 199; Instituto Nacional de Recursos Naturales (INRENA) 1996, p. 3; Ramsen *et al.* 2007, p. 18; Supreme Decree 034-2004-AG 2004, p. 276854).

A slim, long-necked bird, the Junín grebe is about 13.78 in (35 cm) in length, and its weight ranges from 0.66 to 1.04 pounds (0.30 to 0.47 kilograms) (BLI 2009b, p. 1; UNEP-WCMC 2009, p. 1). The Junín grebe has a pointed head, with dark feathers on its back, a white throat, and mottled, dusky-colored underparts. This grebe is distinguished by its slender gray bill, red iris, and dull yellow-orange colored feet. Immature birds are darker gray on the flanks than mature birds (BLI 2009b, p. 1).

Taxonomy

The Junín grebe was taxonomically described by Berlepsch and Stolzmann in 1894 (ITIS 2009, p. 1). It is one of nine species of grebes in the genus *Podiceps* worldwide (Dickinson 2003, p.80). The species' taxonomic status as *Podiceps taczanowskii* is valid (ITIS 2009, p. 1).

Habitat and Life History

The Junín grebe is endemic to the open waters and marshlands of Lake Junín, located at 13,390 ft (4,080 m) above sea level in the Peruvian Administrative Region of Junín (BLI 2003, p. 1; BLI 2009b, p. 1). The 57-mi² (147-km²) lake, also known as ''*Chinchaycocha*'' or ''*Lago de Junín*,'' is large but fairly shallow (BLI 2003, p. 1; BLI 2009a, p. 1; BLI 2009b, p. 1; ParksWatch 2009, p. 1; Tello 2007, p. 1). Situated within ''*puna*'' habitat, the climate is seasonal and can be ''bitterly cold'' in the dry season (Fjeldså 1981, p. 240). Local vegetation is characterized by tall dense grasslands and scrubland with open, rocky areas, all interspersed with wetlands and woodlands (BLI 2003, p. 1; ParksWatch 2009, pp. 1, 4). The dominant terrestrial plant species surrounding the lake includes 43 species of grass (*Poaceae* family), 15 species of asters (*Asteraceae* family), and 10 species of legumes (*Fabaceae* family) (ParksWatch 2009, p. 1). Aquatic vegetation includes Andean watermilfoil (*Myriophyllum quitense*), several species of pondweed (including *Elodea potamogeton, Potamogeton ferrugineus*, and *P. filliformis*), and bladderwort (*Utricularia* spp.). Floating plants, such as duckweed (*Lemna* species (spp.)), large duckweed (*Spiodela* spp.), and water fern (*Azolla filiculoides*), also occur on the lake (ParksWatch 2009, p. 2). The Lake is surrounded by extensive marshland along the lake shore (BLI 2009a, p. 1; BLI 2009b, p. 1) that extends into the lake up to 1–3 mi (2–5 km) from shore (O'Donnel and Fjeldså 1997, p. 29). The marshes are dominated by two robust species of cattails, giant bulrush (*Schoenoplectus californicus* var. *totara*) and totorilla (*Juncus articus* var. *andicola*) (Fjeldså 1981, pp. 244, 246). Both cattail species can reach nearly 6.6 ft (2 m) in height. These plant communities, or ''*tortoras*,'' grow so densely that stands are often impenetrable (ParksWatch 2009, p. 1). In shallow water, during low lake levels, ''*tortora*'' communities can become partially or completely dry (BLI 2009b, p. 1; ParksWatch 2009, p. 2).

Lake Junín supports one of the richest and most diverse arrays of bird species of all Peruvian high Andean wetlands (ParksWatch 2009, p. 3). These bird species include migratory birds, birds that nest at high altitude, aquatic birds, and local endemic species, such as the Junín grebe and the Junín rail (*Laterallus tuerosi*; also the subject of this proposed rule), the giant coot (*Fulica ardesiaca*), and the Chilean flamingo (*Phoenicopterus chilensis*) (BLI 2009a, pp. 2-3; ParksWatch 2009, p. 3; Tello 2007, p. 2). Mammals are relatively scarce in the area, although there are some predators (ParksWatch 2009, p. 4) (see Factor C).

Breeding season for this species occurs annually from November to March (Fjeldså 1981, pp. 44, 246; O'Donnel and Fjeldså 1997, p. 29). The Junín grebe nests in the protective cover of the marshlands during the breeding season (Fjeldså 1981, p. 247; Tello 2007, p. 3), particularly in stands of giant bulrush (ParksWatch 2009, p. 4). Under natural conditions, winter rains increase the lake water level during the breeding season, allowing the grebes to venture into local bays and canals, although they are never found nesting on the lake's shore (Tello 2007, p. 3). The species nests in the giant bulrush marshlands (ParksWatch 2009, p. 4). Well-hidden floating nests can contain up to three eggs, with an average of two eggs, laid during November and December (Fjeldså 1981, p. 245). The species is believed to have a deferred sexual maturation (Fjeldså 2004, p. 201) and exhibits low breeding potential, perhaps as a reflection to adaptation to a ''highly predictable, stable environment'' (del Hoyo *et al.* 1992, p. 195), laying one clutch during the breeding season (ParksWatch 2009, p. 4). Junín grebes occasionally produce a replacement clutch if their original nest is disturbed (Fjeldså 2004, pp. 199, 201). After the eggs hatch, the male grebe cares for the chicks, and does not leave the nest to feed. The female grebe is responsible for feeding the male and chicks until the chicks can leave the nest (Tello 2007, p. 3). The Junín grebe is likely a long-lived species (Fjeldså 2004, p. 201), and its breeding success and population size are highly influenced by the climate (BLI 2008, pp. 1, 3-4; BLI 2009b, p. 2; Elton 2000, p. 3; Fjeldså 2004, p. 200; Hirshfeld 2007, p. 107) (see Factor A).

The Junín grebe feeds in the open waters of the lake and around the marsh edges, moving into the open waters of the lake to feed where it is easier to dive for food during the winter (Fjeldså 1981, pp. 247-248; Tello 2007, p. 3). Fish (primarily pupfish (*Orestias* spp.)) account for over 90 percent of the grebe's diet (Fjeldså 1981, pp. 251-252). Pupfish become scarce when the marshlands dry during periods of reduced water levels, and the Junín grebe is then known to vary its diet with midges (Order *Diptera*), corixid bugs (*Trichocorixa reticulata*), amphipods (*Hyalella simplex*), and shore fly maggots and pupa (*Ephydriid* spp.).

Historical Range and Distribution

The Junín grebe was historically known to be endemic to Lake Junín, in the Peruvian Administrative Region of Junín (Fjeldså 1981, p. 238; Fjeldså 2004, p. 200; Fjeldså and Krabbe 1990, p. 70; INRENA 1996, p. 1). Experts believe that the species was previously distributed throughout the entire 57-mi² (147-km²) lake (BLI 2003, p. 1; BLI 2009a, p. 1; Fjeldså 1981, p. 254; F. Gill and R.W. Storer, pers. comm. as cited in Fjeldså 2004, p. 200). In 1938, the Junín grebe was encountered throughout the entire lake (Morrison 1939, p. 645). The Junín grebe is now absent from the northwest portion of Lake Junín due to mine waste contamination and a severe decline in population (Fjeldså 1981, p. 254; F. Gill and R.W. Storer, pers. comm. as cited in Fjeldså 2004, p. 200).

Current Range and Distribution

The Junín grebe continues to be endemic to the 57-mi² (147-km²) Lake Junín, located at 13,390 ft (4,080 m) above sea level in the Peruvian High Andes (BLI 2003, p. 1; BLI 2009a, p. 1; BLI 2009b, p. 1). Although BirdLife International (2009b, p. 1) reports the current estimated range of the species as 55 mi² (143 km²), their definition of a species' range is the total area within its extent of occurrence (see Current Range and Distribution of the ash-breasted tit-tyrant) (BLI 2000, pp. 22, 27). Noting that Lake Junín is only a 57-mi² (147-km²) lake (BLI 2003, p. 1; BLI 2009a, p. 1) and that the Junín grebe is restricted to the southern portion of the lake (Fjeldså 1981, p. 254; F. Gill and R.W. Storer, pers. comm. as cited in Fjeldså 2004, p. 200), its current range is actually smaller than the figure reported by BirdLife International. The entire population of this species is located within a protected area, the Junín National Reserve (BLI 2008, p. 2; BLI 2009a, p. 1; BLI 2009b, p. 1; ParksWatch 2009, p. 4).

Population Estimates

The current population of the Junín grebe is estimated to be 100–300 individuals (BLI 2009b, p. 3), having undergone a severe population decline in the latter half of the 20th century, with extreme population fluctuations during this time (Fjeldså 1981, p. 254). Field studies in 1938 indicated that the Junín grebe was ''extremely abundant'' throughout Lake Junín (Morrison 1939, p. 645). Between 1961 and 1979 the population fell from greater than 1,000 individuals to an estimated 250–300 birds (BLI 2009b, p. 2; Collar *et al.* 1992, p. 43; Harris 1981, as cited in O'Donnell and Fjeldså 1997, p. 30; Fjeldså 1981, p.

254). Surveys during the mid-1980s estimated a total of 250 individuals inhabiting the southern portion of Lake Junín (BLI 2009b, p. 2; Collar *et al.* 1992, p. 43). In 1992, only 100 birds were observed and, by 1993, the population had declined to 50 birds, of which fewer than half were breeding adults (BLI 2008, p. 3; BLI 2009b, p. 2). In 1995, an estimated 205 Junín grebes were present on Lake Junín (O'Donnell and Fjeldså 1997, p. 30). Breeding and fledging were apparently unsuccessful from 1995 to 1997. However, there were two successful broods fledged during the 1997 and 1998 breeding seasons (BLI 2008, p. 3; T. Valqui in litt., as cited in BLI 2009b, p. 2). In 1998, more than 250 Junín grebes were counted in a 1.5-mi^2 (4-km^2) area in the southern portion of Lake Junín, suggesting a total population of 350 to 400 birds (T. Valqui in litt., as cited in BLI 2009b, p. 2). In 2001, field surveys indicated that there may have been a total population of 300 birds, but that estimate has been considered overly optimistic (Fjeldså in litt. 2003, as cited in BLI 2009b, p. 2). Fjeldså (in litt. 2003, as cited in BLI 2009b, p. 2) postulated that perhaps only half that number would have been mature individuals. These population fluctuations are strongly linked to precipitation (see Factor A).

The species has experienced a population decline of 14 percent in the past 10 years, and is expected to continue to decline (BLI 2009b, pp. 1, 6-7). The species' decline is associated with continued habitat loss and degradation (Fjeldså 1981, p. 254; F. Gill and R.W. Storer, pers. comm. as cited in Fjeldså 2004, p. 200) (See Factors, A, C, and E).

Conservation Status

The Junín grebe is considered ''critically endangered'' by the Peruvian Government under Supreme Decree No. 034-2004-AG (2004, p. 276853). The IUCN categorizes the Junín grebe as ''Critically Endangered'' because it is endemic to one location and has undergone ''significant population declines, such that an extremely small number of adults remain'' (BLI 2008, p. 1; BLI 2009b, pp. 1, 3). The single known population of the Junín grebe occurs wholly within one protected area in Peru, the Junín National Reserve (BLI 2009b, pp. 1-2).

Summary of Factors Affecting the Junín Grebe

A. The Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

The Junín grebe is endemic to Lake Junín, where it resides year-round. The species is completely dependent on the open waters and marshland margins of the lake for feeding and on the protective cover of the marshlands during the breeding season (BLI 2008, p. 1; BLI 2009a, p. 1; Fjeldså 1981, p. 247; Tello 2007, p. 3). The current estimated range of the species is 55 mi^2 (143 km^2) (BLI 2009b, p. 1). However, as described under Current Range and Distribution, its actual range is smaller, because the species is restricted to the southern portion of the lake (BLI 2009b, p. 1; Fjeldså 1981, p. 254; F. Gill and R.W. Storer, pers. comm. as cited in Fjeldså 2004, p. 200). Breeding season begins in November (Fjeldså 1981, pp. 44, 246; O'Donnel and Fjeldså 1997, p. 29). Junín grebes build their nests (BLI 2008, p. 1; Fjeldså 1981, p. 247; Tello 2007, p. 3) and obtain their primary prey, pupfish, in the expansive offshore flooded marshlands that may extend into the lake up to 1–3 mi (2–5 km) from shore (Fjeldså 2004, p. 200; O'Donnel and Fjeldså 1997, pp. 29-30).

The quality of Junín grebe habitat and the species' reproductive success is highly influenced by water levels and the water quality of the lake. Water levels in the lake are affected by manmade activities (such as hydropower generation) that are exacerbated by unpredictable climate fluctuations (such as drought or excessive rain). Water quality in Lake Junín has been compromised by contamination.

The Upamayo Dam, located at the northwest end of the lake, has been in operation since 1936, and lake water is used to power the 54-megawatt Malpaso hydroelectric plant (Martin *et al.* 2001, p. 178; ParksWatch 2006, p. 5). Dam operations have caused seasonal water level fluctuations of as much as 6 ft (2 m) in Lake Junín (Martin and McNee 1999, p. 659). Under normal conditions, water levels are lower in the dry season and the marshlands can become partially or completely dry (BLI 2009b, p. 1; ParksWatch 2009, p. 2). The floodgates of the dam are often opened during the dry season (June to November) (BLI 2009b, p. 1; ParksWatch 2009, p. 2), and water offtake for hydropower generation further drains the lake, such that by the end of the dry season, in November, the marshlands encircling the lake are more apt to become completely desiccated (Fjeldså 2004, p. 123).

Reduced water levels directly impact the Junín grebe's breeding success, by reducing the amount of available nesting habitat (BLI 2008, p. 1; Fjeldså 2004, p. 200). The giant bulrush marshlands, upon which the Junín grebe relies for nesting and foraging habitat, have virtually disappeared from some sections of the lake (O'Donnel and Fjeldså 1997, p. 29). When the marshlands are completely desiccated, the Junín grebe does not breed at all (Fjeldså 2004, p. 123).

Reduced water levels also impact the species by reducing the Junín grebe's primary prey, pupfish (Fjeldså 2004, p. 200) (see Habitat and Life History). The perimeter of the flooded marshlands provides the primary recruitment habitat for fish in the lake during extremely dry years, including 1983–1987, 1991, and 1994–1997 (Fjeldså 2004, p. 200; O'Donnel and Fjeldså 1997, p. 29). Submerged aquatic vegetation, habitat for pupfish, has become very patchy, further triggering declines in the prey population. Few marshlands are permanently inundated now, due to the power generation requirements of the Upamayo Dam, and the giant bulrushes that previously grew tall and provided extensive cover for this species for breeding and feeding have virtually disappeared, reducing both nesting and foraging habitat for the Junín grebe. The reduction in nesting and foraging habitat are believed to contribute to mass mortality of Junín grebes during extreme drought years (O'Donnel and Fjeldså 1997, p. 30).

Manipulation of the Lake Junín's water levels also results in competition between the white-tufted grebe (*Rollandia rolland*) and the Junín grebe for food resources during the Junín grebe's breeding season (Fjeldså 2004, p. 200). Under normal conditions, the expansive offshore marshlands may extend into the lake up to 1–3 mi (2–5 km) from shore (O'Donnel and Fjeldså 1997, p. 29). In years when water levels remain high, the Junín grebe and white-tufted grebe are spatially segregated during the breeding season, with white-tufted grebes utilizing the interior of the reed marsh and Junín grebes remaining at the edges of the marshlands, closer to the center of the lake (Fjeldså 1981, pp. 245, 255). Near the end of the dry season, as early as October, when water levels are lower in the lake and the marshlands can partially or completely dry out (BLI 2009b, p. 1; ParksWatch 2009, p. 2), thousands of white-tufted grebes move from the interior of the marshlands to the edges, where they compete with the Junín grebe for food

(Fjeldså 1984, pp. 413-414). As the breeding season for the Junín grebe begins in November (Fjeldså 1981, pp. 44, 246; O'Donnel and Fjeldså 1997, p. 29), Junín grebes build floating nests and breed on the margins of marshlands (BLI 2008, p. 1; Fjeldså 1981, p. 247; Tello 2007, p. 3), and a plentiful supply of fish becomes more important (O'Donnel and Fjeldså 1997, p. 29). Competition becomes more critical the longer the water level remains low at the end of the dry season, and activities that further reduce low water levels only accentuate this competition (Fjeldså 1981, pp. 252-253).

Water quality affects the availability of habitat for the endemic Junín grebe. The water in Lake Junín has been contaminated from mining waste, agricultural runoff, and organic matter from the land surrounding the lake. There are several mining operations (lead, copper, and zinc) north of Lake Junín, and wastewater from the mines flows untreated into the lake via the Río San Juan (Fjeldså 1981, p. 255; Martin and McNee 1999, pp. 660-661; ParksWatch 2006, p. 2; Shoobridge 2006, p. 3). Agricultural insecticides wash into Lake Junín from surrounding fields and through drainage systems from villages around the lake (ParksWatch 2006, pp. 5, 19). Organic matter originating from local communities is piped untreated into the lake, resulting in eutrophication (a process whereby excess nutrients facilitate excessive plant growth, which ultimately reduces the amount of dissolved oxygen in the water, harming oxygen-dependent organisms) (ParksWatch 2006, p. 5; Shoobridge 2006, p. 3).

Lake Junín is a sink for several streams that transport mining wastes and other pollution downstream and into the lake (ParksWatch 2006, p. 19). The Río San Juan is the primary source of water for Lake Junín and feeds into the lake from the northern end (Fjeldså 1981, p. 255; Martin and McNee 1999, pp. 660-661; Shoobridge 2006, p. 3). Tests indicate that the Río San Juan contains trace metals, including copper, lead, mercury, and zinc, in excess of currently accepted aquatic life thresholds (Martin and McNee 1999, pp. 660-661). Non-point source pollutants from agricultural fertilizers, such as ammonium and nitrate concentrations, are also suspended in the water column (Martin and McNee 1999, pp. 660-661). Iron oxide contamination is visible near the outflow of the Río San Juan because iron oxide produces a reddish tinge to the water and reed borders. Vegetation near the river's outflow is completely absent (Fjeldså 2004, p. 124; ParksWatch 2006, pp. 20-21), and this portion of the lake has been rendered lifeless by the precipitation of iron oxide from mining wastewaters (BLI 2008, p. 4). The giant bulrush marshlands, which once existed in great expanses around the entire perimeter of the lake and upon which the Junín grebe relies for nesting and foraging habitat, have virtually disappeared and at least one species of catfish (*Pygidium oroyae*) may have been extirpated from the lake (O'Donnel and Fjeldså 1997, p. 29).

Heavy metal contamination is not limited to the northern end of the lake (ParksWatch 2006, p. 20), but extends throughout the southern end (Martin and McNee 1999, p. 662), where the Junín grebe is now restricted (BLI 2003, p. 1; BLI 2009b, p. 1; Fjeldså 1981, p. 254; F. Gill and R.W. Storer, pers. comm. as cited in Fjeldså 2004, p. 200). Near the center of the lake, the bottom has been described as ''lifeless,'' due to sedimentation of iron oxides (Fjeldså 1981, pp. 255-256; Fjeldså 2004, p. 124). Martin *et al.* (2001, p. 180) determined that sediments at the lake's center are enriched with copper, zinc, and lead and are anoxic (having low levels of dissolved oxygen). High concentrations of dissolved copper, lead, and zinc have damaged an estimated one-third of the lake, increasing turbidity of the lake, and exceeding established aquatic life thresholds (Martin and McNee 1999, pp. 660-661; ParksWatch 2006, pp. 2, 20; Shoobridge 2006, p. 3). This has severely affected animal and plant populations in the area, contributing to mortality of species, including the Junín grebe, around the lake (ParksWatch 2006, pp. 3, 20) (see Factor C).

In 2009, conservation organizations and civil society groups demanded action to reverse the deterioration of Lake Junín and requested an independent environmental audit and continuous monitoring of the lake (BLI 2009b p. 4; BLI 2009c, p. 1). The conservation groups BLI, American Bird Conservancy (ABC), Asociación Ecosistemas Andinos (ECOAN), and INRENA adopted the Junín grebe as the symbol of wetland conservation for the high Andes (BLI 2009c, p. 1). Although translocation has been a consideration for the conservation of the Junín grebe since the mid-1990s, no suitable habitat for the species has been located (O'Donnel and Fjeldså 1997, pp. 30, 35; BLI 2008, p. 5; BLI 2009b, p. 2). None of these conservation organization's activities have been effective at curbing the ongoing habitat degradation (see also Factor D).

The effects of habitat alteration and destruction (such as those caused by artificially reduced water levels and water contamination) are accentuated by unpredictable climate fluctuations (such as droughts or excessive rains) (Jetz *et al.* 2007, pp. 1211, 1213; Mora *et al.* 2007, p. 1027). Peru is subject to unpredictable climate fluctuations, such as those that are related to the El Niño Southern Oscillation (ENSO). Changes in weather patterns, such as ENSO cycles (El Niño and La Niña events), tend to increase precipitation in normally dry areas, and decrease precipitation in normally wet areas (Holmgren *et al.* 2001, p. 89; TAO Project n.d., p. 1); thereby exacerbating the effects of habitat reduction and alteration on the decline of a species (England 2000, p. 86; Holmgren *et al.* 2001, p. 89; Jetz *et al.* 2007, pp. 1211, 1213; Mora *et al.* 2007, p. 1027; Parmesan and Mathews 2005, p. 334; Plumart 2007, pp. 1-2; Timmermann 1999, p. 694), especially for narrow endemics (Jetz *et al.* 2007, p. 1213) such as the Junín grebe (see also Factor E). Moreover, the Junín grebe's low breeding potential is considered to be a reflection of its adaptation to being in a ''highly predictable, stable environment'' (del Hoyo *et al.* 1992, p. 195).

The Junín grebe's breeding success and population size are highly influenced by the climate, with population declines occurring during dry years, population increases during rainy years, and mortality during extreme cold weather events. Several times during the last two decades (e.g., 1983–1987, 1991–1992, 1994–1997), the population has declined to 100 birds or less following particularly dry years (BLI 2008, pp. 1, 3-4; BLI 2009b, p. 2; Elton 2000, p. 3; Fjeldså 2004, p. 200). There have been short-term population increases of 200 to 300 birds in years with higher rainfall amounts following El Niño events (such as the 1997–1998 and 2001–2002 breeding seasons) (PROFONANPE 2002, as cited in Fjeldså 2004, p. 133; T. Valqui pers. comm., as cited in BLI 2009b, p. 2). However, excessive rains also increase contamination in Lake Junín, which decreases the amount of suitable habitat for the species (as described above) and has adverse effects on the species' health (see Factor C). Many Junín grebes died during extremely cold conditions in 1982 (BLI 2008, p. 4). In 2007, the population declined again following another cold weather event (Hirshfeld 2007, p. 107). ENSO cycles are ongoing, having occurred several times within the last decade (NWS 2009, p. 2), and evidence suggests that ENSO cycles have already increased in periodicity and severity (Richter 2005, pp. 24-25;

Timmermann 1999, p. 694), which will exacerbate the negative impacts of habitat destruction on a species.

Habitat degradation and alteration caused by fluctuating water levels and environmental contamination are considered key factors in the species' historical decline (Fjeldså 1981, p. 254; F. Gill and R.W. Storer, pers. comm. as cited in Fjeldså 2004, p. 200). The species has experienced a population decline of 14 percent in the past 10 years, and is expected to continue to decline as a result of deteriorating habitat and water quality (BLI 2009b, pp. 1, 6-7). Therefore, further habitat degradation is expected to continue impacting this species' already small population size (see Factor E).

Summary of Factor A

The habitat in and around Lake Junín, where the Junín grebe is endemic, has been and continues to be altered and degraded as a result of human activities, including artificial water level fluctuations to generate hydropower and water contamination caused by mining waste, agricultural and organic runoff from surrounding lands, and wastewater from local communities. The Junín grebe is dependent on the quantity and quality of lake water for breeding and feeding. Water levels in Lake Junín are manipulated to generate electricity, which leads to dramatic fluctuations in water levels of up to 6 ft (1.8 m). The Junín grebe relies on the protective cover of flooded marshlands for nesting. As water drawdown occurs near the end of the dry season and the inception of the Junín grebe's mating season, portions of the marshlands may dry out completely. Reductions in water levels decrease the availability of suitable breeding and foraging habitat, and decrease the availability of the Junín grebe's primary prey, forcing competition with the white-tufted grebe for food. Drought years have a negative impact on the Junín grebe, resulting in severe population fluctuations due to poor breeding success and limited recruitment of juveniles into the adult population. Severed dry conditions can cause total breeding failure (see also Factor E).

Although the population appears to rebound during wetter years (i.e., following El Niño events) (see Habitat and Life History and Population Estimate), excessive rain decreases the suitable habitat for the species, as pollution washes into the water from around the lake and the upstream rivers that feed the lake, increasing contamination levels in Lake Junín. This increased contamination also affects the Junín grebe's health and has resulted in mortality of the species (see Factor C). Severe water contamination has rendered the northwest portion of the lake lifeless, devoid of aquatic and terrestrial species. Experts believe that the Junín grebe once inhabited the entire Lake, but the species is now confined to the southern portion of the lake due to water contamination (Historical Range and Distribution). Elevated levels of heavy metals may reduce the fitness and overall viability of the Junín grebe (Factor C), which would heighten risks associated with short- and long-term genetic viability (Factor E). Therefore, we find that destruction and modification of habitat are threats to the continued existence of the Junín grebe throughout its range.

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

We are not aware of any information currently available that indicates that overutilization of Junín grebe for commercial, recreation, scientific, or education purposes has occurred or is occurring at this time. Fjeldså (1981, pp. 254-255) notes that local hunters are not interested in grebes as food because they have ''too little meat.'' As a result, we are not considering overutilization to be a threat to the continued existence of the Junín grebe.

C. Disease or Predation

Disease: Although no specific disease threat has been identified for the Junín grebe, contamination of Lake Junín has contributed directly and indirectly to Junín grebe mortality and has potentially reduced the overall fitness and health of the species. As discussed under Factor A, lead, copper, and zinc mining residues (Fjeldså 1981, p. 255; Martin and McNee 1999, pp. 660-661; Shoobridge 2006, p. 3), agricultural runoff, organic matter, and wastewater are discharged directly into Lake Junín (ParksWatch 2006, pp. 5, 19; Shoobridge 2006, p. 3). High concentrations of environmental contaminants (including ammonium, copper, iron oxide, lead, mercury, nitrate, and zinc) have been detected throughout the lake (Fjeldså 1981, pp. 255-256; Fjeldså 2004, p. 124; Martin and McNee 1999, pp. 660-662; ParksWatch 2006, pp. 20-21) and exceed established thresholds for aquatic life (Martin and McNee 1999, pp. 660-661; ParksWatch 2006, p. 20). Chemical waste has rendered the northern portion of the lake lifeless due to eutrophication (BLI 2008, p. 4; Shoobridge 2006, p. 3) and the sediments in the center of the lake anoxic (containing no dissolved oxygen) (Martin *et al.* 2001, p. 180). High concentrations of suspended particulate matter increases the turbidity of the water, making it less penetrable to sunlight and resulting in die-off of aquatic plants and algae (ParksWatch 2006, p. 20). Chemical waste has damaged at least one third of the lake and has severely affected animal and plant populations in the area (O'Donnel and Fjeldså 1997, p. 29; ParksWatch 2006, pp. 3, 20; Shoobridge 2006, p. 3). The northern portion of the lake is completely devoid of vegetation (Fjeldså 2004, p. 124; ParksWatch 2006, pp. 20-21), and the giant bulrush marshlands, which once existed in great expanses around the entire perimeter of the lake and upon which the Junín grebe relies for nesting and foraging habitat, have virtually disappeared. At least one species of catfish (*Pygidium oroyae*) may have been extirpated from the lake (O'Donnel and Fjeldså 1997, p. 29). During years of heavy rainfall, the lake is filled, and the lakeshore becomes polluted with ''toxic acid gray sediment'' that has caused large-scale mortality of cattle (approximately 2,000 in 1994) and birds, apparently due to lead poisoning (O'Donnel and Fjeldså 1997, p. 30). Lead poisoning from the presence of mine wastes is a common cause of mortality in waterbirds, and is medically described as an intoxication resulting from absorption of hazardous levels of lead into body tissues (Friend and Franson 1999, p. 317).

Water contamination has directly affected the health of the Junín grebe population. As predators of aquatic organisms, the Junín grebe occupies a mid-tertiary level position in the food chain and is prone to bioaccumulation of pesticides, heavy metals, and other contaminants that are absorbed or ingested by its prey (Fjeldså 1981, pp. 255-256; Fjeldså 2004, p. 123). Green plants form the first trophic, or feeding, level; they are the primary producers. Herbivores form the second trophic level, while carnivores form the third and even fourth trophic levels (The University of the Western Cape 2009, p. 1). Moreover, species such as the Junín grebe, which inhabit high trophic levels, are strictly dependent upon the functioning of a multitude of ecosystem processes. The loss or absence of species at lower trophic levels can result in cascading ecosystem effects, causing imbalances in the food web at all higher trophic levels (The University of the Western Cape 2009, p. 1). In parts of the lake, increased turbidity has caused die-off of aquatic plants and algae, disrupting the food chain (ParksWatch 2006, p. 20). Studies indicate that lead mining effluents severely reduce or eliminate primary prey populations of

fish and aquatic invertebrates, either directly through lethal toxicity, or indirectly through toxicity to their prey species (Demayo *et al.* 1982, as cited in Eisler 1988, p. 5). Analysis of feathers and bone tissue of Junín grebes and of pupfish, the species' primary prey, indicate that both the grebe and its prey contain elevated lead levels (Fjeldså 1981, pp. 255-256).

Drought conditions exacerbate the effects of water contamination and bioaccumulation of contaminants in aquatic species. From 1989 to 1992, an extensive drought occurred in the Lake Junín area. During that time, many dead Junín grebes and other waterbirds were found along the edges of the lakeshore (T. Valqui and J. Barrio in litt. 1992, as cited in Collar *et al.* 1992, p. 45, 190). In 1992, one of the driest years in decades, up to 10 dead grebes per month were reported around the lake. Three Junín grebe carcasses were found along 1.2 mi (2 km) of shoreline in one month alone (T. Valqui and J. Barrio in litt. 1992, as cited in Collar *et al.* 1992, p. 45). Experts consider the cause of death to have been either heavy metal contamination, which increased in concentration as water levels decreased (T. Valqui and J. Barrio in litt. 1992, as cited in Collar *et al.* 1992, p. 45), or reduced prey availability (Fjeldså 2004, p. 124). Reduced prey availability is exacerbated by manmade activities that are reducing the water levels of the lake, increasing competition among sympatric grebe species (different species that occupy the same range) and decreasing the marshlands that provide primary spawning habitat for the pupfish, the grebe's primary prey species (Factor A).

Persistent exposure to contaminants can contribute to a decline in fitness for long-lived, mid-trophic level species, which is inherited by offspring and can impact embryonic development, juvenile health, or viability (Rose 2008, p. 624). The excessive contaminant load in Lake Junín could also allow opportunistic bacterial and viral infections to overcome individuals. According to Fjeldså (1981, p. 254), the Junín grebe bears a heavy infestation of stomach nematodes (parasitic roundworms), especially as compared to other grebe species. Stomach contents of Junín grebes that have been examined had an average of 16.7 nematodes, compared with no nematodes in silver grebes and 1.6 nematodes in white-tufted grebes. Fjeldså (1981, p. 254) postulates that the higher nematode infestation in Junín grebes may be an indicator of poor health.

Predation: Predators around Lake Junín include the Andean fox (*Pseudalopex culpaues*), the long-tailed weasel (*Mustela frenata*), Pampas cat (*Onicifelis colocolo*), and hog-nosed skunk (*Conepatus chinga*) (ParksWatch 2009, p. 4). However, nest sites of the Junín grebe are generally inaccessible to mammalian predators (Fjeldså 1981, p. 254). The only raptor likely to take a grebe on Lake Junín is the Cinereus harrier (*Circus cinereus*), which primarily feeds in white-tufted grebe habitats. Moorhens (*Gallinula chloropus*), which also inhabit the lake (ParksWatch 2009, p. 3; Tello 2007, p. 2), are egg stealers and may steal Junín grebe eggs for food (Fjeldså 1981, p. 254). However, there is no direct evidence of predation upon the Junín grebe.

Summary of Factor C

Environmental contamination poses direct and indirect threats to the Junín grebe's overall health and survival. The species' trophic level also exposes it to bioaccumulation of toxins accumulated in the tissue of prey species. Research indicates that the species has elevated lead levels and carries a high load of nematodes, a possible indicator of overall poor health. Junín grebes have died as a direct result of contaminant poisoning or reduction in the pupfish, which has also been found to carry elevated lead levels. Therefore, we find that disease is a threat to the continued existence of the Junín grebe. However, there is no available evidence to indicate that predation is causing declines in Junín grebe populations or otherwise contributing to the species' risk of extinction. Therefore, we find that predation is not a threat to the Junín grebe.

D. Inadequacy of Existing Regulatory Mechanisms

The Junín grebe is listed as ''critically endangered'' by the Peruvian Government under Supreme Decree No. 034-2004-AG (2004, p. 276853). This Decree prohibits hunting, take, transport, and trade of protected species, except as permitted by regulation. As hunting, take, transport, and trade do not currently threaten the Junín grebe, this regulation does not mitigate any current threats to this species.

Peru has several categories of national habitat protection, which were described above as part of the Factor D analysis for the ash-breasted tit-tyrant (BLI 2008, p. 1; IUCN 1994, p. 2; Rodríguez and Young 2000, p. 330). The Junín grebe population occurs wholly within one protected area: the Junín National Reserve (Junín, Peru) (BLI 2009b, pp. 1-2). The Junín National Reserve has an area of 133,437 ac (53,000 ha), bordering Lake Junín and its adjacent territories (Wege and Long 1995, p. 264). In Peru, National Reserves are also created for the sustainable extraction of certain biological resources (BLI 2008, p. 1; Rodríguez and Young 2000, p. 330). Established in 1974, through Supreme Decree No. 0750-74-AG, the stated objectives of the Junín National Reserve include: integrated conservation of the local ecosystem, its associated flora and wildlife; preservation of the scenic beauty of the lake; and support of socioeconomic development in the area through the sustainable use of its renewable natural resources (BLI 2009a, p. 2; Hirshfeld 2007, p. 107). Most of the lakeshore is designated a ''Direct Use Zone,'' which allows fishing, grazing, and other educational, research, and recreational activities (ParksWatch 2006, p. 12). Although designation of this reserve has heightened awareness of the ecological problems at Lake Junín (BLI 2009c, p. 1), it has not reduced or eliminated the primary threats to the Junín grebe: water fluctuations and contamination (Factor A), contamination resulting in poor health (Factor C), and small population size (Factor E). Therefore, the existence of this species within a protected area has not reduced or mitigated the threats to the species.

The Junín National Reserve was designated a Ramsar site under the Convention on Wetlands of International Importance (Ramsar Convention) in 1997 (BLI 2009a, p. 2; Hirshfeld 2007, p. 107; INRENA 1996, pp. 1-14). The Ramsar Convention, signed in Ramsar, Iran, in 1971, is an intergovernmental treaty which provides the framework for national action and international cooperation for the conservation and wise use of wetlands and their resources. There are presently 159 Contracting Parties to the Convention (including Lake Junín), with 1,874 wetland sites, totaling more than 457 million ac (185 million ha), designated for inclusion in the Ramsar List of Wetlands of International Importance (Ramsar 2009, p. 1). Peru acceded to Ramsar in 1992. It has 13 sites on the Ramsar list, comprising 16.8 million ac (6.8 million ha) (Ramsar 2009, p. 5). In an examination of 5 Ramsar sites, experts noted that Ramsar designation may provide nominal protection (protection in name only) by increasing both international awareness of a site's ecological value and stakeholder involvement in conservation (Jellison *et al.* 2004, pp. 1, 4, 19). However, activities that negatively impact the Junín grebe are

ongoing within this Ramsar wetland, including water fluctuations and contamination (Factor A), contamination resulting in poor health (Factor C), and small population size (Factor E). Therefore, the Ramsar designation has not mitigated the impact of threats on the Junín grebe.

In 2002, the Peruvian Government passed an emergency law to protect Lake Junín. This law makes provisions for the cleanup of Lake Junín, and places greater restrictions on extraction of water for hydropower and mining activities (J. Fjeldså in litt. 2003, as cited in BLI 2007, p. 3). However, this law has not been effectively implemented, and conditions around the lake may even have worsened after passage of this law (BLI 2009c, p. 1). The Ministry of Energy and Mining has implemented a series of Environmental Mitigation Programs (PAMA) to combat mine waste pollution in the Junín National Reserve (ParksWatch 2006, p. 21; ParksWatch 2009 p. 3). The PAMAs were scheduled to have been completed by 2002, but extensions have been granted, indicating that many of the mines currently in operation are still functioning without a valid PAMA. Reductions in pollution are reported because some mine companies have begun to utilize drainage fields and recycle residual water. However, analysis of existing PAMAs indicate that they do not address specific responsibilities for mining waste discharged into the Río San Juan and delta, nor do they address deposition of heavy metal-laced sediments in Lake Junín (ParksWatch 2006, p. 21; ParksWatch 2009, p. 3). Recent information indicates that mining waste contamination in the lake continues to be a source of pollution (ParksWatch 2006, pp. 20-21; Fjeldså 2004, p. 124; BLI 2009b, p. 1). Therefore, this law is not effective at mitigating the threat of habitat degradation (Factor A), health issues associated with contamination (Factor C) and small population size of the species (Factor E).

There are approximately 5,000 laws and regulations directly or indirectly related to environmental protection and natural resource conservation in Peru. Recent studies by the Peruvian Society for Environmental Law (SPDA) have concluded that many of these are not effective because of limited implementation and/or enforcement capability (Muller 2001, pp. 1-2).

Summary of Factor D

Peru has enacted various laws and regulatory mechanisms for the protection and management of wildlife and their habitats. The Junín grebe is ''critically endangered'' under Peruvian law, and its entire population occurs within one protected area. As discussed under Factor A, the Junín grebe's distribution, breeding success and recruitment, and food availability on Lake Junín has been curtailed, and are negatively impacted due to habitat destruction that is caused by artificial water fluctuations and water contamination from human activities. These habitat-altering activities are ongoing throughout the species' range, which is wholly encompassed within one protected area. Thus, despite the species' critically endangered status and presence within a designated protected area, laws governing wildlife and habitat protection in Peru are inadequately enforced or ineffective at protecting the species or mitigating ongoing habitat degradation (Factor A), impacts from contaminants, and concomitant population declines (Factor E). Therefore, we find that the existing regulatory mechanisms are inadequate to mitigate the threats to the continued existence of the Junín grebe throughout its range.

E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

An additional factor that affects the continued existence of the Junín grebe is the species' small population size. The current population of the Junín grebe is estimated to be 100–300 individuals, however, only an ''extremely small number of adults remain'' (BLI 2008, p. 1; BLI 2009b, pp. 1, 3). The number of adults in a population are important because these individuals contribute to the next generation (Shaffer 1981, pp. 132-133; Soulé 1980, pp. 160-162). The Junín grebe underwent a severe population decline in the latter half of the 20th century, with extreme population fluctuations (Fjeldså 1981, p. 254) (see Population Estimates). For example, in 1993, the population size declined to below 50 individuals, of which fewer than half were breeding adults (BLI 2008, p. 3; BLI 2009b, p. 2). Even if the estimate of 100–300 individuals is correct, the number of mature individuals is likely to be far smaller, perhaps only half (Fjeldså in litt. 2003, as cited in BLI 2009b, p. 2). Therefore, 100–300 individuals overestimates the species' effective population size (the number of breeding individuals that contribute to the next generation) (Shaffer 1981, pp. 132-133; Soulé 1980, pp. 160-162).

Small population size renders species vulnerable to genetic risks that can have individual or population-level genetic consequences, such as inbreeding depression, loss of genetic variation, and accumulation of new mutations, and may affect the species' viability by increasing its susceptibility to demographic shifts or environmental fluctuations, as explained in more detail above in the Factor E analysis for the ash-breasted tit-tyrant (Charlesworth and Charlesworth 1987, p. 238; Pimm *et al.* 1988, pp. 757, 773-775; Shaffer 1981, p. 131). Small population size also leads to a higher risk of extinction and, once a population is reduced below a certain number of individuals, it tends to rapidly decline towards extinction (Frankham 1996, p. 1507; Franklin 1980, pp. 147-148; Gilpin and Soulé 1986, p. 25; Holsinger 2000, pp. 64-65; Purvis *et al.* 2000, p. 1949; Reed and Frankham 2003, pp. 233-234; Soulé 1987, p. 181). In addition, species that inhabit a small geographic range, occur at low density, occupy a high trophic level, and exhibit low reproductive rates tend to have a higher risk of extinction than species that are not limited by the same risk factors (Purvis *et al.* 2000, p. 1949).

Complications arising from the species' small population size are exacerbated by the species' restricted range and threat of disease (Factor C). The Junín grebe is known only from a single Andean lake, Lake Junín, in central Peru (BLI 2000, p. 45; BLI 2009b, p. 1; Collar *et al.* 1992, p. 43). Although the species was believed to have been previously distributed throughout the entire 57-mi^2 (147-km^2) lake (Fjeldså 1981, p. 254; F. Gill and R.W. Storer, pers. comm. as cited in Fjeldså 2004, p. 200; Morrison 1939, p. 645), it is now restricted to the southern portion of Lake Junín (BLI 2009b, p. 1; Fjeldså 1981, p. 254; F. Gill and R.W. Storer, pers. comm. as cited in Fjeldså 2004, p. 200). The population has declined by at least 14 percent in the last 10 years and is expected to continue to decline, as a result of declining water quality and extreme water level fluctuations (BLI 2009b, pp. 1, 4, 6-7) (Factor A). We consider that the risks associated with small population size will continue to impact this species and may accelerate, if habitat destruction continues unabated. Environmental contamination poses direct and indirect threats to the Junín grebe's overall health and survival, including the presence of toxins in both the Junín grebe and its primary prey species and mass die-offs that are linked to contamination or reduction in prey species (Factor C). A species' small population size, combined with its restricted range and threat of disease, increases the species'

vulnerability to adverse natural events and manmade activities that destroy individuals and their habitat (Holsinger 2000, pp. 64-65; Primack 1998, pp. 279-308; Young and Clarke 2000, pp. 361-366).

Summary of Factor E

The Junín grebe has a small population size that renders it vulnerable to genetic risks that negatively impact the species' long-term viability and, possibly, its short-term viability. The species has a restricted range and occurs in habitat that continues to undergo degradation and curtailment due to human activities (Factor A). Environmental contaminants have caused die-offs of the species and have likely reduced the overall general health of the Junín grebe population (Factor C). The small population size, as well as its restricted range and health issues associated with contamination, increases the species' vulnerability to extinction, through demographic or environmental fluctuations. Based on its small population size, restricted range, and threat of disease, we have determined that the Junín grebe is particularly vulnerable to the threat of adverse natural events (e.g., genetic, demographic, or environmental) and human activities (e.g., water level manipulation) that destroy individuals and their habitat. The genetic and demographic risks associated with small population sizes are exacerbated by ongoing human activities that continue to curtail the species' habitat throughout its range. The species' population has declined and is predicted to continue declining due to an ongoing reduction in water quality and extreme water level fluctuations (Factor A). Therefore, we find that the species' small population size, in concert with its restricted range, threat of disease, and its heightened vulnerability to adverse natural events and manmade activities, are threats to the continued existence of the Junín grebe throughout its range.

Status Determination for the Junín Grebe

The Junín grebe, a flightless grebe, is endemic to Lake Junín, found at 13,390 ft (4,080 m) above sea level in Peru, where it resides year-round. The species relies on the open waters and marshland margins of the lake for feeding and on the protective cover of the marshland margins for nesting during the breeding season. The species has a highly restricted range (approximately 55 mi^2 (143 km^2)) and is currently known only in one location in central Peru. The species' population size is estimated as 100–300 individuals, although the number of mature individuals may be limited to half this amount.

We have carefully assessed the best available scientific and commercial information regarding the past, present, and potential future threats faced by the Junín grebe and have concluded that there are four primary factors that threaten the continued existence of the Junín grebe: (1) Habitat destruction, fragmentation, and degradation; (2) disease; (3) limited size and isolation of remaining populations; and (4) inadequate regulatory mechanisms.

Human activities that degrade, alter, and destroy habitat are ongoing throughout the Junín grebe's range. Lake waters are artificially manipulated to produce hydropower, resulting in reductions in water levels that impact the species' nesting and foraging sites. Manipulation of water levels for hydropower production reduces prey populations, causes increased food competition with white-tufted grebes, and results in the abandonment of breeding in drought years. Reduced water levels have permanently destroyed segments of giant bulrush communities, compromising the amount of suitable flooded marshland available for nesting (Factor A). Mining, agricultural, and organic materials have contaminated the water, causing eutrophication and anoxia in portions of the lake and the accumulation of trace minerals in lake bottom sediments. This has had direct effects on the Junín grebe, destroying habitat in the northwest portion of the lake so that the species' range is restricted to only the southern portion of Lake Junín and causing Junín grebe mortality during times of drought (Factors A and C). Contaminants have also reduced or eliminated submerged and emergent vegetation throughout the lake, decreasing pupfish spawning habitat and reducing prey availability (Factor A).

Junín grebe habitat continues to be altered by human activities, conversion, and destruction of habitat, which reduce the quantity, quality, distribution, and regeneration of habitat available for the Junín grebe on Lake Junín. Habitat loss was a factor in the Junín grebe's historical population decline (see Historical Range and Distribution). Population declines have been correlated with water availability, and droughts have caused severe population fluctuations that have likely compromised the species' long-term viability. The Junín grebe population is small, rendering the species vulnerable to the threat of adverse natural (e.g., genetic, demographic) and human activity (e.g., water extraction and contaminants from mining) events that destroy individuals and their habitat. (Factor E). The Junín grebe's reproductive success and life cycle relies on the availability of sufficient water in Lake Junín. During drought years, nesting and reproduction decline.

Although the population appears to rebound during wetter years (such as following excessive rains from El Niño events (see Population Estimate and Factor A), excessive rains also bring additional contaminants into the lake as runoff from lands surrounding the lake and upstream rivers. Research indicates that both the Junín grebe and its primary prey species, the pupfish, have accumulated toxins resulting in elevated lead levels. Environmental contaminants have caused die-offs of the species and have likely reduced the general health of the Junín grebe population (Factor C). The population has declined 14 percent in the past 10 years (see Population Estimates), and this decline is predicted to continue commensurate with ongoing threats from habitat destruction and water contamination (Factor A).

Despite the species' ''critically endangered'' status in Peru and its occurrence entirely within a protected area, the lake continues to be destroyed and degraded as a result of human activities that alter the lake's water levels and compromise water quality (Factors A and C). Therefore, regulatory mechanisms are either inadequate or ineffective at mitigating the existing threats to the Junín grebe and its habitat (Factor D).

Section 3 of the Act defines an ''endangered species'' as ''any species which is in danger of extinction throughout all or a significant portion of its range'' and a ''threatened species'' as ''any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' Based on the immediate and ongoing threats to the Junín grebe throughout its entire range, as described above, we determine that the Junín grebe is in danger of extinction throughout all of its range. Therefore, on the basis of the best available scientific and commercial information, we are proposing to list the Junín grebe as an endangered species throughout all of its range.

III. Junín rail (*Laterallus tuerosi*)

Species Description

The Junín rail is a secretive bird of the *Rallidae* family that is endemic to a single lake (Lake Junín) in Peru. The species is also referred to as the Junín black rail (Fjeldså 1983, p. 281) and is locally known as ''*gallinetita de Junín*''

(Supreme Decree 034-2004-AG 2004, p. 27684). This rail measures 4.7–5.1 in (12–13 cm) in length, and has a dark slate-colored head, throat and underparts. Its belly and vent (anal aperture) are black, with heavily-barred white primary feathers along the back and side. The under-tail coverts (feathers on the underside of the base of the tail) are buff in color, with a dull rufous-brown back. The remaining underparts are dark brown and boldly barred in white, and the legs are greenish-yellow (BLI 2009b, p. 1).

Taxonomy

The Junín rail was first taxonomically described as *Laterallus spilonotus* after Gould's 1841 description of the Galapagos crake (Fjeldså 1983, p. 281; ITIS 2009b, p. 1). Fjeldså (1983) later described it as a subspecies of the black rail (*Laterallus jamaicensis tuerosi*) (Fjeldså 1983, pp. 277-282; Fjeldså and Krabbe 1990, p. 146; ITIS 2009a, p. 1), noting that the bird's morphology may suggest that it is a distinct species (Fjeldså 1983, p. 281). *Laterallus jamaicensis* has since been split into *L. jamaicensis* and *L. tuerosi* (BLI 2009b, p. 1). ITIS continues to list the species as the subspecies *L. j. tuerosi* based on Fjeldså's work in 1983 (ITIS 2009a, p. 1). BirdLife International considers this rail a full species based on morphological differences (BLI 2009b p. 1). Furthermore, the black rail, *Laterallus jamaicensis* occurs at much lower elevations (i.e., 0 to 4,429 ft (0 to 1,350 m) above sea level) (Collar *et al.* 1992, p. 190; BLI 2000, p. 170; BLI 2007, p. 1). Based on the morphological differences and the species' distinct and disjunct ranges, we consider the Junín rail to be a discrete species and recognize it as *L. tuerosi*.

It should be noted that it appears that only 2 specimens of the Junín rail have ever been collected (near Ondores) (Fjeldså 1983, pp. 278-279) and that all expert accounts of this species rely solely on that collection and a subsequent observation of the species in Pari (Fjeldså in litt., 1992, as cited in Collar *et al.* 1992, p. 190).

Habitat and Life History

The Junín rail inhabits Lake Junín at 13,390 ft (4,080 m) above sea level in the Andean highlands of Peru (Junín Region). The Junín rail occurs in the dense, interior marshlands where rushes (*Juncus* spp.) predominate or in more open mosaics of rushes, mosses (division Bryophyta), and low herbs (Fjeldså 1983, p. 281). Lake Junín, home to the Junín grebe that is also the subject of this proposed rule, is located in the seasonally climatic ''*puna*'' habitat, with a variety of species of grasses, asters, and trees of the bean family forming tall, dense grasslands and open scrubland, interspersed with wetlands and woodlands (ParksWatch 2006, p. 2; ParksWatch 2009, pp. 1, 4). Giant bulrushes and totorilla dominate the extensive marshlands surrounding the lake (BLI 2009b, p. 1; Fjeldså 1983, p. 281; ParksWatch 2009, p. 1). In shallow water, during low lake levels, ''*tortora*'' communities can become partially or completely dry (ParksWatch 2009, p. 2). The lake supports a wide variety of bird species and aquatic vegetation (BLI 2003, p. 1; BLI 2009a, pp. 2-3; ParksWatch 2009, p. 3; Tello 2007, p. 2). Mammals are relatively scarce in the area, although there are some predators (ParksWatch 2009, p. 4) (see Factor C). A more detailed discussion of the flora and fauna of the lake are provided above as part of the analysis of the Habitat and Life History of the Junín grebe.

There is little information regarding the ecology of the Junín rail. The species appears to be completely dependent on the wide marshlands located around the southeast shoreline of the lake for nesting, foraging, and year-round residence (BLI 2009b, p. 2; Collar *et al.* 1992, p. 190; Fjeldså 1983, p. 281) (see also Current Range and Distribution). Similar to all rails, the Junín rail is furtive and remains well-hidden in the marshes surrounding the lake (BLI 2009b, p.2). The Junín rail reportedly nests at the end of the dry season, in September and October. Nests are built on the ground within dense vegetative cover, and the species' clutch size is two eggs (BLI 2009b, p. 2; Collar *et al.* 1992, p. 190). The diet of the Junín rail has not been studied specifically, but other black rail species feed primarily on small aquatic and terrestrial invertebrates and seeds (Eddleman *et al.* 1994, p. 1).

Historical Range and Distribution

The Junín rail is endemic to Lake Junín (Fjeldså 1983, p. 278; BLI 2009b, p. 2). The species may have been historically common in the rush-dominated marshlands surrounding the entire lake (Fjeldså 1983, p. 281). In addition to the species' specific habitat preferences (see Current Range and Distribution), it is believed that the Junín rail is now restricted to the marshes at the southwest corner of the lake because of the high level of water contamination that flows into the northwest margins of the lake via the Río San Juan (Martin and McNee 1999, p. 662).

Current Range and Distribution

The Junín rail is restricted to the southwest shore of the lake, and is currently known in only two localities (near the towns of Ondores and Pari) (BLI 2009b, p. 2; Collar *et al.* 1992, p. 190; Fjeldså 1983, p. 281). The current estimated range of the species is 62 mi^2 (160 km^2) (BLI 2009b, p. 1). However, this is likely an overestimate of the species' actual range for several reasons. First, BirdLife International's definition of a species' range results in an overestimate of the actual range (see Current Range and Distribution of the ash-breasted tit-tyrant) (BLI 2000, pp. 22, 27). Second, the species' range was calculated based on the availability of presumed suitable habitat for the Junín rail. It has long been assumed that the rail potentially occupies the entire marshland area surrounding Lake Junín (Fjeldså 1983, p. 281). The total marshland area has been estimated by BirdLife International to be 58 mi^2 (150 km^2) (BLI 2000, p. 170; BLI 2007, p. 1; BLI 2008, p. 3; BLI 2009b, p. 1). However, the species has never been confirmed outside the two known localities on the southwest shore of the lake. Moreover, a better understanding of the ''*puna*'' habitat, as well as the habitat specificity (the specific habitat needs) of other rail species, indicates that these may be the only two localities for this species.

Despite the apparently uniform appearance of the ''*puna*,'' the habitat provides a complex mosaic of niches that leads to the patchy distribution of many bird species throughout the region, indicating that the species have specialized habitat requirements that are only satisfied locally (Fjeldså and Krabbe 1990, p. 32). The species' distribution is highly localized around the lake. The Junín rail apparently prefers the dense, interior marshlands comprised primarily of rushes (*Juncus* spp.) and mosaics of rushes, mosses (division Bryophyta), and low herbs in more open marsh areas (Fjeldså 1983, p. 281). High habitat specificity is consistent with related rail species. Studies of the closely related California black rail (*Laterallus jamaicensis coturniculus*) indicate that this species is a habitat specialist, whereby the emergent vegetation used for cover, water depth, and access to upland vegetation, are all important factors in the black rail's habitat use (Flores and Eddleman 1995, p. 362). Therefore, the Junín rail's actual range is clearly smaller than the figure that continues to be reported by BirdLife International since 2000 (BLI 2000, p. 170; BLI 2007, p. 1; BLI 2008, p. 3; BLI 2009b, p. 1).

Population Estimates

Rigorous population estimates have not been made (Fjeldså 1983, p. 281), and the species' elusiveness makes it difficult to locate (BLI 2009b, p. 2). In 1983, the Junín rail was characterized as possibly common, based on local fishers' sightings of groups of up to a dozen birds at a time (Fjeldså 1983, p. 281). The species continues to be reported as ''fairly common,'' assuming that it occurs throughout the marshland surrounding the lake (BLI 2007, p. 1; BLI 2009b, p. 1). The BirdLife International estimate that this species' population size falls within the population range category of 1,000–2,499 (BLI 2000, p. 170; BLI 2007, p. 1; BLI 2009b, p. 1). This estimate is an extrapolation that continues to be based on the assumption that the species ''may be fairly common in the entire c. 58 mi^2 (150 km^2) of available marshland'' around Lake Junín (BLI 2000, p. 170; BLI 2007, p. 1; BLI 2008, p. 3; BLI 2009b, p. 1). As indicated in the analysis of this species' Current Range and Distribution, the species has never been confirmed outside its two known localities and, therefore, it is possible that the species is locally common, but not widely distributed. If the Junín rail is not common throughout Lake Junín's marshland, the actual population size may be much lower.

The species has experienced a population decline of between 10 and 19 percent in the past 10 years (BLI 2009b, p. 2). The population is considered to be declining in close association with continued habitat loss and degradation (see Factors A, C, and E) (BLI 2008, p. 1).

Conservation Status

The Junín rail is considered ''endangered'' by the Peruvian Government under Supreme Decree No. 034-2004-AG (2004, p. 276855). The IUCN categorizes the Junín rail as ''Endangered'' because it is known only from a small area of marshland (i.e., near Ondores and Pari) around a single lake, where habitat quality is declining (BLI 2008, p. 3). The single known population of the Junín rail occurs wholly within one protected area in Peru, the Junín National Reserve (BLI 2008, p. 1; BLI 2009b, pp. 1-2).

Summary of Factors Affecting the Junín Rail

A. The Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

The Junín rail is endemic to Lake Junín, where it resides year-round and is restricted to two localities within the shallow marshlands encircling Lake Junín (BLI 2008, p. 3; BLI 2009b, p. 2; Fjeldså 1983, p. 278). The current estimated range of the species, 62 mi^2 (160 km^2) (BLI 2009b, p. 1), is an overestimate of this species' range for the reasons outlined above as part of the analysis of this species' Current Range and Distribution. The species is known only from two discrete locations, near Ondores and Pari, on the southwest shore of the lake. Breeding occurs near the end of the dry season, in September and October, and the birds build their nests on the ground within the dense vegetative cover of the rushes that make up the marshland perimeter of the lake (BLI 2000, p. 170; BLI 2007, p. 1; BLI 2009b, p. 2).

The habitat in and around Lake Junín is subjected to manmade activities that have altered, destroyed, and degraded the quantity and quality of habitat available to the Junín rail. These activities include: (1) artificial manipulation of water levels; (2) water contamination; and (3) plant harvesting in the species' breeding grounds. The negative impacts of these activities are accentuated by unpredictable climate fluctuations (such as droughts or excessive rains) (Jetz *et al.* 2007, pp. 1211, 1213; Mora *et al.* 2007, p. 1027). The Upamayo Dam went into operation at the northwest end of Lake Junín in 1936 to generate electricity using hydropower (Martin *et al.* 2001, p. 178; ParksWatch 2006, p. 5). Under normal conditions, water levels are lower during the dry season, and the marshlands can become partially or completely desiccated (BLI 2009b, p. 1; ParksWatch 2009, p. 2). The dam is often opened during the dry season, to generate power (June to November) (BLI 2009b, p. 1; ParksWatch 2009, p. 2), leading to further drawdown of the lake. Lake drawdown has been known to cause water levels to fluctuate seasonally up to 6 ft (2 m) (Martin and McNee 1999, p. 659) and has at times caused complete desiccation of the marshlands by the end of the dry season (Fjeldså 2004, p. 123). The ground nesting Junín rail breeds near the end of the dry season, in September and October, and the species' relies on the dense vegetative cover of the rushes on the lake perimeter in which to build their nests (BLI 2009b, p. 2). A similar species, the California black rail, may tolerate decreases in water depth, but only if the substrate remains moist enough to support sufficient wetland vegetation (Flores and Eddleman 1995, p. 362). Eddleman *et al.* (1988, p. 463) noted that water drawdown before nesting season disrupts nest initiation by rails. Therefore, water drawdown near the end of the dry season that results in complete desiccation of the shallow marshlands (BLI 2009b, p. 1; ParksWatch 2009, p. 2) is likely to disrupt Junín rail nest initiation.

Experts believe that the Junín rail is restricted to the marshes at the southwest corner of the lake because of the high level of contamination at the northwest margins of the lake (Martin and McNee 1999, p. 662). Experts also believe that pollution and artificial water level fluctuations will continue to have adverse consequences for the vegetation surrounding the lake and, therefore, the Junín rail (BLI 2000, p. 170; BLI 2007, p. 1; J. Fjeldså in litt., 1987, as cited in Collar *et al.* 1992, p. 190). Indeed, in some places, the tall marshlands, which rely on inundated soils to thrive, have virtually disappeared because the reed-beds are no longer permanently inundated (O'Donnel and Fjeldså 1997, p. 30). Moreover, as the marshes dry, livestock (primarily sheep (*Ovis aries*), but also cattle (*Bos taurus*), and some llamas (*Llama glama*) and alpacas (*Llama pacos*)) move into the desiccated wetlands surrounding the lake to graze. Overgrazing is a year-round problem around Lake Junín because the entire lakeshore is zoned for grazing by a large number of livestock (approximately 60,000–70,000 head) (ParksWatch 2006, pp. 12, 19). During the dry season, the hoofed stock moves into the marshlands to graze, compacting the soil and trampling the vegetation (ParksWatch 2006, p. 31). Increased access to the wetlands during the end of the dry season, which coincides with the inception of the Junín rail's nesting season, likely disrupts the rail's nesting activities or leads to nest trampling. Therefore, activities that increase lakeshore access, such as water drawdown, decrease the amount of available habitat for the Junín rail (for nesting and feeding) and are likely to negatively impact the Junín rail's reproduction (through trampling) and mating habits (through disturbance) (BLI 2009b, p. 1).

Water quality is another factor influencing the quality of habitat available to the Junín rail. The degraded water quality in Lake Junín was fully discussed as part of the Factor A analysis for the Junín grebe and is summarized here. The water in Lake Junín has been contaminated from mining (Martin and McNee 1999, pp. 660-661; ParksWatch 2006, p. 2; Shoobridge 2006, p. 3), agricultural activities (Martin and McNee 1999, pp. 660-661; ParksWatch 2006, p. 2;

Shoobridge 2006, p. 3), and from organic matter and wastewater runoff from local communities around the lake (ParksWatch 2006, pp. 5, 19; Shoobridge 2006, p. 3). Water pollution has resulted in heavy metal contamination throughout the lake, exceeding established thresholds for aquatic life throughout at least one-third of the lake (Martin and McNee 1999, pp. 660-661; O'Donnel and Fjeldså 1997, p. 29; ParksWatch 2006, pp. 3, 20; Shoobridge 2006, p. 3), and rendering the northern portion of the lake lifeless (BLI 2008, p. 4; Shoobridge 2006, p. 3; Fjeldså 2004, p. 124; Martin and McNee 1999, pp. 660-662; ParksWatch 2006, pp. 20-21). At the lake's center, lake bottom sediments are lifeless and anoxic due to contaminants (Fjeldså 2004, p. 124; Martin *et al.* 2001, p. 180), and the lakeshore has become polluted with ''toxic acid gray sediment'' (O'Donnel and Fjeldså 1997, p. 30). There is no vegetation at the northern end of the lake (Fjeldså 2004, p. 124; ParksWatch 2006, pp. 20-21), and ongoing contamination has the potential to reduce vegetative cover in other areas of the lake, including the marshlands where the Junín rail occurs. In addition, these pollutants have severely affected animal and plant populations in the area, contributing to mortality of species around the lake (ParksWatch 2006, pp. 3, 20) and have the potential to reduce the health and fitness of the Junín rail (see Factor C).

Local residents also harvest and burn cattails from the marshland habitat, which the Junín rail depends upon. Cattails are harvested for use in construction (i.e., to assemble rafts, baskets, and mats) and as forage for livestock (ParksWatch 2006, p. 23). Cattails are also burned to encourage shoot renewal (ParksWatch 2006, p. 23) and for hunting the montane guinea pig (*Cavia tschudii*), which seeks cover in the cattail marshes and is part of the local diet. Burning cattail communities has a negative and long-lasting impact on species that use the cattails as permanent habitat (INRENA 2000, as cited in ParksWatch 2006, p. 22; Eddleman *et al.* 1988, p. 464), including the Junín rail, which relies on the dense vegetative cover of the marshlands for year-round residence and nesting (BLI 2000, p. 170; BLI 2007, p. 1; BLI 2009b, p. 2).

The negative impacts of habitat alteration and destruction (such as artificially reduced water levels, water contamination, and cattail harvesting and burning) are accentuated by unpredictable climate fluctuations (such as droughts or excessive rains) (Jetz *et al.* 2007, pp. 1211, 1213; Mora *et al.* 2007, p. 1027). Peru is subject to unpredictable climate fluctuations, such as those that are related to the El Niño Southern Oscillation (ENSO). Changes in weather patterns, such as ENSO cycles (El Niño and La Niña events), tend to increase precipitation in normally dry areas, and decrease precipitation in normally wet areas (Holmgren *et al.* 2001, p. 89; TAO Project n.d., p. 1). ENSO events exacerbate the effects of habitat reduction and alteration on the decline of a species (England 2000, p. 86; Holmgren *et al.* 2001, p. 89; Jetz *et al.* 2007, pp. 1211, 1213; Mora *et al.* 2007, p. 1027; Parmesan and Mathews 2005, p. 334; Plumart 2007, pp. 1-2; Timmermann 1999, p. 694), particularly for narrow endemics (Jetz *et al.* 2007, p. 1213) such as the Junín rail (see also Factor E). As discussed above, droughts increase access to the wetlands where Junín rails live and breed. Excessive rain increases contamination in the water and causes soil toxicity (see Factor C). ENSO cycles are ongoing, having occurred several times within the last decade (NWS 2009, p. 2). Evidence suggests that ENSO cycles have already increased in periodicity and severity (Richter 2005, pp. 24-25; Timmermann 1999, p. 694), which will, thus, exacerbate the negative impacts on a species.

Summary of Factor A

The habitat in and around Lake Junín, where the Junín rail is endemic, has been and continues to be altered and degraded as a result of human activities, including artificial water level fluctuations to generate hydropower, water contamination caused by mining waste, agricultural and organic runoff from surrounding lands, and wastewater from local area communities. The Junín rail is dependent on the marshland habitat surrounding the lake for breeding and feeding. Water levels in Lake Junín are manipulated to generate electricity, which leads to dramatic fluctuations in water levels of up to 6 ft (1.8 m). The Junín rail nests on the ground, within the protective cover of the marshlands. As water drawdown occurs near the end of the dry season and during the inception of the Junín rail's mating season, portions of the marshlands may dry out completely, affecting the availability of suitable breeding and foraging habitat. This species' population decline has been linked to deteriorating habitat quality (see also Factor E). Overgrazing, cattail harvest, and burning are ongoing around the lakeshore, and water drawdown increases access to the marshlands. Severe water contamination in the northwest portion of the lake has rendered it lifeless, and experts believe that water contamination limits the Junín rail's foraging and breeding activities to the southern portion of the lake. The effects of artificially reduced water levels and water contamination are accentuated by droughts or excessive rains caused by El Niño events. Reduced water levels near the end of the dry season (during Junín rail nesting season) expose the species to greater vulnerability to predation (see Factor C), which also heightens the risks to the species that are associated with short- and long-term genetic viability (Factor E). Therefore, we find that destruction and modification of habitat are threats to the continued existence of the Junín rail throughout its range.

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

We are not aware of any information currently available that indicates that overutilization of Junín rail for commercial, recreation, scientific, or education purposes has occurred or is occurring at this time. As a result, we are not considering overutilization to be a threat to the continued existence of the Junín rail.

C. Disease or Predation

Disease: Although no specific disease threat has been identified for the Junín rail, contamination of Lake Junín exposes the Junín rail to mortality and a reduction the overall fitness and health of the species. The effects of water contamination on the health of species inhabiting Lake Junín were discussed as part of the analysis of Factor C for the Junín grebe and are summarized here. In Lake Junín, mining activities (Martin and McNee 1999, pp. 660-661; Shoobridge 2006, p. 3), and agricultural runoff, organic matter, and wastewater (ParksWatch 2006, pp. 5, 19; Shoobridge 2006, p. 3) have contaminated the entire lake with high concentrations of dissolved chemicals (Fjeldså 2004, p. 124; Martin and McNee 1999, pp. 660-662; ParksWatch 2006, pp. 20-21). Environmental contaminants exceed current established thresholds for aquatic life (Martin and McNee 1999, pp. 660-661; ParksWatch 2006, p. 20) and have rendered the northern portion of the lake lifeless from eutrophication (BLI 2008, p. 4; Shoobridge 2006, p. 3). Due to severe contamination, the sediments in the center of the lake are anoxic (Martin *et al.* 2001, p. 180), and the lake's turbidity has increased (ParksWatch 2006, p. 20). Chemical waste has damaged at least one third of the lake, severely affecting animal and

plant populations in the area (O'Donnel and Fjeldså 1997, p. 29; ParksWatch 2006, pp. 3, 20; Shoobridge 2006, p. 3) and completely eliminating vegetation from the northern portion of the lake (Fjeldså 2004, p. 124; ParksWatch 2006, pp. 20-21). It is also believed that contamination may, in fact, be responsible forthe possible extirpation of at least one fish species (a catfish) (O'Donnel and Fjeldså 1997, p. 29).

Contamination from mining waste may have direct and indirect impacts on the fitness and health of the Junín rail. As described above as part of the Factor C analysis for the Junín grebe, a waterbird that is sympatric with the Junín rail, mine waste contamination may have caused heavy metal poisoning (T. Valqui and J. Barrio in litt. 1992, as cited in Collar *et al.* 1992, pp. 45, 190) or reduced prey availability (Fjeldså 2004, p. 124), leading to Junín grebe mortality during an extensive drought from 1989 to 1992. Large-scale bird mortality has occurred on the lake, apparently due to lead poisoning from mining effluents—a common cause of mortality in waterbirds (Friend and Franson 1999, p. 317; O'Donnel and Fjeldså 1997, p. 30). Heavy metals in the water column and the lake's sediments, where this species feeds, would have negative health consequences for the Junín rail, as in the case for the Junín grebe and other waterbirds that inhabit the lake. Excessive contaminant load can contribute to a decline in fitness and vigor for long-lived, mid-trophic level species (Rowe 2008, p. 624), such as the Junín rail. Increased turbidity of the water has resulted in die-offs of aquatic plants and algae, which disrupts the food chain (ParksWatch 2006, p. 20). Higher trophic level species (discussed in more detail as part of the Factor C analysis for the Junín grebe), such as the Junín rail, are more susceptible to disruptions in the food chain at lower trophic levels (Fjeldså 2004, p. 123; The University of the Western Cape 2009, p. 1) and prone to bioaccumulation because they ingest pesticides, heavy metals, and other contaminants that are present in their prey (Demayo *et al.* 1982, as cited in Eisler 1988, p. 5; Fjeldså 2004, p. 123). Drought conditions exacerbate the effects of water contamination and bioaccumulation for species at higher trophic levels (Demayo *et al.* 1982, as cited in Eisler 1988, p. 5; Fjeldså 2004, p. 123).

Predation: Predators around Lake Junín include the Andean fox (*Pseudalopex culpaues*), the long-tailed weasel (*Mustela frenata*), Pampas cat (*Onicifelis colocolo*), and hog-nosed skunk (*Conepatus chinga*) (ParksWatch 2009, p. 4). Junín rails are preyed upon by pampas cats (BLI 2008, p. 4; BLI 2009b, p 2). Under normal conditions, water levels are lower in the dry season and the marshlands can become partially or completely dry (BLI 2009b, p. 1; ParksWatch 2009, p. 2) reducing protective cover and allowing predators to more easily locate the rail. When the floodgates of the Upumayo Dam are opened during the dry season (June to November) (BLI 2009b, p. 1; ParksWatch 2009, p. 2), drawdown has led to complete desiccation of the marshlands by the end of the dry season (Fjeldså 2004, p. 123). The ground nesting Junín rail breeds near the end of the dry season, in September and October, and builds their nests in the dense vegetative cover of the rushes on the lake perimeter (BLI 2009b, p. 2). Water drawdown and periods of drought increases the bird's vulnerability to predation because nesting grounds become exposed and larger areas of the marsh are accessible to predators (ParksWatch 2006, p. 23). Predation increases the risk of extirpation due to the species' already small population size. In addition, species that inhabit a small geographic range, occur at low density, occupy a high trophic level, and exhibit low reproductive rates tend to have a higher risk of extinction than species that are not limited by the same risk factors (Purvis *et al.* 2000, p. 1949) (Factor E).

Summary of Factor C

Environmental contaminants (Factor A) in Lake Junín may have negative consequences on the health of the Junín rail, given that extensive environmental contamination in Lake Junín has resulted in mortality of flora and fauna that inhabit the lake and its margins. The species' trophic level also exposes it to bioaccumulation of toxins accumulated in the tissue of prey species. There is documented evidence that other waterbirds occupying the same habitat have died as a direct result of contaminant poisoning or reduction of the availability of prey species. Therefore, we find that disease is a threat to the continued existence of the Junín rail.

Predation by the pampas cat results in the direct removal of individuals from the population and can remove potentially reproductive adults from the breeding pool. Ongoing habitat destruction (through reduced water levels and contamination) continues to degrade the quality of habitat available to the Junín rail (Factor A) and the species' habitat becomes more accessible to predators during droughts and water drawdowns. Predation renders the species particularly vulnerable to local extirpation due to its small population size (Factor E). Therefore, we find that predation, exacerbated by ongoing habitat destruction (Factor A), are threats to the continued existence of the Junín rail throughout its range.

D. Inadequacy of Existing Regulatory Mechanisms

The Junín rail is listed as ''endangered'' by the Peruvian Government under Supreme Decree No. 034-2004-AG (2004, p. 276855). This Decree prohibits hunting, take, transport, and trade of protected species, except as permitted by regulation. As hunting, take, transport, and trade do not currently threaten the Junín rail, this regulation does not mitigate any current threats to this species.

Peru has several categories of national habitat protection, which were described above as part of the Factor D analysis for the ash-breasted tit-tyrant (BLI 2008, p. 1; IUCN 1994, p. 2; Rodríguez and Young 2000, p. 330). The single Junín rail population occurs wholly within the Junín National Reserve (Junín, Peru) (BLI 2009b, pp. 1-2), which encompasses the lake and surrounding land and was established in 1974 by Supreme Decree 0750- 74-AG (BLI 2009a, p. 2; Wege and Long, p. 264). Peruvian National Reserves are created for the sustainable extraction of certain biological resources (BLI 2008, p. 1; Rodríguez and Young 2000, p. 330), and most of the lakeshore is designated a ''Direct Use Zone,'' allowing fishing, grazing, and other educational, research, and recreational activities (ParksWatch 2006, p. 12). Habitat destruction and alteration (through artificial water level fluctuations, contamination (BLI 2009b, p. 1; Fjeldså 2004, p. 124; ParksWatch 2006, pp. 20-21; Wege and Long 1995, p. 264)), overgrazing, and cattail harvest and burning (ParksWatch 2006, pp. 22-23) are ongoing throughout the Reserve (Factor A), increasing the species' susceptibility to predation (ParksWatch 2006, p. 23) (Factor C), and jeopardizing the continued existence of the species, given its already small population size (Factor E). Therefore, the existence of this species within a protected area has not reduced or mitigated the threats to the Junín rail.

The Junín National Reserve was designated a Ramsar site in 1997 (BLI 2009a, p. 2; INRENA 1996, pp. 1-14; Ramsar 2009, p. 2). As more fully described for the Junín grebe, this designation provides only nominal protection of wetland habitat (Jellison *et*

al. 2004, p. 19). Activities that negatively impact the Junín rail are ongoing throughout this wetland, including water fluctuations and contamination (Factor A), water fluctuations that increase the species' risk of predation (Factor C), and small population size (Factor E). Therefore, the Ramsar designation has not mitigated the impact of threats on the Junín rail.

There are approximately 5,000 laws and regulations directly or indirectly related to environmental protection and natural resource conservation in Peru. Recent studies by the Peruvian Society for Environmental Law (SPDA) have concluded that many of these are not effective because of limited implementation or enforcement capability (Muller 2001, pp. 1-2).

Summary of Factor D

Peru has enacted various laws and regulatory mechanisms for the protection and management of wildlife and their habitats. The Junín rail is ''endangered'' under Peruvian law, and its entire population occurs within a protected area. As discussed under Factor A, habitat destruction and alteration have curtailed the species' range and threaten the continued existence of the species. Ongoing habitat destruction (including water level manipulation, contamination, overgrazing, and cattail harvest and burning (Factor A)), predation (Factor C), and predators' increased access due to habitat destruction intensify the risks to the species from its already small population size (Factor E). These activities are ongoing throughout the species' range, which is entirely encompassed within a protected area. Thus, despite its endangered status and its presence within a designated protected area, laws governing wildlife and habitat protection in Peru are inadequately enforced or ineffective at protecting the species or mitigating ongoing habitat degradation (Factor A) and concomitant population declines (Factor E). Therefore, we find that the existing regulatory mechanisms are inadequate to mitigate the threats to the continued existence of the Junín rail throughout its range.

E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

An additional factor that affects the continued existence of the Junín rail is the species' small population size. As discussed above (see Population Estimates), BirdLife International has placed the Junín rail in the population category of between 1,000 and 2,499 individuals (BLI 2009b, p. 2), and considers the population to be likely ''very small and presumably declining'' (BLI 2000, p. 170; BLI 2009b, p. 1).

Small population size renders species vulnerable to genetic risks that can have individual or population-level genetic consequences, such as inbreeding depression, loss of genetic variation, and accumulation of new mutations, and may affect the species' viability by increasing its susceptibility to demographic shifts or environmental fluctuations, as explained in more detail above in the Factor E analysis for the ash-breasted tit-tyrant (Charlesworth and Charlesworth 1987, p. 238; Pimm *et al.* 1988, pp. 757, 773-775; Shaffer 1981, p. 131). Small population size leads to a higher risk of extinction and, once a population is reduced below a certain number of individuals, it tends to rapidly decline towards extinction (Frankham 1996, p. 1507; Franklin 1980, pp. 147-148; Gilpin and Soulé 1986, p. 25; Holsinger 2000, pp. 64-65; Purvis *et al.* 2000, p. 1949; Reed and Frankham 2003, pp. 233-234; Soulé 1987, p. 181). In addition, species that inhabit a small geographic range, occur at low density, occupy a high trophic level, and exhibit low reproductive rates tend to have a higher risk of extinction than species that are not limited by the same risk factors (Purvis *et al.* 2000, p. 1949). We consider that the risks associated with small population size will continue to impact this species and may accelerate, if habitat destruction continues unabated.

Complications arising from the species' small population size are exacerbated by its restricted range and the threat of predation (Factor C). The Junín rail is known from two localities (Ondores and Pari) on the southwest shore of a single Andean lake, Lake Junín, in central Peru (BLI 2000, p. 170; BLI 2009b, pp. 1-2; Fjeldså 1983, p. 281; Fjeldså in litt. 1992, as cited in Collar *et al.* 1992, p. 190) (see Current Range and Distribution). The population has declined at a rate between 10 and 19 percent in the past 10 years, and this decline is expected to continue, as a result of the declining quality of habitat within its small, restricted range (BLI 2009b, pp. 4-5) (Factor A). The pampas cat is a known predator of Junín rails (BLI 2008, p. 4; BLI 2009b, p 2). The ground nesting Junín rail is particularly vulnerable to predation near the end of the dry season, when nesting begins and the vegetative cover of the marshlands within which they build their nests (BLI 2009b, p. 2) is more exposed and accessible to predators (ParksWatch 2006, p. 23). The Junín rail's small population size, combined with its restricted range and threat of predation, increases the species' vulnerability to adverse natural events and manmade activities that destroy individuals and their habitat (Holsinger 2000, pp. 64-65; Primack 1998, pp. 279-308; Young and Clarke 2000, pp. 361-366).

Summary of Factor E

The Junín rail has a small population size that renders it vulnerable to genetic risks that negatively impact the species' viability. The species occupies a restricted range and occurs in habitat that continues to be altered and destroyed due to human activities (Factor A). Predation jeopardizes the species' already small population size because it results in the direct removal of Junín rail individuals from the population, can remove potentially reproductive adults from the breeding pool, and could lead to extirpation (Factor C). The small population size, as well as its restricted range and threat of predation, increases the species' vulnerability to extinction through demographic or environmental fluctuations. Based on the species' small population size, restricted range, and threat of predation, we have determined that the Junín rail is particularly vulnerable to the threat of adverse natural events (e.g., genetic, demographic, or environmental) and human activities (e.g., water level manipulation, contamination, cattail harvest, and overgrazing) that destroy individuals and their habitat. The genetic and demographic risks associated with small population sizes are exacerbated by ongoing human activities that continue to curtail the species' habitat throughout its range. The species' population has declined and is predicted to continue declining due to an ongoing reduction in the quality of its habitat (Factor A). Therefore, we find that the species' small population size, in concert with its restricted range, threat of predation, and its heightened vulnerability to adverse natural events and manmade activities, are threats to the continued existence of the Junín rail throughout its range.

Status Determination for the Junín Rail

The Junín rail is a ground nesting bird endemic to Lake Junín, found at 13,390 ft (4,080 m) above sea level in Peru, where it resides year-round. The species has high habitat specificity and occurs only in two localities within the marshland mosaic habitat that surrounds the lake. The current estimated range of the species is 62 mi^2 (160 km^2), and its population size is estimated to be 1,000–2,499. However,

both of these figures are likely to be overestimates; despite suggestions that the species inhabits the entire area of marshland surrounding the lake, the species has only been confirmed in two localities.

We have carefully assessed the best available scientific and commercial information regarding the past, present, and potential future threats faced by the Junín rail and have concluded that there are four primary factors that threaten the continued existence of the rail: (1) Habitat destruction, fragmentation, and degradation; (2) disease and predation; (3) limited size and isolation of remaining populations; and (4) inadequate regulatory mechanisms.

Human activities that degrade, alter, and destroy habitat are ongoing throughout the Junín rail's range. Lake waters are artificially manipulated to produce hydropower, resulting in reductions in water levels that impact the species' nesting and foraging sites, especially near the end of the dry season when this ground nesting bird begins breeding. Reduced water levels and aquatic contaminants have permanently destroyed segments of cattail communities, compromising the amount of suitable flooded marshland available for nesting. Climate fluctuations exacerbate the effects of habitat alteration, as droughts further decrease available nesting grounds and excessive rains increase contaminant runoff into the lake (Factor A). Environmental contaminants have caused mortality in other waterbirds and have likely reduced the overall general health of the Junín rail population (Factor C). Overgrazing and cattail harvest and burning further alter and destroy the marshland upon which the rails depend (Factor A). Water drawdown exposes the birds and their marshland nesting areas to greater access by grazing animals, cattail harvesters, and predators (Factors A and C).

Junín rail habitat continues to be altered by human activities, which results in the continued degradation and destruction of habitat and reduces the quality and distribution of remaining suitable habitat. Habitat loss was a factor in the Junín rail's historical decline (see Historical Range and Distribution), and the species is considered to be declining today due to continued reduction of available habitat (Factors A and E). The Junín rail population is small, increasing the species' vulnerability to the threat of adverse natural events (e.g., genetic, demographic, or environmental) and human activities (e.g., water contamination, water level manipulation, cattail harvest, and overgrazing) that destroy individuals and their habitat. Human activities that continue to curtail the species' habitat throughout its range exacerbate the genetic and demographic risks associated with small population sizes (Factor E). Predation jeopardizes the species' already small population size because it results in the direct removal of Junín rail individuals from the population, can remove potentially reproductive adults from the breeding pool, and could lead to extirpation (Factor C). The Junín rail population has declined at a rate between 10 and 19 percent during the past 10 years (see Population Estimates), and this decline is predicted to continue commensurate with ongoing threats from habitat destruction, water contamination, overgrazing, and cattail harvest and burning (Factor A).

Despite the species' endangered status in Peru and its occurrence entirely within one protected area (Factor D), habitat destruction and degradation continue as a result of human activities that alter lake levels and compromise water quality and increase the species' susceptibility to overgrazing and predation (Factors A and C). Therefore, regulatory mechanisms are either inadequate or ineffective at mitigating the existing threats to the species and its habitat (Factor D).

Section 3 of the Act defines an ''endangered species'' as ''any species which is in danger of extinction throughout all or a significant portion of its range'' and a ''threatened species'' as ''any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' Based on the immediate and ongoing threats to the Junín rail throughout its entire range, as described above, we determine that the Junín rail is in danger of extinction throughout all of its range. Therefore, on the basis of the best available scientific and commercial information, we are proposing to list the Junín rail as an endangered species throughout all of its range.

IV. Peruvian plantcutter (*Phytotoma raimondii*)

Species Description

The Peruvian plantcutter, locally known as ''*cortarrama Peruana*,'' is a small finch-like bird endemic to the dry forests of coastal northwest Peru (Collar *et al.* 1992, p. 805; Goodall 1965, p. 636; Ridgely and Tudor 1994, p. 733; Sibley and Monroe 1990, p. 371; Schulenberg *et al.* 2007, p. 488; Walther 2004, p. 73). The Peruvian plantcutter is an herbivore with a predominantly leaf-eating diet (Bucher *et al.* 2003, p. 211; Schulenberg *et al.* 2007, p. 488; Walther 2004, p. 73).

Plantcutters have bright yellow eyes, short wings and rather long tails, and their crown feathers form a slight crest (Goodall 1965, p. 635; Ridgely and Tudor 1994, p. 732). Adult birds are 7.28 to 7.48 in (18.5 to 9 cm) in length and weigh approximately 1.26 to 1.55 ounces (oz) (36 to 44 grams (g)) (Schulenberg *et al.* 2007, p. 488; Walther 2004, p. 73). Males are pale ashy gray, except a broad cinnamon-rufous color band on the belly and above the bill, and white colored bands on their wings (BLI 2000, p. 401; BLI 2009a, p. 1; Goodall 1965, p. 636; Ridgely and Tudor 1994, p. 733). Females are buff-brown with broad, dark brown stripes above, and white with heavy black-striped underparts (BLI 2009a, p. 1; Collar *et al.* 1992, p. 805). Juvenile birds have not been described (Walther 2004, p. 73). The Peruvian plantcutter's bill is stout, short, conical, and finely serrated with sharp tooth-like projections that run the length of the beak on both sides, and which are well suited for plucking buds, leaves, shoots, and fruits (Goodall 1965, p. 635; Ridgely and Tudor 1994, p. 732; Schulenberg *et al.* 2007, p. 488) (see Habitat and Life History).

Taxonomy

The Peruvian plantcutter was first taxonomically described as *Phytotoma raimondii* by Taczanowski in 1883 (ITIS 2009, p. 1; Sibley and Monroe 1990, p. 371). The type-specimen of the Peruvian plantcutter (the specimen that was described by Taczanowski) was collected by the ornithologist Konstanty Jelski, who recorded the specimen as being collected in the Tumbes Department of Peru (Flanagan *et al.* in litt. 2009, p. 2). However, the reported collection location may have been inaccurate (see Historical range and Distribution, below).

The genus *Phytotoma* contains three species of plantcutters, all endemic to South America (Dickinson 2003, p. 346; Goodall 1965, p. 635; Sibley and Monroe 1990, p. 371; Walther 2004, p. 73). Ornithologists have long debated to which family this genus belongs. Some ornithologists have recommended that the genus be placed in its own family, Phytotomidae (Lanyon and Lanyon 1989, p. 422), while others placed the genus within the Tyrannidae family (Sibley and Monroe 1990, p. 371). Molecular research using DNA sequencing supports the inclusion of *Phytotoma* in the Cotingidae family (Irestedt *et al.* 2001, p. 23; Johansson *et al.* 2002, p. 993; Ohlson *et al.* 2006, p. 10). The Cotingidae family includes a

wide diversity of species that are found in Central America and tropical South America (Snow 2004, p. 32). Therefore, based on the information currently available to us, we accept that the Peruvian plantcutter belongs to the Cotingidae family, which also follows the Integrated Taxonomic Information System (ITIS 2009, p. 1).

Habitat and Life History

The Peruvian plantcutter is reportedly selective in its habitat preference and requires a variety of arid tree and shrub species with dense low-hanging branches to the ground (Collar *et al.* 1992, p. 805; Flanagan and More 2003, p. 5; Flanagan *et al.* in litt. 2009, p. 7; Williams 2005, p. 2). The primary habitat for the Peruvian plantcutter is seasonally dry tropical forest, which is also referred to equatorial dry tropical forest, and which occurs in the semiarid lowlands of northwest Peru (Linares-Palomino 2006, pp. 260, 263-266; Schulenberg *et al.* 2007, p. 21; Walther 2004, p. 73). The Peruvian plantcutter also uses arid lowland scrub (dense and open) and dense riparian shrub communities (BLI 2009a. p. 2; Collar *et al.* 1992, p. 805; Schulenberg *et al.* 2007, pp. 21, 488; Stotz *et al.* 1996, p. 19; Walther 2004, p. 73). Stotz *et al.* (1996, pp. 19, 428) identified the Peruvian plantcutter as a key indicator species for Equatorial Pacific Coast arid lowland scrub. The lowland dry tropical forest and scrub are characterized as small and heavily fragmented patches of plant species adapted to the arid conditions of the prolonged dry season of northwest Peru (Best and Kessler 1995, p. 40; Bridgewater *et al.* 2003, pp. 132, 140; Ridgely and Tudor 1994, p. 734).

The lowland dry forest or woodlands in northwest Peru are open canopied, with trees occurring in scattered clumps or individually (Flanagan and More 2003, p. 4). The dominant tree species of the lowland dry forest is *Prosopis pallida* (common name ''*kiawe*;'' also locally referred to as ''*algarrobo*'') in the Fabaceae family (legume family) (Lopez *et al.* 2005, p. 542; More 2002, p. 39). *Prosopis pallida* is a wide-spreading tree or large shrub, 26–65 ft (8–20 m) tall, with dense branches; spines can be present or absent (Pasiecznik *et al.* 2001, p. 36). This deep-rooted drought-tolerant species, related to mesquite species of southwest United States and Mexico, provides an important ecological function by improving and stabilizing soil conditions (Brewbaker 1987, p. 1; Pasiecznik *et al.* 2001, pp. 101-102). Typical of legumes, *P. pallida* is able to ''fix'' atmospheric nitrogen for plant utilization and growth (Brewbaker 1987, p. 1; Pasiecznik *et al.* 2001, p. 3).

Three of the most common tree species associated with *P. pallida* dry forest habitat used by the Peruvian plantcutter are *Capparis scabrida* (no common name, but locally known as ''*sapote*''), in the Capparaceae (caper) family, and *Acacia macracantha* (long-spine acacia, locally known as ''*faique*'') and *Parkinsonia aculeata* (Jerusalem thorn, locally known as ''*palo verde*''), both in the Fabaceae (legume) family (More 2002, pp. 17-23). Associated flowering shrubs in dry forest habitat include *Capparis avicennifolia* (no common name, but locally known as ''*bichayo*'') and *C. crotonoides* (no common name, but locally known as ''*guayabito de gentil*''), both in the Capparaceae (caper) family; *Cordia lutea* (no common name, but locally known as ''*overall*'') in the Boraginaceae (borage) family; and *Maytenus octogona* (no common name, but locally known as ''*realengo*'') in the Celastraceae (bittersweet) family. Other commonly occurring dry forest vegetation includes vines (e.g., Convolvulaceae (morning-glory) and Cucurbitaceae (gourd) families), *Psittacanthus chanduyensis* (tropical mistletoe; locally known as ''*suelda con suelda*'') in the Loranthaceae (mistletoe) family, scattered herbaceous species (e.g., Asteraceae (sunflower), Scrophulariaceae (figwort), and Solanaceae (nightshade) families), and grasses (e.g., Poaceae (grass) family) (Elton 2004, p. 2; Ferreyera 1983, pp. 248-250; More 2002, pp. 14-17; Walther 2004, p. 73). Riparian vegetation includes dense shrub and small trees of *P. pallida, A. macracantha*, *Capparis* spp., and *Salix* spp. (willow spp.) (Lanyon 1975, p. 443).

The arid climate of northwest Peru is due to the influence of the cold Humboldt Current that flows north, parallel to the Peruvian Coast (UNEP 2006, p. 16; Linares-Palomino 2006, p. 260; Rodriguez *et al* 2005, p. 2). The Humboldt Current has a cooling influence on the climate of coastal Peru, as the marine air is cooled by the cold current and, thus, is not conducive to generating rain. To the east, the Andean Mountains prevent humid air from the Amazon from reaching the western lowlands (Lanyon 1975, p. 443; Linares-Palomino 2006, p. 260).

Coastal northwest Peru experiences a short rainy season during the summer months (January–April) (Linares-Palomino 2006, p. 260), which can also include precipitation in the form of mist or fine drizzle along the coast (Lanyon 1975, p. 443). The mean annual precipitation across the range of the Peruvian plantcutter is 0.196 to 3.80 in (5.0 to 99 mm) (hyper-arid to arid) (Galan de Mera *et al.* 1997, p. 351). The climate is warm and dry with the annual temperature range of 74° to 77° F (23° to 25° C) at elevations below 1,968 ft (600 m) (Linares-Palomino 2006, p. 260). Northwest Peru is strongly influenced by the El Niño Southern Oscillation (ENSO) cycle (Rodriguez *et al* 2005, p. 1), which can have particularly profound and long-lasting effects on arid terrestrial ecosystems (Holmgren *et al.* 2006a, p. 87; Mooers *et al.* 2007, p. 2) (see Factor A).

Knowledge of the breeding of most species within the Cotingidae family, including the Peruvian plantcutter, is not well known (Walther 2004, p. 73). The Peruvian plantcutter is considered a resident species in Peru, which indicates that it breeds there (Snow 2004, p. 61; Walther 2004, p. 73). Nesting activity of plantcutters appears to occur from March to April (Collar *et al.* 1992, p. 805; Walther 2004, p. 73). Plantcutters build shallow, cup-shaped nests that are made of thin dry twigs and lined with root fibers and other softer material (Snow 2004, p. 55). Nests range from 2.4 to 3.5 in (6 to 9 cm) in height and 3.9 to 7.0 in (10 to 18 cm) in diameter, and can be placed 3.3 to 9.8 ft (1 to 3 m) above the ground inside a thick thorny shrub or higher in the fork of a tree (Elton 2004, p. 2; Flanagan and More 2003, p. 3; Snow 2004, p. 55). Each female lays two to four eggs, and the incubation period lasts about 2 weeks (Snow 2004, p. 56; Goodall 1965, p. 636; Walther 2004, p. 73). The eggs have been described as short oval to sub-elliptical in shape and grayish olive in color with dark brownish olive spots at the larger end (Flanagan and Millen 2008, p. 1). Males assist rearing the chicks, which fledge after 17 days or so (Snow 2004, p. 56).

Plantcutters are herbivores with a predominantly leaf-eating diet (Bucher *et al.* 2003, p. 211; Snow 2004, p. 46). As an herbivore, the Peruvian plantcutter is dependent on year-round availability of high-quality food, particularly during the dry season when plant growth is very limited (Bucher *et al.* 2003, p. 216). Peruvian plantcutters eat buds, leaves, and shoots of *P. pallida* and various other trees and shrubs, as well as some fruits (e.g., mistletoe) (Goodall 1965, p. 635; Schulenberg *et al.* 2007, p. 488; Walther 2004, p. 73). The seeds, green seed pods, leaves, and flowers of *P. pallida* provide a protein-rich food source for animals (Lewis *et al.* 2006, p. 282). Research studies on the two related plantcutter species, the rufous-tailed plantcutter (*P. rara*) and the white-tipped plantcutter (*P. rutila*), showed that the herbivore diet of these

two species did not affect the energy levels of observed birds (Lopez-Calleja and Bozinovic 1999, p. 709; Meynard *et al.* 1999, p. 906; Rezende *et al.* 2001, p. 783). The Peruvian plantcutter appears to prefer to feed while perched in shrubs and trees, although individuals also have been observed foraging on the ground (Snow 2004, p. 50). Birds have been observed in pairs and small groups (Collar *et al.* 1992, p. 804; Flanagan and More 2003, p. 3; Schulenberg *et al.* 2007, p. 488; Walther 2004, p. 73).

Historical Range and Distribution

The Peruvian plantcutter is a restricted-range species that is confined to the mostly flat, narrow desert zone, which is less than 31 mi (50 km) in width (Lanyon 1975, p. 443) and runs along the coast of northwest Peru (Ridgely and Tudor 1994, p. 734; Stattersfield *et al.* 1998, p. 213; Walther 2004, p. 73). The historical range of the Peruvian plantcutter reportedly extended from the town of Tumbes, located in extreme northwest corner of Peru and approximately south to north of Lima within the Regions of Tumbes, Piura, Lambayeque, La Libertad, Ancash, and Lima (from north to south) (Collar *et al.* 1992, pp. 804-805).

The historical distribution of the Peruvian plantcutter was most likely throughout the contiguous lowland *P. pallida* dry forest and riparian vegetation, below 1,804 ft (550 m) (Collar *et al.* 1992; Williams 2005, p. 1). According to Collar *et al.* (1992, pp. 804-805), the Peruvian plantcutter is known from 14 historical sites.

The type-specimen of the Peruvian plantcutter, which was collected and labeled by Konstanty Jelski as being found in Tumbes in the late 1870s, was most likely collected south of the town of Tumbes (Flanagan *et al.* in litt. 2009, pp. 2, 15). It is unknown whether the type specimen was lost or destroyed, or if it was ever returned to Peru (Flanagan *et al.* in litt. 2009, p. 2). Today, there is good indication that the type-specimen was mislabeled as being collected in Tumbes (Flanagan *et al.* in litt. 2009, pp. 2). Although the Tumbes Region has been extensively surveyed for the Peruvian plantcutter, including the North-West Biosphere Reserve, there have never been other collections in or near the vicinity of Tumbes or other evidence to suggest that the Peruvian plantcutter ever occurred in the area (Flanagan *et al.* in litt. 2009, p. 2). Thus, it appears that the Peruvian plantcutter never occurred in the Tumbes Region.

Researchers consider the reduction in dry forest habitat to be the result of historical human activities, including extensive land clearing for agriculture, timber and firewood extraction, charcoal production, and overgrazing. These activities have led to the reduction and severe fragmentation of dry forest habitat today (BLI 2009a, pp. 2-3; Bridgewater *et al.* 2003, p. 132; Flanagan *et al.* in litt. 2009, pp. 1-9; Lanyon 1975, p. 443; Lopez *et al.* 2006, p. 898; Pasiecznik *et al.* 2001, pp. 10, 75, 78, 95; Ridgely and Tudor 1994. p. 734; Schulenberg *et al.* 2007, p. 488; Stotz *et al.* 1998, p. 52) (see Factor A).

Current Range and Distribution

The current range of the Peruvian plantcutter is approximately 1,892 mi^2 (4,900 km^2) (BLI 2009a, p. 1), which is between 33 and 1, 804 ft (10 and 550 m) above sea level and within the Peruvian Regions of Piura, Lambayeque, Cajamarca, La Libertad, and Ancash (from north to south) (Flanagan *et al.* in litt. 2009, pp. 14-15). The species' reported range is an overestimate because BirdLife International defines a species' range as the total area within its extent of occurrence (see Current Range and Distribution of the ash-breasted tit-tyrant) (BLI 2000, pp. 22, 27). The Peruvian plantcutter's current distribution is severely fragmented and distributed amongst small, widely separated remnant patches of *P. pallida* dry forest (BLI 2009a, pp. 2-3; Flanagan *et al.* in litt. 2009, pp. 1-9; Ridgely and Tudor 1994. p. 18), which are usually heavily disturbed fragments of forest (Bridgewater *et al.* 2003, p. 132). Therefore, the species' actual range is smaller than this figure.

The Peruvian plantcutter is extirpated from 11 of its 14 historical sites due to loss of habitat or degradation of habitat (Elton 2004, p. 1; Flanagan and More 2003, p. 5; Hinze 2004, p. 1). Depending on habitat quality, it is estimated that the Peruvian plantcutter requires approximately 2.5 ac (1 ha) of habitat for suitable food and nesting sites (Flanagan and More 2003, p. 3; Flanagan *et al.* in litt. 2009, p. 7). Although the Peruvian plantcutter has been found in patches of *P. pallida* dry forest habitat that are in close proximity to agricultural lands, tracks or roads, and human settlement (Flanagan *et al.* in litt. 2009, pp. 2-7), much of the available *P. pallida* dry forest habitat is unoccupied (BLI 2000, p. 401; Schulenberg *et al.* 2007, p. 488; Snow 2004, p. 69; Walther 2004, p. 73).

Flanagan *et al.* (in litt. 2009, pp. 1-15) recently completed a comprehensive review of 53 locations where there have been documented sightings of the Peruvian plantcutter, of which the authors determined 29 sites were extant. Flanagan *et al.* (in litt. 2009, pp. 2-4, 14) reported that 17 of the 22 documented sites of the Peruvian plantcutter in the Piura Region are extant. In this region, Talara Province contains the largest concentration of intact *P. pallida* dry forest habitat in northwest Peru and the largest subpopulation of the Peruvian plantcutter (BLI 2009a, p. 2; Flanagan *et al.* in litt. 2009, p. 3; Flanagan and More 2003, p. 5; Walther 2004, p. 73). Additionally, there are several other documented sites of the Peruvian plantcutter in the Piura Region (e.g., Manglares de San Pedro, Illescas Peninsula, and Cerro Illescas) (BLI 2009c, p. 1; Flanagan et. al. in litt. 2009, pp. 4, 14).

Flanagan *et al.* (in litt. 2009, pp. 4-5, 14) reported a total of 13 locations of the Peruvian plantcutter in the Lambayeque Region, of which 5 are considered extant. Within the Region, there are four important areas for the Peruvian plantcutter:

(1) The Pómac Forest Historical Sanctuary (Santuario Histórico de Bosque de Pómac), designated as a protected archeological site in 2001, is comprised of 14,547 ac (5,887 ha) of *P. pallida* dry forest (BLI 2009e, p. 1; Flanagan *et al.* in litt. 2009, p. 4). The Sanctuary includes the archeological site Batan Grande, an area comprised of 1,235 ac (500 ha) of *P. pallida* dry forest (BLI 2009e, p. 1; Flanagan *et al.* in litt. 2009, p. 4).

(2) Near the small town of Rafan are remnant patches of *P. pallida* dry forest, encompassing approximately 3,706 ac (1,500 ha) (BLI 2009f, p. 1). The Rafan area has become a popular birding site for the Peruvian plantcutter (BLI 2009f, p. 1; Engblom 1998, p. 1).

(3) Murales Forest (*Bosque de Murales*), comprised of *P. pallida* dry forest, is a designated Archeological Reserved Zone (BLI 2009a, p. 3; Stattersfield *et al.* 2000, p. 402).

(4) Chaparri Ecological Reserve, comprised of 85,033 ac (34,412 ha) with *P. pallida* dry forest, is a community-owned and managed protected area (Walther 2004, p. 73). The remaining sites in the Lambayeque Region are small remnant patches of *P. pallida* dry forest and comprised of a few acres (Flanagan *et al.* in litt. 2009, pp. 4-5; Walther 2004, p. 73). The protected areas are further discussed under Factors A and D.

Flanagan *et al.* (in litt. 2009, pp. 5, 14) reported one occupied site of the Peruvian plantcutter in the Cajamarca Region, consisting of approximately 14.8 ac (6 ha) of remnant *P. pallida* dry forest in the Río Chicama Valley. Six of the 12 known sites of the Peruvian plantcutter in the La Libertad Region are considered extant (Flanagan *et al.* in litt. 2009, pp. 5-6, 14). Each of these sites consists of small patches of remnant *P.*

pallida dry forest habitat (Walther 2004, p. 73; Flanagan *et al.* in litt. 2009, pp. 5-6). Of the three known sites of the Peruvian plantcutter in the Ancash Region, only one is reported to be extant (Flanagan *et al.* in litt. 2009, pp. 6, 14). Additionally, the authors reported that the two historical sites in the Lima Region were also unoccupied in the most recent survey (Flanagan *et al.* in litt. 2009, pp. 7, 15).

In summary, the extant population of the Peruvian plantcutter is comprised of two disjunct subpopulations (BLI 2009g, pp. 1-2; Walther 2004, p. 73), with several smaller sites (Flanagan and More 2003, pp. 5-9; Flanagan *et al.* in litt. 2009, pp. 2-7; Walther 2004, p. 73; Williams 2005, p. 1). Additional surveys are needed to determine if available *P. pallida* dry forest habitat is occupied by the Peruvian plantcutter (Flanagan *et al.* in litt. 2009, p. 7).

Population Estimates

There have been no rigorous quantitative assessments of the Peruvian plantcutter's population size (Williams 2005, p. 1). The estimated extant population size is between 500 and 1,000 individuals, and is comprised of 2 disjunct subpopulations (BLI 2009g, pp. 1-2; Walther 2004, p. 73) and several smaller sites (Flanagan and More 2003, pp. 5-9; Flanagan *et al.* in litt. 2009, pp. 2-7; Walther 2004, p. 73; Williams 2005, p. 1).

The northern subpopulation, located in the Talara Province in Piura Region, reportedly has between 400 and 600 individuals, or approximately 60 to 80 percent of the total population of the Peruvian plantcutter (BLI 2009a, p. 2; Snow 2004, p. 69; Walther 2004, p. 73; Williams 2005, p. 1). The second subpopulation, located at Pómac Forest Historical Sanctuary (Lambayeque Region), reportedly has 20 to 60 individuals (BLI 2009a, p. 2; BLI 2009e 2009, p. 1; Walther 2004, p. 73). The smaller sites are estimated to consist of a few individuals, up to 40 individuals (Flanagan and More 2003, pp. 5-9; Flanagan *et al.* in litt. 2009, pp. 2-7; Walther 2004, p. 73; Williams 2005, p. 1).

The population estimate for the Peruvian plantcutter—that is, the total number of mature individuals—is not the same as the effective population size (i.e., the number of individuals that actually contribute to the next generation). Further, the subpopulation structure and the extent of interbreeding among the occurrences of the Peruvian plantcutter are unknown. Although the two large subpopulations and many of the smaller occurrences of the Peruvian plantcutter are widely separated (BLI 2009a, pp. 2-3; Flanagan *et al.* in litt. 2009, pp. 1-9; Ridgely and Tudor 1994. p. 18), there is insufficient information to determine whether these occurrences function as genetically isolated subpopulations.

The Peruvian plantcutter has experienced a population decline of between 1 and 9 percent in the past 10 years, and this rate of decline is predicted to continue (BLI 2009g, p. 1). The population is considered to be declining in close association with continued habitat loss and degradation of habitat (see Factors A and E) (BLI 2009a, pp. 1-3; BLI 2009g, pp. 1-3; Ridgely and Tudor 1994, p. 18; Snow 2004, p. 69).

Conservation Status

The Peruvian plantcutter is considered ''endangered'' by the Peruvian Government under Supreme Decree No. 034-2004-AG (2004, p. 276855). The IUCN considers the Peruvian plantcutter to be ''Endangered'' because of ongoing habitat destruction and degradation of its small and severely fragmented range (BLI 2000, p. 402; BLI 2009a, pp. 2-3; BLI 2009g 2009, pp. 1-2). From 1996 to 2000, the IUCN considered the Peruvian plantcutter to be ''Critically Endangered'' (BLI 2009g, p. 1), following changes to the IUCN listing criteria in 2001. Experts have suggested returning the the species to its previous classification of ''Critically Endangered,'' due to the numerous and immediate threats to the species (Jeremy N. M. Flanagan, Conservation Biologist, Sullana, Peru, in litt. 2009 e-mail to DSA, p. 1; Snow 2004, p. 69; Walther 2004, p. 74).

The Peruvian plantcutter occurs within two protected areas in Peru. It has been documented in the *P. pallida* dry forest within the protected archeological sites of the Pómac Forest Historical Sanctuary (BLI 2009e, p. 1) and Murales Forest (Walther 2004, p. 73).

Summary of Factors Affecting the Peruvian plantcutter

A. The Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

The Peruvian plantcutter is dependent upon undisturbed *Prosopis pallida* dry forest with good floristic diversity (Collar *et al.* 1992, p. 805; Engblom 1998, p. 1; Flanagan and More 2003, p. 4). In northwest Peru, *P. pallida* dry forest was historically contiguous, covering approximately 2,703 m^2 (7,000 km^2) of the coastal lowland of northwest Peru (Ferreyera 1983, p. 248). There were also extensive wooded stands of small to medium trees of *P. pallida, Acacia* spp., *Capparis* spp., and willows (*Salix* spp.) along permanent lowland rivers, which have since been cleared for agricultural purposes (Lanyon 1975, p. 443).

Today, with the exception of three relatively large intact dry forests (i.e., Talara Province, Murales Forest, and Pómac Forest Historical Sanctuary), the vast majority of *P. pallida* dry forest, arid lowland scrub, and riparian vegetation has been reduced due to human activities. Seasonally dry tropical forests are considered the most threatened of all major tropical forest types (Janzen 1988, p. 130), with higher threat levels than any other Neotropical habitat (Stotz *et al.* 1996, p. 51). The Peruvian plantcutter has been extirpated from most of its historical sites due to loss or degradation of habitat (Elton 2004, p. 1; Flanagan et. al. in litt. 2009, pp. 1-15; Flanagan and More 2003, pp. 5-9; Snow 2004, p. 69). Current information indicates that the vast majority of occupied sites of the Peruvian plantcutter are small, remnant, disjunct patches of *P. pallida* dry forest with each a few acres in size (BLI 2000, p. 402; Flanagan et. al. in litt. 2009, pp. 2-7; Snow 2004, p. 69; Walther 2004, p. 73).

Habitat loss, conversion, and degradation throughout the Peruvian plantcutter's range have been and continue to occur as a result of human activities (BLI 2000, p. 402; BLI 2009a, p. 2; BLI 2009b, p. 1; BLI 2009e, p. 1; BLI 2009f, p. 1; Bridgewater *et al.* 2003, p. 132; Flanagan *et al.* in litt. 2009, p. 15; Lanyon 1975, p. 443; Schulenberg *et al.* 2007, p. 488; Snow 2004, p. 69; Walther 2004, p. 73), including:

(1) Clearcutting and burning of dry forest for agriculture and other purposes (BLI 2000, p. 402; BLI 2009a, p. 2; BLI 2009d, pp. 1-2; BLI 2009f, p. 1; BLI 2009g, p. 2; Bridgewater *et al.* 2003, p. 132; Collar *et al.* 1992, p. 806; Engblom 1998, p. 1; Flanagan *et al.* 2005, p. 244; Ridgely and Tudor 1994, p. 734; Snow 2004, p. 69; Walther 2004, p. 73; Williams 2005, p. 2);

(2) Extraction activities, including cutting for timber, firewood, and charcoal production (Best and Kessler 1995, p. 196; BLI 2000, p. 402; BLI 2009d, pp. 1-2; BLI 2009g, p. 2; Ridgely and Tudor 1994, p. 734; Rodriguez *et al.* 2007, p. 269; Snow 2004, p. 69; Williams 2005, p. 1);

(3) Grazing by goats of *P. pallida* dry forests, and arid scrub and riparian vegetation (*Capra* species) (BLI 2000, p. 402; BLI 2009a, p. 2; BLI 2009b, p. 1; BLI 2009d, pp. 1-2; Best and Kessler

1995, p. 196; More 2002, p. 37; Snow 2004, p. 69);

(4) Human encroachment (Fernandez-Baca *et al.* 2007, p. 45); and

(5) Unpredictable climate fluctuations that exacerbate human activities and encourage further habitat destruction (Block and Richter 2007, p. 1; Jetz *et al.* 2007, p. 1211; Richter 2005, p. 26).

The vast majority of *P. pallida* dry forest habitat has been converted to commercial agricultural production, which is the primary factor in the historical decline of the Peruvian plantcutter (BLI 2000, p. 402; BLI 2009a, p. 2; BLI 2009d, pp. 1-2; BLI 2009f, p. 1; Collar *et al.* 1992, p. 806; Engblom 1998, p. 1; Ridgely and Tudor 1994, p. 734; Snow 2004, p. 69; Walther 2004, p. 73; Williams 2005, p. 2). Agriculture in the coastal lowlands of northwest Peru consists of modern large, privately owned farms and large cooperatives that primarily produce crops (e.g., sugarcane, cotton, rice) for export (Lanyon 1975, p. 443; Roethke 2003, pp. 58-59).

Continual habitat destruction and degradation of the dry forest is mostly due to firewood cutting and charcoal production. *Prosopis pallida* is the dominant tree of the dry forest habitat, and is highly sought after because the wood provides an important source of high-quality cooking fuel (Brewbaker 1987, p. 1; Pasiecznik *et al.* 2001, p. 75). Throughout the Peruvian plantcutter's range, whole trees, branches, and roots of *P. pallida* are cut for firewood and production of charcoal, which is used for cooking fuel in homes, restaurants, and businesses that use brick kilns, both locally and in urban centers (Flanagan *et al.* in litt. 2009, p. 7). Wood of *P. pallida* is also used for construction and fence posts (Pasiecznik *et al.* 2001, p. 78). Additionally, roots of older *P. pallida* trees are used in wooden art crafts (BLI 2009a, p. 2).

Talara Province (in Piura Region) contains the largest remaining intact *P. pallida* dry forest in northwest Peru, encompassing approximately 123,553 ac (50,000 ha) (Flanagan *et al.* in litt. 2009, pp. 2-3; Flanagan and More 2003, p. 5; Walther 2004, p. 73). The Province also has the largest subpopulation of the Peruvian plantcutter, reportedly between 400 and 600 individuals or approximately 60 to 80 percent of the total population (BLI 2009a, p. 2; Elton 2004, pp. 3-4; Snow 2004, p. 69; Walther 2004, p. 73; Williams 2005, p. 1). Until recently, a large portion of the Province, including *P. pallida* dry forest habitat, was owned by the State-owned petroleum company PetroPeru, which prohibited access to approximately 90,000 ac (36,422 ha). Under the management of PetroPeru, the *P. pallida* dry forest was not subject to the same habitat destruction and degradation activities (e.g., clearing of trees, firewood cutting and charcoal production) as other dry forest habitat areas (Elton 2004, pp. 3-4; Hinze 2004, p. 1). Recently, the land was reverted to the Peruvian Government, and it is unclear whether the government plans to issue private concessions as in other areas of the Province (Elton 2004, p. 4). Consequently there have been recent efforts, including a formal petition to the Peruvian Government, to create a 12,000 to 24,710-ac (4,856- to 10,000-ha) protected reserve for the northern subpopulation of the Peruvian plantcutter (Elton 2004, p. 4; Walther 2004, p. 73). However, the government has not designated such a reserve for the species (Elton 2004, p. 4; Williams 2005, p. 3).

Habitat destruction and degradation of *P. pallida* dry forest, including firewood cutting and charcoal production, is ongoing in the Talara Province, including on the land previously owned by PetroPeru and an area identified as the Talara Important Birding Area by BirdLife International (Flanagan in litt. 2009, p. 1). Since 2005, there has been extensive cutting and clearing of *P. pallida* trees for fuel to cook and dry Humboldt giant squid (*Dosidicus gigas*) carcasses (Flanagan *et al.* in litt. 2009, p. 8). The most important commercial fishery of the Humboldt giant squid occurs along the coast of Peru (UNEP 2006, p. 33; Zeidberg and Robison, 2007, p. 12, 948). Harvested carcasses are transported by truck from the Talara port to recently cleared areas in the dry forest, where they are boiled and dried (Flanagan *et al.* in litt. 2009, p. 8). Therefore, this fishery not only adds to the collection pressure on *Prosopis* species for use as fuel, but also adds to forest clearing in the area. Another relatively new demand for *P. pallida* firewood is associated with the illegal extraction of crude oil from above-ground pipes in the Talara Province. The stolen oil is distilled by heating it with firewood (Flanagan *et al.* in litt. 2009, p. 8). *Capparis scabrida* (no common name, but locally known as ''*sapote*'') is a tree that occurs with *P. pallida* and is also a food source for the Peruvian plantcutter. Although the tree is listed as ''Critically Endangered'' by the Peruvian Government, the highly sought after wood is cut to produce handicrafts for the local, national, and international market, as well as for firewood and charcoal production (Rodriguez *et al.* 2007, p. 269).

Habitat alteration is also caused by grazing goats, which remove or heavily degrade the shrubs and trees (BLI 2000, p. 402; BLI 2009a, p. 2; Elton 2004, pp. 3-4; Snow 2004, p. 69; Williams 2005, p 2). The seed pods and leaves of *P. pallida* provide highly nutritious fodder for goats (Brewbaker 1987, pp. 1-2; Pasiecznik *et al.* 2001, p. 95). Goats roam freely and graze on trees and shrubs, particularly lower branches close to ground which are preferred by the Peruvian plantcutter for foraging and nesting (Elton 2004, pp. 3-4; Snow 2004, p. 50; Williams 2005, p 2).

Human encroachment and concomitant increasing human population pressures exacerbate the destructive effects of ongoing human activities (e.g., clearing of *P. pallida* dry forest, firewood cutting, and charcoal production) throughout the Peruvian plantcutter's range. Although the coastal lowlands represent only about 10 percent of country's total territory, more urban centers are located on the coast, which represent approximately 52 percent of the total population of Peru (Fernandez-Baca *et al.* 2007, p. 45). Larger concentrations of people put greater demand on the natural resources in the area, which spurs additional habitat destruction and increases infrastructure development that further facilitates encroachment.

Peruvian plantcutters are also impacted by unpredictable climate fluctuations that exacerbate the effects of habitat fragmentation. Unpredictable climate fluctuations are more fully described under the Factor A analysis of the ash-breasted tit-tyrant and are summarized here. Changes in weather patterns, such as ENSO cycles (El Niño and La Niña events), tend to increase precipitation in normally dry areas, and decrease precipitation in normally wet areas (Holmgren *et al.* 2001, p. 89; TAO Project n.d., p. 1) while intensifying the effects of habitat fragmentation on the decline of a species (England 2000, p. 86; Holmgren *et al.* 2001, p. 89; Jetz *et al.* 2007, pp. 1211, 1213; Mora *et al.* 2007, p. 1027; Parmesan and Mathews 2005, p. 334; Plumart 2007, pp. 1-2; Timmermann 1999, p. 694), especially for narrow endemics (Jetz *et al.* 2007, p. 1213) such as the Peruvian plantcutter.

The arid terrestrial ecosystem of Northwest Peru, where the Peruvian plantcutter occurs, is strongly influenced by the ENSO cycle (Rodriguez *et al* 2005, p. 1), which can have profound and long-lasting effects (Holmgren *et al.* 2006a, p. 87; Mooers *et al.* 2007, p. 2). The amount of rainfall during an El Niño year can be more than 25 times greater than during normal years in northern Peru (Holmgren *et al.*

2006a, p. 90; Rodriguez *et al* 2005, p. 2). El Niño events are important triggers for regeneration of plants in semiarid ecosystems, particularly the dry forest of northwest Peru (Holmgren *et al.* 2006a, p. 88; Lopez *et al.* 2006, p. 903; Rodríguez *et al.* 2005, pp. 2-3). During El Niño events, plant communities and barren lands are transformed into lush vegetation, as seeds germinate and grow more quickly in response to increased rainfall (Holmgren *et al.* 2006a, p. 88; Holmgren *et al.* 2006b, pp. 2-8; Rodríguez *et al.* 2005, pp. 1-6). Over the last 20 years, recruitment of *P. pallida* in northwest Peru doubled during El Niño years, when compared to non-El Niño years (Holmgren *et al.* 2006b, p. 7). However, the abundant supply of vegetation encourages locals to expand goat breeding operations, which results in overgrazing by goats and further land degradation (Richter 2005, p. 26).

ENSO cycles increase the risk of fire because El Niño events are often followed by years of extremely dry weather (Block and Richter 2007, p. 1), and accumulated biomass dries and adds to the fuel load in the dry season (Block and Richter 2007, p. 1; Power *et al.* 2007, p. 898). Evidence suggests that the fire cycle in Peru has shortened, particularly coastal Peru and west of the Andes (Power *et al.* 2007, pp. 897-898), which can have broad ecological consequences (Block and Richter 2007, p. 1; Power *et al.* 2007, p. 898). According to Block and Richter (2007, p. 1), *P. pallida* dry forest and *Capparis* spp. scrublands in northwest Peru would likely experience a long-term change in plant species composition that favor aggressive, annual, non-native weedy plant species (Richter 2005, p. 26). An accelerated fire cycle would further exacerbate changes in species composition that hinder long-lived perennial, native plant species, such as *Prosopis* species, upon which the Peruvian plantcutter relies.

ENSO cycles are ongoing, having occurred several times within the last decade (NWS 2009, p. 2), and evidence suggests that ENSO cycles have already increased in periodicity and severity (Richter 2005, pp. 24-25; Timmermann 1999, p. 694), which will exacerbate the negative impacts of habitat destruction on a species. It is predicted that, by 2050, approximately 11 to 16 percent of existing land is likely to be unsuitable for this species due to climate change; and, by 2100, it is predicted that about 24 to 35 percent of the species' range is likely to be lost as a direct result of global climate change (Jetz *et al.* 2007, p. 81).

Habitat destruction is often caused by a combination of human activities that promote habitat degradation. In Lambayeque Region, a 3,706-ac (1,500-ha) section of remnant *P. pallida* dry forest is under continual threat from human activities, including conversion to agriculture, firewood cutting and charcoal production, and grazing by goats. This area may support between 20 and 40 Peruvian plantcutters (BLI 2009f, p. 1; Walther 2004, p. 73). In the 1990s, a significant portion of this dry forest was converted to sugarcane fields (Engblom in litt. 1998, p. 1; Snow 2004, p. 69; Walther 2004, p. 73; Williams 2005, p. 2). Within Piura and Lambayeque Regions, threats to the dry forest habitat include conversion to agriculture, firewood and timber cutting, and grazing by goats (BLI 2009d, pp. 1-2). Habitat destruction and alteration also occurs within two protected areas where the Peruvian plantcutter occurs (in Lambayeque Region), Pómac Forest Historical Sanctuary (Andean Air Mail and Peruvian Times 2009, p. 1; Flanagan *et al.* in litt. 2009, pp. 7-8; Williams 2005, p. 1), and the Murales Forest (BLI 2000, p. 402; BLI 2009a, p. 3; Stattersfield *et al.* 2000, p. 402; Walther 2004, p. 73). Habitat destruction and alteration activities within these protected areas are discussed under Factor D.

Experts consider the population of this range-restricted endemic species to be declining in close association with the continued habitat loss and degradation (BLI 2000, p. 401; BLI 2009a, pp. 1-2; BLI 2009g, pp. 1-3), and that the effects are higher in dry forest habitat than in any other Neotropical habitat (Stotz *et al.* 1998, p. 51).

Summary of Factor A

The Peruvian plantcutter is dependent upon intact *P. pallida* dry forest with low-hanging branches and high floristic diversity, and associated arid lowland scrub and riparian vegetation. *Prosopis pallida* dry forest habitat, as well as arid lowland scrub and riparian shrub habitats, throughout Peruvian plantcutter's range have been and continue to be altered and destroyed as a result of human activities, including conversion to agriculture; timber and firewood cutting and charcoal production; grazing of goats; and human encroachment. Extant *P. pallida* dry forest today consists of remnant, disjunct patches of woodlands, which are heavily disturbed and under continued threat of degradation by human activities. Although observations suggest that this dry forest–dependent species is able to occupy very small remnant patches of dry forest with low-hanging branches and floristic diversity, and is able to persist to some degree near developed lands, many of these sites are approaching the lower threshold of the species' ecological requirements. This species has been extirpated from most of its historical sites due to loss or degradation of habitat. Additionally, many of the extant occupied sites are separated by great distances, which may lead to genetic isolation of the species (See Factor E). The same activities that caused the historical decline in this species are ongoing today. These habitat-altering activities are compounded by unexpected climate fluctuations, especially for narrow endemics, such as the Peruvian plantcutter. Excessive rains that are accompanied by El Niño events induce further habitat destruction, as people take advantage of better grazing and growing climate conditions. Climate models predict that this species' habitat will continue to decline. Destruction of the remaining *P. pallida* dry forest fragments in Peru continues to reduce the quantity, quality, distribution, and regeneration of remaining patches of dry forest. Human activities that degrade, alter, and destroy habitat are ongoing throughout the species' range, including within the one protected area (Factor D). Therefore, we find that destruction and modification of habitat are threats to the continued existence of Peruvian plantcutter throughout its range.

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

We are not aware of any information currently available that indicates that overutilization of Peruvian plantcutter for commercial, recreation, scientific, or education purposes has occurred or is occurring at this time. As a result, we are not considering overutilization to be a threat to the continued existence of the Peruvian plantcutter.

C. Disease or Predation

We are not aware of any scientific or commercial information that indicates disease or predation poses a threat to the Peruvian plantcutter. As a result, we do not consider disease or predation to be a threat to the continued existence of the Peruvian plantcutter.

D. The Inadequacy of Existing Regulatory Mechanisms

The Peruvian plantcutter is considered ''endangered'' by the Peruvian Government under Supreme Decree No. 034-2004-AG (2004, p. 276854). This Decree prohibits hunting, take, transport, and trade of protected species, except as permitted by regulation. As hunting, taking, or trade

do not currently threaten the Peruvian plantcutter (Factor B), this regulation does not mitigate any current threats to the species.

Peru has several categories of national habitat protection, which were described above as part of Factor D for the ash-breasted tit-tyrant (BLI 2008, p. 1; IUCN 1994, p. 2; Rodríguez and Young 2000, p. 330). The Peruvian plantcutter is known to occur within two Peruvian nationally protected areas, the Pómac Forest Historical Sanctuary and the Murales Forest (both Lambayeque Region). The Pómac Forest Historical Sanctuary supports an estimated 20 to 60 Peruvian plantcutters (BLI 2009a, p. 2; BLI 2009e, p. 1; Walther 2004, p. 73). Resources within the Pómac Forest Historical Sanctuary are managed for the preservation of the archeological site, *P. pallida* dry forest, and wildlife species. However, habitat destruction and alteration, including illegal forest clearing for farming, timber and firewood cutting, and grazing, continually threaten the Sanctuary (Williams 2005, p. 1). For 8 years, more than 250 families illegally occupied and farmed land in the Sanctuary. During the illegal occupancy, the inhabitants logged 4,942 ac (2,000 ha) of *P. pallida* trees for firewood and burned many other trees for charcoal production (Andean Air Mail and Peruvian Times 2009, p. 1). The logged forest was subsequently converted to agricultural crops, while remaining forest habitat was continually degraded by firewood cutting, charcoal production, and grazing of goats (Flanagan *et al.* in litt. 2009, p. 8.). In January 2009, the government forcibly removed the inhabitants, but it is too soon to determine the effect that habitat destruction has had on the suitability of the habitat for the Peruvian plantcutter. There is insufficient information to conclude that recent efforts to stop the illegal human occupancy of the area will have a positive impact on the species or remaining habitat within the protected area. Therefore, any protections afforded by this Sanctuary has not mitigated the threats to the species from ongoing habitat loss and associated population decline (Factor A).

The Murales Forest is a designated Archeological Reserved Zone (BLI 2000, p. 401; BLI 2009a, p. 3; Stattersfield *et al.* 2000, p. 402), and supports a declining population of Peruvian plantcutters. According to Peruvian law, designation as a Reserved Zone allows for temporary protection while further study is under way to determine the area's importance (BLI 2008, p. 1; Rodríguez and Young 2000, p. 330). Although strict monitoring has protected some habitat (BLI 2009a, p. 3), the actual dry forest is not protected. In 1999, land rights to sections of the forest were sold for agricultural conversion, and government intervention has been necessary to prevent further sales of land for conversion to agriculture (BLI 2009a, p. 3). In 1999, Murales Forest and adjacent areas contained approximately 1,221 ac (494 ha) of habitat, and reportedly supported 140 Peruvian plantcutters (BLI 2000, p. 402). In 2004, the population was estimated to be 20 to 40 individuals (Walther 2004, p. 73). Therefore, the presence of the Peruvian plantcutter within this protected area has not mitigated the threats to the species from ongoing habitat loss and associated population decline (Factor A).

Incidences of illegal activity that occur throughout the species' range also impact the Peruvian plantcutter. Ongoing firewood cutting and charcoal production degrades the small amount of remaining dry forest habitat throughout the species' range (BLI 2009d, pp. 1-2; BLI 2009g, p. 2; Ridgely and Tudor 1994, p. 734; Rodriguez *et al.* 2007, p. 269; Snow 2004, p. 69; Williams 2005, p. 1). In Talara Province (Piura Region), a recent increase in the illegal extraction of crude oil has generated further demand for *P. pallida* firewood, which is used as fuel to heat-distill the oil. According to Flanagan *et al.* (in litt. 2009, p. 8), enforcement to combat this illegal activity is difficult. Therefore, existing laws are ineffective at mitigating the ongoing threat of habitat destruction (Factor A).

Summary of Factor D

Peru has enacted various laws and regulatory mechanisms to protect and manage wildlife and their habitats. The Peruvian plantcutter is ''endangered'' under Peruvian law and occurs within two protected areas in Peru. As discussed under Factor A, the Peruvian plantcutter prefers *P. pallida* dry forest. This habitat has been drastically reduced and remaining habitat is comprised of small remnant patches of dry forest that are separated by great distances. Habitat throughout the species' range has been and continues to be destroyed and altered as a result of human activities, primarily conversion to agriculture, and continual degradation by timber and firewood harvest and charcoal production, and grazing by goats. These activities are ongoing, including within protected areas and despite the species' ''endangered'' status, indicating that the laws governing wildlife and habitat protection in Peru are either inadequate or inadequately enforced to protect the species or to mitigate ongoing habitat loss (Factor A) and population declines (Factor E). Therefore, we find that the existing regulatory mechanisms are inadequate to mitigate the current threats to the continued existence of the Peruvian plantcutter throughout its range.

E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

An additional factor that affects the continued existence of the Peruvian plantcutter is the species' small population size. BirdLife International has placed the Peruvian plantcutter in the population category of between 500 and 1,000 individuals (BLI 2009g, p. 1). The species' population size is not characterized as ''small'' in published literature and there is insufficient information on similar species (i.e., the other South American plantcutters) to understand whether the Peruvian plancutter's population size is small relative to other plantcutters. However, there are several indications that this number of individuals represents a small population.

First, the Peruvian plantcutter's population size—which is defined by BirdLife International as the total number of mature individuals—is not the same as the effective population size—the number of individuals that actually contribute to the next generation (Shaffer 1981, pp. 132-133; Soulé 1980, pp. 160-162). Not all individuals in a population will contribute to reproduction each year. Therefore, the estimated population size for the Peruvian plantcutter is an overestimate of the species' effective population size. Moreover, the subpopulation structure and the extent of interbreeding among the occurrences of the Peruvian plantcutter are unknown (see Population Estimates). If further research indicates that species does not breed as a single population, its effective population size would be further reduced.

Second, the extant Peruvian plantcutter population occurs primarily in 2 disjunct subpopulations—Talara and Pómac Forest Historical Sanctuary (BLI 2009g, pp. 1-2; Walther 2004, p. 73)—and in several smaller sites (Flanagan and More 2003, pp. 5-9; Flanagan *et al.* in litt. 2009, pp. 2-7; Walther 2004, p. 73; Williams 2005, p. 1). Talara and Pómac Forest Historical Sanctuary are approximately 160 mi (257 km) apart (FCC (Federal Communications Commission)-Audio Division 2009). The Peruvian plantcutter is dependent upon

undisturbed Prosopis *pallida* dry forest with good floristic diversity (Collar *et al.* 1992, p. 805; Engblom 1998, p. 1; Flanagan and More 2003, p. 4). Its habitat is heavily degraded and localities are small, severely fragmented, and widely separated (BLI 2009a, pp. 2-3; Bridgewater *et al.* 2003, p. 132; Flanagan *et al.* in litt. 2009, pp. 1-9; Ridgely and Tudor 1994. p. 18) (see Factor A). It is possible that the distance between patches of suitable habitat is too great to support interbreeding between localities, so that the extant occurrences of this species would function as genetically isolated subpopulations.

For these reasons, we consider the Peruvian plantcutter's current estimated population to be small and, as such, this species is subject to the risks associated with small population sizes. Small population size renders a species vulnerable to any of several risks, including inbreeding depression, loss of genetic variation, and accumulation of new mutations. 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. 231; Shaffer 1981, p. 131). Small, isolated wildlife populations are also more susceptible to environmental fluctuations and demographic shifts (Pimm *et al.* 1988, pp. 757, 773-775; Shaffer 1981, p. 131), such as reduced reproductive success of individuals and chance disequilibrium of sex ratios. Species tend to have a higher risk of extinction if they occupy a small geographic range and occur at low density (Purvis *et al.* 2000, p. 1949).

The Peruvian plantcutter has experienced a population decline of between 1 and 9 percent in the past 10 years due to habitat loss and this decline is expected to continue in close association with continued habitat loss and degradation (see Factor A) (BLI 2009a, pp. 1-3; BLI 2009g, pp. 1-3; Ridgely and Tudor 1994, p. 18; Snow 2004, p. 69). Extinction risk is heightened in small, declining populations by an increased vulnerability to the loss of genetic variation due to inbreeding depression and genetic drift. This, in turn, compromises a species' ability to adapt genetically to changing environments (Frankham 1996, p. 1507) and reduces fitness, thus increasing extinction risk (Reed and Frankham 2003, pp. 233-234). 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).

Complications arising from the species' small population size are exacerbated by its fragmented distribution. Because remaining habitat patches are small, heavily degraded, and widely separated, the Peruvian plantcutter's current distribution is highly restricted and severely fragmented (BLI 2009a, pp. 2-3; Bridgewater *et al.* 2003, p. 132; Flanagan *et al.* in litt. 2009, pp. 1-9; Ridgely and Tudor 1994. p. 18). Habitat fragmentation can cause genetic isolation and heighten the risks to the species associated with short-term genetic viability. A species' small population size, combined with a restricted and fragmented distribution, exacerbates a species' vulnerability to adverse natural events (e.g., genetic, demographic, or environmental) and manmade activities (e.g., land clearing, timber and firewood cutting, and grazing by goats) (Holsinger 2000, pp. 64-65; Primack 1998, pp. 279-308; Young and Clarke 2000, pp. 361-366).

Summary of Factor E

The Peruvian plantcutter has a small population size that renders it vulnerable to genetic risks that negatively impact the species' viability. The species occurs primarily in two disjunct subpopulations, and remaining habitat is highly fragmented and continues to be altered by human activities (Factor A). Its small population size, combined with its restricted and fragmented range, increases the Peruvian plantcutter's vulnerability to extinction, through demographic or environmental fluctuations. Based on its small population size and fragmented distribution, we have determined that the Peruvian plantcutter is particularly vulnerable to the threat of adverse natural events (e.g., genetic, demographic, or environmental) and human activities (e.g., deforestation, habitat alteration, and infrastructure development) that destroy individuals and their habitat. The genetic and demographic risks associated with small population sizes are exacerbated by ongoing human activities that continue to curtail the species' habitat throughout its range. The species' population has declined and is predicted to continue declining commensurate with ongoing habitat loss (Factor A) and we consider that the risks associated with small population size will continue to impact this species and may accelerate, if habitat destruction continues unabated. Therefore, we find that the species' small population size, in concert with its fragmented distribution and its heightened vulnerability to adverse natural events and manmade activities, are threats to the continued existence of the Peruvian plantcutter throughout its range.

Status Determination for the Peruvian Plantcutter

The Peruvian plantcutter, a small, herbivorous bird, is endemic to semiarid lowland dry forests of coastal northwest Peru. The species' primary habitat is *Prosopis pallida* dry forest between 33 and 1, 804 ft (10 and 550 m) above sea level. The species is dependent on year-round availability of high-quality food and is known primarily in two disjunct subpopulations, with several smaller, widely separated sites in the Regions of Piura, Lambayeque, Cajamarca, La Libertad, and Ancash (from north to south). The actual range of the Peruvian plantcutter is smaller than the reported range of 1,892 mi^2 (4,900 km^2), given the severely fragmented distribution of the species. The species' population size is estimated to be 500-1,000 individuals.

We have carefully assessed the best available scientific and commercial information regarding the past, present, and potential future threats faced by the Peruvian plantcutter and have concluded that there are three primary factors that threaten the continued existence of the Peruvian plantcutter: (1) Habitat destruction, fragmentation, and degradation; (2) limited size and isolation of remaining populations; and (3) inadequate regulatory mechanisms.

Human activities that degrade, alter, and destroy habitat are ongoing throughout the Peruvian plantcutter's range. Widespread land conversion to agriculture has removed the vast majority of *P. pallida* dry forest habitat throughout the range of the Peruvian plantcutter. Peruvian plantcutter habitat continues to be altered by human activities, such as timber and firewood cutting, burning, and grazing, which result in the continued degradation, conversion, and destruction of habitat and reduce the quantity, quality, distribution, and regeneration of remaining dry forest habitat. Current research indicates that narrow endemics, such as the Peruvian plantcutter, are especially susceptible to climate fluctuations, because of the synergistic effect these fluctuations have on declining populations that are also experiencing range reductions due to human activities. Remaining habitat is highly fragmented and disjunct, separated by large areas of converted

land (e.g., agriculture, urban areas) and sparse vegetation (e.g., Sechura Desert), and excessive rains induce further habitat destruction and prevent regeneration, as people take advantage of better grazing and growing climate conditions.

The Peruvian plantcutter's population is small, rendering the species particularly vulnerable to the threat of adverse natural events (e.g., genetic, demographic, or environmental) and human activities (e.g., deforestation and firewood extraction) that destroy individuals and their habitat. Ongoing human activities that cause habitat loss throughout the species' range exacerbate the genetic and demographic risks associated with small population sizes (Factor E). The population has declined 1–9 percent in the past 10 years (see Population Estimates), in association with continued habitat loss (Factor A). Habitat loss was a factor in this species' historical decline (see Historical Range and Distribution)—the Peruvian plantcutter has been extirpated from 11 of its 14 historical sites (see Current Range and Distribution)—and the species is considered to be declining today in association with the continued reduction in habitat (Factors A and E). Moreover, current research indicates that narrow endemics, such as the Peruvian plantcutter, are especially susceptible to climate fluctuations because of the synergistic effect these fluctuations have on declining populations that are also experiencing range reductions due to human activities (Factor A).

Despite the species' endangered status in Peru and its occurrence within two protected areas (Factor D), habitat loss and degradation continue throughout the Peruvian plantcutter's habitat (Factor A). Therefore, regulatory mechanisms are either inadequate or ineffective at mitigating the existing threats to the Peruvian plantcutter and its habitat (Factor D).

Section 3 of the Act defines an ''endangered species'' as ''any species which is in danger of extinction throughout all or a significant portion of its range'' and a ''threatened species'' as ''any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' Based on the immediate and ongoing significant threats to the Peruvian plantcutter throughout its entire range, as described above, we determine that the Peruvian plantcutter is in danger of extinction throughout all of its range. Therefore, on the basis of the best available scientific and commercial information, we are proposing to list the Peruvian plantcutter as an endangered species throughout all of its range.

V. Royal cinclodes (*Cinclodes aricomae*)

Species Description

The royal cinclodes, also known as ''*churrete real*'' and ''*remolinera real*,'' is a large-billed ovenbird in the Furnaridae family that is native to high-altitude woodlands of the Bolivian and Peruvian Andes (BLI 2009i, pp. 1-2; del Hoyo *et al.* 2003, p. 253; InfoNatura 2007, p. 1; Supreme Decree No. 034-2004-AG 2004, p. 27685; Valqui 2000, p. 104). The adult is nearly 8 in (20 cm) in length, with dark chocolate-brown plumage on the upperparts, with a darker crown and a buff-colored area above the eyes. The throat is buff-colored, and the remaining underparts are gray-brown to buff-white. The wings are dark with prominent edging that forms a distinctive wing-bar in flight. The large, dark bill is slightly curved at the tip (BLI 2009i, p. 1).

Taxonomy

When the species was first taxonomically described, the royal cinclodes was placed in the genus *Upucerthia* (Carriker 1932, pp. 1-2) and was then transferred to *Geositta* as a subspecies (*Geositta excelsior aricomae*) (Vaurie 1980, p. 14). Later, it was transferred to the genus *Cinclodes*, where it was considered a race or subspecies of the stout-billed cinclodes (*Cinclodes excelsior*) until recently (BLI 2009i, p. 1; Fjeldså and Krabbe 1990, pp. 337-338; Vaurie 1980, p. 15). The royal cinclodes is now considered a distinct species (*C. aricomae*) based on differences in its habitat, morphology, and genetic distance (Chesser 2004, p. 763; del Hoyo *et al.* 2003, p. 253). Therefore, we accept the species as *Cinclodes aricomae*, which also follows ITIS (2009, p. 1).

Habitat and Life History

The royal cinclodes is restricted to moist and mossy habitat amidst the steep, rocky slopes of semihumid *Polylepis* or *Polylepis - Gynoxys* woodlands, where the species is found at elevations between 11,483 and 12,092 ft (3,500 and 4,600 m) (BLI 2000, p. 345; BLI 2009i, p. 2; Collar *et al.* 1992, p. 588; del Hoyo *et al.* 2003, p. 253). The characteristics of *Polylepis* habitat were described above as part of the Habitat and Life History of the ash-breasted tit-tyrant (Aucca and Ramsay 2005, p. 1; Chutas *et al.* 2008, p. 3; De la Via 2004, p. 10; IPNI 2009, p. 1; Kessler 1998, p. 1; Kessler and Schmidt-Lebuhn 2006, pp. 1-2; Purcell *et al.* 2004, p. 455). The royal cinclodes prefers dense woodlands (BLI 2000, p. 345; BLI 2009i, p. 2; Collar *et al.* 1992, p. 588; del Hoyo *et al.* 2003, p. 253), with more closed canopies that provide habitat for more lush moss growth (Engblom *et al.* 2002, p. 57). The moss-laden vegetation and shaded understory harbor a rich diversity of insects, making good feeding grounds for insectivorous birds (De la Via 2004, p. 10) such as the royal cinclodes (del Hoyo *et al.* 2003, p. 253; Engblom *et al.* 2002, p. 57). In Bolivia, the royal cinclodes has been observed only in *P. pepei* forests, but it is found amongst a greater variety of *Polylepis* species in Peru (Chutas *et al.* 2008, p. 16; I. Gómez, National Museum of National History-Ornithology Section-Bolivian Fauna Collection, La Paz, Bolivia, e-mail to Division of Scientific Authority, in litt. December 4, 2007, p. 1).

Information on the ecology and breeding behavior of royal cinclodes is limited. The species' feeding territory ranges from 7 to 10 ac (3 to 4 ha) (del Hoyo *et al.* 2003, p. 253; Engblom *et al.* 2002, p. 57). Breeding pairs may occupy smaller, 2.5-ac (2-ha) territories (Chutas 2007, p. 7). The royal cinclodes is described as ''nervous'' and is easily disturbed by humans (Engblom *et al.* 2002, p. 57). The breeding season probably begins in December, but territorialism among pairs can be seen in austral winter (June-August) (BLI 2000, p. 345; del Hoyo *et al.* 2003, p. 253). *Cinclodes* species construct burrows or use natural cavities, crevices, or rodent burrows for nesting (Fjeldså and Krabbe 1990, p. 337; Vaurie 1980, pp. 30, 34). The royal cinclodes' clutch size may be similar to that of the closely-related stout-billed cinclodes (*C. excelsior*), which, according to Graves and Arango (1988, p. 252), is two eggs per clutch.

Its diet consists primarily of invertebrates, sometimes seeds, and occasionally small vertebrates (small frogs) (del Hoyo *et al.* 2003, p. 253). The royal cinclodes forages, solitary or in pairs, by probing through moss and debris on the forest floor (BLI 2000, p. 345; Collar *et al.* 1992, p. 589; del Hoyo *et al.* 2003, p. 253; Fjeldså 2002b, p. 9). This ground-feeding strategy generally requires a relatively large territory and may also facilitate interbreeding amongst groups located on adjoining mountain peaks when the species likely descends the mountains during periods of snow cover (Engblom *et al.* 2002, p. 57).

Historical Range and Distribution

The royal cinclodes may once have been locally common and distributed

across most of central to southern Peru and into the Bolivian highlands, in once-contiguous expanses of *Polylepis* forests above 9,843 ft (3,000 m) (BLI 2000, p. 345; BLI 2009i, p. 1; Fjeldså 2002a, pp. 111-112, 115; Herzog *et al.* 2002, p. 94; Kessler 2002, pp. 97-101). *Polylepis* woodlands are now restricted to elevations of 11,483 to 16,404 ft (3,500 to 5,000 m) (Fjeldså 1992, p. 10). As discussed above for the Historical Range and Distribution of the ash-breasted tit-tyrant, researchers consider human activity to be the primary cause for historical habitat decline and resultant decrease in species richness (Fjeldså and Kessler 1996, Kessler 1995a, b, and Lægaard 1992, as cited in Fjeldså 2002a, p. 112; Fjeldså 2002a, p. 116; Herzog *et al.* 2002, p. 94; Kessler 2002, pp. 97-101; Kessler and Herzog 1998, pp. 50-51). The royal cinclodes may have been extirpated from its type locality (Aricoma Pass, Puno), and possibly throughout the entire Puno Region, where *Polylepis* forest no longer occurs exists (Collar *et al.* 1992, p. 589; Engblom *et al.* 2002, p. 57) (see Population Estimates). It is estimated that between 2-3 percent and 10 percent of the original forest cover still remains in Peru and Bolivia, respectively (BLI 2009i, p. 1; Fjeldså and Kessler 1996, as cited in Fjeldså 2002a, p. 113) (see Factor A). Of this amount, less than 1 percent of the remaining woodlands occur in humid areas, where *Polylepis* denser stands occur (Fjeldså and Kessler 1996, as cited in Fjeldså 2002a, p. 113) and which are preferred by the royal cinclodes (del Hoyo *et al.* 2003, p. 253; Engblom *et al.* 2002, p. 57). The royal cinclodes was initially discovered in Bolivia in 1876, but was not observed there again until recently (BLI 2009i, p. 2; Hirshfeld 2007, p. 198) (see Current Range and Distribution).

Current Range and Distribution

The royal cinclodes is restricted to moist and mossy habitat amidst the steep rocky slopes of semihumid *Polylepis* or *Polylepis - Gynoxys* woodlands, where the species is found at elevations between 11,483 and 12,092 ft (3,500 and 4,600 m) (BLI 2000, p. 345; BLI 2009i, p. 2; Collar *et al.* 1992, p. 588; del Hoyo *et al.* 2003, p. 253). The current range of the species is approximately 1,042 mi^2 (2,700 km^2) (BLI 2009i, p. 1), which is an overestimate of the actual range (as discussed under the Current Range and Distribution of the ash-breasted tit-tyrant) (BLI 2000, pp. 22, 27), given the fragmented nature of the species' remaining habitat (BLI 20091, p. 1; Fjeldså and Kessler 1996, as cited in Fjeldså 2002a, p. 113).

The royal cinclodes was only rediscovered in Bolivia within the last decade, after more than 100 years of not being observed there (BLI 2009i, p. 2; Hirshfeld 2007, p. 198). Within the last 15 years, royal cinclodes has been observed in Peru's Runtacocha highlands (Apurímac), Pariahuanca Valley (Junín), and Cordillera Vilcanota (Cusco), and in Bolivia's Cordillera Apolobamba and the Cordillera Real (including Ilampu Valley, Sanja Pampa, and Cordillera de La Paz), all in the Bolivian Department of La Paz (BLI 2007, pp. 1-2; BLI 2009i, pp. 1-2; del Hoyo *et al.* 2003, p. 253; Engblom *et al.* 2002, p. 57; Hirshfeld 2007, p. 198; InfoNatura 2007, p. 1; Valqui 2000, p. 104).

Population Estimates

Population information is presented first on the range-country level and then in terms of a global population estimate. The range country estimates begin with Peru, where the majority of the population resides.

Local population estimate, Peru: In 1990, the global population was estimated to be 100-150 individuals (Fjeldså and Krabbe 1990, p. 338). This number represents the estimated Peruvian population because the royal cinclodes was only thought to be extant in Peru at the time of this estimate (BLI 2009i, p. 2; Hirshfeld 2007, p. 198). Chutas (2007, p. 8) reported an estimated 189 birds located within four disjunct *Polylepis* forest patches in Peru, with a combined area of 1,554 ac (629 ha). This estimate included 116 birds and 30 birds in Cordilleras Vilcanota and Vilcabamba, respectively (Cusco); 2 birds in Cordillera de Carabaya (Puno); and 41 birds in ''Cordillera del Apurímac'' (Runtacocha highlands in Apurímac) (Chutas 2007, pp. 4, 8). Subpopulations at four locations in the Cordillera Vilcanota contain as few as 1-4 individuals (BLI 2008, p. 2).

In the Puno Region of Peru, it is unclear whether a viable population of royal cinclodes remains. The royal cinclodes was first observed in Puno in 1930 (Fjeldså and Krabbe 1990, p. 338) and has continued to be reported there in general terms (BLI 2007, pp. 1-2; BLI 2009i, pp. 1-2; Collar *et al.* 1992, p. 588; del Hoyo 2003, p. 253). However, based on habitat availability, InfoNatura (2007, p. 1) predicted that the royal cinclodes does not occur in Puno because the habitat no longer exists there. Indeed, only two royal cinclodes individuals have been reported in the Puno Region (Cordillera de Carabaya) in recent decades (Chutas 2007, pp. 4, 8). There are no other recent observations of the royal cinclodes in Puno (BLI 2009i, p. 2; del Hoyo 2003, p. 283; Engblom *et al.* 2002, p. 57). The species is believed to be extirpated from its type locality (Collar *et al.* 1992, p. 589; Engblom *et al.* 2002, p. 57).

Local population estimate, Bolivia: The species' current range is more widespread in Bolivia than previously understood. The royal cinclodes had not been observed in Bolivia for more than one century, when it was rediscovered there in 1997 (BLI 2009i, p. 2; Hirshfeld 2007, p. 198). Recent surveys in La Paz Department found at least 13 localities (8 in Cordillera Apolobamba and 5 in Cordillera La Paz) (BLI 2009i, p. 1).

Although BirdLife International reports an estimated population size of 50-70 royal cinclodes in Bolivia (Gómez, in litt. 2003, 2008, as cited in BLI 2009i, p. 2), recent surveys indicate that the estimate may be smaller. As discussed above for the local population estimate of the ash-breasted tit-tyrant in Bolivia, Gómez (in litt. 2007, p. 1) conducted intensive studies in Bolivia. From this research, the presence of 1-8 royal cinclodes in each of 30 forest patches was inferred or observed. Thus, they estimated that the royal cinclodes population in Bolivia totals approximately 30 birds. Researchers add that, because the royal cinclodes does not always respond to tape-playbacks, these numbers may underestimate the actual population size (Gómez in litt. 2007, p. 1).

Global population estimate: In 1990, the global population of the royal cinclodes was estimated to be 100-150 individuals (Fjeldså and Krabbe 1990, p. 338). Since at least 2000, BirdLife International has placed this species in the population category of between 50 and 249 individuals (BLI 2000, p. 345). In 2002, Engblom *et al.* (2002, p. 57) estimated a total population size of up to 250 pairs of birds. This amount far exceeds any previous estimates and has not been confirmed by BirdLife International (BLI 2009i, p. 1). In 2003, the global population was once again reported to include only ''a few hundred individuals'' (del Hoyo *et al.* 2003, p. 253). Based on recent observations in both countries, there are approximately 189 birds in Peru and 50-70 in Bolivia, totaling 239-259 individuals. Recognizing that the royal cinclodes does not always respond to tape-playbacks, this could be an underestimate of the population size (Gómez in litt. 2007, p. 1). While the species continues to be categorized by BirdLife International as having an estimated population between 50-249 individuals (BLI 2007, p. 1; BLI 2009i, p. 1; Fjeldså 2002b, p. 9; Hirshfeld 2007, p. 198), it is possible that the recent

observations in Bolivia will lead to a revision of the species' population estimate (BLI 2009i, p. 1).

It should be noted that the total population size, which includes immature individuals, is not an accurate reflection of the species' effective population size (the number of breeding individuals that contribute to the next generation) (Shaffer 1981, pp. 132-133; Soulé 1980, pp. 160-162). The IUCN estimated that the entire royal cinclodes population contains fewer than 250 mature individuals and no more than 50 mature individuals in any subpopulation (BLI 2008, p. 1; IUCN 2001, pp. 8-12). However, population estimates are incomplete for several of the known localities, and the subpopulation structure and the extent of interbreeding amongst the various localities are unknown. The species' territory ranges from 7 to 10 ac (3 to 4 ha), and its habitat is fragmented, dispersed and sparse (del Hoyo *et al.* 2003, p. 253; Engblom *et al.* 2002, p. 57). However, there is no information to indicate the distance that this species is capable of or likely to travel between localities. Engblom *et al.* (2002, p. 57) noted that gene flow between localities likely occurs when the species descends the mountains to forage in the valleys during periods of snow cover at the higher altitudes such that interbreeding may occur at least among localities with shared valleys. This suggests that the species does not breed as a single population. However, there is insufficient information to determine the extent to which this species functions as genetically isolated subpopulations.

The species has experienced a population decline of between 30 and 49 percent in the past 10 years, and this rate of decline is predicted to continue (BLI 2009i, pp. 1, 5). The population is considered to be declining in close association with continued habitat loss and degradation (BLI 2009i, p. 6) (see Factors A and E).

Conservation Status

The royal cinclodes is considered ''critically endangered'' by the Peruvian Government under Supreme Decree No. 034-2004-AG (2004, p. 276854). The IUCN considers the royal cinclodes to be ''Critically Endangered'' due to its extremely small population, which consists of ''tiny'' subpopulations that are severely fragmented and dependent upon a rapidly declining habitat (BLI 2007, p. 1; BLI 2009i, p. 1). The royal cinclodes occurs within the Peruvian protected area of Santuario Histórico Machu Picchu, in Cusco (BLI 2009h, p. 1; BLI 2009i, p. 6; Chutas *et al.* 2008, p. 16). In La Paz Department, Bolivia, the species is found in Parque Nacional y área Natural de Manejo Integrado Madidi, Parque Nacional y área Natural de Manejo Integrado Cotapata, and the co-located protected areas of Reserva Nacional de Fauna de Apolobamba, área Natural de Manejo Integrado de Apolobamba, and Reserva de la Biosfera de Apolobamba (BLI 2009a, p. 1; BLI 2009b, p. 1; BLI 2009c, p. 1; BLI 2009d, p. 1; BLI 2009i, p. 6; Chutas *et al.* 2008, p. 16).

Summary of Factors Affecting the Royal Cinclodes

A. The Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

The royal cinclodes is restricted to high-elevation (11,483-12,092 ft (3,500-4,600 m)), moist, moss-laden areas of semihumid *Polylepis* or *Polylepis - Gynoxys* woodlands (BLI 2000, p. 345; BLI 2009i, p. 2; Collar *et al.* 1992, p. 588; del Hoyo *et al.* 2003, p. 253). As described more fully for the ash-breasted tit-tyrant (Factor A), *Polylepis* habitat is characterized as a threatened woodland ecosystem on national, regional, and global levels (BLI 2009a, p. 2; Purcell *et al.* 2004, p. 457; Renison *et al.* 2005, as cited in Lloyd 2009, p. 10), with several *Polylepis* species within the royal cinclodes' range considered to be ''Vulnerable,'' according to the IUCN (WCMC 1998a, p. 1; WCMC 1998b, p. 1). *Polylepis* woodlands are dispersed and sparse, with an estimated remaining area of 386 mi^2 (1,000 km^2) in Peru and 1,931 mi^2 (5,000 km^2) in Bolivia (Fjeldså and Kessler 1996, as cited in Fjeldså 2002a, p. 113). Within the remaining *Polylepis* woodlands, the royal cinclodes' range is approximately 1,042 mi^2 (2,700 km^2) (BLI 2009i, p. 1). Less than 1 percent of the remaining woodlands occur in humid areas, where denser stands occur (Fjeldså and Kessler 1996, as cited in Fjeldså 2002a, p. 113). The optimal habitat for the royal cinclodes is dense woodlands, with a closed canopy that supports the best foraging habitat (shady, moss-laden vegetation) for this and other insectivorous birds (see Habitat and Life History) (De la Via 2004, p. 10; del Hoyo *et al.* 2003, p. 253; Engblom *et al.* 2002, p. 57).

Habitat loss, conversion, and degradation occur throughout the royal cinclodes' range and have been attributed to human activities (a full description of which is provided above as part of the Factor A analysis for the ash-breasted tit-tyrant). These activities include:

(1) Clearcutting and uncontrolled burning for agriculture and pastureland for domesticated animals, all of which contributes to loss of understory moss cover, soil erosion, and degradation, which prevent woodland regeneration (BLI 2009a, p. 2; BLI 2009b, p. 2; BLI 2009c, p. 2; BLI 2009d, p. 2; BLI 2009e, p. 3; BLI 2009f, p. 1; BLI 2009g, p. 1; BLI 2009h, p. 4; BLI 2009i, pp. 2, 6; Engblom *et al.* 2002, p. 56; Fjeldså 2002a, pp. 112, 120; Fjeldså 2002b, p. 8; Jameson and Ramsay 2007, p. 42; Purcell *et al.* 2004, p. 458; WCMC 1998a, p. 1; WCMC 1998b, p. 1);

(2) Extractive activities, such as wood and timber, for local and commercial-scale uses, including firewood and construction (Aucca and Ramsay 2005, p. 287; BLI 2009a, p. 2; BLI 2009b, p. 2; BLI 2009c, p. 2; BLI 2009d, p. 2; BLI 2009e, p. 3; BLI 2009g, p. 1; BLI 2009i, p. 2; Engblom 2000, p. 1; p. 2; Engblom *et al.* 2002, p. 56; Purcell *et al.* 2004, p. 458; WCMC 1998a, p. 1);

(3) Human encroachment, including tourism and industrialization projects, which puts greater demand on natural resources, spurs additional habitat destruction as arable land becomes scarce, and increases infrastructure development that further facilitates encroachment (BLI 2009b, p. 2; BLI 2009d, p. 2; Hensen 2002, p. 199; Purcell and Brelsford, 2004, pp. 156-157; Purcell *et al.* 2004, pp. 458-459); and

(4) Unpredictable climate fluctuations that exacerbate the effects of habitat fragmentation (Jetz *et al.* 2007, pp. 1211, 1213; Mora *et al.* 2007, p. 1027).

These habitat-altering activities are ongoing throughout the royal cinclodes' range, including the Apurímac (BLI 2009g, p. 1) and Cusco Regions (BLI 2009e, p. 1; BLI 2009f, p. 1; BLI 2009h, p. 1) in Peru and also in the Bolivian Department of La Paz (BLI 2009a, p. 1; BLI 2009b, p. 1; BLI 2009c, pp. 1; BLI 2009d, p. 1; Hensen 2002, p. 199; Purcell and Brelsford 2004, p. 157; Purcell *et al.* 2004, pp. 458-459). A combination of urbanization, road building, and industrialization projects (such as construction of hydroelectric power stations) in the Bolivian Department of La Paz have resulted in a nearly 40 percent loss of the forest cover between 1991 and 2003 alone; at this rate it is predicted that the remaining *Polylepis* forest in La Paz will be extirpated within the next 30 years (Purcell and Brelsford 2004, pp. 156-157).

Community-based *Polylepis* conservation programs have been under way in Peru and Bolivia since 2004 (Gómez in litt. 2003, 2008, as cited in BLI 2009i, p. 2; MacLennan 2009, p. 2),

and have focused on known sites for the royal cinclodes (BLI 2009i, p. 2), including Cordilleras Vilcanota and Vilcabamba, and highlands of the Apurímac Region (Aucca and Ramsey 2005, p. 287; ECOAN n.d., p. 1; Lloyd 2009, p. 10). These programs confront the main causes of *Polylepis* woodland loss—burning, grazing, and wood-cutting (Aucca and Ramsay 2005, pp. 187-288; BLI 2009i, p. 2; ECOAN n.d., p. 1; Engblom *et al.* 2002, p. 56; Gómez in litt. 2003, 2008, as cited in BLI 2009i, p. 2; Lloyd 2009, p. 10; MacLennan 2009, p. 2) —and are more fully described above as part of the Factor A analysis for the ash-breasted tit-tyrant (Aucca and Ramsay 2005, p. 287; Engblom *et al.* 2002, p. 56; MacLennan 2009, p. 2). While the *Polylepis* conservation programs foster local, sustainable use of resources (Aucca and Ramsay 2005, p. 287; ECOAN n.d., p. 1; Engblom *et al.* 2002, p. 56), commercial-scale activities, such as clearcutting, logging, tourism, and infrastructure development, that are ongoing throughout this species' range, alter otherwise sustainable resource use practices (Aucca and Ramsay 2005, p. 287; Engblom 2000, p. 2; Engblom *et al.* 2002, p. 56; MacLennan 2009, p. 2; Purcell and Brelsford 2004, pp. 156-157; Purcell *et al.* 2004, pp. 458-459; WCMC 1998a, p. 1). Tourism and human encroachment are particularly problematic for the royal cinclodes, which is described as a ''nervous'' species that is easily disturbed by humans (Engblom *et al.* 2002, p. 57).

In the Cordillera de Vilcanota (Cusco, Peru), where a large portion of the known royal cinclodes population occurs (116 birds were observed there, out of 189 total birds observed in 4 study sites in Peru) (Chutas 2007, pp. 4, 8), *Polylepis* woodland habitat is highly fragmented and degraded. As described more fully for the ash-breasted tit-tyrant (Factor A), recent research indicated:

(1) That four forest patches in the Cordillera de Vilcanota disappeared completely in the last half a century, that the size of remaining *Polylepis* remnants is small (with a mean patch size of 7.4 ac (3 ha)) (Jameson and Ramsay 2007, p. 42), and that many patches are less than 2.5 ac (1 ha) (Lloyd and Marsden in press, as cited in Lloyd 2008, p. 532);

(2) Ten percent of the remaining forest patches showed a decline in forest density (Jameson and Ramsay 2007, p. 42); and

(3) There were no indications of forest regeneration within the study area.

Thus, forest patches in Cordillera Vilcanota are at or below the minimum area required for the royal cinclodes to obtain food, given that the ground-feeding strategy used by the royal cinclodes generally requires a relatively large territory, from 7 to 10 ac (3 to 4 ha) (del Hoyo *et al.* 2003, p. 253; Engblom *et al.* 2002, p. 57). Because the moist, moss-covered woodlands that provide optimal foraging habitat for insectivorous birds (De la Via 2004, p. 10), and which this ground-feeding species prefers (del Hoyo *et al.* 2003, p. 253; Engblom *et al.* 2002, p. 57), require a closed canopy, degradation of the royal cinclodes habitat has serious consequences for this species. Reduction of forest density (or, decreased canopy cover) increases desiccation of the moist and mossy ground cover, which, in turn, reduces foraging microhabitats for the species (Engblom *et al.* 2002, p. 57).

Lack of *Polylepis* forest regeneration during nearly 50 years underscores the ramifications of continued burning and clearing to maintain pastures and farmland, which are prevalent activities throughout the royal cinclodes' range (BLI 2009a, p. 2; BLI 2009b, p. 2; BLI 2009c, p. 2; BLI 2009d, p. 2; BLI 2009e, p. 3; BLI 2009f, p. 1; BLI 2009g, p. 1; BLI 2009h, p. 4; BLI 2009i, p. 2; Engblom *et al.* 2002, p. 56; Fjeldså 2002a, pp. 112, 120; Fjeldså 2002b, p. 8; Purcell *et al.* 2004, p. 458; WCMC 1998a, p. 1; WCMC 1998b, p. 1). These habitat-altering activities are considered to be key factors preventing regeneration of *Polylepis* woodlands (Fjeldså 2002a, p. 112, 120; Fjeldså 2002b, p. 8) and are factors in the historical decline of *Polylepis* -dependent bird species, including the royal cinclodes (BLI 2009i, p. 6; Fjeldså and Kessler 1996, Kessler 1995a, b, and Lægaard 1992, as cited in Fjeldså 2002a, p. 112; Fjeldså 2002a, p. 116; Herzog *et al.* 2002, p. 94; Kessler 2002, pp. 97-101; Kessler and Herzog 1998, pp. 50-51).

The royal cinclodes may once have been locally common and distributed across most of central to southern Peru and into the Bolivian highlands, in once contiguous expanses of *Polylepis* forests (BLI 2000, p. 345; BLI 2009i, p. 1; Fjeldså 2002a, pp. 111-112, 115). The royal cinclodes' population size is considered to be declining in close association with continued habitat loss and degradation (BLI 2007, p. 1; BLI 2008, p. 1; BLI 2009i, p. 6). The species may have been extirpated from its type locality (Aricoma Pass, Puno), where *Polylepis* forest no longer occurs, and a search for the species in 1987 resulted in no observations of the royal cinclodes (Collar *et al.* 1992, p. 589; Engblom 2002, p. 57). Based on habitat availability, the royal cinclodes is not predicted to occur in Puno because the habitat no longer exists there (InfoNatura 2007, p. 1), and only two birds have been observed there in recent years (Chutas 2007, pp. 4, 8). Therefore, further habitat loss will continue to impact the species' already small population size (see Factor E).

Royal cinclodes are also impacted by unpredictable climate fluctuations, which are more fully described under the Factor A analysis of the ash-breasted tit-tyrant and are summarized here. Peru is subject to unpredictable climate fluctuations that exacerbate the effects of habitat fragmentation, such as those that are related to the El Niño Southern Oscillation (ENSO). Changes in weather patterns, such as ENSO cycles (El Niño and La Niña events), tend to increase precipitation in normally dry areas, and decrease precipitation in normally wet areas (Holmgren *et al.* 2001, p. 89; TAO Project n.d., p. 1), exacerbating the effects of habitat fragmentation on the decline of a species (England 2000, p. 86; Holmgren *et al.* 2001, p. 89; Jetz *et al.* 2007, pp. 1211, 1213; Mora *et al.* 2007, p. 1027; Parmesan and Mathews 2005, p. 334; Plumart 2007, pp. 1-2; Timmermann 1999, p. 694), especially for narrow endemics (Jetz *et al.* 2007, p. 1213) such as the royal cinclodes (see also Factor E). ENSO cycles strongly influence the growth of *Polylepis* species (Christie *et al.* 2008, p. 1) by altering the *Polylepis* species' age structure and mortality, especially where woodlands have undergone disturbance, such as fire and grazing (Villalba and Veblen 1997, pp. 121-123; Villalba and Veblen 1998, pp. 2624, 2637).

ENSO cycles may have already accelerated the fire cycle (Block and Richter 2007, p. 1; Power *et al.* 2007, pp. 897-898), which is a key factor preventing *Polylepis* regeneration (Fjeldså 2002a, p. 112, 120; Fjeldså 2002b, p. 8) because *Polylepis* species recover poorly following a fire (Cierjacks *et al.* 2007, p. 176). ENSO cycles are ongoing, having occurred several times within the last decade (NWS 2009, p. 2), and evidence suggests that ENSO cycles have already increased in periodicity and severity (Richter 2005, pp. 24-25; Timmermann 1999, p. 694), which will exacerbate the negative impacts of habitat destruction on a species. It is predicted that, by 2050, approximately 3 to 15 percent of the royal cinclodes' current remaining range is likely to be unsuitable for this species due to climate change and, by 2100, it is predicted that about 8 to 18 percent of the species' range is likely to be lost as a direct result of global climate change (Jetz *et al.* 2007, Supplementary Table 2, p. 89).

Human activities that alter the species' habitat are also ongoing within protected areas, including Santuario Histórico Machu Picchu (in Peru) (BLI 2009h, p. 4), and Parque Nacional y área Natural de Manejo Integrado Madidi, Parque Nacional y área Natural de Manejo Integrado Cotapata, and the co-located protected areas of Reserva Nacional de Fauna de Apolobamba, área Natural de Manejo Integrado de Apolobamba, and Reserva de la Biosfera de Apolobamba (in Bolivia) (BLI 2009a, p. 2; BLI 2009b, p. 2; BLI 2009c, p. 2; BLI 2009d, p. 5). Ongoing habitat destruction and alteration within protected areas, including clearing and human encroachment, is further discussed under Factor D.

Summary of Factor A

Polylepis habitat throughout the royal cinclodes' range has been and continues to be altered and destroyed as a result of human activities, including clearcutting and burning for agriculture, grazing lands, and industrialization; extractive activities, including firewood and timber extraction; and human encroachment and concomitant increased pressure on natural resources. An estimated 1 percent of the once-extensive dense *Polylepis* woodlands remains, and other remaining *Polylepis* woodlands are fragmented and degraded. The royal cinclodes occupies an area of approximately 1,042 mi^2 (2,700 km^2), and is particularly vulnerable to reduction in forest cover, because the moist habitats that serve as their feeding grounds quickly dry out as the forest canopy diminishes. Researchers estimate that the royal cinclodes territories are 7-10 ac (3-4 ha). In Cordillera Vilcanota (Cusco, Peru), where a large concentration of the royal cinclodes individuals were observed in 2007, the average size of forest fragments just meets the lower threshold of the species' ecological requirements.

While the species' range is more widespread in Bolivia than previously understood, ongoing and accelerated habitat destruction of the remaining *Polylepis* forest fragments in Peru and Bolivia continues to reduce the quantity, quality, distribution, and regeneration of remaining patches. In the Administrative Region of Puno, Peru, habitat loss may have led to extirpation of the species from its type locality and the species may no longer be viable in that Region due to habitat loss. Current research indicates that climate fluctuations exacerbate the effects of habitat loss on species, especially for narrow endemics such as the royal cinclodes that are already undergoing range reduction due to human activities. Historical decline in habitat availability is attributed to the same human activities that are causing habitat loss today, and climate models predict that this species' habitat will continue to decline. In addition, the royal cinclodes is ''nervous'' around humans, such that human encroachment is a particular problem. Human activities that degrade, alter, and destroy habitat are ongoing throughout the species' range, including within protected areas (see also Factor D). Experts consider the species' population decline to be commensurate with the declining habitat (Factor E). Therefore, we find that destruction and modification of habitat are threats to the continued existence of the royal cinclodes throughout its range.

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

We are not aware of any information currently available that indicates that overutilization of the royal cinclodes for commercial, recreational, scientific, or educational purposes has occurred or is occurring at this time. As a result, we are not considering overutilization to be a threat to the continued existence of the royal cinclodes.

C. Disease or Predation

We are not aware of any scientific or commercial information that indicate disease or predation poses a threat to this species. As a result, we are not considering disease or predation to be a threat to the continued existence of the royal cinclodes.

D. Inadequacy of Existing Regulatory Mechanisms

Existing regulatory mechanisms within Peru and Bolivia that have the potential to confer protection to the royal cinclodes or its habitat are analyzed on a country-by-country basis, beginning with Peru.

Peru: The royal cinclodes is considered ''critically endangered'' by the Peruvian Government under Supreme Decree No. 034-2004-AG (2004, p. 276855). This Decree prohibits hunting, take, transport, and trade of protected species, except as permitted by regulation. As hunting, take, transport, and trade do not currently threaten the royal cinclodes, this regulation does not mitigate any current threats to this species.

Peru has several categories of national habitat protection, which were described above as part of the Factor D analysis for the ash-breasted tit-tyrant (BLI 2008, p. 1; IUCN 1994, p. 2; Rodríguez and Young 2000, p. 330). Protected areas have been established through regulation at one site occupied by the royal cinclodes in Peru: Santuario Histórico Machu Picchu (Cusco, Peru) (BLI 2009h, p. 4). Within the sanctuary, resources are supposed to be managed for conservation (Rodríguez and Young 2000, p. 330). However, habitat destruction and alteration, including burning to maintain pastures for grazing, are ongoing within Santuario Histórico Machu Picchu, preventing the regeneration of the woodlands (BLI 2009h, p. 4; Engblom *et al.* 2002, p. 58). Therefore, the occurrence of the royal cinclodes within protected areas in Peru does not protect the species, nor does it mitigate the threats to the species from ongoing habitat loss (Factor A) and concomitant population decline (Factor E).

Bolivia: The 1975 Law on Wildlife, National Parks, Hunting, and Fishing (Decree Law No. 12,301 1975, pp. 1-34; eLAW 2003, p. 2), was described above as part of the Factor D analysis for the ash-breasted tit-tyrant. This law designates national protection for all wildlife. However, there is no information as to the actual protections this confers to the species itself or its habitat, and ongoing habitat destruction throughout the species' range indicates that this law does not protect the species nor does it mitigate the threat to the species from ongoing habitat loss (Factor A) and concomitant population decline within Bolivia (Factor E).

Environmental Law No. 1333 (eLAW 2003, p. 1; Law No. 1,333 1992, pp. 1-26), was signed in 1992 to protect and conserve the environment. However, we are not aware that any specific legislation needed to implement these laws has been passed (eLAW 2003, p. 1). Therefore, this law does not protect the species, nor does it mitigate the threats to the species from ongoing habitat loss (Factor A) and concomitant population decline (Factor E).

Various levels of habitat protection in Bolivia were described above as part of the Factor D analysis for the ash-breasted tit-tyrant (eLAW 2003, p. 3; Supreme Decree No. 24,781 1997, p. 3). The royal cinclodes occurs within several protected areas in the Department of La Paz, Bolivia: Parque Nacional y área Natural de Manejo Integrado Madidi, Parque Nacional y área Natural de Manejo Integrado Cotapata, and the co-located protected areas of Reserva Nacional de Fauna de Apolobamba, área Natural de Manejo Integrado de Apolobamba, and Reserva de la Biosfera de Apolobamba (Auza and Hennessey 2005, p. 81; BLI 2009a, p. 1; BLI 2009b, p. 1; BLI 2009c, p. 1; BLI 2009d, p. 1). Within Parque

Nacional y área Natural de Manejo Integrado Madidi, habitat destruction is caused by timber harvest used for construction, wood collection for firewood, and burning that often goes out of control to maintain pastures (BLI 2009a, p. 2; WCMC 1998a, p. 1). In addition, one of the most transited highways in the country is located a short distance from the Parque Nacional y área Natural de Manejo Integrado Cotapata; firewood collection and grazing also occur within the protected area (BLI 2009b, p. 2; BLI 2009c, p. 2). Within the Apolobamba protected areas, uncontrolled clearing, extensive agriculture, grazing, and tourism are ongoing (Auza and Hennessey 2005, p. 81; BLI 2009d, p. 5). Therefore, the occurrence of the royal cinclodes within protected areas in Bolivia does not protect the species, nor does it mitigate the threats to the species from ongoing habitat loss (Factor A) and concomitant population decline (Factor E).

Summary of Factor D

Peru and Bolivia have enacted various laws and regulatory mechanisms to protect and manage wildlife and their habitats. The royal cinclodes is ''critically endangered'' under Peruvian law and occurs within several protected areas in Peru and Bolivia. As discussed under Factor A, the royal cinclodes requires dense woodlands, which has been reduced by an estimated 99 percent in Peru and Bolivia. The remaining habitat for the royal cinclodes is fragmented and degraded. Habitat throughout the species' range has been and continues to be altered as a result of human activities, including clearcutting and burning for agriculture, grazing lands, and industrialization; extractive activities, including, firewood, timber, and mineral extraction; and human encroachment and concomitant increased pressure on natural resources. These activities are ongoing within protected areas and despite the species' critically endangered status in Peru, indicating that the laws governing wildlife and habitat protection in both countries are either inadequate or inadequately enforced to protect the species or to mitigate ongoing habitat loss (Factor A) and population declines (Factor E). Therefore, we find that the existing regulatory mechanisms are inadequate to mitigate the current threats to the continued existence of the royal cinclodes throughout its range.

E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

An additional factor that affects the continued existence of the royal cinclodes is the species' small population size. Based on recent observations in Peru and Bolivia, the total population is between 239 and 259 individuals (Chutas 2007, pp. 4, 8; Gómez in litt. 2007, p. 1) (see Population Estimates), and BirdLife International characterizes the species as having an ''extremely small population'' size (BLI 2000, p. 345; BLI 2009i, p. 1). Although there is insufficient information to fully understand gene flow within this species (see Population Estimates), Engblom *et al.* (2002, p. 57) noted that the royal cinclodes may descend the mountains to forage in the valleys during periods of snow cover at the higher altitudes. Thus, interbreeding may occur at least among localities with shared valleys, but there is insufficient information to determine that the species breeds as a single population. Moreover, the total population size, which includes immature individuals, is not an accurate reflection of the species' effective population size (the number of breeding individuals that contribute to the next generation) (Shaffer 1981, pp. 132-133; Soulé 1980, pp. 160-162). Therefore, 239–259 is an overestimate of the species' effective population size.

Small population size renders species vulnerable to genetic risks that can have individual or population-level genetic consequences, such as inbreeding depression, loss of genetic variation, and accumulation of new mutations. These genetic problems may affect the species' viability by increasing its susceptibility to demographic shifts or environmental fluctuations, as described above in the Factor E analysis for the ash-breasted tit-tyrant (Charlesworth and Charlesworth 1987, p. 238; Pimm *et al.* 1988, pp. 757, 773-775; Shaffer 1981, p. 131).

Small population size leads to a higher risk of extinction and, once a population is reduced below a certain number of individuals, it tends to rapidly decline towards extinction (Frankham 1996, p. 1507; Franklin 1980, pp. 147-148; Gilpin and Soulé 1986, p. 25; Holsinger 2000, pp. 64-65; Purvis *et al.* 2000, p. 1949; Reed and Frankham 2003, pp. 233-234; Soulé 1987, p. 181). If further research indicates that interbreeding does not between subpopulations, this would heighten the risks to the species associated with short-term genetic viability.

Complications arising from the species' small population size are exacerbated by the species' fragmented distribution. The royal cinclodes is currently restricted to high-elevation, moist, moss-laden patches of semihumid woodlands in Peru and Bolivia (BLI 2009i, p. 6) (Factor A). Fjeldså and Kessler (1996, as cited in Fjeldså 2002a, p. 113). Remaining *Polylepis* woodlands are highly fragmented and degraded, and it is estimated that only 1 percent of the dense woodlands preferred by the species remain (del Hoyo *et al.* 2003, p. 253; Engblom *et al.* 2002, p. 57) (see Habitat and Life History and Historical Distribution). Therefore, the species' current range is restricted and severely fragmented (BLI 2000, p. 345; BLI 2009i, pp. 1-2; Collar *et al.* 1992, p. 588; del Hoyo *et al.* 2003, p. 253). Habitat fragmentation can cause genetic isolation and heighten the risks to the species associated with short-term genetic viability. The royal cinclodes has undergone a population decline between 30 and 49 percent in the past 10 years, in close association with the continued loss and degradation of the *Polylepis* forest (BLI 2009i, p. 6) (Factor A). The species' small population size, combined with its restricted and severely fragmented range, increases the species' vulnerability to adverse natural events and manmade activities that destroy individuals and their habitat (Holsinger 2000, pp. 64-65; Primack 1998, pp. 279-308; Young and Clarke 2000, pp. 361-366).

Summary of Factor E

The royal cinclodes has a small population size that renders it vulnerable to genetic risks that negatively impact the species' long-term viability, and possibly its short-term viability. The species has a restricted range and occurs in highly fragmented habitat that continues to undergo degradation and curtailment due to human activities (Factor A). The restricted and fragmented range, as well as the small population size, increases the species' vulnerability to extinction through demographic or environmental fluctuations. Based on its small population size and fragmented distribution, we have determined that the royal cinclodes is particularly vulnerable to the threat of adverse natural events (e.g., genetic, demographic, or environmental) and human activities (e.g., deforestation, habitat alteration, and infrastructure development) that destroy individuals and their habitat. The genetic and

demographic risks associated with small population sizes are exacerbated by ongoing human activities that continue to curtail the species' habitat throughout its range. The species' population has declined and is predicted to continue declining commensurate with ongoing habitat loss (Factor A). Therefore, we find that the species' small population size, in concert with its fragmented distribution and its heightened vulnerability to adverse natural events and manmade activities, are threats to the continued existence of the royal cinclodes throughout its range.

Status Determination for the Royal Cinclodes

The royal cinclodes, a large-billed ovenbird, is native to the high-altitude, semihumid *Polylepis* or *Polylepis - Gynoxys* woodlands of the Bolivian and Peruvian Andes, where it occupies a narrow range of distribution at elevations between 11,483 and 12,092 ft (3,500 and 4,600 m). Preferring dense woodlands with more closed canopies, the royal cinclodes is a ground-feeding insectivore that probes the mossy forest undergrowth for food. The species has a highly restricted and severely fragmented range (approximately 1,042 mi^2 (2,700 km^2)), and is found only in the Peruvian Administrative Regions of Apurímac, Cusco, Júnin, and Puno, and in the Bolivian Department of La Paz. The known population of the royal cinclodes is estimated to be 239–259 individuals.

We have carefully assessed the best available scientific and commercial information regarding the past, present, and potential future threats faced by the royal cinclodes and have concluded that there are three primary factors impacting the continued existence of the royal cinclodes: (1) Habitat destruction, fragmentation, and degradation; (2) limited size and isolation of remaining populations; and (3) inadequate regulatory mechanisms.

Human activities that degrade, alter, and destroy habitat are ongoing throughout the royal cinclodes' range. Widespread deforestation and the conversion of forests for grazing, agriculture, and human settlement have led to the fragmentation of habitat throughout the range of the royal cinclodes (Factor A). Researchers estimate that only 1 percent of the dense *Polylepis* woodlands preferred by the species remain extant. Limited by the availability of suitable habitat, the species occurs today only in some of these fragmented and disjunct locations. Royal cinclodes habitat is particularly vulnerable to the drying effects accompanied by diminished forest cover.

Royal cinclodes habitat continues to be altered by human activities, which result in the continued degradation, conversion, and destruction of habitat and reduction of the quantity, quality, distribution, and regeneration of remaining patches. Habitat loss was a factor in this species' historical decline, resulting in extirpation of the species from its type locality and, possibly, the loss of a viable population in the entire Region of Puno, Peru (see Historical Range and Distribution). Thespecies' population is considered to be declining in association with the reduction in habitat (Factors A and E).

The royal cinclodes population is small, rendering the species particularly vulnerable to the threat of adverse natural events (e.g., genetic, demographic, or environmental) and human activities (e.g., deforestation and habitat alteration) that destroy individuals and their habitat. Human activities that continue to curtail the species' habitat throughout its range exacerbate the genetic and demographic risks associated with small population sizes (Factor E). The population has declined 30-49 percent in the past 10 years (see Population Estimates), and is predicted to continue declining commensurate with ongoing habitat loss (Factor A). Current research indicates that narrow endemics, such as the royal cinclodes, are especially susceptible to climate fluctuations because of the synergistic effect these fluctuations have on declining populations that are also experiencing range reductions due to human activities (Factor A).

Despite the species' ''critically endangered'' status in Peru and its occurrence within several protected areas in Peru and Bolivia (Factor D), the species' habitat continues to be destroyed and degraded as a result of human activities (Factor A), which corresponds with population declines (Factor E). Therefore, regulatory mechanisms are either inadequate or ineffective at mitigating the existing threats to the royal cinclodes and its habitat (Factor D).

Section 3 of the Act defines an ''endangered species'' as ''any species which is in danger of extinction throughout all or a significant portion of its range'' and a ''threatened species'' as ''any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' Based on the immediate and ongoing threats to the royal cinclodes throughout its entire range, as described above, we determine that the royal cinclodes is in danger of extinction throughout all of its range. Therefore, on the basis of the best available scientific and commercial information, we are proposing to list the royal cinclodes as an endangered species throughout all of its range.

VI. White-browed tit-spinetail (*Leptasthenura xenothorax*)

Species Description

The white-browed tit-spinetail, or ''*tijeral cejiblanco*,'' is a small dark ovenbird in the Furnaridaii family that is native to high-altitude woodlands of the Peruvian Andes (BLI 2000, p. 347; Chapman 1921, pp. 8-9; del Hoyo *et al.* 2003, pp. 266-267; Fjeldså and Krabbe 1990, p. 348; Parker and O'Neill 1980, p. 169). The sexes are similar, with individuals approximately 7 in (18 cm) in length. The species is characterized by its bright rufous crown and prominent white supercilium (eyebrow) (del Hoyo *et al.* 2003, p. 267; Lloyd 2009, p. 2), which gives the species its name. The species is highly vocal, ''often singing while acrobatically foraging from the outermost branches of *Polylepis* trees'' (Lloyd 2009, p. 2).

Taxonomy

The white-browed tit-spinetail was first described by Chapman in 1921 (del Hoyo *et al.* 2003, p. 267). The species has been synonymized with the nominate subspecies of the rusty-crowned tit-spinetail (*Leptasthenura pileata pileata*) by Vaurie (1980, p. 66), but examination of additional specimens in combination with field observations strongly suggests that *L. xenothorax* is a valid species (Collar *et al.* 1992, p. 596; Fjeldså and Krabbe 1990, p. 348; Parker and O'Neill 1980, p. 169). Therefore, we accept the species as *Leptasthenura xenothorax*, which also follows the Integrated Taxonomic Information System (ITIS 2009, p. 1).

Habitat and Life History

The white-browed tit-spinetail is restricted to high-elevation, semihumid *Polylepis* and *Polylepis-Gynoxys* woodlands, where the species is found between 12,139 and 14,928 ft (3,700 and 4,550 m) above sea level (BLI 2000, p. 347; Collar *et al.* 1992, p. 595; del Hoyo *et al.* 2003, p. 267; Fjeldså and Krabbe 1990, p. 348; Lloyd 2009, pp. 5-6). The characteristics of *Polylepis* habitat were described above as part of the Habitat and Life History of the ash-breasted tit-tyrant (Aucca and Ramsay 2005, p. 1; Chutas *et al.* 2008, p. 3; De la Via 2004, p. 10; IPNI 2009, p. 1; Kessler 1998, p. 1; Purcell *et al.* 2004, p. 455). The white-browed tit-spinetail prefers areas of primary forest that have a high density of tall, large trees and dense *Polylepis*

stands and vegetation cover (Lloyd 2008a, as cited in Lloyd 2009, p. 6).

Dense stands of *Polylepis* woodlands are characterized by moss-laden vegetation and a shaded understory, and provide for a rich diversity of insects, making these areas good feeding grounds for insectivorous birds (De la Via 2004, p. 10), such as the white-browed tit-spinetail (BLI 2009d, p. 2). According to Engblom *et al.* (2002, pp. 57-58), the species has been recorded in patches of woodland as small as 0.6 ac (0.25 ha) in Cordillera Vilcabamba. Based on these observations, Engblom *et al.* (2002, p. 58) suggest that the species is able to persist in very small forest fragments, especially if a number of these patches are in close proximity. The lower elevation of this species' range changes to a mixed *Polylepis-Escallonia* (no common name) woodland, and the white-browed tit-spinetail has been observed there on occasion, such as during a snowstorm (Collar *et al.* 1992, p. 595; del Hoyo *et al.* 2003, p. 267; Fjeldså and Krabbe 1990, p. 348).

There is limited information the ecology and breeding behavior of the white-browed tit-spinetail. Lloyd (2006, as cited in Lloyd 2009, p. 8) reports that the species breeds in October in Cordillera Vilcanota in southern Peru. In the same area, one adult was seen attending a nesting hole in a *Polylepis* tree in November 1997 (del Hoyo *et al.* 2003, p. 267; C. Bushell in litt. (1999), as cited in BLI 2009d, p. 2). Only one nest of the white-browed tit-spinetail has ever been described. According to Lloyd (2006, as cited in Lloyd 2009, p. 8), the nest was located within a natural cavity of a *Polylepis racemosa* tree's main trunk, approximately 7 ft (2 m) above the ground. To construct their nest, the white-browed tit-spinetail pair uses moss, lichen, and bark fibers they stripped from *Polylepis* tree trunks, large branches and large boulders while foraging. The nest was cup-shaped and contained two pale-colored eggs (Lloyd 2006, as cited in Lloyd 2009, p. 8).

The white-browed tit-spinetail is insectivorous, with a diet consisting primarily of arthropods (del Hoyo *et al.* 2003, p. 267; Lloyd 2009, p. 7). The species forages in pairs or small family groups of three to five, and often in mixed-species flocks, gleaning insects from bark crevices, moss, and lichens on twigs, branches, and trunks (BLI 2009d, pp. 2-3; Engblom *et al.* 2002, pp. 57-58; Parker and O'Neill 1980, p. 169). The white-browed tit-spinetail is highly arboreal, typically foraging acrobatically from the outer branches of *Polylepis* trees while hanging upside-down (del Hoyo *et al.* 2003, p. 267; Lloyd 2008b, as cited in Lloyd 2009, p. 7).

Historical Range and Distribution

In our 2008 Annual Notice of Findings on Resubmitted Petitions for Foreign Species (73 FR 44062; July 29, 2008), we stated that historically, the white-browed tit-spinetail may have occupied the *Polylepis* forests of the high-Andes of Peru and Bolivia. We included both countries in the historical range of the species because the species' primary habitat, the *Polylepis* forest, was historically large and contiguous throughout the high-Andes of both Peru and Bolivia (Fjeldså 2002a, p. 115). However, based on further research, we have determined that historically, the species was only known from two Regions in south-central Peru, Cusco and Apurímac (Collar *et al.* 1992, p. 594; del Hoyo *et al.* 2003, p. 267), and not in Bolivia.

The white-browed tit-spinetail may once have been distributed throughout south-central Peru, in previously contiguous *Polylepis* forests above 9,843 ft (3,000 m) (BLI 2000, p. 347; BLI 2009d, pp. 1-2; Fjeldså 2002a, pp. 111-112, 115; Herzog *et al.* 2002, p. 94; Kessler 2002, pp. 97-101). However, *Polylepis* woodlands are now restricted to elevations of 11,483 to 16,404 ft (3,500 to 5,000 m) (Fjeldså 1992, p. 10). As discussed above for the Historical Range and Distribution of the ash-breasted tit-tyrant, researchers consider human activity to be the primary cause for historical habitat decline and resultant decrease in species richness (Fjeldså and Kessler 1996, Kessler 1995a, b, and Lægaard 1992, as cited in Fjeldså 2002a, p. 112; Fjeldså 2002a, p. 116; Herzog *et al.* 2002, p. 94; Kessler 2002, pp. 97-101; Kessler and Herzog 1998, pp. 50-51). It is estimated that only 2-3 percent of the original forest cover still remains in Peru (Fjeldså 2002a, pp. 111, 113). Less than 1 percent of the remaining woodlands occur in humid areas, where denser stands are found (Fjeldså and Kessler 1996, as cited in Fjeldså 2002a, p. 113), and which are preferred by the white-browed tit-spinetail (BLI 2009d, p. 2; Lloyd 2008a, as cited in Lloyd 2009, p. 6).

Current Range and Distribution

Today, the white-browed tit-spinetail is restricted to high-elevation, semihumid patches of *Polylepis* and *Polylepis-Gynoxys* woodlands in the Andes mountains of south-central Peru, where the species occurs between 12,139-14,928 ft (3,700-4,550 m) (BLI 2000, p. 347; Collar *et al.* 1992, p. 595; del Hoyo *et al.* 2003, p. 267; Fjeldså and Krabbe 1990, p. 348; InfoNatura 2007, p. 1; Lloyd 2009, pp. 1, 5-6). The species has a highly restricted and severely fragmented range, and is currently known from only a small number of sites: The Runtacocha highlands (in Apurímac Region) and the Nevado Sacsarayoc massif, Cordillera Vilcabamba (Chapman 1921, p. 8), and Cordillera Vilcanota (in the Cusco Region) (BLI 2000, p. 347; BLI 2009d, p. 2; Lloyd 2009, p. 5). The estimated range of the species is approximately 965 mi^2 (2,500 km^2) (BLI 2000, p. 347; BLI 2009d, pp. 1, 5).

Population Estimates

Population information is presented first on the local level and then in terms of a global population estimate.

Local population estimates: Between 1987 and 1989, populations of 35-70 individuals were estimated to occur at 3 sites in Cusco; since then, declines in the populations at some of these sites have been observed (Fjeldså and Kessler 1996, as cited in BLI 2000, p. 347). At Abra Málaga (Cusco Region), it is estimated that there are approximately 30-50 birds (del Hoyo *et al.* 2003, p. 267; Engblom *et al.* 2002, p. 58). In the Runtacocha highlands (Apurímac Region), the population density of the white-browed tit-spinetail is very low (Fjeldså and Kessler 1996, as cited in BLI 2000, p. 347). Chutas (2007, p. 8) reported an estimated 305 birds located within 3 disjunct *Polylepis* forest patches in Peru. This included 205 birds and 36 birds in Cordilleras Vilcanota and Vilcabamba, respectively (Cusco), and 64 birds in ''Cordillera del Apurímac'' (Runtacocha highlands of Apurímac) (Chutas 2007, p. 8).

Density estimates derived from surveys conducted at 3 sites in Cordillera Vilcanota range from 25.3 (± 15.1) individuals per km^2, to 9.6 (± 21.7) individuals per km^2, and the species may occur at even higher densities in other areas of *Polylepis* forests (Lloyd 2008c, as cited in Lloyd 2009, p. 9). According to Lloyd (2008c, as cited in Lloyd 2009, p. 9), this quantitative data from Cordillera Vilcanota shows that the white-browed tit-spinetail is ''one of the most abundant *Polylepis* specialists in southern Peru.''

Global population estimate: BirdLife International categorizes the white-browed tit-spinetail as having a population size between 500 and 1,500 individuals (BLI 2009d, pp. 1, 5). The category was determined from the population estimates reported by Engblom *et al.* 2002 (p. 58), who estimated ''the known population to be around 500 individuals with a possible total population of 1,500 individuals.''

In 2002, Fjeldså (2002b, p. 9) estimated a total population size of between 250 and 1,000 pairs of birds, which coincides with the BirdLife International category of 500–1,500 individuals.

The species has experienced a population decline of between 10 and 19 percent in the past 10 years, and this rate of decline is predicted to continue (BLI 2009d, p. 5). The population is considered to be declining in close association with continued habitat loss and degradation (see Factors A and E) (BLI 2009d, p. 6).

Conservation Status

The white-browed tit-spinetail is considered ''endangered'' by the Peruvian Government under Supreme Decree No. 034-2004-AG (2004, p. 276854). The IUCN considers the white-browed tit-spinetail to be ''Endangered'' due to its very small and severely fragmented range and population, which continue to decline with ongoing habitat loss and a lack of habitat regeneration (BLI 2009d, p. 1). The white-browed tit-spinetail occurs within the Peruvian protected area of Santuario Histórico Machu Picchu in Cusco (BLI 2009c, pp. 1, 3; BLI 2009d, p. 6; del Hoyo *et al.* 2003, p. 267).

Summary of Factors Affecting the White-browed Tit-Spinetail

A. The Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

The white-browed tit-spinetail is restricted to high-elevation, semihumid *Polylepis* and *Polylepis-Gynoxys* woodlands, where it is found between 12,139 and 14,928 ft (3,700 and 4,550 m) above sea level (BLI 2000, p. 347; Collar *et al.* 1992, p. 595; del Hoyo *et al.* 2003, p. 267; Fjeldså and Krabbe 1990, p. 348; Lloyd 2009, pp. 1, 5-6). High-Andean *Polylepis* habitat is characterized as a threatened woodland ecosystem on national, regional, and global levels (Purcell *et al.* 2004, p. 457; Renison *et al.* 2005, as cited in Lloyd 2009, p. 10), with several *Polylepis* species within the white-browed tit-spinetail's range considered to be ''Vulnerable,'' according to the IUCN (WCMC 1998a, p. 1; WCMC 1998b, p. 1). As described more fully for the ash-breasted tit-tyrant (Factor A), *Polylepis* woodlands have been much reduced from historical estimates, with an estimated remaining area of 386 mi^2 (1,000 km^2) in Peru (Fjeldså and Kessler 1996, as cited in Fjeldså 2002a, p. 113). The majority of these remaining forests are much dispersed, and less than 1 percent is located in the humid parts of the highlands, where denser stands occur (Fjeldså and Kessler 1996, as cited in Fjeldså 2002a, p. 113). The white-browed tit-spinetail prefers areas of dense *Polylepis* primary forest with understory vegetation that provides optimal foraging habitat (BLI 2009d, p. 2; De la Via 2004, p. 10; Lloyd 2008a, as cited in Lloyd 2009, p. 6) (see Habitat and Life History).

In the Cordillera de Vilcanota (Cusco, Peru), where a large portion of the known white-browed tit-spinetail population occurs (205 birds were observed there, out of 305 total birds observed in 3 study sites in Peru) (Chutas 2007, p. 8), *Polylepis* woodland habitat is highly fragmented and degraded. As described more fully for the ash-breasted tit-tyrant (Factor A), recent research indicated that:

(1) Four forest patches in the Cordillera de Vilcanota disappeared completely in the last half a century, and the remaining *Polylepis* remnants are small (with a mean patch size of 7.4 ac (3 ha) (Jameson and Ramsay 2007, p. 42) and commonly separated from the larger patches by distances of 98–4,921 ft (30–1,500 m) (Lloyd and Marsden in press, as cited in Lloyd 2008, p. 532);

(2) Ten percent of the remaining forest patches showed a decline in forest density (Jameson and Ramsay 2007, p. 42); and

(3) There were no indications of forest regeneration within the study area.

These findings have consequences for the white-browed tit-spinetail given the species' ecological requirements. As *Polylepis* woodlands decline in number, the distances between patches increase. According to Engblom *et al.* (2002, pp. 57-58), the species has been recorded in patches of woodland as small as 0.6 ac (0.25 ha) in Cordillera Vilcabamba, but the species' persistence in small patches appears to be dependent on the patches being in close proximity to each other. Habitat degradation impacts the white-browed tit-spinetail, given its preference for dense *Polylepis* woodlands, where optimal foraging habitat is found (BLI 2009d, p. 2; De la Via 2004, p. 10; Lloyd 2008a, as cited in Lloyd 2009, p. 6). The lack of *Polylepis* forest regeneration in the area over nearly 50 years underscores the ramifications of continued burning and clearing to maintain pastures and farmland that are prevalent throughout the white-browed tit-spinetail's range (BLI 2009a, p. 1; Engblom *et al.* 2002, p. 56; Fjeldså 2002a, pp. 112, 120; Fjeldså 2002b, p. 8; Purcell *et al.* 2004, p. 458; WCMC 1998a, p. 1; WCMC 1998b, p. 1).

Habitat loss, conversion, and degradation throughout the white-browed tit-spinetail's range are attributed to human activities (a full description of which is provided above as part of the Factor A analysis for the ash-breasted tit-tyrant). Ongoing activities include:

(1) Clearcutting and uncontrolled burning for agriculture and pastureland for domesticated animals, all of which contributes to soil erosion, and habitat degradation, which prevent forest regeneration and restrict *Polylepis* woodlands to localized and highly fragmented landscapes (BLI 2009a, p. 2; BLI 2009b, p. 1; BLI 2009c, p. 3; BLI 2009d, p. 3; Engblom *et al.* 2002, p. 56; Fjeldså 2002a, pp. 112, 120; Fjeldså 2002b, p. 8; Jameson and Ramsay 2007, p. 42; Purcell *et al.* 2004, p. 458; Renison *et al.* 2006, as cited in Lloyd 2009, p. 11; WCMC 1998a, p. 1; WCMC 1998b, p. 1);

(2) Extractive activities, such as harvest for timber, firewood, and charcoal, for use on local- and commercial-scales as fuel, construction, fencing and tool-making (Aucca and Ramsay 2005, p. 287; BLI 2009a, p. 2; BLI 2009b, p. 1; BLI 2009d, p. 3; Engblom 2000, pp. 1-2; Engblom *et al.* 2002, p. 56; Fjeldså and Kessler 1996, as cited in BLI 2009d, p. 3; Purcell *et al.* 2004, pp. 458-459; WCMC 1998a, p. 1); and

(3) Unpredictable climate fluctuations that exacerbate the effects of habitat fragmentation (Jetz *et al.* 2007, pp. 1211, 1213; Mora *et al.* 2007, p. 1027). These habitat-altering activities are ongoing throughout the range of the white-browed tit-spinetail, including in Apurímac (BLI 2009b, p. 1) and Cusco (BLI 2009a, pp. 1-2; BLI 2009c, pp. 1-3) of south-central Peru and within the one protected area in which the species occurs, Santuario Histórico Machu Picchu (BLI 2009c, p. 3).

Polylepis conservation programs have been under way in Peru since 2004, including in Cordilleras Vilcanota and Vilcabamba and highlands of the Apurímac Region, where white-browed tit-spinetail also occurs (Aucca and Ramsey 2005, p. 287; Chutas 2007, p. 8; ECOAN n.d., p. 1; Lloyd 2009, p. 10). These community-based programs, which are more fully described above as part of the Factor A analysis for the ash-breasted tit-tyrant, confront the primary causes of *Polylepis* deforestation: Burning, grazing, and wood-cutting. One such program, called the ''Vilcanota Project,'' is under way at three locations in the Cordillera de Vilcanota (Abra Málaga, Hulloc, and Cancha-Cancha) (Aucca and Ramsay 2005, p. 287; ECOAN n.d., p. 1; Lloyd 2009, p. 10). Since local populations rely on *Polylepis* wood for firewood and

charcoal production (Aucca and Ramsay 2005, p. 287; Engblom *et al.* 2002, p. 56), the Vilcanota Project works to deliver non- *Polylepis* firewood to families for cooking, as well as supply them with fuel-efficient cooking stoves (ECOAN n.d., p. 1). A short-term aim of these projects is to restore balance to local sustainable resource use (Aucca and Ramsay 2005, p. 288; ECOAN n.d., p. 1). However, at Abra Málaga (one of the Vilcanota Project's sites), *Polylepis* woodlands continue to be impacted by extraction for firewood and burning for agriculture and pastureland (BLI 2009a, pp. 1-2). In addition, commercial-scale activities, such as logging and fuel wood collection, which are ongoing throughout this species' range, alter otherwise sustainable resource use practices (Aucca and Ramsay 2005, p. 287; Engblom 2000, p. 2; Engblom *et al.* 2002, p. 56; MacLennan 2009, p. 2; Purcell *et al.* 2004, pp. 458-459; WCMC 1998a, p. 1).

Habitat destruction caused by burning and grazing, which have prevented regeneration of habitat, is a factor in the historical decline of *Polylepis* -dependent bird species (Fjeldså 2002a, p. 116). The white-browed tit-spinetail's population size is considered to be declining in close association with the continued habitat loss and degradation of *Polylepis* woodlands (BLI 2009d, p. 6). The species may once have been distributed throughout south-central Peru, in once contiguous *Polylepis* forests (BLI 2000, p. 347; BLI 2009d, pp. 1-2; Fjeldså 2002a, pp. 111-112, 115; Herzog *et al.* 2002, p. 94; Kessler 2002, pp. 97-101). Today, the species has a highly restricted and severely fragmented range, and is currently known from only a small number of sites in the Regions of Apurímac and Cusco in south-central Peru (BLI 2000, p. 347; BLI 2009d, pp. 1-2; Lloyd 2009, p. 5).

White-browed tit-spinetails are also impacted by unpredictable climate fluctuations, which are more fully described under the Factor A analysis of the ash-breasted tit-tyrant and are summarized here. Peru is subject to unpredictable climate fluctuations that exacerbate the effects of habitat fragmentation, such as those that are related to the El Niño Southern Oscillation (ENSO). Changes in weather patterns, such as ENSO cycles (El Niño and La Niña events), tend to increase precipitation in normally dry areas, and decrease precipitation in normally wet areas (Holmgren *et al.* 2001, p. 89; TAO Project n.d., p. 1), exacerbating the effects of habitat fragmentation on the decline of a species (England 2000, p. 86; Holmgren *et al.* 2001, p. 89; Jetz *et al.* 2007, pp. 1211, 1213; Mora *et al.* 2007, p. 1027; Parmesan and Mathews 2005, p. 334; Plumart 2007, pp. 1-2; Timmermann 1999, p. 694), especially for narrow endemics (Jetz *et al.* 2007, p. 1213) such as the white-browed tit-spinetail (see also Factor E). ENSO cycles strongly influence the growth of *Polylepis* species (Christie *et al.* 2008, p. 1) by altering *Polylepis* species' age structure and mortality, especially where woodlands have undergone disturbance, such as fire and grazing (Villalba and Veblen 1997, pp. 121-123; Villalba and Veblen 1998, pp. 2624, 2637). These cycles may have already accelerated the fire cycle (Block and Richter 2007, p. 1; Power *et al.* 2007, pp. 897-898), which is a key factor preventing *Polylepis* regeneration (Fjeldså 2002a, p. 112, 120; Fjeldså 2002b, p. 8) because *Polylepis* species recover poorly following a fire (Cierjacks *et al.* 2007, p. 176). ENSO cycles are ongoing, having occurred several times within the last decade (NWS 2009, p. 2), and evidence suggests that ENSO cycles have already increased in periodicity and severity (Richter 2005, pp. 24-25; Timmermann 1999, p. 694), which will exacerbate the negative impacts of habitat destruction on a species. It is predicted that, by 2050, another 1 percent of the white-browed tit-spinetail's current remaining range is likely to be unsuitable for this species due to climate change; and, by 2100, it is predicted that about 43 percent of the species' range is likely to be lost as a direct result of global climate change (Jetz *et al.* 2007, Supplementary Table 2, p. 89).

Summary of Factor A

Polylepis habitat throughout the range of the white-browed tit-spinetail has been and continues to be altered and destroyed as a result of human activities, including clearcutting and burning for agriculture and grazing lands and extractive activities, including harvest for timber, firewood, and charcoal. It is estimated that only 1 percent of the dense *Polylepis* woodlands preferred by the species remain, and the remaining woodlands are highly fragmented and degraded. Observations suggest that the white-browed tit-spinetail is able to persist in very small forest fragments (e.g., areas as small as 0.6 ac (0.25 ha) in Cordillera Vilcabamba); however, this depends on whether or not a number of patches are in close proximity to one another. Since the remaining *Polylepis* woodlands are and continue to be severely fragmented, the distance between some of the small woodland patches may be too large for the species to be able to persist. Today, the species is known from only a small number of sites at four locations: The Runtacocha highlands (in Apurímac Region), and the Nevado Sacsarayoc massif, Cordillera Vilcabamba, and Cordillera Vilcanota (in Cusco Region). Historical decline in habitat availability is attributed to the same human activities that are causing habitat loss today. Ongoing and accelerated habitat destruction of the remaining *Polylepis* woodlands in Peru continues to reduce the quantity, quality, distribution, and potential regeneration of *Polylepis* forests. Human activities that degrade, alter, and destroy habitat are ongoing throughout the species' range, including within protected areas (see also Factor D). Experts consider the species' population decline to be commensurate with the declining habitat (Factor E). Current research indicates that climate fluctuations exacerbate the effects of habitat loss to species, especially for narrow endemics such as the white-browed tit-spinetail that are already undergoing range reduction due to human activities. Climate models predict that this species' habitat will continue to decline. Therefore, we find that destruction and modification of habitat are threats to the continued existence of the white-browed tit-spinetail throughout its range.

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

We are not aware of any information currently available that indicates that overutilization of the species for commercial, recreational, scientific, or educational purposes has occurred or is occurring at this time. As a result, we are not considering overutilization to be a threat to the continued existence of the white-browed tit-spinetail.

C. Disease or Predation

We are not aware of any scientific or commercial information that indicates that disease or predation poses a threat to the species. As a result, we are not considering disease or predation to be a threat to the continued existence of the white-browed tit-spinetail.

D. Inadequacy of Existing Regulatory Mechanisms

The white-browed tit-spinetail is considered ''endangered'' by the Peruvian Government under Supreme Decree No. 034-2004-AG (2004, p. 276854). This Decree prohibits hunting, take, transport, and trade of protected species, except as permitted by regulation. As hunting, taking, or trade do not currently threaten the white-browed tit-spinetail, this regulation does

not mitigate any current threats to the species.

Peru has several categories of national habitat protection, which were described above as part of Factor D for the ash-breasted tit-tyrant (IUCN 1994, p. 2; Rodríguez and Young 2000, p. 330). Protected areas have been established through regulation at one site occupied by the white-browed tit-spinetail in Peru: the Santuario Histórico Machu Picchu (Cusco, Peru); (BLI 2009c, pp. 1, 3; BLI 2009d, p. 6). Resources within Santuario Histórico Machu Picchu are supposed to be managed for conservation (Rodríguez and Young 2000, p. 330). However, habitat destruction and alteration, including burning, cutting, and grazing are ongoing within the sanctuary, preventing regeneration of the woodlands (BLI 2009c, p. 3; Engblom *et al.* 2002, p. 58). Therefore, the occurrence of the white-browed tit-spinetail within protected areas in Peru does not protect the species, nor does it mitigate the threats to the species from ongoing habitat loss (Factor A) and concomitant population decline (Factor E).

Summary of Factor D

Peru has enacted various laws and regulatory mechanisms to protect and manage wildlife and their habitats. The white-browed tit-spinetail is ''endangered'' under Peruvian law and occurs within one protected area in Peru. As discussed under Factor A, the white-browed tit-spinetail prefers dense *Polylepis* woodlands, which have been reduced by an estimated 98 percent in Peru. The *Polylepis* habitat that does remain is highly fragmented and degraded. Habitat throughout the species' range has been and continues to be altered as a result of human activities, including clearcutting and burning for agriculture and grazing lands; and extractive activities such as timber harvest, firewood collection, and charcoal production. These activities are ongoing within protected areas despite the species' endangered status, indicating that the laws governing wildlife and habitat protection in Peru are either inadequate or inadequately enforced to protect the species or to mitigate ongoing habitat loss (Factor A) and population declines (Factor E). Therefore, we find that the existing regulatory mechanisms are inadequate to mitigate the current threats to the continued existence of the white-browed tit-spinetail throughout its range.

E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

An additional factor that affects the continued existence of the white-browed tit-spinetail is the species' small population size. As discussed above (see Population Estimates), BirdLife International has placed the white-browed tit-spinetail in the population category of between 500 and 1,500 individuals (BLI 2009d, pp. 1, 5), and characterizes the species as having a ''very small population'' size (BLI 2000, p. 347; BLI 2009d, p. 1).

Small population size renders species vulnerable to genetic risks that can have individual or population-level genetic consequences, such as inbreeding depression, loss of genetic variation, and accumulation of new mutations, and may affect the species' viability by increasing its susceptibility to demographic shifts or environmental fluctuations, as explained in more detail above in the Factor E analysis for the ash-breasted tit-tyrant (Charlesworth and Charlesworth 1987, p. 238; Pimm *et al.* 1988, pp. 757, 773-775; Shaffer 1981, p. 131). Small population size leads to a higher risk of extinction and, once a population is reduced below a certain number of individuals, it tends to rapidly decline towards extinction (Frankham 1996, p. 1507; Franklin 1980, pp. 147-148; Gilpin and Soulé 1986, p. 25; Holsinger 2000, pp. 64-65; Purvis *et al.* 2000, p. 1949; Reed and Frankham 2003, pp. 233-234; Soulé 1987, p. 181).

Complications arising from the species' small population size are exacerbated by the species' fragmented distribution. The white-browed tit-spinetail is currently confined to high-elevation, semihumid patches of forest in the Andes of Peru, and its population has declined at a rate between 10 and 19 percent in the past 10 years, in close association with the continued loss and degradation of the *Polylepis* forest (BLI 2009d, pp. 5-6) (Factor A). Fjeldså and Kessler (1996, as cited in Fjeldså 2002a, p. 113) describe the remaining *Polylepis* woodlands as highly fragmented and degraded, and estimate that only 1 percent of the dense woodlands preferred by the species remain (BLI 2009d, p. 2; De la Via 2004, p. 10; Lloyd 2008a, as cited in Lloyd 2009, p. 6) (see Habitat and Life History). As a result, experts say that the species' current range is highly restricted and severely fragmented (BLI 2000, p. 347; BLI 2009d, p. 1; Collar *et al.* 1992, p. 595; del Hoyo *et al.* 2003, p. 267; Fjeldså and Krabbe 1990, p. 348; InfoNatura 2007, p. 1; Lloyd 2009, p. 5). The species' small population size, combined with its highly restricted and severely fragmented range, increases the species' vulnerability to adverse natural events and manmade activities that destroy individuals and their habitat (Holsinger 2000, pp. 64-65; Primack 1998, pp. 279-308; Young and Clarke 2000, pp. 361-366).

Summary of Factor E

The white-browed tit-spinetail has a small population size that renders it vulnerable to genetic risks that negatively impact the species' viability. The species has a severely restricted range and occurs in highly fragmented habitat that continues to undergo degradation and curtailment due to human activities (Factor A). The restricted and fragmented range, as well as the small population size, increases the species' vulnerability to extinction through demographic or environmental fluctuations. Based on its small population size and fragmented distribution, we have determined that the white-browed tit-spinetail is particularly vulnerable to the threat of adverse natural events (e.g., genetic, demographic, or environmental) and human activities (e.g., deforestation and habitat alteration) that destroy individuals and their habitat. The genetic and demographic risks associated with small population sizes are exacerbated by ongoing human activities that continue to curtail the species' habitat throughout its range. The species' population has declined and is predicted to continue declining commensurate with ongoing habitat loss (Factor A). Therefore, we find that the species' small population size, in concert with its fragmented distribution and its heightened vulnerability to adverse natural events and manmade activities, are threats to the continued existence of the white-browed tit-spinetail throughout its range.

Status Determination for the White-Browed Tit-Spinetail

The white-browed tit-spinetail, a small dark ovenbird, is restricted to high-altitude woodlands of the Peruvian Andes. Preferring dense, semihumid *Polylepis* and *Polylepis-Gynoxys* woodlands, the ash-breasted tit-tyrant occupies a narrow range of distribution at elevations between 12,139 and 14,928 ft (3,700 and 4,550 m) above sea level. The species has a highly restricted and severely fragmented range (approximately 965 mi^2 (2,500 km^2)), and is currently known from only a small number of sites in the Apurímac and Cusco Regions, in south-central Peru. The known population of the

white-browed tit-spinetail is estimated to be approximately 500 to 1,500 individuals.

We have carefully assessed the best available scientific and commercial information regarding the past, present, and potential future threats faced by the white-browed tit-spinetail. There are three primary factors impacting the continued existence of the white-browed tit-spinetail: (1) Habitat destruction, fragmentation, and degradation; (2) limited size and isolation of remaining populations; and (3) inadequate regulatory mechanisms.

Human activities that degrade, alter, and destroy habitat are ongoing throughout the white-browed tit-spinetail. Widespread deforestation and the conversion of forests for grazing and agriculture have led to the fragmentation of habitat throughout the range of the white-browed tit-spinetail (Factor A). Researchers estimate that only 1 percent of the dense *Polylepis* woodlands preferred by the species remain. Limited by the availability of suitable habitat, the species occurs today only in a few fragmented and disjunct locations.

White-browed tit-spinetail habitat continues to be altered by human activities, which result in the continued degradation, conversion, and destruction of habitat and reduction of the quantity, quality, distribution, and regeneration of remaining forest patches. Habitat loss was a factor in this species' historical decline (see Historical Range and Distribution), and the species is considered to be declining today in association with the continued reduction in habitat (Factors A and E). The species' severely restricted range, combined with its small population size, renders it 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. Human activities that continue to curtail the species' habitat throughout its range exacerbate the genetic and demographic risks associated with small population sizes (Factor E). The species has experienced a population decline of between 10 and 19 percent in the past 10 years (see Population Estimates), and is predicted to continue declining commensurate with ongoing habitat loss and degradation. Current research indicates that narrow endemics, such as the white-browed tit-spinetail, are especially susceptible to climate fluctuations because of the synergistic effect these fluctuations have on declining populations that are also experiencing range reductions due to human activities (Factor A).

Despite the species' endangered status in Peru and its occurrence within one protected area, human activities that degrade, alter, and destroy habitat are ongoing throughout the white-browed tit-spinetail's range, including within protected areas. Therefore, regulatory mechanisms are either inadequate or ineffective at curbing the threats to the white-browed tit-spinetail of habitat loss (Factor A) and corresponding population decline (Factor E).

Section 3 of the Act defines an ''endangered species'' as ''any species which is in danger of extinction throughout all or a significant portion of its range'' and a ''threatened species'' as ''any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' Based on the immediate and ongoing threats to the white-browed tit-spinetail throughout its entire range, as described above, we determine that the white-browed tit-spinetail is in danger of extinction throughout all of its range. Therefore, on the basis of the best available scientific and commercial information, we are proposing to list the white-browed tit-spinetail as an endangered species throughout all of its range.

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 Federal and State governments, private agencies and interest 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 has been proposed or designated. However, given that the ash-breasted tit-tyrant, Junín grebe, Junín rail, Peruvian plantcutter, the royal cinclodes, and the white-browed tit-spinetail are not native to the United States, we are not proposing critical habitat for these species under section 4 of the Act.

Section 8(a) of the Act authorizes the provision of 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 and threatened 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. As such, these prohibitions would be applicable to the ash-breasted tit-tyrant, Junín grebe, Junín rail, Peruvian plantcutter, the royal cinclodes, and the white-browed tit-spinetail. 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 to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct) any endangered wildlife species within the United States or upon the high seas; or to import or export; deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of commercial activity; or to sell or offer for sale in interstate or foreign commerce any endangered wildlife species. It is also 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.

Permits may be issued 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. With regard to endangered wildlife, a permit may 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 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 ash-breasted tit-tyrant, Junín grebe, Junín rail, Peruvian plantcutter, royal cinclodes, and white-browed tit-spinetail.

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, the sections where you feel lists or tables would be useful, etc.

References Cited

A complete list of all references cited in this proposed rule is 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 FURTHER INFORMATION CONTACT**).

Author(s)

The primary authors of this proposed rule are Jesse D'Elia (of the Pacific Regional Office) and Patricia De Angelis, Patricia Ford, Monica Horton, and Marie Maltese (all 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 ''Cinclodes, royal,'' ''Grebe, Junín,'' ''Plantcutter, Peruvian,'' ''Rail, Junín,'' ''Tit-spinetail, white-browed,'' and ''Tit-tyrant, ash-breasted'' in alphabetical order under BIRDS to the List of Endangered and Threatened Wildlife, as follows:

§17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*		*	*
BIRDS							
*	*	*	*	*		*	*
Cinclodes, royal	*Cinclodes aricomae*	Bolivia, Peru	Entire	E		NA	NA
*	*	*	*	*		*	*
Grebe, Junín	*Podiceps taczanowskii*	Peru	Entire	E		NA	NA
*	*	*	*	*		*	*
Plantcutter, Peruvian	*Phytotoma raimondii*	Peru	Entire	E		NA	NA
*	*	*	*	*		*	*

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
Rail, Junín	*Laterallus tuerosi*	Peru	Entire	E		NA	NA
*	*	*	*	*		*	*
Tit-spinetail, white-browed	*Leptasthenura xenothorax*	Peru	Entire	E		NA	NA
Tit-tyrant, ash-breasted	*Anairetes alpinus*	Bolivia, Peru	Entire	E		NA	NA
*	*	*	*	*		*	*

* * * * *

Dated: December 16, 2009

Sam D. Hamilton,

Director, U.S. Fish and Wildlife Service

[FR Doc. E9–31102 Filed 1–4–10; 8:45 am]

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Federal Register

Tuesday,
January 5, 2010

Part V

Department of Energy

10 CFR Parts 430 and 431

Energy Conservation Program Requirements for Certain Consumer Products and Commercial and Industrial Equipment; Proposed Information Collection; Comment Request; Certification, Compliance, and Enforcement Requirements for Consumer Products and Certain Commercial and Industrial Equipment; Final Rule and Notice

DEPARTMENT OF ENERGY

10 CFR Parts 430 and 431

[Docket Nos. EE–RM/TP–99–450 and EE–RM/TP–05–500]

RIN 1904–AA96 and 1904–AB53

Energy Conservation Program: Certification, Compliance, and Enforcement Requirements for Certain Consumer Products and Commercial and Industrial Equipment

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

ACTION: Final rule.

SUMMARY: The Energy Policy and Conservation Act (EPCA), as amended, establishes energy and water conservation standards and test procedures for certain consumer products and commercial and industrial equipment. The Energy Policy Act of 1992 (EPACT 1992) (Pub. L. 102–486) and the Energy Policy Act of 2005 (EPACT 2005) (Pub. L. 109–58) amended EPCA and included new Federal energy and water conservation standards and test procedures for certain consumer products and certain commercial and industrial equipment. In today's final rule, the U.S. Department of Energy (DOE) adopts regulations to implement reporting requirements for energy conservation standards and energy use, and to address other matters, including compliance certification, prohibited actions, and enforcement procedures for specific consumer products and commercial and industrial equipment covered by EPACT 2005, as well as commercial heating, air-conditioning, and water heating equipment covered under EPACT 1992. In addition, DOE is adopting provisions for manufacturer certification for distribution transformers.

DATES: This rule is effective February 4, 2010 except for § 431.371 which contains information collection requirements which have not been approved by the Office of Management and Budget (OMB). The Department of Energy will publish a document in the **Federal Register** announcing the effective date.

Manufacturers (or third-party organizations) of consumer products subject to today's final rule are required to submit a compliance statement and the first certification report to DOE on or before July 6, 2010. Manufacturers (or third-party organizations) of commercial and industrial equipment subject to today's final rule are required to submit a compliance statement and the first certification report to DOE on or before the date 180 days after publication of the notice announcing OMB approval of the information collection requirements.

FOR FURTHER INFORMATION CONTACT: Michael McCabe, 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, (202) 586–9155. E-mail: *Michael.McCabe@ee.doe.gov.*

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SUPPLEMENTARY INFORMATION:

I. Background
II. Summary of Today's Action
III. Discussion of Comments
A. Energy Policy Act of 1992—Commercial Heating, Ventilating, Air-Conditioning and Water Heating Equipment; Energy Policy Act of 2005—Very Large Commercial Packaged Air Conditioning and Heating Equipment
1. Voluntary Industry Certification Program Requirements
2. Criteria for Validation of Alternative Efficiency Determination Methods
3. Differences in Treatment Between Voluntary Industry Certification Program Participants and Non-Participants
4. Reporting for Voluntary Industry Certification Programs
5. Enforcement Testing
B. Energy Policy Act of 2005—Consumer Products
C. Energy Policy Act of 2005—Commercial Equipment
D. Distribution Transformers
E. General Requirements
IV. Procedural Requirements
A. Review Under Executive Order 12866
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G. Review Under the Unfunded Mandates Reform Act of 1995
H. Review Under the Treasury and General Government Appropriations Act, 1999
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J. Review Under the Treasury and General Government Appropriations Act, 2001
K. Review Under Executive Order 13211
L. Congressional Notification
V. Approval of the Office of the Secretary

I. Background

Part A of Title III of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163, as amended, 42 U.S.C. 6291–6309, established the ''Energy Conservation Program for Consumer Products Other Than Automobiles.'' Similarly, Part A–1 of Title III of EPCA, as amended, 42 U.S.C. 6311–6317, established an energy efficiency program for ''Certain Industrial Equipment,'' which included certain commercial equipment.[1] Subtitle C of Title I of the Energy Policy Act of 1992 (EPACT 1992), Public Law 102–486, amended EPCA to add energy conservation standards and test procedures for commercial central air-conditioning equipment, furnaces, and other types of commercial and industrial equipment. Further, Subtitle C of Title I of the Energy Policy Act of 2005 (EPACT 2005), Public Law 109–58, amended EPCA by providing definitions, test procedures, labeling provisions, and energy conservation standards for particular consumer products and commercial and industrial equipment. EPACT 2005 also required manufacturers of commercial equipment covered by this final rule to submit information and reports for a variety of purposes, including ensuring compliance with the energy conservation standards. See 42 U.S.C. 6316(a).

In implementing the series of changes introduced by EPACT 1992 and EPACT 2005, DOE issued a number of notices, including two notices of proposed rulemaking (NOPR), a supplemental notice of proposed rulemaking (SNOPR) and a final rule. These rulemakings are further described in detail below.

To implement EPACT 1992, DOE published a NOPR on December 13, 1999 (hereafter referred to as the December 1999 NOPR) that proposed: (1) Methods for manufacturers to use (in conjunction with DOE test procedures) to rate the energy efficiency or use of, determine compliance with energy conservation standards for, and make energy representations regarding commercial heating, ventilating, air-conditioning, and water heating (HVAC and WH) equipment; (2) procedures for certifying compliance with applicable energy conservation standards to DOE; and (3) criteria and procedures for DOE enforcement of the energy conservation standards for this equipment. 64 FR 69598, 69603–06, and 69612–18. Subsequently, DOE published a SNOPR on April 28, 2006 (April 2006 SNOPR), which proposed alternatives to the proposed requirements for items (1) and (3) described above. See generally 71 FR 25103, 25104–13, and 25115–17.

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

To implement EPACT 2005, DOE first codified the prescribed energy conservation standards and related definitions on October 18, 2005 (October 2005 final rule). 70 FR 60407; Title 10 of the Code of Federal Regulations (10 CFR) Parts 430 (consumer products) and 431 (commercial and industrial equipment). DOE subsequently proposed test procedures for measuring energy and water-use efficiency and related definitions, as well as certification, compliance, and enforcement requirements for various consumer products and commercial and industrial equipment covered by EPACT 2005's amendments to EPCA. 71 FR 42178 (July 25, 2006) (July 2006 NOPR). On December 8, 2006, DOE issued a final rule (December 2006 final rule) adopting the test procedures for measuring energy and water-use efficiency and related definitions for consumer products and commercial and industrial equipment covered by EPACT 2005. 71 FR 71340; 10 CFR parts 430 and 431.

In the April 2006 SNOPR and July 2006 NOPR, DOE discussed how to address the certification, compliance, and enforcement provisions raised in these notices and the December 1999 NOPR. In particular, DOE considered whether to publish two final rules or a single final rule containing the certification, compliance, and enforcement provisions for consumer products and commercial and industrial equipment. See 71 FR 25104 and 71 FR 42193. DOE reviewed the comments responding to the April 2006 SNOPR and the July 2006 NOPR and, as stated in the preamble to the December 2006 final rule, determined that the issues raised were sufficiently related to each other and merited resolution as a single final rule. 71 FR 71341–42. However, DOE did not include the certification, compliance, and enforcement procedures for the EPACT 2005 consumer products and commercial and industrial equipment, or for commercial heating, air-conditioning and water heating products in the December 2006 final rule. Id. at 71342. Instead, DOE stated its intention to issue a separate final rule to establish certification, compliance, and enforcement provisions for consumer products and commercial and industrial equipment. These provisions are the subject of today's final rule.

DOE previously adopted certification and enforcement procedures for the consumer products originally covered by EPCA, as amended by the National Appliance Energy Conservation Act of 1987 (Pub. L. 100–12) and National Appliance Energy Conservation Amendments of 1988 (Pub. L. 100–357). These procedures, which are applicable only to consumer products, are found in 10 CFR 430.24 and 10 CFR part 430, subpart F. The certification, compliance, and enforcement procedures in the December 1999 NOPR, April 2006 SNOPR, and July 2006 NOPR were based on these existing provisions.

Today's final rule sets forth the certification, compliance, and enforcement provisions for the EPACT 1992 and EPACT 2005 consumer products and commercial and industrial equipment, which DOE discussed in detail in the December 1999 NOPR, April 2006 SNOPR, and July 2006 NOPR. Today's final rule also sets out the certification procedures for distribution transformers that DOE proposed in the July 2006 NOPR.

II. Summary of Today's Action

DOE adopts certification, compliance and enforcement procedures for the consumer products and commercial and industrial equipment covered by the December 2006 final rule, including ceiling fans, ceiling fan light kits, dehumidifiers, medium base compact fluorescent lamps, torchieres, unit heaters, automatic commercial ice makers, commercial prerinse spray valves, traffic and pedestrian signal modules, distribution transformers, certain types of commercial refrigerators, freezers, and refrigerator-freezers. DOE also adopts certification, compliance and enforcement procedures for the commercial HVAC and WH equipment covered by the December 1999 NOPR and the April 2006 SNOPR.[2] The adoption of these procedures, explained in more detail below, provides a method by which to measure the energy efficiency of, and determine compliance with the standards established for, the products covered by this final rule. Today's final rule generally follows the same approach that currently exists for regulations covering consumer products under 10 CFR part 430.

For each consumer product covered by the December 2006 final rule, DOE is adopting sampling requirements. These sampling requirements address the number of units of each basic model a manufacturer must test as the basis for rating the model and determining whether it complies with the applicable energy conservation standard. As stated above, these sampling plans follow the approach for sampling found in 10 CFR part 430. Today's final rule also applies to each of these products the existing manufacturer certification and enforcement provisions in 10 CFR part 430. These provisions are set forth in section 430.62 for certification, and sections 430.61, 430.71, 430.72, 430.73, and 430.74 for enforcement. Today's final rule also includes an amendment to section 430.62(a)(4) about information that manufacturers of these products must include in certification reports for the consumer products the rule covers.

For each type of commercial or industrial equipment covered by the December 2006 final rule, the December 1999 NOPR, or the April 2006 SNOPR, DOE is adopting sampling requirements for manufacturer testing. DOE is also requiring in today's rule that each manufacturer of commercial or industrial equipment file a compliance statement and certification reports. The compliance statement adopted today is essentially a one-time filing in which the manufacturer or private labeler states that all basic models currently produced, as well as any basic models manufactured in the future, are (or will be) in compliance with applicable energy conservation requirements.[3] The certification reports will generally provide the efficiency, or energy or water use, as applicable, for each covered basic model that a manufacturer or private labeler distributes.[2] Manufacturers of consumer products subject to today's final rule must submit

[2] Enforcement provisions for distribution transformers were established in the test procedures final rule for distribution transformers published on April 27, 2006. 71 FR 24972. Certification and enforcement for electric motors are set forth in subpart B of 10 CFR part 431. Certification procedures for battery chargers and external power supplies were included in the July 2006 proposed rule but are not included in today's final rule because the energy conservation standards rulemaking addressing those products remains pending.

[3] The compliance statement must be submitted by each manufacturer subject to the energy conservation standards in 10 CFR parts 430 and 431. The compliance statement is signed by the company official submitting the statement (*e.g.,* the point of contact for the company or 3rd party representative), certifying that all basic models currently produced, and those that will be produced in the future, are (or will be) in compliance with the applicable energy or water conservation standards and does not need to be resubmitted unless the information on the compliance statement changes.

[2] The certification report must be submitted for each basic model distributed for sale. The certification report must be updated and resubmitted when any change is made to a basic model, which affects the energy or water consumption. However, if such change to a basic model reduces the energy or water consumption, the new basic model shall be considered in compliance. The certification report should include the applicable energy-efficiency or energy-use ratings as tested using DOE's test procedures along with the other information requested in appendix A to subpart F of part 430, appendix B to subpart T of part 431, or appendix C to subpart T of part 431.

the first compliance statement and certification on or before July 6, 2010, and manufacturers of commercial or industrial equipment subject to today's final rule must submit the first compliance statement and certification on or before 180 days after notification of OMB approval of the information collection requirements is published in the **Federal Register.** As set forth in Subpart T, the certification provisions adopted in today's final rule would also apply to distribution transformers. Today's final rule also includes provisions for DOE enforcement of the applicable energy conservation standards. These provisions include DOE's initial steps in an enforcement action and a requirement for manufacturer cessation of distribution of non-complying equipment.

Consumer products and commercial and industrial equipment covered by DOE's regulations are subject to various provisions in 10 CFR parts 430 and 431, respectively. These provisions address a variety of matters, such as waivers of applicable test procedures, treatment of imported and exported equipment, maintenance of records, subpoenas, confidentiality of information, and petitions to exempt state regulations from preemption. Today's final rule applies these provisions to consumer products and commercial and industrial equipment covered by this rule. For consumer products, those provisions are in sections 430.27, 430.40 through 430.49, 430.50 through 430.57, 430.64, 430.65, 430.72, and 430.75 of 10 CFR part 430. For commercial equipment, those provisions are in sections 431.401, 431.403 through 431.407, and 431.421 through 431.430.

III. Discussion of Comments

The agency received comments from a variety of interested parties including the Air-Conditioning, Heating, and Refrigeration Institute (AHRI) [3]; various manufacturers, and the China WTO/TBT National Notification & Enquiry Center, an agency within the Government of the People's Republic of China (PRC). These entities generally addressed a range of issues and offered alternatives to DOE's proposal. Issues addressed by the commenters included the use and validation of alternative efficiency determination methods (AEDMs), voluntary industry certification program (VICP) requirements, the treatment of non-VICP participants, reporting requirements for VICPs, enforcement testing, sampling, certification, and enforcement for commercial equipment in EPACT 2005, certification requirements for distribution transformers, and general requirements for consumer products and commercial equipment. The comments and DOE's responses to them are discussed below.

A. Energy Policy Act of 1992—Commercial Heating, Ventilating, Air-Conditioning and Water Heating Equipment; Energy Policy Act of 2005—Very Large Commercial Packaged Air Conditioning and Heating Equipment

The December 1999 NOPR proposed sampling requirements for manufacturer testing of commercial HVAC and WH equipment, as well as provisions that would generally allow manufacturers to use AEDMs to calculate the energy performance of equipment in lieu of testing. 64 FR 69604–05, 69612–14. DOE proposed less stringent sampling and AEDM requirements for manufacturers participating in a DOE-approved VICP, which is a voluntary program (usually run by a manufacturer trade association) that collects, disseminates, and verifies information about the performance of one or more types of equipment. 64 FR 69603–05. DOE proposed less stringent sampling and AEDM requirements for manufacturers that participate in a VICP because a VICP verifies the accuracy of the manufacturer's certification claims. Non-VICP participants are not subject to verification testing and, therefore, have a more stringent sampling requirement to ensure the accuracy of the manufacturer's certification claims. Under DOE's proposal, a VICP would be eligible to use these new requirements if it included features such as the collection and dissemination of efficiency ratings for each basic model of equipment, periodic testing of each basic model to determine the accuracy of the manufacturer's efficiency rating for the model, a process for taking corrective actions when a manufacturer's rating is inconsistent with the test results, and reporting of certain information to DOE. 64 FR 69604–05, 69613–14. These conditions would, to some extent, reflect provisions of existing VICPs and were designed to give greater assurance that the programs will work as intended to help justify less stringent requirements for VICP participants.

In the April 2006 SNOPR, DOE supplemented its NOPR by: (1) Proposing specific, and slightly more stringent criteria where a VICP participant uses testing to determine equipment ratings, 71 FR 25105, 25115; (2) requiring that a VICP participant perform the same amount of testing as a non-participant to establish the validity of its AEDM(s), 71 FR 25105–06, 25115; (3) reducing the tolerance level (*i.e.,* the amount by which AEDM and test results could vary) for a manufacturer to determine that an AEDM is valid, *id.;* (4) requiring that any AEDM is validated using test results to rate the efficiency the equipment, *id.;* and (5) requiring that a VICP have specific and stringent criteria for its verification of manufacturer efficiency and energy use ratings. See generally 71 FR 25108–09, 25115–16. The notice also indicated that DOE was considering prohibiting knowingly using an AEDM to overrate a basic model's energy efficiency. See 71 FR 25107.

In addition, EPACT 2005 created a new category of covered equipment and set forth definitions, test procedures, and energy conservation standards for very large commercial package air conditioning and heating equipment. DOE has codified the definitions and energy conservation standards in 10 CFR part 431. 70 FR 60407. In the April 2006 SNOPR, DOE proposed to apply the proposed compliance and enforcement requirements to very large commercial package air conditioning and heating equipment. 71 FR 25104.

DOE received numerous comments responding to the December 1999 NOPR and the five proposed changes detailed in the April 2006 SNOPR, which are summarized in the subsections below. Together, the December 1999 NOPR and the April 2006 SNOPR notices proposed a testing framework that would help ensure the accuracy of energy efficiency ratings while formalizing the use of VICPs for certification purposes. By providing incentives for manufacturers to voluntarily participate in VICPs through less burdensome sampling and certification procedures, DOE, through the VICPs, can better monitor and ensure the accuracy of energy ratings reported by individual manufacturers.

1. Voluntary Industry Certification Program Requirements

In the December 1999 NOPR, DOE proposed tolerances for validating an AEDM by comparing the efficiency

[3] The Air-Conditioning, Heating, and Refrigeration Institute (AHRI) is the trade association representing a majority of air conditioning and heating equipment manufacturers subject to today's rule. Formerly, the Air-Conditioning and Refrigeration Instititute (ARI) represented the air conditioning manufacturers and GAMA (Gas Appliance Manufacturers Association) represented the heating manufacturers. GAMA and the Air-Conditioning and Refrigeration Institute (ARI) announced on December 17, 2007, that their members had voted to approve the merger of the two trade associations to represent the interests of cooling, heating, and commercial refrigeration equipment manufacturers. The merged association became AHRI on Jan. 1, 2008. Since GAMA and ARI submitted comments to this rulemaking prior to the merger, DOE is attributing each comment to its respective organization.

ratings derived from applying the AEDM to the tested models, which were used to derive the AEDM. For VICP participants who made the comparison for only one basic model, DOE proposed that the difference between the AEDM and test results must be within 1 percent for the AEDM to be valid. 64 FR 69613. In the comments from interested parties summarized below, the ''1-percent rule'' refers to the December 1999 proposal that the predicted efficiencies calculated for the tested basic model(s) must on average be within 1 percent of the efficiencies determined from testing such basic model(s). The 1-percent rule requires a level of tolerance that is greater than the tolerance in the basic certification requirements.

The April 2006 SNOPR proposed revisions to the proposals that DOE initially outlined in the December 1999 NOPR to the required criteria to receive DOE approval of a VICP. These revisions to the criteria were proposed partly on the grounds that the initially proposed amendments to sections 431.484(a)(9) and (13) were ''overly vague'' and might not sufficiently convey that a VICP must use verification methods and criteria sufficiently rigorous to give reasonable assurance that a given rating claim would apply to all units of the tested basic model. 71 FR 25108.

In the December 1999 NOPR (64 FR 69613–14), DOE had initially proposed that these sections read as follows: ''The program has an appropriate standard for determining whether the efficiency rating a manufacturer claims for a product is valid. * * * the VICP provides to the Department annually data on the results of its verification testing during the previous 12 months, including the following for each basic model on which the VICP has performed verification testing: The measured efficiency from the verification testing, the manufacturer's efficiency rating, and either the applicable energy conservation standard or a description of the model sufficient to enable the Department to determine such standard.''

In contrast, the April 2006 SNOPR (71 FR 25116) proposed to revise section 431.484(a)(9) to read as follows: ''The program includes appropriate standards for the accuracy of its verification testing results and for determining whether the efficiency rating of a manufacturer claims for equipment is valid. Such standards must include criteria which give reasonable assurance that a manufacturer's efficiency rating for a basic model represents the mean performance for all units it manufactures of that model, and could include, for example, statistically valid methods, such as a sampling plan, for determining the efficiency of a basic model. If the program provides that a manufacturer's rating for equipment will be valid so long as the verification test results under the VICP are within a given percentage of the rating, then the program must meet the following requirements: It must specify the percentage(s) it uses and the equipment categories to which each such percentage applies; each such percentage must correspond to the normal manufacturing variability and measurement uncertainty for the equipment to which the percentage applies; and the program must provide that if, during a calendar year, the average of the manufacturers' efficiency ratings found valid under the VICP is more than one percent above (or more than one percent below for energy use ratings) the average of the efficiencies from the verification tests under the VICP, the program will be revised to provide reasonable assurance that in the future ratings under the VICP will average no more than one percent above verification test results.''

Lennox International, Inc. (Lennox), the Gas Appliance Manufacturers Association (GAMA) and the Air-Conditioning and Refrigeration Institute (ARI) commented on the proposed requirements for VICPs in the April 2006 SNOPR. Lennox asserted that while a general limit on the accuracy of efficiency ratings under a VICP, such as 1 percent, may be obtained for one class of equipment, it may not be practical for other classes of equipment. Lennox urged DOE to prescribe the tolerance placed on the accuracy of an efficiency rating on a case-by-case basis, rather than impose a ''one-size fits all'' approach. To this end, Lennox requested that DOE, in consultation with the VICP, establish an acceptable percentage of accuracy for each class of covered equipment. (EE–RM/TP–99–450, Lennox, No. 10 at p. 1)[4]

Additionally, ARI and GAMA stated that DOE should reconsider its proposal that a VICP revise its certification program when the disparity between average verification test results and average manufacturers' rating claims during a calendar year exceeds 1 percent. Without this modification, these commenters asserted that the DOE-proposed ''1-percent rule'' could be overly burdensome to the industry, particularly in light of the steps already taken to avoid overrating products and the likely additional costs needed to reevaluate each industry certification program. Commenters also pointed to the inherent variability of the test procedure results, *e.g.,* instrument accuracy, and manufacturing variability for each product. (EE–RM/TP–99–450, ARI, No. 12 at p. 2, and EE–RM/TP–99–450, GAMA, No. 11 at p. 3)

GAMA supported the criteria at sections 431.484(a)(9) and (13) in the December 1999 NOPR, but objected to the April 2006 SNOPR revisions to section 431.484(a)(9). GAMA opined that the original language of section 431.484(a)(9) is not vague, but would produce reasonable assurance that a VICP-verified efficiency rating is truly representative of all units of the tested basic model. In addition, GAMA supported the proposed section 431.484(a)(14) changes contained in the April 2006 SNOPR, which would permit manufacturers to challenge a competitor's erroneous efficiency ratings. (EE–RM/TP–99–450, GAMA, No. 11 at p. 2) The April 2006 SNOPR (71 FR 25116) proposed that section 431.484(a)(14) read as follows: ''The program contains provisions under which each participating manufacturer can challenge ratings submitted by other manufacturers, which it believes to be in error.''

ARI, GAMA, and Lennox each contended that a ''one size fits all'' methodology is inappropriate given the different types of commercial equipment experience, manufacturing variability, test procedure accuracy, and measurement uncertainty. (EE–RM/TP–99–450, ARI, No. 12 at p. 2; EE–RM/TP–99–450, GAMA, No. 11 at p. 2; and EE–RM/TP–99–450, Lennox, No. 10 at p. 1) Additionally, GAMA asserted that such a provision would require changing a VICP when ''any disparity'' between average test results and ratings exceeds 1 percent. (EE–RM/TP–99–450, GAMA No. 11 at p. 2)

The April 2006 SNOPR proposals are based on the underlying assumption that each type of equipment would have a normal distribution of ratings, with comparable degrees of error on the high and low sides. 71 FR 25108. With the sampling in DOE's test procedures for a given piece of commercial equipment, on average, the ratings would closely match the VICP's verification test results so long as the ratings were not biased. If these ratings were significantly

[4] A note in the form ''EE–RM/TP–99–450, Lennox, No. 10 at p. 1'' refers to: (1) To a statement that was submitted by Lennox and is recorded in the docket under ''Energy Efficiency Program for Commercial and Industrial Equipment: Efficiency Certification, Compliance, and Enforcement Requirements for Commercial Heating, Air Conditioning and Water Heating Equipment,'' Docket Number EE–RM/TP–99–450, as comment number 10; and (2) a passage that appears on page 1 of that statement.

higher, however, this would appear to indicate that many ratings were inaccurate, implying that the VICP had validated manufacturer overrating of equipment. In such a situation, by systematically rating products at levels above what was warranted by test results, these results would likely indicate that manufacturers were taking advantage of the VICP's practice of holding valid all ratings that were within a given percentage above the verification test results.

In view of the above concerns, DOE recognizes that the proposed ''one size fits all'' methodology may not be appropriate for all commercial HVAC and WH equipment. Therefore, DOE adopts the methodology for VICP participants as originally proposed in the December 1999 NOPR, which includes a reporting of verification test results to DOE to provide assurance that VICP-verified efficiency ratings are representative of the units of the model offered for sale. Nevertheless, DOE believes that the published ratings must accurately reflect the energy efficiency of the models participating in the VICP. For example, DOE expects the differences between rated values and tested values to have a normal (Gaussian) distribution around the rated value (*i.e.,* the proportion of the verification test results that are higher than the rating submitted by the manufacturer is approximately equal to the proportion that are lower). Thus, if DOE reviews the results of a VICP's tests and found a skewed distribution of efficiency levels, DOE would closely examine the validity of the VICP and, based on that examination, determine whether the VICP is qualified under the requirements being issued today.

2. Criteria for Validation of Alternative Efficiency Determination Methods

Lennox asserted that the criteria for validation of an AEDM, as proposed in the April 2006 SNOPR, are inadequate to verify the robustness of an AEDM for use on all equipment models. It indicated that correlating an AEDM to the manufacturer's three highest selling basic models would not be sufficient to validate its use for predicting the efficiency of other basic models with different characteristics because there is no assurance that the basic models chosen are capable of accounting for the impact of all critical variables inherent in the product type being modeled by the AEDM. Instead, Lennox recommended that, in addition to the proposed requirements in the April 2006 SNOPR, the review and qualification for use of an AEDM be judged against a uniform set of criteria established by the VICP for participants, and by DOE for non-VICP participants. (EE–RM/TP–99–450, Lennox, No. 10 at pp. 1–2)

ARI disagreed with the proposed requirement in the April 2006 SNOPR that a VICP participant validate its AEDM by comparing test results and AEDM results for three or more basic models. ARI asserted that the AEDM validation should be performed against no more than one basic model for VICP participants. For non-VICP participants, ARI recommended that DOE require AEDM validation to be made against three or more basic models. (EE–RM/TP–99–450, ARI, No. 12 at p. 2)

In view of ARI's and Lennox's comments, DOE will require a VICP participant to apply its AEDM to one or more basic models that have been tested according to the applicable test procedure, and that each basic model produced by a manufacturer be tested at least once every five years. The provisions being adopted today, which were originally proposed in the December 1999 NOPR for subsection 431.484(a)(4), require each organization operating a VICP to report to DOE annually on verification testing results under the VICP. 64 FR 69603, 69613. In addition, DOE approval of a VICP requires that each basic model covered by a VICP be tested under the program at least once every five years. *Id.* By reviewing these test data, DOE will be able to validate a manufacturer's AEDMs and the appropriate VICP.

In the April 2006 SNOPR, DOE also proposed to modify the tolerance band to ±2 percent for comparing the predicted efficiency calculated with an AEDM to the test results. 71 FR 25106. DOE stated in the April 2006 SNOPR that the December 1999 NOPR proposal, which permitted an AEDM to have a margin of error of 5 percent for the validation points, could create an increased potential for an AEDM to produce erroneous results. *Id.* To reduce this possibility, DOE proposed to modify the tolerance band from ±5 percent as originally proposed in the December 1999 NOPR to a tolerance band of ±2 percent. 71 FR 25106.

ARI disagreed with the ±2 percent tolerance band proposed in the April 2006 SNOPR. ARI commented that tightening the AEDM's tolerance to ±2 percent for VICP participants is not justified, unnecessary, and overly burdensome. Instead, ARI recommended that DOE keep the tolerance at ±5 percent for VICP participants and retain the ±2 percent tolerance for non-VICP participants to account for the very limited testing that is done to verify product efficiency. (EE–RM/TP–99–450, ARI, No. 12 at p. 3)

The PRC commented that commercial HVAC and WH equipment efficiency is influenced by several factors, including the ambient temperature, room structure, and the parts of the refrigeration systems. Because of the variability created by these factors, and the inability of mathematical models to describe accurately how they affect product performance, it asserted that it is difficult to keep the tolerance within ±2 percent between the anticipated efficiency value and the actual test value. Instead, the PRC suggested that the tolerance be set according to the different types and classifications of products. (EE–RM/TP–99–450, PRC, No. 13 at p. 1)

DOE agrees that the 2-percent tolerance level for VICP participants could be overly burdensome and VICP participants are already subject to more stringent tolerance requirements due to the nature of the VICP certification program. DOE also acknowledges the PRC's view that a large variation between various types of commercial HVAC and WH equipment exists that warrants the use of different tolerances.[5] In view of the above comments, DOE establishes a tolerance level of 5 percent for VICP participants and 3 percent for non-VICP participants. DOE understands that there is sufficient variation in testing and repeatability in test results from one laboratory to another that a 3 to 5 percent difference between the tested value and rated value could occur. Nevertheless, DOE expects the variability in test results to be a distribution that is centered around the rated value of the equipment, rather than a skewed distribution. Consequently, DOE will monitor VICPs and AEDMs to determine if they satisfy the goals of the VICP program and the testing requirements adopted by today's final rule.

3. Differences in Treatment Between Voluntary Industry Certification Program Participants and Non-Participants

The proposals detailed in the December 1999 NOPR specified that participation in a VICP would allow a manufacturer to follow either: (1) The DOE sampling plan; or (2) a DOE approved AEDM. A VICP participant must still test its products, validate its AEDM (if applicable), and file a compliance statement and certification

[5] The source of variation between various types of commercial HVAC and WH equipment depends on the size of the equipment, the number of units manufactured, the variation in equipment design, and any manufacturing variations.

report, either directly to DOE, or through the VICP, which will file these documents on the manufacturers' behalf. DOE also included specific criteria that a VICP must meet to gain recognition. The program would have to include, for example, provisions for the collection and dissemination of efficiency ratings of each basic model of equipment, periodic testing of each basic model to determine the accuracy of the manufacturer's efficiency rating for the model, a process for taking corrective action (*e.g.,* deleting or decertifying equipment) when a manufacturer's rating conflicts with the test results, and the reporting of certain information to DOE. The December 1999 NOPR also addressed how the organization operating a VICP could obtain DOE approval of the VICP and the duration of that approval. 64 FR 69605.

Further, the December 1999 NOPR proposed more stringent criteria for testing and the use of AEDMs for those manufacturers opting not to participate in a VICP. DOE proposed to require that non-VICP manufacturers would have to conduct independent testing, use DOE-prescribed sampling plans, and obtain DOE approval of its AEDMs (if applicable) before those methods could be used for compliance certification purposes. Non-VICP manufacturers would also need to file a compliance statement and certification report directly to DOE.

In the December 1999 NOPR, DOE also proposed to require a non-VICP manufacturer that uses an AEDM under this subpart to validate that method by subjecting to testing three or more of its basic models, which must be the highest-selling basic models. These test results would then be compared with the results from the AEDM model. (In contrast, a VICP participant would have to compare the test results for only one or more basic models with the results of the AEDM model.) Under the December 1999 NOPR, the test results would have needed to be within 1 percent of the AEDM model results for the AEDM to be valid. 64 FR 69613. The April 2006 SNOPR maintained these aspects of the proposal. 71 FR 25107.

Lennox and ARI asserted that the December 1999 NOPR and the April 2006 SNOPR would put VICP participants at a disadvantage relative to non-participants. ARI stated that a VICP participant must incur ''significant cost'' and risk ongoing verification testing of its products, whereas a non-participant need only test three basic models to validate its AEDM(s). (EE–RM/TP–99–450, ARI, No. 12 at p. 4) In addition, Lennox claimed that, for a non-participant's products, consumers are only assured that a tested sample of units performs at the level of the manufacturer's efficiency ratings. (EE–RM/TP–99–450, Lennox, No. 10 at p. 2) GAMA also opined that provisions in the April 2006 SNOPR ''provide disincentives to participate in VICPs,'' although it did not identify which provisions. Further, GAMA stated that a VICP polices a manufacturer's efficiency claims at no cost to taxpayers, and that a manufacturer participates in a VICP at significant cost and considerable risk because of the penalties levied if verification testing does not support its efficiency ratings.[6] (EE–RM/TP–99–450, GAMA, No. 11 at p. 4)

Lennox requested that DOE require non-VICP manufacturers to participate in a DOE-administered verification program that would be based on DOE's requirements and funded at a VICP-equivalent level by the non-VICP participants. (EE–RM/TP–99–450, Lennox, No. 10 at p. 2) ARI recommended that a non-VICP participant be required to show compliance and the accuracy of its efficiency representations through verification testing conducted by an independent laboratory. (EE–RM/TP–99–450, ARI, No. 12 at p. 4)

The proposals detailed in the December 1999 NOPR and April 2006 SNOPR were tailored for non-VICP participants and participants of a VICP. Note that while the requirements for VICP participants include less initial testing, the requirements specify third party verification testing. In contrast, non-VICP participants must perform more rigorous initial testing because third party verification testing is not required. As stated above, non-VICP manufacturers are required to conduct independent testing, use DOE-prescribed sampling plans, gain DOE's approval of AEDMs, and file their own compliance statements and certification reports. For the reasons provided above, DOE believes that the procedures for VICP participants and non-VICP manufacturers being adopted in today's final rule are appropriate.

[6] Manufacturer trade organizations, such as GAMA, maintain a certified directory, which includes the efficiency ratings of certified equipment. The information contained within the certified directory for VICP participants includes manufacturer, model number, input or capacity rating, efficiency rating, and other applicable footnotes such as when the efficiency information was revised. In addition, the directory indicates where a model is current or discontinued. One example of a certified directory currently maintained by AHRI (formerly ARI and GAMA) is the ''Consumers' Directory of Certified Efficiency Ratings for Heating and Water Heating Equipment'' (see *http://www.ahrinet.org/ARI/util/showdoc.aspx?doc=710*).

4. Reporting for Voluntary Industry Certification Programs

The December 1999 NOPR proposed to require a VICP to report annually verification test results, each manufacturer's rated efficiency, and either the applicable energy conservation standard or information that would enable DOE to determine the standard for each basic model on which the VICP performed verification testing. The April 2006 SNOPR, which carried over the annual reporting requirement, proposed to require that a VICP also report model numbers for tested products, which would enable DOE to monitor whether the VICP is doing verification testing of each basic model at least once every five years. See 71 FR 25109.

ARI commented that the April 2006 SNOPR's proposed annual model number reporting requirement is overly burdensome. Instead, ARI suggested that VICPs provide aggregate results by type of equipment only. DOE agrees that requiring annual reporting could be unduly burdensome, to both the VICP and DOE due to the vast number of models offered by manufacturers of a given product type. By providing aggregate results, DOE will be able to discern any trends contained in the testing data. In addition, DOE is requiring VICPs to make test data records available for DOE inspection. DOE believes that, in light of all of these factors, the added detail from annual reporting does not add any useful value that would significantly enhance DOE's ability to monitor manufacturer compliance with the energy conservation standards. Therefore, DOE intends to review a VICP on an as-needed basis and has withdrawn its proposed requirement for including model numbers in the annual reporting. A VICP will be required to maintain the records of test results and applicable compliance information, all of which would be made available to DOE for inspection as set forth in the regulations. In the case, for example, where DOE is investigating an energy performance certification, the records of test results would be made available to DOE as set forth in the regulations.

5. Enforcement Testing

DOE proposed in the December 1999 NOPR to test initially two units of a basic model to determine its compliance with the applicable energy conservation standard, except that under certain circumstances DOE would test one unit. 64 FR 69616. The December 1999 NOPR also provided that a model would be in compliance if the average result for the

two tested units (or the result from testing a single unit) fell within a 5-percent tolerance range (*i.e.,* 95 percent or more of the applicable efficiency standard or 105 percent or less of an energy use standard). 64 FR 69617. If the test results fall outside the 5-percent tolerance range, resulting in a non-compliance determination, a manufacturer could request that DOE conduct additional testing. DOE would then conduct the additional testing and determine compliance by averaging the results from both rounds of testing and applying the 5-percent criterion.

DOE revised this approach for enforcement testing in the April 2006 SNOPR by making three changes. First, DOE would generally test four units of a basic model, but would test fewer if only a lesser number were available, or if testing of such lesser number were otherwise warranted (*e.g.,* if a basic model is very large or has unusual testing requirements) as described in section 431.373(a)(3)(ii)(B). If DOE were to test three or four units, it would test each unit once; if it tested two units it would test each twice; and if it tested one unit it would test that unit four times. Second, DOE would compute the mean of the test results, as provided in the NOPR, but would also calculate a lower control limit for energy efficiency or an upper control limit for energy use. The lower control limit, for example, would be the greater of either: (a) 97.5 percent of the applicable energy efficiency standard, or (b) the applicable energy efficiency standard minus the product of the sample standard error and the t-value for a 97.5-percent, one-sided confidence limit. The upper control limit would be calculated in a similar fashion (See Appendix D to Subpart T of Part 431.). Finally, the April 2006 SNOPR proposed that a basic model would be in compliance only if the mean measurement for the sample meets or exceeds the lower control limit in the case of an efficiency standard or is less than or equal to the upper control limit in the case of an energy use standard. 71 FR 25110.

GAMA disagreed with DOE's proposal to tighten the enforcement testing tolerance for commercial equipment. Specifically, it preferred the 95 percent confidence limit proposed in the December 1999 NOPR. GAMA noted that while its certification programs employ test tolerances of 2 percent for commercial equipment and 3.5 percent for residential products, DOE's citing of these tolerances in support of the proposed tightened tolerances is inaccurate and inappropriate because the 2-percent tolerance only applies to verification testing of commercial boilers and commercial water heater thermal efficiencies. Further, GAMA pointed out that the 2-percent tolerance is not included in its certification program for commercial furnaces. For residential products, GAMA's certification program allows a 3.5-percent tolerance for residential water heaters and a 5-percent tolerance for furnaces. GAMA cautioned DOE not to prescribe uniform compliance and enforcement criteria for all products. (EE–RM/TP–99–450, GAMA, No. 11 at p. 4)

Notwithstanding GAMA's comments, DOE continues to believe that it is unnecessary and would be unduly burdensome to prescribe unique tolerances for each type of equipment that could undergo enforcement testing. DOE also notes that the 97.5-percent tolerance proposed in the April 2006 SNOPR is intended to ensure that DOE has a high degree of certainty when making a determination of non-compliance. This is not a requirement for the manufacturers but an effort by DOE to help mitigate false positives by tightening the tolerances during enforcement testing; DOE believes that the lower degree of certainty of 95 percent is not appropriate because it would more likely lead to determinations of non-compliance when, in fact, the basic model complies with the applicable energy conservation standards. Therefore, DOE rejects GAMA's comment and is establishing the tolerance specified for enforcement testing at 97.5 percent for all types of commercial HVAC and WH equipment.

GAMA also commented that the April 2006 SNOPR proposed to significantly change the enforcement testing requirements by proposing the selection and testing of four samples. GAMA opined that adopting such a requirement would be burdensome and out of proportion to the reality of the commercial equipment market. Instead, GAMA supported DOE's approach in the December 1999 NOPR, which based enforcement testing on two samples instead of four. (EE–RM/TP–99–450, GAMA, No. 11 at p. 4; EE–RM/TP–05–500, GAMA, No. 7 at p. 3–4)

In view of GAMA's comment, DOE believes that there are very few units produced in any given year for certain types of commercial HVAC and WH equipment, and that it would be impossible to find, much less test, a sample of four units. For example, small commercial package air conditioners and heat pumps are manufactured on a larger scale with less variation, whereas very large commercial package air conditioners and heat pumps are manufactured on a small scale, made-to-order basis with more specific variations based upon the commercial customer's design preferences for a given project. DOE acknowledges there can be large variations in the number of units produced in a given year depending on the specific projects being developed by the commercial customer. Therefore, DOE adopts the approach outlined in the December 1999 NOPR, which requires enforcement testing to be based upon two samples instead of four.

Additionally, GAMA disagreed with DOE's assertion and proposal that multiple testing of the same unit would provide greater assurance of standards compliance. Instead, GAMA asserted that conducting multiple tests of the same unit becomes an evaluation of the test procedure accuracy and test setup, rather than an evaluation of the model's efficiency rating. (EE–RM/TP–99–450, GAMA, No. 11 at p. 4; EE–RM/TP–05–500, GAMA, No. 7 at p. 3–4)

In view of GAMA's comment, DOE understands that multiple testing of a single unit does not accurately reflect the energy efficiency or performance of the basic model. DOE believes testing multiple units of a basic model gives an indication of the manufacturing variability within a basic model. While testing one unit multiple times indicates the ability of the test procedure to provide repeatable results, testing multiple units captures the variability of the manufacturing process. As a result, DOE concludes that such multiple testing of an individual unit is inappropriate for enforcement testing and is removing that requirement from today's final rule.

GAMA also commented on the definition of a ''defective unit'' as it applies to water heaters that DOE proposed in the July 2006 SNOPR. Under proposed section 431.373(a)(5)(iii), a defective unit is one that is inoperative. A defective unit can also be one that is in noncompliance due to a manufacturing defect or the failure of the unit to operate according to the manufacturer's design and operating instructions, and where the manufacturer demonstrates by statistically valid means that, with respect to such defect or failure, the unit is not representative of the population of production units from which it is obtained. GAMA recommended that a water heater found to have one or more significant insulation voids should be considered a defective unit and should not be included in an enforcement test sample, because it is not representative of the manufacturer's production. GAMA further recommended that for commercial water heaters, the criteria for a significant insulation void should

be one-third of 1 percent or more of the tank surface area that is exposed. GAMA included in its comment a detailed proposal based on nominal tank size, but ultimately, GAMA indicated that DOE should address the issue of water heater insulation voids. (EE–RM/TP–99–450, GAMA, No. 11 at p. 4; EE–RM/TP–05–500, GAMA, No. 7 at p. 3–4)

DOE disagrees with GAMA on the matter of water heater insulation voids. DOE believes that a unit with an insulation void so large as to materially affect the measure of efficiency, the unit should, in the normal course of manufacturing, be identified and either the insulation void corrected or the unit scrapped. Such a unit would, therefore, not be subject to testing for either certification or demonstration of compliance. However, if a unit with an insulation void is not identified through normal inspection procedures and rejected for sale to consumers, then it should not be rejected for testing for certification purposes or demonstration of compliance since it is representative of units offered for sale. Therefore, DOE rejects GAMA's comment and will not include any additional requirements to identify and exclude a water heater with an insulation void from compliance certification or enforcement testing.

GAMA also asked that the agency clarify what it would consider ''the date of last determination of compliance'' under the proposed section 431.508(a)(2). 64 FR 69617. GAMA asserted that the date of last determination of compliance means the most recent date when the efficiency of a particular model has been checked, which could include either normal verification testing by an approved VICP or efficiency checks done in a manufacturer's own quality control program. (EE–RM/TP–99–450, GAMA, No. 11 at p. 4; EE–RM/TP–05–500, GAMA, No. 7 at p. 3–4) Consequently, determining this date largely depends on the individual practices followed by the manufacturer.

Consistent with GAMA's concerns, DOE will notify the manufacturer of the applicable date on a case-by-case basis when DOE, or the manufacturer, or the private labeler determines that the HVAC or WH equipment is noncompliant. Otherwise, if there have been no noncompliance issues for a particular manufacturer's model of HVAC or WH equipment that was certified by DOE, then the date of last determination of compliance would be the date the manufacturer had last certified compliance of that product to DOE.

The PRC suggested that ''definite standards used for testing and sampling be specified to facilitate testing procedures.'' (EE–RM/TP–99–450, PRC, No. 13 at p. 1) DOE understands the PRC's comment as asking DOE to specify a test procedure in addition to the sampling plan for each equipment class. If correct, DOE believes the PRC has misunderstood the purpose of the April 2006 SNOPR, since the test procedures for commercial HVAC and WH equipment were finalized in previous final rules.[7] The purpose of the April 2006 SNOPR was to set forth the revisions to the certification and enforcement provisions for commercial HVAC and WH equipment for the test procedures that already exist.

B. Energy Policy Act of 2005—Consumer Products

Section 323(b)(3) of EPCA, 42 U.S.C. 6293(b)(3), requires a test procedure be reasonably designed to produce results measuring energy efficiency or energy use and not be unduly burdensome to conduct. In the July 2006 NOPR, DOE proposed the use of a statistically meaningful sampling procedure for selecting test specimens of consumer products to reduce the testing burden on manufacturers, while giving sufficient assurance that the true mean energy efficiency of a basic model meets or exceeds the rated measure of energy efficiency or energy use. DOE stated that it reviewed sampling plans for consumer products and commercial and industrial equipment which could provide guidance on how many and which units to test to determine compliance.[8] 71 FR 42193. DOE considered four factors when proposing sampling plans: (1) Minimizing a manufacturer's testing time and costs; (2) assuring compatibility with other sampling plans DOE has promulgated; (3) providing a highly valid statistical probability that basic models that are tested meet the applicable energy conservation standards; and (4) providing a highly valid statistical probability that a manufacturer preliminarily found to be in noncompliance will actually be in noncompliance. 71 FR 42193.

After review of the sampling plans for consumer products in 10 CFR Part 430, sections 430.63, 430.70, and appendix B to subpart F, DOE proposed that the manufacturer select a sample at random from a production line and, after each unit or group of units is tested, either accept the sample, reject the sample, or continue sampling and testing additional units until a compliance determination can be made. *Id.* DOE did not propose a sample size in the July 2006 NOPR because the sample size is determined by the validity of the sample and how the mean compares to the standard, factors which cannot be determined in advance. Moreover, DOE believed that testing a randomly selected sample until a determination is reached is a method that arrives at a statistically valid decision on the basis of fewer tests than fixed-number sampling, which is the basis for most of the statistical sampling procedures for consumer products under 10 CFR 430.24, Units to be Tested.

The July 2006 NOPR proposed to require at section 430.24 that manufacturers randomly select and test a sample of production units of a representative basic model, and then calculate a simple average of the values to determine the actual mean value of the sample. 71 FR 42204. For each representative model, a sample of sufficient size would be selected at random and tested to ensure that any represented value of energy efficiency is, for example, no greater than the lower of (A) the mean of the sample; or (B) the lower 95-percent confidence limit of the mean of the entire population of that basic model, divided by a coefficient applicable to the represented value. The coefficients in the July 2006 NOPR are product specific and intended to reasonably reflect variations in materials, the manufacturing process, and testing tolerances. 71 FR 42193.

Additionally, the July 2006 NOPR sought comments and data concerning the accuracy and workability of the sampling plan for ceiling fans, ceiling fan light kits, torchieres, medium base compact fluorescent lamps, and dehumidifiers, including the confidence limits and coefficients, and invited discussion about improvements or alternatives. 71 FR 42193. DOE did not receive any comments regarding its proposed sampling plans and continues to believe that the sampling plans and procedures would minimize the manufacturers' testing time and cost, while providing statistical validity that the true mean energy efficiency of a

[7] DOE issued several final rules relating to test procedures on October 21, 2004—Test Procedures and Efficiency Standards for Commercial Warm Air Furnaces, 69 FR 61916; Test Procedures and Efficiency Standards for Commercial Water Heaters, Hot Water Supply Boilers and Unfired Hot Water Storage Tanks, 69 FR 61974; Test Procedures and Efficiency Standards for Commercial Packaged Boilers, 69 FR 61949; Test Procedures and Efficiency Standards for Commercial Air Conditioners and Heat Pumps, 69 FR 61962.

[8] The sampling plans reviewed for consumer products are those found in 10 CFR Part 430 and the sampling plans reviewed for commercial and industrial equipment are those found in 10 CFR Part 431 and the December 1999 NOPR. See generally 64 FR 69602–06.

basic model meets or exceeds the rated measure of energy efficiency or energy use and that the basic models comply with the applicable energy conservation standards. Based on a consideration of the above, DOE is adopting the sampling plans as proposed in the July 2006 NOPR for ceiling fans, ceiling fan light kits, torchieres, medium base compact fluorescent lamps, and dehumidifiers. Today's rule would also apply to these products the provisions in 10 CFR part 430, subpart F. The relevant provisions are section 430.62 for certification, and sections 430.61, 430.71, 430.72, 430.73, and 430.74 for enforcement. Today's final rule amends section 430.62(a)(4) to require manufacturer reporting for ceiling fans, ceiling fan light kits, torchieres, medium base compact fluorescent lamps, and dehumidifiers. The existing section 430.62(a)(1) includes general instructions for manufacturer submission of certification data to DOE, including the mailing address for submitting certification data. Those directions apply to the products added by today's final rule.

C. Energy Policy Act of 2005—Commercial Equipment

As part of the July 2006 NOPR, DOE proposed to adopt sampling requirements for manufacturer testing similar to those in part 430 for consumer products for each type of commercial or industrial equipment EPACT 2005 covers and for which DOE finalized test procedures in the December 8, 2006 final rule. For certification reporting on covered commercial equipment, the procedures proposed in the July 2006 NOPR would require manufacturers to report the energy efficiency, energy use, or water use of each basic model. 71 FR 42192. DOE proposed to require that each manufacturer of commercial or industrial equipment file a compliance statement and certification report. The compliance statement would be a one-time filing [9] in which the manufacturer or private labeler states that it complies with applicable energy conservation requirements, and the certification reports generally provide the efficiency, or energy or water use, as applicable, for each covered basic model that a manufacturer distributes. A basic model refers to those models with no differing electrical, physical, or functional features that affect energy consumption. These requirements take the same approach as the certification procedures in part 430 and incorporate, with some modifications, certification provisions that DOE proposed for commercial heating, air conditioning, and water heating equipment in the December 1999 NOPR (64 FR 69602, 69611) and the April 2006 SNOPR (71 FR 25104, 25116).

DOE also set forth provisions for enforcement of the EPACT 2005 standards for commercial equipment in the July 2006 NOPR. 71 FR 42192, 42214. The enforcement proposals address DOE's initial steps in an enforcement action and would require a manufacturer to cease distribution of non-complying equipment, following the approach in Part 430. They are the same procedures for HVAC and WH equipment contained in the December 1999 NOPR. 64 FR 69604, 69617. For enforcement testing, including sampling provisions during enforcement testing and compliance determinations, DOE proposed two procedures based on the volume of shipments produced for commercial equipment. 71 FR 42192. For commercial prerinse spray valves, illuminated exit signs, traffic signal modules and pedestrian modules, and refrigerated bottled or canned beverage vending machines, DOE understands that each basic model is manufactured in relatively large quantities, similar to the quantities of consumer products covered by 10 CFR part 430. As a result of this understanding, DOE proposed to adopt the same sampling provisions that apply to consumer products under 10 CFR part 430 for use during enforcement testing of commercial equipment under 10 CFR part 431. *Id.* For automatic commercial ice makers, as well as commercial refrigerators, freezers, and refrigerator-freezers, DOE understands each basic model is manufactured in smaller quantities, similar to the quantities of commercial heating, air conditioning and water heating equipment covered by 10 CFR part 431. Therefore, DOE proposed to adopt the same sampling provisions for use during enforcement testing as those proposed in the April 2006 SNOPR for commercial equipment. *Id.*

In comments filed in response to the July 2006 NOPR, ARI agreed with DOE that automatic commercial ice makers and commercial refrigerators, freezers, and refrigerator-freezers are manufactured in small quantities and therefore, should have the same certification and enforcement provisions as commercial HVAC and WH equipment. (EE–RM/TP–05–500, ARI, No. 63 at p. 3) ARI requested that DOE review the comments it submitted to DOE in response to the publication of the April 2006 SNOPR and apply them to automatic commercial ice makers and commercial refrigeration equipment. ARI argued that requiring commercial refrigeration equipment and automatic commercial ice makers to be subject to similar sampling procedures for certification and enforcement in 10 CFR part 430 would be unduly burdensome because of the small quantities of equipment that are manufactured. ARI urged DOE to abandon this concept for automatic commercial ice makers, commercial refrigeration equipment, and commercial HVAC and WH equipment. (EE–RM/TP–05–500, ARI, No. 63 at p. 4)

DOE recognizes that modeling its certification and enforcement provisions for commercial refrigeration equipment and automatic commercial ice makers on those provisions already established for consumer products has certain drawbacks. For example, consumer products are generally manufactured in greater quantities than commercial refrigeration equipment and automatic commercial ice makers. Because of the smaller population available for sampling, DOE has decided to adopt certification and enforcement provisions for commercial refrigeration equipment and automatic commercial ice makers with sampling procedures based on commercial HVAC and WH equipment. DOE is adopting some of these provisions from the December 1999 NOPR and some from the July 2006 NOPR in response to commenters, like ARI and others listed above in section III.A, which this final rule applies to for these two types of equipment. 64 FR 69603–06 and 71 FR 42191–93.

D. Distribution Transformers

Section 325(y) of EPCA, 42 U.S.C. 6295(y), establishes energy conservation standards for low-voltage dry-type distribution transformers that are manufactured on or after January 1, 2007. The July 2006 NOPR provided until January 1, 2008, before certification requirements for such transformers would become effective. 71 FR 42193–95. Today's final rule modifies the proposed schedule and applies an effective date of 180 days after publication of notice announcing OMB approval of the information collection requirements for manufacturers of low-voltage, dry-type, liquid-immersed, and medium-voltage dry-type distribution transformers to comply with these certification requirements. This change is consistent

[9] The compliance statement must be submitted by each manufacturer subject to the energy conservation standards in 10 CFR parts 430 and 431. The compliance statement is signed by the company official submitting the statement (*e.g.,* the point of contact for the company or 3rd party representative), certifying that the basic model is in compliance with the applicable energy or water conservation standards and does not need to be resubmitted unless the information on the compliance statement changes.

with the requirements of other EPACT 2005 products and equipment covered under today's final rule.

The certification requirements for distribution transformers have two elements: A compliance statement and a certification report. In the July 2006 NOPR, DOE proposed a single format and set of requirements for compliance statements for all covered commercial and industrial equipment (except electric motors), including distribution transformers. 71 FR 42193–95. The certification report for distribution transformers being adopted today is similar to that which currently exists for electric motors at 10 CFR 431.36(b) and appendix C to subpart B, due to the large number of distribution transformer basic models that each manufacturer typically produces.

For distribution transformers in general, each time a design change is made to a core or winding, the energy consumption of the transformer can change, making that design a different basic model.[10] Due to the way in which distribution transformers are specified and manufactured, customized transformer designs will virtually always be a different basic model. Customized designs are necessary to meet customer requirements and to accommodate price changes in the raw materials used in the production of a distribution transformer. Distribution transformer manufacturers could produce thousands of basic models each year, and DOE is concerned that applying the same certification and reporting requirements as found in 10 CFR Part 430 to them could place a significant burden on these manufacturers.

In light of the heavy burdens manufacturers would face if a compliance certification process similar to the one used for consumer products were followed for distribution transformers, DOE proposed in the July 2006 NOPR that each distribution transformer manufacturer submit a certification report on the efficiency of the least efficient basic model within a certain kilovolt-ampere (kVA) group. 71 FR 42194. For low-voltage dry-type distribution transformers, kVA groups are defined as the combination of a kVA rating and number of phases for a transformer, as presented in the table of efficiency values in 10 CFR 431.196, as amended by the October 2005 final rule. 70 FR 60417. For liquid-immersed distribution transformers, like low-voltage dry-type transformers, kVA groups are based on the insulation type (liquid-immersed), kVA rating, and number of phases. For medium-voltage dry-type distribution transformers, kVA groups are based on the insulation type (dry-type), kVA rating, number of phases (single or three), and the basic impulse insulation level (BIL) rating, such as 20–45 kV BIL, 46–95 kV BIL, and greater than 96 kV BIL.

In response to the compliance testing and certification requirements for dry-type distribution transformers addressed in the July 2006 NOPR, Federal Pacific Transformer (Federal Pacific) asserted that the definition of ''basic model'' in the distribution transformer final rule, at 71 FR 24972 (April 27, 2006), increased the number of basic models for testing to an ''unbearable amount,'' and that the number of basic models to be tested has ''broadened exponentially'' because of how the term ''basic model'' is defined. (EE–RM/TP–05–500, Federal Pacific, No. 70 at pp. 3 and 4) DOE is aware of this issue, and it is the basis for the rule being adopted today, which establishes kVA groupings (described above), the requirement that manufacturers maintain records on all basic models sold, and that only compliance reports on the least efficient basic model within a kVA grouping are required to be submitted to DOE. This approach is consistent with the approach DOE adopted for electric motors, another industry with a large diversity of basic models.

In addition, Federal Pacific, GE Energy and the National Electrical Equipment Manufacturers Association (NEMA) commented on test procedures for distribution transformers which were outside the scope of this rulemaking. Federal Pacific questioned DOE's proposal to require reporting the least efficient basic model within a kVA group and sought clarification as to whether ''least efficient'' refers to the average efficiency of a newer, less efficient basic model within a kVA group or the highest individual unit within the group. (EE–RM/TP–05–500, Federal Pacific, No. 70 at p. 5) Federal Pacific proposed revisions to the draft rule language at 10 CFR 431.371(a)(6)(ii) and (b)(1), which affect sample size requirements and periodic reporting of compliance to DOE. (EE–RM/TP–05–500, Federal Pacific, No. 70 at p. 6).

For distribution transformers, the test procedure rulemaking addressed sampling and other testing issues regarding representations and compliance with the energy conservation standards. See 10 CFR part 431.197; 71 FR 24972 (April 27, 2006). Today's final rule is limited to reporting requirements, which include submitting the compliance statement and certification reports. While DOE appreciates Federal Pacific's comments, changes to incorporate kVA groupings or sampling sizes suggested by Federal Pacific is a test procedure issue. Test procedures for distribution transformers, including the applicable sampling plans for compliance testing, can be found in 10 CFR 431.197 and were finalized in a final rule published in the **Federal Register** on April 27, 2006. 71 FR 24972.

Similarly, GE Energy and NEMA both recommended that DOE adopt a linear interpolation method to determine the appropriate energy efficiency requirement for a unit with a kVA rating that does not appear in the tables. (EE–RM/TP–05–500, GE Energy, No. 145 at p. 1; EE–RM/TP–05–500, NEMA, No. 174 at p. 4) DOE understands that efficiency levels can be scaled between any two kVA ratings, and that similar techniques are used by the Institute of Electrical and Electronics Engineers and the American National Standards Institute to derive requirements for unusual (*i.e.,* non-standard) kVA ratings. This issue also falls outside the scope of this rulemaking as it deals with the application of the energy conservation standards for distribution transformers. This issue was dealt with in the October 12, 2007 final rule regarding test procedures for distribution transformers. In the October 12, 2007 final rule, DOE adopted the linear interpolation method proposed by GE Energy and NEMA. (72 FR 58217)

E. General Requirements

Consumer products and commercial and industrial equipment covered under 10 CFR parts 430 and 431, respectively, are subject to a variety of regulatory provisions, including those involving Petitions for Waiver from a particular test procedure, imported and exported products and equipment, maintenance of records, subpoenas, confidentiality of information, and petitions to exempt a State regulation from preemption. Today's final rule applies these provisions to the consumer products and commercial and industrial equipment it covers. For consumer products, the provisions are in sections 430.27, 430.40 through 430.57, 430.64, 430.65, 430.72, and 430.75 of 10 CFR part 430. For commercial equipment, the provisions are in sections 431.401, 431.403 through 431.407, and 431.421 through 431.430.

[10] The design changes made to distribution transformers affect the amount and quality of the material used for the core or winding and have a direct impact on the basic model. As the amount increased, and the quality improved of the material that is used in the core or winding of the distribution transformer, the electrical resistance decreases and the system efficiency of the distribution transformer increases.

In addition, our July 2006 NOPR proposed provisions for the preemption of State energy use and efficiency regulations for the consumer products and commercial or industrial equipment covered by EPACT 2005. The regulations implement EPACT 2005 amendments to EPCA that include various provisions concerning preemption with respect to these products and equipment. 42 U.S.C. 6295(ff)(7), 6295(ii), and 6316(e).[11] All of the provisions applicable to consumer products provide that, once Federal energy conservation standards take effect for a product, the preemption requirements of section 327 of EPCA (42 U.S.C. 6297) become applicable to any State or local standard for that product. 42 U.S.C. 6295(ff) and (ii) (as amended by EPACT 2005) DOE's existing rules for covered consumer products set forth such a requirement, providing that any Federal standard that is in effect for ''a covered product'' preempts any State standard for the product that is not identical to the Federal standard, except as otherwise provided in section 327 of EPCA. 10 CFR 430.33. Consistent with EPCA's preemption provisions, DOE proposed to apply the same requirements for consumer products to the commercial or industrial equipment. 71 FR 42195.

IV. Procedural Requirements

A. Review Under Executive Order 12866

Today's regulatory action is not a ''significant regulatory action'' under section 3(f)(1) of Executive Order 12866, ''Regulatory Planning and Review.'' 58 FR 51735 (October 4, 1993). Accordingly, today's action was not subject to review by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

B. Review Under the Regulatory Flexibility Act

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

EPACT 1992 and EPACT 2005 amended EPCA to incorporate into DOE's energy conservation program certain consumer products and commercial and industrial equipment. Today, DOE establishes certification, compliance, and enforcement requirements for these products and types of commercial and industrial equipment, as described above and proposed in the December 1999 NOPR, April 2006 SNOPR, and July 2006 NOPR.

DOE reviewed the certification, compliance, and enforcement provisions in today's final rule, for the products and equipment covered, under the provisions of the Regulatory Flexibility Act and the policies and procedures published on February 19, 2003. DOE estimates approximately 350 manufacturing firms could be potentially impacted by the certification, compliance, and enforcement provisions in today's final rule. DOE estimated the total number of manufacturing firms by using AHRI's Directory of Certified Product Performance, the ENERGY STAR databases of qualifying products, AHAM's Directory of Certified Products, and manufacturers' product literature. Of these 350 manufacturing firms, DOE did not explicitly identify the number of small entities that could potentially be impacted by the provisions in today's final rule because DOE believes the burden will be small. DOE's estimates include both small and large businesses, and the actual number of small business is likely to be smaller. The provisions of this final rule, described below and in further detail elsewhere in the preamble, would apply to all of those small businesses.

Today's final rule adopts procedures for manufacturers to certify compliance with the energy conservation standards in EPCA or set forth by DOE pursuant to EPCA, using applicable test procedures established by DOE. These procedures require manufacturers of covered consumer products and commercial equipment to submit information and reports for a variety of purposes, including ensuring compliance with requirements. These certification requirements, as well as the enforcement provisions, are new for manufacturers of consumer products and commercial equipment subject to today's final rule and will affect both small and large enterprises.

The final rule has been drafted to minimize the certification, compliance and enforcement burden for manufacturers and relies heavily on current industry practice. For example, the statistical sampling procedures being adopted in today's final rule are based on procedures established for consumer appliance products at 10 CFR 430.24. These procedures are designed to keep the testing burden on manufacturers as low as possible, while still providing confidence that the test results can be applied to all units of the same basic model. To minimize the testing burden further, manufacturers are permitted to use analytical procedures, such as computer simulation, to determine the efficiencies of their products. Manufacturers are also given the option of certifying their products to DOE independently or through trade associations, which can minimize costs by reporting on large numbers of individual products at one time. Finally, the certification forms and enforcement procedures are similar to those already required for consumer products, and several of the same manufacturers produce both consumer products and commercial equipment.

The cost of establishing compliance will depend on the number of basic models a manufacturer produces. The cost of completing the certification report should be small once testing for each basic model has occurred pursuant to test procedures prescribed by DOE; the manufacturer must input the data required by, for consumer products, 10 CFR 430.62 and, for commercial and industrial equipment, 10 CFR 431.371(a)(6)(i) (or, in the case of distribution transformers, (ii)) into the report and provide it to DOE. Some of the information required by 10 CFR 430.62 and 431.371 is product-specific; manufacturers would be required to provide only that information that is generally applicable or specific to the products they manufacture. DOE estimated in previous rules that the testing, certification, compliance, and enforcement procedures would take the average firm 160 hours to complete. 71 FR 42197–98. DOE also believes that at least 90 percent of these burden hours can be attributed to complying with DOE's test procedures, which have

[11] Since the enactment of EPACT 2005, Congress subsequently amended EPCA through the Energy Independence and Security Act of 2007, Public Law 110–140 (Dec. 19, 2007). As a result of this legislative change, 42 U.S.C. 6295(gg) was redesignated as 42 U.S.C. 6295(ii).

already been established. DOE believes the resulting 10 percent (*i.e.,* 16 hours) would be the most that it would take the average firm to develop the necessary testing documentation, complete the certification and compliance reports, and then either mail or e-mail them to DOE; the costs of e-mail would be negligible and the costs of mailing would depend on the number of basic models manufactured but are not expected to be significant given prevailing postal rates.

The maintenance of records and the compliance reporting requirements are also based largely on current industry practices for similar products and equipment under 10 CFR part 430 and 10 CFR part 431. Moreover, for the products and equipment covered by this notice, manufacturers participating in the ENERGY STAR program already report the energy performance of their products to the Environmental Protection Agency (EPA), and many report such performance to industry trade associations such as ARI. DOE concludes that reporting this same information to DOE would not result in a significant impact. DOE also understands that, as a matter of sound business practice, manufacturers routinely maintain the types of records as to product and equipment testing that today's rule would require. For all of these reasons, DOE believes that the cost of complying with today's final rule will not be significant for small manufacturers of these products.

DOE sought public comment in the December 1999 NOPR and the July 2006 NOPR conclusion that the incremental costs of complying with the certification, compliance and enforcement requirements would not impose a significant impact on a substantial number of small businesses. DOE did not receive any comments on this conclusion; comments on the economic impacts of the proposed rules generally are discussed above and do not change this conclusion. Based on the foregoing factual basis, DOE certifies that today's final rule will not have a significant economic impact on substantial number of small entities. DOE will transmit the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

Adoption of today's final rule requires manufacturers of covered consumer products and commercial and industrial equipment to maintain records about how they determined the energy efficiency or energy consumption of their products. The final rule also requires manufacturers to submit a compliance statement indicating that all basic models currently produced, as well as any basic models produced in the future, comply (or will comply) with the applicable energy conservation standards using applicable test procedures,[14] as well as certification reports that set forth the energy performance of the basic models it manufactures. The certification reports are submitted for each basic model, either when the requirements go into effect (for models already in distribution) or when the manufacturer begins distribution of that model; the reports must be updated when a new model is introduced or a change affecting energy efficiency or use is made to an existing model. The collection of information is necessary for monitoring compliance with the efficiency standards and testing requirements for the consumer products and commercial and industrial equipment mandated by EPCA.

The certification and recordkeeping requirements for consumer products in 10 CFR part 430 have previously been approved by OMB and assigned OMB control number 1910–1400. The certification and recordkeeping requirements being adopted in today's final rule for the commercial and industrial equipment in 10 CFR part 431 must be approved and assigned a control number by OMB. DOE submitted these proposed certification and recordkeeping requirements to OMB for review and approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* and will publish notice of the approval, and the effective date of the information collection requirements, in a subsequent **Federal Register** notice.

DOE initially developed burden estimates for the EPACT 2005 commercial equipment in the July 2006 NOPR; given that the requirements in this final rule do not differ significantly from those proposed in the July 2006 NOPR, these burden estimates continue to remain accurate. 71 FR 42197–198. In addition, DOE believes that these burden estimates would apply equally for manufacturers of the EPACT 1992 commercial equipment because the compliance requirements would be the same for these manufacturers. DOE also believes that at least 90 percent of these burden hours can be attributed to complying with DOE's test procedures, which have already been established through separate rulemakings. DOE believes the resulting 10 percent (*i.e.,* 16 hours) would be the most that it would take the average firm to comply with the certification, compliance, and enforcement requirements in today's final rule. The following are the DOE estimates of the total annual reporting and recordkeeping burden imposed on manufacturers of commercial and industrial equipment by today's final rule to develop the necessary testing documentation, complete the certification and compliance reports, and then either mail or e-mail them to DOE.

- For unit heaters, the estimated number of covered manufacturing firms is 15. The total annual reporting and recordkeeping burden from compliance with the final rule is expected to be 240 hours per year (15 firms × 16 hours per firm).
- For automatic commercial ice makers, the estimated number of covered manufacturing firms is 10. The total annual reporting and recordkeeping burden from compliance with the final rule is expected to be 160 hours per year (10 firms × 16 hours per firm).
- For commercial prerinse spray valves, the estimated number of covered manufacturing firms is five. The total annual reporting and recordkeeping burden from compliance with the final rule is expected to be 80 hours per year (5 firms × 16 hours per firm).
- For illuminated exit signs, the estimated number of covered manufacturing firms is 49. The total annual reporting and recordkeeping burden from compliance with the final rule is expected to be 784 hours per year (49 firms × 16 hours per firm).
- For traffic signal modules and pedestrian modules, the estimated number of covered manufacturing firms is eight. The total annual reporting and recordkeeping burden from compliance with the final rule is expected to be 128 hours per year (8 firms × 16 hours per firm).
- For commercial refrigerators, freezers, and refrigerator-freezers, the estimated number of covered manufacturing firms is 23. The total annual reporting and recordkeeping burden from compliance with the final rule is expected to be 368 hours per year (23 firms × 16 hours per firm).
- For commercial boilers, the estimated number of covered

[14] The compliance statement must be submitted by each manufacturer subject to the energy conservation standards in 10 CFR parts 430 and 431. The compliance statement is signed by the company official submitting the statement (*e.g.,* the point of contact for the company or 3rd party representative), certifying that the basic model is in compliance with the applicable energy or water conservation standards and does not need to be resubmitted unless the information on the compliance statement changes.

manufacturing firms is 26. The total annual reporting and recordkeeping burden from compliance with the final rule is expected to be 416 hours per year (26 firms × 16 hours per firm).

• For commercial furnaces, the estimated number of covered manufacturing firms is 15. The total annual reporting and recordkeeping burden from compliance with the final rule is expected to be 240 hours per year (15 firms × 16 hours per firm).

• For packaged terminal equipment, the estimated number of covered manufacturing firms is 9. The total annual reporting and recordkeeping burden from compliance with the final rule is expected to be 144 hours per year (9 firms × 16 hours per firm).

• For commercial air conditioning and heating equipment, the estimated number of covered manufacturing firms is 30. The total annual reporting and recordkeeping burden from compliance with the final rule is expected to be 480 hours per year (30 firms × 16 hours per firm).

• For commercial water heating equipment, the estimated number of covered manufacturing firms is 14. The total annual reporting and recordkeeping burden from compliance with the final rule is expected to be 224 hours per year (14 firms × 16 hours per firm).

In developing the burden estimates, DOE considered that the required compliance certification would contain the type of information that many manufacturers already submit to trade associations or government agencies, such as EPA under the ENERGY STAR program. Those manufacturers should be able to comply with the proposed certification without undue burden because they are already collecting and reporting data to other organizations. Moreover, DOE understands that manufacturers already maintain the types of records the proposed rule would require them to keep.

In response to the burden hour estimates in the July 2006 proposed rule, DOE received several comments from various ceiling fan manufacturers. The manufacturers stated their concerns that the testing burden hour estimates were inadequate to accurately reflect the number of hours they would need to comply with the airflow efficiency test included in the July 2006 proposed rule. (EE–RM/TP–05–500, American Lighting Association, No. 14 at Part II at pp. 2 and 3, No. 18.8 at pp. 63–65, and No. 97 at pp. 3–5.)

At this time, the only requirement for ceiling fans are the design standards set forth in EPACT 2005 and codified in the October 2005 final rule. Manufacturers of these products would simply have to certify compliance with the applicable design requirements. If DOE establishes energy conservation standards for ceiling fans by setting a minimum airflow efficiency rating in a separate rulemaking proceeding, then manufacturers would be subject to the other types of certification, compliance, and enforcement provisions, such as sampling procedures. Note that ceiling fans are a consumer product, the information collection requirements of which were approved by OMB under control number 1904–1400.

DOE believes that the collection of information required by this final rule is the least burdensome method of meeting the statutory requirements and achieving the program objectives of the DOE compliance certification program for these products and equipment.

Under the Paperwork Reduction Act, an agency may not conduct or sponsor a collection of information unless the collection displays a currently valid OMB control number (44 U.S.C. 3506(c)(1)(B)(iii)(V)). As stated in the **EFFECTIVE DATE** line of this notice of final rulemaking, the information collection requirements of today's final rule will be effective 180 days after the publication of a notice announcing OMB approval of the information collection requirements. DOE will provide notice of OMB approval and the OMB control number in a subsequent **Federal Register** notice.

D. Review Under the National Environmental Policy Act of 1969

DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and DOE's regulations for compliance with the National Environmental Policy Act (10 CFR Part 1021). Specifically, this rule establishing test procedures will not affect the quality or distribution of energy, nor will it result in any environmental impacts, and, therefore, is covered by the Categorical Exclusion at paragraph A6 to subpart D, 10 CFR part 1021. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

DOE reviewed this rule pursuant to Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999), which imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in developing regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in developing such regulations. 65 FR 13735. DOE examined today's 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. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are subject of today's final rule. States can petition DOE for exemption from preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297) No further action required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to 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 duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to

review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

DOE reviewed this regulatory action under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, which requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Today's rule contains neither an intergovernmental mandate nor a mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any year, so these requirements under the UMRA do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

DOE determined that, for this rulemaking, it need not prepare a Family Policymaking Assessment under section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277). 71 FR 42199. DOE received no comments concerning section 654 in response to the July 2006 proposed rule and therefore, is taking no further action in today's final rule with respect to this provision.

I. Review Under Executive Order 12630

DOE determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 18, 1988), that today's rule would not result in any takings that might require compensation under the Fifth Amendment to the United States Constitution. 71 FR 42199. DOE received no comments concerning Executive Order 12630 in response to the July 2006 proposed rule and, therefore, is taking no further action in today's final rule with respect to this Executive Order.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines each agency establishes 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 final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs of OMB a Statement of Energy Effects for any proposed significant energy action. DOE determined that the proposed rule was not a ''significant energy action'' within the meaning of Executive Order 13211. 71 FR 42199. In addition, the Administrator of OIRA did not designate this action as a significant energy action. Accordingly, DOE did not prepare a Statement of Energy Effects on the proposed rule. DOE received no comments on this issue in response to the July 2006 proposed rule. As with the proposed rule, DOE has concluded that today's final rule is not a significant energy action within the meaning of Executive Order 13211, and has not prepared a Statement of Energy Effects on the rule.

L. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress a report regarding the issuance of today's final rule prior to the effective dates set forth at the outset of this notice. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of today's final rule.

List of Subjects

10 CFR Part 430

Administrative practice and procedure, Energy conservation test procedures, Household appliances.

10 CFR Part 431

Administrative practice and procedure, Commercial products, Energy conservation test procedures.

Issued in Washington, DC, on December 9, 2009.

Cathy Zoi,

Assistant Secretary, Energy Efficiency and Renewable Energy.

■ For the reasons stated in the preamble, Chapter II, Subchapter D, of Title 10 of the Code of Federal Regulations is amended to read as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Section 430.24 is amended by revising the introductory paragraph and by adding new paragraphs (w), (x), (y), (z), (aa), and (bb) to read as follows:

§ 430.24 Units to be tested.

When testing of a covered product is required to comply with section 323(c) of the Act, or to comply with rules prescribed under sections 324 or 325 of the Act, a sample shall be selected and tested comprised of units, or be representative of production units of the basic model being tested, and shall meet the following applicable criteria. Components of similar design may be substituted without requiring additional testing if the represented measures of energy consumption, or, in the case of showerheads, faucets, water closets and urinals, water use, continue to satisfy the applicable sampling provision.

* * * * *

(w) For each basic model of ceiling fan with sockets for medium screw base lamps or pin-based fluorescent lamps selected for testing, a sample of sufficient size shall be selected at random and tested to ensure that—

(1) Any represented value of estimated energy consumption or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(i) The mean of the sample, or

(ii) The upper 95 percent confidence limit of the true mean divided by 1.10; and

(2) Any represented value of the airflow efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(i) The mean of the sample, or

(ii) The lower 95 percent confidence limit of the true mean divided by 0.90.

(x) For each basic model of ceiling fan light kit with sockets for medium screw

base lamps or pin-based fluorescent lamps selected for testing, a sample of sufficient size shall be selected at random and tested to ensure that—

(1) Any represented value of estimated energy consumption or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(i) The mean of the sample, or

(ii) The upper 97.5 percent confidence limit of the true mean divided by 1.05, and

(2) Any represented value of the efficacy or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(i) The mean of the sample, or

(ii) The lower 97.5 percent confidence limit of the true mean divided by 0.95.

(y) For each basic model of bare or covered (no reflector) medium base compact fluorescent lamp selected for testing, a sample of sufficient size shall be selected at random and tested to ensure that—

(1) Any represented value of estimated energy consumption or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(i) The mean of the sample, or

(ii) The upper 97.5 percent confidence limit of the true mean divided by 1.05; and

(2) Any represented value of the efficacy or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(i) The mean of the sample, or

(ii) The lower 97.5 percent confidence limit of the true mean divided by 0.95.

(z) For each basic model of dehumidifier selected for testing, a sample of sufficient size shall be selected at random and tested to ensure that—

(1) Any represented value of estimated energy consumption or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(i) The mean of the sample, or

(ii) The upper 95 percent confidence limit of the true mean divided by 1.10; and

(2) Any represented value of the energy factor or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(i) The mean of the sample, or

(ii) The lower 95 percent confidence limit of the true mean divided by 0.90.

(aa) For each basic model of battery charger selected for testing, a sample of sufficient size shall be selected at random and tested to ensure that—

(1) Any represented value of the estimated non-active energy ratio or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(i) The mean of the sample, or

(ii) The upper 97.5 percent confidence limit of the true mean divided by 1.05; and

(2) Any represented value of the estimated nonactive energy ratio or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(i) The mean of the sample, or

(ii) The lower 97.5 percent confidence limit of the true mean divided by 0.95.

(bb) For each basic model of external power supply selected for testing, a sample of sufficient size shall be selected at random and tested to ensure that—

(1) Any represented value of the estimated energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(i) The mean of the sample, or

(ii) The upper 97.5 percent confidence limit of the true mean divided by 1.05; and

(2) Any represented value of the estimated energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(i) The mean of the sample, or

(ii) The lower 97.5 percent confidence limit of the true mean divided by 0.95.

■ 3. Section 430.62 is amended by adding new paragraphs (a)(4)(xviii), (a)(4)(xix), (a)(4)(xx), (a)(4)(xxi), and (a)(4)(xxii) to read as follows:

§ 430.62 Submission of data.

(a) * * *

(4) * * *

(xviii) Ceiling fans, the model number.

(xix) Ceiling fan light kits with sockets for medium screw base lamps or pin-based fluorescent lamps, the efficacy in lumens per watt. Ceiling fan light kits with sockets other than medium screw base lamps or pin-based fluorescent lamps, the model number.

(xx) Medium base compact fluorescent lamps, the minimum initial efficacy in lumens per watt, the lumen maintenance at 1,000 hours in lumens, the lumen maintenance at 40 percent of rated life in lumens, the rapid cycle stress test, and the lamp life in hours.

(xxi) Dehumidifiers, the energy factor in liters per kilowatt hour, and capacity in pints per day.

(xxii) Torchieres, the model number.

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

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

Authority: 42 U.S.C. 6291–6317.

■ 5. Section 431.2 is amended by adding, in alphabetical order, the definitions of ''Independent laboratory'' and ''Manufacturer's model number'' to read as follows:

§ 431.2 Definitions.

* * * * *

Independent laboratory means a laboratory or test facility not controlled by, affiliated with, having financial ties with, or under common control with the manufacturer or distributor of the covered equipment being evaluated.

* * * * *

Manufacturer's model number means the identifier used by a manufacturer to uniquely identify the group of identical or essentially identical commercial equipment to which a particular unit belongs. The manufacturer's model number typically appears on equipment nameplates, in equipment catalogs and in other product advertising literature.

* * * * *

■ 6. Add a new § 431.65 to subpart C of part 431 to read as follows:

§ 431.65 Units to be tested.

For each basic model of commercial refrigerator, freezer, or refrigerator-freezer selected for testing, a sample of sufficient size shall be selected at random and tested to ensure that—

(a) Any represented value of estimated energy consumption or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(1) The mean of the sample, or

(2) The upper 95 percent confidence limit of the true mean divided by 1.10; and

(b) Any represented value of the energy efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(1) The mean of the sample, or

(2) The lower 95 percent confidence limit of the true mean divided by 0.90.

(Components of similar design may be substituted without requiring additional

testing if the represented measures of energy continue to satisfy the applicable sampling provision.)

■ 7. Add a new § 431.135 to subpart H of part 431 to read as follows:

§ 431.135 Units to be tested.

For each basic model of automatic commercial ice maker selected for testing, a sample of sufficient size shall be selected at random and tested to ensure that—

(a) Any represented value of estimated maximum energy use or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(1) The mean of the sample, or

(2) The upper 95 percent confidence limit of the true mean divided by 1.10; and

(b) Any represented value of the energy efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(1) The mean of the sample, or

(2) The lower 95 percent confidence limit of the true mean divided by 0.90.

(Components of similar design may be substituted without requiring additional testing if the represented measures of energy continue to satisfy the applicable sampling provision.)

■ 8. Section 431.172 is amended by revising the introductory text, and adding the definition of ''Alternate efficiency determination method or AEDM'' in alphabetical order to read as follows:

§ 431.172 Definitions.

The following definitions apply for purposes of subparts D through G, J through K and subpart T of this part. Other terms in these subparts shall be defined elsewhere in this Part and, if not defined in this part, shall have the meaning set forth in section 340 of the Act.

Alternate efficiency determination method or AEDM means a method of calculating the efficiency of a commercial HVAC and WH product, in terms of the descriptor used in or under section 342(a) of the Act to state the energy conservation standard for that product.

* * * * *

■ 9. Revise subpart J of part 431 to read as follows:

Subpart J—Provisions for Commercial Heating, Ventilating, Air-Conditioning and Water Heating Products

Sec.
431.174 Additional requirements applicable to Voluntary Independent Certification Program participants.
431.175 Additional requirements applicable to non-Voluntary Independent Certification Program participants.
431.176 Voluntary Independent Certification Programs.

Subpart J—Provisions for Commercial Heating, Ventilating, Air-Conditioning and Water Heating Products

§ 431.173 Requirements applicable to all manufacturers.

(a) *General.* A manufacturer of a HVAC and WH product may not distribute any basic model of such equipment in commerce unless the manufacturer has determined the efficiency of the basic model either from testing of the basic model or from application of an alternative efficiency determination method (AEDM) to the basic model, in accordance with the requirements of this section. In instances where a manufacturer has tested that basic model to validate an AEDM, the efficiency of that basic model must be determined and rated according to results from actual testing. (For purposes of this subpart, the ''efficiency'' of a commercial HVAC and WH product means the energy efficiency or energy use of that product, expressed in terms of the descriptor that referenced in section 342(a) of the Act to state the energy conservation standard for that product.)

(b) *Testing.* If a manufacturer tests a basic model pursuant to this section to determine its efficiency, the manufacturer must:

(1) Select at random the unit(s) to be tested, which must be representative of the basic model,

(2) Perform the testing in accordance with the applicable Department of Energy test procedure,

(3) Meet industry standards for the measurement accuracy of testing for the equipment being tested. This includes accuracy requirements in applicable test procedures, accuracy achieved by laboratory-grade equipment, and the accuracy of calibration standards, and

(4) Meet the requirements of either § 431.174(b) or § 431.175(a), whichever is applicable.

(c) *Alternative efficiency determination methods*—(1) *Criteria an AEDM must satisfy.* You may not apply an AEDM to a basic model to determine its efficiency pursuant to this subpart unless:

(i) The AEDM is derived from a mathematical model that represents the energy consumption characteristics of the basic model; and

(ii) The AEDM is based on engineering or statistical analysis, computer simulation or modeling, or other analytic evaluation of performance data.

(2) *Subsequent verification of an AEDM.* If you have used an AEDM pursuant to this subpart,

(i) You must have available for inspection by the Department records showing:

(A) The method or methods used;

(B) 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;

(C) Complete test data, product information, and related information that you generated or acquired under paragraph (c)(1) of this section and §§ 431.174(c) or 431.(b)(1), as applicable; and

(D) The calculations used to determine the average efficiency and energy consumption of each basic model to which an AEDM was applied.

(ii) If requested by the Department, you must perform at least one of the following:

(A) Conduct simulations to predict the performance of particular basic models of the commercial HVAC and WH product;

(B) Provide analyses of previous simulations conducted by you;

(C) Conduct sample testing of basic models selected by the Department; or

(D) Conduct a combination of these.

(3) *Limitation on use of an AEDM.* A manufacturer may not knowingly use an AEDM to overrate the efficiency of a basic model.

§ 431.174 Additional requirements applicable to Voluntary Independent Certification Program participants.

(a) *Description of Voluntary Independent Certification Program participant.* For purposes of this subpart, a manufacturer that participates in a Voluntary Independent Certification Program (VICP) approved by the Department for a commercial HVAC and WH product, as described in § 431.176, and that complies with all requirements imposed by that program, is a ''VICP participant'' with respect to that product.

(b) *Testing.* A VICP participant that tests a basic model pursuant to this subpart must use statistically valid and accurate methods to arrive at the efficiency rating of such basic model.

(c) *Alternative efficiency determination methods.* Before using an

AEDM to determine the efficiency of a basic model pursuant to this subpart, a VICP participant must apply the AEDM to one or more basic models that have been tested in accordance with §§ 431.173(b) and 431.174(b) of this subpart, and the predicted efficiency calculated for each such basic model from application of the AEDM must be within 5 percent of the efficiency determined from testing that basic model. In addition, the predicted efficiency(ies) calculated for the tested basic model(s) must on average be within one percent of the efficiency(ies) determined from testing such basic model(s).

(d) *Limitation on use of an Alternative Efficiency Determination Method.* A manufacturer may not use an AEDM to overrate the efficiency of a basic model.

§ 431.175 Additional requirements applicable to non-Voluntary Independent Certification Program participants.

If you are a manufacturer that is not a VICP participant with respect to a particular type of commercial HVAC and WH product, you must meet the following requirements as to that product.

(a) *Testing.* You must perform any testing of a basic model pursuant to this subpart under the supervision of independent testing personnel, or have such testing performed at an independent laboratory. In addition, you must test a sufficient number of units of the basic model, and the efficiency rating of the basic model must be determined, such that,

(1) Any represented value of energy efficiency is no greater than the lower of the mean of the sample, or the lower 95 percent confidence limit of the true mean divided by 0.95, and

(2) Any represented value of energy usage is no less than the greater of the mean of the sample, or the upper 95 percent confidence limit of the true mean divided by 1.05.

(b) *Alternative efficiency determination methods.* Before using an AEDM to determine the efficiency of a basic model pursuant to this subpart, you must first:

(1) Apply the AEDM to three or more basic models that have been tested in accordance with §§ 431.173(b) and 431.175(a) of this subpart. The predicted efficiency calculated for each such basic model from application of the AEDM must be within three percent of the efficiency determined from testing that basic model, and the predicted efficiencies calculated for the tested basic models must on average be within one percent of the efficiencies determined from testing such basic models; and

(2) Obtain from the Department approval of the AEDM. The Department will provide such approval after receiving from you documentation which establishes that the AEDM satisfies the requirements of §§ 431.173(c)(1) and 431.175(b)(1) of this subpart.

(3) *Validation of an AEDM.* To use an AEDM under this subpart, the manufacturer must validate it as follows:

(i) Using the AEDM, the manufacturer must calculate the efficiency of three or more of its basic models. They must be the manufacturer's highest-selling basic models to which the AEDM could apply.

(ii) The manufacturer must test each of these basic models in accordance with § 431.173(b) of this subpart, and either §§ 431.174(b) or 431.175(a), whichever is applicable.

(iii) The predicted efficiency calculated for each such basic model from application of the AEDM must be within three percent of the efficiency determined from testing that basic model, and the average of the predicted efficiencies calculated for the tested basic models must be within one percent of the average of the efficiencies determined from testing these basic models.

(4) *Limitation on use of an AEDM.* A manufacturer may not use an AEDM to overrate the efficiency of a basic model.

§ 431.176 Voluntary Independent Certification Programs.

(a) The Department will approve a Voluntary Independent Certification Program (VICP) for a commercial HVAC and WH product if the VICP meets all of the following criteria:

(1) The program publishes its operating procedures in written form, and permits participation by all manufacturers of products covered by the program so long as they comply with the VICP's requirements concerning operation of the program.

(2) The program requires each participant to report to the program the efficiency of each basic model that the participant manufactures and that is covered by the program. The participant must determine such efficiency based on measurement of the basic model's performance.

(3) The program publishes the efficiency ratings received from each participant, or otherwise makes the ratings readily available to the general public and to the Department.

(4) The program conducts periodic verification testing on listed equipment, by testing the efficiency of each basic model at least once every five years and comparing its rated efficiency to the test results.

(5) An independent laboratory conducts the tests, or independent laboratory personnel supervise the tests.

(6) For verification testing, the testing personnel select units randomly from the manufacturer's stock.

(7) The program uses efficiency testing in accordance with the applicable Department test procedures.

(8) The program's verification testing meets industry standards for the accuracy of testing and of rating results for the equipment being tested, and the program satisfactorily describes how it meets these standards.

(9) The program has a standard for determining whether the efficiency rating a manufacturer claims for a product is valid.

(10) The program requires that, if a basic model fails verification testing conducted by the VICP, the manufacturer of the basic model must remove it from production and sale if the verification testing results show it is not in compliance with EPCA efficiency standards, or correctly re-rate it if it complies with such standards. The program must also provide that a participating manufacturer will be expelled from the VICP if it does not comply with such requirements, and that the VICP will report to the Department certification test results that find the performance of a basic model not to meet EPCA efficiency standards. (A basic model ''fails'' verification testing when the VICP has compared the basic model's efficiency rating resulting from completion of that testing with the efficiency rating claimed by the manufacturer, and has determined that the rating claimed by the manufacturer is not valid.)

(11) The program provides for penalties or other incentives to encourage manufacturers to report accurate and reliable efficiency ratings.

(12) The program provides to the manufacturer copies of all records of completed verification testing performed on the manufacturer's equipment covered by the program.

(13) The VICP makes available for DOE review, data on the results of its verification testing, including the following for each basic model on which the VICP has performed verification testing:

(i) The measured efficiency from the verification testing,

(ii) The manufacturer's efficiency rating, and

(iii) Either the applicable energy conservation standard or a description

of the model sufficient to enable the Department to determine such standard.

(14) The program contains provisions under which each participating manufacturer can challenge ratings submitted by other manufacturers, which it believes to be in error.

(b) If the organization operating an approved VICP makes any changes in its program, the organization must notify the Department of such changes within 30 days of their occurrence, and the Department may then rescind or continue its approval.

■ 10. Add a new § 431.205 to subpart L of part 431 to read as follows:

§ 431.205 Units to be tested.

For each basic model of illuminated exit sign selected for testing, a sample of sufficient size shall be selected at random and tested to ensure that—

(a) Any represented value of estimated input power demand or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(1) The mean of the sample, or

(2) The upper 95 percent confidence limit of the true mean divided by 1.10; and

(b) Any represented value of the energy efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(1) The mean of the sample, or

(2) The lower 95 percent confidence limit of the true mean divided by 0.90.

(Components of similar design may be substituted without requiring additional testing if the represented measures of energy continue to satisfy the applicable sampling provision.)

■ 11. Add a new § 431.225 to subpart M of part 431 to read as follows:

§ 431.225 Units to be tested.

For each basic model of traffic signal module or pedestrian module selected for testing, a sample of sufficient size shall be selected at random and tested to ensure that—

(a) Any represented value of estimated maximum and nominal wattage or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(1) The mean of the sample, or

(2) The upper 95 percent confidence limit of the true mean divided by 1.10; and

(b) Any represented value of the energy efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(1) The mean of the sample, or

(2) The lower 95 percent confidence limit of the true mean divided by 0.90.

(Components of similar design may be substituted without requiring additional testing if the represented measures of energy continue to satisfy the applicable sampling provision.)

■ 12. Add a new § 431.265 to subpart O of part 431 to read as follows:

§ 431.265 Units to be tested.

For each basic model of commercial prerinse spray valves selected for testing, a sample of sufficient size shall be selected at random and tested to ensure that–

(a) Any represented value of estimated water consumption or other measure of water consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(1) The mean of the sample, or

(2) The upper 95 percent confidence limit of the true mean divided by 1.10; and

(b) Any represented value of the water efficiency or other measure of water consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(1) The mean of the sample, or

(2) The lower 95 percent confidence limit of the true mean divided by 0.90.

(Components of similar design may be substituted without requiring additional testing if the represented measures of energy continue to satisfy the applicable sampling provision.)

■ 13. Add a new § 431.295 to subpart Q of part 431 to read as follows:

§ 431.295 Units to be tested.

For each basic model of refrigerated bottled or canned beverage vending machine selected for testing, a sample of sufficient size shall be selected at random and tested to ensure that—

(a) Any represented value of estimated energy consumption or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(1) The mean of the sample, or

(2) The upper 95 percent confidence limit of the true mean divided by 1.10; and

(b) Any represented value of the energy efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(1) The mean of the sample, or

(2) The lower 95 percent confidence limit of the true mean divided by 0.90.

(Components of similar design may be substituted without requiring additional testing if the represented measures of energy continue to satisfy the applicable sampling provision.)

■ 14. Add a new subpart T to part 431 to read as follows:

Subpart T—Certification and Enforcement

Sec.
431.370 Purpose and scope.
431.371 Submission of data.
431.372 Sampling.
431.373 Enforcement.
Appendix A to Subpart T of Part 431—Compliance Statement for Certain Commercial Equipment
Appendix B to Subpart T of Part 431—Certification Report for Certain Commercial Equipment
Appendix C to Subpart T of Part 431—Certification Report for Distribution Transformers
Appendix D to Subpart T of Part 431—Enforcement for Performance Standards; Compliance Determination Procedure for Certain Commercial Equipment

Subpart T—Certification and Enforcement

§ 431.370 Purpose and scope.

This subpart sets forth the procedures to be followed for manufacturer compliance certifications of all covered equipment except electric motors, and for the Department's enforcement action to determine 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 this part. Energy and water conservation standards include minimum levels of efficiency and maximum levels of consumption (also referred to as performance standards), and prescriptive design requirements (also referred to as design standards). This subpart does not apply to electric motors.

§ 431.371 Submission of data.

(a) *Certification.* (1) Except as provided in paragraph (a)(2) of this section, each manufacturer or private labeler before distributing into the stream of commerce any basic model of covered equipment covered by this subpart and subject to an energy or water conservation standard set forth in this part, shall certify by means of a compliance statement and a certification report that each basic model meets the applicable energy or water conservation standard. Except as provided in paragraph (a)(2) of this section, each manufacturer or private labeler shall file

a compliance statement and its first certification report with the Department on or before (180 days after the Department of Energy publishes a document in the **Federal Register** announcing OMB approval of the information collection requirements in § 431.371). The compliance statement, signed by the company official submitting the statement, and the certification report(s) shall be sent by certified mail to: U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121, or e-mailed to the Department at: *certification.report@ee.doe.gov.*

(2) Each manufacturer or private labeler of a basic model of commercial clothes washer, distribution transformer, traffic signal module, pedestrian module, and commercial prerinse spray valve shall file a compliance statement and its first certification report with the Department on or before (180 days after the Department of Energy publishes a document in the **Federal Register** announcing OMB approval of the information collection requirements in § 431.371).

(3) *Amendment of information.* If information in a compliance statement or certification report previously submitted to the Department under this section is found to be incorrect, each manufacturer or private labeler (or an authorized representative) must submit the corrected information to the Department at the address and in the manner described in this section.

(4) Notices designating a change of third-party representative must be sent to the Department at the address and in the manner described in this section.

(5) The compliance statement, which each manufacturer or private labeler need not submit more than once unless the information on the report changes, shall include all information specified in the format set forth in appendix A of this subpart and shall certify, with respect to each basic model currently produced by the manufacturer and new basic models it introduces in the future, that:

(i) Each basic model complies and will comply with the applicable energy or water conservation standard;

(ii) All representations as to efficiency in the manufacturer's certification report(s) are and will be based on testing and/or use of an AEDM in accordance with 10 CFR Part 431;

(iii) All information reported in the certification report(s) is and will be true, accurate, and complete; and

(iv) The manufacturer or private labeler is aware of the penalties associated with violations of the Act, the regulations thereunder, and 18 U.S.C. 1001, which prohibits knowingly making false statements to the Federal Government.

(6) Each manufacturer must submit to the Department a certification report for all of its basic models.

(i) For covered equipment that are subject to standards other than distribution transformers and electric motors, the certification report (for which a suggested format is set forth in appendix B of this subpart) shall include for each basic model the product type, product class, manufacturer's name, private labeler's name(s) (if applicable), and the manufacturer's model number(s), and:

(A) The thermal efficiency as a percentage and the maximum rated capacity (rated maximum input) in Btu/h of commercial warm air furnaces;

(B) The combustion efficiency as a percentage and the capacity (rated maximum input) in Btu/h of commercial package boilers;

(C) The seasonal energy efficiency ratio and the cooling capacity in Btu/h of small commercial, air cooled, three-phase, packaged air conditioners less than 65,000 Btu/h;

(D) The energy efficiency ratio and the cooling capacity in Btu/h of small commercial water-cooled and evaporatively cooled packaged air conditioners less than 65,000 Btu/h;

(E) The energy efficiency ratio and the cooling capacity in Btu/h of large and very large commercial air cooled, water-cooled, and evaporatively cooled packaged air conditioners;

(F) The energy efficiency ratio and the cooling capacity in Btu/h of packaged terminal air conditioners;

(G) The seasonal energy efficiency ratio, the heating seasonal performance factor and the cooling capacity in Btu/h of small commercial air cooled, three-phase packaged air conditioning heat pumps less than 65,000 Btu/h;

(H) The energy efficiency ratio, the coefficient of performance and the cooling capacity in Btu/h of small commercial water-source packaged air conditioning heat pumps;

(I) The energy efficiency ratio, the coefficient of performance and the cooling capacity in Btu/h of large and very large air cooled commercial package air conditioning heat pumps;

(J) The energy efficiency ratio, coefficient of performance and the cooling capacity in Btu/h of packaged terminal heat pumps;

(K) The maximum standby loss in percent per hour of electric storage water heaters;

(L) The minimum thermal efficiency in percent, the maximum standby loss in Btu/h, and the size (input capacity) in Btu/h of gas- and oil-fired storage water heaters;

(M) The minimum thermal efficiency in percent, maximum standby loss in Btu/h, and the size (storage capacity) in gallons of gas- and oil-fired instantaneous water heaters and gas- and oil-fired hot water supply boilers greater than or equal to 10 gallons;

(N) The minimum thermal efficiency in percent and the size (storage capacity) in gallons of gas- and oil-fired instantaneous water heaters and gas- and oil-fired hot water supply boilers less than 10 gallons;

(O) The minimum thermal insulation and the storage capacity of unfired hot water storage tanks;

(P) The maximum daily energy consumption in kilowatt hours per day and volume in cubic feet of refrigerators with solid doors, refrigerators with transparent doors, freezers with solid doors, and freezers with transparent doors;

(Q) The maximum daily energy consumption in kilowatt hours per day and adjusted volume in cubic feet of refrigerator-freezers with solid doors;

(R) The equipment type, type of cooling, maximum energy use in kilowatt hours per 100 pounds of ice, maximum condenser water use in gallons per 100 pounds of ice, and harvest rate in pounds of ice per 24 hours of commercial ice makers;

(S) The modified energy factor and water consumption factor of commercial clothes washers;

(T) The input power demand in watts of illuminated exit signs;

(U) The nominal and maximum wattage in watts and signal type of traffic signal modules and pedestrian modules; and

(V) The flow rate in gallons per minute of commercial prerinse spray valves.

(ii) For the least efficient basic model of distribution transformer within each ''kilovolt ampere (kVA) grouping'' for which this part prescribes an efficiency standard, the certification report (for which a suggested format is set forth in appendix C of this subpart shall include the kVA rating, the insulation type (*i.e.,* low-voltage dry-type, medium-voltage dry-type or liquid-immersed), the number of phases (*i.e.,* single-phase or three-phase), the basic impulse insulation level (BIL) group rating (for medium-voltage dry-types), the model number(s), the efficiency, and the method used to determine the efficiency (*i.e.,* actual testing or an AEDM). As used in this section, a ''kVA grouping''

is a group of basic models which all have the same kVA rating, have the same insulation type (*i.e.,* low-voltage dry-type, medium-voltage dry-type or liquid-immersed), have the same number of phases (*i.e.,* single-phase or three-phase), and, for medium-voltage dry-types, have the same BIL group rating (*i.e.,* 20–45 kV BIL, 46–95 kV BIL or greater than 96 kV BIL).

(7) Copies of reports to the Federal Trade Commission that include the information specified in paragraph (a)(6) of this section could serve in lieu of the certification report.

(b) *Model Modifications.* Any change to a basic model that affects energy or water consumption (in the case of prerinse spray valves) constitutes the addition of a new basic model. If such a change reduces consumption, the new model shall be considered in compliance with the standard without any additional testing. If, however, such a change increases consumption while meeting the standard, then

(1) For distribution transformers, the manufacturer must submit all information required by paragraph (a)(6)(ii) of this section for the new basic model, unless the manufacturer has previously submitted to the Department a certification report for a basic model of distribution transformer that is in the same kVA grouping as the new basic model, and that has a lower efficiency than the new basic model;

(2) For other equipment, the manufacturer must submit all information required by paragraph (a)(6) of this section for the new basic model; and

(3) Any such submission shall be by certified mail, to: Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–0121, or e-mailed to the Department at: *certification.report@ee.doe.gov.*

(c) *Discontinued model.* For equipment other than distribution transformers, when production of a basic model has ceased and is no longer being distributed, the manufacturer shall report this, by certified mail, to: U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121, or e-mailed to the Department at: *certification.report@ee.doe.gov.* For each basic model, the report shall include: equipment type, equipment class, the manufacturer's name, the private labeler's name(s), if applicable, and the manufacturer's model number. If the reporting of discontinued models coincides with the submittal of a certification report, such information can be included in the certification report.

(d) *Third-party representation.* A manufacturer or private labeler may elect to use a third party (such as a trade association or other authorized representative) to submit the certification report to the Department. Such certification reports shall include all the information specified in paragraph (a)(6) of this section. Third parties submitting certification reports shall include the names of the manufacturers or private labelers who authorized the submittal of the certification reports to the Department on their behalf. The third-party representative also may submit discontinued model information on behalf of an authorizing manufacturer.

§ 431.372 Sampling.

For purposes of a certification of compliance, the determination that a basic model complies with the applicable energy conservation standard or water conservation standard shall be based upon the testing and sampling procedures, and other applicable rating procedures set forth in this part. For purposes of a certification of compliance, the determination that a basic model complies with the applicable design standard shall be based on the incorporation of specific design requirements specified in this part.

§ 431.373 Enforcement.

For covered equipment other than electric motors, this section sets forth procedures the Department will follow in pursuing alleged non-compliance with an applicable energy or water conservation standard. Paragraph (c) of this section applies to all such covered equipment, paragraphs (a)(1) and (a)(2) of this section apply to all such equipment except for distribution transformers and commercial heating, ventilating, and air conditioning equipment and commercial water heating equipment.

(a) *Performance standards*—(1) *Test notice.* Upon receiving information in writing concerning the energy performance or water performance (in the case of commercial prerinse spray valves) of a particular covered equipment sold by a particular manufacturer or private labeler, which indicates that the covered equipment may not be in compliance with the applicable energy- or water-performance standard, the Secretary may conduct a review of the test records. The Secretary may then conduct enforcement testing of that equipment by means of a test notice addressed to the manufacturer or private labeler in accordance with the following requirements:

(i) The test notice procedure will only be followed after the Secretary or his/her designated representative has examined the underlying test data (or, where appropriate, data about the use of an alternative efficiency determination method (AEDM)) provided by the manufacturer, and after the manufacturer has been offered the opportunity to meet with the Department to verify compliance with the applicable energy conservation standard or water conservation standard. When compliance of a basic model was certified based on an AEDM, the Department has the discretion to pursue other steps provided under this part for verifying the AEDM before invoking the test notice procedure. A representative designated by the Secretary must be permitted to observe any reverification procedures undertaken according to this subpart, and to inspect the results of such reverification.

(ii) The test notice will be signed by the Secretary or his/her designee and will be mailed or delivered by the Department to the plant manager or other responsible official designated by the manufacturer.

(iii) The test notice will specify the model or basic model to be selected for testing, the number of units to be tested, the method for selecting these units, the date and time at which testing is to begin, the date when testing is scheduled to be completed, and the facility at which testing will be conducted. The test notice may also provide for situations in which the selected basic model is unavailable for testing, and it may include alternative basic models. For equipment that this part allows to be rated by use of an AEDM, the specified basic model may be one that the manufacturer has rated by actual testing or that it has rated by the use of an AEDM.

(iv) The Secretary may require in the test notice that the manufacturer of a covered equipment shall ship at his expense a reasonable number of units of each basic model specified in the test notice to a testing laboratory designated by the Secretary. The number of units of a basic model specified in a test notice shall not exceed 20.

(v) Within five working days of the time the units are selected, the manufacturer must ship the specified test units of a basic model to the designated testing laboratory.

(2) *Testing laboratory.* Whenever the Department conducts enforcement

testing at a designated laboratory in accordance with a test notice under this section, the resulting test data shall constitute official test data for that basic model. The Department will use such test data to make a determination of compliance or noncompliance.

(3) *Sampling.* The Secretary will base the determination of whether a manufacturer's basic model complies with the applicable energy- or water-performance standard on testing conducted in accordance with the applicable test procedures specified in this part, and with the following statistical sampling procedures:

(i) For commercial prerinse spray valves, illuminated exit signs, traffic signal modules and pedestrian modules, refrigerated bottled or canned vending machines, and commercial clothes washers, the methods are described in appendix B to subpart F of part 430 (Sampling Plan for Enforcement Testing).

(ii) For automatic commercial ice makers, as well as commercial refrigerators, freezers, and refrigerators-freezers, the methods are described in appendix C to subpart T of part 431 and include the following provisions:

(A) Except as required or provided in paragraphs (a)(3)(ii)(B) and (a)(3)(ii)(C) of this section, initially, the Department will test two units.

(B) Except as provided in paragraph (a)(3)(ii)(C) of this section, if fewer than two units of basic model are available for testing when the manufacturer receives the test notice, then:

(*1*) If only one unit of a basic model is available for testing, the Department will test that unit, and will base the compliance determination on the results for that unit in a manner otherwise in accordance with this section. Available units are those, which are available for commercial distribution within the United States.

(*2*) If a basic model is very large or has unusual testing requirements, the Department may decide to base the determination of compliance on the testing of one unit, if the manufacturer so requests and provides sufficient justification for the request.

(*i*) The available unit(s) and one or more of the other units that subsequently become available (up to a maximum of four); or

(*ii*) Up to four of the other units that subsequently become available.

(C) Notwithstanding paragraphs (a)(3)(ii)(A) and (a)(3)(ii)(B) of this section, if testing of the available or subsequently available units of a basic model would be impractical, as for example when a basic model is very large, has unusual testing requirements, or has limited production, the Department may in its discretion decide to base the determination of compliance on the testing of fewer than the available number of units, if the manufacturer so requests and demonstrates that the criteria of this paragraph are met.

(iii) For commercial HVAC and WH products, the methods are described in appendix C to subpart T of part 431 and include the following provisions:

(A) Except as required or provided in paragraphs (a)(3)(iii)(B) and (a)(3)(iii)(C) of this section, initially, the Department will test two units.

(B) Except as provided in paragraph (a)(3)(iii)(C) of this section, if fewer than two units of basic model are available for testing when the manufacturer receives the test notice, then:

(*1*) The Department will test the available unit(s); or

(*2*) If one or more other units of the basic model are expected to become available within six months, the Department may instead at its discretion, test either:

(*i*) The available unit(s) and one or more of the other units that subsequently become available (up to a maximum of four); or

(*ii*) Up to four of the other units that subsequently become available.

(C) Notwithstanding paragraphs (a)(3)(iii)(A) and (a)(3)(iii)(B) of this section, if testing of the available or subsequently available units of a basic model would be impractical, as for example when a basic model is very large, has unusual testing requirements, or has limited production, the Department may in its discretion decide to base the determination of compliance on the testing of fewer than the available number of units, if the manufacturer so requests and demonstrates that the criteria of this paragraph are met.

(iv) For the purposes of paragraphs (a)(3)(ii)(A) through (a)(3)(ii)(C) and (a)(3)(iii)(A) through (a)(3)(iii)(C) of this section, when it tests three or fewer units, the Department will base the compliance determination on the results of such testing in a manner otherwise in accordance with this section.

(v) For the purposes of paragraphs (a)(3)(ii)(A) through (a)(3)(ii)(C) and (a)(3)(iii)(A) through (a)(3)(iii)(C) of this section, available units are those that are available for commercial distribution within the United States.

(4) *Test unit selection.* (i) For commercial prerinse spray valves, illuminated exit signs, traffic signal modules and pedestrian modules, refrigerated bottled or canned vending machines, and commercial clothes washers, the following applies:

(A) The Department shall select a batch, a batch sample, and test units from the batch sample in accordance with the following provisions of this paragraph and the conditions specified in the test notice.

(B) The batch may be subdivided by the Department using criteria specified in the test notice.

(C) The Department will then randomly select a batch sample of up to 20 units from one or more subdivided groups within the batch. The manufacturer shall keep on hand all units in the batch sample until the basic model is determined to be in compliance or non-compliance.

(D) The Department will randomly select individual test units comprising the test sample from the batch sample.

(E) All random selection shall be achieved by sequentially numbering all of the units in a batch sample and then using a table of random numbers to select the units to be tested.

(ii) For automatic commercial ice makers, as well as commercial refrigerators, freezers, and refrigerator-freezers, the following applies:

(A) The Department will select a batch from all available units, and a test sample (*i.e.,* the units to be tested) from the batch, in accordance with the provisions of this paragraph and the conditions specified in the test notice.

(B) The Department may select the batch by utilizing the criteria specified in the test notice (date of manufacture, component-supplier, location of manufacturing facility, or other criteria) which may differentiate one unit from another within a basic model.

(C) The Department will randomly select individual units to be tested, comprising the test sample, from the batch. The Department will achieve random selection by sequentially numbering all of the units in a batch and then using a table of random numbers to select the units to be tested. The manufacturer must keep on hand all units in the batch until such time as the inspector determines that the unit(s) selected for testing is (are) operative. Thereafter, once a manufacturer distributes or otherwise disposes of any unit in the batch, it may no longer claim under paragraph (a)(5)(iii) of this section that a unit selected for testing is defective due to a manufacturing defect or failure to operate in accordance with its design and operating instructions.

(5) *Test unit preparation.* (i) Before and during the testing, a test unit selected in accordance with paragraph (a)(4) of this section shall not be prepared, modified, or adjusted in any manner unless such preparation, modification, or adjustment is allowed

by the applicable Department test procedure. The Department will test each unit in accordance with the applicable test procedures.

(ii) No one may perform any quality control, testing, or assembly procedures on a test unit, or any parts and subassemblies thereof, that is not performed during the production and assembly of all other units included in the basic model.

(iii) A test unit shall be considered defective if it is inoperative. A test unit is also defective if it is found to be in noncompliance due to a manufacturing defect or due to failure of the unit to operate according to the manufacturer's design and operating instructions, and the manufacturer demonstrates by statistically valid means that, with respect to such defect or failure, the unit is not representative of the population of production units from which it is obtained. Defective units, including those damaged due to shipping or handling, must be reported immediately to the Department. The Department will authorize testing of an additional unit on a case-by-case basis.

(6) *Testing at manufacturer's option.* (i) If the Department determines a basic model to be in noncompliance with the applicable energy performance standard or water performance standard at the conclusion of its initial enforcement sampling plan testing, the manufacturer may request that the Department conduct additional testing of the basic model. Additional testing under this paragraph must be in accordance with the applicable test procedure, and:

(A) For commercial prerinse spray valves, illuminated exit signs, traffic signal modules and pedestrian modules, refrigerated bottled or canned vending machines, and commercial clothes washers, the applicable provisions in appendix B to subpart F of part 430;

(B) For automatic commercial ice makers, as well as commercial refrigerators, freezers, and refrigerator-freezers, the applicable provisions in appendix C of this subpart, and limited to a maximum of six additional units of basic model.

(ii) All units tested under this paragraph shall be selected and tested in accordance with paragraphs (a)(1)(v), (a)(2), (a)(4), and (a)(5) of this section.

(iii) The manufacturer shall bear the cost of all testing under this paragraph.

(iv) The Department will advise the manufacturer of the method for selecting the additional units for testing, the date and time at which testing is to begin, the date by which testing is scheduled to be completed, and the facility at which the testing will occur.

(v) The manufacturer shall cease distribution of the basic model tested under the provisions of this paragraph from the time the manufacturer elects to exercise the option provided in this paragraph until the basic model is determined to be in compliance. The Department may seek civil penalties for all units distributed during such period.

(vi) If the additional testing results in a determination of compliance, the Department will issue a notice of allowance to resume distribution.

(b) *Design standard.* In the case of a design standard, the Department can determine that a model is noncompliant after the Department has examined the underlying design information from the manufacturer and has offered the manufacturer the opportunity to verify compliance with the applicable design standard.

(c) *Cessation of distribution of a basic model of commercial equipment other than electric motors.* (1) In the event the Department determines, in accordance with enforcement provisions set forth in this subpart, a model of covered equipment is noncompliant, or if a manufacturer or private labeler determines one of its models to be in noncompliance, the manufacturer or private labeler shall:

(i) Immediately cease distribution in commerce of all units of the basic model in question;

(ii) Give immediate written notification of the determination of noncompliance to all persons to whom the manufacturer has distributed units of the basic model manufactured since the date of the last determination of compliance; and

(iii) If requested by the Secretary, provide the Department within 30 days of the request, records, reports and other documentation pertaining to the acquisition, ordering, storage, shipment, or sale of a basic model determined to be in noncompliance.

(2) The manufacturer may modify the noncompliant basic model in such manner as to make it comply with the applicable performance standard. The manufacturer or private labeler must treat such a modified basic model as a new basic model and certify it in accordance with the provisions of this subpart. In addition to satisfying all requirements of this subpart, the manufacturer must also maintain records that demonstrate that modifications have been made to all units of the new basic model before its distribution in commerce.

(3) If a manufacturer or private labeler has a basic model that is not properly certified in accordance with the requirements of this subpart, the Secretary may seek, among other remedies, injunctive action to prohibit distribution in commerce of the basic model.

Appendix A to Subpart T of Part 431—Compliance Statement for Certain Commercial Equipment

Equipment Type:

_____

Manufacturer's or Private Labeler's Name and Address:

_____

_____

[Company name] (''the company'') submits this Compliance Statement under 10 CFR Part 431 (Energy Efficiency Program for Certain Commercial and Industrial Equipment) and Part C of the Energy Policy and Conservation Act (Pub. L. 94–163), and amendments thereto. I am signing this on behalf of and as a responsible official of the company. All basic models of commercial or industrial equipment subject to energy conservation standards specified in 10 CFR part 431 that this company manufacturers comply with the applicable energy or water conservation standard(s). We have complied with the applicable testing requirements (prescribed in 10 CFR part 431) in making this determination, and in determining the energy efficiency, energy use, or water use that is set forth in any accompanying Certification Report. All information in such Certification Report(s) and in this Compliance Statement is true, accurate, and complete. The company pledges that all this information in any future Compliance Statement(s) and Certification Report(s) will meet these standards, and that the company will comply with the energy conservation requirements in 10 CFR part 431 with regard to any new basic model it distributes in the future. The company is aware of the penalties associated with violations of the Act and the regulations there under, and is also aware of the provisions contained in 18 U.S.C. 1001, which prohibits knowingly making false statements to the Federal Government.

Name of Company Official: _____

Signature of Company Official:

_____

Title: _____

Firm or Organization: _____

Date: _____

Name of Person to Contact for Further Information: _____

Address: _____

_____

Telephone Number: _____

Facsimile Number: _____

Third-Party Representation (if applicable)

For a certification report prepared and submitted by a third-party organization under the provisions of 10 CFR part 431, the company official who authorized said third-party representation is:

Name: _____

Title: _____

Address: _____

_____

_____

Telephone Number: _____

Facsimile Number: _____

The third-party organization authorized to act as representative:
Third-Party Organization: _____
Address: _____
_____
Telephone Number: _____
Facsimile Number: _____

The Compliance Statement needs to be resubmitted if information on the form changes.

Appendix B to Subpart T of Part 431—Certification Report for Certain Commercial Equipment

All information reported in this Certification Report(s) is true, accurate, and complete. The company is aware of the penalties associated with violations of the Act, the regulations hereunder, and is also aware of the provisions contained in 18 U.S.C. 1001, which prohibits knowingly making false statements to the Federal Government.

Name of Company Official or Third-Party Representative: _____
Signature of Company Official or Third-Party Representative:
_____
Title: _____
Date: _____
Equipment Type: _____
Manufacturer: _____
Private Labeler (if applicable): _____
Name of Person to Contact for Further Information: _____
Address: _____
_____
Telephone Number: _____
Facsimile Number: _____
For Existing, New, or Modified Models: [1]
For Discontinued Models: [2]

Submit by Certified Mail to: U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, Mailstop EE–2J, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–0121.

Submit by E-mail to: *certification.report@ee.doe.gov.*

Appendix C to Subpart T of Part 431—Certification Report for Distribution Transformers

All information reported in this Certification Report(s) is true, accurate, and complete. The company is aware of the penalties associated with violations of the Act, the regulations thereunder, and is also aware of the provisions contained in 18 U.S.C. 1001, which prohibits knowingly making false statements to the Federal Government.

Name of Company Official or Third-Party Representative: _____
Signature of Company Official or Third-Party Representative: _____
_____
Title: _____
Date: _____
Equipment Type: _____
Manufacturer: _____
Private Labeler (if applicable): _____
Name of Person to Contact for Further Information: _____
Address: _____
_____
Telephone Number: _____
Facsimile Number: _____

For Existing, New, or Modified Models: [1]

Prepare tables that will list distribution transformer efficiencies. Each table should have a heading that provides the name of the manufacturer, as well as the type of transformer (*i.e.,* low-voltage dry-type, liquid-immersed, or medium-voltage dry-type) and the number of phases for the transformers reported in that table. Each table should also have five columns, labeled ''kVA rating,'' ''BIL rating'' for medium-voltage units, ''Least efficient basic model (model number(s)),'' ''Efficiency (%)'' and ''Test Method Used.'' Each table should have one row for each of the kVA groups that are produced by the manufacturer and that are subject to minimum efficiency standards. In the ''Test Method Used'' column, the manufacturer should report whether the efficiency of the reported least efficient basic model in that kVA grouping was determined by testing or through the application of an alternative efficiency determination method.

Submit by Certified Mail to: U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, Mailstop EE–2J), Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–0121.

Submit by E-mail to: *certification.report@ee.doe.gov.*

Appendix D to Subpart T of Part 431—Enforcement for Performance Standards; Compliance Determination Procedure for Certain Commercial Equipment

The Department will determine compliance as follows:

(a) The first sample size (n_1) must be four or more units, except as provided by § 431.373(a)(3).

(b) Compute the mean of the measured energy performance (x_1) for all tests as follows:

$$x_1 = \frac{1}{n_1}\left(\sum_{i=1}^{n_1} x_i\right) \qquad [1]$$

where x_i is the measured energy efficiency or consumption from test i, and n_1 is the total number of tests.

(c) Compute the standard deviation (s_1) of the measured energy performance from the n_1 tests as follows:

$$s_1 = \sqrt{\frac{\sum_{i=1}^{n_1}(x_i - x_1)^2}{n_1 - 1}} \qquad [2]$$

(d) Compute the standard error (s_{x1}) of the measured energy performance from the n_1 tests as follows:

$$s_{x_1} = \frac{s_1}{\sqrt{n_1}} \qquad [3]$$

(e)(1) For an energy efficiency standard, compute the lower control limit (LCL_1) according to:

$$LCL_1 = EPS - ts_{x_1} \qquad [4a]$$

or

$$LCL_1 = 95.0EPS, \text{ (whichever is greater).} \qquad [4b]$$

(2) For an energy use standard, compute the upper control limit (UCL1) according to:

$$UCL_1 = EPS + ts_{x_1} \qquad [5a]$$

or

$$UCL_1 = 1.05EPS, \text{ (whichever is less),} \qquad [5b]$$

where EPS is the energy performance standard and t is a statistic based on a 97.5 percent, one-sided confidence limit and a sample size of n_1.

(f)(1) Compare the sample mean to the control limit. The basic model is in compliance and testing is at an end if, for an energy efficiency standard, the sample mean is equal to or greater than the lower control limit or, for an energy consumption standard, the sample mean is equal to or less than the upper control limit. If, for an energy efficiency standard, the sample mean is less than the lower control limit or, for an energy

[1] Provide specific equipment information for each basic model required in 431.371(a)(6)(i), including the product class and manufacturer's model number(s).

[2] Provide manufacturer's model number(s).

consumption standard, the sample mean is greater than the upper control limit, compliance has not been demonstrated. Unless the manufacturer requests manufacturer-option testing and provides the additional units for such testing, the basic model is in noncompliance and the testing is at an end.

(2) If the manufacturer does request additional testing, and provides the necessary additional units, the Department will test each unit the same number of times it tested previous units. The Department will then compute a combined sample mean, standard deviation, and standard error as described above. (The ''combined sample'' refers to the units the Department initially tested plus the additional units the Department has tested at the manufacturer's request.) The Department will determine compliance or noncompliance from the mean and the new lower or upper control limit of the combined sample. If, for an energy efficiency standard, the combined sample mean is equal to or greater than the new lower control limit or, for an energy consumption standard, the sample mean is equal to or less than the upper control limit, the basic model is in compliance, and testing is at an end. If the combined sample mean does not satisfy one of these two conditions, the basic model is in noncompliance and the testing is at an end.

■ 15. Section 431.403 is amended by removing the word ''and'' at the end of paragraph (a)(2); removing the period at the end of paragraph (a)(3) and adding a semicolon in its place; and adding new paragraphs (a)(4) and (a)(5) to read as follows:

§ 431.403 Maintenance of records.

(a) * * *

(4) For commercial HVAC and WH products, the test data for all testing conducted pursuant to 10 CFR part 431, including any testing conducted by a VICP; and

(5) For commercial HVAC and WH products, the development, substantiation, application, and subsequent verification of any AEDM.

* * * * *

■ 16. Section 431.408 is added to subpart V to read as follows:

§ 431.408 Preemption of State regulations for covered equipment other than electric motors and commercial heating, ventilating, air-conditioning and water heating products.

This section concerns State regulations providing for any energy conservation standard, or water conservation standard (in the case of commercial prerinse spray valves or commercial clothes washers), or other requirement with respect to the energy efficiency, energy use, or water use (in the case of commercial prerinse spray valves or commercial clothes washers), for any covered equipment other than an electric motor or commercial HVAC and WH product. Any such regulation that contains a standard or requirement that is not identical to a Federal standard in effect under this subpart is preempted by that standard, except as provided for in sections 327(b) and (c) and 345(e), (f) and (g) of the Act.

[FR Doc. E9–30887 Filed 1–4–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[Docket Nos. EE–RM/TP–99–450 and EE–RM/TP–05–500]

RINs 1904–AA96 and 1904–AB53

Proposed Information Collection; Comment Request; Certification, Compliance, and Enforcement Requirements for Consumer Products and Certain Commercial and Industrial Equipment

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

ACTION: Notice.

SUMMARY: The U.S. Department of Energy (DOE), 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 the proposed information collection described in this notice, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before March 8, 2010.

ADDRESSES: Direct all written comments to Ever Crutchfield or Christina Rouleau, Information Management (IM–23), U.S. Department of Energy, Room 4002/4003, 19901 Germantown Rd., Germantown, MD 20874 (or via the Internet at *Ever.Crutchfield@hq.doe.gov* or *Christina.Rouleau@hq.doe.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Michael McCabe, (202) 586–9155 or *Michael.McCabe@ee.doe.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Energy Policy and Conservation Act (EPCA) establishes energy and water conservation standards and test procedures for consumer products and certain commercial and industrial equipment. The Energy Policy Act of 1992 (EPACT 1992) and the Energy Policy Act of 2005 (EPACT 2005) amended EPCA and included new standards and test procedures for additional consumer products and commercial and industrial equipment. DOE is developing regulations to implement reporting requirements for energy conservation standards and energy use reporting, and to address other matters including compliance certification, prohibited actions, and enforcement procedures for the commercial and industrial equipment covered by EPACT 2005, as well as the commercial heating, air-conditioning, and water heating equipment covered under EPACT 1992. DOE is also developing provisions for manufacturer certification for distribution transformers. See 64 FR 69598 (December 13, 1999); 71 FR 25103 (April 28, 2006); and 71 FR 42178 (July 25, 2006).

The information that would be required by these regulations, if finalized, and that is the subject of this proposed collection of information, would be submitted by manufacturers to certify compliance with energy and water efficiency standards established by DOE. DOE would also use the information to determine whether an enforcement action is warranted.

II. Method of Collection

Respondents have a choice of either electronic or paper forms. Methods of submittal include e-mail of electronic forms, and mail and facsimile transmission of paper forms.

III. Data

OMB Control Number: To be determined.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Manufacturers of consumer products and commercial and industrial equipment covered by the rulemakings discussed above.

Estimated Number of Respondents: 204.

Estimated Time per Response: Certification reports and compliance statements, 16 hours.

Estimated Total Annual Burden Hours: 3,264.00.

Estimated Total Annual Cost to Public: $244,800.00 in recordkeeping/reporting costs.

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.

Issued in Washington, DC, on December 3, 2009.

Cathy Zoi,

Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. E9–30886 Filed 1–4–10; 8:45 am]

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Federal Register

Tuesday,
January 5, 2010

Part VI

Federal Housing Finance Board

12 CFR Parts 925 and 944

Federal Housing Finance Agency

12 CFR Parts 1263 and 1290

Federal Home Loan Bank Membership for Community Development Financial Institutions; Final Rule

FEDERAL HOUSING FINANCE BOARD

12 CFR Parts 925 and 944

FEDERAL HOUSING FINANCE AGENCY

12 CFR Parts 1263 and 1290

RIN 2590–AA18

Federal Home Loan Bank Membership for Community Development Financial Institutions

AGENCIES: Federal Housing Finance Board and Federal Housing Finance Agency.

ACTION: Final rule.

SUMMARY: The Federal Housing Finance Agency (FHFA) is amending its membership regulations to implement provisions of the Housing and Economic Recovery Act of 2008 (HERA) that authorized community development financial institutions (CDFIs) that have been certified by the CDFI Fund of the U.S. Treasury Department (CDFI Fund) to become members of a Federal Home Loan Bank (Bank). The newly-eligible CDFIs include community development loan funds, venture capital funds, and State-chartered credit unions without Federal insurance. This final rule sets out the eligibility and procedural requirements that will enable CDFIs to become members of a Bank and relocates part 925 in its entirety to part 1263. FHFA also is amending its community support regulations to provide that certified CDFIs may be presumed to be in compliance with the statutory community support requirements by virtue of their certification by the CDFI Fund and relocates part 944 in its entirety to part 1290.

DATES: This rule is effective February 4, 2010.

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SUPPLEMENTARY INFORMATION:

I. Background

A. Regulatory History

On May 15, 2009, FHFA published a proposed rule to implement the provisions of HERA authorizing CDFIs to become members of the Banks. 74 FR 22848 (May 15, 2009). FHFA received 79 comment letters on the proposed rule, most of which were generally supportive of the proposal, and many of which recommended ways in which the regulation could be amended to better achieve its objectives. FHFA received comment letters from the Banks, numerous CDFIs, trade associations, and other community organizations. The key substantive issues raised by the comment letters focused principally on the criteria that FHFA had proposed for the Banks to use in evaluating the financial condition of CDFIs applying for membership. In this final rule, FHFA has incorporated certain revisions suggested by commenters, but in other respects retains the substance of the proposed rule.

B. HERA Amendments

On July 30, 2008, HERA, Public Law 110–289, 122 Stat. 2654 (2008), became law and created FHFA as an independent agency of the Federal government. Among other things, HERA transferred to FHFA the supervisory and oversight responsibilities over the Banks that formerly had been vested in the now abolished Federal Housing Finance Board (Finance Board). The Banks continue to operate under regulations promulgated by Finance Board until such time as the existing regulations are supplanted by regulations promulgated by FHFA. Section 1206 of HERA also amended section 4(a) of the Bank Act, 12 U.S.C. 1424(a), which relates to Bank membership, by expressly authorizing certified CDFIs to become members.

C. CDFIs

CDFIs are private institutions that provide financial services dedicated to economic development and community revitalization in underserved markets. The CDFIs may be organized as nonprofit or for-profit entities and comprise diverse institutional structures and business lines. The four categories of institutions eligible for CDFI certification and CDFI Fund financial support are: (1) Federally regulated insured depository institutions and their holding companies; (2) credit unions, whether federally or State-chartered; (3) community development loan funds, which are unregulated institutions specializing in financing of housing, businesses or community facilities that provide health care, childcare, educational, cultural, or social services; and (4) community development venture capital funds, which are unregulated institutions that provide equity and debt-with-equity-features to small and medium-sized businesses in distressed communities.

The CDFIs serve as intermediary financial institutions that promote economic growth and stability in low- and moderate-income communities. They provide a unique range of financial products and services, such as mortgage financing for low-income and first-time homebuyers; homeowner or homebuyer counseling; financing for not-for-profit affordable housing developers; flexible underwriting and risk capital for needed community facilities; financial literacy training; technical assistance; and commercial loans and investments to assist start-up businesses in low-income areas. Frequently, CDFIs serve communities that are underserved by conventional financial institutions and may offer products and services that are not available from conventional financial institutions. Although CDFIs are generally small in asset size, studies have demonstrated that CDFIs can have meaningful positive effects on the low-and-moderate income communities that they serve. One common problem facing non-depository CDFIs, however, is that they do not have access to long-term funding, which may limit their ability to provide housing finance to their communities.

The CDFI Fund of the US Treasury was created to promote economic revitalization and community development through investment in and financial and technical assistance to CDFIs. *See* 12 U.S.C. 4701(b). The CDFI Fund promotes these purposes through several programs, including the CDFI Program, the New Markets Tax Credit Program, the Bank Enterprise Award Program, and Native American Initiatives. *See* 12 U.S.C. 4701 *et seq.* and 12 CFR part 1805. An institution can obtain access to those resources by becoming certified by the CDFI Fund and then applying to the CDFI Fund to receive awards that are available under its programs. *See* 12 U.S.C. 4704 and 12 CFR 1805.200. In order to be certified as a CDFI, an institution must satisfy several statutory and regulatory requirements, including that it have a primary mission of promoting community development, that it provides development services in conjunction with equity investments or loans, and that it serves certain targeted areas or populations. The CDFI certification requirements are more fully elaborated in the statute and the CDFI

program regulations. *See* 12 U.S.C. 4702(5) and 12 CFR 1805.201. The CDFI Fund does not regulate the CDFIs that it certifies, nor does it evaluate their safety and soundness, either during the certification process or the awards application process. Thus, certification by the CDFI Fund does not represent a determination that a CDFI is in sound financial condition, although it does represent a determination by the CDFI fund that the entity satisfies the statutory requirements of being a CDFI. Indeed, the regulations of the CDFI Fund expressly state that certification does not constitute an opinion as to the financial viability of the certified CDFI or as to the likelihood that the CDFI will receive an award from the CDFI Fund. *See* 12 CFR 1805.201(a). If a period of time has passed since an organization became certified as a CDFI, the CDFI Fund may require the CDFI to attest that no events have occurred that would materially affect its strategic direction, mission or business operation, and thereby, its status as a CDFI, before it may receive an award from the CDFI Fund.

D. Membership Requirements

Each Bank is a cooperative institution that is owned by its members. Bank membership is limited to the several types of financial institutions listed in section 4(a)(1) of the Bank Act. Prior to HERA, section 4(a)(1) provided that any building and loan association, savings and loan association, cooperative bank, homestead association, insurance company, savings bank, or federally insured depository institution (including credit unions) was eligible to become a Bank member. Thus, prior to HERA a CDFI could not become a member of a Bank unless it was eligible for membership by virtue of being a federally insured bank, thrift or credit union. Section 1206 of HERA amended section 4(a)(1) to make all CDFIs that are certified by the CDFI Fund of the US Department of the Treasury under the Community Development Banking and Financial Institutions Act of 1994 (CDFI Act) eligible to become members of a Bank. *See* 12 U.S.C. 1424(a)(1) (as amended). As a result of the HERA amendments, any loan funds, venture capital funds, or State-chartered credit unions without Federal insurance that have been certified by the CDFI Fund are now eligible for Bank membership.

In order for any eligible institution to become a member of a Bank, however, it also must comply with certain additional criteria that are specified in section 4(a)(1) and (2) of the Bank Act. Specifically, section 4(a)(1) of the Bank Act requires each applicant to demonstrate that it: (a) Is duly organized under State or Federal law; (b) either is subject to inspection and regulation under banking or similar laws or is certified as a CDFI under the CDFI Act; and (c) makes such home mortgage loans as are, in the judgment of the Director, long-term loans. Those three statutory requirements apply to all types of institutions that are eligible for membership, including the newly-eligible CDFIs. In addition, section 4(a)(2) of the Bank Act requires that an applicant that is an insured depository institution must: (a) Have at least 10 percent of its total assets in residential mortgage loans (with certain limited exceptions); (b) be in sound financial condition such that a Bank may safely make advances to it; (c) have a character of management that is consistent with sound and economical home financing; and (d) have a home-financing policy that is consistent with sound and economical home financing. 12 U.S.C. 1424(a)(1) and (2).

Prior to HERA, the Finance Board had adopted detailed regulations governing the substantive and procedural requirements for institutions seeking to become members of a Bank. Those membership regulations applied the financial condition, character of management, and home financing policy requirements to insurance company applicants (in addition to depository institutions), and established a process for the review and approval of all applications for Bank membership. *See* 12 CFR part 925. The regulations included separate provisions governing the admission of depository institutions and insurance companies, respectively, recognizing that each type of institution operates under a different business model and a different regulatory regime. The regulations also included provisions dealing with several other matters, such as member stock purchase requirements, consolidation of Bank members, and withdrawal from Bank membership.

E. Proposed Rule

The proposed rule would have relocated the membership regulations of the Finance Board in their entirety from part 925 of the Finance Board regulations to part 1263 of the FHFA regulations, and also would have amended various provisions of the relocated regulations to implement the CDFI amendments. The proposed rule would have applied only to those CDFIs that had not been eligible for membership prior to HERA, such as loan funds, venture capital funds, and credit unions with State or private insurance. Federally insured depository institutions that also have been certified as CDFIs would be required to follow the membership regulations applicable to insured depository institutions generally, and could not become members under the CDFI provisions.

The key amendments to be made by the proposed rule related to how the Banks were to assess the financial condition of CDFI applicants. The proposed rule included two separate provisions relating to the financial condition of CDFI applicants. The first provision, which was set out in § 1263.11, applied only to CDFI credit unions, which are State-chartered credit unions that do not have National Credit Union Administration (NCUA) share insurance. The proposed rule would have required that the Banks assess the financial condition of all such CDFI credit unions under the same provisions that the Banks currently use in assessing the financial condition of NCUA-insured credit unions, which were eligible for Bank membership prior to HERA by virtue of their Federal share insurance. The second provision relating to financial condition was set out in § 1263.16(b) and applied to all other types of CDFI applicants. Those provisions were similar to the Finance Board's existing regulations relating to the financial condition of depository institution applicants, but were tailored to recognize the different structures and business models of the CDFIs. The proposed rule also included a number of conforming amendments, such as to the definitions and rebuttable presumptions, and sought comment on particular issues, such as whether CDFIs could take advantage of certain amendments made by HERA for the benefit of community financial institutions (CFIs) and whether the final rule should subject CDFIs to the existing community support requirements in the Finance Board regulations or to new requirements developed solely for CDFIs.

F. Differences

Section 1201 of HERA (codified at 12 U.S.C. 4513(f)) requires the Director of FHFA to consider the differences between the Federal Home Loan Mortgage Corporation (Freddie Mac) and the Federal National Mortgage Association (Fannie Mae) (collectively, the Enterprises) and the Banks with respect to the Banks' cooperative ownership structure, mission of providing liquidity to members, affordable housing and community development mission, capital structure, and joint and several liability, whenever promulgating regulations that affect the Banks. The Director may also consider

any other differences that are deemed appropriate. In preparing this final rule, the Director considered the differences between the Banks and the Enterprises as they relate to the above factors and determined that the rule is appropriate, particularly because this final rule implements a statutory provision that applies only to the Banks. *See* 12 U.S.C. 1424.

II. Summary of Comments

FHFA received 79 comment letters on the proposed rule. The preponderance of the comments came from the CDFI sector, which was represented by three national CDFI associations, a sign-on letter with 134 organizational signatures, and letters from nonprofit organizations and individuals. FHFA also received comments from nine Banks, three credit union associations, and two bank trade associations.

The comments from the CDFI sector were supportive of the general direction of the proposed rule but offered recommendations on specific membership standards, particularly those establishing thresholds for financial condition. Several commenters also recommended changes to current regulations as they relate to advances and collateral. The proposed rule sought to amend only the membership regulations and the community support regulations, and did not propose any revisions to the advances and collateral regulations. As a result, FHFA does not have the authority under the Administrative Procedure Act to amend those provisions as part of this rulemaking. To the extent that the collateral and advances regulations may need to be revised to better accommodate CDFI members, FHFA would undertake those changes as part of a separate rulemaking.

A number of commenters urged FHFA to establish a CDFI membership goal for each Bank, *i.e.,* require each Bank to admit a certain number of CDFIs as members each year, and requested that FHFA publicly release the number of CDFIs that become members, the amount of advances made to by CDFIs, and the reasons for the denial of any CDFI membership applications. At present, the number of members by type of institution is made available through the Federal Home Loan Banks' Combined Financial Report, and in the future, the number of CDFIs that become members each year should be included in the report for that year. FHFA also intends to release the number of CDFI members through its Public Use Data Base.

The final rule does not establish goals for CDFI membership. Whether any institution may become a member of a Bank depends on whether the institution has satisfied the statutory and regulatory requirements for membership. Because each application must be evaluated individually, FHFA does not believe that it is appropriate to establish membership goals, which suggest that CDFIs should be granted membership without regard to those requirements.

In a similar fashion, the final rule does not require the Banks to disclose the reasons for denying membership to a CDFI. Generally speaking, the Banks may deny an application only if an institution does not satisfy the statutory or regulatory requirements for membership, and the Banks do not disclose the reasons for the denial of individual applications. FHFA expects that the Banks will deny applications from CDFIs only in those circumstances, and further believes that releasing reasons for the denial of a membership application might result in reputational harm to the applicant with no public benefit. FHFA intends to monitor the Banks' implementation of the final rule, to ensure that they carry out the intent and spirit of the HERA amendments authorizing CDFIs to become members.

With respect to advances, neither FHFA nor the Banks track the use of member advances, and the final rule does not impose that requirement for advances made to CDFI members. With the exception of Community Investment Program Funds (12 U.S.C. 1430(i)), Bank advances to their members are not project-specific. As is the case with any member, the proceeds of advances are fungible and can be used by the CDFIs for overall asset-liability management, to enhance liquidity, and for other purposes.

Bank and depository institution commenters, in general, expressed concern that CDFI membership would compromise safe and sound lending practices and have an adverse financial impact on the Banks. Those concerns appear to be more closely related to risks of lending to a member, rather than to the key issue of this rulemaking, which relates to whether particular CDFIs have satisfied the statutory and regulatory requirements for membership. FHFA finds that these comments reflect a perception of risk that is not warranted by the performance of the CDFI sector or the asset size of these institutions.[1] The Banks are protected from the risks of doing business with their members through stock purchase requirements, sound underwriting, and collateral requirements. Moreover, CDFIs are small institutions. In 2008, the average size of a non-depository CDFI was $21,000,000, which suggests that, in the case of any single CDFI member the dollar amount of advances outstanding to that member is apt to be comparatively modest. Thus, even if a non-depository CDFI were to fail, the financial impact on a Bank would likely not be material. Notwithstanding those safety and soundness concerns, Congress has unambiguously spoken on the matter of CDFI membership and has determined that CDFIs that satisfy the requirements for membership are entitled to become Bank members. FHFA also is confident that CDFIs will bring added value to the Federal Home Loan Bank System (Bank System) consistent with the Banks' mission and without compromising their safety and soundness and it expects the Banks to be proactive in educating themselves about the CDFIs' lines of business and risk profiles.

The commenters also raised a number of other issues relating to specific provisions of the proposed rule. To the extent that FHFA either adopts revisions in the final rule in response to those comments or declines to adopt comments that raised significant issues about the proposed rule, those matters are addressed below as part of the discussion about the individual sections of the final rule.

III. The Final Rule

A. General

The proposed rule would have relocated many provisions of the Finance Board's membership regulations without substantive changes. In the final rule, FHFA is adopting those provisions of the proposed rule without any further substantive changes. Thus, the provisions of the final rule that are located in Subpart B (Membership Application Process), Subpart D (Stock Requirements), Subpart E (Consolidations Involving Members), Subpart F (Withdrawal and Removal From Membership), Subpart G (Orderly Liquidation of Advances and Redemption of Stock), Subpart H (Reacquisition of Membership), Subpart I (Bank Access to Information) and Subpart J (Membership Insignia) are all

[1] *See* Social Funds Community Investment Center, ''Community Investing'' (*http://www.communityinvest.org/overview/index.cfm.* Accessed on 7/27/09). According to this study, between 2003 and 2005, loan loss ratios among CDFIs were less than one percent. Through their tax exempt status not-for-profit CDFIs can address risk through patient investments, equity capital, risk-sharing arrangements, charitable contributions and private investments.

unchanged from the proposed rule and the predecessor provisions of the Finance Board regulations, apart from certain technical or conforming changes. All of the substantive revisions to the membership regulations relating to CDFI membership were located in Subpart A (Definitions) and Subpart C (Eligibility Requirements) of the proposed rule, and that remains the case with respect to the final rule. Those revisions are described separately below.

B. Definitions—Subpart A

Section 1263.1—Definitions. The proposed rule would have carried over into part 1263 without substantive change to nearly all of the existing definitions from the Finance Board regulations, but would have revised certain definitions and added a number of new definitions to implement the statutory amendments regarding CDFI members. Except as described below, the final rule adopts the definitions from the proposed rule without further change.

Community development financial institution or CDFI (holding companies). Section 1263.1 of the proposed rule defined ''community development financial institution'' and ''CDFI'' to include any institution that is certified by the CDFI Fund of the US Department of the Treasury, but excluded any bank or savings association that is insured under the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*) or a credit union that is insured under the Federal Credit Union Act (12 U.S.C. 1751 *et seq.*). The proposal excluded federally insured depository institutions and credit unions because they already were eligible for membership under the pre-HERA law. The final rule retains those aspects of the proposed definition, and also adds a new provision relating to bank or savings and loan holding companies that have been certified as CDFIs. The proposal did not include CDFI holding companies among the entities eligible for membership under the HERA amendments, and sought comment on that issue. One holding company, that has been certified as a CDFI and that controls a depository institution that is a member of a Bank, favored allowing similarly situated holding companies to become members in addition to the membership of their depository institution subsidiaries. That view was endorsed by another commenter, but several other commenters opposed allowing a bank or savings and loan holding company to obtain its own membership via the CDFI provisions. As a matter of general policy, FHFA believes that the benefits of Bank membership are best conveyed through depository institutions that have direct relationships with the communities in which they do business, and has decided not to allow depository institution holding companies to become Bank members at this time. FHFA intends to monitor the implementation of the CDFI membership provisions and is open to reconsidering this issue at a later date. FHFA notes, however, that there may be certain practical impediments to any holding company becoming a member, in addition to its depository institution subsidiaries, because a holding company would have to purchase its own membership stock in the Bank, in addition to any Bank stock owned by its subsidiaries. Moreover, the additional membership for the holding company would not necessarily provide any additional borrowing capacity beyond that already available to the subsidiary depository institution because current law allows a member to borrow against collateral owned and pledged by an affiliate. In the final rule, the definition of CDFI has been revised to make clear that holding companies for depository institutions cannot obtain membership via the CDFI membership provisions.

Community financial institutions. The proposed rule also carried over without change from the Finance Board regulations the definition of ''community financial institution.'' The Bank Act defines CFIs as FDIC-insured members that have average total assets of $1 billion or less, as adjusted annually for inflation. Section 1211 of HERA amended the Bank Act to allow CFIs to obtain long-term advances for the purpose of funding ''community development activities'' and further allowed CFIs to pledge secured loans for ''community development activities'' as collateral for their advances. As HERA authorized CDFIs to become members and separately authorized CFIs to pledge community development collateral, the proposal requested comment on whether there was any basis in the legislative history to HERA that would allow FHFA to construe the new CFI provisions as applying to CDFIs as well as to CFIs. Commenters addressing this issue overwhelmingly favored allowing CDFI members to be deemed to be CFIs so they could take advantage of the HERA amendments relating to community development collateral for CFIs, although no commenters identified anything in the legislative history to support that view. In the absence of any such evidence of Congressional intent, FHFA must give effect to the language that Congress actually has used in the Bank Act. That language allows an institution to be designated as a CFI, and thus benefit from the expanded collateral available to CFIs, only if it has FDIC deposit insurance and also has total assets less than the statutory amount. Because none of the newly-eligible CDFIs are insured by the FDIC, they cannot be CFIs and thus cannot either pledge community development loans as collateral or obtain long-term advances to support community development purposes. Accordingly, the final rule does not change the existing definition of CFI.

FHFA did not propose any revisions to the definitions of ''home mortgage loan,'' ''long-term,'' ''manufactured housing,'' or ''residential mortgage loan.'' Nonetheless, a number of commenters suggested that FHFA amend each of those provisions in certain respects to bring them more in line with the business of CDFIs generally or with the business of the commenters. Those provisions are discussed separately below.

Home mortgage loan. Some commenters asked that FHFA expand the definition of ''home mortgage loan'' to include certain other types of loans, such as loans secured by second liens, community acquisition loans (loans made to manufactured home communities), or pre-development or construction bridge loans. The Bank Act defines both ''home mortgage'' and ''home mortgage loan'' and FHFA cannot adopt a regulation that would include loans that would be precluded by the statutory definitions. The Bank Act defines a ''home mortgage loan'' as a loan made by a member upon the security of a home mortgage. It further defines a ''home mortgage'' as a mortgage upon real estate (held either in fee simple or a leasehold) on which one or more homes is located, and includes first mortgages and other types of first liens commonly used in the State where the real estate is located. 12 U.S.C. 1422(4) and (5). FHFA believes, for purposes of meeting the Bank Act standard, that an applicant must make long-term mortgage loans the existing definition of ''home mortgage loan'' in § 1263.1 is sufficiently expansive to accommodate loans typically made by CDFIs. Such loans as loans on one-to-four family properties, multifamily properties, residential properties that are partially used for business or farm purposes, or interests in long-term mortgages and mortgage pass-through securities backed by such mortgages qualify as home mortgage loans. FHFA is confident that most CDFIs would be able to meet the home mortgage loan eligibility requirements in the Bank Act.

Because the statute requires a ''home mortgage'' to be a first mortgage or other type of first lien, which requirement has long been in the Finance Board regulations, a loan secured by a subordinate lien cannot qualify as a ''home mortgage loan.'' Similarly, if a pre-development loan or construction bridge loan is not secured by real estate, or is secured by real estate that has no homes on it, then those loans also could not qualify as ''home mortgage loans'' under the statute. Whether other types of loans identified by the commenters may constitute ''home mortgage loans'' is largely a question of whether the particular types of loans at issue satisfy the statutory requirements noted above. FHFA believes that this issue is more appropriately addressed on a case-by-case basis, rather than by revisions to the regulatory definitions. In each such case, however, the inquiry will be the same, *i.e.,* whether the loan at issue is secured by a mortgage instrument, whether that instrument creates a first lien on real estate, and whether there are one or more homes or other dwelling units on the real estate at the time the loan is made and the security interest is created. If each of those questions can be answered in the affirmative, then the particular types of loans made by a CDFI applicant could qualify as ''home mortgage loans.'' To the extent that issues may arise about whether a particular type of loan made or held by a CDFI applicant in fact qualifies as a home mortgage loan, FHFA staff can assist the Banks and CDFI applicants in resolving that question on a case-by-case basis.

Long-term. The proposed regulation retained the existing definition of ''long-term,'' which meant a term-to-maturity of five years or greater. Some CDFI commenters noted that many CDFIs make short-term pre-development or construction bridge loans and requested that the definition of ''long-term'' be changed to accommodate these loan types. The phrase ''long-term'' appears only in four provisions of the proposed rules, just two of which—§§ 1263.6(a)(3) and 1263.9—are relevant to CDFI applicants. In each of those cases, the phrase modifies the term ''home mortgage loan.'' As noted above, ''home mortgage loan'' is also defined by statute and requires that the loan be secured by a first lien on real estate on which a home is located. To the extent that the pre-development or construction bridge loans are unsecured or are secured by property that has no homes on it, those loans would not qualify as home mortgage loans under the Bank Act irrespective of their maturity. Accordingly, the final rule does not change the definition of ''long-term.''

Manufactured housing. The existing regulation defines ''manufactured housing'' to mean a manufactured home as defined in section 603 of the National Manufactured Housing Construction and Safety Standards Act of 1974. This provision establishes safety and quality standards for the housing units. Some commenters proposed expanding the definition of ''manufactured housing'' and the definitions of ''one-to-four family property'' and ''multifamily property'' in § 1263.1 to accommodate real property loans for such uses as resident-owned manufactured housing cooperatives in which the land is owned in common or rented, and, to include real estate loans used to finance community facilities, infrastructure, and access roads within a manufactured housing complex. FHFA finds that for purposes of meeting the requirement in § 1263.9, the existing definitions of ''home mortgage loans,'' ''multifamily property,'' and ''one-to-four family property'' in § 1263.1 are adequate to accommodate real property loans to manufactured housing complexes where the property is used for residential purposes and dwellings are located on the property. Therefore, no change to the definition is necessary.

Residential mortgage loan. Certain CDFI commenters asked that FHFA revise the definition of ''residential mortgage loan'' to expressly include loans made to manufactured housing communities. The term ''residential mortgage loan'' appears only in two provisions of the membership regulations—§§ 1263.6(b) and 1263.10—both of which relate to the statutory requirement that federally insured depository institutions must have at least 10 percent of their assets in residential mortgage loans in order to become a member of a Bank. That 10 percent requirement applies only to depository institutions and thus is not relevant for CDFI members. Because any amendments to this definition would have no effect on the newly-eligible CDFIs, the final rule does not amend that provision.

C. Eligibility Requirements—Subpart C

The proposed rule would have carried over into part 1263 all of the existing provisions from Subpart C of the Finance Board regulations, which established the various eligibility requirements for Bank membership. Subpart C is made up of 13 separate sections, and the proposed rule would have carried over six of those sections without any substantive changes. The final rule adopts each of those six sections without any substantive change. Those unchanged provisions are §§ 1263.8 (which relates to the inspection and regulation requirement, and includes a nonsubstantive conforming change to the existing language), 1263.10 (which requires depository institutions to have 10 percent of assets in residential mortgage loans), 1263.13 (which relates to an applicant's home financing policy), 1263.14 (which relates to applicants that are de novo depository institutions), 1263.15 (relating to applicants that have recently merged) and 1263.18 (relating to which Bank an applicant may join).

Although FHFA did not propose to amend any of those provisions, certain commenters raised questions about them or asked that they be revised in certain respects. For example, a number of commenters asked that CDFI applicants not be required to demonstrate that they have 10 percent of their assets in residential mortgage loans in order to become Bank members. The provisions about which those commenters expressed concern are §§ 1263.6(b) and 1263.10, both of which implement section 4(a)(2)(A) of the Bank Act, which requires federally insured depository institutions to have at least 10 percent of their assets in residential mortgage loans as a condition to becoming a Bank member. The proposed rule did not subject the newly-eligible CDFI applicants (which are not federally insured depository institutions) to the 10 percent requirement, nor does the final rule.

Certain other commenters asked that FHFA revise § 1263.14, which establishes special procedures for de novo insured depository institutions, so that newly organized CDFIs could also have the benefit of those procedures. FHFA declines to amend § 1263.14 to accommodate newly organized CDFI applicants because the requirements for obtaining a depository institution charter and Federal deposit insurance are considerably more rigorous than are the processes for obtaining certification from the CDFI Fund. A de novo depository institution typically is allowed to commence business and obtain deposit insurance only after one or more bank regulatory agencies have determined that the institution is adequately capitalized, has a sound business plan, capable management, and can operate in a safe and sound manner. There is no comparable regulatory review for CDFIs; indeed, the regulations of the CDFI Fund expressly state that CDFI certification does not represent an assessment that the entity is financially viable. 12 CFR 1805.201(a). In the absence of any such

independent financial evaluation of the CDFI applicants, FHFA does not believe that they should be included within the provisions for de novo depository institutions.

With respect to each of the seven other sections located within Subpart C, the proposed rule included some substantive revisions, all of which were intended to implement the HERA amendments. In the final rule, FHFA is adopting certain of those provisions as proposed, but is revising other provisions in response to comments received on the proposed rule. Each of those sections is described separately below.

Section 1263.6—General Eligibility Requirements. Section 1263.6 of the proposed rule closely followed the requirements of section 4(a) of the Bank Act, which established the eligibility requirements for Bank membership. 12 U.S.C. 1424(a). That statutory provision lists the types of entities that are eligible to apply for membership, and then establishes several requirements that each entity must satisfy in order to be approved for membership. Certain of those statutory requirements apply to all applicants. Those requirements are located at section 4(a)(1)(A) through (C) and require that an applicant: (1) Is duly organized under Federal or State law; (2) is subject to inspection and regulation under Federal or State banking laws, or is a certified CDFI; and (3) makes long-term home mortgage loans. The other statutory requirements apply only to federally insured depository institutions, although the Finance Board also had long applied them to insurance company applicants, based on its authority to oversee the Banks to ensure that they operate in a safe and sound manner and carry out their housing finance mission. *See* 12 CFR 925.6(a)(4) to (6). Those other statutory provisions are located at section 4(a)(2)(B) through (C) and require that an applicant: (1) Be in sound financial condition so that a Bank may safely make advances to it; and (2) have a character of management and a home financing policy that are consistent with sound and economical home financing. That Finance Board regulation also included a requirement that any applicant that is not an insured depository institution must have mortgage-related assets that reflect a commitment to housing finance, as determined by the Bank in its discretion. 12 CFR 925.6(c).

In § 1263.6 of the proposed rule, FHFA made only one substantive change to the Finance Board regulations, which was to add CDFIs to the list of entities that are eligible for membership. As a result, the proposed rule would have required CDFI applicants to comply with each of the three eligibility requirements imposed by section 4(a)(1) of the Bank Act, *i.e.,* duly organized, certified, and making home mortgage loans, as well as with the regulatory requirements relating to financial condition, character of management, and home financing policy. The proposed rule also retained the requirement that applicants that are not insured depository institutions must have mortgage-related assets that reflect a commitment to housing finance, and relocated it to § 1263.6(c). FHFA stated that it expected the Banks to assess the commitment to housing finance requirement in light of the unique community development orientation of CDFI applicants.

In the final rule, FHFA has retained the language of the proposed rule regarding the general eligibility requirements, but has also made certain further revisions in response to the comments. In paragraph (a), FHFA has added a clarifying parenthetical reference to CDFI credit unions. In paragraph (a)(1), FHFA has added a reference to ''Tribal law.'' Certain commenters had suggested this revision in order to allow CDFIs that are organized under the laws of Tribal governments to become members, which FHFA believes is permissible under the statute and is consistent with the intent of Congress. In paragraph (a)(2), FHFA has added a reference to certified CDFIs, to make clear that the ''inspection and regulation'' eligibility requirement does not apply to a CDFI applicant, which need only demonstrate that it has been certified by the CDFI Fund.

With respect to the requirement that applicants other than insured depository institutions must have mortgage-related assets that reflect a commitment to housing finance, FHFA is also retaining that provision in the final rule without change. The term ''mortgage-related assets'' is not defined, and FHFA believes that the term can be construed broadly in considering whether a CDFI applicant meets this requirement. Moreover, the regulations do not require that a CDFI applicant's assets be exclusively, or even predominantly, oriented to traditional housing finance. What is required is that the CDFI applicant has assets that, when viewed in the overall context of the applicant's business and how it provides products and services to its targeted markets, can be fairly said to support housing finance. Because CDFI applicants are apt to have asset profiles that differ from those that the Banks typically review, FHFA expects that the Banks will consider the assets of CDFI applicants in light of their unique products and mission. Thus, although a CDFI may be able to demonstrate its commitment to housing finance through traditional means, such as by originating mortgage loans or otherwise to supporting the development or acquisition of housing, it also may demonstrate its commitment through other means. Examples of such other means would include, but are not limited to, loans related to manufactured housing (regardless of whether the unit is deemed to be real estate), pre-development or construction loans for real estate that will become or include residential property, or loans secured by subordinated liens on residential real estate.

Section 1263.7—Duly Organized Requirement. Section 4(a)(1)(A) of the Bank Act requires an applicant to be duly organized under the laws of any State or of the United States. 12 U.S.C. 1424(a)(1)(A). The regulations of the Finance Board provided that an applicant would be deemed to be duly organized if it is chartered by a State or Federal agency as one of several types of entities eligible for Bank membership. In the proposed rule, FHFA retained the existing language from the Finance Board regulation and added new language providing that being incorporated under State law would be sufficient for a CDFI to demonstrate that it is duly organized. As noted in the prior section, several commenters asked that FHFA also allow CDFIs that are organized under Tribal law to be deemed to be duly organized, and the final rule includes an additional reference to Tribal law to clarify that a CDFI that is incorporated under State or Tribal law is deemed to satisfy the statutory requirement.

Section 1263.8—Subject to Inspection and Regulation Requirement. Section 4(a)(1)(B) of the Bank Act generally requires an applicant for membership to be subject to inspection and regulation under State or Federal banking or similar laws. In the case of a CDFI, the statute imposes an alternative requirement, which is that the applicant be certified by the CDFI Fund. *See* 12 U.S.C. 1424(a)(1)(B). The proposed rule simply carried over the language from the Finance Board regulations without any changes. Nonetheless, several commenters asked that the final rule make clear that a CDFI applicant is not subject to the inspection and regulation requirement because of the alternative requirement noted above. FHFA agrees that clarification of this issue is appropriate and has addressed that

matter in both the general eligibility provisions of § 1263.6(a)(2) of the final rule, which states that an applicant must be either subject to inspection and regulation by a regulatory agency or be certified as a CDFI by the CDFI Fund, and in § 1263.8, which states that a certified CDFI is not subject to the ''inspection and regulation'' requirement.

Section 1263.9—Makes Long-Term Mortgage Loans Requirement. As noted previously, section 4(a)(1)(C) of the Bank Act requires that every applicant for membership, including CDFIs, must make such home mortgage loans that the Director determines to be ''long-term loans.'' 12 U.S.C. 1424(a)(1)(C). The regulations of the Finance Board presumed that an applicant had satisfied that requirement if the regulatory reports that it filed with its regulator showed that it originates or purchases long-term home mortgage loans. Section 1263.9 of the proposed rule carried over the substance of the Finance Board regulation, with some modifications to accommodate CDFI applicants. Under that provision of the proposed rule, a CDFI applicant also would have been presumed to have satisfied that requirement if it provides to the Bank other documentation showing that the applicant originates or purchases long-term home mortgage loans.

In the final rule, FHFA is adopting this provision without change. Because certain commenters sought FHFA guidance on how the Banks are to apply this provision, as well as the other provisions relating to an applicant's home financing policy and its commitment to housing finance, FHFA is providing such guidance in this preamble. Although it is clear that a CDFI applicant must originate or purchase long-term home mortgage loans in order to become a member, the Bank Act and the implementing regulations do not set a minimum threshold for the amount of home mortgage loans that an applicant must make in order to satisfy that requirement. Similarly, neither the statute nor the regulations characterize this as an ongoing requirement for membership.

Given the differences between the business of a typical depository institution and that of a typical CDFI, the amount of home mortgage loans that a CDFI applicant originates or purchases will likely be considerably less than the amount that a similarly sized depository institution would originate or purchase. FHFA expects that in assessing a CDFI applicant's compliance with this ''makes long-term home mortgage loans'' requirement the Banks will view the extent to which the CDFI originates or purchases long-term home mortgage loans in light of their unique mission and community development orientation, and thus will deem such applicants to have satisfied this requirement if they in fact have originated or purchased home mortgage loans and can document that fact. Moreover, an applicant's compliance with this provision need be assessed only at the time that a CDFI applies for membership. This approach is consistent with how the Banks assess compliance with section 4(a)(2)(A) of the Bank Act, which requires certain insured depository institution applicants to have at least 10 percent of their assets in ''residential mortgage loans.''

In an earlier portion of this preamble FHFA discussed in some detail the definitions of the terms ''home mortgage loan'' and ''long-term'' as they are used in the context of the membership regulations. As discussed earlier, FHFA believes that for purposes of meeting the ''makes long-term home mortgage loans'' requirement the definition of home mortgage loans in § 1263.1 is sufficiently expansive to accommodate loans typically made by CDFIs, such as loans on one-to-four family properties, multifamily properties, residential properties with business components, interests in long-term mortgages, and mortgage pass-through securities backed by such mortgages.

Section 1263.11—Financial Condition Requirement for Depository Institutions and CDFI Credit Unions. The proposed rule included two separate provisions for evaluating the financial condition of CDFI applicants: § 1263.11, which related to CDFI credit unions, and § 1263.16, which related to all other types of CDFIs. The proposal defined ''CDFI credit unions'' as State-chartered credit unions that have been certified as CDFIs but do not have Federal share insurance. Because the Finance Board had previously adopted regulations for evaluating the financial condition of all depository institution applicants, including State-chartered credit unions with NCUA share insurance, FHFA proposed to require CDFI credit unions to comply with the same regulations under which all other depository institution applicants are evaluated. In brief, the proposal would require the Banks to evaluate the financial condition of CDFI credit unions based on information in the regulatory financial reports they file with their applicable regulators, their audited financial statements, and the examination reports prepared by their regulators. Although CDFI credit unions do not file financial regulatory reports with the NCUA, they do file comparable reports with their appropriate State regulator, and FHFA believes that those documents may be used to assess the financial condition of the CDFI credit unions. The proposed rule would have amended the Finance Board's regulatory text in two respects—by adding CDFI credit unions to the list of institutions that are subject to § 1263.11, and by requiring all CDFI credit unions to meet certain performance trend criteria.

These provisions of the proposed rule generated few comments, and FHFA is adopting § 1263.11 as proposed. One commenter asked that FHFA revise the ''earnings'' provision of the regulation to require a CDFI credit union to demonstrate positive earnings for two of the last three years, rather than for four of the six most recent calendar quarters, as was in the proposed rule. As noted above, the financial condition requirements for CDFI credit unions are essentially identical to those of the Finance Board regulations, which the Banks have long used to evaluate the condition other depository institutions that apply for membership. FHFA believes that those requirements are well understood by the Banks and by depository institutions generally, and does not believe that there is a compelling reason to alter the earnings requirement solely for the benefit of CDFI credit union applicants. Moreover, to revise the regulation in the manner requested would change the earnings analysis for all other depository institution applicants, which FHFA does not believe is warranted.

A few commenters, including those representing State-chartered credit unions, objected to the provisions of the proposed rule that would have required all CDFI credit union applicants to meet certain performance trend criteria. For all other depository institution applicants, those performance trend criteria apply only if the applicant has received a composite regulatory examination rating of ''2'' or ''3.'' FHFA did not receive comments from any prospective CDFI credit union member on this proposal. As was stated in the proposed rule, CDFI credit unions are not subject to oversight by the NCUA and have not previously been eligible for membership. As a result, the Banks may be less familiar with State examination processes and ratings, and FHFA believes that it is prudent to require all CDFI credit unions to demonstrate that their earnings, nonperforming assets, and allowance for loan and lease losses are consistent with the existing performance criteria. Thus,

the final rule adopts the language of the proposed rule on this issue without change.

Section 1263.12—Character of Management Requirement. The proposed rule carried over all of the substance of the Finance Board regulation relating to the character of management standard and added a separate paragraph for assessing the management of all CDFI applicants other than CDFI credit unions. Under the proposed rule, the character of a CDFI applicant's management would be deemed to be consistent with sound and economical home financing if the applicant provides the Bank with an unqualified written certification that neither the applicant nor its senior officials are subject to any enforcement actions, criminal, civil or administrative proceedings, or criminal, civil or administrative monetary liabilities, lawsuits or judgments. The proposed rule would have required CDFI credit unions to comply with the existing provisions applicable to depository institutions generally, but would have imposed slightly different standards on other types of CDFIs, such as loan funds and venture capital funds, because they are not regulated and thus are not subject to regulatory examinations or administrative enforcement actions. This provision of the proposed rule did not generate any significant comments and is being adopted in final form without change.

Section 1263.13—Home Financing Policy Requirement. Section 4(a)(2)(C) of the Bank Act provides that any insured depository institution applicant must have a home financing policy that is consistent with sound and economical home financing. Although the Bank Act applies this requirement only to depository institutions, the Finance Board regulations have applied it to all entities applying for Bank membership. *See* 12 CFR 925.6(a)(6). The Finance Board regulations provide that an insured depository institution applicant may be deemed to have satisfied the statutory requirement if it has a satisfactory Community Reinvestment Act (CRA) rating, but requires that applicants not subject to the CRA file with the Bank a written justification showing how and why their home financing policy is consistent with the housing finance mission of the Bank System. *Id.* at 925.13.

FHFA did not propose any changes to the Finance Board regulation, and stated that CDFI applicants would be required to provide a written justification, acceptable to the Bank, explaining how and why their home financing policy is consistent with the Bank System's housing finance mission. Certain commenters asked that CDFI applicants be presumed to comply with this requirement by virtue of their certification from the CDFI Fund. Although some certified CDFIs may in fact have a housing finance orientation that would satisfy this requirement, that will not necessarily be the case for every CDFI that is certified by the CDFI Fund, given the potential variety of activities in which a CDFI may engage. Because not all CDFIs will have the same degree of involvement in housing finance activities, FHFA believes that the better approach is to have the Banks assess the housing finance policies of the CDFI applicants on an individual basis, which is what the proposed rule required. Accordingly, a CDFI applicant must provide to the Bank a written narrative describing the manner in which the CDFI supports housing finance generally, which may include direct support such as originating loans, as well as indirect support through other investments, activities, or services. FHFA believes that this should not be a burdensome requirement for most CDFI applicants, as they are likely to have some direct or indirect nexus to housing finance in their communities. Thus, FHFA expects that most CDFI applicants can readily demonstrate that their business operations and housing finance policies are consistent with the mission of the Bank System, which includes both traditional housing finance as well as other community investment activities.

Section 1263.16—Financial Condition Requirement for Insurance Company and Certain CDFI Applicants. In the proposed rule, FHFA included new provisions for evaluating the financial condition of CDFI applicants. The provisions for evaluating CDFI credit unions were located in § 1263.11 and were discussed earlier in this document. The provisions for evaluating all other types of CDFI applicants, such as loan funds and venture capital funds, were located in § 1263.16(b) of the proposed rule. Those new provisions were similar in substance to the provisions relating to depository institutions, although their specific requirements differed somewhat, in recognition of the differences between depository institutions and the newly-eligible CDFIs. The structure of proposed § 1263.16(b) generally paralleled that of the provisions used for depository institutions, *i.e.,* the regulation identified the types of financial documents that a Bank must review in assessing a CDFI applicant's financial condition and established standards for determining whether the financial condition of a particular applicant was such that a Bank could safely make advances to the applicant. These provisions of the proposed rule generated a significant number of comment letters, which raised a variety of issues relating to the manner in which the Banks were to assess the financial condition of CDFI applicants. The following paragraphs address the various provisions of § 1263.16(b) in the order they appear within the regulation, and describe key aspects of the proposal, the comments, and the approach taken in the final rule.

Review requirement. Section 1263.16(b)(1) of the proposed rule required a Bank to obtain certain specified financial statements from each CDFI applicant, as well as its certification from the CDFI Fund, and any other information the Bank deemed necessary to assessing the applicant's financial condition. In the introductory language for this provision, the proposed rule restated language from the regulations of the Finance Board for depository institution applicants, which stated that a Bank ''shall obtain'' certain information from an applicant in assessing its financial condition. In the final rule, FHFA has revised that language to state that an applicant ''shall submit'' the required information, which is intended to make clear that an applicant must provide a Bank with sufficient information for the Bank to make an informed assessment of the applicant's financial condition. The final rule also adds a new requirement to this introductory language, which provides that a Bank shall consider all information provided by a member before deciding whether to approve or deny the membership application. This change relates to the standards established by § 1263.16(b)(2), which are presumptive indicators of an applicant's compliance with the requirement that it be in sufficiently sound financial condition that a Bank can safely make advances to it. Under the proposed rule, an applicant's failure to comply with one or more of the presumptive standards does not mean that the applicant cannot become a member of a Bank. Instead, it means that the applicant must overcome the presumption of noncompliance by providing the Bank with additional information demonstrating that the applicant is indeed in sufficiently sound financial condition to obtain advances from the Bank. The processes for rebutting such presumptions of noncompliance are established by § 1263.17, which applies to all types of

applicants. The new requirement added to the introductory language of § 1263.16(b)(1) is intended to ensure that a Bank does not automatically deny membership to a CDFI applicant based solely on that applicant's failure to satisfy any of the presumptive standards. It also is intended to make clear that a CDFI applicant has a right to submit additional information, beyond that required by the regulation, to demonstrate that it is in sound financial condition and to have that information considered by the Bank before it decides whether to approve the application.

The above revisions are intended to work in tandem with additional new language that the final rule adds to § 1263.16(b)(1)(iii). As proposed, that provision would have required an applicant to provide any additional information relating to its financial condition that is requested by the Bank. Because of the possibility that some CDFI applicants may not satisfy one of the presumptive standards, but may nonetheless be in sound financial condition, FHFA believes that it is important to make clear in the regulation that each CDFI applicant has the right to submit whatever information that it believes demonstrates its financial condition, regardless of whether the Bank has asked for such information. For example, if a CDFI applicant would not satisfy the net asset ratio requirement, it could submit additional information as part of its initial membership application demonstrating that its financial condition is sufficiently sound to satisfy the regulatory requirement, notwithstanding its failure to satisfy the presumptive standard. If the information in fact demonstrates that the applicant's financial condition is sufficiently sound to borrow from the Bank, FHFA expects that the Bank would approve the membership application.

The revisions described above are the only substantive amendments that the final rule makes to § 1263.16(b)(1). As to the particular financial statements that must be submitted, § 1263.16(b)(i) of the proposed rule would have required CDFIs to submit financial statements audited under generally accepted auditing standards (GAAS), as well as more recent quarterly financial statements, if those are available. An applicant also was required to submit financial statements for the two years prior to the most recent audited financial statements. At a minimum, all such financial statements must include income and expense statements, statements of activities, statements of financial position, and statements of cash flows. The financial statements for the most recent year also would have to include detailed disclosures or schedules relating to the affiliates of the CDFI applicant regarding the financial position of each affiliate, their lines of business, and the relationship between the affiliates and the applicant CDFI. There were no objections from commenters to this requirement and it is retained in the final rule. FHFA believes that in most cases a GAAS audited statement will suffice to show evidence of financial condition and anticipates that the Banks will be judicious in the amount of additional information they require CDFI applicants to submit. The proposed rule also asked whether CDFIs that do not typically obtain audited financial statements should be permitted to submit an alternative financial statement. Some commenters representing both the CDFI sector and the Banks recommended that in addition to an audited statement, a CDFI applicant be permitted to submit an alternative third party assessment, such as the CDFI Assessment and Rating System (CARS™) assessment. The final rule does not require the submission of a CARS™ statement or other similar documents. In light of the revisions made to § 1263.16(b)(1)(iii), which allows a CDFI applicant to provide the Bank with any information the applicant believes relevant to its financial condition, FHFA does not believe that the final rule needs to specify by name any other types of documents to be submitted.

The proposed rule also required any CDFI applicant that had been certified more than three years prior to applying for membership to submit to the Bank a written statement certifying that it had not undergone any material events that would adversely affect its strategic direction, mission, or business operations. Some commenters asked that the final rule be revised to require any such CDFI applicants to obtain a re-certification from the CDFI Fund in order to be admitted to membership, but FHFA has not included a re-certification requirement in the final rule. As an initial matter, the Bank Act requires only that a CDFI must have been ''certified'' by the CDFI Fund in order to be eligible for membership, and does not speak to how long ago the certification must have been obtained. Under the regulations of the CDFI Fund, a certification appears to remain effective unless the CDFI Fund rescinds the certification, such as if it finds that a CDFI no longer meets the certification requirements. 12 CFR 1805.201(a). Moreover, the regulations of the CDFI Fund do not provide a means by which an entity that has been previously certified, can routinely obtain re-certification for purposes unrelated to the CDFI Fund, such as applying for Bank membership. There does not appear to be any way for a certified CDFI to obtain routine re-certification; therefore FHFA believes that requiring submission of a written statement attesting to the absence of any material adverse events is an appropriate means of providing some assurance that an applicant has not done anything to jeopardize its standing as a CDFI. Indeed, in the absence of a means of obtaining routine re-certification from the CDFI Fund, a provision mandating re-certification as a condition of membership could effectively frustrate the intent of Congress to allow CDFIs to become Bank members.

Financial condition standards. Section 1263.16(b)(2) of the proposed rule sets out four presumptive standards that a CDFI applicant must satisfy in order to be deemed to satisfy the financial condition requirement of § 1263.6(a)(4), *i.e.,* that an applicant's condition is such that a Bank can safely make advances to it. The four presumptive standards related to an applicant's compliance are net asset ratio, earnings, loan loss reserves, and liquidity. These provisions generated a significant number of comments and suggested revisions, which FHFA has considered in developing the final rule. The final rule generally retains the standards of financial condition that were in the proposed rule, but also includes some revisions based on the suggestions of the commenters. Each of the provisions relating to the four presumptive standards is discussed separately below.

Net asset ratio. The proposed rule would have required that a CDFI applicant have a ratio of net assets to total assets of at least 20 percent, with net and total assets including restricted assets, where net assets is calculated as the residual value of assets over liabilities and is based on the information derived from the applicant's most recent financial statement. In the absence of independent regulatory examinations for this group of CDFIs, the proposed financial condition requirements for Bank membership were based on accepted prudential standards, *i.e.,* the net asset ratio mirrored the ''Financial Ratios of Minimum Prudent Standards'' used by the CDFI Fund, which prescribes a minimum net asset ratio of 20 percent (or .20). The 20 percent

standard also was subjected to peer benchmarking. A survey of 130 loan fund CDFIs conducted in 2002 found that the median net asset ratio to be .437 and the mean ratio to be .446.[2] Similarly, the CDFI Fund reported that during the period between 2003 and 2005, non-depository CDFIs had a net asset ratio of ''about 40 percent''.[3] These ratios are higher than the 20 percent net asset ratio threshold in the proposed rule.

The preponderance of CDFI sector commenters objected to the 20 percent net assets ratio in the proposed rule as too high. Several CDFI commenters called on FHFA to reduce the net asset ratio to not greater than 10 percent. These commenters argued that a 10 percent net asset ratio would be in line with the standards used by the Federal regulators for a well-capitalized federally insured credit union and suggested that FHFA adopt internal capital ratios similar to those applicable to FDIC-insured institutions.

FHFA believes that the capital composition of CDFIs and insured depositories, respectively, reflect different institutional models and are not directly comparable. The variations in CDFI sources of revenue and capital do not readily permit classifications comparable to those used by depository institutions. For example, a CDFI's assets may include: (1) Unrestricted net assets, which are assets available for use by the CDFI without encumbrance; (2) designated net assets, which have been designated by a CDFI board for a specific purpose and can become undesignated; (3) temporarily restricted net assets, which are assets that cannot be released without prior agreement from the donor but can be converted to unrestricted capital upon satisfaction of donor requirements; and (4) permanently restricted net assets that have financial covenants that cannot be removed, except, in some cases during liquidation of assets pursuant to insolvency.

The terms of grant and investor covenants also can affect the permanency of capital. In addition, the components of capital will also vary from one nonprofit CDFI to another. For example, a unique characteristic of CDFI loan funds is their use of a debt-as-equity instrument known as Equity Equivalent Investments or ''EQ2.'' The EQ2 represents a small fraction (5 percent) of the aggregate capital of all loan funds.[4] Regulated financial institutions investing in CDFIs are attracted to EQ2 investments because regulators treat EQ2 investments in a CDFI as eligible in meeting the requirements of the CRA. The EQ2 loans are deeply subordinated to all other debt; carry a rolling term; limit the rights of the investor to call the investment; and, carry interest that is independent from income. The EQ2 are included as capital in CDFI financial statements. This treatment increases capital ratios and enables a CDFI to access capital at lower rates.

FHFA recognizes that a CDFI's balance sheet and financial ratios may vary depending on the line of financial products and services that it offers. A CDFI active in lending might be more leveraged than a service-oriented CDFI and this could result in a lower net asset ratio. Such a finding does not by itself indicate declining financial performance or that the financial condition of the CDFI is not sufficiently sound to allow the Bank to safely make advances to it. Further, the CDFI specializing in lending might have more experience in asset-liability management. In fact, data show that as a CDFI grows and matures it will have lower net asset ratios than those of emerging CDFIs.[5] It is likely that these organizations have become more active lenders and less dependent on grants. More recently, however, there is evidence that financial distress among CDFI investors, such as insured depositories and grant makers, has resulted in reduced investments in CDFIs, lowering the CDFIs' equity and thus affecting their net asset ratios.[6]

Recognition of these varying conditions notwithstanding, FHFA is not inclined to accept the recommendations made by the commenters that the minimum net asset ratio should be reduced, either to equal the capital ratios of insured depositories or to some other value between 10 percent and 20 percent. In the absence of regulatory standards and comprehensive examinations of the CDFIs, there is no good way for FHFA to establish the merit of one particular numerical ratio over another. Moreover, the 20 percent net asset ratio is consistent with the experience of the CDFI Fund, and appears well below the levels documented in the peer benchmarking studies described earlier. In light of those factors, FHFA decided to retain the requirement in the proposed rule that a CDFI applicant must demonstrate a 20 percent net asset ratio in order to satisfy the presumptive standard. FHFA emphasizes, however, that the revisions to § 1263.16(b)(1) are intended to allow an applicant that does not meet any of the presumptive standards, including the 20 percent threshold, to provide additional evidence of its financial condition and have the Bank consider that information prior to acting on the application. Moreover, FHFA intends to monitor the Banks' implementation of this rule, including their assessment of additional information provided by any applicant that does not initially meet one of the presumptive standards.

Earnings. Under the proposed rule, the applicant would have been required to show a positive net income for any two of the three most recent years, where net income is calculated as gross revenues less total expenses and is based on information derived from the applicant's most recent financial statement. Most commenters supported the standard in the proposed rule as reasonable measure of a CDFI's earnings, but a number of CDFIs and CDFI trade associations proposed revising this provision to allow applicants to use a rolling three-year average to demonstrate that they have achieved a pattern of positive net income over that time. Those commenters favored this method because it recognizes fluctuations on a CDFI balance sheet resulting from newly received and expiring grants. The rolling three-year average method is also consistent with the methods used by some grantors. FHFA believes that these suggestions have merit and has amended the final rule to delete the requirement that an applicant show positive net income in two of the most recent three years and replaced it with a requirement that an applicant have positive income on a rolling three-year average basis.

Loan loss reserves. The proposed rule included a requirement that an applicant's ratio of loan loss reserves to loans and leases 90 days or more delinquent (including loans sold with full recourse) be at least 30 percent, where loan loss reserves are a specified balance sheet account that reflects the amount reserved for loans expected to

[2] Lam, Marcus *et al.* ''Recommendations for CDFI Performance Measurement.'' *See* Table 2.1 based on data obtained from the Opportunity Finance Network's CDFI Project. Unpublished document, March 2002.

[3] United States Department of the Treasury, CDFI Fund, ''*Three-year Trend Analysis of Community Investment Impact System Institutional Level Report Data FY 2003–2005*'' at 47. *See http://www.cdfifund.gov/impact_we_make/ciis/CDFI3yearTrend.pdf.*

[4] CDFI Data Project 2007.

[5] *See* CDFI Fund, *Three Year Trend Analysis* at 47.

[6] *See* Opportunity Finance Network, ''*CDFI Market Conditions Report: Fourth Quarter 2008*'', (April, 2009). *See* ''*The Economic Crisis and Community Development Finance: An Industry Assessment*'', Community Development Investment Center Working paper Series, Federal Reserve Bank of San Francisco, (May 2009).

be uncollectible and are based on information derived from the applicant's most recent financial statement. FHFA proposed the 30 percent threshold, which is half the reserve requirement that applies to depository institution applicants, in recognition of the historically low delinquency rate among CDFI-originated loans and the willingness and ability of CDFIs to work with borrowers to modify loans. Generally speaking, CDFI loans have performed as well or better than prime loans, and FHFA believed that it was appropriate for the loan loss reserve standard to recognize that difference.

Notwithstanding that, FHFA explained its rationale for the 30 percent requirement in the proposed rule, a number of commenters serving or representing depository institutions stated that the 30 percent figure was too low and recommended that it be increased to 60 percent, the same as it is for depositories. For the same reasons that were cited in the proposed rule, FHFA believes that the 30 percent figure is appropriate for CDFI applicants, and that increasing the ratio to 60 percent would not take into consideration the default experience for CDFI loans. One CDFI commenter recommended lowering the reserve ratio to 20 percent, in recognition that nonprofit institutions typically work with borrowers to modify loans. In light of current economic conditions affecting all lenders, FHFA believes that a 20 percent reserve may be too low and is not prepared to accept that suggestion, though it notes that any CDFI applicant not meeting the 30 percent requirement could provide the Bank additional information demonstrating why, in the context of the business conducted by that CDFI, its level of loan loss reserves is consistent with the concept of operating in a sound financial condition. Accordingly, the final rule adopts the loan loss reserve standard exactly as it was proposed.

Liquidity ratio. The proposed rule included a standard requiring a CDFI applicant to have an operating liquidity ratio of at least 1.0 for the current year, and for one or both of the two preceding years, where the numerator of the ratio includes unrestricted cash and cash equivalents and the denominator of the ratio is the average quarterly operating expense for the four most recent quarters. FHFA believes that this liquidity ratio provides a measure of funds available to pay creditors by requiring a CDFI to have sufficient liquidity to cover its average operating expenses for one quarter. The preponderance of commenters supported the liquidity ratio in the proposed rule, and one commenter suggested that the final rule replace the reference to ''current year'' with a reference to the ''four most recent quarters.'' FHFA agrees with that suggestion and has incorporated it into the final rule. In all other respects, the final rule is identical to the proposed rule on this topic.

Self-sufficiency or sustainability ratio. The proposed rule sought comment on whether FHFA should incorporate into the final rule a requirement that a CDFI applicant have a minimum self-sufficiency or sustainability ratio, *i.e.,* a ratio used to evaluate the extent to which a CDFI can cover its expenses from earned revenue and, by inference, the CDFI's independence from grants and loans. FHFA acknowledged in the proposed rule that self-sufficiency ratios can be affected by the type of services and grant programs operated by the CDFI, and thus may not adequately portray a CDFI's financial condition. Moreover, if a self-sufficiency ratio for Bank membership were to be too stringent, it could conflict with the service delivery requirements for a CDFI to become certified by the CDFI Fund. *See* 12 U.S.C. 4701(b). Most of the commenters addressing this issue believed that a self-sufficiency ratio was not necessary, though some commenters did advocate for its inclusion. Given the above-described concerns and the absence in the comments of any compelling reasons for adopting a self-sufficiency requirement, FHFA does not include one in the final rule.

Section 1263.17—Rebuttable Presumptions. The membership regulations of the Finance Board had long included a series of presumptive standards, under which an applicant that satisfied a particular standard would be presumed to have satisfied the underlying statutory or regulatory requirement to which the standard related. For example, those regulations presumed that an insurance company applicant that was subject to inspection and regulation by a State regulator that is accredited by the National Association of Insurance Commissioners had satisfied the statutory ''inspection and regulation'' requirement of 12 U.S.C. 1424(a)(1)(B). *See* 12 CFR 925.8. In the event that an insurance company applicant was not regulated by an accredited agency, and thus had failed to meet the presumptive standard, other provisions of the regulations allowed the applicant to rebut the presumption of non-compliance by providing the Bank with ''substantial evidence'' that it in fact could satisfy the statutory requirement notwithstanding the lack of accreditation for its regulator. *See* 12 CFR 925.17(c). In the proposed rule, FHFA retained this framework, with certain modifications to proposed § 1263.17 to accommodate CDFI applicants. In effect, the proposed rule would have applied the presumptive compliance and rebuttal provisions to CDFI applicants in the same manner that they apply to other applicants.

Certain commenters objected to this arrangement, apparently on the mistaken belief that the presumption and rebuttal structure of the regulation disadvantaged CDFI applicants by presuming that they had not satisfied one or more of the requirements for membership. In the final rule FHFA retains the presumption and rebuttal provisions as proposed. Each of the regulation's presumptive standards for Bank membership is linked to one of the statutory or regulatory requirements that each applicant must satisfy in order to become a Bank member. An applicant that satisfies a presumptive standard is presumed to have satisfied the underlying statutory or regulatory requirement and need do nothing more with respect to that requirement.

An applicant that does not satisfy a presumptive standard, however, is not conclusively determined to have failed to satisfy the underlying requirement. Instead, the regulation effectively requires an applicant to go through a somewhat more rigorous process before a Bank can determine that the applicant in fact has satisfied the underlying membership requirement. FHFA believes that this level of scrutiny is appropriate because Congress has established certain requirements for membership that each applicant must satisfy in order to become a member and FHFA has a responsibility to ensure that the Banks admit to membership only those applicants that have satisfied all applicable requirements for membership. FHFA also believes that this arrangement ultimately works to the benefit of an applicant because it provides an opportunity to present whatever additional documentation an applicant believes relevant to satisfying a particular requirement for membership. As a practical matter, FHFA also notes that the addition of the new provisions into § 1263.16(b)(1)(ii) and (b)(1)(iii), which allow CDFI applicants to submit as part of their original membership application whatever information they believe relevant to their application, and gives CDFI applicants an opportunity to address any such issues at the beginning of the application process, which should lessen the likelihood that a CDFI applicant will need to rely on the rebuttal provisions of § 1263.17.

D. Community Support Amendment—Part 944

Section 10(g) of the Bank Act requires FHFA to adopt regulations establishing standards of community investment or service for members of the Banks to maintain continued access to long-term Bank advances. That section further provides that the regulations shall take into account factors such as a member's performance under the CRA and the member's record of lending to first-time homebuyers. 12 U.S.C. 1430(g)(1) and (2). In the proposed rule, FHFA stated its belief that a CDFI member should be able to comply with the existing community support regulations but also requested comments on whether FHFA should develop an alternative community support regulation for CDFIs that recognizes their unique mission and business practices. The comments received on this issue were split, with some advocating a revision to the community support regulations to accommodate CDFI members and others expressing the view that most CDFI members should be able to satisfy the requirements of the existing community support regulations. After consideration, FHFA decided to amend the community support regulations to add provisions in the final rule that deem a CDFI member (other than a depository institution or credit union) to have satisfied the statutory community support if it is certified by the CDFI Fund. The substance of the new provisions and FHFA's rationale are set out below.

The existing Finance Board regulations implementing the community support requirement are located at 12 CFR part 944, and incorporate the two factors cited by the statute, *i.e.,* the CRA and the record of lending to first-time homebuyers. Under these provisions, a Bank member that is subject to the CRA is deemed to meet the CRA standard if its most recent CRA evaluation is ''outstanding'' or ''satisfactory.'' *See* 12 CFR 944.3(b)(1). A member also is presumed to meet the first-time homebuyer lending standard if its CRA evaluation is ''outstanding'' and there are no public comments or other information to the contrary. 12 CFR 944.3(c). Members that are not subject to the CRA, such as credit unions and insurance companies, are only required to meet the first-time homebuyer lending standard. *Id.* Because the newly-eligible CDFIs are not subject to the CRA, they too would only be subject to the first-time homebuyer lending standard if they were to be subject to the existing regulations. Section 944.3(c)(1) includes a non-exclusive list of eligible activities that meet the first-time homebuyer lending standard, such as having an established record of lending to first-time homebuyers, providing homeownership counseling programs for first-time homebuyers, providing or participating in marketing plans and related outreach programs targeted to first-time homebuyers, and providing technical assistance or financial support to organizations that assist first-time homebuyers. *See id.* at 944.3(c)(1).

When the Finance Board adopted the current community support regulations, it construed the statutory provisions narrowly and described the references to the CRA and first-time homebuyers as ''mandatory statutory factors.'' *See* 61 FR 60229, 60230 (November 27, 1996) (proposed rule). At that time, however, the Bank Act did not authorize CDFIs to become Bank members, and the Finance Board did not consider the issue of how the community support requirements should be applied to CDFIs, which are not subject to the CRA and may not be as actively involved in first-time home buyer activities as are depository institutions. In light of the HERA amendments, FHFA reconsidered that interpretation and determined that it need not construe the references to the CRA and first-time home buyers as ''mandatory factors'' for all members. FHFA believes that it has the authority under section 10(g) of the Bank Act to adopt different community support standards for particular categories of members if it believes that the circumstances warrant such a difference. With respect to certified CDFI members, FHFA believes that the circumstances warrant that they be treated differently from depository institution and insurance company members with respect to the community support requirements and is including in the final rule revisions to the community support regulations to deal with certified CDFI members.

Section 10(g) of the Bank Act mandates that FHFA adopt regulations that establish standards of community investment or service for the members of the Banks. That mandate appears clearly intended to encourage members to be engaged in providing community investments and services by making their access to long-term advances dependent on how involved they are in those activities. That approach makes eminent sense, in the case of depository institutions and insurance companies, because the principal focus of the business of such entities may well involve activities that do not have a community orientation. In the case of CDFIs, however, the principal, and in some cases the exclusive business focus is on community oriented services and investments. Indeed, in order to become certified by the CDFI Fund a CDFI must by statute have a primary mission of promoting community development, serve an investment area (which is a geographic area that meets certain criteria of economic distress), and provide development services (which are activities that promote community development and are integral to lending or investment activities) in conjunction with equity investments or loans. 12 U.S.C. 4702(5)(A). Given that a principal reason certified CDFIs exist is to promote economic revitalization and community development through investments and other services within their local communities, *see* 12 U.S.C. 4701(b), and that certification represents a determination by the CDFI Fund that the CDFI has satisfied the above described statutory requirements, FHFA believes that an entity that has been certified by the CDFI Fund may be presumed to have satisfied the community support requirements of section 10(g) of the Bank Act. Accordingly, the final rule includes several amendments to the existing community support regulations to implement that determination. The final rule also relocates the existing community support regulations from 12 CFR part 944 to 12 CFR part 1290.

Section 1290.1 of the final rule adds several definitions to those in the existing community support regulations and revises one existing definition. The newly defined terms are ''appropriate Federal banking agency,'' ''appropriate State regulator,'' ''Bank,'' ''CDFI Fund,'' ''community development financial institution,'' and ''FHFA.'' The definition of ''targeted community lending'' is revised to replace a cross-reference to a definition from the Finance Board regulations with the actual content of the cross-referenced definition, which does not alter the substance of the defined term.

Section 1290.2 of the relocated community support regulations is being revised by including in paragraph (a) (which deals with the biennial selection of members for community support review) new language saying that the review process applies ''except as otherwise provided in this section.'' That new language refers to new paragraph (e), which provides that a member that has been certified as a CDFI by the CDFI Fund shall be deemed to be in compliance with the community support requirements of section 10(g) of the Bank Act by virtue of that certification and is not subject to the biennial review under paragraph (a) of this section. This language also includes an express statement that the

exclusion for certified CDFIs does not apply to any members that are insured depository institutions or CDFI credit unions. Those institutions would continue to be evaluated under the community support requirements that apply to all other depository institutions and credit unions, notwithstanding their CDFI status. FHFA has excluded those institutions because it believes that all depository institution and credit union members should be evaluated for community support compliance under the same regulatory standards, *i.e.,* the CRA and first-time home buyer standards described above.

IV. Paperwork Reduction Act

The final rule will have no substantive or material effect on any collection of information covered by the Paperwork Reduction Act of 1995 (PRA). *See* 44 U.S.C. 3501 *et seq.* Therefore, FHFA has not submitted this final rule to the Office of Management and Budget (OMB) for review.

The currently approved information collection, entitled ''Members of the Banks,'' has been assigned control number 2590–0003 by the Office of Management and Budget (OMB). FHFA uses this information as set forth in the existing Members of the Banks regulation.

The Community Support Statement Form contained in the currently approved information collection, entitled ''Community Support Requirements,'' has been assigned the control number 2590–0005 by the OMB. FHFA uses this information as set forth in the existing Community Support Requirements Regulation.

FHFA plans to direct the Banks to use a revised version of those instructions, applications, and forms, which revised version will not materially modify the approved information collections.

V. Regulatory Flexibility Act

The final rule will apply only to the Banks, which do not come within the meaning of ''small entities,'' as defined in the Regulatory Flexibility Act (RFA). *See* 5 U.S.C. 601(6). Therefore, in accordance with section 605(b) of the RFA, 5 U.S.C. 605(b), the General Counsel of FHFA hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

List of Subjects

12 CFR Parts 925 and 1263

Federal home loan banks, Reporting and recordkeeping requirements.

12 CFR Parts 944 and 1290

Credit, Federal home loan banks, Housing, Reporting and recordkeeping requirements.

■ For the reasons stated in the preamble, FHFA hereby amends chapters IX and XII, of title 12 of the Code of Federal Regulations as follows:

CHAPTER IX—FEDERAL HOUSING FINANCE BOARD

PART 925—[REDESIGNATED AS PART 1263]

■ 1. Transfer 12 CFR part 925 from chapter IX, subchapter D, to chapter XII, subchapter D and redesignate as 12 CFR part 1263.

■ 2. Revise the newly redesignated part 1263 to read as follows:

PART 1263—MEMBERS OF THE BANKS

Subpart A—Definitions

Sec.
1263.1 Definitions.

Subpart B—Membership Application Process

1263.2 Membership application requirements.
1263.3 Decision on application.
1263.4 Automatic membership.
1263.5 Appeals.

Subpart C—Eligibility Requirements

1263.6 General eligibility requirements.
1263.7 Duly organized requirement.
1263.8 Subject to inspection and regulation requirement.
1263.9 Makes long-term home mortgage loans requirement.
1263.10 Ten percent requirement for certain insured depository institution applicants.
1263.11 Financial condition requirement for depository institutions and CDFI credit unions.
1263.12 Character of management requirement.
1263.13 Home financing policy requirement.
1263.14 De novo insured depository institution applicants.
1263.15 Recent merger or acquisition applicants.
1263.16 Financial condition requirement for insurance company and certain CDFI applicants.
1263.17 Rebuttable presumptions.
1263.18 Determination of appropriate Bank district for membership.

Subpart D—Stock Requirements

1263.19 Par value and price of stock.
1263.20 Stock purchase.
1263.21 Issuance and form of stock.
1263.22 Adjustments in stock holdings.
1263.23 Excess stock.

Subpart E—Consolidations Involving Members

1263.24 Consolidations involving members.

Subpart F—Withdrawal and Removal from Membership

1263.25 Reserved.
1263.26 Voluntary withdrawal from membership.
1263.27 Involuntary termination of membership.
1263.28 Reserved.

Subpart G—Orderly Liquidation of Advances and Redemption of Stock

1263.29 Disposition of claims.

Subpart H—Reacquisition of Membership

1263.30 Readmission to membership.

Subpart I—Bank Access to Information

1263.31 Reports and examinations.

Subpart J—Membership Insignia

1263.32 Official membership insignia.

Authority: 12 U.S.C. 1422, 1423, 1424, 1426, 1430, 1442, 4511, 4513.

Subpart A—Definitions

§ 1263.1 Definitions.

For purposes of this part:

Adjusted net income means net income, excluding extraordinary items such as income received from, or expense incurred in, sales of securities or fixed assets, reported on a regulatory financial report.

Aggregate unpaid loan principal means the aggregate unpaid principal of a subscriber's or member's home mortgage loans, home-purchase contracts and similar obligations.

Allowance for loan and lease losses means a specified balance-sheet account held to fund potential losses on loans or leases, which is reported on a regulatory financial report.

Appropriate regulator means:

(1) In the case of an insured depository institution or CDFI credit union, the Federal Deposit Insurance Corporation, Board of Governors of the Federal Reserve System, National Credit Union Administration, Office of the Comptroller of the Currency, Office of Thrift Supervision, or appropriate State regulator that has regulatory authority over, or is empowered to institute enforcement action against, the institution, as applicable, and

(2) In the case of an insurance company, an appropriate State regulator accredited by the National Association of Insurance Commissioners.

Bank Act means the Federal Home Loan Bank Act, as amended (12 U.S.C. 1421 through 1449).

CDFI credit union means a State-chartered credit union that has been certified as a CDFI by the CDFI Fund and that does not have Federal share insurance.

CDFI Fund means the Community Development Financial Institutions

Fund established under section 104(a) of the Community Development Banking and Financial Institutions Act of 1994 (12 U.S.C. 4703(a)).

CFI asset cap means $1 billion, as adjusted annually by FHFA, beginning in 2009, to reflect any percentage increase in the preceding year's Consumer Price Index (CPI) for all urban consumers, as published by the U.S. Department of Labor.

Class A stock means capital stock issued by a Bank, including subclasses, that has the characteristics specified in section 6(a)(4)(A)(i) of the Bank Act (12 U.S.C. 1426(a)(4)(A)(i)) and applicable FHFA regulations.

Class B stock means capital stock issued by a Bank, including subclasses, that has the characteristics specified in section 6(a)(4)(A)(ii) of the Bank Act (12 U.S.C. 1426(a)(4)(A)(ii)) and applicable FHFA regulations.

Combination business or farm property means real property for which the total appraised value is attributable to residential, and business or farm uses.

Community development financial institution or CDFI means an institution that is certified as a community development financial institution by the CDFI Fund under the Community Development Banking and Financial Institutions Act of 1994 (12 U.S.C. 4701 *et seq.*), other than a bank or savings association insured under the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*), a holding company for such a bank or savings association, or a credit union insured under the Federal Credit Union Act (12 U.S.C. 1751 *et seq.*).

Community financial institution or CFI means an institution:

(1) The deposits of which are insured under the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*); and

(2) The total assets of which, as of the date of a particular transaction, are less than the CFI asset cap, with total assets being calculated as an average of total assets over three years, with such average being based on the institution's regulatory financial reports filed with its appropriate regulator for the most recent calendar quarter and the immediately preceding 11 calendar quarters.

Composite regulatory examination rating means a composite rating assigned to an institution following the guidelines of the Uniform Financial Institutions Rating System (issued by the Federal Financial Institutions Examination Council), including a CAMELS rating or other similar rating, contained in a written regulatory examination report.

Consolidation includes a consolidation, a merger, or a purchase of all of the assets and assumption of all of the liabilities of an entity by another entity.

Director means the Director of FHFA or his or her designee.

Dwelling unit means a single room or a unified combination of rooms designed for residential use.

Enforcement action means any written notice, directive, order, or agreement initiated by an applicant for Bank membership or by its appropriate regulator to address any operational, financial, managerial or other deficiencies of the applicant identified by such regulator. An ''enforcement action'' does not include a board of directors' resolution adopted by the applicant in response to examination weaknesses identified by such regulator.

Funded residential construction loan means the portion of a loan secured by real property made to finance the on-site construction of dwelling units on one-to-four family property or multifamily property disbursed to the borrower.

Gross revenues means, in the case of a CDFI applicant, total revenues received from all sources, including grants and other donor contributions and earnings from operations.

Home mortgage loan means:

(1) A loan, whether or not fully amortizing, or an interest in such a loan, which is secured by a mortgage, deed of trust, or other security agreement that creates a first lien on one of the following interests in property:

(i) One-to-four family property or multifamily property, in fee simple;

(ii) A leasehold on one-to-four family property or multifamily property under a lease of not less than 99 years that is renewable, or under a lease having a period of not less than 50 years to run from the date the mortgage was executed; or

(iii) Combination business or farm property where at least 50 percent of the total appraised value of the combined property is attributable to the residential portion of the property, or in the case of any community financial institution, combination business or farm property, on which is located a permanent structure actually used as a residence (other than for temporary or seasonal housing), where the residence constitutes an integral part of the property; or

(2) A mortgage pass-through security that represents an undivided ownership interest in:

(i) Long-term loans, provided that, at the time of issuance of the security, all of the loans meet the requirements of paragraph (1) of this definition; or

(ii) A security that represents an undivided ownership interest in long-term loans, provided that, at the time of issuance of the security, all of the loans meet the requirements of paragraph (1) of this definition.

Insured depository institution means an insured depository institution as defined in section 2(9) of the Bank Act, as amended (12 U.S.C. 1422(9)).

Long-term means a term to maturity of five years or greater.

Manufactured housing means a manufactured home as defined in section 603(6) of the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended (42 U.S.C. 5402(6)).

Multifamily property means:

(1) Real property that is solely residential and includes five or more dwelling units;

(2) Real property that includes five or more dwelling units combined with commercial units, provided that the property is primarily residential; or

(3) Nursing homes, dormitories, or homes for the elderly.

Nonperforming loans and leases means the sum of the following, reported on a regulatory financial report:

(1) Loans and leases that have been past due for 90 days (60 days, in the case of credit union applicants) or longer but are still accruing;

(2) Loans and leases on a nonaccrual basis; and

(3) Restructured loans and leases (not already reported as nonperforming).

Nonresidential real property means real property that is not used for residential purposes, including business or industrial property, hotels, motels, churches, hospitals, educational and charitable institution buildings or facilities, clubs, lodges, association buildings, golf courses, recreational facilities, farm property not containing a dwelling unit, or similar types of property.

One-to-four family property means:

(1) Real property that is solely residential, including one-to-four family dwelling units or more than four family dwelling units if each dwelling unit is separated from the other dwelling units by dividing walls that extend from ground to roof, such as row houses, townhouses or similar types of property;

(2) Manufactured housing if applicable State law defines the purchase or holding of manufactured housing as the purchase or holding of real property;

(3) Individual condominium dwelling units or interests in individual cooperative housing dwelling units that are part of a condominium or cooperative building without regard to the number of total dwelling units therein; or

(4) Real property which includes one-to-four family dwelling units combined with commercial units, provided the property is primarily residential.

Operating expenses means, in the case of a CDFI applicant, expenses for business operations, including, but not limited to, staff salaries and benefits, professional fees, interest, loan loss provision, and depreciation, contained in the applicant's audited financial statements.

Other real estate owned means all other real estate owned (*i.e.,* foreclosed and repossessed real estate), reported on a regulatory financial report, and does not include direct and indirect investments in real estate ventures.

Regulatory examination report means a written report of examination prepared by the applicant's appropriate regulator, containing, in the case of insured depository institution applicants, a composite rating assigned to the institution following the guidelines of the Uniform Financial Institutions Rating System, including a CAMELS rating or other similar rating.

Regulatory financial report means a financial report that an applicant is required to file with its appropriate regulator on a specific periodic basis, including the quarterly call report for commercial banks, thrift financial report for savings associations, quarterly or semi-annual call report for credit unions, the National Association of Insurance Commissioners' annual or quarterly report for insurance companies, or other similar report, including such report maintained by the appropriate regulator on a computer on-line database.

Residential mortgage loan means any one of the following types of loans, whether or not fully amortizing:

(1) Home mortgage loans;

(2) Funded residential construction loans;

(3) Loans secured by manufactured housing whether or not defined by State law as secured by an interest in real property;

(4) Loans secured by junior liens on one-to-four family property or multifamily property;

(5) Mortgage pass-through securities representing an undivided ownership interest in–

(i) Loans that meet the requirements of paragraphs (1) through (4) of this definition at the time of issuance of the security;

(ii) Securities representing an undivided ownership interest in loans, provided that, at the time of issuance of the security, all of the loans meet the requirements of paragraphs (1) through (4) of this definition; or

(iii) Mortgage debt securities as defined in paragraph (6) of this definition;

(6) Mortgage debt securities secured by–

(i) Loans, provided that, at the time of issuance of the security, substantially all of the loans meet the requirements of paragraphs (1) through (4) of this definition;

(ii) Securities that meet the requirements of paragraph (5) of this definition; or

(iii) Securities secured by assets, provided that, at the time of issuance of the security, all of the assets meet the requirements of paragraphs (1) through (5) of this definition;

(7) Home mortgage loans secured by a leasehold interest, as defined in paragraph (1)(ii) of the definition of ''home mortgage loan,'' except that the period of the lease term may be for any duration; or

(8) Loans that finance properties or activities that, if made by a member, would satisfy the statutory requirements for the Community Investment Program established under section 10(i) of the Bank Act (12 U.S.C. 1430(i)), or the regulatory requirements established for any CICA program.

Restricted assets means both permanently restricted assets and temporarily restricted assets, as those terms are used in Financial Accounting Standard No. 117, or any successor publication.

Total assets means the total assets reported on a regulatory financial report or, in the case of a CDFI applicant, the total assets contained in the applicant's audited financial statements.

Unrestricted cash and cash equivalents means, in the case of a CDFI applicant, cash and highly liquid assets that can be easily converted into cash that are not restricted in a manner that prevents their use in paying expenses, as contained in the applicant's audited financial statements.

Subpart B—Membership Application Process

§ 1263.2 Membership application requirements.

(a) *Application.* An applicant for membership in a Bank shall submit to that Bank an application that satisfies the requirements of this part. The application shall include a written resolution or certification duly adopted by the applicant's board of directors, or by an individual with authority to act on behalf of the applicant's board of directors, of the following:

(1) *Applicant review.* Applicant has reviewed the requirements of this part and, as required by this part, has provided to the best of applicant's knowledge the most recent, accurate, and complete information available; and

(2) *Duty to supplement.* Applicant will promptly supplement the application with any relevant information that comes to applicant's attention prior to the Bank's decision on whether to approve or deny the application, and if the Bank's decision is appealed pursuant to § 1263.5, prior to resolution of any appeal by FHFA.

(b) *Digest.* The Bank shall prepare a written digest for each applicant stating whether or not the applicant meets each of the requirements in §§ 1263.6 to 1263.18, the Bank's findings, and the reasons therefor.

(c) *File.* The Bank shall maintain a membership file for each applicant for at least three years after the Bank decides whether to approve or deny membership or, in the case of an appeal to FHFA, for three years after the resolution of the appeal. The membership file shall contain at a minimum:

(1) *Digest.* The digest required by paragraph (b) of this section.

(2) *Required documents.* All documents required by §§ 1263.6 to 1263.18, including those documents required to establish or rebut a presumption under this part, shall be described in and attached to the digest. The Bank may retain in the file only the relevant portions of the regulatory financial reports required by this part. If an applicant's appropriate regulator requires return or destruction of a regulatory examination report, the date that the report is returned or destroyed shall be noted in the file.

(3) *Additional documents.* Any additional document submitted by the applicant, or otherwise obtained or generated by the Bank, concerning the applicant.

(4) *Decision resolution.* The decision resolution described in § 1263.3(b).

§ 1263.3 Decision on application.

(a) *Authority.* FHFA hereby authorizes the Banks to approve or deny all applications for membership, subject to the requirements of this part. The authority to approve membership applications may be exercised only by a committee of the Bank's board of directors, the Bank president, or a senior officer who reports directly to the Bank president, other than an officer with responsibility for business development.

(b) *Decision resolution.* For each applicant, the Bank shall prepare a written resolution duly adopted by the Bank's board of directors, by a committee of the board of directors, or

by an officer with delegated authority to approve membership applications. The decision resolution shall state:

(1) That the statements in the digest are accurate to the best of the Bank's knowledge, and are based on a diligent and comprehensive review of all available information identified in the digest; and

(2) The Bank's decision and the reasons therefor. Decisions to approve an application should state specifically that:

(i) The applicant is authorized under the laws of the United States and the laws of the appropriate State to become a member of, purchase stock in, do business with, and maintain deposits in, the Bank to which the applicant has applied; and

(ii) The applicant meets all of the membership eligibility criteria of the Bank Act and this part.

(c) *Action on applications.* The Bank shall act on an application within 60 calendar days of the date the Bank deems the application to be complete. An application is ''complete'' when a Bank has obtained all the information required by this part, and any other information the Bank deems necessary, to process the application. If an application that was deemed complete subsequently is deemed incomplete because the Bank determines during the review process that additional information is necessary to process the application, the Bank may stop the 60-day clock until the application again is deemed complete, and then resume the clock where it left off. The Bank shall notify an applicant in writing when its application is deemed by the Bank to be complete, and shall maintain a copy of such letter in the applicant's membership file. The Bank shall notify an applicant if the 60-day clock is stopped, and when the clock is resumed, and shall maintain a written record of such notifications in the applicant's membership file. Within three business days of a Bank's decision on an application, the Bank shall provide the applicant and FHFA with a copy of the Bank's decision resolution.

§ 1263.4 Automatic membership.

(a) *Automatic membership for certain charter conversions.* An insured depository institution member that converts from one charter type to another automatically shall become a member of the Bank of which the converting institution was a member on the effective date of such conversion, provided that the converting institution continues to be an insured depository institution and the assets of the institution immediately before and immediately after the conversion are not materially different. In such case, all relationships existing between the member and the Bank at the time of such conversion may continue.

(b) *Automatic membership for transfers.* Any member whose membership is transferred pursuant to § 1263.18(d) automatically shall become a member of the Bank to which it transfers.

(c) *Automatic membership, in the Bank's discretion, for certain consolidations.*—(1) If a member institution (or institutions) and a nonmember institution are consolidated, and the consolidated institution has its principal place of business in a State in the same Bank district as the disappearing institution (or institutions), and the consolidated institution will operate under the charter of the nonmember institution, on the effective date of the consolidation, the consolidated institution may, in the discretion of the Bank of which the disappearing institution (or institutions) was a member immediately prior to the effective date of the consolidation, automatically become a member of such Bank upon the purchase of the minimum amount of Bank stock required for membership in that Bank, as required by § 1263.20, provided that:

(i) 90 percent or more of the consolidated institution's total assets are derived from the total assets of the disappearing member institution (or institutions); and

(ii) The consolidated institution provides written notice to such Bank, within 60 calendar days after the effective date of the consolidation, that it desires to be a member of the Bank.

(2) The provisions of § 1263.24(b)(4)(i) shall apply, and upon approval of automatic membership by the Bank, the provisions of § 1263.24(c) and (d) shall apply.

§ 1263.5 Appeals.

(a) *Appeals by applicants.*—(1) *Filing procedure.* Within 90 calendar days of the date of a Bank's decision to deny an application for membership, the applicant may file a written appeal of the decision with FHFA.

(2) *Documents.* The applicant's appeal shall be addressed to the Deputy Director for Federal Home Loan Bank Regulation, Federal Housing Finance Agency, 1625 Eye Street, NW., Washington, DC 20006, with a copy to the Bank, and shall include the following documents:

(i) *Bank's decision resolution.* A copy of the Bank's decision resolution; and

(ii) *Basis for appeal.* An applicant must provide a statement of the basis for the appeal with sufficient facts, information, analysis, and explanation to rebut any applicable presumptions, or otherwise to support the applicant's position.

(b) *Record for appeal.*—(1) *Copy of membership file.* Upon receiving a copy of an appeal, the Bank whose action has been appealed (appellee Bank) shall provide FHFA with a copy of the applicant's complete membership file. Until FHFA resolves the appeal, the appellee Bank shall supplement the materials provided to FHFA as any new materials are received.

(2) *Additional information.* FHFA may request additional information or further supporting arguments from the appellant, the appellee Bank, or any other party that FHFA deems appropriate.

(c) *Deciding appeals.* FHFA shall consider the record for appeal described in paragraph (b) of this section and shall resolve the appeal based on the requirements of the Bank Act and this part within 90 calendar days of the date the appeal is filed with FHFA. In deciding the appeal, FHFA shall apply the presumptions in this part, unless the appellant or appellee Bank presents evidence to rebut a presumption as provided in § 1263.17.

Subpart C—Eligibility Requirements

§ 1263.6 General eligibility requirements.

(a) *Requirements.* Any building and loan association, savings and loan association, cooperative bank, homestead association, insurance company, savings bank, community development financial institution (including a CDFI credit union), or insured depository institution, upon submission of an application satisfying all of the requirements of the Bank Act and this part, shall be eligible to become a member of a Bank if:

(1) It is duly organized under Tribal law, or under the laws of any State or of the United States;

(2) It is subject to inspection and regulation under the banking laws, or under similar laws, of any State or of the United States or, in the case of a CDFI, is certified by the CDFI Fund;

(3) It makes long-term home mortgage loans;

(4) Its financial condition is such that advances may be safely made to it;

(5) The character of its management is consistent with sound and economical home financing; and

(6) Its home financing policy is consistent with sound and economical home financing.

(b) *Additional eligibility requirement for insured depository institutions other than community financial institutions.* In order to be eligible to become a member of a Bank, an insured depository institution applicant other than a community financial institution also must have at least 10 percent of its total assets in residential mortgage loans.

(c) *Additional eligibility requirement for applicants that are not insured depository institutions.* In order to be eligible to become a member of a Bank, an applicant that is not an insured depository institution also must have mortgage-related assets that reflect a commitment to housing finance, as determined by the Bank in its discretion.

(d) *Ineligibility.* Except as otherwise provided in this part, if an applicant does not satisfy the requirements of this part, the applicant is ineligible for membership.

§ 1263.7 Duly organized requirement.

An applicant shall be deemed to be duly organized, as required by section 4(a)(1)(A) of the Bank Act (12 U.S.C. 1424(a)(1)(A)) and § 1263.6(a)(1), if it is chartered by a State or Federal agency as a building and loan association, savings and loan association, cooperative bank, homestead association, insurance company, savings bank, or insured depository institution or, in the case of a CDFI applicant, is incorporated under State or Tribal law.

§ 1263.8 Subject to inspection and regulation requirement.

An applicant shall be deemed to be subject to inspection and regulation, as required by section 4(a)(1)(B) of the Bank Act (12 U.S.C. 1424 (a)(1)(B)) and § 1263.6(a)(2) if, in the case of an insured depository institution or insurance company applicant, it is subject to inspection and regulation by its appropriate regulator. A CDFI applicant that is certified by the CDFI Fund is not subject to this requirement.

§ 1263.9 Makes long-term home mortgage loans requirement.

An applicant shall be deemed to make long-term home mortgage loans, as required by section 4(a)(1)(C) of the Bank Act (12 U.S.C. 1424(a)(1)(C)) and § 1263.6(a)(3), if, based on the applicant's most recent regulatory financial report filed with its appropriate regulator, or other documentation provided to the Bank, in the case of a CDFI applicant that does not file such reports, the applicant originates or purchases long-term home mortgage loans.

§ 1263.10 Ten percent requirement for certain insured depository institution applicants.

An insured depository institution applicant that is subject to the 10 percent requirement of section 4(a)(2)(A) of the Bank Act (12 U.S.C. 1424(a)(2)(A)) and § 1263.6(b) shall be deemed to be in compliance with such requirement if, based on the applicant's most recent regulatory financial report filed with its appropriate regulator, the applicant has at least 10 percent of its total assets in residential mortgage loans, except that any assets used to secure mortgage debt securities as described in paragraph (6) of the definition of ''residential mortgage loan'' set forth in § 1263.1 shall not be used to meet this requirement.

§ 1263.11 Financial condition requirement for depository institutions and CDFI credit unions.

(a) *Review requirement.* In determining whether a building and loan association, savings and loan association, cooperative bank, homestead association, savings bank, insured depository institution, or CDFI credit union has complied with the financial condition requirements of section 4(a)(2)(B) of the Bank Act (12 U.S.C. 1424(a)(2)(B)) and § 1263.6(a)(4), the Bank shall obtain as a part of the membership application and review each of the following documents:

(1) *Regulatory financial reports.* The regulatory financial reports filed by the applicant with its appropriate regulator for the last six calendar quarters and three year-ends preceding the date the Bank receives the application;

(2) *Financial statement.* In order of preference—

(i) The most recent independent audit of the applicant conducted in accordance with generally accepted auditing standards by a certified public accounting firm which submits a report on the applicant;

(ii) The most recent independent audit of the applicant's parent holding company conducted in accordance with generally accepted auditing standards by a certified public accounting firm which submits a report on the consolidated holding company but not on the applicant separately;

(iii) The most recent directors' examination of the applicant conducted in accordance with generally accepted auditing standards by a certified public accounting firm;

(iv) The most recent directors' examination of the applicant performed by other external auditors;

(v) The most recent review of the applicant's financial statements by external auditors;

(vi) The most recent compilation of the applicant's financial statements by external auditors; or

(vii) The most recent audit of other procedures of the applicant.

(3) *Regulatory examination report.* The applicant's most recent available regulatory examination report prepared by its appropriate regulator, a summary prepared by the Bank of the applicant's strengths and weaknesses as cited in the regulatory examination report, and a summary prepared by the Bank or applicant of actions taken by the applicant to respond to examination weaknesses;

(4) *Enforcement actions.* A description prepared by the Bank or applicant of any outstanding enforcement actions against the applicant, responses by the applicant, reports as required by the enforcement action, and verbal or written indications, if available, from the appropriate regulator of how the applicant is complying with the terms of the enforcement action; and

(5) *Additional information.* Any other relevant document or information concerning the applicant that comes to the Bank's attention in reviewing the applicant's financial condition.

(b) *Standards.* An applicant of the type described in paragraph (a) of this section shall be deemed to be in compliance with the financial condition requirement of section 4(a)(2)(B) of the Bank Act (12 U.S.C. 1424(a)(2)(B)) and § 1263.6(a)(4), if:

(1) *Recent composite regulatory examination rating.* The applicant has received a composite regulatory examination rating from its appropriate regulator within two years preceding the date the Bank receives the application;

(2) *Capital requirement.* The applicant meets all of its minimum statutory and regulatory capital requirements as reported in its most recent quarter-end regulatory financial report filed with its appropriate regulator; and

(3) *Minimum performance standard*—(i) Except as provided in paragraph (b)(3)(iii) of this section, the applicant's most recent composite regulatory examination rating from its appropriate regulator within the past two years was ''1'', or the most recent rating was ''2'' or ''3'' and, based on the applicant's most recent regulatory financial report filed with its appropriate regulator, the applicant satisfied all of the following performance trend criteria—

(A) *Earnings.* The applicant's adjusted net income was positive in four of the six most recent calendar quarters;

(B) *Nonperforming assets.* The applicant's nonperforming loans and leases plus other real estate owned, did

not exceed 10 percent of its total loans and leases plus other real estate owned, in the most recent calendar quarter; and

(C) *Allowance for loan and lease losses.* The applicant's ratio of its allowance for loan and lease losses plus the allocated transfer risk reserve to nonperforming loans and leases was 60 percent or greater during four of the six most recent calendar quarters.

(ii) For applicants that are not required to report financial data to their appropriate regulator on a quarterly basis, the information required in paragraph (b)(3)(i) of this section may be reported on a semi-annual basis.

(iii) A CDFI credit union applicant must meet the performance trend criteria in paragraph (b)(3)(i) of this section irrespective of its composite regulatory examination rating.

(c) *Eligible collateral not considered.* The availability of sufficient eligible collateral to secure advances to the applicant is presumed and shall not be considered in determining whether an applicant is in the financial condition required by section 4(a)(2)(B) of the Bank Act (12 U.S.C. 1424(a)(2)(B)) and § 1263.6(a)(4).

§ 1263.12 Character of management requirement.

(a) *General.* A building and loan association, savings and loan association, cooperative bank, homestead association, savings bank, insured depository institution, insurance company, and CDFI credit union shall be deemed to be in compliance with the character of management requirements of section 4(a)(2)(C) of the Bank Act (12 U.S.C. 1424(a)(2)(C)) and § 1263.6(a)(5) if the applicant provides to the Bank an unqualified written certification duly adopted by the applicant's board of directors, or by an individual with authority to act on behalf of the applicant's board of directors, that:

(1) *Enforcement actions.* Neither the applicant nor any of its directors or senior officers is subject to, or operating under, any enforcement action instituted by its appropriate regulator;

(2) *Criminal, civil or administrative proceedings.* Neither the applicant nor any of its directors or senior officers has been the subject of any criminal, civil or administrative proceedings reflecting upon creditworthiness, business judgment, or moral turpitude since the most recent regulatory examination report; and

(3) *Criminal, civil or administrative monetary liabilities, lawsuits or judgments.* There are no known potential criminal, civil or administrative monetary liabilities, material pending lawsuits, or unsatisfied judgments against the applicant or any of its directors or senior officers since the most recent regulatory examination report, that are significant to the applicant's operations.

(b) *CDFIs other than CDFI credit unions.* A CDFI applicant, other than a CDFI credit union, shall be deemed to be in compliance with the character of management requirement of § 1263.6(a)(5), if the applicant provides an unqualified written certification duly adopted by the applicant's board of directors, or by an individual with authority to act on behalf of the applicant's board of directors, that:

(1) *Criminal, civil or administrative proceedings.* Neither the applicant nor any of its directors or senior officers has been the subject of any criminal, civil or administrative proceedings reflecting upon creditworthiness, business judgment, or moral turpitude in the past three years; and

(2) *Criminal, civil or administrative monetary liabilities, lawsuits or judgments.* There are no known potential criminal, civil or administrative monetary liabilities, material pending lawsuits, or unsatisfied judgments against the applicant or any of its directors or senior officers arising within the past three years that are significant to the applicant's operations.

§ 1263.13 Home financing policy requirement.

(a) *Standard.* An applicant shall be deemed to be in compliance with the home financing policy requirements of section 4(a)(2)(C) of the Bank Act (12 U.S.C. 1424(a)(2)(C)) and § 1263.6(a)(6), if the applicant has received a Community Reinvestment Act (CRA) rating of ''Satisfactory'' or better on its most recent formal, or if unavailable, informal or preliminary, CRA performance evaluation.

(b) *Written justification required.* An applicant that is not subject to the CRA shall file, as part of its application for membership, a written justification acceptable to the Bank of how and why the applicant's home financing policy is consistent with the Bank System's housing finance mission.

§ 1263.14 De novo insured depository institution applicants.

(a) *Duly organized, subject to inspection and regulation, financial condition and character of management requirements.* An insured depository institution applicant whose date of charter approval is within three years prior to the date the Bank receives the applicant's application for membership in the Bank (*de novo* applicant) is deemed to meet the requirements of §§ 1263.7, 1263.8, 1263.11 and 1263.12.

(b) *Makes long-term home mortgage loans requirement.* A de novo applicant shall be deemed to make long-term home mortgage loans as required by § 1263.9, if it has filed as part of its application for membership, a written justification acceptable to the Bank of how its home financing credit policy and lending practices will include originating or purchasing long-term home mortgage loans.

(c) *10 percent requirement*—(1) *One-year requirement.* A de novo applicant subject to the 10 percent requirement of section 4(a)(2)(A) of the Bank Act (12 U.S.C. 1424(a)(2)(A)) and § 1263.6(b) shall have until one year after commencing its initial business operations to meet the 10 percent requirement of § 1263.10.

(2) *Conditional approval.* A de novo applicant shall be conditionally deemed to be in compliance with the 10 percent requirement of section 4(a)(2)(A) of the Bank Act (12 U.S.C. 1424(a)(2)(A)) and § 1263.6(b). A de novo applicant that receives such conditional membership approval is subject to the stock purchase requirements established by FHFA regulation or the Bank's capital plan, as applicable, as well as FHFA regulations governing advances to members.

(3) *Approval.* A de novo applicant shall be deemed to be in compliance with the 10 percent requirement of section 4(a)(2)(A) of the Bank Act (12 U.S.C. 1424(a)(2)(A)) and § 1263.6(b) upon receipt by the Bank from the applicant, within one year after commencement of the applicant's initial business operations, of evidence acceptable to the Bank that the applicant satisfies the 10 percent requirement.

(4) *Conditional approval deemed null and void.* If the requirements of paragraph (c)(3) of this section are not satisfied, a de novo applicant shall be deemed to be in noncompliance with the 10 percent requirement of section 4(a)(2)(A) of the Bank Act (12 U.S.C. 1424(a)(2)(A)) and § 1263.6(b), and its conditional membership approval is deemed null and void.

(5) *Treatment of outstanding advances and Bank stock.* If a de novo applicant's conditional membership approval is deemed null and void pursuant to paragraph (c)(4) of this section, the liquidation of any outstanding indebtedness owed by the applicant to the Bank and redemption of stock of such Bank shall be carried out in accordance with § 1263.29.

(d) *Home financing policy requirement*—(1) *Conditional approval.*

A de novo applicant that has not received its first formal, or, if unavailable, informal or preliminary, CRA performance evaluation, shall be conditionally deemed to be in compliance with the home financing policy requirement of section 4(a)(2)(C) of the Bank Act (12 U.S.C. 1424(a)(2)(C)) and § 1263.6(a)(6), if the applicant has filed, as part of its application for membership, a written justification acceptable to the Bank of how and why its home financing credit policy and lending practices will meet the credit needs of its community. An applicant that receives such conditional membership approval is subject to the stock purchase requirements established by FHFA regulation or the Bank's capital plan, as applicable, as well as FHFA regulations governing advances to members.

(2) *Approval.* A de novo applicant that has been granted conditional approval under paragraph (d)(1) of this section shall be deemed to be in compliance with the home financing policy requirement of section 4(a)(2)(C) of the Bank Act (12 U.S.C. 1424(a)(2)(C)) and § 1263.6(a)(6) upon receipt by the Bank of evidence from the applicant that it received a CRA rating of ''Satisfactory'' or better on its first formal, or if unavailable, informal or preliminary, CRA performance evaluation.

(3) *Conditional approval deemed null and void.* If the de novo applicant's first such CRA rating is ''Needs to Improve'' or ''Substantial Non-Compliance,'' the applicant shall be deemed to be in noncompliance with the home financing policy requirement of section 4(a)(2)(C) of the Bank Act (12 U.S.C. 1424(a)(2)(C)) and § 1263.6(a)(6), subject to rebuttal by the applicant under § 1263.17(f), and its conditional membership approval is deemed null and void.

(4) *Treatment of outstanding advances and Bank stock.* If the applicant's conditional membership approval is deemed null and void pursuant to paragraph (d)(3) of this section, the liquidation of any outstanding indebtedness owed by the applicant to the Bank and redemption of stock of such Bank shall be carried out in accordance with § 1263.29.

§ 1263.15 Recent merger or acquisition applicants.

An applicant that merged with or acquired another institution prior to the date the Bank receives its application for membership is subject to the requirements of §§ 1263.7 to 1263.13 except as provided in this section.

(a) *Financial condition requirement*—(1) *Regulatory financial reports.* For purposes of § 1263.11(a)(1), an applicant that, as a result of a merger or acquisition preceding the date the Bank receives its application for membership, has not yet filed regulatory financial reports with its appropriate regulator for the last six calendar quarters and three year-ends preceding such date, shall provide any regulatory financial reports that the applicant has filed with its appropriate regulator.

(2) *Performance trend criteria.* For purposes of § 1263.11(b)(3)(i)(A) to (C), an applicant that, as a result of a merger or acquisition preceding the date the Bank receives its application for membership, has not yet filed combined regulatory financial reports with its appropriate regulator for the last six calendar quarters preceding such date, shall provide pro forma combined financial statements for those calendar quarters in which actual combined regulatory financial reports are unavailable.

(b) *Home financing policy requirement.* For purposes of § 1263.13, an applicant that, as a result of a merger or acquisition preceding the date the Bank receives its application for membership, has not received its first formal, or if unavailable, informal or preliminary, CRA performance evaluation, shall file as part of its application, a written justification acceptable to the Bank of how and why the applicant's home financing credit policy and lending practices will meet the credit needs of its community.

(c) *Makes long-term home mortgage loans requirement; 10 percent requirement.* For purposes of determining compliance with §§ 1263.9 and 1263.10, a Bank may, in its discretion, permit an applicant that, as a result of a merger or acquisition preceding the date the Bank receives its application for membership, has not yet filed a consolidated regulatory financial report as a combined entity with its appropriate regulator, to provide the combined pro forma financial statement for the combined entity filed with the regulator that approved the merger or acquisition.

§ 1263.16 Financial condition requirement for insurance company and certain CDFI applicants.

(a) *Insurance companies.* An insurance company applicant shall be deemed to meet the financial condition requirement of § 1263.6(a)(4) if, based on the information contained in the applicant's most recent regulatory financial report filed with its appropriate regulator, the applicant meets all of its minimum statutory and regulatory capital requirements and the capital standards established by the National Association of Insurance Commissioners.

(b) *CDFIs other than CDFI credit unions*—(1) *Review requirement.* In order for a Bank to determine whether a CDFI applicant, other than a CDFI credit union, has complied with the financial condition requirement of § 1263.6(a)(4), the applicant shall submit, as a part of its membership application, each of the following documents, and the Bank shall consider all such information prior to acting on the application for membership:

(i) *Financial statements.* An independent audit conducted within the prior year in accordance with generally accepted auditing standards by a certified public accounting firm, plus more recent quarterly statements, if available, and financial statements for the two years prior to the most recent audited financial statement. At a minimum, all such financial statements must include income and expense statements, statements of activities, statements of financial position, and statements of cash flows. The financial statement for the most recent year must include separate schedules or disclosures of the financial position of each of the applicant's affiliates, descriptions of their lines of business, detailed financial disclosures of the relationship between the applicant and its affiliates (such as indebtedness or subordinate debt obligations), disclosures of interlocking directorships with each affiliate, and identification of temporary and permanently restricted funds and the requirements of these restrictions;

(ii) *CDFI Fund certification.* The certification that the applicant has received from the CDFI Fund. If the certification is more than three years old, the applicant must also submit a written statement attesting that there have been no material events or occurrences since the date of certification that would adversely affect its strategic direction, mission, or business operations; and

(iii) *Additional information.* Any other relevant document or information a Bank requests concerning the applicant's financial condition that is not contained in the applicant's financial statements, as well as any other information that the applicant believes demonstrates that it satisfies the financial condition requirement of § 1263.6(a)(4), notwithstanding its failure to meet any of the financial condition standards of paragraph (b)(2) of this section.

(2) *Standards.* A CDFI applicant, other than a CDFI credit union, shall be

deemed to be in compliance with the financial condition requirement of § 1263.6(a)(4) if it meets all of the following minimum financial standards—

(i) *Net asset ratio.* The applicant's ratio of net assets to total assets is at least 20 percent, with net and total assets including restricted assets, where net assets is calculated as the residual value of assets over liabilities and is based on information derived from the applicant's most recent financial statements;

(ii) *Earnings.* The applicant has shown positive net income, where net income is calculated as gross revenues less total expenses, is based on information derived from the applicant's most recent financial statements, and is measured as a rolling three-year average;

(iii) *Loan loss reserves.* The applicant's ratio of loan loss reserves to loans and leases 90 days or more delinquent (including loans sold with full recourse) is at least 30 percent, where loan loss reserves are a specified balance sheet account that reflects the amount reserved for loans expected to be uncollectible and are based on information derived from the applicant's most recent financial statements;

(iv) *Liquidity.* The applicant has an operating liquidity ratio of at least 1.0 for the four most recent quarters, and for one or both of the two preceding years, where the numerator of the ratio includes unrestricted cash and cash equivalents and the denominator of the ratio is the average quarterly operating expense.

§ 1263.17 Rebuttable presumptions.

(a) *Rebutting presumptive compliance.* The presumption that an applicant meeting the requirements of §§ 1263.7 to 1263.16 is in compliance with section 4(a) of the Bank Act (12 U.S.C. 1424(a)) and § 1263.6(a) and (b), may be rebutted, and the Bank may deny membership to the applicant, if the Bank obtains substantial evidence to overcome the presumption of compliance.

(b) *Rebutting presumptive noncompliance.* The presumption that an applicant not meeting a particular requirement of §§ 1263.8, 1263.11, 1263.12, 1263.13, or 1263.16, is in noncompliance with section 4(a) of the Bank Act (12 U.S.C. 1424(a)), and § 1263.6(a)(2), (4), (5), or (6) may be rebutted. The applicant shall be deemed to meet such requirement, if the applicable requirements in this section are satisfied.

(c) *Presumptive noncompliance by insurance company applicant with ''subject to inspection and regulation'' requirement of § 1263.8.* If an insurance company applicant is not subject to inspection and regulation by an appropriate State regulator accredited by the National Association of Insurance Commissioners (NAIC), as required by § 1263.8, the applicant or the Bank shall prepare a written justification that provides substantial evidence acceptable to the Bank that the applicant is subject to inspection and regulation as required by § 1263.6(a)(2), notwithstanding the lack of NAIC accreditation.

(d) *Presumptive noncompliance with financial condition requirements of §§ 1263.11 and 1263.16*—(1) *Applicants subject to § 1263.11.* For applicants subject to § 1263.11, in the case of an applicant's lack of a composite regulatory examination rating within the two-year period required by § 1263.11(b)(1), a variance from the rating required by § 1263.11(b)(3)(i), or a variance from a performance trend criterion required by § 1263.11(b)(3)(i), the applicant or the Bank shall prepare a written justification pertaining to such requirement that provides substantial evidence acceptable to the Bank that the applicant is in the financial condition required by § 1263.6(a)(4), notwithstanding the lack of rating or variance.

(2) *Applicants subject to § 1263.16.* For applicants subject to § 1263.16, in the case of an insurance company applicant's variance from a capital requirement or standard of § 1263.16(a) or, in the case of a CDFI applicant's variance from the standards of § 1263.16(b), the applicant or the Bank shall prepare a written justification pertaining to such requirement or standard that provides substantial evidence acceptable to the Bank that the applicant is in the financial condition required by § 1263.6(a)(4), notwithstanding the variance.

(e) *Presumptive noncompliance with character of management requirement of § 1263.12*—(1) *Enforcement actions.* If an applicant or any of its directors or senior officers is subject to, or operating under, any enforcement action instituted by its appropriate regulator, the applicant shall provide or the Bank shall obtain:

(i) *Regulator confirmation.* Written or verbal confirmation from the applicant's appropriate regulator that the applicant or its directors or senior officers are in substantial compliance with all aspects of the enforcement action; or

(ii) *Written analysis.* A written analysis acceptable to the Bank indicating that the applicant or its directors or senior officers are in substantial compliance with all aspects of the enforcement action. The written analysis shall state each action the applicant or its directors or senior officers are required to take by the enforcement action, the actions actually taken by the applicant or its directors or senior officers, and whether the applicant regards this as substantial compliance with all aspects of the enforcement action.

(2) *Criminal, civil or administrative proceedings.* If an applicant or any of its directors or senior officers has been the subject of any criminal, civil or administrative proceedings reflecting upon creditworthiness, business judgment, or moral turpitude since the most recent regulatory examination report or, in the case of a CDFI applicant, during the past three years, the applicant shall provide or the Bank shall obtain—

(i) *Regulator confirmation.* Written or verbal confirmation from the applicant's appropriate regulator that the proceedings will not likely result in enforcement action; or

(ii) *Written analysis.* A written analysis acceptable to the Bank indicating that the proceedings will not likely result in enforcement action or, in the case of a CDFI applicant, that the proceedings will not likely have a significantly deleterious effect on the applicant's operations. The written analysis shall state the severity of the charges, and any mitigating action taken by the applicant or its directors or senior officers.

(3) *Criminal, civil or administrative monetary liabilities, lawsuits or judgments.* If there are any known potential criminal, civil or administrative monetary liabilities, material pending lawsuits, or unsatisfied judgments against the applicant or any of its directors or senior officers since the most recent regulatory examination report or, in the case of a CDFI applicant, occurring within the past three years, that are significant to the applicant's operations, the applicant shall provide or the Bank shall obtain—

(i) *Regulator confirmation.* Written or verbal confirmation from the applicant's appropriate regulator that the liabilities, lawsuits or judgments will not likely cause the applicant to fall below its applicable capital requirements set forth in §§ 1263.11(b)(2) and 1263.16(a); or

(ii) *Written analysis.* A written analysis acceptable to the Bank indicating that the liabilities, lawsuits or judgments will not likely cause the applicant to fall below its applicable

capital requirements set forth in § 1263.11(b)(2) or § 1263.16(a), or the net asset ratio set forth in § 1263.16(b)(2)(i). The written analysis shall state the likelihood of the applicant or its directors or senior officers prevailing, and the financial consequences if the applicant or its directors or senior officers do not prevail.

(f) *Presumptive noncompliance with home financing policy requirements of §§ 1263.13 and 1263.14(d).* If an applicant received a ''Substantial Non-Compliance'' rating on its most recent formal, or if unavailable, informal or preliminary, CRA performance evaluation, or a ''Needs to Improve'' CRA rating on its most recent formal, or if unavailable, informal or preliminary, CRA performance evaluation and a CRA rating of ''Needs to Improve'' or better on any immediately preceding CRA performance evaluation, the applicant shall provide or the Bank shall obtain:

(1) *Regulator confirmation.* Written or verbal confirmation from the applicant's appropriate regulator of the applicant's recent satisfactory CRA performance, including any corrective action that substantially improved upon the deficiencies cited in the most recent CRA performance evaluation(s); or

(2) *Written analysis.* A written analysis acceptable to the Bank demonstrating that the CRA rating is unrelated to home financing, and providing substantial evidence of how and why the applicant's home financing credit policy and lending practices meet the credit needs of its community.

§ 1263.18 Determination of appropriate Bank district for membership.

(a) *Eligibility.* (1) An institution eligible to become a member of a Bank under the Bank Act and this part may become a member only of the Bank of the district in which the institution's principal place of business is located, except as provided in paragraph (a)(2) of this section. A member shall promptly notify its Bank in writing whenever it relocates its principal place of business to another State and the Bank shall inform FHFA in writing of any such relocation.

(2) An institution eligible to become a member of a Bank under the Bank Act and this part may become a member of the Bank of a district adjoining the district in which the institution's principal place of business is located, if demanded by convenience and then only with the approval of FHFA.

(b) *Principal place of business.* Except as otherwise designated in accordance with this section, the principal place of business of an institution is the State in which the institution maintains its home office established as such in conformity with the laws under which the institution is organized.

(c) *Designation of principal place of business.* (1) A member or an applicant for membership may request in writing to the Bank in the district where the institution maintains its home office that a State other than the State in which it maintains its home office be designated as its principal place of business. Within 90 calendar days of receipt of such written request, the board of directors of the Bank in the district where the institution maintains its home office shall designate a State other than the State where the institution maintains its home office as the institution's principal place of business, provided that all of the following criteria are satisfied:

(i) At least 80 percent of the institution's accounting books, records, and ledgers are maintained, located or held in such designated State;

(ii) A majority of meetings of the institution's board of directors and constituent committees are conducted in such designated State; and

(iii) A majority of the institution's five highest paid officers have their place of employment located in such designated State.

(2) Written notice of a designation made pursuant to paragraph (c)(1) of this section shall be sent to the Bank in the district containing the designated State, FHFA, and the institution.

(3) The notice of designation made pursuant to paragraph (c)(1) of this section shall include the State designated as the principal place of business and the resulting Bank to which membership will be transferred.

(4) If the board of directors of the Bank in the district where the institution maintains its home office fails to make the designation requested by the member or applicant pursuant to paragraph (c)(1) of this section, then the member or applicant may request in writing that FHFA make the designation.

(d) *Transfer of membership.* (1) No transfer of membership from one Bank to another Bank shall take effect until the Banks involved reach an agreement on a method of orderly transfer.

(2) In the event that the Banks involved fail to agree on a method of orderly transfer, FHFA shall determine the conditions under which the transfer shall take place.

(e) *Effect of transfer.* A transfer of membership pursuant to this section shall be effective for all purposes, but shall not affect voting rights in the year of the transfer and shall not be subject to the provisions on termination of membership set forth in section 6 of the Bank Act (12 U.S.C. 1426) or §§ 1263.26 and 1263.27, nor the restriction on reacquiring Bank membership set forth in § 1263.30.

Subpart D—Stock Requirements

§ 1263.19 Par value and price of stock.

The capital stock of each Bank shall be sold at par, unless the Director has fixed a higher price.

§ 1263.20 Stock purchase.

(a) *Minimum stock purchase.* Each member shall purchase stock in the Bank of which it is a member in an amount specified by the Bank's capital plan, except that each member of a Bank that has not converted to the capital structure authorized by the Gramm-Leach-Bliley Act (GLB Act) shall purchase stock in the Bank in an amount equal to the greater of:

(1) $500;

(2) 1 percent of the member's aggregate unpaid loan principal; or

(3) 5 percent of the member's aggregate amount of outstanding advances.

(b) *Timing of minimum stock purchase.* (1) Within 60 calendar days after an institution is approved for membership in a Bank, the institution shall purchase its minimum stock requirement as set forth in paragraph (a) of this section.

(2) In the case of a Bank that has not converted to the capital structure authorized by the GLB Act, an institution that has been approved for membership may elect to purchase its minimum stock requirement in installments, provided that not less than one-fourth of the total amount shall be purchased within 60 calendar days of the date of approval of membership, and that a further sum of not less than one-fourth of such total shall be purchased at the end of each succeeding period of four months from the date of approval of membership.

(c) *Commencement of membership.* An institution that has been approved for membership shall become a member at the time it purchases its minimum stock requirement or the first installment thereof pursuant to this section.

(d) *Failure to purchase minimum stock requirement.* If an institution that has submitted an application and been approved for membership fails to purchase its minimum stock requirement or its first installment within 60 calendar days of the date of its approval for membership, such approval shall be null and void and the

institution, if it wants to become a member, shall be required to submit a new application for membership.

(e) *Reports.* The Bank shall make reports to FHFA setting forth purchases by institutions approved for membership of their minimum stock requirement pursuant to this section and in accordance with the instructions provided in the Data Reporting Manual issued by FHFA, as amended from time to time.

§ 1263.21 Issuance and form of stock.

(a) A Bank shall issue to each new member, as of the effective date of membership, stock in the member's name for the amount of stock purchased and paid for in full.

(b) If the member purchases stock in installments, the stock shall be issued in installments with the appropriate number of shares issued after each payment is made.

(c) A Bank that has not converted to the capital structure authorized by the GLB Act may issue stock in certificated or uncertificated form at the discretion of the Bank.

(d) A Bank that has not converted to the capital structure authorized by the GLB Act may convert all outstanding certificated stock to uncertificated form at its discretion.

§ 1263.22 Adjustments in stock holdings.

(a) *Adjustment in general.* A Bank may from time to time increase or decrease the amount of stock any member is required to hold.

(b)(1) *Annual adjustment.* A Bank shall calculate annually, in the manner set forth in § 1263.20(a), each member's required minimum holdings of stock in the Bank in which it is a member using calendar year-end financial data provided by the member to the Bank, pursuant to § 1263.31(d), and shall notify each member of the adjustment. The notice shall clearly state that the Bank's calculation of each member's minimum stock holdings is to be used to determine the number of votes that the member may cast in that year's election of directors and shall identify the State within the district in which the member will vote. A member that does not agree with the Bank's calculation of the minimum stock requirement or with the identification of its voting State may request FHFA to review the Bank's determination. FHFA shall promptly determine the member's minimum required holdings and its proper voting State, which determination shall be final.

(2) *Redemption of excess shares.* If, in the case of a Bank that has not converted to the capital structure authorized by the GLB Act and after the annual adjustment required by paragraph (b)(1) of this section is made, the amount of stock that a member is required to hold is decreased, the Bank may, in its discretion and upon proper application of the member, retire such excess stock, and the Bank shall pay for each share upon surrender of the stock an amount equal to the par value thereof (except that if at any time FHFA finds that the paid-in capital of a Bank is or is likely to be impaired as a result of losses in or depreciation of the assets held, the Bank shall on the order of FHFA withhold from the amount to be paid in retirement of the stock a *pro rata* share of the amount of such impairment as determined by FHFA) or, at its election, the Bank may credit any part of such payment against the member's debt to the Bank. The Bank's authority to retire such excess stock shall be further subject to the limitations of section 6(f) of the Bank Act (12 U.S.C. 1426(f)).

(c) A member's stock holdings shall not be reduced under this section to an amount less than required by sections 6(b) and 10(c) of the Bank Act (12 U.S.C. 1426(b), 1430(c)).

§ 1263.23 Excess stock.

(a) *Sale of excess stock.* Subject to the restriction in paragraph (b) of this section, a member may purchase excess stock as long as the purchase is approved by the member's Bank and is permitted by the laws under which the member operates.

(b) *Restriction.* Any Bank with excess stock greater than 1 percent of its total assets shall not declare or pay any dividends in the form of additional shares of Bank stock or otherwise issue any excess stock. A Bank shall not issue excess stock, as a dividend or otherwise, if after the issuance, the outstanding excess stock at the Bank would be greater than 1 percent of its total assets.

Subpart E—Consolidations Involving Members

§ 1263.24 Consolidations involving members.

(a) *Consolidation of members.* Upon the consolidation of two or more institutions that are members of the same Bank into one institution operating under the charter of one of the consolidating institutions, the membership of the surviving institution shall continue and the membership of each disappearing institution shall terminate on the cancellation of its charter. Upon the consolidation of two or more institutions, at least two of which are members of different Banks, into one institution operating under the charter of one of the consolidating institutions, the membership of the surviving institution shall continue and the membership of each disappearing institution shall terminate upon cancellation of its charter, provided, however, that if more than 80 percent of the assets of the consolidated institution are derived from the assets of a disappearing institution, then the consolidated institution shall continue to be a member of the Bank of which that disappearing institution was a member prior to the consolidation, and the membership of the other institutions shall terminate upon the effective date of the consolidation.

(b) *Consolidation into nonmember*—(1) *In general.* Upon the consolidation of a member into an institution that is not a member of a Bank, where the consolidated institution operates under the charter of the nonmember institution, the membership of the disappearing institution shall terminate upon the cancellation of its charter.

(2) *Notification.* If a member has consolidated into a nonmember that has its principal place of business in a State in the same Bank district as the former member, the consolidated institution shall have 60 calendar days after the cancellation of the charter of the former member within which to notify the Bank of the former member that the consolidated institution intends to apply for membership in such Bank. If the consolidated institution does not so notify the Bank by the end of the period, the Bank shall require the liquidation of any outstanding indebtedness owed by the former member, shall settle all outstanding business transactions with the former member, and shall redeem or repurchase the Bank stock owned by the former member in accordance with § 1263.29.

(3) *Application.* If such a consolidated institution has notified the appropriate Bank of its intent to apply for membership, the consolidated institution shall submit an application for membership within 60 calendar days of so notifying the Bank. If the consolidated institution does not submit an application for membership by the end of the period, the Bank shall require the liquidation of any outstanding indebtedness owed by the former member, shall settle all outstanding business transactions with the former member, and shall redeem or repurchase the Bank stock owned by the former member in accordance with § 1263.29.

(4) *Outstanding indebtedness.* If a member has consolidated into a nonmember institution, the Bank need

not require the former member or its successor to liquidate any outstanding indebtedness owed to the Bank or to redeem its Bank stock, as otherwise may be required under § 1263.29, during:

(i) The initial 60 calendar-day notification period;

(ii) The 60 calendar-day period following receipt of a notification that the consolidated institution intends to apply for membership; and

(iii) The period of time during which the Bank processes the application for membership.

(5) *Approval of membership.* If the application of such a consolidated institution is approved, the consolidated institution shall become a member of that Bank upon the purchase of the amount of Bank stock required by section 6 of the Bank Act (12 U.S.C. 1426). If a Bank's capital plan has not taken effect, the amount of stock that the consolidated institution is required to own shall be as provided in §§ 1263.20 and 1263.22. If the capital plan for the Bank has taken effect, the amount of stock that the consolidated institution is required to own shall be equal to the minimum investment established by the capital plan for that Bank.

(6) *Disapproval of membership.* If the Bank disapproves the application for membership of the consolidated institution, the Bank shall require the liquidation of any outstanding indebtedness owed by, and the settlement of all other outstanding business transactions with, the former member, and shall redeem or repurchase the Bank stock owned by the former member in accordance with § 1263.29.

(c) *Dividends on acquired Bank stock.* A consolidated institution shall be entitled to receive dividends on the Bank stock that it acquires as a result of a consolidation with a member in accordance with applicable FHFA regulations.

(d) *Stock transfers.* With regard to any transfer of Bank stock from a disappearing member to the surviving or consolidated member, as appropriate, for which the approval of FHFA is required pursuant to section 6(f) of the Bank Act (12 U.S.C. 1426(f)), as in effect prior to November 12, 1999, such transfer shall be deemed to be approved by FHFA by compliance in all applicable respects with the requirements of this section.

Subpart F—Withdrawal and Removal From Membership

§ 1263.25 [Reserved]

§ 1263.26 Voluntary withdrawal from membership.

(a) *In general.* (1) Any institution may withdraw from membership by providing to the Bank written notice of its intent to withdraw from membership. A member that has so notified its Bank shall be entitled to have continued access to the benefits of membership until the effective date of its withdrawal. The Bank need not commit to providing any further services, including advances, to a withdrawing member that would mature or otherwise terminate subsequent to the effective date of the withdrawal. A member may cancel its notice of withdrawal at any time prior to its effective date by providing a written cancellation notice to the Bank. A Bank may impose a fee on a member that cancels a notice of withdrawal, provided that the fee or the manner of its calculation is specified in the Bank's capital plan.

(2) A Bank shall notify FHFA within 10 calendar days of receipt of any notice of withdrawal or notice of cancellation of withdrawal from membership.

(b) *Effective date of withdrawal.* The membership of an institution that has submitted a notice of withdrawal shall terminate as of the date on which the last of the applicable stock redemption periods ends for the stock that the member is required to hold, as of the date that the notice of withdrawal is submitted, under the terms of a Bank's capital plan as a condition of membership, unless the institution has cancelled its notice of withdrawal prior to the effective date of the termination of its membership.

(c) *Stock redemption periods.* The receipt by a Bank of a notice of withdrawal shall commence the applicable 6-month and 5-year stock redemption periods, respectively, for all of the Class A and Class B stock held by that member that is not already subject to a pending request for redemption. In the case of an institution, the membership of which has been terminated as a result of a merger or other consolidation into a nonmember or into a member of another Bank, the applicable stock redemption periods for any stock that is not subject to a pending notice of redemption shall be deemed to commence on the date on which the charter of the former member is cancelled.

(d) *Certification.* No institution may withdraw from membership unless, on the date that the membership is to terminate, there is in effect a certification from FHFA that the withdrawal of a member will not cause the Bank System to fail to satisfy its requirements under section 21B(f)(2)(C) of the Bank Act (12 U.S.C. 1441b(f)(2)(C)) to contribute toward the interest payments owed on obligations issued by the Resolution Funding Corporation.

§ 1263.27 Involuntary termination of membership.

(a) *Grounds.* The board of directors of a Bank may terminate the membership of any institution that:

(1) Fails to comply with any requirement of the Bank Act, any regulation adopted by FHFA, or any requirement of the Bank's capital plan;

(2) Becomes insolvent or otherwise subject to the appointment of a conservator, receiver, or other legal custodian under Federal or State law; or

(3) Would jeopardize the safety or soundness of the Bank if it were to remain a member.

(b) *Stock redemption periods.* The applicable 6-month and 5-year stock redemption periods, respectively, for all of the Class A and Class B stock owned by a member and not already subject to a pending request for redemption, shall commence on the date that the Bank terminates the institution's membership.

(c) *Membership rights.* An institution whose membership is terminated involuntarily under this section shall cease being a member as of the date on which the board of directors of the Bank acts to terminate the membership, and the institution shall have no right to obtain any of the benefits of membership after that date, but shall be entitled to receive any dividends declared on its stock until the stock is redeemed or repurchased by the Bank.

§ 1263.28 [Reserved]

Subpart G—Orderly Liquidation of Advances and Redemption of Stock

§ 1263.29 Disposition of claims.

(a) *In general.* If an institution withdraws from membership or its membership is otherwise terminated, the Bank shall determine an orderly manner for liquidating all outstanding indebtedness owed by that member to the Bank and for settling all other claims against the member. After all such obligations and claims have been extinguished or settled, the Bank shall return to the member all collateral pledged by the member to the Bank to secure its obligations to the Bank.

(b) *Bank stock.* If an institution that has withdrawn from membership or that

otherwise has had its membership terminated remains indebted to the Bank or has outstanding any business transactions with the Bank after the effective date of its termination of membership, the Bank shall not redeem or repurchase any Bank stock that is required to support the indebtedness or the business transactions until after all such indebtedness and business transactions have been extinguished or settled.

Subpart H—Reacquisition of Membership

§ 1263.30 Readmission to membership.

(a) *In general.* An institution that has withdrawn from membership or otherwise has had its membership terminated and which has divested all of its shares of Bank stock, may not be readmitted to membership in any Bank, or acquire any capital stock of any Bank, for a period of 5 years from the date on which its membership terminated and it divested all of its shares of Bank stock.

(b) *Exceptions.* An institution that transfers membership between two Banks without interruption shall not be deemed to have withdrawn from Bank membership or had its membership terminated.

Subpart I—Bank Access to Information

§ 1263.31 Reports and examinations.

As a condition precedent to Bank membership, each member:

(a) Consents to such examinations as the Bank or FHFA may require for purposes of the Bank Act;

(b) Agrees that reports of examinations by local, State or Federal agencies or institutions may be furnished by such authorities to the Bank or FHFA upon request;

(c) Agrees to give the Bank or the appropriate Federal banking agency, upon request, such information as the Bank or the appropriate Federal banking agency may need to compile and publish cost of funds indices and to publish other reports or statistical summaries pertaining to the activities of Bank members;

(d) Agrees to provide the Bank with calendar year-end financial data each year, for purposes of making the calculation described in § 1263.22(b)(1); and

(e) Agrees to provide the Bank with copies of reports of condition and operations required to be filed with the member's appropriate Federal banking agency, if applicable, within 20 calendar days of filing, as well as copies of any annual report of condition and operations required to be filed.

Subpart J—Membership Insignia

§ 1263.32 Official membership insignia.

Members may display the approved insignia of membership on their documents, advertising and quarters, and likewise use the words ''Member Federal Home Loan Bank System.''

CHAPTER IX—FEDERAL HOUSING FINANCE BOARD

PART 944—[REDESIGNATED AS PART 1290]

■ 3. Transfer 12 CFR part 944 from chapter IX, subchapter F, to chapter XII subchapter E and redesignate as 12 CFR part 1290.

■ 4. Revise the newly redesignated part 1290 to read as follows:

PART 1290—COMMUNITY SUPPORT REQUIREMENTS

Sec.

1290.1 Definitions.
1290.2 Community support requirement.
1290.3 Community support standards.
1290.4 Decision on community support statements.
1290.5 Restrictions on access to long-term advances.
1290.6 Bank community support programs.
1290.7 Reports.

Authority: 12 U.S.C. 1430(g), 4511, 4513.

§ 1290.1 Definitions.

For purposes of this part:

Advisory Council means the Advisory Council each Bank is required to establish pursuant to section 10(j)(11) of the Federal Home Loan Bank Act (12 U.S.C. 1430(j)(11)) and part 1291 of this chapter.

Appropriate Federal banking agency has the meaning set forth in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)) and, for federally insured credit unions, means the National Credit Union Administration.

Appropriate State regulator means any State officer, agency, supervisor, or other entity that has regulatory authority over, or is empowered to institute enforcement action against, a particular institution.

Bank means a Federal Home Loan Bank established under section 12 of the Federal Home Loan Bank Act (12 U.S.C. 1432).

CDFI Fund means the Community Development Financial Institutions Fund established under section 104(a) of the Community Development Banking and Financial Institutions Act of 1994 (12 U.S.C. 4703(a)).

Community development financial institution or CDFI means an institution that is certified as a community development financial institution by the CDFI Fund under the Community Development Banking and Financial Institutions Act of 1994 (12 U.S.C. 4701 *et seq.*).

CRA means the Community Reinvestment Act of 1977, as amended (12 U.S.C. 2901, *et seq.*).

CRA evaluation means the public disclosure portion of the CRA performance evaluation provided by a member's appropriate Federal banking agency.

Displaced homemaker means an adult who has not worked full-time, full-year in the labor force for a number of years, and during that period, worked primarily without remuneration to care for a home and family, and currently is unemployed or underemployed and is experiencing difficulty in obtaining or upgrading employment.

FHFA means Federal Housing Finance Agency.

First-time homebuyer means:

(1) An individual and his or her spouse, if any, who has had no present ownership interest in a principal residence during the three-year period prior to purchase of a principal residence.

(2) A displaced homemaker who, except for owning a residence with his or her spouse or residing in a residence owned by his or her spouse, meets the requirements of paragraph (1) of this definition.

(3) A single parent who, except for owning a residence with his or her spouse or residing in a residence owned by his or her spouse, meets the requirements of paragraph (1) of this definition.

Long-term advance means an advance with a term to maturity greater than one year.

Restriction on access to long-term advances means a member may not borrow long-term advances or renew any maturing advance for a term to maturity greater than one year.

Single parent means an individual who is unmarried or legally separated from a spouse and has custody or joint custody of one or more minor children or is pregnant.

Targeted community lending means providing financing for economic development projects for targeted beneficiaries.

§ 1290.2 Community support requirement.

(a) *Selection for community support review.* Except as otherwise provided in this section, FHFA shall select a member for community support review approximately once every two years.

(b) *Notice*—(1) *By the FHFA.* FHFA concurrently shall:

(i) Notify each Bank of the members within its district that have to submit

community support statements during the calendar quarter; and

(ii) Publish a notice in the **Federal Register** that includes the name and address of each member required to submit a community support statement during the calendar quarter, and the deadline for submission of the community support statement to FHFA. The deadline for submission of a community support statement shall be no earlier than 45 calendar days after the date of publication of the notice in the **Federal Register**.

(2) *By the Banks.* Within 15 calendar days of the date of publication in the **Federal Register** of the notice required by paragraph (b)(1)(ii) of this section, a Bank shall provide written notice to—

(i) Each member within its district that is named in the **Federal Register** notice, that the member has to submit a community support statement to FHFA by the deadline stated in the **Federal Register** notice; and

(ii) Its Advisory Council and nonprofit housing developers, community groups, and other interested parties in its district of the name and address of each member within its district that has to submit a community support statement during the calendar quarter.

(c) *Required documents.* Each member selected for community support review must submit a completed Community Support Statement Form executed by an appropriate senior officer to FHFA and any other information FHFA may require to determine whether a member meets the community support standards.

(d) *Public comments.* In reviewing a member for compliance with the community support requirement, FHFA shall take into consideration any public comments it has received concerning the member.

(e) *Community Development Financial Institutions.* A member that has been certified as a community development financial institution by the CDFI Fund, other than a member that also is an insured depository institution or a CDFI credit union (as defined in § 1263.1), shall be deemed to be in compliance with the community support requirements of section 10(g) of the Federal Home Loan Bank Act (Bank Act), 12 U.S.C. 1430(g), by virtue of that certification and is not subject to periodic review under paragraph (a) of this section.

§ 1290.3 Community support standards.

(a) *In general.* In reviewing a community support statement, FHFA shall take into account a member's performance under the CRA if the member is subject to the requirements of the CRA, and the member's record of lending to first-time homebuyers.

(b) *CRA standard*—(1) *Adequate performance.* A member that is subject to the requirements of the CRA shall be deemed to meet the CRA standard if the rating in the member's most recent CRA evaluation is ''outstanding'' or ''satisfactory.''

(2) *Probationary performance.* A member that is subject to the requirements of the CRA shall be subject to a probationary period if the rating in the member's most recent CRA evaluation is ''Needs to Improve.'' The probationary period shall extend until the member's appropriate Federal banking agency completes its next CRA evaluation and issues a rating. The member will be eligible to receive long-term advances during the probationary period. If the member does not meet the CRA standard at the end of the probationary period, FHFA will restrict the member's access to long-term advances in accordance with § 1290.5.

(3) *Inadequate performance.* FHFA will restrict a member's access to long-term advances in accordance with § 1290.5 if the rating in the member's most recent CRA evaluation is ''Substantial Non-Compliance.''

(c) *First-time homebuyer standard*—(1) *Adequate performance.* In the absence of public comments or other information to the contrary, FHFA will presume that a member meets the first-time homebuyer standard if the member is subject to the requirements of the CRA and the rating in the member's most recent CRA evaluation is ''outstanding.'' In determining whether other members meet the first-time homebuyer standard, FHFA will consider a member's description of its efforts to assist first-time or potential first-time homebuyers or its explanation of factors that affect its ability to assist first-time or potential first-time homebuyers. A member shall be deemed to meet the first-time homebuyer standard if the member otherwise demonstrates to the satisfaction of FHFA that it:

(i) Has an established record of lending to first-time homebuyers;

(ii) Has a program whereby it actively seeks to lend or support lending to first-time homebuyers, including, but not limited to, the following—

(A) Providing special credit products with flexible underwriting standards for first-time homebuyers;

(B) Participating in Federal, State, or local government, or nationwide homeownership lending programs that benefit, serve, or are targeted to, first-time homebuyers; or

(C) Participating in loan consortia for first-time homebuyer loans or loans that serve predominantly low- or moderate-income borrowers;

(iii) Has a program whereby it actively seeks to assist or support organizations that assist potential first-time homebuyers to qualify for mortgage loans, including, but not limited to, the following—

(A) Providing, participating in, or supporting special counseling programs or other homeownership education activities that benefit, serve, or are targeted to, first-time homebuyers;

(B) Providing or participating in marketing plans and related outreach programs targeted to first-time homebuyers;

(C) Providing technical assistance of financial support to organizations that assist first-time homebuyers;

(D) Participating with or financially supporting community or nonprofit groups that assist first-time homebuyers;

(E) Holding investments or making loans that support first-time homebuyer programs;

(F) Holding mortgage-backed securities that may include a pool of loans to low- and moderate-income homebuyers;

(G) Participating or investing in service organizations that assist credit unions in providing mortgages; or

(H) Participating in Bank targeted community lending programs; or

(iv) Has any combination of the elements described in paragraphs (c)(1)(i), (ii), or (iii) of this section.

(2) *Probationary performance.* If FHFA deems the evidence of first-time homebuyer performance to be unsatisfactory, the member will be subject to a one-year probationary period. The member will be eligible to receive long-term advances during the probationary period. If the member does not demonstrate compliance with the first-time homebuyer standard before the probationary period ends, FHFA will restrict the member's access to long-term advances in accordance with § 1290.5.

(3) *Inadequate performance.* FHFA will restrict a member's access to long-term advances in accordance with § 1290.5 if the member provides no evidence of first-time homebuyer performance.

§ 1290.4 Decision on community support statements.

(a) *Action on community support statements.* FHFA will act on each community support statement in accordance with the requirements of § 1290.3 within 75 calendar days of the date FHFA deems the community

support statement to be complete. FHFA will deem a community support statement complete when it has obtained all of the information required by this part and any other information it deems necessary to process the community support statement. If FHFA determines during the review process that additional information is necessary to process the community support statement, FHFA may deem the community support statement incomplete and stop the 75-day time period by providing written notice to the member. When FHFA receives the additional information, it shall again deem the community support statement complete and resume the 75-day time period where it stopped. FHFA will have 10 calendar days in addition to the 75-day time period to act on a community support statement if FHFA receives the additional information on or after the seventieth day of the 75-day time period.

(b) *Decision on community support statements.* FHFA will provide written notice to the member and the member's Bank of its determination regarding the community support statement submitted by the member. The notice will identify the reasons for FHFA's determination.

§ 1290.5 Restrictions on access to long-term advances.

(a) *Requirement.* FHFA will restrict a member's access to long-term advances if the member:

(1) Failed to comply with the requirements of this part;

(2) Submitted a community support statement that was not approved by FHFA;

(3) Did not receive a rating in a CRA evaluation of ''outstanding'' or ''satisfactory'' at the end of the probationary period described in § 1290.3(b)(2); or

(4) Failed to provide evidence satisfactory to FHFA of its first-time homebuyer performance before the end of the probationary period described in § 1290.3(c)(2).

(b) *Notice.* FHFA will provide written notice to a member and the member's Bank of its determination to restrict the member's access to long-term advances.

(c) *Effective date.* Restrictions on access to long-term advances will take effect 30 days after the date the notices required under paragraph (b) of this section are sent unless the member complies with the requirements of this part before the end of the 30-day period.

(d) *Removing restrictions.* (1) FHFA may remove restrictions on a member's access to long-term advances imposed under this section:

(i) If FHFA determines that application of the restriction may adversely affect the safety and soundness of the member. A member may submit a written request to FHFA to remove a restriction on access to long-term advances under this paragraph (d)(1)(i). The written request must include a clear and concise statement of the basis for the request, and a statement that application of the restriction may adversely affect the safety and soundness of the member from the member's appropriate Federal banking agency, or the member's appropriate State regulator for a member that is not subject to regulation or supervision by a Federal regulator. FHFA will consider each written request within 30 calendar days of receipt.

(ii) If FHFA determines that the member subsequently has complied with the requirements of this part. A member may submit a written request to FHFA to remove a restriction on access to long-term advances under this paragraph (d)(1)(ii). The written request must state with specificity how the member has complied with the requirements of this part. FHFA will consider each written request within 30 calendar days of receipt.

(2) FHFA will place a member on probation in accordance with § 1290.3(b)(2), if—

(i) The member's access to long-term advances was restricted on the basis of the member's inadequate performance under the CRA standard, as described in § 1290.3(b)(3);

(ii) The rating in the member's subsequent CRA evaluation is ''Needs to Improve;'' and

(iii) The member did not receive either a ''Substantial Non-Compliance'' CRA rating or a ''Needs to Improve'' CRA rating immediately preceding the CRA rating on which the member's inadequate performance under the CRA standard was based.

(3) FHFA will provide written notice to the member and the member's Bank of its determination under this paragraph (d). FHFA's determination takes effect on the date the notices are sent.

(e) *Community Investment Cash Advance (CICA) Programs.* A member that is subject to a restriction on access to long-term advances under this part is not eligible to participate in a CICA program offered under part 952 of this title and 1291 of this chapter. The restriction in this paragraph (e), does not apply to CICA applications or funding approved before the date the restriction is imposed.

§ 1290.6 Bank community support programs.

(a) *Requirement.* Consistent with the safe and sound operation of the Bank, each Bank shall establish and maintain a community support program. A Bank's community support program shall:

(1) Provide technical assistance to members;

(2) Promote and expand affordable housing finance;

(3) Identify opportunities for members to expand financial and credit services in underserved neighborhoods and communities;

(4) Encourage members to increase their targeted community lending and affordable housing finance activities by providing incentives such as awards or technical assistance to nonprofit housing developers or community groups with outstanding records of participation in targeted community lending or affordable housing finance partnerships with members; and

(5) Include an annual Targeted Community Lending Plan, approved by the Bank's board of directors and subject to modification, which shall require the Bank to—(i) Conduct market research in the Bank's district;

(ii) Describe how the Bank will address identified credit needs and market opportunities in the Bank's district for targeted community lending;

(iii) Consult with its Advisory Council and with members, housing associates, and public and private economic development organizations in the Bank's district in developing and implementing its Targeted Community Lending Plan; and

(iv) Establish quantitative targeted community lending performance goals.

(b) *Notice.* A Bank shall provide annually to each of its members a written notice:

(1) Identifying CICA programs and other Bank activities that may provide opportunities for a member to meet the community support requirements and to engage in targeted community lending; and

(2) Summarizing targeted community lending and affordable housing activities undertaken by members, housing associates, nonprofit housing developers, community groups, or other entities in the Bank's district, that may provide opportunities for a member to meet the community support requirements and to engage in targeted community lending.

§ 1290.7 Reports.

Each Advisory Council annual report submitted to FHFA pursuant to section 10(j)(11) of the Bank Act (12 U.S.C. 1430(j)(11)) must include an analysis of the Bank's targeted community lending and affordable housing activities.

Dated: December 23, 2009.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

[FR Doc. E9–31003 Filed 1–4–10; 8:45 am]

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Federal Register

Tuesday,
January 5, 2010

Part VII

The President

Executive Order 13526—Classified National Security Information

Memorandum of December 29, 2009—Implementation of the Executive Order "Classified National Security Information"

Order of December 29, 2009—Original Classification Authority

Federal Register
Vol. 75, No. 2
Tuesday, January 5, 2010

Presidential Documents

Title 3—

The President

Executive Order 13526 of December 29, 2009

Classified National Security Information

This order prescribes a uniform system for classifying, safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism. Our democratic principles require that the American people be informed of the activities of their Government. Also, our Nation's progress depends on the free flow of information both within the Government and to the American people. Nevertheless, throughout our history, the national defense has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations. Protecting information critical to our Nation's security and demonstrating our commitment to open Government through accurate and accountable application of classification standards and routine, secure, and effective declassification are equally important priorities.

NOW, THEREFORE, I, BARACK OBAMA, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

PART 1—ORIGINAL CLASSIFICATION

Section 1.1. *Classification Standards.* (a) Information may be originally classified under the terms of this order only if all of the following conditions are met:

(1) an original classification authority is classifying the information;

(2) the information is owned by, produced by or for, or is under the control of the United States Government;

(3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and

(4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

(b) If there is significant doubt about the need to classify information, it shall not be classified. This provision does not:

(1) amplify or modify the substantive criteria or procedures for classification; or

(2) create any substantive or procedural rights subject to judicial review.

(c) Classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information.

(d) The unauthorized disclosure of foreign government information is presumed to cause damage to the national security.

Sec. 1.2. *Classification Levels.* (a) Information may be classified at one of the following three levels:

(1) ''Top Secret'' shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe.

(2) ''Secret'' shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the

national security that the original classification authority is able to identify or describe.

(3) ''Confidential'' shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe.

(b) Except as otherwise provided by statute, no other terms shall be used to identify United States classified information.

(c) If there is significant doubt about the appropriate level of classification, it shall be classified at the lower level.

Sec. 1.3. *Classification Authority.* (a) The authority to classify information originally may be exercised only by:

(1) the President and the Vice President;

(2) agency heads and officials designated by the President; and

(3) United States Government officials delegated this authority pursuant to paragraph (c) of this section.

(b) Officials authorized to classify information at a specified level are also authorized to classify information at a lower level.

(c) Delegation of original classification authority.

(1) Delegations of original classification authority shall be limited to the minimum required to administer this order. Agency heads are responsible for ensuring that designated subordinate officials have a demonstrable and continuing need to exercise this authority.

(2) ''Top Secret'' original classification authority may be delegated only by the President, the Vice President, or an agency head or official designated pursuant to paragraph (a)(2) of this section.

(3) ''Secret'' or ''Confidential'' original classification authority may be delegated only by the President, the Vice President, an agency head or official designated pursuant to paragraph (a)(2) of this section, or the senior agency official designated under section 5.4(d) of this order, provided that official has been delegated ''Top Secret'' original classification authority by the agency head.

(4) Each delegation of original classification authority shall be in writing and the authority shall not be redelegated except as provided in this order. Each delegation shall identify the official by name or position.

(5) Delegations of original classification authority shall be reported or made available by name or position to the Director of the Information Security Oversight Office.

(d) All original classification authorities must receive training in proper classification (including the avoidance of over-classification) and declassification as provided in this order and its implementing directives at least once a calendar year. Such training must include instruction on the proper safeguarding of classified information and on the sanctions in section 5.5 of this order that may be brought against an individual who fails to classify information properly or protect classified information from unauthorized disclosure. Original classification authorities who do not receive such mandatory training at least once within a calendar year shall have their classification authority suspended by the agency head or the senior agency official designated under section 5.4(d) of this order until such training has taken place. A waiver may be granted by the agency head, the deputy agency head, or the senior agency official if an individual is unable to receive such training due to unavoidable circumstances. Whenever a waiver is granted, the individual shall receive such training as soon as practicable.

(e) Exceptional cases. When an employee, government contractor, licensee, certificate holder, or grantee of an agency who does not have original classification authority originates information believed by that person to require classification, the information shall be protected in a manner consistent

with this order and its implementing directives. The information shall be transmitted promptly as provided under this order or its implementing directives to the agency that has appropriate subject matter interest and classification authority with respect to this information. That agency shall decide within 30 days whether to classify this information.

Sec. 1.4. *Classification Categories.* Information shall not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security in accordance with section 1.2 of this order, and it pertains to one or more of the following:

(a) military plans, weapons systems, or operations;

(b) foreign government information;

(c) intelligence activities (including covert action), intelligence sources or methods, or cryptology;

(d) foreign relations or foreign activities of the United States, including confidential sources;

(e) scientific, technological, or economic matters relating to the national security;

(f) United States Government programs for safeguarding nuclear materials or facilities;

(g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or (h) the development, production, or use of weapons of mass destruction.

Sec. 1.5. *Duration of Classification.* (a) At the time of original classification, the original classification authority shall establish a specific date or event for declassification based on the duration of the national security sensitivity of the information. Upon reaching the date or event, the information shall be automatically declassified. Except for information that should clearly and demonstrably be expected to reveal the identity of a confidential human source or a human intelligence source or key design concepts of weapons of mass destruction, the date or event shall not exceed the time frame established in paragraph (b) of this section.

(b) If the original classification authority cannot determine an earlier specific date or event for declassification, information shall be marked for declassification 10 years from the date of the original decision, unless the original classification authority otherwise determines that the sensitivity of the information requires that it be marked for declassification for up to 25 years from the date of the original decision.

(c) An original classification authority may extend the duration of classification up to 25 years from the date of origin of the document, change the level of classification, or reclassify specific information only when the standards and procedures for classifying information under this order are followed.

(d) No information may remain classified indefinitely. Information marked for an indefinite duration of classification under predecessor orders, for example, marked as ''Originating Agency's Determination Required,'' or classified information that contains incomplete declassification instructions or lacks declassification instructions shall be declassified in accordance with part 3 of this order.

Sec. 1.6. *Identification and Markings.* (a) At the time of original classification, the following shall be indicated in a manner that is immediately apparent:

(1) one of the three classification levels defined in section 1.2 of this order;

(2) the identity, by name and position, or by personal identifier, of the original classification authority;

(3) the agency and office of origin, if not otherwise evident;

(4) declassification instructions, which shall indicate one of the following:

(A) the date or event for declassification, as prescribed in section 1.5(a);

(B) the date that is 10 years from the date of original classification, as prescribed in section 1.5(b);

(C) the date that is up to 25 years from the date of original classification, as prescribed in section 1.5(b); or

(D) in the case of information that should clearly and demonstrably be expected to reveal the identity of a confidential human source or a human intelligence source or key design concepts of weapons of mass destruction, the marking prescribed in implementing directives issued pursuant to this order; and

(5) a concise reason for classification that, at a minimum, cites the applicable classification categories in section 1.4 of this order.

(b) Specific information required in paragraph (a) of this section may be excluded if it would reveal additional classified information.

(c) With respect to each classified document, the agency originating the document shall, by marking or other means, indicate which portions are classified, with the applicable classification level, and which portions are unclassified. In accordance with standards prescribed in directives issued under this order, the Director of the Information Security Oversight Office may grant and revoke temporary waivers of this requirement. The Director shall revoke any waiver upon a finding of abuse.

(d) Markings or other indicia implementing the provisions of this order, including abbreviations and requirements to safeguard classified working papers, shall conform to the standards prescribed in implementing directives issued pursuant to this order.

(e) Foreign government information shall retain its original classification markings or shall be assigned a U.S. classification that provides a degree of protection at least equivalent to that required by the entity that furnished the information. Foreign government information retaining its original classification markings need not be assigned a U.S. classification marking provided that the responsible agency determines that the foreign government markings are adequate to meet the purposes served by U.S. classification markings.

(f) Information assigned a level of classification under this or predecessor orders shall be considered as classified at that level of classification despite the omission of other required markings. Whenever such information is used in the derivative classification process or is reviewed for possible declassification, holders of such information shall coordinate with an appropriate classification authority for the application of omitted markings.

(g) The classification authority shall, whenever practicable, use a classified addendum whenever classified information constitutes a small portion of an otherwise unclassified document or prepare a product to allow for dissemination at the lowest level of classification possible or in unclassified form.

(h) Prior to public release, all declassified records shall be appropriately marked to reflect their declassification.

Sec. 1.7. *Classification Prohibitions and Limitations.* (a) In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to:

(1) conceal violations of law, inefficiency, or administrative error;

(2) prevent embarrassment to a person, organization, or agency;

(3) restrain competition; or

(4) prevent or delay the release of information that does not require protection in the interest of the national security.

(b) Basic scientific research information not clearly related to the national security shall not be classified.

(c) Information may not be reclassified after declassification and release to the public under proper authority unless:

(1) the reclassification is personally approved in writing by the agency head based on a document-by-document determination by the agency that reclassification is required to prevent significant and demonstrable damage to the national security;

(2) the information may be reasonably recovered without bringing undue attention to the information;

(3) the reclassification action is reported promptly to the Assistant to the President for National Security Affairs (National Security Advisor) and the Director of the Information Security Oversight Office; and

(4) for documents in the physical and legal custody of the National Archives and Records Administration (National Archives) that have been available for public use, the agency head has, after making the determinations required by this paragraph, notified the Archivist of the United States (Archivist), who shall suspend public access pending approval of the reclassification action by the Director of the Information Security Oversight Office. Any such decision by the Director may be appealed by the agency head to the President through the National Security Advisor. Public access shall remain suspended pending a prompt decision on the appeal.

(d) Information that has not previously been disclosed to the public under proper authority may be classified or reclassified after an agency has received a request for it under the Freedom of Information Act (5 U.S.C. 552), the Presidential Records Act, 44 U.S.C. 2204(c)(1), the Privacy Act of 1974 (5 U.S.C. 552a), or the mandatory review provisions of section 3.5 of this order only if such classification meets the requirements of this order and is accomplished on a document-by-document basis with the personal participation or under the direction of the agency head, the deputy agency head, or the senior agency official designated under section 5.4 of this order. The requirements in this paragraph also apply to those situations in which information has been declassified in accordance with a specific date or event determined by an original classification authority in accordance with section 1.5 of this order.

(e) Compilations of items of information that are individually unclassified may be classified if the compiled information reveals an additional association or relationship that:

(1) meets the standards for classification under this order; and

(2) is not otherwise revealed in the individual items of information.

Sec. 1.8. *Classification Challenges.* (a) Authorized holders of information who, in good faith, believe that its classification status is improper are encouraged and expected to challenge the classification status of the information in accordance with agency procedures established under paragraph (b) of this section.

(b) In accordance with implementing directives issued pursuant to this order, an agency head or senior agency official shall establish procedures under which authorized holders of information, including authorized holders outside the classifying agency, are encouraged and expected to challenge the classification of information that they believe is improperly classified or unclassified. These procedures shall ensure that:

(1) individuals are not subject to retribution for bringing such actions;

(2) an opportunity is provided for review by an impartial official or panel; and

(3) individuals are advised of their right to appeal agency decisions to the Interagency Security Classification Appeals Panel (Panel) established by section 5.3 of this order.

(c) Documents required to be submitted for prepublication review or other administrative process pursuant to an approved nondisclosure agreement are not covered by this section.

Sec. 1.9. *Fundamental Classification Guidance Review.* (a) Agency heads shall complete on a periodic basis a comprehensive review of the agency's classification guidance, particularly classification guides, to ensure the guidance reflects current circumstances and to identify classified information that no longer requires protection and can be declassified. The initial fundamental classification guidance review shall be completed within 2 years of the effective date of this order.

(b) The classification guidance review shall include an evaluation of classified information to determine if it meets the standards for classification under section 1.4 of this order, taking into account an up-to-date assessment of likely damage as described under section 1.2 of this order.

(c) The classification guidance review shall include original classification authorities and agency subject matter experts to ensure a broad range of perspectives.

(d) Agency heads shall provide a report summarizing the results of the classification guidance review to the Director of the Information Security Oversight Office and shall release an unclassified version of this report to the public.

PART 2—DERIVATIVE CLASSIFICATION

Sec. 2.1. *Use of Derivative Classification.* (a) Persons who reproduce, extract, or summarize classified information, or who apply classification markings derived from source material or as directed by a classification guide, need not possess original classification authority.

(b) Persons who apply derivative classification markings shall:

(1) be identified by name and position, or by personal identifier, in a manner that is immediately apparent for each derivative classification action;

(2) observe and respect original classification decisions; and

(3) carry forward to any newly created documents the pertinent classification markings. For information derivatively classified based on multiple sources, the derivative classifier shall carry forward:

(A) the date or event for declassification that corresponds to the longest period of classification among the sources, or the marking established pursuant to section 1.6(a)(4)(D) of this order; and

(B) a listing of the source materials.

(c) Derivative classifiers shall, whenever practicable, use a classified addendum whenever classified information constitutes a small portion of an otherwise unclassified document or prepare a product to allow for dissemination at the lowest level of classification possible or in unclassified form.

(d) Persons who apply derivative classification markings shall receive training in the proper application of the derivative classification principles of the order, with an emphasis on avoiding over-classification, at least once every 2 years. Derivative classifiers who do not receive such training at least once every 2 years shall have their authority to apply derivative classification markings suspended until they have received such training. A waiver may be granted by the agency head, the deputy agency head, or the senior agency official if an individual is unable to receive such training due to unavoidable circumstances. Whenever a waiver is granted, the individual shall receive such training as soon as practicable.

Sec. 2.2. *Classification Guides.* (a) Agencies with original classification authority shall prepare classification guides to facilitate the proper and uniform derivative classification of information. These guides shall conform to standards contained in directives issued under this order.

(b) Each guide shall be approved personally and in writing by an official who:

(1) has program or supervisory responsibility over the information or is the senior agency official; and

(2) is authorized to classify information originally at the highest level of classification prescribed in the guide.

(c) Agencies shall establish procedures to ensure that classification guides are reviewed and updated as provided in directives issued under this order.

(d) Agencies shall incorporate original classification decisions into classification guides on a timely basis and in accordance with directives issued under this order.

(e) Agencies may incorporate exemptions from automatic declassification approved pursuant to section 3.3(j) of this order into classification guides, provided that the Panel is notified of the intent to take such action for specific information in advance of approval and the information remains in active use.

(f) The duration of classification of a document classified by a derivative classifier using a classification guide shall not exceed 25 years from the date of the origin of the document, except for:

(1) information that should clearly and demonstrably be expected to reveal the identity of a confidential human source or a human intelligence source or key design concepts of weapons of mass destruction; and

(2) specific information incorporated into classification guides in accordance with section 2.2(e) of this order.

PART 3—DECLASSIFICATION AND DOWNGRADING

Sec. 3.1. *Authority for Declassification.* (a) Information shall be declassified as soon as it no longer meets the standards for classification under this order.

(b) Information shall be declassified or downgraded by:

(1) the official who authorized the original classification, if that official is still serving in the same position and has original classification authority;

(2) the originator's current successor in function, if that individual has original classification authority;

(3) a supervisory official of either the originator or his or her successor in function, if the supervisory official has original classification authority; or (4) officials delegated declassification authority in writing by the agency head or the senior agency official of the originating agency.

(c) The Director of National Intelligence (or, if delegated by the Director of National Intelligence, the Principal Deputy Director of National Intelligence) may, with respect to the Intelligence Community, after consultation with the head of the originating Intelligence Community element or department, declassify, downgrade, or direct the declassification or downgrading of information or intelligence relating to intelligence sources, methods, or activities.

(d) It is presumed that information that continues to meet the classification requirements under this order requires continued protection. In some exceptional cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified. When such questions arise, they shall be referred to the agency head or the senior agency official. That official will determine, as an exercise of discretion, whether the public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure. This provision does not:

(1) amplify or modify the substantive criteria or procedures for classification; or

(2) create any substantive or procedural rights subject to judicial review.

(e) If the Director of the Information Security Oversight Office determines that information is classified in violation of this order, the Director may require the information to be declassified by the agency that originated the classification. Any such decision by the Director may be appealed to the President through the National Security Advisor. The information shall remain classified pending a prompt decision on the appeal.

(f) The provisions of this section shall also apply to agencies that, under the terms of this order, do not have original classification authority, but had such authority under predecessor orders.

(g) No information may be excluded from declassification under section 3.3 of this order based solely on the type of document or record in which it is found. Rather, the classified information must be considered on the basis of its content.

(h) Classified nonrecord materials, including artifacts, shall be declassified as soon as they no longer meet the standards for classification under this order.

(i) When making decisions under sections 3.3, 3.4, and 3.5 of this order, agencies shall consider the final decisions of the Panel.

Sec. 3.2. *Transferred Records.*

(a) In the case of classified records transferred in conjunction with a transfer of functions, and not merely for storage purposes, the receiving agency shall be deemed to be the originating agency for purposes of this order.

(b) In the case of classified records that are not officially transferred as described in paragraph (a) of this section, but that originated in an agency that has ceased to exist and for which there is no successor agency, each agency in possession of such records shall be deemed to be the originating agency for purposes of this order. Such records may be declassified or downgraded by the agency in possession of the records after consultation with any other agency that has an interest in the subject matter of the records.

(c) Classified records accessioned into the National Archives shall be declassified or downgraded by the Archivist in accordance with this order, the directives issued pursuant to this order, agency declassification guides, and any existing procedural agreement between the Archivist and the relevant agency head.

(d) The originating agency shall take all reasonable steps to declassify classified information contained in records determined to have permanent historical value before they are accessioned into the National Archives. However, the Archivist may require that classified records be accessioned into the National Archives when necessary to comply with the provisions of the Federal Records Act. This provision does not apply to records transferred to the Archivist pursuant to section 2203 of title 44, United States Code, or records for which the National Archives serves as the custodian of the records of an agency or organization that has gone out of existence.

(e) To the extent practicable, agencies shall adopt a system of records management that will facilitate the public release of documents at the time such documents are declassified pursuant to the provisions for automatic declassification in section 3.3 of this order.

Sec. 3.3 *Automatic Declassification.*

(a) Subject to paragraphs (b)–(d) and (g)–(j) of this section, all classified records that (1) are more than 25 years old and (2) have been determined to have permanent historical value under title 44, United States Code, shall be automatically declassified whether or not the records have been reviewed. All classified records shall be automatically declassified on December 31 of the year that is 25 years from the date of origin, except as provided in paragraphs (b)–(d) and (g)–(j) of this section. If the date of origin of an individual record cannot be readily determined, the date of original classification shall be used instead.

(b) An agency head may exempt from automatic declassification under paragraph (a) of this section specific information, the release of which should clearly and demonstrably be expected to:

(1) reveal the identity of a confidential human source, a human intelligence source, a relationship with an intelligence or security service of a foreign

government or international organization, or a nonhuman intelligence source; or impair the effectiveness of an intelligence method currently in use, available for use, or under development;

(2) reveal information that would assist in the development, production, or use of weapons of mass destruction;

(3) reveal information that would impair U.S. cryptologic systems or activities;

(4) reveal information that would impair the application of state-of-the-art technology within a U.S. weapon system;

(5) reveal formally named or numbered U.S. military war plans that remain in effect, or reveal operational or tactical elements of prior plans that are contained in such active plans;

(6) reveal information, including foreign government information, that would cause serious harm to relations between the United States and a foreign government, or to ongoing diplomatic activities of the United States;

(7) reveal information that would impair the current ability of United States Government officials to protect the President, Vice President, and other protectees for whom protection services, in the interest of the national security, are authorized;

(8) reveal information that would seriously impair current national security emergency preparedness plans or reveal current vulnerabilities of systems, installations, or infrastructures relating to the national security; or

(9) violate a statute, treaty, or international agreement that does not permit the automatic or unilateral declassification of information at 25 years.

(c)(1) An agency head shall notify the Panel of any specific file series of records for which a review or assessment has determined that the information within that file series almost invariably falls within one or more of the exemption categories listed in paragraph (b) of this section and that the agency proposes to exempt from automatic declassification at 25 years.

(2) The notification shall include:

(A) a description of the file series;

(B) an explanation of why the information within the file series is almost invariably exempt from automatic declassification and why the information must remain classified for a longer period of time; and

(C) except when the information within the file series almost invariably identifies a confidential human source or a human intelligence source or key design concepts of weapons of mass destruction, a specific date or event for declassification of the information, not to exceed December 31 of the year that is 50 years from the date of origin of the records.

(3) The Panel may direct the agency not to exempt a designated file series or to declassify the information within that series at an earlier date than recommended. The agency head may appeal such a decision to the President through the National Security Advisor.

(4) File series exemptions approved by the President prior to December 31, 2008, shall remain valid without any additional agency action pending Panel review by the later of December 31, 2010, or December 31 of the year that is 10 years from the date of previous approval.

(d) The following provisions shall apply to the onset of automatic declassification:

(1) Classified records within an integral file block, as defined in this order, that are otherwise subject to automatic declassification under this section shall not be automatically declassified until December 31 of the year that is 25 years from the date of the most recent record within the file block.

(2) After consultation with the Director of the National Declassification Center (the Center) established by section 3.7 of this order and before the records are subject to automatic declassification, an agency head or senior agency official may delay automatic declassification for up to five additional years for classified information contained in media that make a review for possible declassification exemptions more difficult or costly.

(3) Other than for records that are properly exempted from automatic declassification, records containing classified information that originated with other agencies or the disclosure of which would affect the interests or activities of other agencies with respect to the classified information and could reasonably be expected to fall under one or more of the exemptions in paragraph (b) of this section shall be identified prior to the onset of automatic declassification for later referral to those agencies.

(A) The information of concern shall be referred by the Center established by section 3.7 of this order, or by the centralized facilities referred to in section 3.7(e) of this order, in a prioritized and scheduled manner determined by the Center.

(B) If an agency fails to provide a final determination on a referral made by the Center within 1 year of referral, or by the centralized facilities referred to in section 3.7(e) of this order within 3 years of referral, its equities in the referred records shall be automatically declassified.

(C) If any disagreement arises between affected agencies and the Center regarding the referral review period, the Director of the Information Security Oversight Office shall determine the appropriate period of review of referred records.

(D) Referrals identified prior to the establishment of the Center by section 3.7 of this order shall be subject to automatic declassification only in accordance with subparagraphs (d)(3)(A)–(C) of this section.

(4) After consultation with the Director of the Information Security Oversight Office, an agency head may delay automatic declassification for up to 3 years from the date of discovery of classified records that were inadvertently not reviewed prior to the effective date of automatic declassification.

(e) Information exempted from automatic declassification under this section shall remain subject to the mandatory and systematic declassification review provisions of this order.

(f) The Secretary of State shall determine when the United States should commence negotiations with the appropriate officials of a foreign government or international organization of governments to modify any treaty or international agreement that requires the classification of information contained in records affected by this section for a period longer than 25 years from the date of its creation, unless the treaty or international agreement pertains to information that may otherwise remain classified beyond 25 years under this section.

(g) The Secretary of Energy shall determine when information concerning foreign nuclear programs that was removed from the Restricted Data category in order to carry out provisions of the National Security Act of 1947, as amended, may be declassified. Unless otherwise determined, such information shall be declassified when comparable information concerning the United States nuclear program is declassified.

(h) Not later than 3 years from the effective date of this order, all records exempted from automatic declassification under paragraphs (b) and (c) of this section shall be automatically declassified on December 31 of a year that is no more than 50 years from the date of origin, subject to the following:

(1) Records that contain information the release of which should clearly and demonstrably be expected to reveal the following are exempt from automatic declassification at 50 years:

(A) the identity of a confidential human source or a human intelligence source; or

(B) key design concepts of weapons of mass destruction.

(2) In extraordinary cases, agency heads may, within 5 years of the onset of automatic declassification, propose to exempt additional specific information from declassification at 50 years.

(3) Records exempted from automatic declassification under this paragraph shall be automatically declassified on December 31 of a year that is no more than 75 years from the date of origin unless an agency head, within 5 years of that date, proposes to exempt specific information from declassification at 75 years and the proposal is formally approved by the Panel.

(i) Specific records exempted from automatic declassification prior to the establishment of the Center described in section 3.7 of this order shall be subject to the provisions of paragraph (h) of this section in a scheduled and prioritized manner determined by the Center.

(j) At least 1 year before information is subject to automatic declassification under this section, an agency head or senior agency official shall notify the Director of the Information Security Oversight Office, serving as Executive Secretary of the Panel, of any specific information that the agency proposes to exempt from automatic declassification under paragraphs (b) and (h) of this section.

(1) The notification shall include:

(A) a detailed description of the information, either by reference to information in specific records or in the form of a declassification guide;

(B) an explanation of why the information should be exempt from automatic declassification and must remain classified for a longer period of time; and

(C) a specific date or a specific and independently verifiable event for automatic declassification of specific records that contain the information proposed for exemption.

(2) The Panel may direct the agency not to exempt the information or to declassify it at an earlier date than recommended. An agency head may appeal such a decision to the President through the National Security Advisor. The information will remain classified while such an appeal is pending.

(k) For information in a file series of records determined not to have permanent historical value, the duration of classification beyond 25 years shall be the same as the disposition (destruction) date of those records in each Agency Records Control Schedule or General Records Schedule, although the duration of classification shall be extended if the record has been retained for business reasons beyond the scheduled disposition date.

Sec. 3.4. *Systematic Declassification Review.*

(a) Each agency that has originated classified information under this order or its predecessors shall establish and conduct a program for systematic declassification review for records of permanent historical value exempted from automatic declassification under section 3.3 of this order. Agencies shall prioritize their review of such records in accordance with priorities established by the Center.

(b) The Archivist shall conduct a systematic declassification review program for classified records:

(1) accessioned into the National Archives; (2) transferred to the Archivist pursuant to 44 U.S.C. 2203; and (3) for which the National Archives serves as the custodian for an agency or organization that has gone out of existence.

Sec. 3.5. *Mandatory Declassification Review.*

(a) Except as provided in paragraph (b) of this section, all information classified under this order or predecessor orders shall be subject to a review for declassification by the originating agency if:

(1) the request for a review describes the document or material containing the information with sufficient specificity to enable the agency to locate it with a reasonable amount of effort;

(2) the document or material containing the information responsive to the request is not contained within an operational file exempted from search and review, publication, and disclosure under 5 U.S.C. 552 in accordance with law; and

(3) the information is not the subject of pending litigation.

(b) Information originated by the incumbent President or the incumbent Vice President; the incumbent President's White House Staff or the incumbent Vice President's Staff; committees, commissions, or boards appointed by the incumbent President; or other entities within the Executive Office of the President that solely advise and assist the incumbent President is exempted from the provisions of paragraph (a) of this section. However, the Archivist shall have the authority to review, downgrade, and declassify papers or records of former Presidents and Vice Presidents under the control of the Archivist pursuant to 44 U.S.C. 2107, 2111, 2111 note, or 2203. Review procedures developed by the Archivist shall provide for consultation with agencies having primary subject matter interest and shall be consistent with the provisions of applicable laws or lawful agreements that pertain to the respective Presidential papers or records. Agencies with primary subject matter interest shall be notified promptly of the Archivist's decision. Any final decision by the Archivist may be appealed by the requester or an agency to the Panel. The information shall remain classified pending a prompt decision on the appeal.

(c) Agencies conducting a mandatory review for declassification shall declassify information that no longer meets the standards for classification under this order. They shall release this information unless withholding is otherwise authorized and warranted under applicable law.

(d) If an agency has reviewed the requested information for declassification within the past 2 years, the agency need not conduct another review and may instead inform the requester of this fact and the prior review decision and advise the requester of appeal rights provided under subsection (e) of this section.

(e) In accordance with directives issued pursuant to this order, agency heads shall develop procedures to process requests for the mandatory review of classified information. These procedures shall apply to information classified under this or predecessor orders. They also shall provide a means for administratively appealing a denial of a mandatory review request, and for notifying the requester of the right to appeal a final agency decision to the Panel.

(f) After consultation with affected agencies, the Secretary of Defense shall develop special procedures for the review of cryptologic information; the Director of National Intelligence shall develop special procedures for the review of information pertaining to intelligence sources, methods, and activities; and the Archivist shall develop special procedures for the review of information accessioned into the National Archives.

(g) Documents required to be submitted for prepublication review or other administrative process pursuant to an approved nondisclosure agreement are not covered by this section.

(h) This section shall not apply to any request for a review made to an element of the Intelligence Community that is made by a person other than an individual as that term is defined by 5 U.S.C. 552a(a)(2), or by a foreign government entity or any representative thereof.

Sec. 3.6. *Processing Requests and Reviews.* Notwithstanding section 4.1(i) of this order, in response to a request for information under the Freedom of Information Act, the Presidential Records Act, the Privacy Act of 1974, or the mandatory review provisions of this order:

(a) An agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors.

(b) When an agency receives any request for documents in its custody that contain classified information that originated with other agencies or the disclosure of which would affect the interests or activities of other agencies with respect to the classified information, or identifies such documents in the process of implementing sections 3.3 or 3.4 of this order, it shall refer copies of any request and the pertinent documents to the originating agency for processing and may, after consultation with the originating agency, inform any requester of the referral unless such association is itself classified under this order or its predecessors. In cases in which the originating agency determines in writing that a response under paragraph (a) of this section is required, the referring agency shall respond to the requester in accordance with that paragraph.

(c) Agencies may extend the classification of information in records determined not to have permanent historical value or nonrecord materials, including artifacts, beyond the time frames established in sections 1.5(b) and 2.2(f) of this order, provided:

(1) the specific information has been approved pursuant to section 3.3(j) of this order for exemption from automatic declassification; and

(2) the extension does not exceed the date established in section 3.3(j) of this order.

Sec. 3.7. *National Declassification Center.* (a) There is established within the National Archives a National Declassification Center to streamline declassification processes, facilitate quality-assurance measures, and implement standardized training regarding the declassification of records determined to have permanent historical value. There shall be a Director of the Center who shall be appointed or removed by the Archivist in consultation with the Secretaries of State, Defense, Energy, and Homeland Security, the Attorney General, and the Director of National Intelligence.

(b) Under the administration of the Director, the Center shall coordinate:

(1) timely and appropriate processing of referrals in accordance with section 3.3(d)(3) of this order for accessioned Federal records and transferred presidential records.

(2) general interagency declassification activities necessary to fulfill the requirements of sections 3.3 and 3.4 of this order;

(3) the exchange among agencies of detailed declassification guidance to enable the referral of records in accordance with section 3.3(d)(3) of this order;

(4) the development of effective, transparent, and standard declassification work processes, training, and quality assurance measures;

(5) the development of solutions to declassification challenges posed by electronic records, special media, and emerging technologies;

(6) the linkage and effective utilization of existing agency databases and the use of new technologies to document and make public declassification review decisions and support declassification activities under the purview of the Center; and

(7) storage and related services, on a reimbursable basis, for Federal records containing classified national security information.

(c) Agency heads shall fully cooperate with the Archivist in the activities of the Center and shall:

(1) provide the Director with adequate and current declassification guidance to enable the referral of records in accordance with section 3.3(d)(3) of this order; and

(2) upon request of the Archivist, assign agency personnel to the Center who shall be delegated authority by the agency head to review and exempt

or declassify information originated by their agency contained in records accessioned into the National Archives, after consultation with subject-matter experts as necessary.

(d) The Archivist, in consultation with representatives of the participants in the Center and after input from the general public, shall develop priorities for declassification activities under the purview of the Center that take into account the degree of researcher interest and the likelihood of declassification.

(e) Agency heads may establish such centralized facilities and internal operations to conduct internal declassification reviews as appropriate to achieve optimized records management and declassification business processes. Once established, all referral processing of accessioned records shall take place at the Center, and such agency facilities and operations shall be coordinated with the Center to ensure the maximum degree of consistency in policies and procedures that relate to records determined to have permanent historical value.

(f) Agency heads may exempt from automatic declassification or continue the classification of their own originally classified information under section 3.3(a) of this order except that in the case of the Director of National Intelligence, the Director shall also retain such authority with respect to the Intelligence Community.

(g) The Archivist shall, in consultation with the Secretaries of State, Defense, Energy, and Homeland Security, the Attorney General, the Director of National Intelligence, the Director of the Central Intelligence Agency, and the Director of the Information Security Oversight Office, provide the National Security Advisor with a detailed concept of operations for the Center and a proposed implementing directive under section 5.1 of this order that reflects the coordinated views of the aforementioned agencies.

PART 4—SAFEGUARDING

Sec. 4.1. *General Restrictions on Access.*

(a) A person may have access to classified information provided that:

(1) a favorable determination of eligibility for access has been made by an agency head or the agency head's designee;

(2) the person has signed an approved nondisclosure agreement; and

(3) the person has a need-to-know the information.

(b) Every person who has met the standards for access to classified information in paragraph (a) of this section shall receive contemporaneous training on the proper safeguarding of classified information and on the criminal, civil, and administrative sanctions that may be imposed on an individual who fails to protect classified information from unauthorized disclosure.

(c) An official or employee leaving agency service may not remove classified information from the agency's control or direct that information be declassified in order to remove it from agency control.

(d) Classified information may not be removed from official premises without proper authorization.

(e) Persons authorized to disseminate classified information outside the executive branch shall ensure the protection of the information in a manner equivalent to that provided within the executive branch.

(f) Consistent with law, executive orders, directives, and regulations, an agency head or senior agency official or, with respect to the Intelligence Community, the Director of National Intelligence, shall establish uniform procedures to ensure that automated information systems, including networks and telecommunications systems, that collect, create, communicate, compute, disseminate, process, or store classified information:

(1) prevent access by unauthorized persons;

(2) ensure the integrity of the information; and

(3) to the maximum extent practicable, use:

(A) common information technology standards, protocols, and interfaces that maximize the availability of, and access to, the information in a form and manner that facilitates its authorized use; and

(B) standardized electronic formats to maximize the accessibility of information to persons who meet the criteria set forth in section 4.1(a) of this order.

(g) Consistent with law, executive orders, directives, and regulations, each agency head or senior agency official, or with respect to the Intelligence Community, the Director of National Intelligence, shall establish controls to ensure that classified information is used, processed, stored, reproduced, transmitted, and destroyed under conditions that provide adequate protection and prevent access by unauthorized persons.

(h) Consistent with directives issued pursuant to this order, an agency shall safeguard foreign government information under standards that provide a degree of protection at least equivalent to that required by the government or international organization of governments that furnished the information. When adequate to achieve equivalency, these standards may be less restrictive than the safeguarding standards that ordinarily apply to U.S. ''Confidential'' information, including modified handling and transmission and allowing access to individuals with a need-to-know who have not otherwise been cleared for access to classified information or executed an approved nondisclosure agreement.

(i)(1) Classified information originating in one agency may be disseminated to another agency or U.S. entity by any agency to which it has been made available without the consent of the originating agency, as long as the criteria for access under section 4.1(a) of this order are met, unless the originating agency has determined that prior authorization is required for such dissemination and has marked or indicated such requirement on the medium containing the classified information in accordance with implementing directives issued pursuant to this order.

(2) Classified information originating in one agency may be disseminated by any other agency to which it has been made available to a foreign government in accordance with statute, this order, directives implementing this order, direction of the President, or with the consent of the originating agency. For the purposes of this section, ''foreign government'' includes any element of a foreign government, or an international organization of governments, or any element thereof.

(3) Documents created prior to the effective date of this order shall not be disseminated outside any other agency to which they have been made available without the consent of the originating agency. An agency head or senior agency official may waive this requirement for specific information that originated within that agency.

(4) For purposes of this section, the Department of Defense shall be considered one agency, except that any dissemination of information regarding intelligence sources, methods, or activities shall be consistent with directives issued pursuant tosection 6.2(b) of this order.

(5) Prior consent of the originating agency is not required when referring records for declassification review that contain information originating in more than one agency.

Sec. 4.2 *Distribution Controls.*

(a) The head of each agency shall establish procedures in accordance with applicable law and consistent with directives issued pursuant to this order to ensure that classified information is accessible to the maximum extent possible by individuals who meet the criteria set forth in section 4.1(a) of this order.

(b) In an emergency, when necessary to respond to an imminent threat to life or in defense of the homeland, the agency head or any designee

may authorize the disclosure of classified information (including information marked pursuant to section 4.1(i)(1) of this order) to an individual or individuals who are otherwise not eligible for access. Such actions shall be taken only in accordance with directives implementing this order and any procedure issued by agencies governing the classified information, which shall be designed to minimize the classified information that is disclosed under these circumstances and the number of individuals who receive it. Information disclosed under this provision or implementing directives and procedures shall not be deemed declassified as a result of such disclosure or subsequent use by a recipient. Such disclosures shall be reported promptly to the originator of the classified information. For purposes of this section, the Director of National Intelligence may issue an implementing directive governing the emergency disclosure of classified intelligence information.

(c) Each agency shall update, at least annually, the automatic, routine, or recurring distribution mechanism for classified information that it distributes. Recipients shall cooperate fully with distributors who are updating distribution lists and shall notify distributors whenever a relevant change in status occurs.

Sec. 4.3. *Special Access Programs.* (a) Establishment of special access programs. Unless otherwise authorized by the President, only the Secretaries of State, Defense, Energy, and Homeland Security, the Attorney General, and the Director of National Intelligence, or the principal deputy of each, may create a special access program. For special access programs pertaining to intelligence sources, methods, and activities (but not including military operational, strategic, and tactical programs), this function shall be exercised by the Director of National Intelligence. These officials shall keep the number of these programs at an absolute minimum, and shall establish them only when the program is required by statute or upon a specific finding that:

(1) the vulnerability of, or threat to, specific information is exceptional; and

(2) the normal criteria for determining eligibility for access applicable to information classified at the same level are not deemed sufficient to protect the information from unauthorized disclosure.

(b) Requirements and limitations.

(1) Special access programs shall be limited to programs in which the number of persons who ordinarily will have access will be reasonably small and commensurate with the objective of providing enhanced protection for the information involved.

(2) Each agency head shall establish and maintain a system of accounting for special access programs consistent with directives issued pursuant to this order.

(3) Special access programs shall be subject to the oversight program established under section 5.4(d) of this order. In addition, the Director of the Information Security Oversight Office shall be afforded access to these programs, in accordance with the security requirements of each program, in order to perform the functions assigned to the Information Security Oversight Office under this order. An agency head may limit access to a special access program to the Director of the Information Security Oversight Office and no more than one other employee of the Information Security Oversight Office or, for special access programs that are extraordinarily sensitive and vulnerable, to the Director only.

(4) The agency head or principal deputy shall review annually each special access program to determine whether it continues to meet the requirements of this order.

(5) Upon request, an agency head shall brief the National Security Advisor, or a designee, on any or all of the agency's special access programs.

(6) For the purposes of this section, the term ''agency head'' refers only to the Secretaries of State, Defense, Energy, and Homeland Security, the

Attorney General, and the Director of National Intelligence, or the principal deputy of each.

(c) Nothing in this order shall supersede any requirement made by or under 10 U.S.C. 119.

Sec. 4.4. *Access by Historical Researchers and Certain Former Government Personnel.*

(a) The requirement in section 4.1(a)(3) of this order that access to classified information may be granted only to individuals who have a need-to-know the information may be waived for persons who:

(1) are engaged in historical research projects;

(2) previously have occupied senior policy-making positions to which they were appointed or designated by the President or the Vice President; or

(3) served as President or Vice President.

(b) Waivers under this section may be granted only if the agency head or senior agency official of the originating agency:

(1) determines in writing that access is consistent with the interest of the national security;

(2) takes appropriate steps to protect classified information from unauthorized disclosure or compromise, and ensures that the information is safeguarded in a manner consistent with this order; and

(3) limits the access granted to former Presidential appointees or designees and Vice Presidential appointees or designees to items that the person originated, reviewed, signed, or received while serving as a Presidential or Vice Presidential appointee or designee.

PART 5—IMPLEMENTATION AND REVIEW

Sec. 5.1. *Program Direction.* (a) The Director of the Information Security Oversight Office, under the direction of the Archivist and in consultation with the National Security Advisor, shall issue such directives as are necessary to implement this order. These directives shall be binding on the agencies. Directives issued by the Director of the Information Security Oversight Office shall establish standards for:

(1) classification, declassification, and marking principles;

(2) safeguarding classified information, which shall pertain to the handling, storage, distribution, transmittal, and destruction of and accounting for classified information;

(3) agency security education and training programs;

(4) agency self-inspection programs; and

(5) classification and declassification guides.

(b) The Archivist shall delegate the implementation and monitoring functions of this program to the Director of the Information Security Oversight Office.

(c) The Director of National Intelligence, after consultation with the heads of affected agencies and the Director of the Information Security Oversight Office, may issue directives to implement this order with respect to the protection of intelligence sources, methods, and activities. Such directives shall be consistent with this order and directives issued under paragraph (a) of this section.

Sec. 5.2. *Information Security Oversight Office.* (a) There is established within the National Archives an Information Security Oversight Office. The Archivist shall appoint the Director of the Information Security Oversight Office, subject to the approval of the President.

(b) Under the direction of the Archivist, acting in consultation with the National Security Advisor, the Director of the Information Security Oversight Office shall:

(1) develop directives for the implementation of this order;

(2) oversee agency actions to ensure compliance with this order and its implementing directives;

(3) review and approve agency implementing regulations prior to their issuance to ensure their consistency with this order and directives issued under section 5.1(a) of this order;

(4) have the authority to conduct on-site reviews of each agency's program established under this order, and to require of each agency those reports and information and other cooperation that may be necessary to fulfill its responsibilities. If granting access to specific categories of classified information would pose an exceptional national security risk, the affected agency head or the senior agency official shall submit a written justification recommending the denial of access to the President through the National Security Advisor within 60 days of the request for access. Access shall be denied pending the response;

(5) review requests for original classification authority from agencies or officials not granted original classification authority and, if deemed appropriate, recommend Presidential approval through the National Security Advisor;

(6) consider and take action on complaints and suggestions from persons within or outside the Government with respect to the administration of the program established under this order;

(7) have the authority to prescribe, after consultation with affected agencies, standardization of forms or procedures that will promote the implementation of the program established under this order;

(8) report at least annually to the President on the implementation of this order; and

(9) convene and chair interagency meetings to discuss matters pertaining to the program established by this order.

Sec. 5.3. *Interagency Security Classification Appeals Panel.*

(a) Establishment and administration.

(1) There is established an Interagency Security Classification Appeals Panel. The Departments of State, Defense, and Justice, the National Archives, the Office of the Director of National Intelligence, and the National Security Advisor shall each be represented by a senior-level representative who is a full-time or permanent part-time Federal officer or employee designated to serve as a member of the Panel by the respective agency head. The President shall designate a Chair from among the members of the Panel.

(2) Additionally, the Director of the Central Intelligence Agency may appoint a temporary representative who meets the criteria in paragraph (a)(1) of this section to participate as a voting member in all Panel deliberations and associated support activities concerning classified information originated by the Central Intelligence Agency.

(3) A vacancy on the Panel shall be filled as quickly as possible as provided in paragraph (a)(1) of this section.

(4) The Director of the Information Security Oversight Office shall serve as the Executive Secretary of the Panel. The staff of the Information Security Oversight Office shall provide program and administrative support for the Panel.

(5) The members and staff of the Panel shall be required to meet eligibility for access standards in order to fulfill the Panel's functions.

(6) The Panel shall meet at the call of the Chair. The Chair shall schedule meetings as may be necessary for the Panel to fulfill its functions in a timely manner.

(7) The Information Security Oversight Office shall include in its reports to the President a summary of the Panel's activities.

(b) Functions. The Panel shall:

(1) decide on appeals by persons who have filed classification challenges under section 1.8 of this order;

(2) approve, deny, or amend agency exemptions from automatic declassification as provided in section 3.3 of this order;

(3) decide on appeals by persons or entities who have filed requests for mandatory declassification review under section 3.5 of this order; and

(4) appropriately inform senior agency officials and the public of final Panel decisions on appeals under sections 1.8 and 3.5 of this order.

(c) Rules and procedures. The Panel shall issue bylaws, which shall be published in the *Federal Register*. The bylaws shall establish the rules and procedures that the Panel will follow in accepting, considering, and issuing decisions on appeals. The rules and procedures of the Panel shall provide that the Panel will consider appeals only on actions in which:

(1) the appellant has exhausted his or her administrative remedies within the responsible agency;

(2) there is no current action pending on the issue within the Federal courts; and

(3) the information has not been the subject of review by the Federal courts or the Panel within the past 2 years.

(d) Agency heads shall cooperate fully with the Panel so that it can fulfill its functions in a timely and fully informed manner. The Panel shall report to the President through the National Security Advisor any instance in which it believes that an agency head is not cooperating fully with the Panel.

(e) The Panel is established for the sole purpose of advising and assisting the President in the discharge of his constitutional and discretionary authority to protect the national security of the United States. Panel decisions are committed to the discretion of the Panel, unless changed by the President.

(f) An agency head may appeal a decision of the Panel to the President through the National Security Advisor. The information shall remain classified pending a decision on the appeal.

Sec. 5.4. *General Responsibilities.* Heads of agencies that originate or handle classified information shall:

(a) demonstrate personal commitment and commit senior management to the successful implementation of the program established under this order;

(b) commit necessary resources to the effective implementation of the program established under this order;

(c) ensure that agency records systems are designed and maintained to optimize the appropriate sharing and safeguarding of classified information, and to facilitate its declassification under the terms of this order when it no longer meets the standards for continued classification; and

(d) designate a senior agency official to direct and administer the program, whose responsibilities shall include:

(1) overseeing the agency's program established under this order, provided an agency head may designate a separate official to oversee special access programs authorized under this order. This official shall provide a full accounting of the agency's special access programs at least annually;

(2) promulgating implementing regulations, which shall be published in the *Federal Register* to the extent that they affect members of the public;

(3) establishing and maintaining security education and training programs;

(4) establishing and maintaining an ongoing self-inspection program, which shall include the regular reviews of representative samples of the agency's

original and derivative classification actions, and shall authorize appropriate agency officials to correct misclassification actions not covered by sections 1.7(c) and 1.7(d) of this order; and reporting annually to the Director of the Information Security Oversight Office on the agency's self-inspection program;

(5) establishing procedures consistent with directives issued pursuant to this order to prevent unnecessary access to classified information, including procedures that:

(A) require that a need for access to classified information be established before initiating administrative clearance procedures; and

(B) ensure that the number of persons granted access to classified information meets the mission needs of the agency while also satisfying operational and security requirements and needs;

(6) developing special contingency plans for the safeguarding of classified information used in or near hostile or potentially hostile areas;

(7) ensuring that the performance contract or other system used to rate civilian or military personnel performance includes the designation and management of classified information as a critical element or item to be evaluated in the rating of:

(A) original classification authorities;

(B) security managers or security specialists; and

(C) all other personnel whose duties significantly involve the creation or handling of classified information, including personnel who regularly apply derivative classification markings;

(8) accounting for the costs associated with the implementation of this order, which shall be reported to the Director of the Information Security Oversight Office for publication;

(9) assigning in a prompt manner agency personnel to respond to any request, appeal, challenge, complaint, or suggestion arising out of this order that pertains to classified information that originated in a component of the agency that no longer exists and for which there is no clear successor in function; and

(10) establishing a secure capability to receive information, allegations, or complaints regarding over-classification or incorrect classification within the agency and to provide guidance to personnel on proper classification as needed.

Sec. 5.5. *Sanctions.* (a) If the Director of the Information Security Oversight Office finds that a violation of this order or its implementing directives has occurred, the Director shall make a report to the head of the agency or to the senior agency official so that corrective steps, if appropriate, may be taken.

(b) Officers and employees of the United States Government, and its contractors, licensees, certificate holders, and grantees shall be subject to appropriate sanctions if they knowingly, willfully, or negligently:

(1) disclose to unauthorized persons information properly classified under this order or predecessor orders;

(2) classify or continue the classification of information in violation of this order or any implementing directive;

(3) create or continue a special access program contrary to the requirements of this order; or

(4) contravene any other provision of this order or its implementing directives.

(c) Sanctions may include reprimand, suspension without pay, removal, termination of classification authority, loss or denial of access to classified information, or other sanctions in accordance with applicable law and agency regulation.

(d) The agency head, senior agency official, or other supervisory official shall, at a minimum, promptly remove the classification authority of any individual who demonstrates reckless disregard or a pattern of error in applying the classification standards of this order.

(e) The agency head or senior agency official shall:

(1) take appropriate and prompt corrective action when a violation or infraction under paragraph (b) of this section occurs; and

(2) notify the Director of the Information Security Oversight Office when a violation under paragraph (b)(1), (2), or (3) of this section occurs.

PART 6—GENERAL PROVISIONS

Sec. 6.1. *Definitions.* For purposes of this order:

(a) ''Access'' means the ability or opportunity to gain knowledge of classified information.

(b) ''Agency'' means any ''Executive agency,'' as defined in 5 U.S.C. 105; any ''Military department'' as defined in 5 U.S.C. 102; and any other entity within the executive branch that comes into the possession of classified information.

(c) ''Authorized holder'' of classified information means anyone who satisfies the conditions for access stated in section 4.1(a) of this order.

(d) ''Automated information system'' means an assembly of computer hardware, software, or firmware configured to collect, create, communicate, compute, disseminate, process, store, or control data or information.

(e) ''Automatic declassification'' means the declassification of information based solely upon:

(1) the occurrence of a specific date or event as determined by the original classification authority; or

(2) the expiration of a maximum time frame for duration of classification established under this order.

(f) ''Classification'' means the act or process by which information is determined to be classified information.

(g) ''Classification guidance'' means any instruction or source that prescribes the classification of specific information.

(h) ''Classification guide'' means a documentary form of classification guidance issued by an original classification authority that identifies the elements of information regarding a specific subject that must be classified and establishes the level and duration of classification for each such element.

(i) ''Classified national security information'' or ''classified information'' means information that has been determined pursuant to this order or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form.

(j) ''Compilation'' means an aggregation of preexisting unclassified items of information.

(k) ''Confidential source'' means any individual or organization that has provided, or that may reasonably be expected to provide, information to the United States on matters pertaining to the national security with the expectation that the information or relationship, or both, are to be held in confidence.

(l) ''Damage to the national security'' means harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, taking into consideration such aspects of the information as the sensitivity, value, utility, and provenance of that information.

(m) ''Declassification'' means the authorized change in the status of information from classified information to unclassified information.

(n) ''Declassification guide'' means written instructions issued by a declassification authority that describes the elements of information regarding

a specific subject that may be declassified and the elements that must remain classified.

(o) ''Derivative classification'' means the incorporating, paraphrasing, restating, or generating in new form information that is already classified, and marking the newly developed material consistent with the classification markings that apply to the source information. Derivative classification includes the classification of information based on classification guidance. The duplication or reproduction of existing classified information is not derivative classification.

(p) ''Document'' means any recorded information, regardless of the nature of the medium or the method or circumstances of recording.

(q) ''Downgrading'' means a determination by a declassification authority that information classified and safeguarded at a specified level shall be classified and safeguarded at a lower level.

(r) ''File series'' means file units or documents arranged according to a filing system or kept together because they relate to a particular subject or function, result from the same activity, document a specific kind of transaction, take a particular physical form, or have some other relationship arising out of their creation, receipt, or use, such as restrictions on access or use.

(s) ''Foreign government information'' means:

(1) information provided to the United States Government by a foreign government or governments, an international organization of governments, or any element thereof, with the expectation that the information, the source of the information, or both, are to be held in confidence;

(2) information produced by the United States Government pursuant to or as a result of a joint arrangement with a foreign government or governments, or an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both, are to be held in confidence; or

(3) information received and treated as ''foreign government information'' under the terms of a predecessor order.

(t) ''Information'' means any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, that is owned by, is produced by or for, or is under the control of the United States Government.

(u) ''Infraction'' means any knowing, willful, or negligent action contrary to the requirements of this order or its implementing directives that does not constitute a ''violation,'' as defined below.

(v) ''Integral file block'' means a distinct component of a file series, as defined in this section, that should be maintained as a separate unit in order to ensure the integrity of the records. An integral file block may consist of a set of records covering either a specific topic or a range of time, such as a Presidential administration or a 5-year retirement schedule within a specific file series that is retired from active use as a group. For purposes of automatic declassification, integral file blocks shall contain only records dated within 10 years of the oldest record in the file block.

(w) ''Integrity'' means the state that exists when information is unchanged from its source and has not been accidentally or intentionally modified, altered, or destroyed.

(x) ''Intelligence'' includes foreign intelligence and counterintelligence as defined by Executive Order 12333 of December 4, 1981, as amended, or by a successor order.

(y) ''Intelligence activities'' means all activities that elements of the Intelligence Community are authorized to conduct pursuant to law or Executive Order 12333, as amended, or a successor order.

(z) ''Intelligence Community'' means an element or agency of the U.S. Government identified in or designated pursuant to section 3(4) of the National Security Act of 1947, as amended, or section 3.5(h) of Executive Order 12333, as amended.

(aa) ''Mandatory declassification review'' means the review for declassification of classified information in response to a request for declassification that meets the requirements under section 3.5 of this order.

(bb) ''Multiple sources'' means two or more source documents, classification guides, or a combination of both.

(cc) ''National security'' means the national defense or foreign relations of the United States.

(dd) ''Need-to-know'' means a determination within the executive branch in accordance with directives issued pursuant to this order that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function.

(ee) ''Network'' means a system of two or more computers that can exchange data or information.

(ff) ''Original classification'' means an initial determination that information requires, in the interest of the national security, protection against unauthorized disclosure.

(gg) ''Original classification authority'' means an individual authorized in writing, either by the President, the Vice President, or by agency heads or other officials designated by the President, to classify information in the first instance.

(hh) ''Records'' means the records of an agency and Presidential papers or Presidential records, as those terms are defined in title 44, United States Code, including those created or maintained by a government contractor, licensee, certificate holder, or grantee that are subject to the sponsoring agency's control under the terms of the contract, license, certificate, or grant.

(ii) ''Records having permanent historical value'' means Presidential papers or Presidential records and the records of an agency that the Archivist has determined should be maintained permanently in accordance with title 44, United States Code.

(jj) ''Records management'' means the planning, controlling, directing, organizing, training, promoting, and other managerial activities involved with respect to records creation, records maintenance and use, and records disposition in order to achieve adequate and proper documentation of the policies and transactions of the Federal Government and effective and economical management of agency operations.

(kk) ''Safeguarding'' means measures and controls that are prescribed to protect classified information.

(ll) ''Self-inspection'' means the internal review and evaluation of individual agency activities and the agency as a whole with respect to the implementation of the program established under this order and its implementing directives.

(mm) ''Senior agency official'' means the official designated by the agency head under section 5.4(d) of this order to direct and administer the agency's program under which information is classified, safeguarded, and declassified.

(nn) ''Source document'' means an existing document that contains classified information that is incorporated, paraphrased, restated, or generated in new form into a new document.

(oo) ''Special access program'' means a program established for a specific class of classified information that imposes safeguarding and access requirements that exceed those normally required for information at the same classification level.

(pp) ''Systematic declassification review'' means the review for declassification of classified information contained in records that have been determined by the Archivist to have permanent historical value in accordance with title 44, United States Code.

(qq) ''Telecommunications'' means the preparation, transmission, or communication of information by electronic means.

(rr) ''Unauthorized disclosure'' means a communication or physical transfer of classified information to an unauthorized recipient.

(ss) ''U.S. entity'' includes:

(1) State, local, or tribal governments;

(2) State, local, and tribal law enforcement and firefighting entities;

(3) public health and medical entities;

(4) regional, state, local, and tribal emergency management entities, including State Adjutants General and other appropriate public safety entities; or

(5) private sector entities serving as part of the nation's Critical Infrastructure/Key Resources.

(tt) ''Violation'' means:

(1) any knowing, willful, or negligent action that could reasonably be expected to result in an unauthorized disclosure of classified information;

(2) any knowing, willful, or negligent action to classify or continue the classification of information contrary to the requirements of this order or its implementing directives; or

(3) any knowing, willful, or negligent action to create or continue a special access program contrary to the requirements of this order.

(uu) ''Weapons of mass destruction'' means any weapon of mass destruction as defined in 50 U.S.C. 1801(p).

Sec. 6.2. *General Provisions.* (a) Nothing in this order shall supersede any requirement made by or under the Atomic Energy Act of 1954, as amended, or the National Security Act of 1947, as amended. ''Restricted Data'' and ''Formerly Restricted Data'' shall be handled, protected, classified, downgraded, and declassified in conformity with the provisions of the Atomic Energy Act of 1954, as amended, and regulations issued under that Act.

(b) The Director of National Intelligence may, with respect to the Intelligence Community and after consultation with the heads of affected departments and agencies, issue such policy directives and guidelines as the Director of National Intelligence deems necessary to implement this order with respect to the classification and declassification of all intelligence and intelligence-related information, and for access to and dissemination of all intelligence and intelligence-related information, both in its final form and in the form when initially gathered. Procedures or other guidance issued by Intelligence Community element heads shall be in accordance with such policy directives or guidelines issued by the Director of National Intelligence. Any such policy directives or guidelines issued by the Director of National Intelligence shall be in accordance with directives issued by the Director of the Information Security Oversight Office under section 5.1(a) of this order.

(c) The Attorney General, upon request by the head of an agency or the Director of the Information Security Oversight Office, shall render an interpretation of this order with respect to any question arising in the course of its administration.

(d) Nothing in this order limits the protection afforded any information by other provisions of law, including the Constitution, Freedom of Information Act exemptions, the Privacy Act of 1974, and the National Security Act of 1947, as amended. This order is not intended to and does not create any right or benefit, substantive or procedural, enforceable at law

by a party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. The foregoing is in addition to the specific provisos set forth in sections 1.1(b), 3.1(c) and 5.3(e) of this order.

(e) Nothing in this order shall be construed to obligate action or otherwise affect functions by the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(f) This order shall be implemented subject to the availability of appropriations.

(g) Executive Order 12958 of April 17, 1995, and amendments thereto, including Executive Order 13292 of March 25, 2003, are hereby revoked as of the effective date of this order.

Sec. 6.3. *Effective Date.* This order is effective 180 days from the date of this order, except for sections 1.7, 3.3, and 3.7, which are effective immediately.

Sec. 6.4. *Publication.* The Archivist of the United States shall publish this Executive Order in the *Federal Register*.

THE WHITE HOUSE,
December 29, 2010.

[FR Doc. E9–31418
Filed 1–4–10; 11:15 am]
Billing code 7515–01–P

Presidential Documents

Memorandum of December 29, 2009

Implementation of the Executive Order, ''Classified National Security Information''

Memorandum for the Heads of Executive Departments and Agencies

Today I have signed an executive order entitled, ''Classified National Security Information'' (the ''order''), which substantially advances my goals for reforming the security classification and declassification processes. I expect that the order will produce measurable progress towards greater openness and transparency in the Government's classification and declassification programs while protecting the Government's legitimate interests, and I will closely monitor the results. I also look forward to reviewing recommendations from the study that the National Security Advisor will undertake in cooperation with the Public Interest Declassification Board to design a more fundamental transformation of the security classification system. To further assist in fulfilling the goal of measurable progress toward greater openness and transparency, I hereby direct the following actions.

1. *Initial Implementation Efforts.*

Successful implementation of the order requires personal commitment from the heads of departments and agencies, as well as their senior officials. It also requires effective security education and training programs, self-inspection programs, and measures designed to hold personnel accountable.

In accordance with section 5.4 of the order, the head of each department and agency that creates or handles classified information shall provide the Director of the Information Security Oversight Office (ISOO) a copy of the department or agency regulations implementing the requirements of the order. Such regulations shall be issued in final form within 180 days of ISOO's publication of its implementing directive for the order. The Director of ISOO shall consider agency actions to implement the requirements of section 5.4 of the order as a key element in planning oversight of agencies. Each senior agency official designated under section 5.4(d) of the order shall provide ISOO with updates concerning agency plans and other actions to implement the requirements of the order. The Director of ISOO shall publish a periodic status report on agency implementation.

2. *Declassification of Records of Permanent Historical Value.*

Under the direction of the National Declassification Center (NDC), and utilizing recommendations of an ongoing Business Process Review in support of the NDC, referrals and quality assurance problems within a backlog of more than 400 million pages of accessioned Federal records previously subject to automatic declassification shall be addressed in a manner that will permit public access to all declassified records from this backlog no later than December 31, 2013. In order to promote the efficient and effective utilization of finite resources available for declassification, further referrals of these records are not required except for those containing information that would clearly and demonstrably reveal: (a) the identity of a confidential human source or a human intelligence source; or (b) key design concepts of weapons of mass destruction.

The Secretaries of State, Defense, and Energy, and the Director of National Intelligence shall provide the Archivist of the United States with sufficient

guidance to complete this task. The Archivist shall make public a report on the status of the backlog every 6 months.

3. *Delegation of Original Classification Authority.*

Delegations of original classification authority shall be limited to the minimum necessary to implement the order and only those individuals or positions with a demonstrable and continuing need to exercise such authority shall be delegated original classification authority.

Accordingly, heads of departments and agencies with original classification authority shall commence a review to ensure that all delegations of original classification authority are so limited and otherwise in accordance with section 1.3(c) of the order. Each department and agency shall submit a report on the results of this review to the Director of ISOO within 120 days of the date of this memorandum.

4. *Promotion of New Technologies to Support Declassification.*

Striking the critical balance between openness and secrecy is a difficult but necessary part of our democratic form of government. Striking this balance becomes more difficult as the volume and complexity of the information increases. Improving the capability of departments and agencies to identify still-sensitive information and to make declassified information available to the public are integral parts of the classification system.

Therefore, I am directing that the Secretary of Defense and the Director of National Intelligence each support research to assist the NDC in addressing the cross-agency challenges associated with declassification.

5. *Publication.* The Archivist of the United States is authorized and directed to publish this memorandum in the *Federal Register*.

THE WHITE HOUSE,
Washington, December 29, 2009

[FR Doc. E9–31424
Filed 1–4–10; 11:15 am]
Billing code 7515–01–P

Presidential Documents

Order of December 29, 2009

Original Classification Authority

Pursuant to the provisions of section 1.3 of the Executive Order issued today, entitled ''Classified National Security Information'' (Executive Order), I hereby designate the following officials to classify information originally as ''Top Secret'' or ''Secret'':

TOP SECRET

Executive Office of the President:

The Assistant to the President and Chief of Staff

The Assistant to the President for National Security Affairs (National Security Advisor)

The Assistant to the President for Homeland Security and Counterterrorism

The Director of National Drug Control Policy

The Director, Office of Science and Technology Policy

The Chair or Co-Chairs, President's Intelligence Advisory Board

Departments and Agencies:

The Secretary of State

The Secretary of the Treasury

The Secretary of Defense

The Attorney General

The Secretary of Energy

The Secretary of Homeland Security

The Director of National Intelligence

The Secretary of the Army

The Secretary of the Navy

The Secretary of the Air Force

The Chairman, Nuclear Regulatory Commission

The Director of the Central Intelligence Agency

The Administrator of the National Aeronautics and Space Administration

The Director, Information Security Oversight Office

SECRET

Executive Office of the President:

The United States Trade Representative

Departments and Agencies:

The Secretary of Agriculture

The Secretary of Commerce

The Secretary of Health and Human Services

The Secretary of Transportation

The Administrator of the United States Agency for International Development

The Administrator of the Environmental Protection Agency

Any delegation of this authority shall be in accordance with section 1.3(c) of the Executive Order, except that the Director of the Information Security Oversight Office, the Secretary of Agriculture, and the Administrator of the Environmental Protection Agency may not delegate the authority granted in this order. If an agency head without original classification authority under this order, or otherwise delegated in accordance with section 1.3(c) of the Executive Order, has an exceptional need to classify information originated by their agency, the matter shall be referred to the agency head with appropriate subject matter interest and classification authority in accordance with section 1.3(e) of the Executive Order. If the agency with appropriate subject matter interest and classification authority cannot readily be determined, the matter shall be referred to the Director of the Information Security Oversight Office.

Presidential designations ordered prior to the issuance of the Executive Order are revoked as of the date of this order. However, delegations of authority to classify information originally that were made in accordance with the provisions of section 1.4 of Executive Order 12958 of April 17, 1995, as amended, by officials designated under this order shall continue in effect, provided that the authority of such officials is delegable under this order.

This order shall be published in the *Federal Register*.

THE WHITE HOUSE,
December 29, 2009.

[FR Doc. E9–31425
Filed 1–4–10; 11:15 am]
Billing code 3195–W0–P

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H.R. 4165/P.L. 111–120
To extend through December 31, 2010, the authority of the Secretary of the Army to accept and expend funds contributed by non-Federal public entities to expedite the processing of permits. (Dec. 22, 2009; 123 Stat. 3478)

H.J. Res. 62/P.L. 111–121
Appointing the day for the convening of the second session of the One Hundred Eleventh Congress. (Dec. 22, 2009; 123 Stat. 3479)

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