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FEDERAL REGISTER

Vol. 77 Tuesday,
No. 118 June 19, 2012

Pages 36387–36900

OFFICE OF THE FEDERAL REGISTER

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

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WHEN: Tuesday, July 10, 2012
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

Printed on recycled paper.

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Presidential Documents

Presidential Determination No. 2012–09 of June 11, 2012

Presidential Determination Pursuant to Section 1245(d)(4)(B) and (C) of the National Defense Authorization Act for Fiscal Year 2012

Memorandum for the Secretary of State[,] the Secretary of the Treasury[, and] the Secretary of Energy

By the authority vested in me as President by the Constitution and the laws of the United States, after carefully considering the report submitted to the Congress by the Energy Information Administration on April 27, 2012, and other relevant factors, including global economic conditions, increased oil production by certain countries, the level of spare capacity, and the availability of strategic reserves, I determine, pursuant to section 1245(d)(4)(B) and (C) of the National Defense Authorization Act for Fiscal Year 2012, Public Law 112–81, and consistent with my determination of March 30, 2012, that there is a sufficient supply of petroleum and petroleum products from countries other than Iran to permit a significant reduction in the volume of petroleum and petroleum products purchased from Iran by or through foreign financial institutions.

I will closely monitor this situation to ensure that the market can continue to accommodate a reduction in purchases of petroleum and petroleum products from Iran.

The Secretary of State is authorized and directed to publish this memorandum in the **Federal Register**.

THE WHITE HOUSE,
Washington, June 11, 2012.

[FR Doc. 2012–14993
Filed 6–18–12; 8:45 am]
Billing code 4710–10–P

Rules and Regulations

Federal Register

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

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0087; Directorate Identifier 2011–SW–029–AD; Amendment 39–17091; AD 2012–12–11]

RIN 2120–AA64

Airworthiness Directives; Bell Helicopter Textron Canada, Limited, Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for Bell Helicopter Textron Canada (Bell) Model 206, 206A, 206A–1, 206B, 206B–1, 206L, 206L–1, 206L–3, and 206L–4 helicopters, with Aviation Specialties Unlimited, Inc. (ASU), Night Vision Imaging System (NVIS) lighting modified by Supplemental Type Certificate SR01383SE (STC). This AD requires determining the date of STC installation, determining if the aircraft has an unfiltered turbine outlet temperature (TOT) internal over-temperature warning light, and based on those findings, installing an NVIS filter. This AD was prompted by the finding that an unfiltered TOT indicator over-temperature warning light, when illuminated, created glare and reflections that could degrade the pilot's view while using night vision goggles thereby creating an unsafe condition. The actions of this AD are intended to modify any unfiltered TOT indicator unit over-temperature warning light by installing a filter to prevent degradation of the pilot's vision while using night vision goggles and to prevent subsequent loss of control of the helicopter.

DATES: This AD is effective July 24, 2012.

ADDRESSES: For service information identified in this AD, contact Aviation Specialties Unlimited, Inc., 4632 Aeronca Street, Boise, Idaho 83705; telephone (208) 426–8117; fax (208) 426–8975; or *http://www.asu-nvg.com/.* You may review the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

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, any incorporated-by-reference service information, the economic evaluation, any comments received, and other information. The street address for the Docket Operations Office (phone: 800–647–5527) is U.S. Department of Transportation, Docket Operations Office, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Kathleen Arrigotti, Aviation Safety Engineer, Seattle Aircraft Certification Office, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057; telephone (425) 917–6426; email *kathleen.arrigotti@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

On February 3, 2012, at 77 FR 5423, the **Federal Register** published our notice of proposed rulemaking (NPRM), which proposed to amend 14 CFR part 39 to include an AD that would apply to Bell Model 206, 206A, 206A–1, 206B, 206B–1, 206L, 206L–1, 206L–3, and 206L–4 helicopters, modified with ASU NVIS lighting installed per STC SR01383SE. That NPRM proposed to require, within 30 days or 50 hours time-in-service, whichever occurs first, determining the date of the STC installation. If the date is on or before April 6, 2011, or is undocumented, the NPRM proposed to require determining if the TOT indicator unit has an internal over-temperature warning light. If the unit has an unfiltered internal over-temperature warning light, the NPRM proposed to require installing an NVIS filter, part number (P/N) ASU–TOTGAG–1. The proposed requirements were intended to modify any unfiltered TOT indicator unit over-temperature warning light by installing a filter to prevent degradation of the pilot's vision while using night vision goggles and to prevent subsequent loss of control of the helicopter.

Comments

We gave the public the opportunity to participate in developing this AD, but we did not receive any comments on the NPRM.

FAA's Determination

We have reviewed the relevant information and determined that an unsafe condition exists and is likely to exist or develop on other helicopters of these same type designs and that air safety and the public interest require adopting the AD requirements as proposed except for an editorial change. We have revised the ''Differences Between This Proposed AD and the Service Information'' section to include a statement about this AD applying to Model 206A–1 helicopters, whereas the service information does not. This change is consistent with the intent of the proposal and will not increase the economic burden on any operator nor increase the scope of the AD.

Related Service Information

We reviewed ASU Alert Service Bulletin No. ASU 206–2010–11–1, dated November 4, 2010 (ASB) for the Bell Helicopter Textron 206 series helicopters. The ASB states to visually inspect each helicopter to determine if the TOT indicator/gauge has an internal over-temperature warning light installed. If the over-temperature warning light is internal, the ASB specifies notifying ASU. ASU states it will immediately ship an NVIS filter, P/N ASU–TOTGAG–1.

Differences Between This AD and the Service Information

This AD does not apply to helicopters modified by the STC after April 6, 2011, because a new design was approved for the STC on April 6, 2011, and contained instructions to install the NVIS over-temperature indicator light filter. This AD applies to Model 206A–1 helicopters, whereas the service information does not. This AD does not require you to notify ASU.

Costs of Compliance

We estimate that this AD will affect 34 helicopters of U.S. Registry.

We estimate that operators may incur the following costs in order to comply with this AD: Determining the date, inspecting for an unfiltered, over-temperature TOT indicator light in the cockpit, and installing a filter will take about 1.8 work-hours at $85 per work-hour. A filter will cost about $300. The total cost will be $15,402 assuming the filter will be installed on the entire fleet

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 helicopters identified in this rulemaking action.

Regulatory Findings

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 that this AD:

(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);

(3) Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction; and

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

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

List of Subjects in 14 CFR Part 39

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

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 airworthiness directive (AD):

2012–12–11 BELL HELICOPTER TEXTRON CANADA, LIMITED (BELL): Amendment 39–17091; Docket No. FAA–2012–0087; Directorate Identifier 2011–SW–029–AD.

(a) Applicability

This AD applies to Model 206, 206A, 206A–1, 206B, 206B–1, 206L, 206L–1, 206L–3, and 206L–4 helicopters, certificated in any category, modified with Aviation Specialties Unlimited, Inc. (ASU), Night Vision Imaging System (NVIS) lighting installed per Supplemental Type Certificate (STC) SR01383SE.

(b) Unsafe Condition

This AD defines the unsafe condition as an unfiltered turbine outlet temperature (TOT) indicator over-temperature warning light, when illuminated, creating glare and reflections that could degrade the pilot's view through night vision goggles. This condition could result in loss of control of the helicopter.

(c) Effective Date

This AD becomes effective July 24, 2012.

(d) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(e) Required Actions

Within 30 days or 50 hours time-in-service, whichever occurs first:

(1) Determine the date of the STC installation.

(2) If the date of the STC installation is on or before April 6, 2011, or the date is undocumented, determine whether the cockpit TOT indicator unit has an unfiltered internal over-temperature warning light. If the unit has an unfiltered internal over-temperature warning light, install an NVIS filter, part number ASU–TOTGAG–1.

(f) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office, FAA, may approve AMOCs for this AD. Send your proposal to: Kathleen Arrigotti, Aviation Safety Engineer, Seattle Aircraft Certification Office, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057; telephone (425) 917–6426; email *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, we suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office, before operating any aircraft complying with this AD through an AMOC.

(g) Additional Information

Aviation Specialties Unlimited, Inc., Alert Service Bulletin No. ASU 206–2010–11–1, dated November 4, 2010, which is not incorporated by reference, contains additional information about the subject of this AD. For service information identified in this AD, contact Aviation Specialties Unlimited, Inc., 4632 Aeronca Street, Boise, Idaho 83705; telephone (208) 426–8117; fax (208) 426–8975; or *http://www.asu-nvg.com/* . You may review this service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

(h) Subject

Joint Aircraft Service Component (JASC) Code: 7722, Engine EFT/TOT Indicating System.

Issued in Fort Worth, Texas, on June 7, 2012.

Kim Smith,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2012–14804 Filed 6–18–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2012–0403]

RIN 1625–AA08

Special Local Regulations; Annual Bayview Mackinac Race

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing a permanent Special Local Regulations to provide for the safe control of vessel movement during the start of the Annual Bayview Mackinac Race, commonly known as the Port Huron to Mackinac Sail Race. This action is necessary to provide for the safety of the general boating public and commercial shipping during the start of the race.

DATES: This rule is effective July 21, 2012.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble, are part of docket [USCG–2012–0403]. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number in the ''SEARCH'' box, and click ''Search.'' You may visit the Docket Management Facility, Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, email or call Frank Jennings, Jr., Auxiliary and Boating Safety Branch, Ninth Coast Guard District, 1240 East 9th Street, Cleveland, OH, via email at: *frank.t.jennings@uscg.mil* or by phone at: (216) 902–6094. 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:

Table of Acronyms

DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking

A. Regulatory History and Information

On May 15, 2012, we published a notice of proposed rulemaking (NPRM) entitled Special Local Regulations; Annual Bayview Mackinac Race in the **Federal Register** (77 FR 28538). We received 0 comments on the proposed rule. No public meeting was requested, and none was held.

The Coast Guard recognizes that this final rule may be effective less than 30 days after publication in the **Federal Register**. Under 5 U.S.C. 553(d)(3), an agency may issue a rule less than 30 days before its effective date when the agency finds good cause to do so. For this rule, the Coast Guard finds that good cause exists for publishing this final rule less than 30 days before its effective date. Delaying the effective date of this final rule would prevent its enforcement on the scheduled day of the 2012 race and thus, would preclude the Coast Guard from protecting spectators and vessels from the associated hazards, which are discussed herein. The goal of delaying the effective date is to allow the public time to prepare to comply with the new rule. In this case, that goal is supported by the NPRM published in rule has been met by the NPRM published in May of this year. In addition, this race is a local institution and has been run every year since 1925. The Coast Guard does not expect any member of the public to be unable to comply with the rule because they did not have sufficient time to prepare.

B. Basis and Purpose

The Port Huron to Mackinac sail race (currently titled the ''Bell's Beer Bayview Mackinac Race'') is an annual regatta that has taken place since 1925. The race occurs in July of each year with a starting point in Port Huron, MI. It is typical for more than 200 sailboats to take part in this annual event. The Coast Guard's Ninth District Commander has determined that the high concentration of participants and spectators at the race's starting point poses extra and unusual hazards to the boating public. The likely combination of recreational vessels and sailing vessels gathered together in high concentrations within a congested area known to have fast currents could lead to serious boating injuries or fatalities.

C. Discussion of Rule

In light of the extra and unusual hazards likely to occur at the starting point of the Port Huron to Mackinac sail race, the Coast Guard is establishing permanent Special Local Regulations. These Special Local Regulations will be enforced in July of each year, and the exact times and dates of enforcement will be published in the **Federal Register** annually via a Notice of Enforcement.

This Special Local Regulation will apply in the starting area of the race in the vicinity of Port Huron, MI. Specifically, this regulated area will include all U.S. navigable waters of the Black River, St. Clair River and lower Lake Huron starting at: Latitude 042°58′47″ N, longitude 082°26′0″ W; then easterly to latitude 042°58′24″ N, longitude 082°24′47″ W; then northward along the International Boundary to latitude 043°2′48″ N, longitude 082°23′47″ W; then westerly to the shoreline at approximate location latitude 043°2′48″ N, longitude 082°26′48″ W; then southward along the U.S. shoreline to latitude 042°58′54″ N, longitude 082°26′1″ W; then back to the beginning [DATUM: NAD 83].

In order to ensure the safety of spectators and those vessels participating in the race, the Coast Guard will patrol the regulated area under the direction of a designated Coast Guard Patrol Commander (PATCOM). Vessels desiring to transit the regulated area may do so but only with prior approval of the PATCOM and only when so directed by that individual. The PATCOM may be contacted on Channel 16 (156.8 MHZ) by the call sign ''Coast Guard Patrol Commander.'' Vessels allowed within the regulated area will be operated at a no wake speed and in a manner that will not endanger participants in the event or any other craft. These Special Local Regulations shall not apply to vessels participating in the event or government vessels patrolling the regulated area.

In the event these Special Local Regulations affect shipping, commercial vessels may request permission from the PATCOM to transit the area of the event by hailing call sign ''Coast Guard Patrol Commander'' on Channel 16 (156.8 MHZ).

D. Regulatory Analyses

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

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS). We conclude that this rule is not a significant regulatory action because we anticipate that it will have minimal impact on the economy, will not interfere with other agencies, will not adversely alter the budget of any grant or loan recipients, and will not raise any novel legal or policy issues.

This Special Local Regulation will be enforced for only seven hours on a single day in July of each year. Also, the regulated area will be a relatively small and only in effect at the race's starting point. It is expected that during the annual enforcement of this Special Local Regulation the majority of vessel traffic in the vicinity of the regulated area will be recreational in nature. Furthermore, some vessel traffic will be allowed to pass, albeit with caution and at a reduced speed, through the regulated area with the permission of

the Coast Guard Patrol Commander. Finally, the Coast Guard expects that public awareness of this event, along with the Coast Guard's regulation of it, is particularly high. As mentioned above, this race has recurred regularly since 1925, and the Coast Guard has regulated it for many years with both permanent and temporary regulations. Despite the race's long history, the Coast Guard still intends to issue maritime advisories to current users of the affected waterways. On the whole, local maritime interests are already well familiar with the effects of this event and this Special Local Regulation.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule will affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in a portion of the Black River, St. Clair River, and lower Lake Huron during the month of July each year. This Special Local Regulations will not have a significant economic impact on a substantial number of small entities for the same reasons discussed in above *Regulatory Planning and Review* section.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

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.

4. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has 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. We have analyzed this rule under that Order and determined that this rule does not have implications for federalism.

6. Unfunded Mandates Reform Act

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

7. Taking of Private Property

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

8. 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.

9. Protection of Children

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

10. Indian Tribal Governments

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

11. Energy Effects

This action is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

12. Technical Standards

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

13. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves the establishment of Special Local Regulations and is therefore categorically excluded under figure 2–1, paragraph (34)(h), of the Instruction. During the annual permitting process for this event an environmental analysis will be conducted to include the effects of these proposed Special Local Regulations. Thus, no preliminary environmental analysis checklist or Categorical Exclusion Determination (CED) are required for this proposed rulemaking action. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

■ 2. Add § 100.902 to read as follows:

§ 100.902 Special Local Regulations; Annual Bayview Mackinac Race.

(a) *Regulated area.* These Special Local Regulations apply to all U.S. navigable waters of the Black River, St. Clair River, and lower Lake Huron, bound by a line starting at latitude 042°58′47″ N, longitude 082°26′0″ W; then easterly to latitude 042°58′24″ N, longitude 082°24′47″ W; then northward along the International Boundary to latitude 043°2′48″ N, longitude 082°23′47″ W; then westerly to the shoreline at approximate location latitude 043°2′48″ N, longitude 082°26′48″ W; then southward along the U.S. shoreline to latitude 042°58′54″ N, longitude 082°26′1″ W; then back to the beginning [DATUM: NAD 83].

(b) *Enforcement period.* These Special Local Regulations will be enforced annually at the commencement of the Bayview Mackinac Race. The enforcement period will last approximately seven hours on a single day each July. The Coast Guard will notify the public of the exact enforcement date and times via a Notice of Enforcement published in the **Federal Register**. Also, the Coast Guard may use marine broadcasts, local notice to mariners, local news media, on-scene oral notice, and broadcasts on VHF–FM marine radio Channel 16 (156.8 MHZ) to notify the public of the exact dates and times of enforcement.

(c) *Special local regulations.* (1) No vessel may enter the regulated area established in paragraph (a) of this section without prior approval from the Coast Guard's designated Patrol Commander (PATCOM). The PATCOM may restrict vessel operation within the regulated area to vessels having particular operating characteristics.

(2) Vessels permitted to enter this regulated area must operate at a no wake speed and in a manner that will not endanger race participants or any other craft.

(3) The PATCOM may direct the anchoring, mooring, or movement of any vessel within this regulated area. A succession of sharp, short signals by whistle or horn from vessels patrolling the area under the direction of the PATCOM shall serve as a signal to stop. Vessels so signaled shall stop and shall comply with the orders of the PATCOM. Failure to do so may result in expulsion from the area, a Notice of Violation for failure to comply, or both.

(4) If it is deemed necessary for the protection of life and property, the PATCOM may terminate at any time the marine event or the operation of any vessel within the regulated area.

(5) In accordance with the general regulations in § 100.35 of this part, the Coast Guard will patrol the regatta area under the direction of a designated Coast Guard Patrol Commander (PATCOM). The PATCOM may be contacted on Channel 16 (156.8 MHz) by the call sign ''Coast Guard Patrol Commander.''

(6) The rules in this section shall not apply to vessels participating in the event or to government vessels patrolling the regulated area in the performance of their assigned duties.

Dated: June 15, 2012.

M.N. Parks,

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

[FR Doc. 2012–14972 Filed 6–15–12; 11:15 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2012–0566]

Drawbridge Operation Regulation; Sacramento River, Isleton, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating regulation that governs the Isleton Drawbridge across Sacramento River, mile 18.7, at Isleton, CA. The deviation is necessary to allow California Department of Transportation to paint and perform routine maintenance on the drawbridge. This deviation allows single leaf operation of the double leaf bascule style drawbridge during the project.

DATES: This deviation is effective from 7 a.m., June 19, 2012 to 6 p.m. on August 17, 2012.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of the docket USCG–2012–0566 and are available online by going to *http://www.regulations.gov,* inserting USCG–2012–0566 in the ''Keyword'' box and then clicking ''Search''. They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email David H. Sulouff, Chief, Bridge Section, Eleventh Coast Guard District; telephone 510–437–3516, email *David.H.Sulouff@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The California Department of Transportation has requested a temporary change to the operation of the Isleton Drawbridge, mile 18.7, over Sacramento River, at Isleton, CA. The drawbridge navigation span provides a vertical clearance of 15 feet above Mean High Water in the closed-to-navigation position. The draw opens on signal from May 1 through October 31 from 6 a.m. to 10 p.m. and from November 1 through April 30 from 9 a.m. to 5 p.m. At all other times the draw shall open on signal if at least four hours notice is given to the drawtender at the Rio Vista bridge across the Sacramento River, mile 12.8, as required by 33 CFR 117.189(a). Navigation on the waterway is commercial and recreational.

Either leaf of the double bascule drawspan may be secured in the closed-to-navigation position from 7 a.m., June 19, 2012 to 6 p.m. on August 17, 2012, to allow Caltrans to conduct painting and maintenance on the bridge. The opposite leaf will continue to operate normally, providing unlimited vertical clearance and 83 feet horizontal clearance between leafs. A work platform will be installed below the secured leaf, reducing vertical clearance by 6 feet. This temporary deviation has been coordinated with waterway users. No objections to the proposed temporary deviation were raised.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: June 11, 2012.

D.H. Sulouff,

District Bridge Chief, Eleventh Coast Guard District.

[FR Doc. 2012–14974 Filed 6–18–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2012–0507]

RIN 1625–AA00

Safety Zone for Fireworks Display, Potomac River, National Harbor Access Channel; Oxon Hill, MD

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a safety zone upon specified waters of the Potomac River. This action is necessary to provide for the safety of life on navigable waters during a fireworks display launched from a floating platform located within the National Harbor Access Channel at Oxon Hill in Prince Georges County, Maryland. This safety zone is intended to protect the maritime public in a portion of the Potomac River.

DATES: This rule is effective from 8:00 p.m. on June 24, 2012, through 10:30 p.m. on June 25, 2012.

ADDRESSES: Documents mentioned in this preamble are part of docket [USCG–2012–0507]. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Mr. Ronald L. Houck, Sector Baltimore Waterways Management Division, U.S. Coast Guard; telephone 410–576–2674, email *Ronald.L.Houck@uscg.mil*. 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:

Table of Acronyms

DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking

A. Regulatory History and Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it would be impracticable to publish an NPRM for this rule. The Coast Guard received the information about the event on April 30, 2012; delaying the effective date by first publishing an NPRM would be contrary to the safety zone's intended objectives as well as to the public interest because immediate action is needed to protect persons and vessels against the hazards associated with a fireworks display on navigable waters. Such hazards include premature detonations, dangerous projectiles and falling or burning debris.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Due to the need for immediate action, the restriction of vessel traffic is necessary to protect life, property and the environment; therefore, a 30-day notice is impracticable. Delaying the effective date would be contrary to the safety zone's intended objectives of as well as the public interest in protecting persons and vessels involved in the event, and enhancing public and maritime safety.

B. Basis and Purpose

Fireworks displays are frequently held from locations on or near the navigable waters of the United States. The potential hazards associated with fireworks displays are a safety concern during such events. The purpose of this rule is to promote public and maritime safety during a fireworks display, and to protect mariners transiting the area from the potential hazards associated with a fireworks display, such as the accidental discharge of fireworks, dangerous projectiles, and falling hot embers or other debris. This rule is needed to ensure safety on the waterway during the scheduled event.

C. Discussion of the Final Rule

Digital Lightning, of Kensington, Maryland, will conduct a fireworks display launched from a floating platform located on the Potomac River, adjacent to the Gaylord National Resort Hotel, at Oxon Hill in Prince Georges County, Maryland scheduled on June 24, 2012 at approximately 9:30 p.m. If necessary, due to inclement weather, the fireworks display may be re-scheduled to take place on June 25, 2012 at approximately 9:30 p.m.

The Coast Guard is establishing a temporary safety zone on certain waters of the Potomac River, National Harbor Access Channel, within a 150 yards radius of a fireworks discharge platform in approximate position latitude 38°47′00″ N, longitude 77°01′21″ W, located at Oxon Hill in Prince Georges County, Maryland (NAD 1983). The temporary safety zone will be enforced from 8 p.m. through 10:30 p.m. on June 24, 2012 and, if necessary due to inclement weather, from 8 p.m. through 10:30 p.m. on June 25, 2012. The effect of this temporary safety zone will be to restrict navigation in the regulated area during, as well as the set up and take down of, the fireworks display. No person or vessel may enter or remain in the safety zone. Vessels will be allowed to transit the waters of the Potomac River outside the safety zone. Notification of the temporary safety zone will be provided to the public via marine information broadcasts.

D. Regulatory Analyses

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

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. Although this safety zone will restrict some vessel traffic, there is little vessel traffic associated with commercial fishing in the area, and recreational boating in the area can transit waters outside the safety zone. In addition, the effect of this rule will not be significant because the safety zone is of limited duration and limited size. For the above reasons, the Coast Guard does not anticipate any significant economic impact.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to operate, transit, or anchor in a portion of the Potomac River, National Harbor Access Channel, located at Oxon Hill in Prince Georges County, Maryland from 8 p.m. through 10:30 p.m. on June 24, 2012 and, if necessary due to inclement weather, from 8 p.m. through 10:30 p.m. on June 25, 2012. This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons. The safety zone is of limited size; this safety zone would be activated, and thus subject to enforcement, for only 2½ hours in the evening when vessel traffic is low; and vessel traffic could pass safely around the safety zone. In addition, before the activation of the zone, we will issue maritime advisories widely available to users of the waterway to allow mariners to make alternative plans for transiting the affected area.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above.

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.

4. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has 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. We have analyzed this rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. 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.

10. Protection of Children

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

11. Indian Tribal Governments

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

12. Energy Effects

This action is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

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

14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves establishing a temporary safety zone. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T05–0507 to read as follows:

§ 165.T05–0507 Safety Zone for Fireworks Display, Potomac River, National Harbor Access Channel; Oxon Hill, MD.

(a) *Regulated Area.* The following area is a safety zone: All waters of the Potomac River, National Harbor Access Channel, within a 150 yards radius of a fireworks discharge platform in approximate position latitude 38°47′00″ N, longitude 77°01′21″ W, located at Oxon Hill in Prince Georges County, Maryland (NAD 1983).

(b) *Regulations.* The general safety zone regulations found in 33 CFR 165.23 apply to the safety zone created by this temporary section, § 165.T05–0507.

(1) All vessels and persons are prohibited from entering this zone, except as authorized by the Coast Guard Captain of the Port Baltimore.

(2) Persons or vessels requiring entry into or passage within the zone must request authorization from the Captain of the Port or his designated representative by telephone at 410–576–2693 or on VHF–FM marine band radio channel 16.

(3) All Coast Guard assets enforcing this safety zone can be contacted on VHF–FM marine band radio channels 13 and 16.

(4) The operator of any vessel within or in the immediate vicinity of this safety zone shall:

(i) Stop the vessel immediately upon being directed to do so by any commissioned, warrant or petty officer on board a vessel displaying a Coast Guard Ensign, and

(ii) Proceed as directed by any commissioned, warrant or petty officer on board a vessel displaying a Coast Guard Ensign.

(c) *Definitions. Captain of the Port Baltimore* means the Commander, Coast Guard Sector Baltimore or any Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port to act on his behalf.

Designated representative means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port Baltimore to assist in enforcing the safety zone described in paragraph (a) of this section.

(d) *Enforcement.* The U.S. Coast Guard may be assisted by Federal, State and local agencies in the patrol and enforcement of the zone.

(e) *Enforcement period.* This section will be enforced from 8 p.m. through 10:30 p.m. on June 24, 2012 and, if necessary due to inclement weather, from 8 p.m. through 10:30 p.m. on June 25, 2012.

Dated: June 4, 2012.

Mark P. O'Malley,

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

[FR Doc. 2012–14846 Filed 6–18–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2012–0477]

RIN 1625–AA00

Safety Zones; Fireworks Displays in Captain of the Port Long Island Sound Zone

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing fourteen safety zones for fireworks displays within the Captain of the Port (COTP) Long Island Sound Zone. This action is necessary to provide for the safety of life on navigable waters during these events. Entry into, transit through, mooring or anchoring within these zones is prohibited unless authorized by the COTP Sector Long Island Sound.

DATES: This rule is effective from June 23, 2012 until July 21, 2012.

This rule will be enforced during the specific dates and times listed in Table of § 165.T01–0477.

ADDRESSES: Documents mentioned in this preamble are part of docket [USCG–2012–0477]. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Petty Officer Joseph Graun, Prevention Department, U.S. Coast Guard Sector Long Island Sound, (203) 468–4544, *Joseph.L.Graun@uscg.mil.* 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:

Table of Acronyms

COTP Captain of the Port
DHS Department of Homeland Security
FR Federal Register
LIS Long Island Sound

A. Regulatory History and Information

The Coast Guard is issuing this final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because any delay encountered in this regulation's effective date by publishing a NPRM would be contrary to public interest since immediate action is needed to provide for the safety of life and property on navigable waters from the hazardous nature of fireworks including unexpected detonation and burning debris. We spoke with each event sponsor and each indicated they were unable and unwilling to move their event date to a later time for the following reasons.

The sponsor for North Bay Fourth of July Fireworks stated they are unwilling to reschedule their event because it is held in conjunction with the Independence Day holiday. Many individuals have made holiday plans based on this fireworks event, changing the date would cause numerous cancelations and hurt small businesses.

Sponsors for Goren Wedding Fireworks, Goldstein Party Fireworks, National Golf Links Fireworks and Connetquot River Boat parade Fireworks were not aware of the requirements for submitting a marine event application 135 days in advance resulting in a late notification to the Coast Guard. The sponsors are now aware of this for future events. It is not viable for the sponsors to reschedule the event due to other activities being held in conjunction with these fireworks displays, including a wedding and

Independence Day celebrations involving many out of town guests.

The sponsor for Salute to Veterans Fireworks, Devon Yacht Club Fireworks, Dolan Family Fourth Fireworks, Islip Fireworks, Madison Fireworks, Stratford Fireworks, Rowayton Fireworks, Quarentello Wedding Fireworks, and Niantic Bay Fireworks submitted marine event applications with 135 day notice and on April 4, 2012 the Coast Guard provided the public with prior notice when it published a notice of proposed rulemaking (NPRM) entitled Special Local Regulations and Safety Zones; Marine Events in Captain of the Port Sector Long Island Sound Zone, in the **Federal Register** (77 FR 20324). The NPRM proposed these events and advertised a public comments period. We received no comments on the NPRM. No requests for a public meeting were received and no public meetings were held. These events will take place in less than 30 days and cannot be moved to a later date because many individuals made holiday plans based on these fireworks events and changing the dates would cause numerous cancelations and hurt small businesses.

For the same reasons, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**.

B. Basis and Purpose

The legal basis for this temporary rule is 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Public Law 107–295, 116 Stat. 2064; and Department of Homeland Security Delegation No. 0170.1, which collectively authorize the Coast Guard to define regulatory safety zones.

This rulemaking establishes marine events involving fireworks displays on the navigable waters of COTP Sector LIS zone. This rule is necessary to protect waterway users from the dangers inherent to fireworks displays.

C. Discussion of the Final Rule

This temporary rule establishes safety zones for fourteen fireworks displays in the COTP Sector LIS zone.

FIREWORKS DISPLAY EVENTS

1. Goldstein Party Fireworks	• Location: On Sag Harbor Cove off of Ferry Road, Sag Harbor, NY.
2. Salute to Veterans Fireworks	• Location: Waters of Reynolds Channel off Hempstead, NY.
3. Goren Wedding Fireworks	• Location: On Bellport Bay 700 feet east of Point Road, Bellport, NY.
4. Connetquot River Boat Parade Fireworks	• Location: On the Great South Bay off Snapper Inn Restaurant, Oakdale, NY.
5. North Bay 4th of July Fireworks	• Location: On the Great South Bay in Patchogue Bay 4000 feet south east of Blue Point, NY.
6. National Golf Links Fireworks	• Location: On the Great Peconic Bay three quarters of a mile north west of Bullhead Bay, Shinnecock, NY.
7. Devon Yacht Club Fireworks	• Location: Waters of Napeague Bay, in Block Island Sound off Amagansett, NY.
8. Dolan Family Fourth Fireworks	• Location: Waters of Oyster Bay Harbor in Long Island Sound off Oyster Bay, NY.
9. Islip Fireworks	• Location: Waters of the Great South Bay off Bay Shore Manor Park, Islip, NY.
10. Madison Fireworks	• Location: Waters of Long Island Sound off Madison Beach in Madison, CT.
11. Stratford Fireworks	• Location: Waters of Long Island Sound surrounding Short Beach Park in Stratford, CT.
12. Rowayton Fireworks	• Location: Waters of Long Island Sound south of Bayley Beach Park in Rowayton, CT.
13. Quarentello Wedding Fireworks	• Location: Waters of the Great South Bay southeast of Brown Point in Sayville, NY.
14. Niantic Bay Fireworks	• Location: Waters of Niantic Bay 1,500 feet west of the Niantic River Railroad Bridge in Niantic, CT.

Because large numbers of spectator vessels are expected to congregate around the location of these events, these regulated areas are needed to protect both spectators and participants from the safety hazards created by them including unexpected pyrotechnics detonation and burning debris.

This rule prevents vessels from entering, transiting, mooring or anchoring within areas specifically designated as regulated areas during the periods of enforcement unless authorized by the COTP or designated representative.

The Coast Guard has determined that these regulated areas will not have a significant impact on vessel traffic due to their temporary nature, limited size, and the fact that vessels are allowed to transit the navigable waters outside of the regulated areas. The COTP will cause public notifications to be made by all appropriate means including but not limited to the Local Notice to Mariners and Broadcast Notice to Mariners.

D. Regulatory Analyses

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

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders.

The Coast Guard determined that this rule is not a significant regulatory action for the following reasons: The regulated areas will be of limited duration and cover only a small portion of the navigable waterways. Furthermore, vessels may transit the navigable waterways outside of the regulated areas. Vessels requiring entry into the regulated areas may be authorized to do so by the COTP or designated representative.

Advanced public notifications will also be made to the local maritime

community by the Local Notice to Mariners as well as Broadcast Notice to Mariners.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit or anchor in the designated regulated areas during the enforcement periods stated for each event listed below in the List of Subjects.

The temporary safety zones will not have a significant economic impact on a substantial number of small entities for the following reasons: The regulated areas will be of limited size and of short duration, and vessels that can safely do so may navigate in all other portions of the waterways except for the areas designated as regulated areas. Additionally, notifications will be made before the effective period by all appropriate means, including but not limited to the Local Notice to Mariners and Broadcast Notice to Mariners well in advance of the events.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above.

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.

4. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has 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. We have analyzed this rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INTFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. 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.

10. Protection of Children

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

11. Indian Tribal Governments

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

12. Energy Effects

This action is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

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

14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves the establishment of safety zones. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195;

33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; and Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T01–0477 to read as follows:

§ 165.T01–0477 Safety Zones; Fireworks Displays in Captain of the Port Long Island Sound Zone.

(a) *Regulations.* The general regulations contained in 33 CFR 165.23 as well as the following regulations apply to the events listed in the TABLE of § 165.T01–0477. These regulations will be enforced for the duration of each event.

(b) *Definitions.* The following definitions apply to this section:

(1) *Designated Representative.* A ''designated representative'' is any Coast Guard commissioned, warrant or petty officer of the U.S. Coast Guard who has been designated by the Captain of the Port (COTP), Sector Long Island Sound, to act on his or her behalf. The designated representative may be on an official patrol vessel or may be on shore and will communicate with vessels via VHF–FM radio or loudhailer. In addition, members of the Coast Guard Auxiliary may be present to inform vessel operators of this regulation.

(2) *Official Patrol Vessels.* Official patrol vessels may consist of any Coast Guard, Coast Guard Auxiliary, state, or local law enforcement vessels assigned or approved by the COTP.

(3) *Spectators.* All persons and vessels not registered with the event sponsor as participants or official patrol vessels.

(c) Vessel operators desiring to enter or operate within the regulated areas should contact the COTP or the designated representative via VHF channel 16 or by telephone at (203) 468–4404 to obtain permission to do so.

(d) Spectators shall not anchor, block, loiter, or impede the transit of event participants or official patrol vessels in the regulated areas during the effective dates and times, or dates and times as modified through the Local Notice to Mariners, unless authorized by COTP or designated representative.

(e) The COTP or designated representative may delay or terminate any marine event in this subpart at any time it is deemed necessary to ensure the safety of life or property.

(f) The regulated area for all fireworks displays listed in the TABLE of § 165.T01–0477 is that area of navigable waters within a 1000 foot radius of the launch platform or launch site for each fireworks display. Fireworks barges used in these locations will also have a sign on their port and starboard side labeled ''FIREWORKS—STAY AWAY.'' This sign will consist of 10 inch high by 1.5 inch wide red lettering on a white background. Shore sites used in these locations will display a sign labeled ''FIREWORKS—STAY AWAY'' with the same dimensions.

TABLE OF § 165.T01–0477
FIREWORKS DISPLAY EVENTS

1	Goldstein Party Fireworks	• Date: June 23, 2012. • Rain Date: June 24, 2012. • Time: 8:30 p.m. to 10:30 p.m. • Location: A point in Sag Harbor Cove off of Ferry Road, Sag Harbor, NY in approximate position 41°00′15.39″ N, 072°18′21.92″ W (NAD 83).
2	Salute to Veterans Fireworks	• Date: June 23, 2012. • Rain Date: June 30, 2012. • Location: Waters of Reynolds Channel off Hempstead, NY in approximate position 40°35′36.62″ N, 073°35′20.72″ W (NAD 83).
3	Goren Wedding Fireworks	• Date: June 30, 2012. • Rain Date: July 1, 2012. • Time: 8:30 p.m. to 10:30 p.m. • Location: A point in Bellport Bay 700 feet east of Point Road, Bellport, NY in approximate position 40°44′31.18″ N, 072°56′31.38″ W (NAD 83).
4	Connetquot River Boat Parade Fireworks	• Date: July 3, 2012. • Rain Date: July 5, 2012. • Time: 8:30 p.m. to 10:30 p.m. • Location: A point on the Connetquot River off Snapper Inn Restaurant, Oakdale, NY in approximate position 40°43′32.38″ N, 073°9′2.64″ W (NAD 83).
5	North Bay 4th of July Fireworks	• Date: July 4, 2012. • Rain Date: July 5, 2012. • Time: 8:30 p.m. to 10:30 p.m. • Location: A point on the Great South Bay in Patchogue Bay 4000 feet south east of Blue Point, NY in approximate position 40°44′6.28″ N, 073°1′2.5″ W (NAD 83).
6	National Golf Links Fireworks	• Date: July 6, 2012. • Rain Date: July 7, 2012. • Time: 8:30 p.m. to 10:30 p.m. • Location: A point on the Great Peconic Bay ¾ of a mile north west of Bullhead Bay, Shinnecock, NY in approximate position 40°55′11.79″ N, 072°28′4.34″ W (NAD 83).
7	Devon Yacht Club Fireworks	• Date: July 7, 2012. • Rain Date: July 8, 2012. • Location: Waters of Napeague Bay, in Block Island Sound off Amagansett, NY in approximate position 40°59′41.4″ N, 072°6′8.7″ W (NAD 83).
8	Dolan Family Fourth Fireworks	• Date: July 4, 2012. • Rain Date: July 5, 2012.

TABLE OF § 165.T01–0477—Continued
FIREWORKS DISPLAY EVENTS

9 Islip Fireworks	• Location: Waters of Oyster Bay Harbor in Long Island Sound off Oyster Bay, NY in approximate position 40°53′42.50″ N, 073°30′04.30″ W (NAD 83). • Date: July 4, 2012. • Rain Date: July 5, 2012. • Location: Waters of the Great South Bay off Bay Shore Manor Park, Islip, NY in approximate position 40°42′24″ N, 073°14′24″ W (NAD 83).
10 Madison Fireworks	• Date: July 4, 2012. • Rain Date: July 7, 2012. • Location: Waters of Long Island Sound off Madison Beach in Madison, CT in approximate position 41°16′3.93″ N, 072°36′15.97″ W (NAD 83).
11 Stratford Fireworks	• Date: July 3, 2012. • Rain Date: July 5, 2012. • Location: Waters of Long Island Sound surrounding Short Beach Park in Stratford, CT in approximate position 41°09′50.82″ N, 073°6′47.13″ W (NAD 83).
12 Rowayton Fireworks	• Date: July 4, 2012. • Rain Date: July 5, 2012. • Location: Waters of Long Island Sound south of Bayley Beach Park in Rowayton, CT in approximate position 41°03′11″ N, 073°26′41″ W (NAD 83).
13 Quarentello Wedding Fireworks	• Date: July 21, 2012. • Rain Date: None. • Location: Waters of the Great South Bay south east of Brown Point in Sayville, NY in approximate position 40°43′19″ N, 073°03′53″ W (NAD 83).
14 Niantic Bay Fireworks	• Date: July 6, 2012. • Rain Date: July 7, 2012. • Location: Waters of Niantic Bay 1500 feet west of the Niantic River Railroad Bridge in Niantic, CT in approximate position 41°19′22.59″ N, 072°11′3.47″ W (NAD 83).

Dated: June 7, 2012.

J.M. Vojvodich,

Captain, U.S. Coast Guard, Captain of the Port Sector Long Island Sound.

[FR Doc. 2012–14847 Filed 6–18–12; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2011–0775; FRL–9688–3]

Approval and Promulgation of Air Quality Implementation Plans; Texas; Determination of Failure To Attain the 1-Hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is taking final action to determine that the Houston/Galveston/Brazoria (HGB) area did not attain the 1-hour ozone national ambient air quality standard (NAAQS) by its applicable attainment date, November 15, 2007. This determination is based on three years of complete, quality-assured and certified ambient air quality monitoring data for the period preceding the applicable attainment deadline.

DATES: This rule is effective on July 19, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2011–0775. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 Freedom of Information Act Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at (214) 665–7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

FOR FURTHER INFORMATION CONTACT: Kenneth W. Boyce, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone 214–665–7259; fax number 214–665–7263; email address *boyce.kenneth@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, whenever ''we'' ''us'' or ''our'' is used, we mean the EPA.

Outline

I. Background
II. Final Action
III. Statutory and Executive Order Reviews

I. Background

EPA's Proposed Action

The background for today's action is discussed in detail in our February 1, 2012, proposal (77 FR 4937). In that notice, EPA proposed to determine,

under the Clean Air Act (CAA or ''Act''), the HGB ozone nonattainment area failed to attain the 1-hour ozone NAAQS by its applicable 1-hour NAAQS attainment date of November 15, 2007. The proposal was based on three years of complete, quality-assured and certified ambient air quality monitoring data for the period preceding the applicable attainment deadline (2005–2007).

The CAA, as amended in 1990, required EPA to designate as nonattainment any area that was violating the 1-hour ozone standard, generally based on air quality monitoring data from the 1987 through 1989 period (section 107(d)(4) of the Act; 56 FR 56694, November 6, 1991). The Act further classified these areas, based on the severity of their nonattainment problem, as Marginal, Moderate, Serious, Severe, or Extreme.

The control requirements and date by which attainment of the 1-hour ozone standard was to be achieved varied with an area's classification. Marginal areas were subject to the fewest mandated control requirements and had the earliest attainment date, November 15, 1993, while Severe and Extreme areas were subject to more stringent planning requirements and were provided more time to attain the standard. Two measures that are linked to a determination that a Severe or Extreme area failed to attain the standard by the applicable attainment date are contingency measures [section 172(c)(9)] and a major stationary source fee provision [sections 182(d)(3) and 185)] (''major source fee program'' or ''section 185 fee program'').

Designation and Classification

The HGB area consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery and Waller counties in Texas. Upon the date of enactment of the 1990 CAA Amendments, the HGB area was classified as a severe ozone nonattainment area for the 1-hour ozone NAAQS. As noted above, severe and extreme areas are subject to more stringent planning requirements but were provided more time to attain the ozone standard. The HGB 1-hour ozone nonattainment area was classified as severe 17. As a result, the attainment date for the HGB area was November 15, 2007.[1]

Technical Evaluation

As we more fully explained in our February 1, 2012, proposal (77 FR 4937), a determination of whether an area's air quality meets the 1-hour ozone standard is generally based upon three years of complete, quality-assured and certified air quality monitoring data gathered at established State and Local Air Monitoring Stations (''SLAMS'') in the nonattainment area and entered into the EPA's Air Quality System (AQS) database. Data from air monitors operated by state/local agencies in compliance with EPA monitoring requirements must be submitted to the AQS database. Monitoring agencies annually certify that these data are accurate to the best of their knowledge. Accordingly, EPA relies primarily on data in its AQS database when determining the attainment status of an area. See 40 CFR 50.9; 40 CFR part 50, appendix H; 40 CFR part 53; 40 CFR part 58, appendices A, C, D and E. All data are reviewed to determine the area's air quality status in accordance with 40 CFR part 50, appendix H.

Under EPA regulations at 40 CFR 50.9, the 1-hour ozone standard is attained at a monitoring site when the expected number of days per calendar year with maximum hourly average concentrations above 0.12 parts per million (235 micrograms per cubic meter) is equal to or less than 1, as determined by 40 CFR part 50, appendix H.

EPA has determined that the HGB area failed to attain the 1-hour ozone standard by its applicable attainment date; that is, the number of expected exceedances at sites in the nonattainment area was greater than one per year in the period prior to the applicable attainment date. This determination is based on three years of complete, quality-assured and certified ambient air quality monitoring data in AQS for the 2005–2007 monitoring period for the HGB area. Please see our February 1, 2012, proposal (77 FR 4937) for a more complete description and summary of the monitoring data relied upon for this determination.

Comment Received on the Proposed Rulemaking

The comment period on the proposed rulemaking closed on March 2, 2012 and EPA received no comments. On May 14, 2012, more than two months after the close of the comment period, the BCCA Appeal Group and the Section 185 Working Group (''the groups'' or ''BCCA'') submitted a late comment opposing EPA's determination that Houston failed to attain the 1-hour ozone standard by its attainment deadline. The groups acknowledged that this late comment—the only comment submitted by the groups—came after the close of the comment period. The groups claimed, however, that the comment was ''based on legal grounds arising after the close of EPA's comment period.'' The groups contended that an EPA rulemaking entitled, ''Final Rule to Implement the 1997 8-Hour Ozone National Ambient Air Quality Standard: Classification of Areas That Were Initially Classified Under Subpart 1: Revision to the Anti-backsliding Provisions to Address 1-Hour Contingency Measure Requirements; Deletion of Obsolete 1-Hour Standard Provision,'' 77 FR 28424, 28439 (May 14, 2012) ''reflects EPA's final decision not to issue further determinations whether areas (such as HGB) attained the 1-hour ozone standard by the applicable attainment dates.'' The commenters claimed that ''it would be arbitrary and capricious for EPA to ignore the May 14 Rulemaking with respect to the HGB area and make a finding only with respect to HGB.''

Response to Comment

EPA believes that there is no justification for this late comment. EPA's May 14, 2012 Rulemaking did not give rise to any new grounds for comment. First, as the commenters themselves admit, ''the May 14, rule preserves the * * * wording'' of EPA's regulation at 40 CFR 51.905 (e)(2)(i) Thus the commenters concede that the May 14 Rulemaking merely preserved the regulation, which existed at the time of EPA's proposed determination on Houston, and as to which the groups could have commented at that time. The commenters' argument, it seems, centers on a few sentences, contained in the preamble of the May 14 rule, which refer to the regulation. The commenters offer no explanation for their prior failure to address the regulation in comments on EPA's proposed determination with respect to Houston. See, 77 FR 4937 (Feb. 1, 2012). Since commenters do not claim that the May 14 Rulemaking changed the regulation, perhaps what they intend to convey is that EPA's May 14 Rulemaking reminded the commenters of the regulation's existence. Despite their claim of fresh awareness, however, the commenters' own actions reveal that they were closely acquainted with 40 CFR 51.905(e)(2)(i) and with determinations regarding specific anti-backsliding requirements. For example, in June, 2011, the BCAA Appeal Group filed a motion to intervene in the very litigation that resulted in EPA's agreement to make final determinations on 1-hour ozone attainment for Houston and five other areas in the country. *Sierra Club* v. *Jackson* (D.D.C. Case No.

[1] 56 FR 56694, November 6, 1991 and CAA section 181(a)(1).

1:11–CV–00100–JDB). In support of their motion, BCCA raised the same argument relating to determinations under this regulatory provision that they echo here. Similarly, BCCA took another opportunity to comment on the issue of the Houston determination in the CAA section 113(g) proceedings that EPA conducted when it gave notice of the settlement agreement that resolved the litigation. Ultimately, however, the groups failed to submit any comments on EPA's proposed rulemaking to make the Houston determination. The comment period closed on March 2, 2012. On May 14—just two weeks prior to EPA's deadline for making a final determination under the settlement agreement—a deadline known to BCCA, as shown by its participation in the litigation and section 113(g) process—BCCA submitted its comment.[2] The late comment was submitted under the claim that BCCA had just learned of the issue through a tangential reference in a correction to a footnote contained in a separate EPA rulemaking.

Although EPA believes that we are not compelled to respond to BCCA's late comments, since the basis for them existed at the time of the original proposal, EPA has considered their comment, and we address it below.

As set forth above, EPA's May 14 Rulemaking enunciates no new legal position to which the comment is responding. 40 CFR 51.905(e)(2)(i)(A) and (B) provide that EPA is no longer obligated to determine ''*pursuant to section 181(b)(2) or section 179(c),*'' * * *''whether an area attained by its deadline the revoked 1-hour standard, or to reclassify the area as a result.'' 40 CFR 51.905(e)(2). (emphasis added) This regulation existed when EPA published its February 1, 2012 proposed determination for Houston, and EPA's May 14 Rulemaking did not change that regulation. The statements in the preamble cited by the commenters merely corrected a portion of a footnote (n.16) in a 2009 proposal 74 FR 2941, 2942 (January 16, 2009), which had erroneously stated that EPA would continue to reclassify areas under the revoked 1-hour ozone standard. In the May 14 Rulemaking, EPA stated:

''EPA is clarifying that the portion of footnote 16 stating the EPA remains obligated to make a finding of failure to attain the 1-hour ozone standard by an area's attainment date (*under section 181(b)(2) or section 179(c)) and to reclassify the area* was erroneous and in conflict with 51.905(e)(2)(i).'' (emphasis added).

Contrary to commenters' claim, this clarification nowhere states that EPA is prohibited from or will no longer make determinations of failure to attain the 1-hour ozone deadlines for the purpose of effectuating specific 1-hour anti-backsliding requirements as required by the court in the *South Coast Air Quality Management District, et al.,* v. *EPA,* 472 F.3d 882 (D.C. Cir. 2006) reh'g denied 489 F.3d 1245.

BCCA's comments are ostensibly in response to EPA's February 1, 2012 proposed determination that the Houston nonattainment area failed to attain the revoked 1-hour ozone standard by its applicable attainment date. EPA's proposal expressly stated that this determination is solely for the purpose of effectuating the 1-hour ozone anti-backsliding requirements for section 185 penalty fees and contingency measures. While BCCA claims that its comment was prompted by EPA's May 14 Rulemaking, that Rulemaking specifically declared that it did not address 1-hour ozone anti-backsliding for section 185 penalty fees, and advised that section 185 anti-backsliding issues would be addressed in other rulemakings. See, 77 FR 28,424 at 28436 (May 14, 2012). Thus it is doubly plain that the paragraph entitled ''A Correction to a Footnote in Proposed Rule'' in the preamble of the May 14 Rulemaking was not intended to address or to prohibit EPA from proceeding with air quality determinations affecting section 185 anti-backsliding requirements.

EPA recently published in the **Federal Register** final determinations that three California 1-hour ozone nonattainment areas failed to meet their 1-hour ozone attainment deadlines. See 76 FR 82133 (Dec. 30, 2011). The rulemakings show that, for the purpose of effectuating contingency measures and section 185 anti-backsliding requirements, EPA continues to make determinations of failure to attain the 1-hour ozone deadlines. The California notices, and the responses to comments they contain, explain at length EPA's views of its authority and of its obligation to make these determinations. See, e.g., 76 FR 82140. They also demonstrate that there is no conflict between 40 CFR 51.905(e)(2)(i) and EPA's continuing obligations to effectuate specific 1-hour ozone anti-backsliding requirements through determinations regarding attainment deadlines. EPA incorporates by reference the extensive discussions of these points contained in the December 30, 2011 California determinations.

Aside from its proposed and final determinations for Houston and the California areas, EPA has proposed and finalized, also pursuant to the settlement agreement, determinations as to whether a number of other 1-hour ozone nonattainment areas throughout the country attained the 1-hour ozone standard by their applicable attainment dates. As in the case of Houston, the purpose of these determinations is limited to effectuating 1-hour ozone anti-backsliding requirements. See, Baltimore, MD 77 FR 4940 (February 1, 2012), NY-NJ-CT 77 FR 3720 (January 25, 2012), Eastern Massachusetts 77 FR 31496 (May 29, 2012), Western Massachusetts 77 FR 25362 (April 30, 2012), and Greater Connecticut 77 FR 15607 (March 16, 2012).

EPA has considered BCCA's comment, and we believe that EPA's responses here will relieve the groups of their concerns that EPA is ''ignoring the May 14 rule with respect to the [Houston] area'' and also allay their fears that EPA makes determinations such as this ''only with respect to [Houston].''

II. Final Action

After revocation of the 1-hour standard, EPA must continue to provide a mechanism to give effect to the 1-hour anti-backsliding requirements. See *SCAQMD* v. *EPA,* 472 F.3d 882, at 903. As stated in EPA's proposal, EPA is making its determination here pursuant to, and solely with the purpose and effect of discharging this obligation. As EPA stated in its proposal, EPA is making this attainment deadline determination for the revoked standard for the strictly limited purpose of effectuating specific 1-hour ozone anti-backsliding requirements. Based on the facts and rationale set forth in our February 1, 2012, proposal (77 FR 4937) and in today's rulemaking, EPA has determined that the HGB area failed to attain the 1-hour ozone standard by its applicable attainment date.

This determination bears solely on the HGB's obligation with respect to two required 1-hour anti-backsliding measures: i.e., 1-hour contingency measures for failure to attain under section 172(c)(9), and fee programs under sections 182(d)(3) and 185 of the CAA. This final determination of failure to attain by the area's 2007 attainment date does not result in reclassification of the area under the revoked 1-hour standard. As a severe 1-hour nonattainment area, the HGB area is not subject to reclassification for the 1-hour standard, and in any event EPA is no

[2] The settlement agreement deadline was May 31, 2012, but was extended to June 7, 2012 for the HGB area.

longer required to reclassify any area to a higher classification for the 1-hour ozone NAAQS based upon a determination that the area failed to attain that NAAQS by its attainment date. 40 CFR 51.905(e)(2)(i)(B).

With respect to the 1-hour ozone anti-backsliding requirement for contingency measures, the Texas SIP included contingency measures to achieve an additional 3 percent reduction in NOx and VOC emissions in 2008. The contingency measure reductions for 2008 were to be obtained from on-road and off-road mobile control measures already being implemented. EPA has previously approved the State's 1-hour ozone attainment demonstration and Rate of Progress plans for the HGB area which included contingency measures. See: 71 FR 52670, 70 FR 7407, 66 FR 57195, and 66 FR 20750. Thus, the reductions from contingency measures have already been achieved and therefore this final determination of failure to attain by the area's 1-hour ozone attainment date would not trigger any additional contingency measures.

With respect to the 1-hour ozone anti-backsliding requirement for penalty fees, section 182(d)(3) of the CAA requires SIPs to include provisions required by section 185 of the CAA. Section 185 requires 1-hour ozone SIPs for severe areas to provide a program requiring each major stationary source of ozone precursors located in the area to pay fees to the State when the area has failed to attain by the attainment date. This final determination of failure to attain by the area's 1-hour attainment date bears on the obligation relating to implementation of the 1-hour anti-backsliding penalty fee program under section 182(d)(3) and 185, unless that obligation is terminated.

III. Statutory and Executive Order Reviews

This action makes a determination, based on air quality, that this area did not attain the 1-hour ozone standard, and it does not impose any requirements beyond those required by federal statute or regulation. 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 the 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 disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 20, 2012.

Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Oxides of nitrogen, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: June 6, 2012.

Samuel Coleman,

Acting Regional Administrator, Region 6.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart SS—Texas

■ 2. Section 52.2275 is amended by adding paragraph (d) to read as follows:

§ 52.2275 Control strategy and regulations: Ozone.

* * * * *

(d) *Determinations that Certain Areas Did Not Attain the 1-Hour Ozone NAAQS.* EPA has determined that the Houston/Galveston/Brazoria severe-17 1-hour ozone nonattainment area did not attain the 1-hour ozone NAAQS by the applicable attainment date of November 15, 2007. This determination bears on the area's obligations with respect to implementation of two specific 1-hour ozone standard anti-backsliding requirements: section 172(c)(9) contingency measures for failure to attain and sections 182(d)(3) and 185 major stationary source fee programs.

* * * * *

[FR Doc. 2012–14713 Filed 6–18–12; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2011–0960; FRL–9688–4]

Approval and Promulgation of Air Quality Implementation Plans; Massachusetts; Determination of Attainment of the 1997 Ozone Standard for the Western Massachusetts Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is making two separate and independent determinations. First, EPA is making a final determination that the Springfield (Western Massachusetts) moderate 1997 8-hour ozone nonattainment area has attained the 1997 8-hour National Ambient Air Quality Standard (NAAQS) for ozone. This determination is based upon complete, quality-assured, certified ambient air monitoring data that show the area has monitored attainment of the 1997 8-hour ozone NAAQS for the 2007–2009 and 2008–2010 monitoring periods. In addition, complete, quality-assured, certified ambient air monitoring data for 2011 indicate that the area continues to attain the standard. Under the provisions of EPA's ozone implementation rule, the requirements for this area to submit an attainment demonstration, a reasonable further progress plan, contingency measures, and other planning State Implementation Plans related to attainment of the 1997 8-hour ozone NAAQS shall be suspended for so long as the area continues to attain the 1997 ozone NAAQS. In addition, EPA is determining that this area attained the 1997 ozone NAAQS as of June 15, 2010, its applicable attainment date.

DATES: *Effective Date:* This rule is effective on July 19, 2012.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R01–OAR–2011–0960. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Quality Planning Unit, 5 Post Office Square—Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: Richard P. Burkhart, Air Quality Planning Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square, Suite 100, Boston, MA 02109–3912, telephone number (617) 918–1664, fax number (617) 918–0664, email *Burkhart.Richard@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

Organization of this document. The following outline is provided to aid in locating information in this preamble.

I. What actions is EPA taking?
II. What is the background for these actions?
III. What is the effect of these actions?
IV. Final Actions
V. Statutory and Executive Order Reviews

I. What actions is EPA taking?

EPA is making two separate and independent determinations. First, EPA is determining that the Springfield (Western Massachusetts) moderate 8-hour ozone nonattainment area has attained the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS). This determination is based upon complete, quality-assured and certified ambient air monitoring data that show the area has monitored attainment of the 1997 ozone NAAQS for the 2007–2009 and 2008–2010 monitoring periods. In addition, complete, quality-assured, certified ambient air monitoring data for 2011 [1] indicate that the area continues to attain the standard. Second, EPA is determining, under section 181(b)(2)(A) of the Clean Air Act (CAA), that this area attained the 1997 8-hour ozone NAAQS by its applicable attainment date (June 15, 2010).

II. What is the background for these actions?

On January 23, 2012 (77 FR 3220), EPA published in the **Federal Register** a Notice of Proposed Rulemaking (NPR) proposing the determinations that are the subject of this final rulemaking action. The rationale and bases for EPA's actions are set forth in the January 23, 2012 NPR, and need not be restated here. EPA received no comments on the NPR.

III. What is the effect of these actions?

Under the provisions of EPA's ozone implementation rule (see 40 CFR Section 51.918), a determination that the area is attaining the standard suspends the requirements for the Western Massachusetts moderate ozone nonattainment area to submit an attainment demonstration, a reasonable further progress plan, section 172(c)(9) contingency measures, and any other planning State Implementation Plans (SIPs) related to attainment of the 1997 8-hour ozone NAAQS for so long as the area continues to attain the 1997 ozone NAAQS.

This action does not constitute a redesignation to attainment under CAA section 107(d)(3), because EPA has not yet approved a maintenance plan for the area, as required under section 175A of the CAA, nor made a determination that the area has met the other requirements for redesignation. The classification and designation status of the area remains moderate nonattainment for the 1997 8-hour ozone NAAQS until such time as EPA determines that it meets the CAA requirements for redesignation to attainment. If EPA subsequently determines, after notice-and-comment rulemaking in the **Federal Register**, that the area has violated the 1997 8-hour ozone standard, the basis for the suspension of these requirements would no longer exist, and the area would thereafter have to address the pertinent requirements. In addition, in accordance with CAA section 181(b)(2)(A), EPA is determining that the Western Massachusetts 1997 8-hour ozone nonattainment area attained the 1997 ozone NAAQS by its applicable attainment date of June 15, 2010. The

[1] The data capture for the Adams ozone monitor for 2011 was below EPA data capture requirements for the 1997 8-hour ozone NAAQS. In addition the 3-year period between 2009 and 2011 had low data capture. The Adams monitor is a mountain top monitor and the road to the site was not accessible until early May in both 2010 and 2011, due to snow and ice. The Massachusetts Department of Environmental Protection recently performed a missing data analysis for this site in accordance with the regulatory requirements of 40 CFR Part 50, Appendix I, for both 2010 and 2011. The Massachusetts missing data analysis used a combination of meteorology and air quality data for ozone monitors near the Adams site for the missing days to decisively conclude that on the days with missing ozone data, the ozone levels, if captured, would have been below both the 1997 8-hour ozone NAAQS and the 2008 8-hour ozone NAAQS. Thus, by rule, these days can be counted for the purpose of meeting the data completeness requirement. The missing data analysis for this site was approved by EPA on April 27, 2012. The approval letter is in the Docket for this action.

effect of this determination of attainment by the area's attainment date is to discharge EPA's obligation under section 181(b)(2)(A), and to establish that, in accordance with that section, the area will not be reclassified for failure to attain by its applicable attainment date.

IV. Final Actions

EPA is making two separate and independent determinations. First, EPA is determining that the Western Massachusetts 8-hour ozone nonattainment area has attained the 1997 8-hour ozone standard based on complete, quality-assured and certified ozone monitoring data from 2007–2009 and from 2008–2010. In addition, complete, quality-assured, certified ambient air monitoring data for 2011 indicate the area continues to attain the standard. As provided in 40 CFR 51.918, this determination suspends the requirements for Massachusetts to submit an attainment demonstration, a reasonable further progress plan, contingency measures under section 172(c)(9), and any other planning SIP related to attainment of the 1997 8-hour ozone NAAQS for this area, for so long as the area continues to attain the 1997 ozone standard. Furthermore, pursuant to CAA section 181(b)(2)(A) EPA is determining that the Western Massachusetts 8-hour ozone nonattainment area attained the 1997 8-hour ozone NAAQS by its applicable attainment date (June 15, 2010).

IV. Statutory and Executive Order Reviews

These actions make determinations of attainment based on air quality, result in the suspension of certain Federal requirements, and/or would not impose additional requirements beyond those imposed by state law. For that reason, these actions:

- Are not ''significant regulatory actions'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Are 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.*);
- Do 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);
- Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Are not economically significant regulatory actions based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Are not significant regulatory actions subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Are 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
- Do 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, these actions do not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 20, 2012.

Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action.

This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: June 6, 2012.

H. Curtis Spalding,

Regional Administrator, EPA New England.

Part 52 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart W—Massachusetts

■ 2. Section 52.1129 is amended by adding paragraph (h) to read as follows:

§ 52.1129 Control strategy: Ozone.

* * * * *

(h) Determinations of Attainment: Effective July 19, 2012.

(1) Determination of Attainment. EPA is determining that the Springfield (Western Massachusetts) 8-hour ozone nonattainment area has attained the 1997 8-hour ozone standard. Under the provisions of EPA's ozone implementation rule (see 40 CFR 51.918), this determination suspends the reasonable further progress and attainment demonstration requirements of section 182(b)(1) and related requirements of section 172(c)(9) of the Clean Air Act for as long as the area continues to attain the 1997 8-hour ozone standard. If EPA determines, after notice-and comment rulemaking, that the Western Massachusetts area no longer meets the 1997 ozone NAAQS, this determination shall be withdrawn.

(2) Determination of Attainment by the Area's Attainment Date. EPA has determined that the Springfield (Western Massachusetts) 8-hour ozone nonattainment area met the applicable June 15, 2010 attainment deadline for the 1997 8-hour ozone standard.

[FR Doc. 2012–14719 Filed 6–18–12; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 51 and 54

[WC Docket Nos. 10–90, 07–135, 05–337, 03–109; GN Docket No. 09–51; CC Docket Nos. 01–92, 96–45; WT Docket No. 10–208; FCC 12–47]

Connect America Fund; a National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Correction

AGENCY: Federal Communications Commission.

ACTION: Final rule; correction.

SUMMARY: The Federal Communications Commission published in the **Federal Register** of May 29, 2012, a document that reconsiders and modifies certain provisions of the Commission's rules that were adopted in the *USF/ICC Transformation Order.* This final rule correction states that the amendments made to 47 CFR part 51 shall be effective on July 13, 2012, and, the amendments made to 47 CFR part 54 shall be effective on June 28, 2012.

DATES: Effective June 19, 2012, the effective date of the amendments to 47 CFR part 51 in the final rule published May 29, 2012 (77 FR 31520) is corrected to July 13, 2012. The effective date of the amendments to 47 CFR part 54 shall remain June 28, 2012.

FOR FURTHER INFORMATION CONTACT: Amy Bender, Wireline Competition Bureau, (202) 418–1469, Victoria Goldberg, Wireline Competition Bureau, (202) 418–1520

SUPPLEMENTARY INFORMATION: The FCC published a document in the **Federal Register** of May 29, 2012, (77 FR 31520) stating that 47 CFR part 51, is *amended,* and such rule amendments shall be effective 45 days after the date of publication of the rule amendments in the **Federal Register**. The document also states that 47 CFR part 54, is *amended,* and such rule amendments shall be effective 30 days after the date of publication of the rule amendments in the **Federal Register**. This document specifies the actual effective dates of the rule amendments. The **DATES** heading of the May 29, 2012, **Federal Register** document only included the effective date of the revisions to 47 CFR part 51. This final rule correction specifies the separate effective dates for the part 51 amendments and the part 54 amendments as follows: The amendments to part 51 are effective July 13, 2012. The amendments to part 54 are effective June 28, 2012.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2012–14303 Filed 6–18–12; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

49 CFR Part 1572

[Docket No. TSA–2006–24191]

Exemption From Transportation Worker Identification Credential (TWIC) Expiration Provisions for Certain Individuals Who Hold a Valid TWIC

AGENCY: Transportation Security Administration, DHS.

ACTION: Notice of Exemption.

SUMMARY: The Transportation Security Administration (TSA) is granting a temporary exemption from certain TWIC regulations regarding card expiration and replacement requirements. This exemption applies to U.S. nationals [1] who hold a valid TWIC expiring on or before December 31, 2014. The exemption permits eligible TWIC holders to obtain a replacement card that extends the expiration date of their current security threat assessment and TWIC by three years. During 2012, DHS intends to publish a Notice of Proposed Rulemaking (NPRM) to seek comment on card reader requirements and deployment requirement plans. At the end of the three-year extension period, pending the outcome of this rulemaking activity, DHS expects card reader requirements to be in place and readers to be deployed at facilities with the highest risk.

DATES: This exemption becomes effective August 30, 2012.

FOR FURTHER INFORMATION CONTACT: David Baker, Office of Security Policy and Industry Engagement, TWIC Program Office, TSA–28, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6028; telephone (571) 227–2659; facsimile (571) 227–1376; email: *david.baker1@dhs.gov.*

SUPPLEMENTARY INFORMATION: This document grants a temporary exemption to certain TWIC regulations contained at 49 CFR part 1572. The background, purpose, and terms of the exemption are explained below.

[1] The term U.S. nationals includes U.S. citizens and noncitizen nationals of the United States.

Background

The Maritime Transportation Security Act (MTSA) of 2002 [2] and the Security and Accountability for Every Port Act of 2006 [3] require TSA and the U.S. Coast Guard to establish regulations requiring certain merchant mariners and individuals with unescorted access to secure areas of certain vessels and facilities to undergo a security threat assessment (STA) and receive a biometric credential called the Transportation Worker Identification Credential (TWIC). The STA consists of criminal, immigration and terrorism checks. TSA and the U.S. Coast Guard implemented these requirements in a joint final rulemaking.[4]

TSA is issuing this exemption to give eligible individuals the option to extend for an additional three years their current STAs for five-year TWICs that are set to expire on or before December 31, 2014,[5] rather than require them to renew the card. Through this notice, we are exempting eligible individuals from 49 CFR 1572.23(a) and (a)(1) and 1572.501(d) of the TWIC regulation. If card holders so choose, they will have the option to renew the card for a full five years, as detailed in the TWIC regulation, codified at 49 CFR 1572.17, 1572.19, and 1572.21. The process for exercising the three-year TWIC extension option will be similar to the card replacement procedures outlined in the TWIC regulation at 49 CFR 1572.19(f) and 1572.501(d).

Eligible individuals choosing the three-year TWIC extension may obtain it by ordering the credential via telephone, paying a $60 card replacement fee, and visiting a TWIC enrollment center to pick up and activate the card. For the purposes of this exemption, the three-year TWIC is considered a valid TWIC, in that it can be used to enter maritime facilities and vessels just as the five-year TWIC is used currently. The three-year TWIC will expire three years from the expiration date of the TWIC that is being replaced. Eligible individuals selecting the three-year TWIC option do not have to go through the standard renewal process that includes providing new biometric and biographic information at an enrollment center, new STA, payment of the renewal fee of $129.75, and a second trip to an enrollment center to retrieve and activate the credential.

[2] Public Law 107–295, 116 Stat. 2064 (November 25, 2002).

[3] Public Law 109–347, 120 Stat. 1884 (October 13, 2006).

[4] Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector Final Rule, 72 FR 3492 (January 25, 2007).

[5] 49 CFR 1572.23.

This exemption will reduce the burden and cost[6] associated with obtaining a new TWIC for the majority of individuals holding expiring TWICs, while the U.S. Coast Guard develops the TWIC reader regulation. This exemption (and the option that it will provide to certain TWIC holders with expiring TWICs) and the U.S. Coast Guard TWIC reader rulemaking are part of the Department of Homeland Security's overall proposed effort to ensure that TWIC readers are deployed, through a risk-based approach, to appropriate vessels and facilities throughout the Nation in the coming three-year period.

In particular, over the next three years, during the STA extension period, DHS intends to issue a U.S Coast Guard NPRM and final rulemaking to establish a risk-based reader deployment and implementation schedule. DHS anticipates that the highest risk facilities will be required to implement TWIC card readers prior to the expiration of the TWIC STA extension period detailed in this notice. If a card holder chooses not to exercise this extension, the individual must follow TWIC renewal provisions as specified in the TWIC regulation at 49 CFR 1572.17, 1572.19 and 1572.21. For card holders that opt to follow renewal procedures in the final rule, renewal cards will be valid for five years.

Authority and Determination

TSA may grant an exemption from a regulation if TSA determines that the exemption is in the public interest.[7] TSA has determined that it is in the public interest to grant an exemption from certain TWIC regulations found at 49 CFR part 1572, described below under ''Exemption.'' This exemption will contribute to providing safe and efficient transportation while ensuring the efficient use and conservation of the resources of the United States. Due to the fact that readers are not yet required by regulation or in widespread use, we believe the burden associated with the full renewal requirements is not currently justified. The exemption permits eligible individuals to pay lower fees, reduce trips to an enrollment center, and avoid providing new biometric and biographic enrollment information when they request the card. As stated above, this exemption will reduce the burden and cost associated with obtaining a new TWIC for the majority of individuals holding expiring TWICs, without reducing the current benefits of possession of those TWICs, while the U.S. Coast Guard develops the TWIC reader regulation.

These factors save time and resources for TWIC workers and the government and also facilitate commerce at America's ports, a vital element of the national economy.

Eligibility and Process for Using the Exemption

Individuals are eligible to apply for the three-year TWIC if they are U.S. nationals[8] and hold a valid TWIC that expires on or before December 31, 2014. Individuals eligible for the three-year TWIC may choose to obtain a five-year TWIC under the current process. All other individuals who are not eligible for the three-year TWIC must obtain or renew a TWIC through the standard renewal process and obtain a five-year TWIC.

Eligible individuals must request a three-year TWIC from TSA. To make this request, individuals should call 1–866–347–8942 (the TWIC Help Desk[9]) to order a three-year TWIC. Individuals must pay the associated $60 card replacement fee either by credit card over the telephone, or via cashier's check or money order at an enrollment center.[10] The new three-year TWICs will be available within five to ten business days after calling the TWIC Help Desk. Once the card is ready, individuals must make one visit to an enrollment center of their choosing to pick up and activate the three-year TWIC, and present a government-issued photo identification to verify that they are the authorized TWIC holder. This visit to the enrollment center is the only one required; individuals can make an appointment or walk in during normal enrollment center business hours to pick-up and activate the three-year TWIC.

All individuals holding a TWIC must continue to comply with all non-exempt requirements of 49 CFR part 1572, including requirements to report disqualifying arrests, convictions or unlawful immigration status. Ports and facility operators do not have to modify current access control procedures to accommodate three-year TWICs. Any facility may use a TWIC reader in conjunction with TSA's Cancelled Card List (CCL) to determine if a five-year or three-year TWIC has been revoked for cause, or reported as lost, stolen or damaged. Industry and law enforcement officials may use a three-year TWIC to verify identity using a TWIC reader, as is currently done with five-year TWICs.

Exemption

Section I—General Exemption

Beginning August 30, 2012, TSA exempts eligible individuals who hold a valid TWIC that expires on or before December 31, 2014, from the requirements of 49 CFR part 1572 described below:

1. Eligible individuals are exempt from 49 CFR 1572.23(a) and may receive a three-year extension of the five-year expiration date of their current TWIC by following the procedures described below in ''Approved Procedures.'' TSA does not exempt individuals from the requirements of 49 CFR 1572.23(a)(2).

2. Eligible individuals whose TWIC was issued based on a comparable threat assessment are exempt from 49 CFR 1572.23(a)(1) and may receive a three-year extension of the expiration date of their current TWIC by following the procedures described below in ''Approved Procedures.''

3. Eligible individuals are exempt from 49 CFR 1572.501(d) and may replace their five-year TWIC with a three-year TWIC by paying the $60 card replacement fee even if their current TWIC has not been lost, stolen or damaged. Individuals may continue to replace a lost, stolen or damaged TWIC pursuant to the requirements in 49 CFR 1572.501(d).

Section II—Approved Procedures

To receive a three-year TWIC, eligible individuals must:

1. Call the TWIC Help Desk (currently 1–866–347–8942) and order a three-year TWIC.[11]

2. Pay the $60 card replacement fee.

3. For individuals who became a U.S. national after enrolling for the original five-year TWIC, provide proof of U.S. national status[12] before picking up the three-year TWIC.

[6] TSA's OMB control number for the TWIC collection of information is 1652–0047. TSA has updated its Paperwork Reduction Act submission to OMB to reflect the changes in hour and cost burden that will result from the TWIC Exemption. TSA estimates for those eligible individuals who select the three-year TWIC option, the cost and hour burden will be reduced by over 50 percent. This information will be available at *www.reginfo.gov.*

[7] 49 U.S.C. 114(q).

[8] 8 U.S.C. 1101(a)(22).

[9] To obtain more information about contacting the TWIC Help Desk and this exemption, visit the TSA Web site at *http://www.tsa.gov/what_we_do/layers/twic/contact.shtm* (last visited Apr. 18, 2012).

[10] Please note that because payment must be made in advance of ordering the replacement card, those eligible individuals who choose to pay via cashier's check or money order will have to make a separate trip to the enrollment center to order the card, in addition to visiting the enrollment center to pick-up and activate the three-year TWIC.

[11] To obtain more information about contacting the TWIC Help Desk and this exemption, visit the TSA Web site at *http://www.tsa.gov/what_we_do/layers/twic/contact.shtm* (last visited Apr. 18, 2012).

[12] The list of acceptable documents that may be used to provide proof of U.S. nationality is located at *http://www.tsa.gov/assets/pdf/*

Continued

4. Visit an enrollment center and present a government-issued photo identification [13] to activate and pick up the new TWIC.

5. Comply with all non-exempt requirements of 49 CFR part 1572.

Issued in Arlington, Virginia, on June 15, 2012.

John S. Pistole,

Administrator.

[FR Doc. 2012–15027 Filed 6–15–12; 4:15 pm]

BILLING CODE 9110–05–P

approved_twic_identification_docs.pdf (last visited May 2, 2012).

[13] The list of acceptable identification documents is located at *http://www.tsa.gov/assets/pdf/approved_twic_identification_docs.pdf.*

Proposed Rules

Federal Register
Vol. 77, No. 118
Tuesday, June 19, 2012

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 COMMERCE

Bureau of Industry and Security

15 CFR Parts 772 and 774

[Docket No. 120403245–1034–01]

RIN 0694–AF66

''Specially Designed'' Definition

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Proposed rule.

SUMMARY: As part of the President's Export Control Reform (ECR) Initiative, this proposed rule, and a separate proposed rule from the Department of State, Directorate of Defense Trade Controls, being published in conjunction with this document, sets forth, as much as possible, a common definition of the term ''specially designed'' for use in the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR). The term ''specially designed'' is used widely in the Commerce Control List (CCL) and would play an important role in the ''600 series'' that the Bureau of Industry and Security (BIS) has proposed to create to control less sensitive defense articles transferred from the United States Munitions List (USML) to the Commerce Control List (CCL). The revisions in this rule are part of Commerce's retrospective plan under EO 13563 completed in August 2011. Commerce's full plan can be accessed at: *http://open.commerce.gov/news/2011/08/23/commerce-plan-retrospective-analysis-existing-rules*.

DATES: Comments must be received by BIS no later than August 3, 2012.

ADDRESSES: Comments on this rule may be submitted to the Federal rulemaking portal (*www.regulations.gov*). The regulations.gov ID for this rule is: BIS–2012–0021. Comments may also be submitted via email to *publiccomments@bis.doc.gov* or on paper to Regulatory Policy Division, Bureau of Industry and Security, Room 2099B, U.S. Department of Commerce, 14th St. and Pennsylvania Ave. NW., Washington, DC 20230. Please refer to RIN 0694–AF66 in all comments and in the subject line of email comments. All comments must be in writing. All comments (including any personal identifiable information) will be available for public inspection and copying. Those wishing to comment anonymously may do so by submitting their comment via regulations.gov and leaving the fields for identifying information blank.

FOR FURTHER INFORMATION CONTACT: Timothy Mooney, Regulatory Policy Division, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482–2440, Fax: (202) 482–3355, Email: *timothy.mooney@bis.doc.gov*.

SUPPLEMENTARY INFORMATION: The revisions in this proposed rule are part of Commerce's retrospective plan under EO 13563 completed in August 2011.

Elsewhere in this issue of the **Federal Register**, BIS publishes an advanced notice of proposed rulemaking, *Feasibility of Enumerating ''Specially Designed'' Components,* requesting comments on the feasibility of positively identifying ''specially designed'' components on the CCL. That proposal is a part of a longer term project the U.S. Government intends to undertake with the multilateral export control regimes.

Background

On July 15, 2011, BIS proposed a single definition of the term ''specially designed'' as it would be used in the proposed ''600 series'' and the rest of the Commerce Control List (CCL) (the ''July 15 proposed rule'') (76 FR 41958). This action would revise that proposed definition. Additionally, the State Department is concurrently publishing a proposed rule to create, to the extent possible, a common definition of ''specially designed'' in the International Traffic in Arms Regulations (ITAR). After reviewing comments received in response to both proposed rules, the Departments of Commerce and State plan to publish final rules amending the Export Administration Regulations (EAR) and ITAR so that they have, to the extent possible, common definitions of the term. The revisions in this rule are part of Commerce's retrospective plan under EO 13563 completed in August 2011. Commerce's full plan can be accessed at: *http://open.commerce.gov/news/2011/08/23/commerce-plan-retrospective-analysis-existing-rules*.

All references to the United States Munitions List (USML) in this rule are to the list of defense articles that are controlled for purposes of export pursuant to the ITAR, 22 CFR Parts 120 *et seq.,* and not to the list of defense articles on the United States Munitions Import List (USMIL) controlled by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) for purposes of import, under its regulations at 27 CFR Part 447. Pursuant to section 38(a)(1) of the Arms Export Control Act (AECA), all defense articles controlled for export or import are part of the USML under the AECA, but, for the sake of clarity, the list of defense articles controlled by ATF for purposes of import are on the USMIL. The transfer of defense articles from the ITAR's USML to the EAR's CCL for purposes of export controls does not affect the list of defense articles controlled on the USMIL under the AECA for purposes of import controls.

A common definition of the term ''specially designed'' that is as clear and objective as possible is vital to the Administration's ECR Initiative. Many of the controls in the CCL use the term. Most of the new ''600 series'' ECCNs that have been proposed to control items the President determines no longer warrant control under the ITAR pursuant to AECA section 38(f) use the term. Several of the USML categories the State Department proposes to revise use the term as well.

The State Department has decided to revise the USML to make it more ''positive.'' A ''positive'' list uses more objective parameters to describe the items controlled. As described in the ANPR referenced in the summary of this rule, BIS plans to continue the process of revising the CCL so that it is more ''positive'' as well.

BIS cannot, however, immediately remove all references to the term in the CCL and replace them with lists of specific items that warrant control because the lists of items controlled by the multilateral export control regimes rely on the term extensively. Most of the CCL is based on and implements these regime lists. Moreover, BIS has not developed lists of which specific items would be ''specially designed.'' Such an

effort would take many years to complete and would require BIS to prepare and submit proposals to the regimes and then receive approval of those proposals to change the relevant control text.

In addition, the new ''600 series'' ECCNs that have been proposed to control items that the President determines no longer warrant control on the USML must use a catch-all ''specially designed'' term to avoid inadvertently de-controlling items other than common, single unassembled parts that are now ITAR-controlled as ''specifically designed, modified or configured'' for a military application. As the State Department has described in its previous ANPR and proposed rules, much of the ITAR now relies upon catch-all controls. For example, the control for military electronic components, parts, components, accessories, and associated equipment is in USML Category XI(c), which controls ''[c]omponents, parts, accessories, attachments, and associated equipment specifically designed or modified for use with equipment in paragraphs (a) and (b) of this category, except for such items as are in normal commercial use.'' No other detail is provided. USML (22 CFR Part 121) Category XI(a) similarly uses a broad catch-all control phrase to control ''[e]lectronic equipment not included in Category XII of the [USML] which is specifically designed, modified or configured for military applications.'' The examples provided in the rule are not an exhaustive list of controlled items. USML Category VIII(h) similarly controls all ''[c]omponents, parts, accessories, attachments and associated equipment (including ground support equipment) specifically designed or modified for the articles in paragraphs (a) through (d) of [Category VIII], excluding aircraft tires and propellers used with reciprocating engines,'' other than the parts and components that are standard equipment in civil aircraft as described in the ''Note'' to USML Category VIII. Similarly, USML Category XII(e) controls ''[c]omponents, parts, accessories, attachments and associated equipment specifically designed or modified for the [fire control, range finding, optical, night vision and other articles enumerated in] paragraphs (a) through (d) of this category, except for such items as are in normal commercial use.''

The ''specially designed'' definition proposed here would capture the items currently captured under the ITAR ''specifically designed, modified or configured'' for a military application catch-all. BIS understands that the issues associated with catch-all control text would largely be transferred from one set of regulations to another. However, the Administration believes that industry and government would benefit from adopting this new definition because doing so would confine the term's use to a single set of regulations for a large volume of parts, components, and other items that do not warrant the worldwide and collateral controls of the ITAR. Moreover, this action would objectively define the catch-all term ''specially designed'' for such items, consistently apply the ''normal commercial use'' carve-outs described above, and also implement the statement of policy in ITAR section 120.3, consistent with the AECA. Under that policy, the ITAR, and by implication, the new ''600 series'' ECCNs, should not control items that (a) have predominant civil applications and performance equivalents to those used for civil applications and (b) do not have significant military or intelligence applicability such that control under the ITAR (or a new ''600 series'' ECCN) is warranted.

This proposed definition would also provide the public with an as objective as possible basis for determining whether any other item on the CCL is ''specially designed,'' thus responding to a common industry suggestion for improving the CCL. In addition, the proposed definition responds to a common industry request to clarify that ''specially designed'' does not mean merely ''capable of use in'' or ''capable of use for'' another item. For example, non-application specific general purpose integrated circuits that are not designed for a particular application would not be ''specially designed'' items, even if they are used in controlled end items. Rather, the extent of the controls on such circuits would be described by the technical and other parameters in Category 3 of the CCL.

Although BIS does not propose to remove references to ''specially designed'' that are part of multilateral control texts, it does have the discretion to define the term so long as the definition is not inconsistent with how the regimes define the term. The Missile Technology Control Regime (MTCR) is the only one of the four multilateral export control regimes to define the term. BIS believes that the proposed definition is not inconsistent with the MTCR definition, which is in EAR § 772.1. BIS asks the public to comment in particular on whether this proposed definition would result in specific items that are not now controlled for Missile Technology (MT) reasons on the CCL to become controlled for MT reasons. We also ask for public comments on whether this definition would remove from control items that are now controlled for MT reasons on the CCL as a result of the application of the MTCR definition. Additionally, as in the July 15 proposed rule, BIS asks the public to test this proposed definition to determine its ease of use, whether it meets the nine objectives identified for the term, and how it corresponds to what the public considers ''specially designed'' items.

Objectives for the ''Specially Designed'' Definition

The July 15 proposed rule included nine objectives for the revised ''specially designed'' definition. These objectives have not changed. The U.S. Government is committed to adopting a ''specially designed'' definition under the EAR and ITAR that would achieve these objectives. The nine objectives are to:

(i) Preclude multiple or overlapping controls of similar items within and across the two control lists;

(ii) Be easily understood and applied by exporters, prosecutors, juries, and the U.S. Government—*e.g.,* by using objective, knowable, and clear requirements that do not rely upon a need to investigate and divine the intentions of the original designer of a part or the predominant market applications for such items;

(iii) Be consistent with definitions used by the multilateral export control regimes;

(iv) Not include any item specifically enumerated on either the USML or the CCL and, in order to avoid a definitional loop, do not use ''specially designed'' as a control criterion;

(v) Be capable of excluding from control simple or multi-use parts such as springs, bolts, and rivets, and other types of items the U.S. Government determines do not warrant significant export controls;

(vi) Apply to both descriptions of end items that are ''specially designed'' to have particular characteristics *and* to parts and components that were ''specially designed'' for particular end items;

(vii) Apply to materials and software because they are ''specially designed'' to have a particular characteristic or for a particular type of end item;

(viii) Not increase the current control level to ''600 series'' control or other higher end controls of items (*i.e.,* not move items currently subject to a lower control status to a higher level control status), particularly current EAR99 items, which are now controlled at lower levels; *and*

(ix) Not, merely as a result of the definition, cause historically EAR-controlled items to become ITAR controlled.

BIS believes that this proposed definition, and its counterpart published by the State Department, achieves these nine objectives. However, we invite public comments and ideas for how to define the term to meet or exceed all these objectives, and to provide additional objectives for such a term.

BIS received many responses to the proposed ''specially designed'' definition in the July 15 proposed rule. The comments, along with the additional review of this issue the U.S. Government conducted in conjunction with BIS's Technical Advisory Committees (TACs) and State's Defense Trade Advisory Group (DTAG), identified additional changes necessary to achieve the nine objectives for ''specially designed.'' This rule proposes a revised definition of ''specially designed'' to allow this term to play the key role envisioned for it under the ECR Initiative.

Similar to the July 15 proposed definition, this proposed definition adopts a ''catch and release'' approach. Paragraph (a) of the definition contains broad bases for items to be ''specially designed''—the ''catch''—and paragraph (b) contains various exceptions to an item's being ''specially designed''—the ''release.'' BIS believes that this structure creates an objective and common definition for both the EAR and ITAR, which nonetheless can be tailored and refined over time as necessary. This definition also simultaneously meets the nine objectives defined above while, with respect to the ''600 series'' items, also remains consistent with the policy standards set out in ITAR section 120.3 and the carve-outs in various USML categories that do not control items ''in normal commercial use.'' BIS believes that this approach more readily lends itself to analysis in a decision tree format, *i.e.,* with a series of ''yes'' and ''no'' questions leading to a conclusion about whether an item is ''specially designed.'' BIS further believes that this format will contribute to a more orderly and efficient determination about whether an item is ''specially designed.'' This change would, then, eventually facilitate enhanced public understanding of the definition of the term.

Summary of Public Comments on ''Specially Designed''

Generally, public comments on the July 15 proposed rule supported the overall ECR Initiative and the proposed rule. In particular, commenters supported creating the ''600 series,'' which most commenters characterized as a sensible approach to addressing a fairly complicated problem. However, most commenters expressed concerns about the proposed ''specially designed'' definition, along with transition-related concerns that are being addressed in a separate proposed rule to be published in the **Federal Register**. For example, commenters felt that the new definition was difficult to understand and would capture items that should not be considered ''specially designed.'' The comments are discussed in greater detail below in regards to the specific concerns with the July 15 proposed rule. The comments can be reviewed at: *http://efoia.bis.doc.gov/pubcomm/records-of-comments/record_of_comments_usml.pdf*.

BIS took into account the comments from the July 15 proposed rule when developing the revised definition of ''specially designed'' proposed here. BIS intends this revised definition to be evaluated on its own merits, and the public need not review the July 15 proposed rule to understand this action. Once the public comments on this rule are reviewed and responded to, BIS intends to publish a final ''specially designed'' definition.

However, a general summary of the July 15 definition and the responses to it provides context for this proposed definition. In the July 15 proposed rule, BIS suggested defining ''specially designed'' in four paragraphs. Paragraph (a) would have identified what items would be ''specially designed'' except for ''parts'' and ''components.'' Paragraph (b) would have identified which ''parts'' and ''components'' would be ''specially designed.'' The paragraph (c) and (d) exclusion paragraphs would have identified certain items that would not be ''specially designed.'' Most commenters supported paragraph (a) of the proposed definition. The majority of commenters suggested also adopting paragraph (a) for ''parts'' and ''components.'' Additionally, the majority of comments received indicated the public could understand and apply the paragraph (a) criteria, so BIS decided to include the same type of criteria as part of the proposed paragraph (a)(1) criteria included in this rule's proposed definition of ''specially designed.'' However, a small number of commenters indicated that the proposed paragraph (a) could result in confusion over whether an item was ''specially designed,'' because the definition still relied on design intent. This proposed ''specially designed'' definition addresses that concern by adopting a single paragraph (a) for determining what items are ''specially designed.'' Under the proposed structure, an item meeting one of the three listed criteria would be considered ''specially designed.''

Most of the concerns with the definition related to paragraphs (b), (c), and (d), which defined non-specific ''parts'' or ''components'' could be considered ''specially designed.'' Of the commenters criticizing these paragraphs, most believed the exclusions in paragraphs (c) and (d) were difficult to understand and, once understood, would have resulted in items that they had not historically considered to be ''specially designed'' to become controlled as a result of the definition. In particular, the definition would have caused non-specific ''parts'' and ''components'' designed for controlled and uncontrolled applications or no particular application to become ''specially designed,'' and therefore subject to control. Thus, the definition would have resulted in some items' control status being undefined until the items first were used in a controlled, or uncontrolled item. BIS believes the paragraphs (b)(4) and (b)(5) proposed here address those concerns.

I. Proposed Adoption of a Revised ''Specially Designed'' Definition

A. Discussion of Each Element of the Proposed Definition and Its Notes

The definition begins with introductory text to provide guidance on the proper steps for analyzing the definiton. This brief introductory text would assist the public in understanding that they must follow the sequential analysis set forth below. Specifically, the public is to begin with paragraph (a)(1) and proceed through each subsequent paragraph. This introductory text would also specify that commodities subject to the EAR described in any paragraph (b) subparagraph are not ''specially designed'' under this definition.

1. Paragraph (a) Identifies ''Specially Designed'' Items

Paragraph (a) begins with the phrase ''Except for items described in (b), an 'item' is 'specially designed' if, as a result of 'development,' it [is within the scope of any one of three subparagraphs discussed below].'' It is the beginning of the ''catch'' in the ''catch and release'' structure of the definition. With respect to ECCNs containing the term ''specially designed,'' an item is ''caught'' as ''specially designed'' if any of the three

elements of paragraph (a) apply and none of the elements of paragraph (b) apply. The word ''items'' refers to how the term is defined in the EAR, *i.e.,* any ''commodity,'' ''software,'' or ''technology.''

Paragraph (a) is limited by the phrase ''if, as a result of 'development.''' The EAR defines ''development'' as ''related to all stages prior to serial production, such as: design, design research, design analyses, design concepts, assembly and testing of prototypes, pilot production schemes, design data, process of transforming design data into a product, configuration design, integration design, layouts.'' Determining whether an item is ''a result of development'' is a threshold question for whether an item is ''specially designed;'' an item is considered to be ''specially designed'' under this paragraph only if someone engaged in any of these ''development'' activities with respect to that item.

Thus, there are three questions an exporter, reexporter or transferor must ask to determine if an item is within the scope of paragraph (a):

1. Does the item, as a result of ''development,'' have properties ''peculiarly responsible for'' achieving or exceeding the performance levels, characteristics, or functions described in the relevant ECCN or USML paragraph?

2. If the item is a part or component, is it, as a result of ''development,'' necessary for an enumerated or referenced commodity or defense article to function as designed?

3. If the item is an accessory or attachment, is it, as a result of ''development,'' used with an enumerated or referenced commodity or defense article to enhance its usefulness or effectiveness?

If the answer to all three questions is ''no,'' then the item is not ''specially designed'' and no further analysis of paragraph (b) is necessary. If the answer to any one of the questions is ''yes,'' then the exporter, reexporter or transferor must determine whether any one of the five paragraph (b) exclusions applies. If any one of the five paragraph (b) exclusions apply, then the item is not ''specially designed.'' If none do, then the item is ''specially designed.''

Paragraph (a)(1). Paragraph (a)(1) would capture an item if, as a result of ''development,'' it ''has properties peculiarly responsible for achieving or exceeding the performance levels, characteristics, or functions described in the relevant ECCN or U.S. Munitions List (USML) paragraph.'' This criterion is essentially the same as the one that was proposed in the July 15 rule. Based on the comments, the public found this part of the definition clear. The positive response was, perhaps, due to the fact that it is taken from the EAR's current definition of ''required'' at § 772.1. Although that definition, by its terms, applies only to technology and software, BIS believes that the principle of that definition—which is that items are not controlled merely because they are somehow capable of use with a controlled item—equally applies to commodities for purposes of the proposed definition. Therefore, even if something is capable of being used with a controlled item, it is not captured by this part of paragraph (a) unless someone did something during the item's development so that it would achieve or exceed the performance levels, characteristics, or functions described in a referenced ECCN or USML paragraph.

Example for paragraph (a)(1): ECCN 1A007 controls equipment and devices specially designed to initiate charges and devices containing energetic materials, by electrical means. If a piece of equipment or device, as a result of ''development,'' has properties peculiarly responsible for initiating energetic materials by electrical means, such equipment or device would be ''specially designed'' under paragraph (a)(1) of the proposed definition. For example, if the equipment was designed to communicate electronically with devices containing energetic materials, such as sending a detonation signal and having safety features to ensure other electronic equipment could not detonate the device containing the energetic material, such equipment or device would be ''specially designed'' under this proposal.

Note to paragraph (a)(1). This rule would add a note to paragraph (a)(1) to provide an example of an item that would, as a result of ''development,'' meet the paragraph (a)(1) criterion. This note would also include an example of an item that would not, as a result of ''development,'' meeting the paragraph (a)(1) criterion. In addition to providing two concrete examples under ECCN 2B007, this note would also specify that similar to the definition of ''required'' the peculiarly responsible for criterion in paragraph (a)(1) would not be limited to exclusive use.

Paragraph (a)(2). Paragraph (a) would capture a part or component if, as a result of ''development,'' it ''is necessary for an enumerated or referenced commodity or defense article to function as designed.'' This element is similar to (a)(1), but it must be listed separately because not all descriptions of commodities on the USML and the CCL include performance levels, characteristics, or functions as a basis for control. Paragraph (a)(2) would capture parts and components that are necessary for another item on the CCL or the USML to function ''as designed.'' If an item would function ''as designed'' without the part or component at issue, then that part or component is not captured by paragraph (a)(2).

BIS has deliberately separated the terms 'enumerated' and 'referenced' in paragraph (a)(2), which are unique to the EAR's definition of the term. As described below, an 'enumerated' item is one that is controlled on the USML or the CCL (except for AT-only items) for reasons other than being ''specially designed.'' The CCL, however, contains notes that exclude from control parts and components ''specially designed'' for uncontrolled items. Such uncontrolled items are merely 'referenced' but not 'enumerated.' Note 2 to ECCN 1A002 provides an example of items excluded from control based on being ''specially designed'' for a referenced item. Under Note 2 to 1A002, if the semi-finished item was ''specially designed'' for a referenced sporting goods item, such as a golf club designated as EAR99, such a semi-finished item is excluded from 1A002.

Example for paragraph (a)(2): ECCN 7A001.b controls angular or rotational accelerometers specified to function at linear acceleration levels exceeding 100 g and, according to the heading, specially designed components therefor. The heading of 7A001 is an example of a catch-all control for ''specially designed'' components for the accelerometers subject to control in 7A001.b. In this case, if a component, as a result of ''development,'' is necessary for an accelerometer enumerated in 7A001.b to function as designed, such component would be considered ''specially designed'' as a result of paragraph (a)(2), unless the component was excluded from ''specially designed'' on the basis of paragraph (b) of the proposed definition.

Paragraph (a)(3). Paragraph (a)(3) would capture an accessory or attachment if, as a result of ''development,'' it ''is used with an enumerated or referenced commodity or defense article to enhance its usefulness or effectiveness.'' BIS takes this phrase from the ITAR's current and the EAR's proposed definition of ''accessory'' and ''attachment.''

Example for paragraph (a)(3): ECCN 3B001 controls specific types of equipment for manufacturing semiconductor devices or materials, and specially designed components and accessories therefor. ECCN 3B001.i controls imprint lithography templates designed for integrated circuits by 3A001. If, as a result of ''development,'' an accessory is used with equipment enumerated in 3B001.i to enhance its usefulness or effectiveness, such an accessory would be ''specially designed'' under the catch-all control for ''specially designed'' accessory included in the heading of 3B001, unless the accessory was excluded from ''specially designed'' on the basis of paragraph (b) of the proposed definition.

2. Paragraph (b) Identifies Exclusions From ''Specially Designed''

BIS proposes adopting a simplified, single paragraph structure for excluding certain parts, components, accessories and attachments from the ''specially designed'' definition. Under this proposal, any ''part,'' ''component,'' ''accessory,'' or ''attachment'' described in an exclusion paragraph under (b)(1), (b)(2), (b)(3), (b)(4) *or* (b)(5), would not be controlled by a 'catch-all' provision of an ECCN.

The five exclusions under paragraph (b) would refine the set of ''parts,'' ''components,'' ''accessories'' and ''attachments'' that would be subject to the 'catch-all' controls on the CCL. In this way, paragraph (a) and (b) are inextricably linked and together identify the ''parts,'' ''components,'' ''accessories,'' and ''attachments'' that are ''specially designed'' for purposes of the 'catch-all' controls on the CCL.

Paragraph (a), described above, would create objective tests for what ''items,'' as a result of ''development,'' would be ''specially designed'' based on the criteria identified in (a)(1), (a)(2) *or* (a)(3). Paragraph (b) would create objective tests for what ''parts,'' ''components,'' ''accessories,'' and ''attachments'' are excluded from ''specially designed'' under the exclusion criteria identified in (b)(1), (b)(2), (b)(3), (b)(4) *or* (b)(5). Together, the objective criteria identified in paragraph (a) and the objective exclusion criteria identified in paragraph (b) allow the proposed ''specially designed'' definition to achieve the nine objectives identified above for the definition.

Paragraph (b) codifies the principle in ITAR section 120.3 that, in general, a commodity should not be ITAR controlled if it has a predominant civil application or has performance equivalent (defined by form, fit, and function) to articles used for civil applications. If such an article nonetheless warrants control under the ITAR because it provides the U.S. with a critical military or intelligence advantage or for another reason, then it is or should be enumerated on the USML, as described in the ''bright line,'' ''positive list'' objectives listed in the Department of State's December 10, 2010 **Federal Register** notice, *Revisions to the United States Munitions List* (75 FR 76935).

Another purpose of paragraph (b) is to apply the ITAR concept of ''in normal commercial use'' equally and consistently to all non-specific, catch-all controls with respect to the ''600 series.'' Under the current USML, this concept of exclusions for certain items ''in normal commercial use'' is variously worded in multiple catch-all paragraphs in the current USML. For example, Category XI(c), by its terms, does not control electronic components, parts, accessories, attachments or associated equipment specifically designed or modified for military electronics if they are ''in normal commercial use.'' Similarly, Category XII(e) does not control components, parts, accessories, attachments or associated equipment specifically designed or modified for fire control systems, military lasers, ITAR-controlled night vision equipment, military inertial navigation equipment, and other items controlled by Category XII(a) through (d) that are ''in normal commercial use.'' Categories XVI(b) and XIV(n)(2) have similar carve-outs for items in normal commercial use. In addition, Category VIII(h), by virtue of a note, does not control parts, components, accessories, or attachments specifically designed or modified for military aircraft or engines if they are, among other things, standard equipment in certain civil aircraft.

These five exclusions under paragraph (b) play an important role in the proposed ''specially designed'' definition and are described below in greater detail. The description below includes examples of parts, components, accessories and attachments that would be excluded from ''specially designed'' under each of the respective paragraph (b) exclusions.

Exclusion paragraph (b)(1). Paragraph (b)(1) would exclude any ''part,'' ''component,'' ''accessory,'' or ''attachment'' from a 'catch-all' provision of an ECCN if the ''part,'' ''component,'' ''accessory'' or ''attachment'' is enumerated in a USML paragraph. This exclusion also addresses an important concept regarding how the USML and CCL relate to each other, and the correct order in which the public should review the two control lists. When determining an item's proper jurisdiction and classification, before reviewing the CCL, a person must examine the ITAR to determine that the item is not subject to the ITAR, or to the exclusive jurisdiction of any of the other departments or agencies of the U.S. Government identified in § 734.3(b)(1)(i) of the EAR.

Paragraph (b)(1) would clarify that any ''part,'' ''component,'' ''accessory,'' or ''attachment'' enumerated on the USML, is excluded from the definition of ''specially designed,'' because it would remain subject to the ITAR and would not be controlled under a catch-all provision of an ECCN. Under the current USML, most of its categories end with a broad catch-all control on ''parts,'' ''components,'' ''accessories,'' and ''attachments'' that were specifically designed or modified for the particular USML category. Under the USML categories being proposed under the USML-to-CCL process, in most cases these broad catch-all controls would no longer be used. Instead, these items would be enumerated on the revised USML's ''positive'' control list. This change will make the paragraph (b)(1) exclusion more useful by more clearly defining the line between control under the USML and CCL. The items in former 'catch-all' controls found at the end of most of the USML categories would be added to the CCL under the ''600 series'' .x paragraphs that are being created under the USML-to-CCL process and would include ''specially designed'' criteria.

Example of a ''component'' excluded under paragraph (b)(1): On December 6, 2011, the Department of State proposed a rule, *Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category VII* (76 FR 76100) that, among other things, would control ground vehicle components, parts, accessories, attachments, and associated equipment identified in paragraphs (g)(1)–(14) of the rule. Under proposed paragraph (g)(5), reactive armor parts and components would be controlled under USML Category VII. If a company uses reactive armor components enumerated on the USML in producing the EAR item, such a component would not be captured under a 'catch-all' control on the CCL, because the reactive armor components would be enumerated on the USML and would therefore be subject to the ITAR, not the EAR. Paragraph (b)(1) of this proposed rule would make this existing policy explicit by excluding such USML enumerated ''parts,'' ''components,'' ''accessories,'' or ''attachments'' from the definition of ''specially designed.''

Exclusion paragraph (b)(2). Paragraph (b)(2) would exclude any single unassembled ''part'' that is of a type commonly used in multiple types of commodities not enumerated on the USML or the CCL. The paragraph (b)(2) exclusion would include an illustrative list of the types of ''parts'' excluded under this paragraph. These ''parts'' include threaded fasteners (*e.g.,* screws, bolts, nuts, nut plates, studs, inserts), other fasteners (*e.g.,* clips, rivets, pins), basic hardware (*e.g.,* washers, spacers, insulators, grommets, bushings, springs), wire, and solder.

In preparing this proposed rule, BIS evaluated the merits of expanding the scope of this exclusion to cover minor components, but ultimately determined that the expansion would not be

warranted, particularly in light of the other exclusions and the proposed criterion in paragraph (a)(2). However, BIS determined it should clarify the illustrative list of single unassembled ''parts'' that would be excluded from the definition of ''specially designed'' on the basis of the exclusion paragraph (b)(2).

Paragraph (b)(2) would adopt the phrase ''used in multiple types of commodities not enumerated on the CCL or the USML'' instead of the phrase ''used in multiple types of civil items.'' BIS believes the former phrase is more specific than the latter, and would clarify this exclusion. BIS also proposes to change the illustrative list of single unassembled ''parts'' that may be excluded from ''specially designed'' on the basis of paragraph (b)(2). BIS further proposes using the term ''basic hardware'' instead of the term ''common hardware,'' and to include the term ''springs'' in the parenthetical examples of basic hardware. Finally, BIS proposes to add the term ''solder'' as another type of ''part'' that would be within the scope of this exclusion paragraph (b)(2).

Example of a ''part'' excluded under paragraph (b)(2): ECCN 8A992 controls vessels, marine systems or equipment, not controlled by 8A001, 8A002 or 8A018, and specially designed parts therefor. A company developing a new vessel that would be controlled under 8A992 needs to modify nut plates for use in it. The modified nut plate is an example of a single unassembled ''part'' that meets the necessary criteria in paragraph (a)(2). However, if the modified nut plate is of a type commonly used in multiple types of commodities not enumerated on the USML or the CCL, it would not be ''specially designed'' on the basis of paragraph (b)(2). Although, as a result of ''development'' the ''part'' may have some unique characteristic, such as being a cut-to-length nut plate, substantively the ''part'' is common to multiple types of commodities not enumerated on the USML or the CCL. For example, a similar type of nut plate may also be used for assembling self-assembled furniture designated as EAR99.

Exclusion paragraph (b)(3). Under paragraph (b)(3), a ''part,'' ''component,'' ''accessory,'' or ''attachment'' that would otherwise be controlled by a 'catch-all' provision of an ECCN would not be controlled if it has the same performance capabilities as a ''part,'' ''component,'' ''accessory,'' or ''attachment'' used in or with a commodity that (i) is or was in ''production'' (*i.e.,* not in ''development'') *and* (ii) is either not enumerated on the CCL or USML, or is enumerated in an ECCN controlled only for Anti-Terrorism (AT) reasons. In the context of paragraph (b)(3), an item in an ECCN controlled only for AT reasons is considered enumerated provided it is not controlled in a 'catch-all' paragraph.

Proposed paragraph (b)(3) would use the phrase ''performance capabilities'' instead of the term ''function,'' which was in the July 15 proposal. Several comments to the July 15 proposed rule suggested using this alternative term because performance capabilities is a well understood concept under the EAR, and is easier to understand than function. BIS agrees.

In addition, paragraph (b)(3)(i) would simplify the exclusion by removing the term ''serial production,'' and substituting the EAR-defined term ''production,'' along with a parenthetical explanation that if an item is in ''production'' it is no longer in ''development.'' Some of the comments in response to the July 15 proposed rule did not see a sufficient distinction between serial production and ''production'' to warrant adding a new EAR definition and creating another concept the public would need to understand to apply the ''specially designed'' definition. After further consideration, BIS agrees that this suggested change would clarify the intent of exclusion paragraph (b)(3) and further simplify the definition.

Paragraph (b)(3)(ii) would expand the scope of what was included in the July 15 proposed rule with the second criterion extending to ECCNs controlled only for Anti-Terrorism (AT) reasons. The July 15 exclusion was limited to EAR99 items. BIS made this change because such a ''part,'' ''component,'' accessory'' or ''attachment'' crosses over into broader commercial applicability and thus does not warrant being treated as ''specially designed.'' This crossing over into broader commercial applicability occurs when a ''part,'' ''component,'' ''accessory,'' or ''attachment'' has the same form, fit and performance capabilities as a ''part,'' ''component,'' ''accessory,'' or ''attachment'' used in or with an item that is either not enumerated on the CCL or USML or is only controlled for AT reasons. If such an item nonetheless warranted control because of certain capabilities or potential uses of concern for national security, foreign policy, or other reasons, then the item would be enumerated on either the USML or the CCL.

Note to paragraph (b)(3). This proposed rule would add a note to clarify the applicability of paragraph (b)(3). This note would specify that commodities in ''production'' that are subsequently subject to ''development'' activities, such as those pertaining to quality improvements, cost reductions, or feature enhancements, remain in ''production.'' However, any new models or versions of such commodities developed from such efforts that change the basic performance or capability of the commodity are in ''development'' until and unless they enter into ''production.'' This proposed rule would use the term ''production'' instead of ''serial production'' to conform to the use of ''production'' in paragraph (b)(3).

This Note to paragraph (b)(3) further clarifies the relationship between ''production'' and ''development'' in the context of this exclusion. When an item enters ''production,'' there may still be some peripheral ''development'' activities for the next generation of the item in which the ''part,'' ''component,'' ''accessory,'' or ''attachment'' is used. This note would provide guidance on when the exclusion would no longer apply and when a separate determination would need to be made regarding whether a particular ''part,'' ''component,'' ''accessory,'' or ''attachment'' would no longer be excluded.

Example of excluded component under paragraph (b)(3): A company manufactures a fire truck designated as EAR99. The manufacturer uses a radiator originally designed in the 1980s for use in large military transport vehicles. The cost of the original 1980s radiator has now dropped significantly, so the company incorporates that same radiator into a fire truck that went into ''production'' in 2010. Under this example, although the radiator is not a ''specially designed'' ''component'' because it is necessary for large military transport vehicles to function as designed, it might nonetheless be caught by the criteria in paragraph (a)(2). However, because the ''component'' with the same form, fit and performance capabilities is used in the ''production'' of an EAR99 fire truck, it would be excluded from the ''specially designed'' definition by paragraph (b)(3). If, for some reason, such radiators warranted control for national security, foreign policy, or other reasons, then it would be enumerated on either the USML or the CCL. It would thus be controlled regardless of its use in a civil or military end item.

Exclusion paragraph (b)(4) and (b)(5). This proposed rule would add paragraphs (b)(4) and (b)(5) to address aspects of unintended overreaching identified in the definition of ''specially designed'' in the July 15 proposed rule. The comments identified one unintended result of eliminating design intent from the criteria used to identify a ''specially designed'' ''component'' or ''part'' is that the first use of a part or component could result in a part or component being considered ''specially designed'' under the rule. This result could occur even if the ''part'' or ''component'' had been originally developed for a general purpose that was not specific to the 'enumerated' item for which the ''part'' or

''component'' would have been ''specially designed'' under the July 15 definition.

To address this unintended overreach, BIS decided that some element of design intent should be included in the proposed ''specially designed'' definition. Through paragraph (b)(4), this rule proposes excluding ''parts,'' ''components,'' ''accessories'' and ''attachments'' if they were or are being developed with a reasonable expectation of (i) use in or with commodities described on the CCL *and* commodities not enumerated on the CCL or the USML, *or* (ii) use in or with commodities not enumerated on the CCL or the USML. As discussed below, through paragraph (b)(5), this rule proposes excluding ''parts,'' ''components,'' ''accessories,'' and ''attachments'' if they were or are being developed for no particular application.

Although these exclusion concepts under paragraphs (b)(4) and (b)(5) are new to the proposed definition of ''specially designed,'' they are little more than a restatement of BIS's application of the term ''specially designed'' now. BIS had not included these two exclusions in the July 15 proposed rule in an effort to avoid overtly design-intent based aspects of the definition. The public comments, however, as noted above made it clear that without such carve-outs proposed in this rule under (b)(4) and (b)(5), the EAR would likely over-control items based on their first uses. Thus, the proposed paragraphs (b)(4) and (b)(5) are intended to allow people who know or who can determine the design intent of their ''part,'' ''component,'' ''accessory,'' or ''attachment'' to exclude it from the definition of ''specially designed'' when it was or is being developed for the items identified in (b)(4)(i), or (ii), or (b)(5). These exclusion paragraphs (b)(4) and (b)(5) would not create a burden to know the original design intent, but they would allow those who know the original design intent to exclude those ''parts,'' ''components,'' ''accessories,'' or ''attachments'' from being controlled as ''specially designed.'' This change is not a departure from the current BIS position on the subject. It is, however, a specific, precise written articulation of the practice that would become part of the EAR.

Example of a ''component'' excluded under paragraph (b)(4)(i): An example of a component that would not be ''specially designed'' and excluded under (b)(4)(i) is one that was or is being developed to be interchangeable between a military vehicle enumerated in ECCN 0A606.a *and* also a vehicle that is not described on the USML or the CCL, such as an EAR99 civilian vehicle. One example would be a component that a company designs that is used in both military vehicles as well as in firetrucks. Another example of a component that would not be ''specially designed'' as a result of (b)(4)(i) is one that was or is being developed to be interchangeable between a military aircraft enumerated in ECCN 9A610.a and also a civilian aircraft that is controlled for AT-only reasons in ECCN 9A991.b, such as an aircraft actuator developed for use in military aircraft in ECCN 9A610.a and civil transport aircraft in 9A991.b.

Even though a component may be used interchangeably and meet the paragraph (b)(4) exclusion and thus not be ''specially designed,'' it does not necessarily mean that the component is exempt from export controls. The component may, for example, be positively identified on the USML and ITAR controlled, regardless of whether it is common to a vehicle or aircraft not enumerated on the CCL. The jurisdictional and classification status of any particular component must be determined by reviewing the full scope of the control lists to determine the appropriate jurisdiction and classification. Paragraph (b)(4)(i) merely states that such a component would not be within the scope of a 'catch-all' paragraph of an ECCN (i.e., would not be ''specially designed)'' based on its commonality with components not identified on the CCL or controlled for AT-only reasons.

Example of a ''part'' excluded under paragraph (b)(4)(ii): An example of a ''part'' that would not be ''specially designed'' as a result of (b)(4)(ii) is one that was or is being developed for use in or with commodities not enumerated on the CCL or the USML, such as a ''part'' being developed for use in a mining truck designated as EAR99. Again, the application of (b)(4)(ii) does not necessarily mean that such a part is uncontrolled. As a result of its characteristics or capabilities it may be positively listed on the USML or CCL and, as such, controlled by the applicable provisions. The jurisdictional and classification status of any particular component must be determined by reviewing the full scope of the control lists to determine the appropriate jurisdiction and classification. Paragraph (b)(4)(ii) merely states that such a part would not be within the scope of a 'catch-all' paragraph of an ECCN (i.e., would not be ''specially designed)'' based on its development for use in or with commodities not enumerated on the CCL or the USML.

Exclusion paragraph (b)(5). As noted above, this rule would also add a paragraph (b)(5) to address another aspect of the unintended overreach identified in the definition of ''specially designed'' in the July 15 proposed rule. This paragraph (b)(5) exclusion is intended to address potential overreach that could occur even if the ''part'' or ''component'' had been originally developed for a general purpose that was not specific to the 'enumerated' item for which the ''part'' or ''component'' would have been ''specially designed'' under the July 15 definition. BIS would address this by excluding from ''specially designed'' on the basis of paragraph (b)(5) ''parts,'' ''components,'' ''accessories'' and ''attachments'' if they were or are being developed with no reasonable expectation of use for a particular application.

Example of a ''component'' excluded under paragraph (b)(5): An example of a component that would not be ''specially designed'' as a result of (b)(5) is one that was developed for general or multi-purpose applications. For example, many catalog electronic components are designed as basic building blocks for other equipment, regardless of whether the equipment is military or civilian, controlled or uncontrolled. Again, application of (b)(5) does not necessarily mean that such a component is uncontrolled, and as result of its characteristics or capabilities it may be positively listed on the USML or CCL and, as such, controlled by the applicable provisions. The jurisdictional and classification status of any particular component must be determined by reviewing the full scope of the control lists to determine the appropriate jurisdiction and classification. Paragraph (b)(5) merely states that such a component would not be within the scope of a 'catch-all' paragraph of an ECCN (i.e., would not be ''specially designed)'' based on its not having been designed for a particular application.

Note to paragraph (b)(4) and (b)(5): This proposed rule would also add a note to paragraph (b)(4) and (b)(5) to specify for a commodity not to be ''specially designed'' on the basis of paragraph (b)(4) *or* (b)(5), documents contemporaneous with its ''development,'' in their totality, must establish the elements of paragraph (b)(4) *or* (b)(5). The proposed note would also provide an illustrative list of documents that may be pointed to to demonstrate the applicability of the exclusions under (b)(4) or (b)(5). Such documents may include concept design information, marketing plans, declarations in patent applications, or contracts. Lastly, the note would specify that absent such documents, the ''commodity'' may not be determined to be excluded from the definition of ''specially design'' by virtue of paragraphs (b)(4) *or* (b)(5).

Proposed paragraphs (b)(4) and (b)(5) would create an incentive for parties responsible for making jurisdictional and classification determinations to maintain such documents for the life of the product in order to be able to demonstrate without ambiguity that it was or was not ''specially designed'' for a controlled item or application. The

creation of such incentives would help national security by emphasizing the need for those responsible for making jurisdictional and classification self-determinations to do so in a reliable, consistent, documented way that is consistent with the relevant export control regulations. The creation of such incentives would also help make U.S. exporters more reliable and predictable because they would be able to make and demonstrate with more certainty determinations regarding whether a commodity is or is not controlled by virtue of a ''specially designed'' catch-all in the regulations.

Note to paragraph (b)(5): This rule would also add another note to paragraph (b)(5) to specify that if one has ''knowledge'' that the commodity was or is being developed for a particular application, one cannot rely on paragraph (b)(5) to determine that a commodity was not ''specially designed.'' BIS would use the EAR defined term ''knowledge'' in this note to paragraph (b)(5) to establish a clear standard for when the commodity would not be eligible for being excluded from ''specially designed'' on the basis of paragraph (b)(5).

Note 1: This proposed rule would also add a new Note 1 to define 'enumerated' for purposes of the proposed ''specially designed'' definition. This note would read: 'Enumerated' means any item (i) on either the USML or CCL not controlled in a 'catch-all' paragraph and (ii) when on the CCL, controlled for more than AT-only reasons, except in the context of paragraph (b)(3), where an item in an ECCN controlled only for AT reasons is considered enumerated when it is not controlled in a 'catch-all' paragraph.

Examples of enumerated items: The law enforcement end items controlled in the heading of ECCN 0A978 are examples of enumerated commodities on the CCL. ECCN 0A978 specifies that it controls law enforcement striking weapons and includes six examples for the types of law enforcement striking weapons that are subject to control under 0A978. The fiber optic hull penetrators and connectors controlled in ECCN 8A002.c are additional examples of enumerated commodities on the CCL. The ECCN specifies the hull penetrators controlled are limited to fiber optic hull penetrators or connectors.

Note 2: This proposed rule would also add a Note 2 to define 'catch-all' for purposes of the proposed ''specially designed'' definition. This note would read as follows: A 'catch-all' paragraph is one that does not refer to specific types of parts, components, accessories, or attachments but rather controls non-specific ''parts,'' ''components,'' ''accessories,'' or ''attachments'' because they were ''specially designed'' for an enumerated item. BIS is aware that the term 'catch-all' has also been used informally by the public to refer to the part 744 end-use and end-user controls that impose a license requirement on all items subject to the EAR. In preparing this proposed rule, BIS considered adding a new part 772 definition to clarify the two different contexts under which the term 'catch-all' would be used, but decided simply noting this in the preamble of this proposed rule would be sufficient.

Examples of catch-all controls: The phrase ''and specially designed components therefor'' in the heading of ECCN 1A005 is an example of a catch-all control on the CCL; it reaches all components that have been ''specially designed'' for the body armor enumerated in 1A005. The phrase ''and specially designed components therefor'' used in ECCN 3A001.c is another example of a catch-all control on the CCL. That catch-all control reaches all components that have been ''specially designed'' for the acoustic wave devices enumerated in 3A001.c.

3. Guidance for ''Specially Designed'' in the Context of De-Control Notes

Some ECCNs, such as 1A002, state that an item is *not* controlled if it is ''specially designed'' for a particular type of item, purpose, or application. As indicated by the introduction to paragraph (b) explained above, an item that would be ''specially designed'' under paragraph (a) and would not be controlled as a result of such a de-control provision in an ECCN nonetheless remains ''specially designed'' and, thus, uncontrolled regardless of whether any aspect of paragraph (b) would apply to it. The basis for this conclusion is that paragraph (b) states that it only applies to items that ''would be *controlled* by a catch-all provision of an ECCN.''

II. Other Definition To Assist Public's Review of the ''Specially Designed'' definition

This rule proposes to revise the definition of ''end item'' included in the July 15 proposed rule by proposing a definition that would more closely correspond with the ITAR definition of end item, although be EAR specific. BIS made this change because several commenters indicated that the July 15 definition, with the inclusion of the term 'stand-alone,' would cause confusion over whether an item was an ''end item'' or a ''component.'' BIS determined the best and simplest approach would be to revise the definition to more closely correspond to the ''end item'' definition used in the ITAR. This rule proposes defining ''end item'' as follows:

End item. This is an assembled commodity ready for its intended use. Only ammunition, fuel or other energy source is required to place it in an operating state. Examples of end items include ships, aircraft, firearms, and milling machines.

This rule also proposes splitting the proposed definition of ''accessories and attachments'' included in the July 15 proposed rule into separate but identical definitions for the terms ''accessories'' and ''attachments.'' As there will be locations in the EAR where either ''accessories'' or ''attachments'' but not both will be used, this change would avoid any potential confusion as to whether the definition applies to the terms when used separately. While ''accessories'' and ''attachments'' would have the same definitions, both would include a note at the end of each definition to indicate that the definition of ''accessories'' and ''attachments'' are the same. This rule proposes defining ''accessories'' and ''attachments'' as follows:

Accessories. These are associated items for any ''component,'' ''end item,'' or ''system,'' and which are not necessary for their operation, but which enhance their usefulness or effectiveness. For example, for a riding lawnmower, accessories and attachments will include the bag to capture the cut grass, and a canopy to protect the operator from the sun and rain. For purposes of this definition, accessories and attachments are the same.

Attachments. These are associated items for any ''component,'' ''end item,'' or ''system,'' and which are not necessary for their operation, but which enhance their usefulness or effectiveness. For example, for a riding lawnmower, accessories and attachments will include the bag to capture the cut grass, and a canopy to protect the operator from the sun and rain. For purposes of this definition, attachments and accessories are the same.

As with the proposed ''specially designed'' definition, BIS requests comments on the proposed definitions of ''end item,'' ''accessories,'' and ''attachments.'' Any comments received on these three proposed definitions will be considered and addressed in the final rule adding these three definitions to the EAR.

BIS does not propose here to re-define the terms ''part,'' and ''component,'' that were included in the July 15 proposed rule.

Although the Export Administration Act expired on August 20, 2001, the President, through Executive Order 13222 of August 17, 2001, 3 CFR, 2001 Comp., p. 783 (2002), as extended by the Notice of August 12, 2011, 76 FR 50661 (August 16, 2011), has continued the Export Administration Regulations in effect under the International Emergency Economic Powers Act. BIS continues to carry out the provisions of the Export Administration Act, as

appropriate and to the extent permitted by law, pursuant to Executive Order 13222.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a ''significant regulatory action,'' but not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget (OMB).

2. Notwithstanding any other provision of law, no person is required to respond to, nor is subject to a penalty for failure to comply with, a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid OMB control number. This proposed rule would affect two approved collections: Simplified Network Application Processing + System (control number 0694–0088), which includes, among other things, license applications, and License Exceptions and Exclusions (0694–0137). Total burden hours associated with the PRA and OMB control numbers 0694–0088 and 0694–0137 are not expected to increase as a result of this rule. As part of the President's Export Control Reform (ECR) Initiative, this proposed rule, and a separate proposed rule from the Department of State, Directorate of Defense Trade Controls being published in conjunction with this rule, sets forth, as much as possible, a common definition of ''specially designed'' for use in the EAR and the ITAR. This proposed rule would not move any items from the USML to the CCL, although the revised definition included here would play an important role in the ''600 series'' that would be used to control items transitioned from the USML to the CCL.

As stated in the July 15 proposed rule (76 FR 41958), BIS believed that the combined effect of all rules to be published adding items to the EAR that would be removed from the ITAR as part of the administration's Export Control Reform Initiative would increase the number of license applications submitted by approximately 16,000 annually. As the review of the USML has progressed, the interagency group has gained more specific information about the number of items that would come under BIS jurisdiction whether those items would be eligible for export under license exception. As of June 19, 2012, BIS believes the increase in license applications may be 30,000 annually, resulting in an increase in burden hours of 8,500 (30,000 transactions at 17 minutes each) under control number 0694–0088.

3. This rule does not contain policies with Federalism implications as that term is defined under E.O. 13132.

4. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.,* generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553) or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Under section 605(b) of the RFA, however, if the head of an agency certifies that a rule will not have a significant impact on a substantial number of small entities, the statute does not require the agency to prepare a regulatory flexibility analysis. Pursuant to section 605(b), the Chief Counsel for Regulations, Department of Commerce, submitted a memorandum to the Chief Counsel for Advocacy, Small Business Administration, certifying that proposed rule published on July 15, 2011, will not have a significant impact on a substantial number of small entities.

This proposed rule re-proposes, with certain changes, the definitions of ''specially designed,'' of ''end item,'' and of ''accessories and attachments'' that BIS originally proposed in the July 15 proposed rule. The changes proposed here do not impact the original certification. Consequently, BIS has not prepared a regulatory flexibility analysis. A summary of the factual basis for the certification is provided below.

Number of Small Entities

The Bureau of Industry and Security (BIS) does not collect data on the size of entities that apply for and are issued export licenses. Although BIS is unable to estimate the exact number of small entities that would be affected by this rule, it acknowledges that this rule would affect some unknown number.

Economic Impact

This rule will not have a significant impact on a small number of entities, and in fact will reduce the burden on small entities by facilitating enhanced public understanding of a key term used extensively on the Commerce Control List (CCL). This rule proposes a single definition for the term ''special designed'' and slightly revised definitions for the terms ''end item,'' ''accessories,'' and ''attachments'' BIS proposed in the July 15 proposed rule.

The proposed definition of ''specially designed'' would provide clear guidance to small entities, and all other entities, on the meaning of this term wherever it is used on the CCL. The term ''specially designed'' is used extensively throughout the CCL, but up to this point the only definition included in the EAR has been under the Missile Technology Control Regime (MTCR) context. Outside of the MTCR context, the First Circuit's ruling in *United States* v. *Lachman,* 387 F.3d 42, 52–53 (2004) provides a definition of the term ''specially designed,'' but for small entities, and all other entities, this requires reviewing the *Lachman* decision to understand the court-provided definition outside the MTCR context.

BIS is aware that some small entities, and other entities, instead of relying on the *Lachman* definition for the term ''specially designed'' outside the MTCR context have simply decided to submit classification requests to BIS for ECCNs where the term ''specially designed'' is used. Others have made subjective determinations of which types of items are ''special'' to or for a controlled end item. The CCL is intended to allow exporters to self-classify their items. If the *status quo,* where the term is not defined in the regulations, creates an incentive for the public to submit additional classification requests or make self-determinations that expose exporters to compliance risks, then the rule places a burden on all entities, large and small. All entities should be able to confidently self-classify their items on the CCL. BIS believes it should take steps to alleviate any concerns the public may have with self-classifying their items, including providing definitions for key terms used on the CCL, which is being done in this proposed rule and not making small entities and other entities to consult outside legal decisions in order to determine the meaning of a key term used under the EAR.

This proposed rule would reduce burdens on small entities and all other entities by proposing a single definition

of the term ''specially designed'' to part 772 that would apply wherever the term is used. In the past, small entities, and other entities, have urged BIS to add a single definition of the term ''specially designed'' to the EAR. This proposed definition is consistent with the scope of the other two definitions of the term ''specially designed'' that are currently in use. Specifically, this rule's proposed definition is consistent with the ''specially designed'' MTCR definition defined at § 772.1 of the EAR, and with the *Lachman* decision. BIS believes this rule's proposed ''specially designed'' definition comes closest to encompassing the scope and intent of both the *Lachman* and the MTCR definitions, while also allowing this term to play the key role envisioned for it under the larger Export Control Reform (ECR) Initiative. This proposed rule identifies nine objectives for the term ''specially designed'' and encourages the public to submit comments on whether they agree with BIS that this proposed definition best achieves the nine objectives and whether the public may have any alternative that would better achieve the nine stated objectives.

The ECR Initiative is making fundamental changes to the U.S. export control system. These fundamental changes will protect and enhance U.S. national security interests, while at the same time also easing the burdens on small entities and all other entities. One of the key objectives of the ECR Initiative is to draw a bright-line between the USML and the CCL, including transitioning items that no longer warrant ITAR control to the CCL.

A bright-line between the two control lists will be a key benefit to small entities and all other entities. When small entities, and other entities, have difficulty in determining the jurisdiction and/or classification of their item, it creates a burden on such entities. The proposed definition of ''specially designed'' included in this rule is a key term being used to develop the bright-line between the USML and the CCL. Using this proposed ''specially designed'' definition in the ''600 series'' .x and .y paragraphs is a key structural element that will create a more ''positive'' USML and ensure that munitions items transitioned from the USML to the CCL are appropriately controlled in the applicable ''600 series'' ECCNs.

This rule is based on a simple catch-and-release concept. The proposed definition would allow for small entities, and all other entities, to use a simple set of ''yes/no'' questions to make determinations whether an item is or is not ''specially designed.'' The ''release'' portion of the proposed definition will also allow for items that no longer warrant being considered ''specially designed'' to be removed from ''specially designed'' once they have crossed over into broader commercial applicability. The five proposed paragraph (b) exclusions included in the proposed rule would allow the public to objectively know when an item would no longer be ''specially designed.''

Conclusion

BIS is unable to determine the precise number of small entities that would be affected by this rule. Based on the facts and conclusions set forth above, BIS believes that any burdens imposed by this rule would be offset by the benefits that will occur with the fundamental changes being made to the U.S. export control system under the Export Control Reform Initiative and the USML-to-CCL process, which the definition of ''specially designed'' will be an important role. In addition, any burdens would be offset by the benefits of defining this key term used extensively on the CCL. For these reasons, the Chief Counsel for Regulations of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule, if adopted in final form, would not have a significant economic impact on a substantial number of small entities.

List of Subjects

15 CFR Part 772

Exports.

15 CFR Part 774

Exports, Reporting and recordkeeping requirements.

Accordingly, parts 772 and 774 of the Export Administration Regulations (15 CFR parts 730–774) are proposed to be amended as follows:

PART 772—[AMENDED]

1. The authority citation for 15 CFR part 772 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 12, 2011, 76 FR 50661 (August 16, 2011).

2. Section 772.1 is amended:

a. By revising the definition of ''specially designed;'' and

b. By adding definitions for the terms ''accessories,'' ''attachments,'' and ''end item''.

The revision and additions read as follows:

§ 772.1 Definitions of terms as used in the Export Administration Regulations (EAR).

* * * * *

Accessories. These are associated items for any ''component,'' ''end item,'' or ''system,'' and which are not necessary for their operation, but which enhance their usefulness or effectiveness. For example, for a riding lawnmower, accessories and attachments will include the bag to capture the cut grass, and a canopy to protect the operator from the sun and rain. For purposes of this definition, accessories and attachments are the same.

* * * * *

Attachments. These are associated items for any ''component,'' ''end item,'' or ''system,'' and which are not necessary for their operation, but which enhance their usefulness or effectiveness. For example, for a riding lawnmower, accessories and attachments will include the bag to capture the cut grass, and a canopy to protect the operator from the sun and rain. For purposes of this definition, attachments and accessories are the same.

* * * * *

End item. This is an assembled commodity ready for its intended use. Only ammunition, fuel or other energy source is required to place it in an operating state. Examples of end items include ships, aircraft, firearms, and milling machines.

* * * * *

Specially designed. When applying this definition, follow this sequential analysis: Begin with paragraph (a)(1) of this definition and proceed through each subsequent paragraph. If an item would not be controlled as a result of the application of the standards in paragraph (a) of this definition, then it is not necessary to work through paragraph (b) of this definition. If an item would be controlled as a result of paragraph (a), then it is necessary to work through each of the elements of paragraph (b). Items subject to the EAR described in any of paragraphs (b)(1) through (5) of this definition are not ''specially designed'' items subject to the EAR.

(a) Except for items described in (b) of this definition, an ''item'' is ''specially designed'' if, as a result of ''development,'' it:

(1) Has properties peculiarly responsible for achieving or exceeding the performance levels, characteristics, or functions in the relevant ECCN or U.S. Munitions List (USML) paragraph;

(2) Is a part or component necessary for an enumerated or referenced

commodity or defense article to function as designed; *or*

(3) Is an accessory or attachment used with an enumerated or referenced commodity or defense article to enhance its usefulness or effectiveness.

(b) A ''part,'' ''component,'' ''accessory,'' or ''attachment'' that would be *controlled* by paragraph (a) of this paragraph is not ''specially designed'' if it:

(1) Is enumerated in a USML paragraph;

(2) Is a single unassembled ''part'' that is of a type commonly used in multiple types of commodities not enumerated on the CCL or the USML, such as threaded fasteners (*e.g.,* screws, bolts, nuts, nut plates, studs, inserts), other fasteners (*e.g.,* clips, rivets, pins), basic hardware (*e.g.,* washers, spacers, insulators, grommets, bushings, springs), wire, and solder;

(3) Has the same form, fit, and performance capabilities as a part, component, accessory, or attachment used in or with a commodity that:

(i) Is or was in ''production'' (*i.e.,* not in ''development''); *and*

(ii) Is either not enumerated on the CCL or USML, or is enumerated in an ECCN controlled only for Anti-Terrorism (AT) reasons;

(4) Was or is being developed with a reasonable expectation of:

(i) Use in or with commodities described on the CCL *and* commodities not enumerated on the CCL or the USML; *or*

(ii) Use in or with commodities not enumerated on the CCL or the USML; *or*

(5) Was or is being developed with no reasonable expectation of use for a particular application.

Note 1: 'Enumerated' means any item (i) on either the USML or CCL not controlled in a 'catch-all' paragraph and (ii) when on the CCL, controlled by an ECCN for more than AT-only reasons, except in the context of paragraph (b)(3), where an item in an ECCN controlled only for AT reasons is considered enumerated when it is not controlled in a 'catch-all' paragraph. An example of an 'enumerated' ECCN is 2A226, which controls valves with the following three characteristics: a ''nominal size'' of 5 mm or greater; having a bellows seal; *and* wholly made of or lined with aluminum, aluminum alloy, nickel, or nickel alloy containing more than 60% nickel by weight. The CCL also contains notes excluding from control parts and components ''specially designed'' for uncontrolled items. Such uncontrolled items are merely 'referenced' and are not 'enumerated.' Note 2 to ECCN 1A002 is an example of items excluded from control based on being ''specially designed'' for a referenced item.

Note 2: A 'catch-all' paragraph is one that does not refer to specific types of parts, components, accessories, or attachments but rather controls non-specific ''parts,'' ''components,'' ''accessories,'' or ''attachments'' because they were ''specially designed'' for an enumerated item. For example, ECCN paragraph 9A610.x is a catch-all, because it controls ''parts,'' ''components,'' ''accessories,'' and ''attachments'' ''specially designed'' for military aircraft, but does not identify specific types of parts, components, accessories, or attachments within its control. Another example of a 'catch-all' is the heading of 7A102, which controls ''specially designed'' components for the gyros enumerated in 7A102, but does not identify the specific types of components within its control.

Note to paragraph (a)(1): Items that as a result of ''development'' have properties peculiarly responsible for achieving or exceeding the performance levels, functions or characteristics in a relevant ECCN paragraph may have properties shared by different products. For example, ECCN 2B007.a controls ''robots'' capable in real time of full three-dimensional image processing or full-three dimensional 'scene analysis' to generate or modify ''programs'' or to generate or modify numerical program data [and specially designed controllers and ''end effectors'' therefor]. An example of a component not meeting the peculiarly responsible standard under paragraph (a)(1) is a component that as a result of ''development'' has properties that allow the component to conduct 2D image processing for use in a ''robot.'' This component is not ''specially designed'' for purposes of 2B007.a because the component even if used in a ''robot'' does not have properties peculiarly responsible for a ''robot'' achieving or exceeding the performance levels, functions or characteristics in 2B207.a. Conversely, another component that as a result of ''development,'' has properties that allow the component to perform in real time of full three-dimensional image processing for use in a ''robot,'' is an example of a component that is peculiarly responsible because as a result of ''development'' the component has a direct and proximate causal relationship in the ''robot'' that is central or special for achieving or exceeding the performance levels, functions or characteristics identified in 2B207.a.

Note to paragraph (b)(3): Commodities in ''production'' that are subsequently subject to ''development'' activities, such as those pertaining to quality improvements, cost reductions, or feature enhancements, remain in ''production.'' However, any new models or versions of such commodities developed from such efforts that change the basic performance or capability of the commodity are in ''development'' until and unless they enter into ''production.''

Note to paragraph (b)(4) and (b)(5): For a commodity not to be ''specially designed'' on the basis of paragraphs (b)(4) *or* (b)(5), documents contemporaneous with its ''development,'' in their totality, must establish the elements of paragraphs (b)(4) *or* (b)(5). Such documents may include concept design information, marketing plans, declarations in patent applications, or contracts. Absent such documents, the ''commodity'' may not be excluded from being ''specially designed'' by either paragraph (b)(4) *or* (b)(5).

Note to paragraph (b)(5): If you have ''knowledge'' that the commodity was or is being developed for a particular application, you may not rely on paragraph (b)(5) to conclude that the commodity was or is not ''specially designed.''

* * * * *

PART 774—[AMENDED]

3. The authority citation for 15 CFR part 774 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* 10 U.S.C. 7420; 10 U.S.C. 7430(e); 22 U.S.C. 287c, 22 U.S.C. 3201 *et seq.,* 22 U.S.C. 6004; 30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 15 U.S.C. 1824a; 50 U.S.C. app. 5; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 12, 2011, 76 FR 50661 (August 16, 2011).

Supplement No. 1 to Part 774 [Amended]

4. In Supplement No. 1 to part 774 (the Commerce Control List) wherever the term ''specially designed'' occurs, add quotation marks around the term ''specially designed.''

Dated: June 6, 2012.

Kevin J. Wolf,

Assistant Secretary for Export Administration.

[FR Doc. 2012–14475 Filed 6–15–12; 11:15 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 774

[Docket No. 120426028–1028–01]

RIN 0694–AF68

Feasibility of Enumerating ''Specially Designed'' Components

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Advanced notice of proposed rulemaking (ANPRM).

SUMMARY: As part of the President's Export Control Reform (ECR) Initiative, this ANPRM requests comments on the feasibility of positively identifying ''specially designed'' ''components'' on the Commerce Control List (CCL) so as to decrease the use of the term, which appears extensively throughout the CCL,

and thereby facilitate enhanced public compliance with the Export Administration Regulations. Specifically, the Bureau of Industry and Security (BIS) is evaluating whether it is feasible to create exhaustive lists of the ''specially designed'' ''components'' referred to in certain Export Control Classification Numbers on the CCL that currently use ''specially designed'' catch-all paragraphs, and seeks public input to assist in this evaluation. If BIS ultimately determines that such lists might be beneficial, it intends to submit these findings to the appropriate multilateral export control regimes in the normal course of list proposal changes. The request for comments in this ANPRM is part of Commerce's retrospective plan under EO 13563 completed in August 2011. Commerce's full plan can be accessed at: *http://open.commerce.gov/news/2011/08/23/commerce-plan-retrospective-analysis-existing-rules.*

DATES: Comments must be received by BIS no later than September 17, 2012.

ADDRESSES: Comments on this advanced notice of proposed rulemaking may be submitted to the Federal rulemaking portal (*www.regulations.gov*). The regulations.gov ID for this rule is: BIS–2012–0022. Written comments on this advanced notice of proposed rulemaking may also be submitted via email to *publiccomments@bis.doc.gov* or on paper to Regulatory Policy Division, Bureau of Industry and Security, Room 2099B, U.S. Department of Commerce, 14th St. and Pennsylvania Ave. NW., Washington, DC 20230. Please refer to RIN 0694–AF68 in all comments and in the subject line of email comments. All comments must be in writing. All comments (including any personal identifiable information) will be available for public inspection and copying. Those wishing to comment anonymously may do so by submitting their comment via regulations.gov and leaving the fields for identifying information blank.

FOR FURTHER INFORMATION CONTACT: Timothy Mooney, Regulatory Policy Division, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482–2440, Fax: (202) 482–3355, Email: *timothy.mooney@bis.doc.gov.*

SUPPLEMENTARY INFORMATION

Background

This ANPRM requests comments on a longer-term project involving minimizing the use of the term ''specially designed'' on the current Commerce Control List (CCL) by specifically identifying ''components.'' Specifically listing ''components,'' with multilateral agreement where appropriate, would make the CCL a more positive list.

As part of the implementation of the Export Control Reform (ECR) Initiative, the Departments of Commerce and State published rules that proposed, as much as possible, a common definition of the term ''specially designed.'' A common definition of ''specially designed'' would protect and enhance U.S. national security interests because the term ''specially designed'' would be used in the ''600 series'' that would be created to control United States Munitions List (USML) items moved to the CCL. In addition, the term ''specially designed'' is used widely on the current CCL.

The request for comments in this ANPRM is part of Commerce's retrospective plan under EO 13563 completed in August 2011. Commerce's full plan can be accessed at: *http://open.commerce.gov/news/2011/08/23/commerce-plan-retrospective-analysis-existing-rules.*

Request for Comments on the Feasibility of Enumerating ''Specially Designed'' ''Components''

This ANPRM requests comments on the use of the term ''specially designed'' when applied to ''components'' outside of the ''600 series'' on the CCL. Specifically, the Bureau of Industry and Security is evaluating whether it is feasible to create exhaustive lists of the ''specially designed'' ''components'' in certain Export Control Classification Numbers on the CCL that currently use ''specially designed'' catch-all paragraphs. BIS does not believe a similar approach is needed for ''parts'' controlled on the CCL, but BIS also requests public comments regarding whether a similar approach should also be evaluated for ''parts'' controlled on the CCL.

Ultimately, any changes to multilaterally-controlled CCL entries would be made in cooperation with the multilateral export control regimes. This longer-term project may result eventually in a reduction in the use of the term ''specially designed'' outside of the ''600 series'' on the CCL if exhaustive lists of such ''components'' can be identified and specified. To assist the public, BIS has identified the set of ECCN entries that are the best candidates for taking this approach.

Most of the public comments and concerns about the July 15 proposed ''specially designed'' definition included in the rule, *Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML)* (76 FR 41958) revolved around references in the application of the definition to existing CCL controls on ''components'' ''specially designed'' for a particular ''end item'' or purpose. Minimizing use of the term ''specially designed'' by specifically listing controlled ''components'' may address some of these concerns.

As described below, BIS parsed the CCL and removed all text that does not directly describe controls on ''components'' ''specially designed'' for an end item or purpose. To make the analysis easier and more relevant to the proposed definition of ''specially designed,'' BIS has not included in this ANPRM references to such controls in ECCNs that are controlled for only anti-terrorism reasons, because the number of circumstances where a licensing determination would be affected by whether a component is EAR99 or AT-only controlled is relatively small.

BIS has also not included in this ANPRM the ECCNs where a component is solely or primarily controlled for Missile Technology (MT) reasons or where the MT controls overlap other controls, such as National Security (NS) controls. Because the EAR has adopted the Missile Technology Control Regime's definition of the term for such controls, BIS needs to further evaluate whether those ECCNs controlled for MT reasons would also be good candidates for specifically identifying ''components.'' In responding to this ANPRM, the public may also submit comments regarding whether they believe a similar approach would also be feasible for items controlled for MT reasons, which BIS will factor into the evaluation for the scope of this review project going forward.

Unlike the USML, the CCL does not contain a broad catch-all control on essentially all ''components'' ''specially designed'' for any other item identified on the CCL. You must carefully read each heading and each subparagraph. Some catch-all controls are in the heading and apply by reference to all items described in the subparagraphs, such as in ECCN 3B001. Other headings merely refer to the fact that some of the subparagraphs contain catch-all controls ''as follows,'' such as ECCN 2B001 where only its subparagraph ''f'' contains controls on ''specially designed'' ''components.'' (The fact that a ''specially designed'' ''component'' control exists in some of an ECCN's subparagraphs means, by negative implication, that such controls do not exist in the other subparagraphs in the

same ECCN.) Some ECCN headings do not refer to catch-all controls but individual subparagraphs do, such as in ECCN 8A002.a. Some ECCNs refer to specific types of ''components'' ''specially designed'' for other items in that ECCN, such as 2B005, which limits its ''component'' controls to ''specially designed automated handling, positioning, manipulation and control components.''

Finally, a few ECCNs, such as 3A292, contain a specific, positive list of the types of components that are within the scope of that ECCN's controls on ''specially designed'' ''components.'' Specifically, 3A292 contains a ''note'' stating that ''[s]pecially designed components controlled by this item are the following, for analog oscilloscopes: 1. Plug-in units; 2. External amplifiers; 3. Pre-amplifiers; 4. Sampling devices; 5. Cathode ray tubes.'' Thus, only those particularly identified components are controlled in that ECCN. Another example is ECCN 6A002. ECCN 6A002.a.2 controls ''components'' ''specially designed'' for ''image intensifier tubes'' described in ECCN 6A002.a.2.a. These components are described in three subparagraphs that specify the specially designed components under paragraph a.2.b, as follows: 1. Microchannel plates having a hole pitch (center-to-center spacing) of 12 µm or less; 2. GaAs or GaInAs photocathodes; and 3. Other III–V compound semiconductor photocathodes. To further refine what are considered specially designed components, a ''note'' specifies that ''6A002.a.2.b.3 does not control compound semiconductor photocathodes with a maximum radiant sensitivity of 10 mA/W or less.''

Request for Comments

BIS seeks the advice and suggestions of the public regarding whether identifying the specific types of ''components'' controlled by the ECCNs identified below would be of assistance to exporters. If so, BIS requests public comment regarding the ''components'' that should be identified in a positive list within the scope of the ''specially designed'' controls of the ECCNs identified below. In addition to the ECCNs identified below, the public may also submit public comments on other ''specially designed'' ''component'' references on the CCL where the public believes a similar approach of identifying the specific types of ''components'' would be feasible. If a list of such components could be created, the United States could consider developing proposals for the relevant multilateral export control regimes to control only those ''components'' within the scope of the relevant ECCNs. BIS does not believe a similar approach is needed for ''parts'' controlled on the CCL, but BIS also requests public comments regarding whether a similar approach should also be evaluated for ''parts'' controlled on the CCL.

BIS is particularly interested in comments from those with technical expertise related to or experience with classifying items identified below to provide advice on those items. The identified ''components'' should be those that have specific performance parameters or functions which make them particularly suitable for use in the controlled items. They should also include those ''components'' that are the essence of the controlled end item.

CCL Entries Where the U.S. Government Is Evaluating the Feasibility of Enumerating ''Specially Designed'' ''Components''

In the following list, BIS identifies ECCNs containing a control on a generic ''component'' ''specially designed'' for another item. The list does not include any references to any explanatory notes that may be germane to classifying an item against the ECCN. Thus, when preparing your suggested positive list of components for BIS to consider inserting into the ECCN, please read the whole ECCN for context.

For purposes of this ANPRM, BIS is using the definition of ''*component*'' from the July 15 proposed rule, as follows:

''*Component.*'' This is an item that is useful only when used in conjunction with an ''*end item.*'' Components are also commonly referred to as assemblies. For purposes of this definition an assembly and a component are the same. There are two types of ''*components*'': ''*Major components*'' and ''*minor components.*'' A ''*major component*'' includes any assembled element which forms a portion of an ''*end item*'' without which the end item is inoperable. For example, for an automobile, components will include the engine, transmission, and battery. If you do not have all those items, the automobile will not function, or function as effectively. A ''*minor component*'' includes any assembled element of a ''*major component.*'' ''*Components*'' consist of *'parts.'* '' References in the CCL to ''*components*'' include both ''*major components*'' and ''*minor components.*''

List of ECCN ''Specially Designed'' Paragraphs

1. ECCN 1A004.a controls ''components'' ''specially designed'' for ''gas masks, filter canisters and decontamination equipment therefor, designed or modified for defense against'' (1) ''biological agents 'adapted for use in war;' '' (2) ''radioactive materials 'adapted for use in war;' '' (3) ''chemical warfare (CW) agents;'' or (4) specific ''riot control agents'' listed in ECCN 1A004.a.4.

2. ECCN 1A004.c controls ''components'' ''specially designed'' for ''[d]etection systems, specially designed or modified for detection or identification of'' (1) ''[b]iological agents 'adapted for use in war;' '' (2) ''[r]adioactive materials 'adapted for use in war;' '' or (3) ''[c]hemical warfare (CW) agents.''

3. ECCN 1A006 controls ''components'' ''specially designed'' for ''remotely operated vehicles'' and ''disruptors'' ''specially designed or modified for the disposal of improvised explosive devices.''

4. ECCN 1A008.b controls ''components'' ''specially designed'' for ''linear shaped cutting charges'' that have ''an explosive load greater than 40 g/m'' and ''a width of 10 mm or more.''

5. ECCN 1B001.e controls ''components'' ''specially designed'' for ''[e]quipment for producing prepregs controlled by 1C010.e by the hot melt method.''

6. ECCN 1B001.f controls ''components'' ''specially designed'' for ''[n]on-destructive inspection equipment specially designed for 'composite' materials'' as described in ECCN 1B001.f.1 and f.2.

7. ECCN 1B003.c controls ''components'' ''specially designed'' for ''[t]ools, dies, molds or fixtures, for 'superplastic forming' or 'diffusion bonding' titanium, aluminum or their alloys, specially designed for the manufacture of'' ''airframe or aerospace structures'' or ''aerospace engines.''

8. ECCN 2B003 controls ''components'' ''specially designed'' for ' ''[n]umerically controlled' or manual machine tools * * * specially designed for the shaving, finishing, grinding or honing of hardened (R_c = 40 or more) spur, helical and double-helical gears with a pitch diameter exceeding 1,250 mm and a face width of 15% of pitch diameter or larger finished to a quality of AGMA 14 or better (equivalent to ISO 1328 class 3).''

9. ECCN 3A001.c controls ''components'' ''specially designed'' for ''[a]coustic wave devices'' that have any of the characteristics described in 3A001.c.1.a., c.1.b., c.1.c, c.2 or c.3.

10. ECCN 3A003 controls ''components'' ''specially designed'' for ''[s]pray cooling thermal management systems employing closed loop fluid handling and reconditioning equipment in a sealed enclosure where a dielectric fluid is sprayed onto electronic components using specially designed spray nozzles that are designed to maintain electronic components within their operating temperature range.''

11. ECCN 3A292.d controls ''components'' ''specially designed'' for ''[d]igital oscilloscopes and transient recorders, using analog-to-digital conversion techniques, capable of storing transients by sequentially sampling single-shot inputs at successive intervals of less than 1 ns (greater than 1 giga-sample per second), digitizing to 8 bits or greater resolution and storing 256 or more samples.''

12. ECCN 3B001.a controls ''components'' ''specially designed'' for ''equipment designed for epitaxial growth as follows:'' (1) ''[e]quipment capable of producing a layer of any material other than silicon with a thickness uniform to less than ±2.5% across a distance of 75 mm or more;'' (2) ''Metal Organic Chemical Vapor Deposition (MOCVD) reactors specially designed for compound semiconductor crystal growth by the chemical reaction between materials controlled by 3C003 or 3C004;'' or (3) ''[m]olecular beam epitaxial growth equipment using gas or solid sources.''

13. ECCN 3B001.b. controls ''components'' ''specially designed'' for ''[e]quipment designed for ion implantation and having any of the following:'' (1) ''[a] beam energy (accelerating voltage) exceeding 1MeV;'' (2) ''[b]eing specially designed and optimized to operate at a beam energy (accelerating voltage) of less than 2 keV;'' (3) ''[d]irect write capability;'' or (4) ''beam energy of 65 keV or more and a beam current of 45 mA or more for high energy oxygen implant into a heated semiconductor material 'substrate.' ''

14. ECCN 3B001.c. controls ''components'' ''specially designed'' for ''[a]nisotropic plasma dry etching equipment'' having all the following: (1) ''[d]esigned or optimized to produce critical dimensions of 65 nm or less;'' and (2) ''[w]ithin wafer non-uniformity equal to or less than 10% 3σ measured with an edge exclusion of 2 mm or less.''

15. ECCN 3B001.e controls ''components'' ''specially designed'' for ''[a]utomatic loading multi-chamber central wafer handling systems'' having (1) ''[i]nterfaces for wafer input and output, to which more than two functionally different 'semiconductor process tools' controlled by 3B001.a, 3B001.b, 3B001.c or 3B001.d are designed to be connected;'' and (2) ''[d]esigned to form an integrated system in a vacuum environment for 'sequential multiple wafer processing.' ''

16. ECCN 3B001.f.1 controls ''components'' ''specially designed'' for ''[l]ithography equipment'' that ''[a]lign[s] and expose[s] step and repeat (direct step on wafer) or step and scan (scanner) equipment for wafer processing using photo-optical or X-ray methods and having'' any of the following (a) ''light source wavelength shorter than 245 nm;'' or (b) ''[c]apable of producing a pattern with a 'Minimum Resolvable Feature size' (MRF) of 95 nm or less.''

17. ECCN 3B001.f.2 controls ''components'' ''specially designed'' for ''[i]mprint lithography equipment capable of production features of 95 nm or less'' described in ECCN 3B001.f.2.

18. ECCN 3B001.f.3 controls ''components'' ''specially designed'' for ''[e]quipment specially designed for mask making or semiconductor device processing using direct writing methods, having'' all the characteristics described in ECCN 3B001.f.3.a. and any of the characteristics described in .b.

19. ECCN 3B002 controls ''components'' ''specially designed'' for ''[t]est equipment specially designed for testing finished or unfinished semiconductor devices as follows * * *'' (1) ''[f]or testing S-parameters of transistor devices at frequencies exceeding 31.8 GHz;'' or (2) ''[f]or testing microwave integrated circuits controlled by 3A001.b.2.''

20. ECCN 4A003.c controls '' '[e]lectronic assemblies' specially designed or modified to be capable of enhancing performance by aggregation of processors so that the 'APP' of the aggregation exceeds the limit in 4A003.b.''

21. ECCN 4A003.e controls ''components'' ''specially designed'' for ''[e]quipment performing analog-to-digital conversions exceeding the limits in 3A001.a.5.''

22. ECCN 4A003.g controls ''components'' ''specially designed'' for ''[e]quipment specially designed for aggregating the performance of 'digital computers' by providing external interconnections which allow communications at unidirectonal data rates exceeding 2.0 Gbyte/s per link.''

23. ECCN 4A004 controls ''components'' ''specially designed'' for (a) ''[s]ystolic array computers;'' (b) ''[n]eural computers;'' and (c) ''[o]ptical computers.''

24. ECCN 5A001.b controls ''components'' ''specially designed'' for ''telecommunication systems and equipment, having any of ''characteristics, functions or features'' described in ECCN 5A001.b.1, b.2, b.3, b.4, b.5, or b.6.

25. ECCN 5A001.e controls ''components'' ''specially designed'' for radio direction finding equipment operating at frequencies above 30 MHz and having (1) '' 'instantaneous bandwidth' of 10 MHz or more;'' and (2) ''capable of finding a Line Of Bearing (LOB) to non-cooperating radio transmitters with a signal duration of less than 1 ms.''

26. ECCN 5A001.f controls ''components'' ''specially designed'' for ''[j]amming equipment specially designed or modified to intentionally and selectively interfere with, deny, inhibit, degrade or seduce mobile telecommunication services and'' (1) ''simulate the functions of Radio Access Network (RAN) equipment;'' (2) ''detect and exploit specific characteristics of the mobile telecommunications protocol employed (e.g., GSM);'' or (3) ''exploit specific characteristics of the mobile telecommunications protocol employed (e.g., GSM).''

27. ECCN 5B001.a controls ''components'' ''specially designed'' for ''equipment * * * specially designed for the 'development', 'production' or 'use' of equipment, functions or features, controlled by 5A001.''

28. ECCN 5B001.b controls ''components'' ''specially designed'' for ''equipment * * * specially designed for the 'development' of any of the following telecommunication transmission or switching equipment'' ''employing a 'laser' '' and (a) having ''a transmission wavelength exceeding 1750 nm;'' (b) ''performing 'optical amplification' using Praseodymium-Doped Fluoride Fiber Amplifiers (PDFFA);'' (c) ''employing coherent optical transmission or coherent optical detection techniques (also called optical heterodyne or homodyne techniques);'' or (d) ''employing analog techniques and having a bandwidth exceeding 2.5 GHz.''

29. ECCN 5B001.b also controls ''components'' ''specially designed'' for ''equipment * * * specially designed for the 'development' of any of the following telecommunication transmission or switching equipment'' (a) ''radio equipment employing Quadrature-Amplitude-Modulation (QAM) techniques above level 256;'' or (b) ''equipment employing 'common channel signaling' operating in non-associated mode of operation.''

30. ECCN 5A002.a controls ''components'' ''specially designed'' for ''systems, equipment, application specific 'electronic assemblies', modules and integrated circuits for 'information security' '' if they were also ''specially designed for 'information security.' ''

31. ECCN 6A001.a.1 controls ''components'' ''specially designed'' for ''marine acoustic systems'' that are within the scope of ECCN 6A001.a.1.a, a.1.b, a.1.c., a.1.d, or a.1.e.

32. ECCN 6A001.a.2 controls ''components'' ''specially designed'' for ''passive systems'' described in 6A001.a.2.a, a.2.b, a.2.c., a.2.d, a.2.e, or a.2.f.

33. ECCN 6A004.a.1 controls ''components'' '' 'specially designed' for 'deformable mirrors' having either continuous or multi-element surfaces * * * capable of dynamically repositioning portions of the surface of the mirror at rates exceeding 100 Hz.''

34. ECCN 6A005.e.2. controls ''components'' (optical mirrors, transmissive or partially transmissive optical or electro-optical components) ''specially designed'' for use with controlled lasers.

35. ECCN 6A203.a controls ''components'' ''specially designed'' for ''mechanical rotating mirror cameras'' that are (1) ''framing cameras with recording rates greater than 225,000 frames per second;'' or (2) ''streak cameras with writing speeds greater than 0.5 mm per microsecond.''

36. ECCN 6A998.a controls ''components'' ''specially designed'' for ''airborne radar equipment, n.e.s.''

37. ECCN 6A998.b controls ''components'' ''specially designed for '' 'space-qualified' 'laser' radar or Light Detection and Ranging (LIDAR) equipment specially designed for surveying or for meteorological observation.''

38. ECCN 7A008 controls ''components'' ''specially designed'' for ''underwater sonar navigation systems using Doppler velocity or correlation velocity logs integrated with a heading source and having a positioning accuracy of equal to or less (better) than 3% of distance traveled 'Circular Error Probable' ('CEP').''

39. ECCN 8A002.a controls ''components'' ''specially designed'' for ''submersible vehicles and designed to operate at depths exceeding 1,000 m'' that have (1) ''pressure housings or pressure hulls with a maximum inside chamber diameter exceeding 1.5 m,'' (2) ''direct current propulsion motors or thrusters,'' (3) ''umbilical cables, and connectors therefor, using optical fiber and having synthetic strength members,'' and (4) ''components manufactured from material specified by ECCN 8C001.''

40. ECCN 9A002 controls ''components'' ''specially designed'' for '' 'marine gas turbine engines' with an ISO standard continuous power rating of 24,245 kW or more and a specific fuel consumption not exceeding 0.219 kg/kWh in the power range from 35 to 100%.''

41. ECCN 9A003.a controls ''components'' and ''assemblies'' that ''incorporat[e] any of the 'technologies' controlled by 9E003.a, 9E003.h or 9E003.i'' and were ''specially designed'' for gas turbine engines ''controlled by ECCN 9A001.''

42. ECCN 9A003.b controls ''components'' and ''assemblies'' that ''incorporat[e] any of the 'technologies' controlled by 9E003.a, 9E003.h or 9E003.i'' and ''whose design or production origins are either countries in Country Group D:1 or unknown to the manufacturer.''

Comments should be submitted to BIS as described in the **ADDRESSES** section of this notice by September 17, 2012.

Dated: June 6, 2012.

Kevin J. Wolf,

Assistant Secretary for Export Administration.

[FR Doc. 2012–14473 Filed 6–15–12; 11:15 am]

BILLING CODE 3510–33–P

FEDERAL TRADE COMMISSION

16 CFR Part 309

Labeling Requirements for Alternative Fuels and Alternative Fueled Vehicles

AGENCY: Federal Trade Commission (FTC or Commission).

ACTION: Notice of proposed rulemaking; request for public comments.

SUMMARY: The Commission seeks public comment on two amendments to its ''Labeling Requirements for Alternative Fuels and Alternative Fueled Vehicles'' (''Alternative Fuels Rule'' or ''Rule''). Specifically, the proposed amendments consolidate the FTC's alternative fueled vehicle (AFV) labels with new fuel economy labels required by the Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA) and eliminate FTC requirements for used AFV labels.

DATES: Written comments must be received on or before August 17, 2012.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form by following the instructions in section V of the **SUPPLEMENTARY INFORMATION** section below. Comments in electronic form should be submitted using the following weblink *https://ftcpublic.commentworks.com/ftc/atlfuelslabelingnprm* (and following the instructions on the web-based form). Comments filed in paper form should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex N), 600 Pennsylvania Avenue NW., Washington, DC 20580, in the manner detailed in the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: Hampton Newsome, (202) 326–2889, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

The Energy Policy Act of 1992 (''EPAct 92'' or ''Act'') [1] established federal programs that encourage the development of alternative fuels and alternative fueled vehicles (AFVs). Section 406(a) of the Act directed the Commission to establish uniform labeling requirements for alternative fuels and AFVs. Under the Act, such labels must provide ''appropriate information with respect to costs and benefits [of alternative fuels and AFVs], so as to reasonably enable the consumer to make choices and comparisons.'' In addition, the required labels must be ''simple and, where appropriate, consolidated with other labels providing information to the consumer.'' [2]

In response to EPAct 92, the Commission published the Alternative Fuels Rule in 1995.[3] The Rule requires labels on new and used AFVs that run on liquid and non-liquid fuels, such as ethanol and other alcohols including E85 ethanol-gasoline mixtures, natural gas, liquefied petroleum gas, hydrogen, coal-derived liquid fuels, fuels derived from biological materials (*e.g.,* 100% biodiesel), and electricity. The labels for new AFVs disclose the vehicle's estimated cruising range (*i.e.,* the travel distance on a single charge or tank of fuel), general factors consumers should consider before buying an AFV, and toll free telephone numbers and Web sites for additional information from the Department of Energy (DOE) and NHTSA.[4] Labels for used AFVs contain

[1] Public Law 102–486, 106 Stat. 2776 (1992).

[2] 42 U.S.C. 13232(a).

[3] 60 FR 26926 (May 19, 1995).

[4] The Rule requires manufacturers to have a reasonable basis for the vehicle cruising range, and, for certain AFVs, specifies the test method for calculating that range. 16 CFR 309.22.

only the general buying factors and DOE/NHTSA contact information.[5]

The Rule also requires labels on fuel dispensers for *non-liquid* alternative fuels, such as electricity, compressed natural gas, and hydrogen.[6] The labels for electricity provide the dispensing system's kilowatt capacity, voltage, and other related information. The labels for other non-liquid fuels disclose the fuel's commonly used name and principal component (expressed as a percentage).[7]

II. Regulatory Review

In a June 1, 2011, Advance Notice of Proposed Rulemaking (ANPR),[8] the Commission initiated its regulatory review of the Rule to ensure that FTC-required vehicle labels and EPA fuel economy labeling requirements are consistent.[9] In doing so, the Commission sought comment about the Rule's costs, benefits, and regulatory impact. In addition, the Commission raised three specific issues for comment: (1) The consolidation of the FTC label with EPA's fuel economy label; (2) the inclusion of new definitions for AFVs contained in recent legislation; and (3) the retention of labeling requirements for used AFVs.

The Commission received nine comments.[10] Seven urged the Commission to consolidate its AFV labeling requirements with EPA's fuel economy labels (including those for newly defined AFVs).[11] No comments opposed consolidation. In addition, three comments supported elimination of FTC labels for used AFVs while one supported their continuation.[12] Two comments also recommended that the Commission retain existing FTC requirements for labeling non-liquid alternative fuels.[13]

In response, the Commission proposes to consolidate FTC labels with EPA fuel economy labels for all AFVs, including those identified in recent legislation, and eliminate FTC labeling requirements for used AFVs. However, the Commission does not propose changes to existing alternative fuel rating requirements. For each of these issues, the following sections provide background on alternative fuel requirements, discuss the comments received, and explain the proposed amendments.

A. EPA and NHTSA Fuel Economy Labels

Background: The Commission requested comment on whether it should consolidate its AFV labels with fuel economy labels recently issued by EPA to provide a uniform label for consumers.[14] The new EPA labels apply to both conventional vehicles and AFVs, including AFVs subject to the FTC's labeling requirements.[15] The EPA label differs depending on the type of AFV. For electric and compressed natural gas vehicles, the labels disclose information about fuel economy, greenhouse gases (and other emissions), cruising (driving) range, and estimated annual fuel cost. For ethanol-fueled vehicles, including flexible fuel vehicles (FFVs) (*i.e.,* dual fueled vehicles) that operate on a combination of gasoline and ethanol, the labels disclose the fuel economy, fuel cost, and emissions based on gasoline operation and allow, but do not require, a driving range for gasoline or alternative fuel operation. All the EPA labels reference *www.fueleconomy.gov,* which provides comprehensive consumer information about fuel economy and alternative fuels. Given this content, the ANPR requested comment on whether the EPA label accomplishes the EPAct 92's goal of providing ''appropriate information with respect to costs and benefits [of alternative fuels and AFVs], so as to reasonably enable the consumer to make choices and comparisons.'' [16]

The ANPR also sought comment on whether to allow the use of the EPA label, in lieu of the FTC label, on three categories of vehicles (hydrogen fuel cell, advanced lean burn, and hybrid motor vehicles) that were added to the definition of ''alternative fuel vehicle'' by the National Defense Authorization Act for Fiscal Year 2008.[17] The Commission noted that, because these vehicles are already covered under existing labeling programs, additional labeling requirements appear unnecessary.[18]

Comments: Seven comments supported consolidating the FTC and new fuel economy labels explaining that a single label would reduce consumer confusion and industry burden.[19] No comments opposed such a change.[20] These comments noted that the EPA fuel economy labels offer as much or more information than the FTC labels with one exception. Finally, they noted that EPA labels cover the three vehicle types added by recent legislation.

Commenters explained that the FTC labeling requirements duplicate the new fuel economy labels mandated by the EPA and NHTSA, create potential confusion, and provide little, if any, benefit for consumers.[21] For instance, the Alliance of Automobile Manufacturers (Alliance) argued such duplication creates potential consumer confusion by presenting the same or similar information on differently formatted labels and imposes costs on manufacturers with no significant consumer benefit. General Motors (GM) also explained that the overlapping

[5] The general factors listed on the current label include fuel type, operating costs, fuel availability, performance, convenience, energy security, energy renewability, and emissions. *See* 16 CFR part 309, Appendix A.

[6] The Commission's Fuel Labeling Rule, 16 CFR Part 306, addresses labeling for *liquid* alternative fuels, such as ethanol and liquefied natural gas.

[7] The Rule requires fuel importers, producers, and distributors to have a reasonable basis for the information disclosed on the label, maintain records, and provide certifications when transferring fuel. 16 CFR 309.11–14.

[8] 76 FR 31513.

[9] At the same time, the Commission also announced postponement of amendments to its ''Guide Concerning Fuel Economy Advertising for New Automobiles'' (''Fuel Economy Guide'') (16 CFR Part 259) pending completion of EPA's fuel economy labeling requirements and the Commission's review of the Alternative Fuels Rule. 76 FR 31467 (June 1, 2011). Once the Commission completes the Alternative Fuels Rule review, it will decide how to proceed with amendments to the Fuel Economy Guide.

[10] The comments are available at *http://www.ftc.gov/os/comments/alternativefuelsanpr/index.shtm.* The comments include the Alliance of Automobile Manufacturers (Alliance) (# 00008), Association of Global Automakers (Global Automakers) (# 00006), Clean Energy Fuels (# 00010), Denney (# 00003), Edison Electric Institute (EEI) (# 00005), General Motors Company (GM) (# 00012), Gibbs (# 00004), Growth Energy (# 00007), and National Automobile Dealers Association (NADA) (# 00011).

[11] *See* the Alliance, Global Automakers, Denney, EEI, GM, Growth Energy, and NADA.

[12] The Alliance, NADA, and GM (supported elimination); and EEI (supported continuation).

[13] NADA and EEI.

[14] *See* 76 FR 39478 (July 6, 2011).

[15] *See* EPA sample label at *http://www.epa.gov/otaq/carlabel/fealllabels.pdf.* Although EPA regulations (40 CFR Part 600) require labeling for all vehicles covered under the Alternative Fuels Rule, EPA did not propose a specific label for several vehicle types not generally available to individual consumers such as those fueled by liquefied petroleum gas, coal-derived liquid fuels, or fuels (other than alcohol) derived from biological materials. *See* 76 FR 39478. However, EPA has authority to require labels for such vehicles.

[16] 42 U.S.C. 13232(a).

[17] 42 U.S.C. 13211(3)(B). According to the legislative history, the purpose of these amendments is to ''allow additional types of vehicles to be used to meet minimum'' requirements for vehicle and fuel use by Federal agencies (*i.e.,* ''Federal fleet requirements''). 153 CONG. REC. 147 (2007).

[18] 76 FR at 31516.

[19] *See, e.g.,* the Alliance, EEI, Denney, GM, Global Automakers, Growth Energy, and NADA.

[20] Clean Energy Fuels offered suggestions for new label content, including ''fuel displacement'' of foreign oil, a full life cycle assessment of greenhouse gas emissions and both fossil-based and biological-based natural gas values for natural gas vehicles. However, the comment did not specify how such information should be derived or whether consumers would understand such information. Given the Commission's proposal to eliminate the FTC label, such suggestions are best directed to EPA for consideration in future development of their fuel economy label.

[21] *See, e.g.,* the Alliance, EEI, Denney, GM, Global Automakers, Growth Energy, and NADA.

labels have led to inconsistencies between the driving range numbers on FTC and EPA labels.[22] The Alliance and the Association of Global Automakers (Global Automakers) noted that, over the past several years, industry members have urged state and federal agencies to develop a single national vehicle label.[23] No commenters disagreed with these views.

Five comments suggested that elimination of the FTC labels would not harm consumers because the EPA fuel economy labels provide more vehicle-specific information than the FTC label.[24] Specifically, Global Automakers explained the EPA labeling program provides comprehensive fuel economy information by requiring labels that disclose the most important vehicle information and offers a Web site, *www.fueleconomy.gov,* with more detailed information, including data on older vehicles.[25] According to the Alliance, the new EPA fuel economy label, like the current FTC label, requires driving range information for most AFVs, including electric vehicles (EVs), plug-in hybrid electric vehicles (PHEVs), hydrogen fuel cell vehicles (FCVs), and compressed natural gas (CNG-fueled) vehicles. At the same time, the EPA label provides additional information not found on the FTC label including fuel costs, smog ratings, and greenhouse gas information.[26] Two comments, GM and the Alliance, noted that, unlike the FTC label for FFVs, the EPA rules do not require driving range information but instead provide manufacturers the option to include the range for gasoline and alternative fuel (*e.g.,* E85) operation. The Alliance recommended that the FTC provide the same flexibility. No comments identified harm to consumers from consolidation.

Finally, three comments recommended that the FTC allow manufacturers to use the EPA fuel economy label for vehicle categories added to the definition of AFV by recent legislation (*i.e.,* lean burn, hybrid, and fuel cell vehicles). No comments opposed this approach. Edison Electric Institute (EEI) argued that the federal requirements should be the same for all types of vehicles to minimize industry costs and ensure consumers can make ''apples to apples'' vehicle comparisons. The Alliance agreed, noting that EPA labeling rules already cover these vehicles. GM also explained that FTC labels for these vehicles would not provide any significant additional consumer benefit and could increase the opportunity for errors.

Discussion: Consistent with the comments, the Commission proposes to require manufacturers to use EPA's fuel economy label for alternative fuel vehicles, including the vehicle categories added by recent legislation, in lieu of existing FTC requirements.[27] The Commission agrees with commenters that consolidating the FTC and EPA labels will benefit consumers and industry by eliminating potential confusion caused by overlapping or inconsistent labels, and by reducing the burden on manufacturers to create and post two labels.[28] Generally, the EPA labels are likely to be more helpful to consumers in making choices and comparisons because they contain more vehicle-specific information than the current FTC labels. The fuel economy labels also link consumers to *www.fueleconomy.gov,* which provides comprehensive comparative information for conventional vehicles and AFVs.[29]

Unlike the FTC labels, the EPA labels for FFVs allow, but do not require, driving range disclosures. In support of making driving range disclosures optional, EPA has indicated that nearly all FFV owners (99%) use only regular gasoline, limiting the practical value of driving range disclosures.[30] EPA's conventional gasoline label does not disclose driving range. Also, the inclusion of driving range on the FFV label alters the location of the ''gallons per 100 miles'' disclosure.[31] Other factors, however, may support a mandatory driving range disclosure for these vehicles. First, the difference between driving range performance for alternative fuel and conventional gasoline operation can be significant.[32] Second, the use of alternative fuels may increase in the future. Therefore, to ensure the label provides vehicle buyers with comparative driving range performance for both alternative fuel and conventional gasoline, the Commission proposes to require use of the EPA FFV label that contains the vehicle's alternative fuel and gasoline driving range. This proposal would effectively eliminate use of the EPA FFV label that does not disclose driving range.

The Commission seeks comment on all aspects of this proposal. In particular, comments should indicate whether driving range information on FFV labels is necessary given the few consumers that appear to use alternative fuel in such vehicles. Comments should also address whether the elimination of FFV label that does not disclose driving range would have any negative impacts on consumers' efforts to compare vehicles. The Commission also seeks comment on whether there are any types of AFVs on the market that are not covered by the EPA label, and, if so, whether the Commission should retain its current labeling requirements for such vehicles.

B. Labels for Used AFVs

Background: In the ANPR, the Commission sought comment on whether to change the Rule's labeling requirements for used AFVs.[33] Under

[22] *See* GM. For example, consolidation would eliminate current inconsistencies between cruising range values on FTC and EPA electric vehicle labels. To address electric vehicles introduced pending completion of this rulemaking, the Commission issued a policy stating that it will not enforce current FTC labeling requirements for any electric vehicle bearing an EPA-mandated fuel economy label and will encourage vehicle manufacturers to use the EPA label in lieu of the FTC label. *See* FTC enforcement policy on driving range numbers for electric vehicles at *http://www.ftc.gov/opa/2011/05/afr.shtm.*

[23] Working toward that goal, EPA has coordinated with California to incorporate the state's labeling information into the national fuel economy label. *See* the Alliance and Global Automakers. Global Automakers urged the Commission to work with EPA and NHTSA to resolve any deficiencies the Commission finds with the fuel economy label.

[24] Global Automakers, the Alliance, Growth Energy, NADA, and GM.

[25] According to the Alliance, many consumers conduct Internet research to make basic vehicle purchasing decisions before ever visiting a dealership. *See also,* Global Automakers, Denney, and NADA.

[26] *See* Growth Energy and NADA.

[27] The proposed amendments add the statutory definitions for lean burn, hybrid, and fuel cell vehicles to the Rule.

[28] In addition to concerns about electric vehicle labels discussed above, the EPA and FTC labels disclose driving range for E85 dual-fueled vehicles in different ways. The FTC label requires a lower range number based on city fuel economy and an upper range number based on highway fuel economy (*e.g.,* 246–378 on one tank). Conversely, the EPA label presents a single number (*e.g.,* 300 miles on one tank) based on the vehicle's combined city-highway fuel economy. 40 CFR 600.311–12(j)(1). Although the resulting numbers are similar and based on the same test procedures, the differences in presentation have the potential to confuse consumers.

[29] The proposed amendments are consistent with the EPAct 92, which gives the Commission discretion to consolidate its requirements ''with other labels providing information to the consumer.'' 42 U.S.C. 13232(a). In addition, the Energy and Policy Conservation Act, 42 U.S.C. 32908(e)(2), authorizes the FTC to enforce the EPA automobile label requirements issued pursuant to 49 U.S.C. 32908(b).

[30] 76 FR at 39485.

[31] *See* EPA sample labels at *http://www.epa.gov/otaq/carlabel/fealllabels.pdf.*

[32] For example, EPA's sample fuel economy label FFV's displays a 390 mile driving range for gasoline and a 270 mile range for E85 operation. *See* 76 FR at 39584 (Figure 5).

[33] 16 CFR 309.21. The Act contains no specific requirement for used AFV labels nor does it specifically exclude used vehicles from its coverage. *See* 42 U.S.C. 13211 and 13232(a). In promulgating the original Rule in 1995, the Commission determined that used AFV labeling

Continued

the current Rule, used AFV dealers must post labels with general tips and references to government telephone numbers and Web sites that provide additional information.[34] However, these labels do not contain vehicle-specific information, such as cruising range. Because these labels provide limited information and are likely to impose increasing burdens on used car dealers as the AFV market expands, the Commission asked whether it should retain the requirement and, if so, whether to change the label's content.

Comments: Three comments urged the Commission to eliminate the FTC labeling requirement for used vehicles, while two suggested alternative approaches to the existing label. The Alliance, the National Automobile Dealers Association (NADA), and GM recommended elimination because the used vehicle label does not provide consumers with significant benefit and places unnecessary burden on used automobile dealers. NADA also argued that the rule, which does not apply to private used vehicle sellers, poses unfair burdens on dealers who account for only about half of all used vehicle transactions. In lieu of the current label which only provides general tips, these three comments suggested that consumers use *www.fueleconomy.gov* to locate specific vehicle information.

Although NADA recommended elimination of the used label altogether, it also suggested alternatively that the Commission insert an AFV disclosure into the FTC's current used vehicle Buyers Guide (16 CFR Part 455). NADA suggested that the FTC used vehicle Buyers Guide could state: ''For more information on the fuel economy and fuel type for this vehicle, consult *www.fueleconomy.gov.*'' [35] In addition, EEI, the only comment that supported keeping the used vehicle label, urged the Commission to simplify the requirements by only requiring a link to the *www.fueleconomy.gov* Web site on the existing label.

Discussion: The Commission proposes to eliminate the requirement for a separate AFV label for used vehicles. Unlike in 1995, when the Commission originally issued its Alternative Fuels Rule, consumers can now access detailed used AFV information online at *www.fueleconomy.gov,* including vehicle-specific fuel economy, energy consumption, and environmental impact data. Given the extensive information at *www.fueleconomy.gov,* the benefits of a separate used vehicle label that contains only generic tips for consumers seem small compared to the costs of posting such labels. Accordingly, the used label does not appear necessary to ''reasonably enable the consumer to make choices and comparisons'' as contemplated by the statute.[36] The Commission seeks comment on this proposal, including whether the Commission should consider including a link to *www.fueleconomy.gov* on the FTC's used vehicle Buyers Guide.

C. Alternative Fuel Labeling

The Commission proposes no change to non-liquid alternative fuel requirements because two comments indicated that existing alternative fuel labeling helps consumers and no comment proposed changes.[37] EEI, for example, urged the Commission to retain existing requirements because fuel dispenser labels help ensure consumers choose fuels that match the needs of their vehicle's energy system.[38]

III. Paperwork Reduction Act

The current Rule contains recordkeeping, disclosure, testing, and reporting requirements that constitute ''information collection requirements'' as defined by 5 CFR 1320.3(c) under the OMB regulations that implement the Paperwork Reduction Act (PRA).[39] OMB has approved the Rule's existing information collection requirements through April 30, 2013 (OMB Control No. 3084–0094). The proposed amendments would reduce the burdens associated with the Rule by eliminating FTC labeling requirements for vehicles subject to EPA's fuel economy labeling requirements.

In past PRA analyses, FTC staff has estimated the Rule applies to 1,121,153 alternative fuel vehicles, which mostly include flex-fuel vehicles. The staff estimated a two-minute average time to comply with the posting requirements for each of the approximately 1,121,153 new and used AFVs manufactured each year, for a total of 37,371 hours.[40] The staff also estimated that the Rule's vehicle labeling requirements apply to an estimated 1,121,153 new and used AFVs each year at 38 cents (per industry sources) for each label, the annual AFV labeling cost is estimated to be $426,038 ($0.38 × 1,121,153). The Commission believes that the proposed rule would eliminate the Rule's burden for all these vehicles. Accordingly, FTC staff is submitting a related clearance request to OMB to adjust these previously submitted burden totals.

The Commission invites comments on: (1) Whether the proposed modifications to the current labeling requirements are necessary and/or will be practically useful; (2) the accuracy of the associated burden estimates; (3) how to improve the quality, utility, and clarity of the labels; and (4) how to minimize further the burden of the collections of information.

Your responses to the points above additionally should be sent to OMB. If sent by U.S. mail, they should be addressed to Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission, New Executive Office Building, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503. Comments sent to OMB by U.S. postal mail, however, are subject to delays due to heightened security precautions. Thus, comments should instead be sent by facsimile to (202) 395–5167.

IV. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, requires that the Commission provide an Initial Regulatory Flexibility Analysis (IRFA) with a Proposed Rule and a Final Regulatory Flexibility Analysis (FRFA), with the final Rule, if any, unless the Commission certifies that the Rule will not have a significant economic impact on a substantial number of small entities.[41]

The Commission does not anticipate that the Proposed Rule will have a

was ''appropriate'' because Aconsumers would likely have the same need for information, and would consider the same factors, whether they were contemplating a new or used ''FV acquisition.'' 60 FR at 26941.

[34] The Commission's Used Car Rule (16 CFR Part 455) also requires used car dealers to affix on the vehicle the FTC's Buyers Guide, which contains warranty information about the vehicle. *See* 16 CFR part 455.

[35] Use of the FTC's used vehicle Buyers Guide would be consistent with Congress' directive to ''consolidate'' the AFV information with other labels where appropriate. 42 U.S.C. 13232(a).

[36] 42 U.S.C. 13232(a).

[37] NADA and EEI. No comments opposed existing requirements. NADA suggested that the Commission consider transferring the alternative fuel provisions from 16 CFR Part 309 to Part 306 (*i.e.,* the Fuel Rating Rule) to create a single rule governing motor vehicle fuel ratings and simplify compliance for the regulated community. Given that the Commission recently completed a review of Part 306, the Commission is not implementing NADA's suggestion at this time. In addition, aside from NADA's comment, the Commission has no evidence that the location of Part 309 has caused significant confusion for industry members. In the future, the Commission may consider consolidating the fuel information from Part 309 into Part 306.

[38] Another comment (Gibbs) listed various benefits provided by alternative fuels but did not specifically address the FTC's labeling requirements.

[39] 44 U.S.C. 3501–3521.

[40] 75 FR 366, 367 (Jan. 5, 2010); 75 FR 12750, 12751 (Mar. 17, 2010).

[41] 5 U.S.C. 603–605.

significant economic impact on a substantial number of small entities. The Commission recognizes that some affected entities may qualify as small businesses under the relevant thresholds. Because the Proposed Rule would reduce burdens, however, the Commission does not expect that the economic impact of the Rule will be significant.

Accordingly, this document serves as notice to the Small Business Administration of the FTC's certification of no effect. To ensure the accuracy of this certification, however, the Commission requests comment on whether the Proposed Rule will have a significant impact on a substantial number of small entities, including specific information on the number of entities that would be covered by the Proposed Rule, the number of these companies that are ''small entities,'' and the average annual burden for each entity. Although the Commission certifies under the RFA that the Rule proposed in this Notice would not, if promulgated, have a significant impact on a substantial number of small entities, the Commission has determined, nonetheless, that it is appropriate to publish an IRFA in order to inquire into the impact of the Proposed Rule on small entities. Therefore, the Commission has prepared the following analysis:

A. Description of the Reasons That Action by the Agency Is Being Considered

To provide clear disclosures to consumers and reduce labeling burden, the Commission proposes to direct manufacturers to use EPA fuel economy labels in lieu of the existing FTC label.

B. Statement of the Objectives of, and Legal Basis for, the Proposed Rule

Section 406(a) of EPAct 92 directed the Commission to establish uniform labeling requirements, to the greatest extent practicable, for alternative fuels and AFVs.[42]

C. Small Entities to Which the Proposed Rule Will Apply

Under the Small Business Size Standards issued by the Small Business Administration, automobile manufacturers qualify as small businesses if they have fewer than 1,000 employees. The Commission estimates that approximately six vehicle manufacturers or commercial importers subject to the Proposed Rule qualify as small businesses. The Commission seeks comment and information with regard to the estimated number and nature of small business entities for which the Proposed Rule would have a significant economic impact.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The Proposed Rule does not impose any additional reporting, recordkeeping, or compliance requirements. Rather, the Proposed Rule would eliminate FTC labeling requirements for certain vehicles. The classes of small entities affected by the Rule include fuel distributors, vehicle manufacturers, and fuel retailers.

E. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission has not identified any other federal statutes, rules, or policies that would duplicate, overlap, or conflict with the Proposed Rule. Indeed, the Proposed Rule would harmonize labeling requirements for new AFVs by consolidating the FTC's AFV labels with fuel economy labels required by EPA and NHTSA. The Commission invites comment and information on this issue.

F. Significant Alternatives to the Proposed Rule

The Commission seeks comment and information on the need, if any, for alternative compliance methods that would reduce the economic impact of the Rule on such small entities. If the comments filed in response to this Notice identify small entities that would be affected by the Rule, as well as alternative methods of compliance that would reduce the economic impact of the Rule on such entities, the Commission will consider the feasibility of such alternatives and determine whether they should be incorporated into the final rule.

V. Request for Comment

The Commission invites affected industries, consumer organizations, federal and state agencies, and other interested persons to submit written comments on any issue of fact, law, or policy that may bear upon the proposals under consideration. Please include explanations for any answers provided, as well as supporting evidence where appropriate. After examining the comments, the Commission will determine whether to issue specific amendments.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before August 17, 2012. Write ''Alternative Fuels Labeling (16 CFR Part 309) (Matter No. R311002)'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, such as anyone'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. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do 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 FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[43] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online, or to send them to the Commission by courier or overnight service. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/altfuelslabelingnprm* by following the instructions on the web-based form. If this Notice appears at *http://*

[42] 42 U.S.C. 13232(a). EPAct 92 did not specify what information should be displayed on these labels. Instead, it provided generally that the Commission's rule must require disclosure of ''appropriate,'' ''useful,'' and ''timely'' cost and benefit information on ''simple'' labels.

[43] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

www.regulations.gov/#!home, you also may file a comment through that Web site.

If you file your comment on paper, write ''Proposed Amendments to the Alternative Fuels Rule, (16 CFR part 309) (Matter No. R311002)'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex N), 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that 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 on or before August 17, 2012. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

VI. Proposed Rule

List of Subjects in 16 CFR Part 309

Alternative fuel, Alternative fueled vehicle, Energy conservation, Labeling, Reporting and recordkeeping, Trade practices.

The Commission proposes to amend 16 CFR part 309 as follows:

PART 309—LABELING REQUIREMENTS FOR ALTERNATIVE FUELS AND ALTERNATIVE FUELED VEHICLES

1. The authority citation for part 309 continues to read as follows:

Authority: 42 U.S.C. 13232(a).

2. In § 309.1 add new paragraph (f)(3) to read as follows:

§ 309.1 Definitions.

* * * * *

(f) * * *

(3) Any vehicle that is—

(i) A new qualified fuel cell motor vehicle (as defined in 26 U.S.C. 30B(b)(3));

(ii) A new advanced lean burn technology motor vehicle (as defined in 26 U.S.C. 30B(c)(3));

(iii) A new qualified hybrid motor vehicle (as defined in 26 U.S.C. 30B(d)(3)); or

(iv) Any other type of vehicle that the Administrator of the Environmental Protection Agency demonstrates to the Secretary would achieve a significant reduction in petroleum consumption.

* * * * *

3. In § 309.1, remove paragraphs (dd), (ee), and (ff) and redesignate (gg) as (dd).

4. Revise § 309.20 to read as follows:

309.20 Labeling requirements for new covered vehicles.

(a) Before offering a new covered vehicle for acquisition to consumers, manufacturers shall affix or cause to be affixed, and new vehicle dealers shall maintain or cause to be maintained, fuel economy labels as required by under 40 CFR part 600. For dual fueled vehicles, such labels must include driving range information for alternative fuel and gasoline operation and be otherwise consistent with provisions in 40 CFR part 600.

(b) If an aftermarket conversion system is installed on a vehicle by a person other than the manufacturer prior to such vehicle's being acquired by a consumer, the manufacturer shall provide that person with the vehicle's fuel economy label prepared pursuant to 40 CFR part 600 and ensure that new fuel economy vehicle labels are affixed to such vehicles as required by paragraph (a) of this section.

5. Remove §§ 309.21 and 309.22.

6. Redesignate § 309.23 as 309.21.

7. In Appendix A to part 309, remove figures 4, 5, 5.1, and 6.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2012–14828 Filed 6–18–12; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF STATE

22 CFR Part 120

RIN 1400–AD22

[Public Notice 7921]

Amendment to the International Traffic in Arms Regulations: Definition for ''Specially Designed''

AGENCY: Department of State.

ACTION: Proposed rule.

SUMMARY: As part of the President's Export Control Reform (ECR) Initiative, the Directorate of Defense Trade Controls (DDTC) seeks public comment on the proposed definition of ''specially designed'' to be adopted in the International Traffic in Arms Regulations (ITAR). This proposed rule is published concurrently with the Department of Commerce's proposed revision to the definition of ''specially designed'' in the Export Administration Regulations (EAR). The revisions contained in this rule are part of the Department of State's retrospective plan under E.O. 13563 completed on August 17, 2011. The Department of State's full plan can be accessed at *http://www.state.gov/documents/organization/181028.pdf.*

DATES: The Department of State will accept comments on this proposed rule until August 3, 2012.

ADDRESSES: Interested parties may submit comments within 45 days of the date of publication by one of the following methods:

- *Email: DDTCResponseTeam@state.gov* with the subject line, ''Specially Designed Definition.''
- *Internet:* At *www.regulations.gov,* search for this notice by using this notice's RIN (1400–AD22).

Comments received after that date will be considered if feasible, but consideration cannot be assured. Those submitting comments should not include any personally identifying information they do not desire to be made public or information for which a claim of confidentiality is asserted because those comments and/or transmittal emails will be made available for public inspection and copying after the close of the comment period via the Directorate of Defense Trade Controls Web site at *www.pmddtc.state.gov.* Parties who wish to comment anonymously may do so by submitting their comments via *www.regulations.gov,* leaving the fields that would identify the commenter blank and including no identifying information in the comment itself. Comments submitted via *www.regulations.gov* are immediately available for public inspection.

FOR FURTHER INFORMATION CONTACT: Ms. Candace M. J. Goforth, Director, Office of Defense Trade Controls Policy, U.S. Department of State, telephone (202) 663–2792, or email *DDTCResponseTeam@state.gov.* ATTN: Specially Designed Definition.

SUPPLEMENTARY INFORMATION: The Directorate of Defense Trade Controls (DDTC), U.S. Department of State, administers the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120–130). The items subject to the jurisdiction of the ITAR, *i.e.,* ''defense articles,'' are identified on the ITAR's U.S. Munitions List (USML) (22 CFR 121.1). With few exceptions, items not subject to the export control jurisdiction of the ITAR are subject to the jurisdiction of the Export Administration Regulations (''EAR,'' 15 CFR parts 730–774, which includes the

Commerce Control List (CCL) in Supplement No. 1 to Part 774), administered by the Bureau of Industry and Security (BIS), U.S. Department of Commerce. Both the ITAR and the EAR impose license requirements on exports and reexports. Items not subject to the ITAR or to the exclusive licensing jurisdiction of any other set of regulations are subject to the EAR.

Export Control Reform Update

The Departments of State and Commerce described in their respective Advanced Notices of Proposed Rulemaking (ANPRM) in December 2010 the Administration's plan to make the USML and the CCL positive, tiered, and aligned so that eventually they can be combined into a single control list (*see* ''Commerce Control List: Revising Descriptions of Items and Foreign Availability,'' 75 FR 76664 (December 9, 2010) and ''Revisions to the United States Munitions List,'' 75 FR 76935 (December 10, 2010)). The notices also called for the establishment of a ''bright line'' between the USML and the CCL to reduce government and industry uncertainty regarding export jurisdiction by clarifying whether particular items are subject to the jurisdiction of the ITAR or the EAR. While these remain the Administration's ultimate Export Control Reform objectives, their concurrent implementation would be problematic in the near term. In order to more quickly reach the national security objectives of greater interoperability with U.S. allies, enhancing the defense industrial base, and permitting the U.S. Government to focus its resources on controlling and monitoring the export and reexport of more significant items to destinations, end-uses, and end-users of greater concern than NATO allies and other multi-regime partners, the Administration has decided, as an interim step, to propose and implement revisions to both the USML and the CCL that are more positive, but not yet tiered.

Specifically, based in part on a review of the comments received in response to the December 2010 notices, the Administration has determined that fundamentally altering the structure of the USML by tiering and aligning it on a category-by-category basis would significantly disrupt the export control compliance systems and procedures of exporters and reexporters. For example, until the entire USML was revised and became final, some USML categories would follow the legacy numbering and control structures while the newly revised categories would follow a completely different numbering structure. In order to allow for the national security benefits to flow from re-aligning the jurisdictional status of defense articles that no longer warrant control on the USML on a category-by-category basis while minimizing the impact on exporters' internal control and jurisdictional and classification marking systems, the Administration plans to proceed with building positive lists now and afterward return to structural changes.

Definition for ''Specially Designed''

Although one of the goals of the ECR Initiative is to describe USML controls without using design intent criteria, a few of the controls in the proposed revision nonetheless use the term ''specially designed.'' It is, therefore, necessary for the Department to define the term. Two proposed definitions have been published to date.

The Department first provided a draft definition for ''specially designed'' in the December 2010 ANPRM (75 FR 76935) and noted the term would be used minimally in the USML, and then only to remain consistent with the Wassenaar Arrangement or other multilateral regime obligations or when no other reasonable option exists to describe the control without using the term. The definition provided at that time is as follows: ''For the purposes of this Subchapter, the term 'specially designed' means that the end-item, equipment, accessory, attachment, system, component, or part (*see* ITAR § 121.8) has properties that (i) distinguish it for certain predetermined purposes, (ii) are directly related to the functioning of a defense article, and (iii) are used exclusively or predominantly in or with a defense article identified on the USML.''

The Department of Commerce subsequently published on July 15, 2011, for public comment, (*see* ''Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control under the United States Munitions List (USML),'' 76 FR 41958), the Administration's proposed definition of ''specially designed'' that would be common to the CCL and the USML. The public provided more than 40 comments on that proposed definition on or before the September 13, 2011, submission deadline. The Departments of State, Commerce, and Defense have reviewed those comments and related issues. The Department of State's Defense Trade Advisory Group and the Department of Commerce's Technical Advisory Committees participated in the review. The revised definition provided in this proposed rule is, but for a few modifications, identical to the definition published separately by the Department of Commerce (*see* elsewhere in this issue of the **Federal Register**). The overall goal of the definition is to differentiate between those articles ''enumerated'' on the USML and those articles not enumerated but captured in ''catch-all'' paragraphs.

The July 15 rule referenced above identified nine objectives for the revised ''specially designed'' definition. These objectives have not changed and the U.S. Government is committed to adopting a ''specially designed'' definition under the ITAR and EAR that would achieve these nine objectives. The nine objectives are to:

(1) Preclude multiple or overlapping controls of similar items within and across the two control lists;

(2) Be easily understood and applied by exporters, prosecutors, juries, and the U.S. Government—*e.g.,* by using objective, knowable, and clear requirements that do not rely upon a need to investigate and divine the intentions of the original designer of a part or the predominant market applications for such items;

(3) Be consistent with definitions used by the international export control regimes;

(4) Not include any item specifically enumerated on either the USML or the CCL and, in order to avoid a definitional loop, do not use ''specially designed'' as a control criterion;

(5) Be capable of excluding from control simple or multi-use parts such as springs, bolts, and rivets, and other types of items the U.S. Government determines do not warrant significant export controls;

(6) Apply to both descriptions of end items that are ''specially designed'' to have particular characteristics *and* to parts and components that were ''specially designed'' for particular end items;

(7) Apply to materials and software because they are ''specially designed'' to have a particular characteristic or for a particular type of end item;

(8) Not increase the current control level to ''600 series'' control or other higher end controls of items (*i.e.,* not moving items currently subject to a lower control status to a higher level control status), particularly current EAR99 items, that are now controlled at lower levels; *and*

(9) Not, merely as a result of the definition, cause historically EAR controlled items to become ITAR controlled.

The revised ''specially designed'' definition provided in this notice

proposes a simplified two paragraph structure. Paragraph (a) is to identify what commodities, as a result of development, are ''specially designed,'' and paragraph (b) is to identify what parts, components, accessories, and attachments are excluded from ''specially designed.''

Paragraph (a) begins with the phrase, ''Except for commodities described in (b), a commodity is 'specially designed' if, as a result of development, it [is within the scope of any one of three subparagraphs discussed below].'' It is the beginning of the ''catch'' in the ''catch and release'' structure of the definition. For U.S. Munitions List paragraphs containing the term ''specially designed,'' a defense article is ''caught''—it is ''specially designed''—if any of the three elements of paragraph (a) apply and none of the elements of paragraph (b) apply.

Paragraph (a) is limited by the phrase, ''if, as a result of development.'' The definition would also include a note to paragraph (b)(3) that contains the following definition of development for purposes of the proposed ''specially designed'' definition: '''Development' is related to all stages prior to serial production, such as: design, design research, design analyses, design concepts, assembly and testing of prototypes, pilot production schemes, design data, process of transforming design data into a product, configuration design, integration design, layouts.'' Thus, a defense article is caught by the threshold requirement of paragraph (a) only if someone is engaged in any of these ''development'' activities with respect to the article at issue. Three questions one may ask to determine if a defense article is within the scope of paragraph (a) are as follows: (1) Does the commodity, as a result of development, have properties peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions described in the relevant USML paragraph?; (2) Is the part or component, as a result of development, necessary for an enumerated defense article to function as designed?; and (3) Is the accessory or attachment, as a result of development, used with an enumerated defense article to enhance its usefulness or effectiveness? If the answer to all three questions is ''no,'' then the commodity is not ''specially designed'' and further analysis pursuant to paragraph (b) is not necessary. If the answer to any one of the questions is ''yes,'' then the exporter or reexporter must determine whether any one of the five parts of paragraph (b) of the definition applies. If any one of the five paragraph (b) exclusions apply, then the commodity is not ''specially designed.'' If none do, then the commodity is ''specially designed.''

Paragraph (a)(1) would capture a commodity if it, as a result of ''development,'' ''has properties peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions described in the relevant U.S. Munitions List paragraph.'' This criterion is essentially the same as was proposed in the July 15 proposed definition. Based on the comments, the public found this part of the definition clear. As an example, even if a commodity is capable of use with a controlled defense article, it is not captured by this part of paragraph (a) unless someone did something during the commodity's development so that it would achieve or exceed the performance levels, characteristics, or functions described in a referenced USML paragraph.

Paragraph (a)(2) would capture a part or component if it, as a result of ''development,'' ''is necessary for an enumerated defense article to function as designed.'' The Department realizes that this element is similar to paragraph (a)(1), but believes that it needs to be listed separately because not all descriptions of parts and components on the USML include performance levels, characteristics, or functions as a basis for control. Paragraph (a)(2) thus will capture parts and components that are necessary for another article on the USML to function ''as designed.'' If an article will function ''as designed'' without the part or component at issue, then that part or component is not captured by paragraph (a)(2).

Paragraph (a)(3) would capture an accessory or attachment if it, as a result of ''development,'' ''is used with an enumerated defense article to enhance its usefulness or effectiveness.'' This phrase is from the ITAR's current and the EAR's proposed definitions of ''accessory,'' ''attachment,'' and ''equipment.''

The July 15 proposed ''specially designed'' definition included two exclusion paragraphs (paragraphs (c) and (d)) that identified what items would not be ''specially designed.'' Many commenting parties requested the July 15 definition be simplified and shortened, including the exclusion paragraphs. The Department has addressed these concerns by adopting a simplified structure for the exclusion paragraph (b) included in this proposed rule. Specifically, any part, component, accessory, or attachment that is described in an exclusion paragraph under (b)(1), (b)(2), (b)(3), (b)(4), or (b)(5), would *not* be controlled by a USML ''catch-all'' paragraph.

These five exclusions under paragraph (b) would play an important role in this proposed ''specially designed'' definition. Paragraphs (a)(2) and (a)(3) are broad enough to capture all the defense articles that would be potentially ''specially designed,'' but in practice would capture a larger set of parts, components, accessories, and attachments than is intended. Paragraph (b) would work to release from inclusion under ''specially designed'' specific and non-specific parts, components, accessories, and attachments, consistent with existing U.S. export control and international commitments. The exclusions under paragraph (b) as proposed in this rule would refine the set of parts, components, accessories, and attachments that would be subject to the ''catch-all'' controls on the USML. In this way, paragraphs (a) and (b) are inextricably linked and are intended to work together to identify the parts, components, accessories, and attachments that need to be treated as ''specially designed'' for purposes of the ''catch-all'' provisions on the USML.

Paragraph (b) codifies the principle in ITAR § 120.3 that, in general, a commodity should not be ITAR controlled if has a predominant civil application or has performance equivalent (defined by form, fit, and function) to a commodity used for civil applications. If such a commodity warrants control under the ITAR because it provides the United States with a critical military or intelligence advantage or for another reason, then it is or should be enumerated on the USML, as described in the ''bright line,'' ''positive list'' objectives in the December 2010 ANPRM (75 FR 76935).

An example of an article that would not be ''specially designed'' as a result of proposed paragraph (b)(4) is one that was or is being developed to be interchangeable between an aircraft enumerated in USML Category VIII *and* also an aircraft controlled by ECCN 9A610.a. Such a conclusion for a particular article does not necessarily mean that the article is not subject to export controls. The article may, for example, be enumerated on the USML and, thus, ITAR controlled. In addition, if it is not enumerated on the USML, it might fall with the scope of the controls at ECCN 9A610.x. The jurisdiction of an article must be determined on a case-by-case basis. Proposed paragraph (b)(4) merely states that such an article would not be within the scope of a ''catch-all'' paragraph of the USML in light of its

commonality with non-ITAR controlled articles.

Paragraph (a) would create more objective tests for what defense articles, as a result of development, would be ''specially designed'' based on the criteria identified in (a)(1), (a)(2), *or* (a)(3). Paragraph (b) would create more objective tests for what parts, components, accessories, and attachments are excluded from ''specially designed'' under the exclusion criteria identified in (b)(1), (b)(2), (b)(3), (b)(4) *or* (b)(5). The objective criteria identified in paragraph (a) working with the objective exclusion criteria identified in paragraph (b) would allow this proposed ''specially designed'' definition to achieve the nine stated objectives identified above for the definition.

Request for Comments

As the U.S. Government works through the proposed revisions to the USML, some solutions have been adopted that were determined to be the best of available options. With the thought that multiple perspectives would be beneficial to the USML revision process, the Department welcomes the assistance of users of the lists and requests input on the following:

(1) The key goal of this rulemaking is to establish a definition of ''specially designed'' that provides a ''bright line'' between the commodities controlled by the USML and the CCL. The public is asked to provide comment on the clarity and understanding of the proposed definition.

(2) The key goal of this rulemaking is to establish a definition of ''specially designed'' that is applicable to all USML categories. The public is asked to provide comments on the use of ''specially designed'' in proposed rules for USML revision where the comment period has already closed, as well those proposed rules with open comment periods.

Regulatory Analysis and Notices

Administrative Procedure Act

The Department of State is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules implementing this function are exempt from sections 553 (Rulemaking) and 554 (Adjudications) of the Administrative Procedure Act (APA). Although the Department is of the opinion that this rule is exempt from the rulemaking provisions of the APA, the Department is publishing this rule with a 45-day provision for public comment and without prejudice to its determination that controlling the import and export of defense services is a foreign affairs function. As noted above, and also without prejudice to the Department position that this proposed rulemaking is not subject to the APA, the Department previously published a related Advance Notice of Proposed Rulemaking (RIN 1400–AC78) on December 10, 2010 (75 FR 76935), and accepted comments for 60 days.

Regulatory Flexibility Act

Since the Department is of the opinion that this proposed rule is exempt from the rulemaking provisions of 5 U.S.C. 553, it does not require analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This proposed amendment does not involve a mandate that will 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 and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed amendment has been found not to be a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996.

Executive Orders 12372 and 13132

This proposed amendment will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this proposed amendment does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this proposed amendment.

Executive Orders 12866 and 13563

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributed impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a ''significant regulatory action,'' although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget (OMB).

Executive Order 12988

The Department of State has reviewed the proposed amendment in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175

The Department of State has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, Executive Order 13175 does not apply to this rulemaking.

Paperwork Reduction Act

Notwithstanding any other provision of law, no person is required to respond to, nor is subject to a penalty for failure to comply with, a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid OMB control number. This proposed rule would affect the following approved collections: (1) Statement of Registration, DS–2032, OMB No. 1405–0002; (2) Application/License for Permanent Export of Unclassified Defense Articles and Related Unclassified Technical Data, DSP–5, OMB No. 1405–0003; (3) Application/License for Temporary Import of Unclassified Defense Articles, DSP–61, OMB No. 1405–0013; (4) Nontransfer and Use Certificate, DSP–83, OMB No. 1405–0021; (5) Application/License for Permanent/Temporary Export or Temporary Import of Classified Defense Articles and Classified Technical Data, DSP–85, OMB No. 1405–0022; (6) Application/License for Temporary Export of Unclassified Defense Articles, DSP–73, OMB No. 1405–0023; (7) Statement of Political Contributions, Fees, or Commissions in Connection with the Sale of Defense Articles or Services,

OMB No. 1405–0025; (8) Authority to Export Defense Articles and Services Sold Under the Foreign Military Sales (FMS) Program, DSP–94, OMB No. 1405–0051; (9) Application for Amendment to License for Export or Import of Classified or Unclassified Defense Articles and Related Technical Data, DSP–6, –62, –74, –119, OMB No. 1405–0092; (10) Request for Approval of Manufacturing License Agreements, Technical Assistance Agreements, and Other Agreements, DSP–5, OMB No. 1405–0093; (11) Maintenance of Records by Registrants, OMB No. 1405–0111; (12) Annual Brokering Report, DS–4142, OMB No. 1405–0141; (13) Brokering Prior Approval (License), DS–4143, OMB No. 1405–0142; (14) Projected Sale of Major Weapons in Support of Section 25(a)(1) of the Arms Export Control Act, DS–4048, OMB No. 1405–0156; (15) Export Declaration of Defense Technical Data or Services, DS–4071, OMB No. 1405–0157; (16) Request for Commodity Jurisdiction Determination, DS–4076, OMB No. 1405–0163; (17) Request to Change End-User, End-Use, and/or Destination of Hardware, DS–6004, OMB No. 1405–0173; (18) Request for Advisory Opinion, DS–6001, OMB No. 1405–0174; (19) Voluntary Disclosure, OMB No. 1405–0179; and (20) Technology Security/Clearance Plans, Screening Records, and Non-Disclosure Agreements Pursuant to 22 CFR 126.18, OMB No. 1405–0195. The Department of State believes there will be minimal changes to these collections. The Department of State believes the combined effect of all rules to be published moving commodities from the USML to the EAR as part of the Administration's Export Control Reform would decrease the number of license applications by approximately 30,000 annually. The Department of State is looking for comments on the potential reduction in burden.

List of Subjects in 22 CFR Part 120

Arms and munitions, Exports.

Accordingly, for the reasons set forth above, Title 22, Chapter I, Subchapter M, part 120 is proposed to be amended as follows:

PART 120—PURPOSE AND DEFINITIONS

1. The authority citation for part 120 continues to read as follows:

Authority: Sections 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2794; E.O. 11958, 42 FR 4311, E.O. 13284, 68 CFR 4075, 3 CFR, 1977 Comp. p. 79; 22 U.S.C. 2658; Pub. L. 105–261, 112 Stat. 1920.

2. Add § 120.41 to read as follows:

§ 120.41 Specially designed.

When applying this definition, follow this sequential analysis: Begin with paragraph (a)(1) of this section and proceed through each subsequent paragraph. If a commodity would not be controlled as a result of the application of the standards in paragraph (a) of this section, then it is not necessary to work through paragraph (b) of this section. If a commodity would be controlled as a result of paragraph (a), then it is necessary to work through each of the elements of paragraph (b). Commodities described in any of paragraphs (b)(1) through (5) of this section are not ''specially designed'' commodities controlled on the U.S. Munitions List but may be subject to the jurisdiction of another U.S. Government regulatory agency (*see* § 120.5 of this subchapter).

(a) Except for commodities described in (b) of this section, a commodity is ''specially designed'' if, as a result of development, it:

(1) Has properties peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions described in the relevant U.S. Munitions List paragraph;

(2) Is a part (*see* § 121.8(d) of this subchapter) or component (*see* § 121.8(b) of this subchapter) necessary for an enumerated defense article to function as designed; or

(3) Is an accessory or attachment (*see* § 121.8(c) of this subchapter) used with an enumerated defense article to enhance its usefulness or effectiveness.

(b) A part, component, accessory, or attachment is not controlled by a U.S. Munitions List ''catch-all'' paragraph if it:

(1) Is enumerated in a U.S. Munitions List paragraph;

(2) Is a single unassembled part that is of a type commonly used in multiple types of commodities not enumerated on the U.S. Munitions List or the Commerce Control List, such as threaded fasteners (*e.g.,* screws, bolts, nuts, nut plates, studs, inserts), other fasteners (*e.g.,* clips, rivets, pins), basic hardware (*e.g.,* washers, spacers, insulators, grommets, bushings, springs), wire, and solder;

(3) Has the same form, fit, and performance capabilities as a part, component, accessory, or attachment used in or with a commodity that:

(i) Is or was in production (*i.e.,* not in development); and

(ii) Is not enumerated on the U.S. Munitions List;

(4) Was or is being developed with a reasonable expectation of use in or with defense articles enumerated on the U.S. Munitions List and commodities not on the U.S. Munitions List; or

(5) Was or is being developed with no reasonable expectation of use for a particular application.

Note 1: The term ''enumerated'' refers to any article which is identified on the U.S. Munitions List or the Commerce Control List.

Note 2: The term ''commodity'' refers to any article, material, or supply, except technology/technical data or software.

Note to paragraph (a)(1): An example of a commodity that, as a result of development has properties peculiarly responsible for achieving or exceeding the controlled performance levels, functions, or characteristics in a U.S. Munitions List category would be a swimmer delivery vehicle ''specially designed'' to dock with a submarine to provide submerged transport for swimmers or divers from submarines.

Note to paragraph (b): A ''catch-all'' paragraph is one that does not refer to specific types of parts, components, accessories, or attachments, but rather controls parts, components, accessories, or attachments if they were ''specially designed'' for an enumerated item. For the purposes of the U.S. Munitions List, a ''catch-all'' paragraph is delineated by the phrases ''and 'specially designed' parts and components therefor,'' or ''parts, components, accessories, attachments, and associated equipment 'specially designed' for.''

Note 1 to paragraph (b)(3): For the purposes of this definition, ''production'' means all production stages, such as product engineering, manufacture, integration, assembly (mounting), inspection, testing, and quality assurance. This includes ''serial production'' where commodities have passed production readiness testing (*i.e.,* an approved, standardized design ready for large scale production) and have been or are capable of being produced on an assembly line using the approved, standardized design.

Note 2 to paragraph (b)(3): For the purposes of this definition, ''development'' is related to all stages prior to serial production, such as: Design, design research, design analyses, design concepts, assembly and testing of prototypes, pilot production schemes, design data, process of transforming design data into a product, configuration design, integration design, layouts.

Note 3 to paragraph (b)(3): Commodities in ''production'' that are subsequently subject to ''development'' activities, such as those pertaining to quality improvements, cost reductions, or feature enhancements, remain in ''production.'' However, any new models or versions of such commodities developed from such efforts that change the basic performance or capability of the commodity are in ''development'' until and unless they enter into ''production.''

Note to paragraphs (b)(4) and (b)(5): For a defense article not to be ''specially designed''

on the basis of (b)(4) or (b)(5), documents contemporaneous with its development, in their totality, must establish the elements of paragraph (b)(4) *or* (b)(5). Such documents may include concept design information, marketing plans, declarations in patent applications, or contracts. Absent such documents, the commodity may not to be excluded from being ''specially designed'' by either paragraph (b)(4) or (b)(5).

Note to paragraph (b)(5): If you have knowledge that the commodity was or is being developed for a particular application, you may not rely on paragraph (b)(5) to conclude that the commodity was or is not ''specially designed.''

Dated: June 7, 2012.

Rose E. Gottemoeller,

Acting Under Secretary, Arms Control and International Security, Department of State.

[FR Doc. 2012–14471 Filed 6–15–12; 11:15 am]

BILLING CODE 4710–25–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

[Docket No. TTB–2012–0005; Notice No. 130]

RIN 1513–AB88

Proposed Establishment of the Elkton Oregon Viticultural Area

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau (TTB) proposes to establish the approximately 74,900-acre ''Elkton Oregon'' viticultural area in Douglas County, Oregon. The proposed viticultural area lies totally within the Umpqua Valley viticultural area and the multi-county Southern Oregon viticultural area. TTB designates viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase. TTB invites comments on this proposed addition to its regulations.

DATES: Comments must be received on or before August 20, 2012.

ADDRESSES: Please send your comments on this notice to one of the following addresses:

- *http://www.regulations.gov* (via the online comment form for this notice as posted within Docket No. TTB–2012–0005 at ''Regulations.gov,'' the Federal e-rulemaking portal);
- *U.S. mail:* Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412; or
- *Hand delivery/courier in lieu of mail:* Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Suite 200–E, Washington, DC 20005.

See the Public Participation section of this notice for specific instructions and requirements for submitting comments, and for information on how to request a public hearing.

You may view copies of this notice, selected supporting materials, and any comments TTB receives about this proposal at *http://www.regulations.gov* within Docket No. TTB–2012–0005. A link to that docket is posted on the TTB Web site at *http://www.ttb.gov/wine/wine_rulemaking.shtml* under Notice No. 130. You also may view copies of this notice, all related petitions, maps or other supporting materials, and any comments TTB receives about this proposal by appointment at the TTB Information Resource Center, 1310 G Street NW., Washington, DC 20220. Please call 202–453–2270 to make an appointment.

FOR FURTHER INFORMATION CONTACT: Karen A. Thornton, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Box 12, Washington, DC 20005; telephone 202–453–1039, ext. 175.

SUPPLEMENTARY INFORMATION:

Background on Viticultural Areas

TTB Authority

Section 105(e) of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. 205(e), authorizes the Secretary of the Treasury to prescribe regulations for the labeling of wine, distilled spirits, and malt beverages. The FAA Act provides that these regulations should, among other things, prohibit consumer deception and the use of misleading statements on labels, and ensure that labels provide the consumer with adequate information as to the identity and quality of the product. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers the FAA Act pursuant to section 1111(d) of the Homeland Security Act of 2002, codified at 6 U.S.C. 531(d). The Secretary has delegated various authorities through Treasury Department Order 120–01 (Revised), dated January 21, 2003, to the TTB Administrator to perform the functions and duties in the administration and enforcement of this law.

Part 4 of the TTB regulations (27 CFR part 4) allows the establishment of definitive viticultural areas and the use of their names as appellations of origin on wine labels and in wine advertisements. Part 9 of the TTB regulations (27 CFR part 9) contains the list of approved American viticultural areas.

Definition

Section 4.25(e)(1)(i) of the TTB regulations (27 CFR 4.25(e)(1)(i)) defines a viticultural area for American wine as a delimited grape-growing region having distinguishing features as described in part 9 of the regulations and a name and a delineated boundary as established in part 9 of the regulations. These designations allow vintners and consumers to attribute a given quality, reputation, or other characteristic of a wine made from grapes grown in an area to its geographic origin. The establishment of viticultural areas allows vintners to describe more accurately the origin of their wines to consumers and helps consumers to identify wines they may purchase. Establishment of a viticultural area is neither an approval nor an endorsement by TTB of the wine produced in that area.

Requirements

Section 4.25(e)(2) of the TTB regulations outlines the procedure for proposing an American viticultural area and provides that any interested party may petition TTB to establish a grape-growing region as a viticultural area. Section 9.12 of the TTB regulations (27 CFR 9.12) prescribes standards for petitions for the establishment or modification of American viticultural areas. Such petitions must include the following—

- Evidence that the area within the proposed viticultural area boundary is locally or nationally known by the viticultural area name specified in the petition;
- An explanation of the basis for defining the boundary of the proposed viticultural area;
- A narrative description of the features of the proposed viticultural area that affect viticulture, such as climate, geology, soil, physical features, and elevation, that make the proposed viticultural area distinctive and distinguish it from adjacent areas outside the proposed viticultural area boundary;
- A copy of the appropriate United States Geological Survey (USGS) map(s) showing the location of the proposed viticultural area, with the boundary of the proposed viticultural area clearly drawn thereon; and
- A detailed narrative description of the proposed viticultural area boundary based on USGS map markings.

Elkton Oregon Petition

TTB received a petition from Michael Landt, on behalf of himself and the owners of seven other Elkton area vineyards, proposing the establishment of the ''Elkton Oregon'' American viticultural area in Douglas County in southwestern Oregon. The proposed viticultural area encompasses approximately 74,900 acres, with 12 commercially-producing vineyards covering 96.5 acres, according to the petition. The petition also included a map indicating that the vineyards are disbursed throughout the proposed viticultural area.

The proposed Elkton Oregon viticultural area is located entirely within the larger Umpqua Valley viticultural area (27 CFR 9.89), which, in turn, is located entirely within the Southern Oregon viticultural area (27 CFR 9.179). The proposed viticultural area covers approximately 11 percent of the 689,904-acre Umpqua Valley viticultural area and 0.04 percent of the much larger 1,977,298-acre Southern Oregon viticultural area. The proposed Elkton Oregon viticultural area lies to the northwest of, but does not share any boundary with, the Red Hills Douglas County viticultural area (27 CFR 9.190), which also is entirely within the Umpqua Valley viticultural area, and it is southwest of the Willamette Valley viticultural area (27 CFR 9.90). The petition states that the marine influence from the Pacific Ocean distinguishes the proposed viticultural area from the larger Umpqua Valley.

TTB notes that the boundaries and name usage of the Umpqua Valley and Southern Oregon viticultural areas would not be affected by the establishment of the proposed Elkton Oregon viticultural area. TTB also notes that, except for its location within the existing Umpqua Valley and Southern Oregon viticultural areas, the proposed viticultural area does not overlap any other existing or proposed viticultural areas. Unless otherwise noted, all information and data contained in the below sections are from the petition for the proposed viticultural area and its supporting exhibits.

Name Evidence

The proposed Elkton Oregon viticultural area surrounds the small, incorporated town of Elkton, Oregon, which is located at the confluence of Elk Creek and the Umpqua River in northern Douglas County. The town is shown on the USGS topographical ''Elkton Oregon'' quadrangle map, and it is listed as a populated place in the USGS's Geographical Names Information System (GNIS; *http://geonames.usgs.gov/index.html*). A search of GNIS shows the name ''Elkton'' used 11 times for places, sites, or buildings in Oregon, all of which are in Douglas County, with 9 of those names appearing on the Elkton quadrangle map and the remaining 2 names appearing on maps of adjoining quadrangles.

The town of Elkton also is shown on commercially-produced road maps. For example, the American Automobile Association (AAA) map, Oregon Washington State series, published February, 2008, shows the town of Elkton in western Oregon on State Route 38 between Interstate 5 and the Pacific Ocean.

The City of Elkton Web site (*http://www.elkton-oregon.com*) lists information about the city and its elected officials. The Elkton School District Web site (*http://www.elkton.k12.or.us/*) includes information on the Elkton Grade School and Elkton High School. Other places located within the proposed viticultural area include the Elkton Baptist Church, Elkton Christian Church, Elkton Lions Club, Elkton RV Park, Elkton Cash Market, and Elkton Bait and Tackle, according to the Elkton Business Directory Web page (*http://www.elkton-oregon.com/businessdirectory*).

According to a search of the GNIS system, the Elkton name is also used for at least 123 towns and sites in 16 States. Given that the name ''Elkton'' is used for various locations throughout the United States, the petitioners included ''Oregon'' as part of the proposed viticultural area name to more specifically describe the location of the proposed viticultural area.

Boundary Evidence

The proposed Elkton Oregon viticultural area is nestled in the northwest portion of the Umpqua Valley viticultural area, which is, in turn, within the larger, multi-county Southern Oregon viticultural area. The northern portion of the boundary line and part of the western portion of the boundary line for the proposed Elkton Oregon viticultural area coincides with portions of the boundary line for the Umpqua Valley and Southern Oregon viticultural areas. The proposed viticultural area does not include the northwestern-most part of the Umpqua and Southern Oregon viticultural areas because of that area's more extreme marine influence, which is inconsistent with the distinguishing features of the proposed viticultural area.

The northern portion of the boundary line for the proposed Elkton Oregon viticultural area follows the 1,000-foot elevation line that separates the higher, more rugged mountain terrain outside the proposed viticultural area from the lower elevations within the proposed viticultural area that descend to the Umpqua River.

The proposed eastern portion of the boundary line incorporates 1,000-foot elevation lines, several connecting straight lines between marked points on USGS maps, and a portion of Elk Creek to separate the lower elevated foothills and river bottom within the proposed viticultural area from the higher mountain elevations to the east.

The proposed southern portion of the boundary line follows a 1,000-foot elevation line and then a straight line to the southwest corner of the proposed viticultural area, separating the lower elevated wide terraces along the Umpqua River from the higher elevated rugged mountain terrain to the south.

The proposed southwestern and western portions of the boundary line are connected straight lines between marked points on USGS maps that are based on the western extent of viticulture in the Elkton area, separating the proposed viticultural area from heavily timbered and remote areas to the west. The southwestern and western portions of the proposed Elkton Oregon viticultural area boundary line also coincide with the northwest portion of the boundary lines for both the Southern Oregon and Umpqua Valley viticultural areas.

Distinguishing Features

The distinguishing features of the proposed Elkton Oregon viticultural area include climate and topography.

Climate

The marine influence from the Pacific Ocean moderates temperatures and creates a unique micro-climate within the proposed Elkton Oregon viticultural area. The proximity to the Pacific Ocean, geographical location along the Umpqua River, and low elevation combine to influence the Elkton area growing season climate. The coastal marine influence brings cooling breezes, fog, and moist air inland from the Pacific coastline along the Umpqua River and into the proposed viticultural area, resulting in a milder and longer growing season with more rainfall than in the surrounding areas. The cooler temperatures make the proposed viticultural area suitable for growing cool climate varieties of grapes, such as pinot noir, that do not grow and mature as reliably in the warmer climates of the region farther to the south within the

Umpqua Valley and Southern Oregon viticultural areas.

Climate data from within the proposed Elkton Oregon viticultural area and from areas to the east and south was obtained from the Western Regional Climate Center (WRCC) Web site, which collects data from various federal, state, and local agencies. All data is from the 1971–2000 climate normals for each station and is summarized in the table below. The five weather stations from which the data was collected are located in Elkton and in Drain, Riddle, Roseburg, and Winchester, four communities within the larger Umpqua Valley and Southern Oregon viticultural areas.[1]

Location (direction from the proposed viticultural area)	Median date of last spring frost	Median date of first fall frost	Frost-free period (days)	Average growing degree day units (Winkler)[2]	Average annual precipitation (inches)
Elkton	April 2	November 9	220	2,346	52.5
Drain (East)	April 24	October 26	193	2,268	47.9
Riddle (South)	April 22	October 31	191	2,436	31.6
Roseburg (South)	April 7	November 8	215	2,683	33.7
Winchester (South)	March 28	November 5	222	2,426	35.7

The table shows that the climates of the areas to the east and south differ from the climate within the Elkton Oregon proposed viticultural area. The community to the east of the proposed viticultural area (Drain) receives less precipitation and has cooler temperatures, as shown by the shorter frost-free period and fewer growing degree day (GDD) units. Drain also has a shorter growing season than the proposed viticultural area, as indicated by a later date of last spring frost and earlier date of first fall frost.

The communities located in the region to the south of the proposed viticultural area (Riddle, Roseburg, and Winchester) are generally warmer and drier than the proposed viticultural area. The three communities all receive significantly less precipitation, with annual totals of between 31 and 35 inches. All three communities also have higher totals of GDD units, indicating a warmer climate than within the proposed viticultural area. The warmer temperatures allow grapes to ripen earlier and harvest to take place in September, whereas grapes within the cooler proposed viticultural area are frequently not ripe enough to harvest until October, according to the petitioner.

The petitioner attributes the cooler climate of the proposed Elkton Oregon viticultural area to its proximity to the Pacific Ocean. During the summer, frequent breezes travel inland from the Pacific Ocean along the Umpqua River and into the proposed viticultural area. The breezes begin in the late afternoon and contribute to lower nighttime temperatures. To offset the cooling effect of the breezes and ensure the greatest chance for grapes to ripen fully, most vineyards within the proposed viticultural area are planted at lower elevations, where temperatures are warmer than on the higher slopes. The cool nighttime temperatures resulting from the breezes also promote morning fog. Because the fog persists until late morning, vineyards do not receive much sunlight until the afternoon. As a result, vineyards within the proposed viticultural area are commonly planted on the west side of slopes, where they can benefit most from the afternoon sun. The cool, moist air from the Pacific diminishes as it travels south along the Umpqua River, resulting in little fog and few cool breezes reaching the communities south of the proposed viticultural area.

The marine influence of the Pacific Ocean also contributes to the high precipitation levels within the proposed viticultural area. Moist air traveling east from the Pacific Ocean is blocked by the mountains to the west of the proposed viticultural area and the Umpqua Valley and Southern Oregon viticultural areas and only enters these areas through gaps in the mountains created by creeks and rivers, particularly the Umpqua River. The proposed viticultural area receives more of this moist air than other regions within the larger Umpqua Valley viticultural area because the Pacific air diminishes the farther it travels from the ocean and has less moisture by the time it reaches the communities farther upstream. The amount of annual rainfall within the proposed viticultural area makes irrigation unnecessary, unlike in the areas farther to the east and south within the Umpqua Valley (''Explore Wine Regions in Oregon: Umpqua Valley,'' from the Oregon Wine Board Web site, *www.oregonwine.org*).

Topography

TTB notes that the proposed Elkton Oregon viticultural area can be described as a steep-sided basin, consisting of low-lying, relatively flat river bottom lands that quickly rise to steep slopes. The Umpqua River enters from the south, through a gap in the mountain range near the town of Kellogg, and exits through a similar gap in the northwest corner of the proposed viticultural area. The terrain of the proposed viticultural area is most notably marked by the broad turns of the Umpqua River. Along these river bends are river terraces and foothills with lower elevations and gentle slopes with grades of 2 to 12 percent, in addition to wide swaths of relatively flat river bottom land. Elk Creek, which is also bordered by river terraces and river bottom land, flows from east to west through the northeastern portion of the proposed viticultural area, joining with the Umpqua River near the town of Elkton.

The flat river bottom land and gentle river terraces of the Umpqua River and Elk Creek form the bottom of the basin. Above the river terraces and river bottom lands, the terrain quickly rises to steep, rugged hills with higher elevations, forming the sides of the basin, with the 1,000-foot elevation contour forming the rim. The 1,000-foot elevation contour was chosen to form most of the boundary line for the proposed viticultural area because above 1,000 feet the land becomes too steep and rugged for vineyards. Elevations within the proposed Elkton Oregon viticultural area vary from approximately 122 feet in elevation along the Umpqua River to a peak at the 1,754-foot elevation in the southwestern

[1] Due to the lack of weather stations in the areas to the west and north of the proposed Elkton Oregon viticultural area, data was not available for those areas.

[2] In the Winkler climatic classification system, annual heat accumulation during the growing season, measured in annual GDD, defines climatic regions. One GDD accumulates for each degree Fahrenheit that a day's mean temperature is above 50 degrees, the minimum temperature required for grapevine growth (''General Viticulture,'' by Albert J. Winkler, University of California Press, 1974, pages 61–64). Climatic region I has less than 2,500 GDD units per year; region II, 2,501 to 3,000; region III, 3,001 to 3,500; region IV, 3,501 to 4,000; and region V, 4,001 or more (*ibid.*).

portion of the proposed viticultural area near Heddin Creek.

The basin-like shape of the proposed viticultural area, along with the Umpqua River, contributes to the distinctive climate of the proposed viticultural area. Cool, moist air travels east from the Pacific Ocean along the Umpqua River and into the Elkton area, bringing mild growing season temperatures, summer breezes, and rain. The steep slopes to the north, east, and south of the proposed Elkton Oregon viticultural area trap most of the cool air and precipitation within the lower elevations of the basin, preventing much of the marine influence from travelling farther into the Umpqua Valley viticultural area. As a result, the remainder of the Umpqua Valley viticultural area is warmer and drier than the proposed Elkton viticultural area.

All of the vineyards within the proposed Elkton Oregon viticultural area are located on the gentle river terraces and foothills along the Umpqua River and Elk Creek, at elevations of 140 to 1,000 feet. In discussions with TTB, the petitioner stated that river terraces and foothills are preferable to river bottom lands because the river bottom lands have thick layers of topsoil which allows vines to grow too vigorously, requiring special cultivation techniques in order to create a favorable foliage-to-fruit ratio. The terraces and foothills, by contrast, are less fertile, with a thinner layer of topsoil over gravel. As a result, the vines require less extensive pruning to produce the desired foliage-to-fruit ratio.

The area to the west of the proposed Elkton Oregon viticultural area is desolate, heavily forested, and rugged. In this region, the Umpqua River is closely bound by the rugged terrain, with little to none of the open river bottom land or gentle river terraces and foothills found within the proposed viticultural area, until the river reaches the ocean, according to USGS maps. Elevations to the west rise to 1,410 feet along ridge lines and dip to 40 feet along the Umpqua River as it flows toward the Pacific Ocean.

To the north of the proposed viticultural area, the elevation rises rapidly to 1,871 feet at Devil Peak in the region marked on USGS maps as Devils Graveyard. TTB notes that the only lower elevation areas in this area are along the small canyon creeks that feed into the Umpqua River and Elk Creek. However, according to the USGS maps, even these small creeks are closely bound by steep hillsides and lack the gently-sloped river terraces and foothills suitable for viticulture, which are characteristic of the proposed viticultural area.

Elevations east of the proposed viticultural area range from 200 feet along Elk Creek and Big Tom Folley Creek to the 2,456-foot peak of Yellow Butte. There is very little open land east of the proposed viticultural area until Putnam Valley near the town of Drain, 14 miles from Elkton. Although numerous creeks flow through the region to the east of the proposed viticultural area, they are closely bound by steep hillsides and lack gentle slopes suitable for viticulture.

To the immediate south of the proposed viticultural area, the Umpqua River flows along a more constricted course, with sharper turns, narrower river bottom lands, and steeper slopes along its banks. Elevations are generally similar to those found within the proposed viticultural area, but the lack of open terrain and gentle slopes, particularly along the Umpqua River, distinguishes this region from the proposed viticultural area. Farther south, near the town of Roseburg (approximately 35 miles away from the proposed viticultural area), the land along the Umpqua River opens and becomes suitable for viticulture. However, in discussions with TTB, the petitioner noted that the majority of vineyards in the southern region of the Umpqua Valley viticultural area are located on river bottom land due to the steeply graded slopes and higher elevations beyond the river bottom land. By comparison, all of the vineyards within the proposed Elkton Oregon viticultural area are planted on the gentle slopes of the river terraces and foothills.

Comparisons of the Proposed Elkton Oregon Viticultural Area to the Existing Umpqua Valley and Southern Oregon Viticultural Areas

Umpqua Valley Viticultural Area

The Umpqua Valley viticultural area was established by T.D. ATF–170, which published in the **Federal Register** on March 29, 1984 (49 FR 12246).

According to T.D. ATF–170, the Umpqua Valley viticultural area is a lowland section of the Umpqua basin bounded on the west and north by the Coast Range, to the south by the Klamath Mountains, and on the east by the Cascade Range. The terrain of the surrounding area is generally steep and rugged. The 1,000-foot elevation line is the basic boundary line and a reliable indicator of suitability for cultivation in the region. Above the 1,000-foot elevation line, the terrain becomes steep and less hospitable to agriculture, and noticeable differences occur in climate, soils, topography, and vegetation.

The proposed Elkton Oregon viticultural area, similar to the Umpqua Valley viticultural area, also has low elevations with a boundary line that rises to 1,000 feet in elevation to exclude areas without viticultural potential. However, due to its smaller size, the proposed Elkton Oregon viticultural area has a less varied topography that consists primarily of river bottom lands and gently-sloping river terraces at lower elevations than much of the rest of the Umpqua Valley.

The Umpqua Valley viticultural area has cool winters and warm summers. The Coast Range Mountains to the west block most of the marine influence moving inland from the Pacific Ocean, making this viticultural area warmer and less foggy than the coastal region. The cool marine air that does enter along the Umpqua River diminishes the farther upstream it travels, so that very little reaches the southernmost portion of this viticultural area.

The Coast Range Mountains also shield the proposed Elkton Oregon viticultural area and make the proposed viticultural area warmer and drier than the region along the Pacific coast. However, because of its downstream location along the Umpqua River, the proposed viticultural area receives more cool breezes and moisture from the Pacific Ocean than areas farther upstream. As a result, the proposed viticultural area has lower temperatures and more fog than locations farther south within the Umpqua Valley viticultural area.

The Umpqua Valley viticultural area is also described as having high annual rainfall amounts, but also a notable lack of rainfall during the summer months. By contrast, annual rainfall amounts are higher within the proposed Elkton Oregon viticultural area due to moist air from the Pacific Ocean. Rainfall also occurs more frequently during the growing season within the proposed Elkton Oregon viticultural area than in the Umpqua Valley viticultural area, making vineyard irrigation unnecessary.

Southern Oregon Viticultural Area

The large 1,977,298-acre Southern Oregon viticultural area was established by T.D. TTB–19, which published in the **Federal Register** on December 8, 2004 (69 FR 70889). The Southern Oregon viticultural area boundary encompasses the established Umpqua Valley and Rogue Valley viticultural areas, as well as the Applegate Valley viticultural area, which is totally within the larger Rogue Valley viticultural area. Between the Rogue Valley and Umpqua Valley

viticultural areas is a connecting valley corridor with viticultural potential that is part of the Southern Oregon viticultural area.

T.D. TTB–19 describes the Southern Oregon viticultural area as a series of high intermountain valleys that share a warm, sunny, arid climate and contain old, complex soils derived from bedrock. To the west, the Coast Range casts a rain shadow on the south and east parts of the Southern Oregon viticultural area that reduces precipitation and buffers the cooling marine air from moving inland to the grape-growing regions. As a result, the Southern Oregon viticultural area has the warmest grape-growing conditions in Oregon and moderated precipitation.

Vineyards in the Southern Oregon viticultural area are typically situated in high mountain valleys. Vineyard elevations range from below 1,000 feet along the Umpqua River, in the northern portion of the Southern Oregon viticultural area, to 2,000 feet in the Rogue Valley viticultural area at the southern end of the Southern Oregon viticultural area. Both warm and cool wine grape varieties grow successfully in different parts of the Southern Oregon viticultural area.

The proposed Elkton Oregon viticultural area is one of the high mountain valleys within the Southern Oregon viticultural area. The proposed viticultural area, as with the Umpqua Valley viticultural area in which it would be located, broadly shares some characteristics of the larger Southern Oregon viticultural area, such as vineyards below the 2,000-foot elevation line and lower precipitation and warmer temperatures than the coastal regions to the west. However, the proposed Elkton Oregon viticultural area has a distinctive microclimate due to its proximity to both the Pacific Ocean and the Umpqua River. The marine influence from the ocean brings cooling breezes and moist air up the Umpqua River and into the proposed viticultural area, resulting in high annual precipitation amounts and a mild growing season climate. As a result of the mild climate, the proposed viticultural area produces cooler climate varieties of grapes almost exclusively because they mature more reliably than warmer varieties of grapes.

TTB Determination

TTB concludes that the petition to establish the 74,900-acre Elkton Oregon viticultural area merits consideration and public comment, as invited in this notice.

TTB notes that the name ''Elkton OR'' is an equivalent form of the petitioned-for name ''Elkton Oregon.'' Although the original petition only proposed the name ''Elkton Oregon'' in reference to the proposed viticultural area, TTB believes that also allowing the abbreviated ''Elkton OR'' as an alternative name is appropriate. TTB does not believe allowing the abbreviated form as an alternative viticultural area name would cause consumer confusion. Therefore, the part 9 regulatory text set forth in this proposed rule specifies both ''Elkton Oregon'' and ''Elkton OR'' as names for this proposed viticultural area.

Boundary Description

See the narrative boundary description of the petitioned-for viticultural area in the proposed regulatory text published at the end of this notice.

Maps

The petitioner provided the required maps, and they are listed below in the proposed regulatory text.

Impact on Current Wine Labels

Part 4 of the TTB regulations prohibits any reference on a wine label that indicates or implies an origin other than the wine's true place of origin. If TTB establishes this proposed viticultural area, its name, ''Elkton Oregon,'' and the alternative name ''Elkton OR,'' will both be recognized as terms of viticultural significance under 27 CFR 4.39(i)(3). The text of the proposed regulation clarifies this point.

On the other hand, TTB does not believe that any single part of the proposed viticultural area name standing alone, that is, ''Elkton'' or ''Oregon,'' would have viticultural significance in relation to this proposed viticultural area. The GNIS shows the name ''Elkton'' used in reference to 132 locations, including populated places in 16 states, so TTB believes that ''Elkton,'' standing alone, would not necessarily imply that a wine originated within the proposed viticultural area. Additionally, ''Oregon,'' standing alone, is locally and nationally known as referring to the State of Oregon, which is already a term of viticultural significance as a state-wide appellation of origin under 27 CFR 4.25(a)(1)(ii), and under 27 CFR 4.39(i)(3), which states that a term has viticultural significance when it is the name of a State. Therefore, the part 9 regulatory text set forth in this proposed rule specifies only ''Elkton Oregon'' and ''Elkton OR'' as terms of viticultural significance for purposes of part 4 of the TTB regulations.

If this proposed regulatory text is adopted as a final rule, wine bottlers using ''Elkton Oregon'' or ''Elkton OR'' in a brand name, including a trademark, or in another label reference as to the origin of the wine, would have to ensure that the product is eligible to use the viticultural area's full name or the alternative name of ''Elkton OR'' as an appellation of origin. The approval of the proposed Elkton Oregon viticultural area would not affect any existing viticultural area, and any bottlers using ''Umpqua Valley'' or ''Southern Oregon'' as an appellation of origin or in a brand name for wines made from grapes grown within the Umpqua Valley or Southern Oregon viticultural areas would not be affected by the establishment of this new viticultural area. The establishment of the Elkton Oregon viticultural area would allow vintners to use ''Elkton Oregon,'' ''Elkton OR,'' ''Umpqua Valley,'' and ''Southern Oregon'' as appellations of origin for wines made from grapes grown within the Elkton Oregon viticultural area if the wines meet the eligibility requirements for the appellation.

For a wine to be labeled with a viticultural area name or with a brand name that includes a viticultural area name or other term identified as being viticulturally significant in part 9 of the TTB regulations, at least 85 percent of the wine must be derived from grapes grown within the area represented by that name or other term, and the wine must meet the other conditions listed in 27 CFR 4.25(e)(3). If the wine is not eligible for labeling with the viticultural area name or other viticulturally significant term and that name or term appears in the brand name, then the label is not in compliance and the bottler must change the brand name and obtain approval of a new label. Similarly, if the viticultural area name or other viticulturally significant term appears in another reference on the label in a misleading manner, the bottler would have to obtain approval of a new label.

Different rules apply if a wine has a brand name containing a viticultural area name or other viticulturally significant term that was used as a brand name on a label approved before July 7, 1986. See 27 CFR 4.39(i)(2) for details.

Public Participation

Comments Invited

TTB invites comments from interested members of the public on whether the agency should establish the proposed Elkton Oregon viticultural area. TTB is interested in receiving comments on the sufficiency and accuracy of the name,

boundary, climate, soils, and other required information submitted in support of the petition. Please provide any available specific information in support of your comment. In addition, given the proposed Elkton Oregon viticultural area's location within both the existing Umpqua Valley and Southern Oregon viticultural areas, TTB is interested in comments on whether the evidence submitted in the petition regarding the distinguishing features of the proposed viticultural area sufficiently differentiates it from the existing Umpqua Valley and Southern Oregon viticultural areas. TTB is also interested in comments on whether the geographic features of the proposed viticultural area are so distinguishable from the surrounding Umpqua Valley and Southern Oregon viticultural areas that the proposed Elkton Oregon viticultural area should no longer be part of those viticultural areas. Please provide any available specific information in support of your comments.

Because of the potential impact of the establishment of the proposed Elkton Oregon viticultural area on wine labels that include the terms ''Elkton Oregon'' or ''Elkton OR'' as discussed above under Impact on Current Wine Labels, TTB is also interested in comments regarding whether there will be a conflict between the proposed area name and currently used brand names. If a commenter believes that a conflict will arise, the comment should describe the nature of that conflict, including any anticipated negative economic impact that approval of the proposed viticultural area will have on an existing viticultural enterprise. TTB is also interested in receiving suggestions for ways to avoid conflicts, for example, by adopting a modified or different name for the viticultural area.

Submitting Comments

You may submit comments on this notice by using one of the following three methods:

- *Federal e-Rulemaking Portal:* You may send comments via the online comment form posted with this notice within Docket No. TTB–2012–0005 on ''Regulations.gov,'' the Federal e-rulemaking portal, at *http://www.regulations.gov.* A direct link to that docket is available under Notice No. 130 on the TTB Web site at *http://www.ttb.gov/wine/wine_rulemaking.shtml.* Supplemental files may be attached to comments submitted via Regulations.gov. For complete instructions on how to use Regulations.gov, visit the site and click on the site's ''Help'' tab.
- *U.S. Mail:* You may send comments via postal mail to the Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412.
- *Hand Delivery/Courier:* You may hand-carry your comments or have them hand-carried to the Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Suite 200–E, Washington, DC 20005.

Please submit your comments by the closing date shown above in this notice. Your comments must reference Notice No. 130 and include your name and mailing address. Your comments also must be made in English, be legible, and be written in language acceptable for public disclosure. TTB does not acknowledge receipt of comments, and considers all comments as originals.

In your comment, please indicate if you are speaking on your own behalf or on behalf of an association, business, or other entity. If you are speaking on behalf of an entity, your comment must include the entity's name as well as your name and position title. If you comment via *http://www.regulations.gov,* please also enter the entity's name in the ''Organization'' blank of the online comment form. If you comment via postal mail or hand delivery/courier, please submit your entity's comment on letterhead.

You may also write to the Administrator before the comment closing date to ask for a public hearing. The Administrator reserves the right to determine whether to hold a public hearing.

Confidentiality

All submitted comments and attachments are part of the public record and subject to disclosure. Do not include, attach, or enclose any material in or with your comments that you consider to be confidential or inappropriate for public disclosure.

Public Disclosure

On the Federal e-rulemaking portal, Regulations.gov, TTB will post, and you may view, copies of this notice, selected supporting materials, and any online or mailed comments TTB receives about this. A direct link to the Regulations.gov docket containing this notice and the posted comments received on it is available on the TTB Web site at *http://www.ttb.gov/wine/wine-rulemaking.shtml* under Notice No. 130. You may also reach the docket containing this notice and the posted comments received on it through the Regulations.gov search page at *http://www.regulations.gov.* For instructions on how to use Regulations.gov, visit the site and click on ''User Guide'' under ''How to Use this Site.''

All posted comments will display the commenter's name, organization (if any), city, and State, and, in the case of mailed comments, all address information, including email addresses. TTB may omit voluminous attachments or material that TTB considers unsuitable for posting.

You may view copies of this notice, all related petitions, maps and other supporting materials, and any electronic or mailed comments TTB receives about this proposal by appointment at the TTB Information Resource Center, 1310 G Street NW., Washington, DC 20220. You may also obtain copies at 20 cents per 8.5- x 11-inch page. Contact the information specialist at the above address or by telephone at 202–453–2270 to schedule an appointment or to request copies of comments or other materials.

Regulatory Flexibility Act

TTB certifies that this proposed regulation, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed regulation imposes no new reporting, recordkeeping, or other administrative requirement. Any benefit derived from the use of a viticultural area name would be the result of a proprietor's efforts and consumer acceptance of wines from that area. Therefore, no regulatory flexibility analysis is required.

Executive Order 12866

This proposed rule is not a significant regulatory action as defined by Executive Order 12866. Therefore, it requires no regulatory assessment.

Drafting Information

Karen A. Thornton of the Regulations and Rulings Division drafted this notice.

List of Subjects in 27 CFR Part 9

Wine.

Proposed Regulatory Amendment

For the reasons discussed in the preamble, TTB proposes to amend title 27, chapter I, part 9, Code of Federal Regulations, as follows:

PART 9—AMERICAN VITICULTURAL AREAS

1. The authority citation for part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

Subpart C—Approved American Viticultural Areas

2. Subpart C is amended by adding § 9.__ to read as follows:

§ 9.__ Elkton Oregon.

(a) *Name.* The name of the viticultural area described in this section is ''Elkton Oregon''. ''Elkton OR'' may also be used as the name of the viticultural area described in this section. For purposes of part 4 of this chapter, ''Elkton Oregon'' and ''Elkton OR'' are terms of viticultural significance.

(b) *Approved maps.* The five United States Geological Survey (USGS) 1:24,000 scale topographic maps used to determine the boundary of the Elkton Oregon viticultural area are titled:

(1) Kellogg Quadrangle, Oregon-Douglas Co., Provisional Edition 1990;

(2) Old Blue Quadrangle, Oregon-Douglas Co., Provisional Edition 1990;

(3) Devils Graveyard Quadrangle, Oregon-Douglas Co., Provisional Edition 1990;

(4) Elkton Quadrangle, Oregon-Douglas Co., Provisional Edition 1990; and

(5) Yellow Butte, Oregon-Douglas Co., Provisional Edition 1987.

(c) *Boundary.* The Elkton Oregon viticultural area is located in Douglas County, Oregon. The boundary of the Elkton Oregon viticultural area is as described below:

(1) The beginning point is on the Kellogg map at the intersection of the T23S/T24S and R7W/R8W common lines. From the beginning point, proceed northwest in a straight line, crossing onto the Old Blue map, to the eastern-most intersection of the T22S/T23S and R8W/R9W common lines; then

(2) Proceed north along the R8W/R9W common line onto the Devils Graveyard map, across the Umpqua River, to the intersection of the R8W/R9W common line with the 1,000-foot elevation line along the western boundary of section 30, T21S/R8W; then

(3) Proceed generally east along the meandering 1,000-elevation line that crosses over Patterson Creek, Weatherly Creek headwaters, Cedar Creek, and House Creek; continue following the 1,000-foot elevation line onto the Elkton map, back to the Devils Graveyard map, returning to the Elkton map, and then continuing generally east and southeast across Paradise Creek and Little Tom Folley Creek, to the intersection of the 1,000-foot elevation line with an unnamed, improved road in the southeast quadrant of section 4, T22S/R7W; then

(4) Proceed south-southwest along the unnamed, improved road to the intersection of that road with an unimproved logging road, approximately 1.65 miles due north of the Mile 5 marker on Elk Creek, section 9, T22S/R7W; then

(5) Proceed southeast in a straight line, passing through the southeast corner of section 9, T22S/R7W, to Elk Creek, section 15, T22S/R7W; then

(6) Proceed generally southeast (downstream) along Elk Creek to the State Route 38 bridge at BM 172, section 15, T22S/R7W; then

(7) Proceed south in a straight line to the intersection of the 1,000-foot elevation line and the section 22 south boundary line, T22S/R7W; then

(8) Proceed generally south, west, and then north along the meandering 1,000-foot elevation line crossing back and forth between the Kellogg map and the Yellow Butte map, returning to the Yellow Butte map to the intersection of the 1,000-foot elevation line with the R7W/R6W common line on Bell Ridge, along the section 1 east boundary line, T23S/R7W; then

(9) Proceed southeast in a straight line to the intersection of the line with the 1,000-foot elevation line and an unnamed, unimproved road, section 7, T23S/R6W; then

(10) Proceed south and west along the meandering 1,000-foot elevation, crossing back and forth between the Kellogg and Yellow Butte maps, and finally returning to the Kellogg map, to the intersection of the 1,000-foot elevation line with the T23S/T24S common line along the section 3 north boundary line, T24S/R7W; and then

(11) Proceed west along the T23S/T24S common line to the beginning point.

Signed: June 11, 2012.

John J. Manfreda,

Administrator.

[FR Doc. 2012–14920 Filed 6–18–12; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2012–0441]

RIN 1625–AA00

Safety Zone; Bullhead City Regatta; Bullhead City, AZ

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing a temporary safety zone on the navigable waters of the Colorado River in Bullhead City, Arizona for the Bullhead City Regatta on August 11, 2012. This temporary safety zone is necessary to provide for the safety of the participants, crew, spectators, participating vessels, and other vessels and users of the waterway. Persons and vessels would be prohibited from entering into, transiting through or anchoring within this safety zone unless authorized by the Captain of the Port or his designated representative.

DATES: Comments and related material must be received by the Coast Guard on or before July 19, 2012.

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

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail or Delivery:* 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. Deliveries accepted between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. The telephone number is 202–366–9329.

See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for further instructions on submitting comments. To avoid duplication, please use only one of these three methods.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Petty Officer Deborah Metzger, Waterways Management, U.S. Coast Guard Sector San Diego; telephone (619) 278–7656, email *d11marineeventssd@uscg.mil.* 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:

Table of Acronyms

DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking

A. Public Participation and Request for Comments

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

1. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online at *http://www.regulations.gov*, or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov*, type the docket number USCG–2012–0441 in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Submit a Comment'' on the line associated with this rulemaking.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

2. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, type the docket number USCG–2012–0441 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

3. Privacy Act

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

4. Public Meeting

We do not plan to hold a public meeting. But you may submit a request for one using one of the methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

B. Basis and Purpose

The City of Bullhead is sponsoring the Bullhead City Regatta, which is held on the navigable waters of the Colorado River in Bullhead City, AZ. The proposed temporary safety zone is necessary to provide for the safety of the participants, crew, spectators, sponsor vessels, and other vessels and users of the waterway. This event involves people floating down the river on inflatable rafts, inner tubes and floating platforms. The size of vessels used would vary in length from 3 feet to 100 feet. Approximately 30,000 to 40,000 people would be participating in this event. The sponsor would provide 50 patrol and rescue boats to help facilitate the event and ensure public safety.

D. Discussion of Proposed Rule

The Coast Guard is proposing a temporary safety zone that would be enforced from 6 a.m. to 6 p.m. on August 11, 2012. This safety zone is necessary to provide for the safety of the crews, spectators, participants, and other vessels and users of the waterway. Persons and vessels would be prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative. The proposed temporary safety zone would include the waters of the Colorado River between Davis Camp and Rotary Park in Bullhead City, AZ. Before the effective period, the Coast Guard will publish a Local Notice to Mariners (LNM).

E. Regulatory Analyses

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

1. Regulatory Planning and Review

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. This determination is based on the size and location of the safety zone. Although the safety zone would apply to the entire width of the river, traffic would be allowed to pass through the zone with the permission of the Captain of the Port. Additionally, before the effective period, the Coast Guard will publish a Local Notice to Mariners (LNM).

2. Impact on Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered the impact of this proposed rule on small entities. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule will not have a significant economic impact on a substantial number of small entities. This proposed rule will affect the following entities, some of which might be small entities: the owners or operators of vessels intending to transit or anchor in a portion of the waters of the Colorado River between Davis Camp to Rotary Park in Bullhead City, AZ from 6 a.m. to 6 p.m. on August 11, 2012.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons. Although the safety zone would apply to the entire width of the river, traffic would be allowed to pass through the zone with the permission of the Coast Guard patrol commander. Before the effective period, the Coast Guard will publish a Local Notice to Mariners (LNM).

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the

rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

4. Collection of Information

This proposed rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has 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. We have analyzed this proposed rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the ''For Further Information Contact'' section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children From Environmental Health Risks

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

11. Indian Tribal Governments

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

12. Energy Effects

This proposed rule is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use 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.

13. Technical Standards

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

14. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves establishing a temporary safety zone. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. A preliminary environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

F. List of Subjects in 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

2. Add § 165.T11–496 to read as follows:

§ 165.T11–496 Safety zone; Bullhead City Regatta; Bullhead City, AZ.

(a) *Location.* This temporary safety zone includes the waters of the Colorado River between Davis Camp and Rotary Park in Bullhead City, AZ.

(b) *Enforcement Period.* This section will be enforced from 6 a.m. to 6 p.m. on August 11, 2012. Before the effective period, the Coast Guard will publish a Local Notice to Mariners (LNM). If the event concludes prior to the scheduled termination time, the Captain of the Port will cease enforcement of this safety zone and will announce that fact via Broadcast Notice to Mariners.

(c) *Definitions.* The following definition applies to this section: *designated representative,* means any commissioned, warrant, or petty officer of the Coast Guard on board Coast Guard, Coast Guard Auxiliary, and local, state, and federal law enforcement vessels who have been authorized to act on the behalf of the Captain of the Port.

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

(2) Mariners can request permission to transit through the safety zone from the Patrol Commander. The Patrol Commander can be contacted on VHF–FM channels 16 and 23.

(3) All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or his designated representative.

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

(5) The Coast Guard may be assisted by other federal, state, or local agencies.

Dated: May 30, 2012.

S.M. Mahoney,

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

[FR Doc. 2012–14845 Filed 6–18–12; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2011–0826; FRL–9689–7]

Approval and Promulgation of Air Quality Implementation Plans; Michigan; PSD Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the Prevention of Significant Deterioration (PSD) construction permit program of State of Michigan's State Implementation Plan (SIP) to meet the Clean Air Act (CAA) requirements for PSD in Class I Areas attaining the National Ambient Air Quality Standards.

DATES: Comments must be received on or before July 19, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2011–0826, by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: damico.genevieve@epa.gov.*
3. *Fax:* (312) 385–5501.
4. *Mail:* Genevieve Damico, Chief, Air Permits Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand Delivery:* Genevieve Damico, Chief, Air Permits Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2011–0826. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *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 *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov* your email 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 instructions on submitting comments, go to Section I of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Constantine Blathras, Environmental Engineer, at (312) 886–0671 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Constantine Blathras, Environmental Engineer, Air Permits Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–0671, *Blathras.Constantine@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

I. What should I consider as I prepare my comments for EPA?
II. What revisions are included in the proposed approval?
III. What action is EPA taking?
IV. Statutory and Executive Order Reviews

I. What should I consider as I prepare my comments for EPA?

When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
2. Follow directions—EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
4. Describe any assumptions and provide any technical information and/or data that you used.
5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
6. Provide specific examples to illustrate your concerns, and suggest alternatives.
7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
8. Make sure to submit your comments by the comment period deadline identified.

II. What revisions are included in the proposed approval?

On September 2, 2011, the Michigan Department of Environmental Quality (MDEQ) submitted to EPA for approval a revision to the Michigan SIP consisting of amendments to Michigan Air Pollution Control Rules, Part 18, PSD, and Part 19, PSD for major sources. Specifically, Michigan submitted a revision to modify Michigan Air Pollution Control Rule R. 336.2816 to

make it consistent with the Federal requirements for PSD in Class I Areas. Additionally, Michigan submitted amendments to modify Michigan's Air Pollution Control Rules R. 336.2801 and R. 336.2910 to add a significance threshold of 10 tons per year for particulate matter less than 2.5 microns in size ($PM_{2.5}$). However, EPA is not proposing action on the particulate matter amendments in this rulemaking action; we will propose action at a later date, when Michigan submits additional rules pertaining to its definitions for $PM_{2.5}$.

III. What action is EPA taking?

EPA is proposing to approve Michigan's request to revise its SIP to add rule R. 336.2816 to be consistent with Federal PSD regulations in 40 CFR 51.166(p), that require state PSD programs to have a mechanism in place to coordinate and consult with Federal land managers of Class I PSD Areas. On September 16, 2008, EPA proposed to disapprove R 336.2816 from Michigan's SIP submittal because it did not provide for such a mechanism. Michigan has now revised R. 336.2816 to be consistent with the Federal requirement. With this change, EPA is proposing to fully approve the revised R. 336.2816 for its PSD program. On March 25, 2010, EPA published a direct final approval to convert a conditional approval of the Michigan PSD SIP to full approval under section 110 of the CAA. In that notice, EPA stated that we would be taking a separate action on rule R. 336.2816(2) through (4)(requirements relating to Class I Areas).

EPA is not proposing to approve Michigan's request to revise its SIP by adding requirements for a significance level for $PM_{2.5}$. EPA has established a significance threshold to limit the applicability of PSD regulations to sources with emissions above the significance level. To be consistent with the Federal requirements, Michigan amended R. 336.2801 and R. 336.2901 to add the significance threshold for $PM_{2.5}$. Because Michigan is planning to submit additional state rules as revisions to its SIP for precursors of $PM_{2.5}$, EPA will defer action on this matter.

EPA is also proposing to approve the removal of R. 336.2830 and R. 336.2910 from the Michigan SIP. Appeals of state permit actions will be handled through the state's appeal process.

IV. Statutory and Executive Order Reviews

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. This action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

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

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

In May 2011, EPA issued its policy on consultation and coordination with Indian tribes. EPA explained that its policy is to consult on a government to government basis with Federally recognized tribal governments when EPA actions and decisions may affect tribal interests. Accordingly, EPA sent an invitation to consult with potentially interested tribes, and subsequently engaged in consultation with representatives of the Forest County Potawatomi Community regarding the Michigan proposed SIP revisions.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: June 11, 2012.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2012–14937 Filed 6–18–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2007–1034; FRL–9689–1]

Disapproval and Promulgation of Air Quality Implementation Plans; State of Utah; Revisions To Open Burning Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to disapprove a State Implementation Plan (SIP) revision submitted by the State of Utah on December 10, 1999. This revision to R307–202 Emission Standards: General Burning authorizes the State to extend the time period for open burning. EPA is proposing to disapprove the submitted revision because it does not meet the requirements of section 110(l) of the Clean Air Act (CAA). This action is being taken under section 110 of the CAA.

DATES: Comments must be received on or before July 19, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2007–1034, by one of the following methods:

- *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Email: freeman.crystal@epa.gov.*
- *Fax:* (303) 312–6064 (please alert the individual listed in the **FOR FURTHER**

INFORMATION CONTACT if you are faxing comments).

• *Mail:* Carl Daly, Director, Air Program, U.S. Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129.

• *Hand Delivery:* Carl Daly, Director, Air Program, U.S. Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop, Denver, Colorado 80202–1129. Such deliveries are only accepted Monday through Friday, 8:00 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R08–OAR–2007–1034. 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 email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA, without going through *http://www.regulations.gov,* your email 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 instructions on submitting comments, go to Section I. General Information of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly-available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Program, U.S. Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop, Denver, Colorado 80202–1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Crystal Freeman, Air Program, U.S. Environmental Protection Agency, Region 8, Mailcode 8P–AR, 1595 Wynkoop, Denver, Colorado 80202–1129, (303) 312–6602, *freeman.crystal@epa.gov.*

SUPPLEMENTARY INFORMATION:

Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The initials *AQS* mean or refer to Air Quality System.

(ii) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(iii) The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.

(iv) The initials *NAAQS* mean or refer to the National Ambient Air Quality Standards.

(v) The initials NO_X mean or refer to nitrogen oxides.

(vi) The initials $PM_{2.5}$ mean or refer to particulate matter with an aerodynamic diameter of less than 2.5 micrometers (fine particulate matter).

(vii) The initials *PSD* mean or refer to prevention of significant deterioration.

(viii) The initials *SIP* mean or refer to State Implementation Plan.

(ix) The words *Utah* or *State* mean the State of Utah.

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VI. Statutory and Executive Order Reviews

I. General Information

1. *Submitting CBI.* Do not submit CBI to EPA through *http://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

a. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

b. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

c. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

d. Describe any assumptions and provide any technical information and/or data that you used.

e. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

f. Provide specific examples to illustrate your concerns, and suggest alternatives.

g. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

h. Make sure to submit your comments by the comment period deadline identified.

II. Background

On December 10, 1999, the State of Utah submitted a SIP revision to Rule R307–202 Emission Standards: General Burning. This rule contains the following provisions: definitions and exclusions, community waste disposal, general prohibitions, permissible burning—without permit, permissible burning with permit, and special conditions.

The proposed revision is found within the 'permissible burning with permit' in section R307–202–5(3)(e)(i). The revision extends the time period during which open burning could be authorized. The current burning period in the rule is from March 30 to May 30, the revision would extend the beginning of the burning period to March 1. This would allow an additional 30 days to the open burning period. The revision to

the rule is based on a request from the Washington County Mayors Association to change the beginning date to accommodate areas of the State that were dry enough to burn earlier in the year.

III. What is the State process to submit these materials to EPA?

Section 110(k) of the CAA addresses EPA's rulemaking action on SIP submissions by states. The CAA requires states to observe certain procedural requirements in developing SIP revisions for submittal to EPA. Section 110(a)(2) of the CAA requires that each SIP revision be adopted after reasonable notice and public hearing. This must occur prior to the revision being submitted by a state to EPA.

The State of Utah's Department of Environmental Quality, Air Quality Board held public hearings to amend Rule R307–202 Emission Standards: General Burning on June 3, 1999, and also on June 30, 1999, when the revision was adopted. On December 10, 1999, Utah submitted a SIP revision to R307–202–5 to extend the burning period.

EPA has reviewed the submittal from the State of Utah and has determined that the State met the requirements for reasonable notice and public hearing under section 110(a)(2) of the CAA. The SIP submittal from Utah became complete by operation of law six months after the submission date.

IV. EPA's Review and Technical Information

EPA is proposing to disapprove Utah's SIP revision submitted on December 10, 1999. Any submittal for a SIP revision must meet section 110(l) of the CAA. Section 110(l) of the Act states that EPA shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in Section 171 of the CAA), or any other applicable requirement of the Act. An analysis should have been conducted by the State and included in the submittal showing what effect the relaxation would have on emissions of criteria pollutants. Since Utah did not provide a section 110(l) analysis, EPA lacks sufficient information to determine whether the proposed SIP relaxation would not interfere with any applicable requirement concerning attainment and maintenance of the National Ambient Air Quality Standards (NAAQS), Prevention of Significant Deterioration (PSD) increment, or any other requirement of the Act.

EPA reviewed data from the Air Quality System (AQS) Raw Data Reports for $PM_{2.5}$ violations in the entire State of Utah for the month of March from 1999 to present. These reports can be found in the docket as supporting and related materials. The $PM_{2.5}$ 24-hour NAAQS is 35 μg/m^3 for which the counties of Salt Lake, Utah, Davis and parts of Box Elder, Weber, Tooele and Cache are designated nonattainment (74 FR 58688, November 13, 2009). Based on our review, Cache County, specifically the City of Logan, showed a total of fifteen violations of the $PM_{2.5}$ standard over the years: 2001, 2004, 2005, and 2007. The AQS site ID that showed the violations in the years above was 49–005–0004. For the year 2001, the $PM_{2.5}$ violation was recorded on March 2 with a concentration of 37.5 μg/m^3. In 2004 there were five violations on March 8, 9, 10, 12, and 13, with concentrations of 35.5 μg/m^3, 53.4 μg/m^3, 52.9 μg/m^3, 41.9 μg/m^3, and 52.3 μg/m^3, respectively. For the following year of 2005, there were seven violations on the dates of March 1, 2, 4, 7, 8, 10, and 11, with concentrations of 54.5 μg/m^3, 36.6 μg/m^3, 68.4 μg/m^3, 49.6 μg/m^3, 71.0 μg/m^3, 62.0 μg/m^3, and 44.6 μg/m^3, respectively. The last year that this monitor showed violations was in 2007, on March 6 and 7, with concentrations of 46 μg/m^3 and 43 μg/m^3, respectively. In Salt Lake County, the North Salt Lake City monitor also showed an exceedance in 2007, on March 6, with a concentration of 38 μg/m^3. On March 30, 2010, there were ten exceedances that occurred in four counties: Davis, Salt Lake, Utah, and Tooele, which the State has flagged as exceptional events. The Bountiful monitor in Davis County and the Tooele City monitor in Tooele County recorded a concentration of 42 μg/m^3 and 57 μg/m^3, respectively. Four monitors in Salt Lake County: Cottonwood, Magna, Hawthorne, and Rose Park, showed concentrations of: 56 μg/m^3, 67 μg/m^3, 50 μg/m^3, and 65 μg/m^3, respectively. Additionally, four monitors in Utah County: North Provo, Lindon, Highland, and Spanish Fork, showed concentrations of 53 μg/m^3, 56 μg/m^3, 61 μg/m^3, and 48 μg/m^3, respectively.

Based on our analysis of the AQS data above, EPA finds that the relaxation of the open burning rule could contribute to further degradation of air quality within the State of Utah and especially in the $PM_{2.5}$ nonattainment areas because violations of the $PM_{2.5}$ standard have been recorded during periods covered by the proposed extension of the open burning period. In the absence of a section 110(l) analysis or demonstration by the State of Utah showing that extending the burning period would not cause a $PM_{2.5}$ violation, EPA cannot determine that this revision would not interfere with attainment and maintenance of the NAAQS. Therefore, EPA is proposing to disapprove this revision to R307–202 Emission Standards: General Burning.

V. Proposed Action

EPA is proposing to disapprove the SIP revision to R307–202 Emission Standards: General Burning submitted by the State on December 10, 1999. Without a section 110(l) analysis or demonstration, EPA finds that the revision relaxes the control on open burning and could potentially interfere with the attainment and maintenance of the NAAQS. EPA's review of the AQS data for Cache, Salt Lake, Davis, Utah, and Tooele Counties have shown violations of the $PM_{2.5}$ standard during the proposed extension of the open burning period.

VI. 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 or disapprove state choices, depending on whether they meet the criteria of the Clean Air Act. With this proposed action EPA is merely disapproving a state law as not meeting Federal requirements, and is not imposing additional requirements beyond those imposed by state law.

A. Executive Order 12866: Regulatory Planning and Review

Because the proposed disapproval only applies to a date change for Utah's General Burning window, this proposed 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 under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This proposed 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). The proposed disapproval only applies to a date change for Utah's General Burning window.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) 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 will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations 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 today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant *adverse* economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

EPA's proposal consists of a proposed disapproval of Utah's General Burning rule submission. The revision would extend the General Burning window an extra month, which requires a CAA section 110(l) analysis to show no relaxation of the rule. Since Utah did not submit a section 110(l) analysis for this revision EPA is proposing disapproval. The proposed disapproval of the SIP, if finalized, merely disapproves the state law as not meeting federal requirements and does not impose any additional requirements.

D. Unfunded Mandates Reform Act (UMRA)

This action 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);

Under Title II of UMRA, EPA has determined that this proposed rule does not contain a federal mandate that may result in expenditures that exceed the inflation-adjusted UMRA threshold of $100 million by State, local, or Tribal governments or the private sector in any one year. In addition, this proposed rule does not contain a significant federal intergovernmental mandate as described by section 203 of UMRA nor does it contain any regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the State, on the relationship between the national government and the State, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely addresses the State not fully meeting its obligation under section 110(l) of the CAA. Thus, Executive Order 13132 does not apply to this action. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

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

Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This proposed rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments. Thus, Executive Order 13175 does not apply to this rule.

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

Executive Order 13045: *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be economically significant as defined under Executive Order 12866; and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. EPA interprets EO 13045 as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it implements specific standards established by Congress in statutes. However, to the extent this proposed rule is disapproving a possible relaxation to Utah's General Burning rule, it will have a beneficial effect on children's health by not allowing additional air pollution.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires federal agencies to evaluate existing technical standards when developing a new

regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

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.

We have determined that this proposed rule, if finalized, will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it disapproves a possible relaxation of Utah's rule where increases in emissions are possible.

In addition, this proposed action does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP being disapproved would not apply in Indian country located in the state, and it would not impose substantial direct costs on tribal governments or preempt tribal law.

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 20, 2012. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2) of the CAA.)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: June 6, 2012.

James B. Martin,

Regional Administrator, Region 8.

[FR Doc. 2012–14943 Filed 6–18–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[EPA–R06–RCRA–2012–0138; FRL–9685–6]

Hazardous Waste Management System; Identification and Listing of Hazardous Waste

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to grant a petition submitted by ExxonMobil Refining and Supply Company (ExxonMobil) Baytown Refinery (BTRF) to exclude (or delist) the underflow water generated at the North Landfarm (NLF) in Baytown, Texas from the lists of hazardous wastes. EPA used the Delisting Risk Assessment Software (DRAS) Version 3.0 in the evaluation of the impact of the petitioned waste on human health and the environment.

DATES: We will accept comments until July 19, 2012. Your requests for a hearing must reach EPA by July 5, 2012. See the **FOR FURTHER INFORMATION CONTACT** section for details.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R06–RCRA–2012–0138 by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
2. *Email: jacques.wendy@epa.gov.*
3. *Mail:* Wendy Jacques, Environmental Protection Agency, Multimedia Planning and Permitting Division, RCRA Branch, Mail Code: 6PD–F, 1445 Ross Avenue, Dallas, TX 75202.
4. *Hand Delivery or Courier*: Deliver your comments to: Wendy Jacques, Environmental Protection Agency, Multimedia Planning and Permitting Division, RCRA Branch, Mail Code: 6PD–F, 1445 Ross Avenue, Dallas, TX 75202.

Instructions: Direct your comments to Docket ID No. EPA–R06–RCRA–2012–0138. 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 email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov*, your email 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, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly

available docket materials may be available either electronically in *http://www.regulations.gov* or in electronic or hard copy at the Environmental Protection Agency, RCRA Branch, 1445 Ross Avenue, Dallas, TX 75202. The hard copy RCRA regulatory docket for this proposed rule, EPA–R06–RCRA–2012–0138, is available for viewing from 8 a.m. to 5 p.m., Monday through Friday, excluding Federal holidays. The public may copy material from any regulatory docket at no cost for the first 100 pages, and at fifteen cents per page for additional copies. EPA requests that you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The interested persons wanting to examine these documents should make an appointment with the office at least 24 hours in advance.

FOR FURTHER INFORMATION CONTACT: For technical information regarding the ExxonMobil Baytown Refinery petition, contact Wendy Jacques at 214–665–7395 or by email at *jacques.wendy@epa.gov.*

Comments are due by the date specified in the **DATES** section. We will stamp comments received after the close of the comment period as late. These comments may or may not be considered in formulating a final decision. Your requests for a hearing must reach EPA by July 5, 2012. The request must contain the information described in 40 CFR 260.20(d).

SUPPLEMENTARY INFORMATION: ExxonMobil submitted a petition under 40 CFR 260.20 and 260.22(a). Section 260.20 allows any person to petition the EPA Administrator to modify or revoke any provision of parts 260 through 266, 268 and 273. Section 260.22(a) specifically provides generators the opportunity to petition the Administrator to exclude a waste on a ''generator specific'' basis from the hazardous waste lists.

EPA bases its proposed decision to grant the petition on an evaluation of waste-specific information provided by the petitioner. This decision, if finalized, would conditionally exclude the petitioned waste from the requirements of hazardous waste regulations under the Resource Conservation and Recovery Act (RCRA).

If finalized, EPA would conclude that ExxonMobil's petitioned waste is non-hazardous with respect to the original listing criteria. EPA would also conclude that ExxonMobil's process minimizes short-term and long-term threats from the petitioned waste to human health and the environment.

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I. Overview Information

A. What action is EPA proposing?

EPA is proposing to approve the delisting petition submitted by ExxonMobil to have the underflow water excluded, or delisted from the definition of a hazardous waste upon issuance of notification to the Texas Commission of Environmental Quality (TCEQ) that ExxonMobil will initiate closure activities of the North Landfarm. The underflow water is an aqueous solution which seeps through the treatment zone (soils) of the North Landfarm, making it an F039 waste.

B. Why is EPA proposing to approve this delisting?

ExxonMobil's petition requests an exclusion from the F039 waste listings pursuant to 40 CFR 260.20 and 260.22. ExxonMobil does not believe that the petitioned waste meets the criteria for which EPA listed it. ExxonMobil also believes no additional constituents or factors could cause the waste to be hazardous. EPA's review of this petition included consideration of the original listing criteria and the additional factors required by the Hazardous and Solid Waste Amendments of 1984 (HSWA). See section 3001(f) of RCRA, 42 U.S.C. 6921(f), and 40 CFR 260.22 (d)(1)–(4) (hereinafter all sectional references are to 40 CFR unless otherwise indicated). In making the initial delisting determination, EPA evaluated the petitioned waste against the listing criteria and factors cited in §§ 261.11(a)(2) and (a)(3). Based on this review, EPA agrees with the petitioner that the waste is non-hazardous with respect to the original listing criteria. If EPA had found, based on this review, that the waste remained hazardous based on the factors for which the waste was originally listed, EPA would have proposed to deny the petition. EPA evaluated the waste with respect to other factors or criteria to assess whether there is a reasonable basis to believe that such additional factors could cause the waste to be hazardous. EPA considered whether the waste is acutely toxic, the concentration of the constituents in the waste, their tendency to migrate and to bioaccumulate, their persistence in the environment once released from the waste, plausible and specific types of management of the petitioned waste, the quantities of waste generated, and waste variability. EPA believes that the petitioned waste does not meet the listing criteria and thus should not be a listed waste. EPA's proposed decision to delist waste from ExxonMobil is based on the information submitted in support of this rule, including descriptions of the wastes and analytical data from the Baytown, Texas facility.

C. How will Exxonmobil manage the waste, if it is delisted?

If the underflow water is delisted, ExxonMobil will either: (1) Continue to accumulate the underflow water in a holding tank, sample the water once each calendar year, analyze the annual sample for target constituents and submit the results to the EPA for review; or (2) route the underflow to the underflow collection system and then to the series of ditches to the underground Baytown Refinery East sewer. In the latter case, samples of the underflow water would be collected from the underflow sump once each calendar year, analyzed for target constituents and the results submitted to the EPA for

review. Ultimately, the underflow will enter the waste water treatment system where it is commingled with other wastewaters from the Baytown Chemical Plant and Baytown Olefins Plant.

D. When would the proposed delisting exclusion be finalized?

RCRA section 3001(f) specifically requires EPA to provide a notice and an opportunity for comment before granting or denying a final exclusion. Thus, EPA will not grant the exclusion until it addresses all timely public comments (including those at public hearings, if any) on this proposal.

RCRA section 3010(b)(1) at 42 U.S.C. 6930(b)(1), allows rules to become effective in less than six months when the regulated facility does not need the six-month period to come into compliance. That is the case here, because this rule, if finalized, would reduce the existing requirements for persons generating hazardous wastes.

EPA believes that this exclusion should be effective immediately upon final publication because a six-month deadline is not necessary to achieve the purpose of section 3010(b), and a later effective date would impose unnecessary hardship and expense on this petitioner. These reasons also provide good cause for making this rule effective immediately, upon final publication, under the Administrative Procedure Act, 5 U.S.C. 553(d).

E. How would this action affect the states?

Because EPA is issuing this exclusion under the Federal RCRA delisting program, only states subject to Federal RCRA delisting provisions would be affected. This would exclude states which have received authorization from EPA to make their own delisting decisions.

EPA allows states to impose their own non-RCRA regulatory requirements that are more stringent than EPA's, under section 3009 of RCRA, 42 U.S.C. 6929. These more stringent requirements may include a provision that prohibits a Federally issued exclusion from taking effect in the state. Because a dual system (that is, both Federal (RCRA) and state (non-RCRA) programs) may regulate a petitioner's waste, EPA urges petitioners to contact the state regulatory authority to establish the status of their wastes under the state law.

EPA has also authorized some states (for example, Louisiana, Oklahoma, Georgia, Illinois) to administer a RCRA delisting program in place of the Federal program, that is, to make state delisting decisions. Therefore, this exclusion does not apply in those authorized states unless that state makes the rule part of its authorized program. If ExxonMobil transports the petitioned waste to or manages the waste in any state with delisting authorization, ExxonMobil must obtain delisting authorization from that state before it can manage the waste as non-hazardous in the state.

II. Background

A. What is the history of the delisting program?

EPA published an amended list of hazardous wastes from non-specific and specific sources on January 16, 1981, as part of its final and interim final regulations implementing section 3001 of RCRA. EPA has amended this list several times and published it in 40 CFR 261.31 and 261.32.

EPA lists these wastes as hazardous because: (1) The wastes typically and frequently exhibit one or more of the characteristics of hazardous wastes identified in Subpart C of Part 261 (that is, ignitability, corrosivity, reactivity, and toxicity), (2) the wastes meet the criteria for listing contained in § 261.11(a)(2) or (a)(3), or (3) the wastes are mixed with or derived from the treatment, storage or disposal of such characteristic and listed wastes and which therefore become hazardous under § 261.3(a)(2)(iv) or (c)(2)(i), known as the ''mixture'' or ''derived-from'' rules, respectively.

Individual waste streams may vary, however, depending on raw materials, industrial processes, and other factors. Thus, while a waste described in these regulations or resulting from the operation of the mixture or derived-from rules generally is hazardous, a specific waste from an individual facility may not be hazardous.

For this reason, 40 CFR 260.20 and 260.22 provide an exclusion procedure, called delisting, which allows persons to prove that EPA should not regulate a specific waste from a particular generating facility as a hazardous waste.

B. What is a delisting petition, and what does it require of a petitioner?

A delisting petition is a request from a facility to EPA or an authorized state to exclude wastes from the list of hazardous wastes. The facility petitions EPA because it does not consider the wastes hazardous under RCRA regulations.

In a delisting petition, the petitioner must show that wastes generated at a particular facility do not meet any of the criteria for which the waste was listed. The criteria for which EPA lists a waste are in part 261 and further explained in the background documents for the listed waste.

In addition, under 40 CFR 260.22, a petitioner must prove that the waste does not exhibit any of the hazardous waste characteristics (that is, ignitability, reactivity, corrosivity, and toxicity) and present sufficient information for EPA to decide whether factors other than those for which the waste was listed warrant retaining it as a hazardous waste. (See part 261 and the background documents for the listed waste.)

Generators remain obligated under RCRA to confirm whether their waste remains non-hazardous based on the hazardous waste characteristics even if EPA has ''delisted'' the waste.

C. What factors must EPA consider in deciding whether to grant a delisting petition?

Besides considering the criteria in 40 CFR 260.22(a) and § 3001(f) of RCRA, 42 U.S.C. 6921(f), and in the background documents for the listed wastes, EPA must consider any factors (including additional constituents) other than those for which EPA listed the waste, if a reasonable basis exists that these additional factors could cause the waste to be hazardous.

EPA must also consider as hazardous waste mixtures containing listed hazardous wastes and wastes derived from treating, storing, or disposing of listed hazardous waste. See § 261.3(a)(2)(iii and iv) and (c)(2)(i), called the ''mixture'' and ''derived-from'' rules, respectively. These wastes are also eligible for exclusion and remain hazardous wastes until excluded. See 66 FR 27266 (May 16, 2001).

III. EPA's Evaluation of the Waste Information and Data

A. What waste did ExxonMobil petition EPA to delist?

In August 2010, ExxonMobil petitioned EPA to exclude from the lists of hazardous wastes contained in §§ 261.31 and 261.32, underflow water (F039) generated from its facility located in Baytown, Texas. The waste falls under the classification of listed waste pursuant to §§ 261.31 and 261.32. Specifically, in its petition, ExxonMobil requested that EPA grant a standard exclusion for 7,427 cubic yards (1,500,000 gallons) per year of the underflow water.

B. Who is ExxonMobil and what process does it use to generate the petitioned waste?

ExxonMobil Baytown Refinery processes crude oil in the production of a number of petroleum products, including fuels, solvents and chemical feedstocks. The petitioned waste is generated by downward vertical migration of liquid through the North Landfarm. The North Landfarm does not prepare or process materials. The underflow is transported by the collection system to the North Landfarm underflow sump which is the point of waste generation.

C. How did ExxonMobil sample and analyze the data in this petition?

To support its petition, ExxonMobil submitted:

(1) Historical information on waste generation and management practices; and

(2) analytical results from five samples for total concentrations of compounds of concern (COC)s;

D. What were the results of ExxonMobil's analyses?

EPA believes that the descriptions of the ExxonMobil analytical characterization provide a reasonable basis to grant ExxonMobil's petition for an exclusion of the North Landfarm underflow water. EPA believes the data submitted in support of the petition show the North Landfarm underflow water is non-hazardous. Analytical data for the North Landfarm underflow water samples were used in the DRAS to develop delisting levels. The data summaries for COCs are presented in Table I. EPA has reviewed the sampling procedures used by ExxonMobil and has determined that it satisfies EPA criteria for collecting representative samples of the variations in constituent concentrations in the landfill underflow water. In addition, the data submitted in support of the petition show that constituents in ExxonMobil's waste are presently below health-based levels used in the delisting decision-making. EPA believes that ExxonMobil has successfully demonstrated that the landfill underflow water is non-hazardous.

TABLE 1—ANALYTICAL RESULTS/MAXIMUM ALLOWABLE DELISTING CONCENTRATION

[North Landfarm Underflow Water ExxonMobil Baytown Refinery, Baytown, Texas]

Constituent	Maximum total concentration (mg/L)	Maximum allowable TCLP delisting level (mg/L)
Arsenic	ND	1.64E–01
Barium	2.99E–02	1.00E+02
Benzene	ND	5.00E–01
Benzo(a)anthracene	ND	1.36E+00
Benzo(b)fluoranthene	ND	1.03E+03
Benzo(k)fluoranthene	ND	1.22E+04
Benzo(a)pyrene	ND	1.03E+02
Cadmium	ND	5.00E+00
Carbon tetrachloride	ND	5.00E–01
Chlorobenzene	ND	2.94E+01
Chloroform	ND	1.56E+00
Chromium	ND	5.00E+00
Chrysene	ND	1.36E+02
Cobalt	9.53E–04	4.05E+00
Copper	2.23E–03	4.60E+02
o-Cresol	ND	2.00E+02
m-Cresol	ND	2.00E+02
p-Cresol	ND	2.00E+02
1,2-Dichloroethane	ND	5.00E–01
1,1-Dichloroethylene	ND	7.00E–01
2,4-Dinitrotoluene	ND	1.30E–01
Fluoride	7.20E–01	7.65E+02
Hexachlorobenzene	ND	1.30E–01
Hexachloroethane	ND	3.00E+00
Lead	9.47E–04	1.04E+01
Manganese	6.66E–01	3.11E+02
Mercury	ND	2.00E–01
Methyl ethyl ketone	ND	2.00E+00
Molybdenum	1.66E–02	6.38E+01
Nitrobenzene	ND	2.00E+00
Pentachlorophenol	ND	3.03E–01
Pyridine	ND	5.00E+00
Selenium	5.16E–03	1.00E+00
Silver	ND	5.00E+00
Total-TCDD	2.14E–09	3.74E–05
Tetrachloroethylene	ND	3.98E–01
Trichloroethylene	ND	5.00E–01
2,4,6-Trichlorophenol	ND	2.00E+00
Vinyl chloride	ND	1.56E–01
Zinc	6.05E–02	3.93E+03

Notes: These levels represent the highest constituent concentration found in any one sample and does not necessarily represent the specific level found in one sample.

ND—Constituent was not detected in any of the delisting samples collected for the petition but was in waste(s) historically applied to the North Landfarm and could reasonably be expected to be present in underflow water.

E. How did EPA evaluate the risk of delisting the waste?

For this delisting determination, EPA used such information gathered to identify plausible exposure routes (i.e., groundwater, surface water, air) for hazardous constituents present in the petitioned waste. EPA determined that disposal in a surface impoundment is the most reasonable, worst-case disposal scenario for ExxonMobil's petitioned waste. EPA applied the Delisting Risk Assessment Software (DRAS) described in 65 FR 58015 (September 27, 2000) and 65 FR 75637 (December 4, 2000), to predict the maximum allowable concentrations of hazardous constituents that may be released from the petitioned waste after disposal and determined the potential impact of the disposal of ExxonMobil's petitioned waste on human health and the environment. A copy of this software can be found on the world wide web at *http://www.epa.gov/reg5rcra/wptdiv/hazardous/delisting/dras-software.html.* In assessing potential risks to groundwater, EPA used the maximum waste volumes and the maximum reported extract concentrations as inputs to the DRAS program to estimate the constituent concentrations in the groundwater at a hypothetical receptor well down gradient from the disposal site. Using the risk level (carcinogenic risk of 10^{-5} and non-cancer hazard index of 1.0), the DRAS program can back-calculate the acceptable receptor well concentrations (referred to as compliance-point concentrations) using standard risk assessment algorithms and EPA health-based numbers. Using the maximum compliance-point concentrations and EPA's Composite Model for Underflow water Migration with Transformation Products (EPACMTP) fate and transport modeling factors, the DRAS further back-calculates the maximum permissible waste constituent concentrations not expected to exceed the compliance-point concentrations in groundwater.

EPA believes that the EPACMTP fate and transport model represents a reasonable worst-case scenario for possible groundwater contamination resulting from disposal of the petitioned waste in a surface impoundment, and that a reasonable worst-case scenario is appropriate when evaluating whether a waste should be relieved of the protective management constraints of RCRA Subtitle C. The use of some reasonable worst-case scenarios resulted in conservative values for the compliance-point concentrations and ensures that the waste, once removed from hazardous waste regulation, will not pose a significant threat to human health or the environment.

The DRAS also uses the maximum estimated waste volumes and the maximum reported total concentrations to predict possible risks associated with releases of waste constituents through surface pathways (e.g., volatilization from the impoundment). As in the above groundwater analyses, the DRAS uses the risk level, the health-based data and standard risk assessment and exposure algorithms to predict maximum compliance-point concentrations of waste constituents at a hypothetical point of exposure. Using fate and transport equations, the DRAS uses the maximum compliance-point concentrations and back-calculates the maximum allowable waste constituent concentrations (or ''delisting levels'').

In most cases, because a delisted waste is no longer subject to hazardous waste control, EPA is generally unable to predict, and does not presently control, how a petitioner will manage a waste after delisting. Therefore, EPA currently believes that it is inappropriate to consider extensive site-specific factors when applying the fate and transport model. EPA does control the type of unit where the waste is disposed. The waste must be disposed in the type of unit the fate and transport model evaluates.

The DRAS results which calculate the maximum allowable concentration of chemical constituents in the waste are presented in Table I. Based on the comparison of the DRAS and TCLP Analyses results found in Table I, the petitioned waste should be delisted because no constituents of concern tested are likely to be present or formed as reaction products or by-products in ExxonMobil waste.

F. What did EPA conclude about ExxonMobil's waste analysis?

EPA concluded, after reviewing ExxonMobil's processes that no other hazardous constituents of concern, other than those for which tested, are likely to be present or formed as reaction products or by-products in the waste. In addition, on the basis of explanations and analytical data provided by ExxonMobil, pursuant to § 260.22, EPA concludes that the petitioned waste do not exhibit any of the characteristics of ignitability, corrosivity, reactivity or toxicity. See §§ 261.21, 261.22 and 261.23, respectively.

G. What other factors did EPA consider in its evaluation?

During the evaluation of ExxonMobil's petition, EPA also considered the potential impact of the petitioned waste via non-groundwater routes (i.e., air emission and surface runoff). With regard to airborne dispersion in particular, EPA believes that exposure to airborne contaminants from ExxonMobil's petitioned waste is unlikely. Therefore, no appreciable air releases are likely from ExxonMobil's waste under any likely disposal conditions. EPA evaluated the potential hazards resulting from the unlikely scenario of airborne exposure to hazardous constituents released from ExxonMobil's waste in an open impoundment. The results of this worst-case analysis indicated that there is no substantial present or potential hazard to human health and the environment from airborne exposure to constituents from ExxonMobil's North Landfarm underflow water.

H. What is EPA's evaluation of this delisting petition?

The descriptions of ExxonMobil's hazardous waste process and analytical characterization provide a reasonable basis for EPA to grant the exclusion. The data submitted in support of the petition show that constituents in the waste are below the leachable concentrations (see Table I). EPA believes that ExxonMobil's North Landfarm underflow water will not impose any threat to human health and the environment.

Thus, EPA believes ExxonMobil should be granted an exclusion for the North Landfarm underflow water. EPA believes the data submitted in support of the petition show ExxonMobil's North Landfarm underflow water is non-hazardous. The data submitted in support of the petition show that constituents in ExxonMobil's waste are presently below the compliance point concentrations used in the delisting decision and would not pose a substantial hazard to the environment. EPA believes that ExxonMobil has successfully demonstrated that the North Landfarm underflow water is non-hazardous.

EPA therefore, proposes to grant an exclusion to ExxonMobil in Baytown, Texas, for the North Landfarm underflow water described in its petition. EPA's decision to exclude this waste is based on descriptions of the treatment activities associated with the petitioned waste and characterization of the North Landfarm underflow water.

If EPA finalizes the proposed rule, EPA will no longer regulate the petitioned waste under Parts 262 through 268 and the permitting standards of Part 270.

IV. Next Steps

A. With what conditions must the petitioner comply?

The petitioner, ExxonMobil, must comply with the requirements in 40 CFR Part 261, Appendix IX, Table 1. The text below gives the rationale and details of those requirements.

(1) Delisting Levels

This paragraph provides the levels of constituents for which ExxonMobil must test the North Landfarm underflow water, below which these wastes would be considered non-hazardous. EPA selected the set of inorganic and organic constituents specified in paragraph (1) of 40 CFR Part 261, Appendix IX, Table 1, (the exclusion language) based on information in the petition. EPA compiled the inorganic and organic constituents list from the composition of the waste, descriptions of ExxonMobil's treatment process, previous test data provided for the waste, and the respective health-based levels used in delisting decision-making. These delisting levels correspond to the allowable levels measured in the TCLP concentrations.

(2) Waste Holding and Handling

The purpose of this paragraph is to ensure that ExxonMobil manages and disposes of any North Landfarm underflow water that contains hazardous levels of inorganic and organic constituents according to Subtitle C of RCRA. Managing the North Landfarm underflow water as a hazardous waste until initial verification testing is performed will protect against improper handling of hazardous material. If EPA determines that the data collected under this paragraph do not support the data provided for in the petition, the exclusion will not cover the petitioned waste. The exclusion is effective upon publication in the **Federal Register** but the disposal as non-hazardous cannot begin until the verification sampling is completed.

(3) Verification Testing Requirements

ExxonMobil must complete a rigorous verification testing program on the North Landfarm underflow water to assure that the water does not exceed the maximum levels specified in paragraph (1) of the exclusion language. This verification program operates on two levels. The first part of the verification testing program consists of testing the North Landfarm underflow water for specified indicator parameters as per paragraph (1) of the exclusion language. ExxonMobil will test underflow water within the first 30 days after notifying the TCEQ of its intention to initiate closure activities for the North Landfarm. Once ExxonMobil notifies TCEQ that it will begin closure activities, wastes (including underflow water) will no longer be applied to the North Landfarm.

If EPA determines that the data collected under this paragraph do not support the data provided for the petition, the exclusion will not cover the generated wastes. If the data from the initial verification testing program demonstrate that the North Landfarm underflow water meets the delisting levels, ExxonMobil may commence verification testing. EPA will notify ExxonMobil in writing, if and when it may replace the testing conditions in paragraph (3)(A) with the testing conditions in (3)(B) of the exclusion language.

The second part of the verification testing program is the testing of representative samples of North Landfarm underflow water for all constituents specified in paragraph (1) of the exclusion language. EPA believes that the concentrations of the constituents of concern in the North Landfarm underflow water may vary over time. Consequently, this program will ensure that the North Landfarm underflow water is evaluated in terms of variation in constituent concentrations in the waste over time.

The proposed subsequent testing would verify that the constituent concentrations of the North Landfarm underflow water do not exhibit unacceptable temporal and spatial levels of toxic constituents. EPA is proposing to require ExxonMobil to analyze representative samples of the North Landfarm underflow water twice during the first six months of waste generation. ExxonMobil would begin sampling after confirmation that the results from the initial verification sampling are less than the Maximum Allowable Delisting Concentrations for the indicator parameters included in paragraph (1) of the exclusion language as described in paragraph (3)(A) of the exclusion language.

EPA, per paragraph 3(B) of the exclusion language, is proposing to end the subsequent testing conditions after the first six months, if ExxonMobil has demonstrated that the waste consistently meets the delisting levels. To confirm that the characteristics of the waste do not change significantly over time, ExxonMobil must continue to analyze a representative sample of the waste on an annual basis. Annual testing requires analyzing the full list of components in paragraph (1) of the exclusion language. If operating conditions change as described in paragraph (4) of the exclusion language; ExxonMobil must reinstate all testing in paragraph (1) of the exclusion language.

ExxonMobil must prove through a new demonstration that their waste meets the conditions of the exclusion. If the annual testing of the waste does not meet the delisting requirements in paragraph (1), ExxonMobil must notify EPA according to the requirements in paragraph (6) of the exclusion language. The facility must provide sampling results that support the rationale that the delisting exclusion should not be withdrawn.

(4) Changes in Operating Conditions

Paragraph (4) of the exclusion language would allow ExxonMobil the flexibility of modifying its processes (for example, changes in equipment or change in operating conditions). However, ExxonMobil must prove the effectiveness of the modified process and request approval from EPA. ExxonMobil must manage wastes generated during the new process demonstration as hazardous waste until it has obtained written approval and paragraph (3) of the exclusion language is satisfied.

(5) Data Submittals

To provide appropriate documentation that ExxonMobil's North Landfarm underflow water is meeting the delisting levels, ExxonMobil must compile, summarize, and keep delisting records on-site for a minimum of five years. It should keep all analytical data obtained through paragraph (3) of the exclusion language including quality control information for five years. Paragraph (5) of the exclusion language requires that ExxonMobil furnish these data upon request for inspection by any employee or representative of EPA or the State of Texas.

If the proposed exclusion is made final, it will apply only to 7,427 cubic yards per year of North Landfarm underflow water generated at the ExxonMobil Baytown Refinery after successful verification testing. EPA would require ExxonMobil to file a new delisting petition under any of the following circumstances and treat the underflow water as hazardous waste:

(a) If it significantly alters the process or treatment system except as described in paragraph (4) of the exclusion language;

(b) If it significantly changes from the current process(es) described in their petition; or

(c) If it makes any changes that could affect the composition or type of waste generated.

ExxonMobil must manage waste volumes greater than 7,427 cubic yards per year of North Landfarm underflow water as hazardous until EPA grants a new exclusion.

When this exclusion becomes final, ExxonMobil's management of the wastes covered by this petition would be relieved from Subtitle C jurisdiction, the North Landfarm underflow water from ExxonMobil will be treated and discharged to the Houston Ship Channel.

(6) Reopener

The purpose of paragraph (6) of the exclusion language is to require ExxonMobil to disclose new or different information related to a condition at the facility or disposal of the waste, if it is pertinent to the delisting. ExxonMobil must also use this procedure, if the waste sample in the annual testing fails to meet the levels found in paragraph (1). This provision will allow EPA to reevaluate the exclusion, if a source provides new or additional information to EPA. EPA will evaluate the information on which EPA based the decision to see if it is still correct, or if circumstances have changed so that the information is no longer correct or would cause EPA to deny the petition, if presented. This provision expressly requires ExxonMobil to report differing site conditions or assumptions used in the petition in addition to failure to meet the annual testing conditions within 10 days of discovery. If EPA discovers such information itself or from a third party, it can act on it as appropriate. The language being proposed is similar to those provisions found in RCRA regulations governing no-migration petitions at § 268.6.

EPA believes that it has the authority under RCRA and the Administrative Procedures Act (APA), 5 U.S.C. 551 (1978) *et seq.,* to reopen a delisting decision. EPA may reopen a delisting decision when it receives new information that calls into question the assumptions underlying the delisting.

EPA believes a clear statement of its authority in delistings is merited in light of EPA's experience. See Reynolds Metals Company at 62 FR 37694 (July 14, 1997) and 62 FR 63458 (December 1, 1997) where the delisted waste leached at greater concentrations in the environment than the concentrations predicted when conducting the TCLP, thus leading EPA to repeal the delisting. If an immediate threat to human health and the environment presents itself, EPA will continue to address these situations on a case-by-case basis. Where necessary, EPA will make a good cause finding to justify emergency rulemaking. *See* APA § 553 (b).

(7) Notification Requirements

In order to adequately track wastes that have been delisted, EPA is requiring that ExxonMobil provide a one-time notification to any state regulatory agency through which or to which the delisted waste is being carried. ExxonMobil must provide this notification 60 days before commencing this activity.

B. What happens if ExxonMobil violates the terms and conditions?

If ExxonMobil violates the terms and conditions established in the exclusion, EPA will start procedures to withdraw the exclusion. Where there is an immediate threat to human health and the environment, EPA will evaluate the need for enforcement activities on a case-by-case basis. EPA expects ExxonMobil to conduct the appropriate waste analysis and comply with the criteria explained above in paragraph (1) of the exclusion.

V. Public Comments

A. How can I as an interested party submit comments?

EPA is requesting public comments on this proposed decision. Please send three copies of your comments. Send two copies to Section Chief of the Corrective Action and Waste Minimization Section (6PD–C), Multimedia Planning and Permitting Division, Environmental Protection Agency (EPA), 1445 Ross Avenue, Dallas, Texas 75202. Identify your comments at the top with this regulatory docket number: ''EPA–R6–RCRA–2012–0138 ExxonMobil Baytown Refinery, North Landfarm underflow water delisting.'' You may submit your comments electronically to Wendy Jacques at *jacques.wendy@epa.gov.*

You should submit requests for a hearing to Section Chief of the Corrective Action and Waste Minimization Section (6PD–C), Multimedia Planning and Permitting Division, U.S. Environmental Protection Agency, 1445 Ross Avenue, Dallas, Texas 75202.

B. How may I review the docket or obtain copies of the proposed exclusion?

You may review the RCRA regulatory docket for this proposed rule at the Environmental Protection Agency Region 6, 1445 Ross Avenue, Dallas, Texas 75202. It is available for viewing in EPA Freedom of Information Act Review Room from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays. Call (214) 665–6444 for appointments. The public may copy material from any regulatory docket at no cost for the first 100 pages, and at fifteen cents per page for additional copies. Docket materials may be available both electronically in *http://www.regulations.gov* and you may also request the electronic files of the docket which do not appear on regulations.gov.

VI. Statutory and Executive Order Reviews

Under Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993), this rule is not of general applicability and therefore is not a regulatory action subject to review by the Office of Management and Budget (OMB). This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) because it applies to a particular facility only.

Because this rule is of particular applicability relating to a particular facility, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), or to sections 202, 204, and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4). Because this rule will affect only a particular facility, it will not significantly or uniquely affect small governments, as specified in section 203 of UMRA.

Because this rule will affect only a particular facility, this proposed 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, ''Federalism,'' (64 FR 43255, August 10, 1999). Thus, Executive Order 13132 does not apply to this rule.

Similarly, because this rule will affect only a particular facility, this proposed rule does not have tribal implications, as specified in Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000). Thus, Executive Order 13175 does not apply to this rule.

This rule also is not subject to Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant 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. The basis for this belief is that the Agency used the DRAS program, which considers health and safety risks to infants and children, to calculate the maximum allowable concentrations for this rule.

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

This rule does not involve technical standards; thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

As required by section 3 of Executive Order 12988, ''Civil Justice Reform,'' (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct.

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. Section 804 exempts from section 801 the following types of rules (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding this action under section 801 because this is a rule of particular applicability.

Lists of Subjects in 40 CFR Part 261

Environmental protection, Hazardous Waste, Recycling, Reporting and recordkeeping requirements.

Authority: Sec. 3001(f) RCRA, 42 U.S.C. 6921(f)

Dated: May 24, 2012.

Carl E. Edlund,

Director Multimedia Planning and Permitting Division, Region 6.

For the reasons set out in the preamble, 40 CFR part 261 is proposed to be amended as follows:

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

1. The authority citation for part 261 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, 6922, 6924(y) and 6938.

2. In Tables 1 and 2 of Appendix IX to Part 261 add the following entries in alphabetical order by facility to read as follows:

Appendix IX to Part 261—Waste Excluded Under §§ 260.20 and 260.22

TABLE 1—WASTE EXCLUDED FROM NON-SPECIFIC SOURCES

Facility	Address	Waste description
*	*	* * * * *
ExxonMobil North Landfarm.	Baytown, TX	North Landfarm underflow water (EPA Hazardous Waste Numbers F039 generated at a maximum rate of 1,500,000 gallons (7,427 cubic yards) per calendar year after issuing notice that ExxonMobil will initiate closure of the North Landfarm. For the exclusion to be valid, ExxonMobil must implement a verification testing program for each of the waste streams that meets the following Paragraphs: (1) Delisting Levels: All concentrations for those constituents must not exceed the maximum allowable concentrations in mg/l specified in this paragraph. North Landfarm underflow water. Leachable Concentrations (mg/l): Arsenic—0.164; Barium—100; Benzene—0.5; Benzo(a)anthracene—1.36; Benzo(b)fluoranthene—1030; Benzo(k)fluoranthene—12200; Benzo(a)pyrene—103; Cadmium—5; Carbon tetrachloride—0.50; Chlorobenzene—29.4; Chloroform—1.56; Chromium—5; Chrysene—136; Cobalt—4.05; Copper—460; o-Cresol—200; m-Cresol—200; p-Cresol—200; 1,2-Dichloroethane—0.50; 1,1-Dichloroethylene—0.7; 2,4-Dinitrotoluene—0.13; Fluoride—765; Hexachlorobenzene—0.13; Hexachloroethane—3; Lead—10.4; Manganese—311; Mercury—0.2; Methyl ethyl ketone—2; Molybdenum—63.8; Nitrobenzene—2; Pentachlorophenol—0.303; Pyridine—5; Selenium—1; Silver—5; Total-TCDD—.0000374; Tetrachloroethylene—0.398; Trichloroethylene—0.5; 2,4,6–Trichlorophenol—2; Vinyl Chloride—0.156; Zinc-3930. (2) Waste Holding and Handling: (A) Waste classification as non-hazardous can not begin until compliance with the limits set in paragraph (1) for the North Landfarm underflow water has occurred for two consecutive sampling events. (B) If constituent levels in any annual sample and retest sample taken by ExxonMobil exceed any of the delisting levels set in paragraph (1) for the North Landfarm underflow water, ExxonMobil must do the following: (i) notify EPA in accordance with paragraph (6) and (ii) manage and dispose the North Landfarm underflow water as hazardous waste generated under Subtitle C of RCRA. (3) Testing Requirements: Upon notification that it will initiate closure of the North Landfarm, ExxonMobil must perform analytical testing by sampling and analyzing the North Landfarm underflow water as follows: (A) Initial Verification Testing: (i) Collect one representative sample of the North Landfarm underflow water for analysis of all constituents listed in paragraph (1) within the first 30 days after notifying the TCEQ of the intention to initiate closure activities for the North Landfarm. Sampling must be performed in accordance with the sampling plan approved by EPA in support of the exclusion.

TABLE 1—WASTE EXCLUDED FROM NON-SPECIFIC SOURCES—Continued

Facility	Address	Waste description
		(ii) If the data from the initial verification testing program demonstrate that the North Landfarm underflow water meets the Maximum Allowable Delisting Concentrations for the indicator parameters included in paragraph (1), collect two representative samples of the North Landfarm underflow water twice during the first six months of waste generation. Analyze the samples for all constituents listed in paragraph (1). Any representative sample taken that exceeds the delisting levels listed in paragraph (1) indicates that the North Landfarm underflow water must continue to be disposed as hazardous waste in accordance with the applicable hazardous waste requirements until such time that two consecutive representative samples indicate compliance with delisting levels listed in paragraph (1). (iii) Within sixty (60) days after taking its last representative sample, ExxonMobil will report its analytical test data to EPA. If levels of constituents measured in the samples of the North Landfarm underflow water do not exceed the levels set forth in paragraph (1) of this exclusion for six consecutive months, ExxonMobil can manage and dispose the non-hazardous North Landfarm underflow water according to all applicable solid waste regulations. (B) Annual Testing: (i) If ExxonMobil completes the testing specified in paragraph (3) above and no sample contains a constituent at a level which exceeds the limits set forth in paragraph (1), ExxonMobil must begin annual testing as follows: ExxonMobil must test a representative grab sample of the North Landfarm underflow water for all constituents listed in paragraph (1) at least once per calendar year. If any measured constituent concentration exceeds the delisting levels set forth in paragraph (1), ExxonMobil must collect an additional representative sample within 10 days of being made aware of the exceedence and test it expeditiously for the constituent(s) which exceeded delisting levels in the original annual sample. (ii) The samples for the annual testing shall be a representative grab sample according to appropriate methods. As applicable to the method-defined parameters of concern, analyses requiring the use of SW–846 methods incorporated by reference in 40 CFR 260.11 must be used without substitution. As applicable, the SW–846 methods might include Methods 0010, 0011, 0020, 0023A, 0030, 0031, 0040, 0050, 0051, 0060, 0061, 1010A, 1020B,1110A, 1310B, 1311, 1312, 1320, 1330A, 9010C, 9012B, 9040C, 9045D, 9060A, 9070A (uses EPA Method 1664, Rev. A), 9071B, and 9095B. Methods must meet Performance Based Measurement System Criteria in which the Data Quality Objectives are to demonstrate that samples of the ExxonMobil North Landfarm underflow water are representative for all constituents listed in paragraph (1). (iii) The samples for the annual testing taken for the second and subsequent annual testing events shall be taken within the same calendar month as the first annual sample taken. (iv) The annual testing report should include the total amount of delisted waste in cubic yards disposed during the calendar year. (4) Changes in Operating Conditions: If ExxonMobil significantly changes the process described in its petition or starts any processes that generate(s) the waste that may or could affect the composition or type of waste generated (by illustration, but not limitation, changes in equipment or operating conditions of the treatment process), it must notify EPA in writing and it may no longer handle the waste generated from the new process as non-hazardous until the waste meet the delisting levels set in paragraph (1) and it has received written approval to do so from EPA. ExxonMobil must submit a modification to the petition complete with full sampling and analysis for circumstances where the waste volume changes and/or additional waste codes are added to the waste stream. (5) Data Submittals: ExxonMobil must submit the information described below. If ExxonMobil fails to submit the required data within the specified time or maintain the required records on-site for the specified time, EPA, at its discretion, will consider this sufficient basis to reopen the exclusion as described in paragraph(6). ExxonMobil must: (A) Submit the data obtained through paragraph 3 to the Chief, Corrective Action and Waste Minimization Section, Multimedia Planning and Permitting Division, U. S. Environmental Protection Agency Region 6, 1445 Ross Ave., Dallas, Texas 75202, within the time specified. All supporting data can be submitted on CD–ROM or comparable electronic media. (B) Compile records of analytical data from paragraph (3), summarized, and maintained on-site for a minimum of five years. (C) Furnish these records and data when either EPA or the State of Texas requests them for inspection. (D) Send along with all data a signed copy of the following certification statement, to attest to the truth and accuracy of the data submitted: ''Under civil and criminal penalty of law for the making or submission of false or fraudulent statements or representations (pursuant to the applicable provisions of the Federal Code, which include, but may not be limited to, 18 U.S.C. § 1001 and 42 U.S.C. § 6928), I certify that the information contained in or accompanying this document is true, accurate and complete. As to the (those) identified section(s) of this document for which I cannot personally verify its (their) truth and accuracy, I certify as the company official having supervisory responsibility for the persons who, acting under my direct instructions, made the verification that this information is true, accurate and complete.

TABLE 1—WASTE EXCLUDED FROM NON-SPECIFIC SOURCES—Continued

Facility	Address	Waste description
		If any of this information is determined by EPA in its sole discretion to be false, inaccurate or incomplete, and upon conveyance of this fact to the company, I recognize and agree that this exclusion of waste will be void as if it never had effect or to the extent directed by EPA and that the company will be liable for any actions taken in contravention of the company's RCRA and CERCLA obligations premised upon the company's reliance on the void exclusion.'' (6) Reopener (A) If, anytime after disposal of the delisted waste ExxonMobil possesses or is otherwise made aware of any environmental data (including but not limited to underflow water data or ground water monitoring data) or any other data relevant to the delisted waste indicating that any constituent identified for the delisting verification testing is at a level higher than the delisting level allowed by the Division Director in granting the petition, then the facility must report the data, in writing, to the Division Director within 10 days of first possessing or being made aware of that data. (B) If either the annual testing (and retest, if applicable) of the waste does not meet the delisting requirements in paragraph 1, ExxonMobil must report the data, in writing, to the Division Director within 10 days of first possessing or being made aware of that data. (C) If ExxonMobil fails to submit the information described in paragraphs (5), (6)(A) or (6)(B) or if any other information is received from any source, the Division Director will make a preliminary determination as to whether the reported information requires EPA action to protect human health and/or the environment. Further action may include suspending, or revoking the exclusion, or other appropriate response necessary to protect human health and the environment. (D) If the Division Director determines that the reported information requires action by EPA, the Division Director will notify the facility in writing of the actions the Division Director believes are necessary to protect human health and the environment. The notice shall include a statement of the proposed action and a statement providing the facility with an opportunity to present information as to why the proposed EPA action is not necessary. The facility shall have 10 days from receipt of the Division Director's notice to present such information. (E) Following the receipt of information from the facility described in paragraph (6)(D) or (if no information is presented under paragraph (6)(D)) the initial receipt of information described in paragraphs (5), (6)(A) or (6)(B), the Division Director will issue a final written determination describing EPA actions that are necessary to protect human health and/or the environment. Any required action described in the Division Director's determination shall become effective immediately, unless the Division Director provides otherwise. (7) Notification Requirements: ExxonMobil must do the following before transporting the delisted waste. Failure to provide this notification will result in a violation of the delisting petition and a possible revocation of the decision. (A) Provide a one-time written notification to any state Regulatory Agency to which or through which it will transport the delisted waste described above for disposal, 60 days before beginning such activities. (B) For onsite disposal a notice should be submitted to the State to notify the State that disposal of the delisted materials has begun. (C) Update one-time written notification, if it ships the delisted waste into a different disposal facility. (D) Failure to provide this notification will result in a violation of the delisting exclusion and a possible revocation of the decision.
*	*	* * * * *

TABLE 2—WASTE EXCLUDED FROM SPECIFIC SOURCES

Facility	Address	Waste description
*	*	* * * * *
ExxonMobil North Landfarm.	Baytown, TX	North Landfarm underflow water (EPA Hazardous Waste Numbers F039 generated at a maximum rate of 1,500,000 gallons (7,427 cubic yards) per calendar year after notification that ExxonMobil will initiate closure of the North Landfarm.
*	*	* * * * *

[FR Doc. 2012–14780 Filed 6–18–12; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2009–0022; 4500030114]

RIN 1018–AX68

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Coquí Llanero

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the reopening of the public comment period on the October 12, 2011, proposed designation of critical habitat for the coquí llanero (*Eleutherodactylus juanariveroi*) (a tree frog) under the Endangered Species Act of 1973, as amended (Act). We are reopening the comment period to allow all interested parties an opportunity to comment on the proposed rule, our evaluation of the potential economic impacts of the proposed designation, and the amended required determinations section. Comments previously submitted need not be resubmitted, as they will be fully considered in preparation of the final rule.

DATES: The comment period for the proposed rule that published on October 12, 2011, at 76 FR 63420, is reopened. We will consider comments received on or before July 19, 2012. Comments must be received by 11:59 p.m. Eastern Time on the closing date. Any comments that we receive after the closing date may not be considered in the final decision on this action.

ADDRESSES: You may submit written comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* Search for Docket No. FWS–R4–ES–2009–0022, which is the docket number for this rulemaking.

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R4–ES–2009–0022; Division of Policy and Directives Management, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, MS 2042–PDM, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Marelisa Rivera, Deputy Field Supervisor, Caribbean Ecological Services Field Office, P.O. Box 491, Road 301 Km 5.1, Boquerón, Puerto Rico 00622, by telephone 787–851–7297, extension 206, or by facsimile 787–851–7440. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on our proposed designation of critical habitat for the coquí llanero (an endemic Puerto Rican tree frog) that was published in the **Federal Register** on October 12, 2011 (76 FR 63420), our evaluation of potential economic impacts of the proposed designation, and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) Additional information concerning the historical and current status, range, distribution, and population size of this species, including the locations of any additional populations of this species.

(2) Any information on the biological or ecological requirements of the species and ongoing conservation measures for the species and its habitat.

(3) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to this species and regulations that may be addressing those threats.

(4) Current or planned activities in the areas occupied by the species and possible impacts of these activities on this species.

(5) The reasons why areas should or should not be designated as critical habitat as provided by section 4 of the Act (16 U.S.C. 1531 *et seq.*), including the possible risks or benefits of designating critical habitat, including risks associated with publication of maps designating any area on which this species may be located, now or in the future, as critical habitat.

(6) Specific information on:

(a) The amount and distribution of habitat for the coquí llanero;

(b) What areas, which were occupied at the time of listing (or are currently occupied) and that contain the physical and biological features essential to the conservation of this species, should be included in a critical habitat designation and why;

(c) Special management considerations or protection that may be needed for the essential features in critical habitat areas, including managing for the potential effects of climate change; and

(d) What areas not occupied at the time of listing are essential for the conservation of this species and why.

(7) Information on the projected and reasonably likely impacts of changing environmental conditions resulting from climate change on the species and its habitat.

(8) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation; in particular, any impacts on small entities or families, and the benefits of including or excluding areas that exhibit these impacts.

(9) Information on the extent to which the description of probable economic impacts of the proposed critical habitat designation is complete and accurate.

(10) Information on whether the benefits of an exclusion of any particular area may outweigh the benefits of its inclusion under section 4(b)(2) of the Act.

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

If you submitted comments or information on the proposed rule (76 FR 63420) during the initial comment period from October 12, 2011, to December 12, 2011, please do not resubmit them. We have incorporated them into the public record, and we will fully consider them in the preparation of our final determination, which will take into consideration all written comments and any additional information we receive during both comment periods. On the basis of public comments, we may, during the development of our final determination, find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

You may submit your comments and materials by one of the methods listed in the **ADDRESSES** section. We request that you send comments only by the methods described 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 Web site. We will post all hardcopy comments on *http://www.regulations.gov* as well. 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.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule and our evaluation of probable economic impacts of the proposed designation, will be available for public inspection on *http://www.regulations.gov* at Docket No. FWS–R4–ES–2009–0022, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat for the coquí llanero in this document. For more information on previous Federal actions concerning the coquí llanero, refer to the joint 12-month petition finding, proposed listing of the species as endangered, and the proposed designation of critical habitat published in the **Federal Register** on October 12, 2011 (76 FR 63420, which is available online at *http://www.regulations.gov* at Docket Number FWS–R4–ES–2009–0022) or from the Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

On October 12, 2011, we published a proposed rule to list the coquí llanero as endangered and to designate critical habitat (76 FR 63420). We proposed to designate approximately 615 acres (ac) (249 hectares (ha)) in one unit located in Sabana Seca Ward, Toa Baja, Puerto Rico, as critical habitat. That proposal had a 60-day comment period, ending December 12, 2011. We will submit for publication in the **Federal Register** a final critical habitat designation for the coquí llanero on or before October 12, 2012. We received no requests for a public hearing, and, therefore, we will not hold any public hearings as part of this rulemaking.

Critical Habitat

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction of critical habitat as a result of actions with a Federal nexus (activities conducted, funded, permitted, or authorized by Federal agencies), the educational benefits of mapping areas containing essential features that aid in the recovery of the listed species, and any benefits that may result from designation due to State or Federal laws that may apply to critical habitat.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan. In the case of the coquí llanero, the benefits of critical habitat include public awareness of the presence of the coquí llanero and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for the coquí llanero due to protection from adverse modification or destruction of critical habitat. In practice, situations with a Federal nexus exist primarily on Federal lands or for projects undertaken by Federal agencies.

We have not proposed to exclude any areas from critical habitat. However, the final decision on whether to exclude any areas will be based on the best scientific data available at the time of the final designation, including information obtained during the comment period and information about the potential economic impact of designation. Accordingly, we have evaluated the potential economic impact of the proposed critical habitat designation. A discussion of the potential economic impacts follows.

Evaluation of Potential Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we evaluate the probable economic impacts that may result from a designation of critical habitat, and to take into consideration these impacts when evaluating whether to exclude any particular area from a final critical habitat designation. To assess the potential economic impacts of a designation, we must first evaluate the impacts of restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the proposed critical habitat area. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat. The economic impact of a proposed critical habitat designation is analyzed by comparing scenarios both ''with critical habitat'' and ''without critical habitat.'' The ''without critical habitat'' scenario represents the baseline for the analysis, considering protections already in place for the species (e.g., under the Federal listing as well as other Federal, State, and local regulations). The baseline, therefore, represents the costs of all efforts to conserve the species and its habitat incurred regardless of whether critical habitat is designated. The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs; these are the costs we may consider in the final designation of critical habitat when evaluating the benefits of excluding particular areas under section 4(b)(2) of the Act.

In our evaluation of the potential economic impacts that may result from the proposed designation of critical habitat for the coquí llanero, first we identified, in an Incremental Effects Memorandum dated October 12, 2011, potential incremental costs associated with the following categories of activity:

(1) Species and habitat management; (2) residential, commercial, or industrial

development; (3) agriculture; (4) construction of new, or maintenance of, roads and highways; (5) maintenance (including vegetation removal or alteration) of drainage ditches; (6) construction or maintenance of recreational facilities; (7) construction and maintenance of telecommunication towers; (8) renewable wind power energy; (9) gas pipeline; (10) closure of landfill; and (11) transfer of Federal lands (Navy).

In this memorandum, the Service attempted to clarify the difference between the jeopardy and adverse modification standards for the coquí llanero critical habitat. Because the designation of critical habitat for coquí llanero is being proposed concurrently with the listing, it is more difficult to discern which conservation efforts are attributable to the species being listed and those which will result solely from the designation of critical habitat. However, the following specific circumstances in this case help to inform our evaluation: (1) The essential physical and biological features identified for critical habitat are the same features essential for the life requisites of the species, (2) the current range of the coquí llanero is limited to the specific area identified as critical habitat, and (3) any actions that may affect the species or its habitat would also affect designated critical habitat. The Incremental Effects Memorandum outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the potential incremental economic impacts of this proposed designation of critical habitat.

On the basis of our evaluation of the potential incremental effects, we have determined that almost all conservation-related efforts and activities will result from the protections afforded the species through State and Federal law once the species is federally listed. In other words, specific actions or efforts, or project modifications that may be recommended to conserve the species or its habitat, would be recommended because the species is protected under both State and Federal law. While it has been suggested (Vermont Law School, 2012) that the proposed Via Verde pipeline would adversely affect the coquí llanero and its proposed critical habitat, at this time the proposed alignment is not anticipated to cross or affect the habitat of the coquí llanero. Only in those cases where an action may affect the designated critical habitat and there is a Federal nexus (i.e., a Federal agency that is authorizing, funding, or permitting the action) would there be the additional requirement that the Federal action agency evaluate whether the action may adversely modify the designated critical habitat. This additional analysis by the Federal action agency is considered to be an incremental effect of the designation. While this additional analysis will require time and resources by both the Federal action agency and the Service, it is believed that, in most circumstances, these costs would predominantly be administrative in nature and also would not be significant. Because, in this circumstance, we believe that the incremental impacts of the designation, and therefore the potential economic impacts, would be limited to these administrative actions, we have determined that this rule will not result in a significant economic impact in any given year or result in a disproportionate economic impact to any particular sector.

Required Determinations—Amended

In our October 12, 2011, proposed rule (76 FR 63420), we indicated that we would defer our determination of compliance with several statutes and executive orders until we had evaluated the potential economic impacts of the designation and potential effects on landowners and stakeholders. Following our evaluation of the potential incremental economic impacts resulting from the designation of critical habitat for the coquí llanero, we have amended or affirmed our determinations below. Specifically, we affirm the information in our proposed rule concerning Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), and the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951). However, based on our evaluation of the potential economic impacts of the proposed designation of critical habitat for coquí llanero, we are amending our required determination concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

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 of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

When evaluating the potential effects of a proposed rulemaking on small entities, the RFA only requires that the agency analyze the potential impacts to directly affected entities. However, where practicable, the RFA recommends also evaluating the potential impacts to indirectly affected entities as well. To determine if the proposed designation of critical habitat for the coquí llanero would affect a substantial number of small entities, we must first evaluate whether any small entities may be directly affected by the designation.

The designation of critical habitat for an endangered or threatened species only has a regulatory effect under section 7 of the Act where a Federal action agency is involved in a particular action that may affect the designated critical habitat. Under these circumstances, only the Federal action agency is directly affected by the designation, and, therefore, the requirements of the RFA allow for the Service to limit its evaluation of the potential impacts to only the Federal action agencies. There is no further requirement under the RFA to evaluate the potential impacts to indirectly affected entities, such as small businesses, organizations, or governments. As a consequence, we have determined that the proposed designation of critical habitat for the coquí llanero would not directly affect small entities.

Based on this determination, we certify that, if promulgated, the proposed critical habitat designation would not have a significant economic impact on a substantial number of small

business entities. Therefore, an initial regulatory flexibility analysis is not required.

Authors

The primary authors of this notice are the staff members of the Caribbean Ecological Services Field Office, Southeast Region, U.S. Fish and Wildlife Service.

Authority

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

Dated: June 6, 2012.

Eileen Sobeck,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2012–14733 Filed 6–18–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2012–0002; FXES11130900000C6–123–FF09E30000]

RIN 1018–AX59

Endangered and Threatened Wildlife and Plants; Removing the Magazine Mountain Shagreen From the Federal List of Endangered and Threatened Wildlife

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; availability of draft post-delisting monitoring plan.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service or USFWS), propose to remove the terrestrial snail Magazine Mountain shagreen (*Inflectarius magazinensis;* formerly *Mesodon magazinensis*) from the Federal List of Endangered and Threatened Wildlife. This proposed action is based on a thorough review of the best available scientific and commercial data, which indicate that this species has recovered and no longer meets the definition of threatened under the Endangered Species Act of 1973, as amended (Act). Our review of the status of this species shows that all of the threats to the species have been eliminated or reduced, adequate regulatory mechanisms exist, and populations are stable so that the species is not currently, and is not likely to again become, a threatened species within the foreseeable future in all or a significant portion of its range. We seek information, data, and comments from the public regarding this proposal to delist Magazine Mountain shagreen and on the draft post-delisting monitoring plan.

DATES: We will accept comments received or postmarked on or before August 20, 2012. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES**), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Time on this date. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by August 3, 2012.

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

Electronically: Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* Search for Docket No. FWS–R4–ES–2012–0002, which is the docket number for this rulemaking. After you have located the correct docket, you may submit a comment by clicking on ''Submit a Comment.''

By hard copy: Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R4–ES–2012–0002; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

Copies of Documents: The proposed rule and draft post-delisting monitoring plan are available on *http://www.regulations.gov.* In addition, the supporting file for this proposed rule will be available for public inspection, by appointment, during normal business hours, at the Arkansas Ecological Services Field Office, 110 South Amity Road, Suite 300, Conway, AR 72032; telephone 501–513–4470. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Services (FIRS) at 800–877–8339.

FOR FURTHER INFORMATION CONTACT: Jim Boggs, Field Supervisor, U.S. Fish and Wildlife Service, Arkansas Ecological Services Field Office, 110 South Amity Road, Suite 300, Conway, AR 72032; telephone 501–513–4470. Individuals who are hearing-impaired or speech-impaired may call the Federal Information Relay Service (FIRS) at 800–877–8339 for TTY assistance 24 hours a day, 7 days a week.

SUPPLEMENTARY INFORMATION:

Public Comments

We intend that any final action resulting from this proposal will be based on the best available scientific and commercial data and will be as accurate and as effective as possible. Therefore, we request data, comments, and new information from other concerned governmental agencies, the scientific community, Tribes, industry, or other interested parties concerning this proposed rule. The comments that will be most useful and likely to influence our decisions are those that are supported by data or peer-reviewed studies and those that include citations to, and analyses of, applicable laws and regulations. Please make your comments as specific as possible and explain the basis for them. In addition, please include sufficient information with your comments to allow us to authenticate any scientific or commercial data you reference or provide. In particular we seek comments concerning the following:

(1) Biological data regarding Magazine Mountain shagreen.

(2) Relevant data concerning any threats (or lack thereof) to Magazine Mountain shagreen, including but not limited to:

(a) Whether or not climate change is a threat to the species;

(b) What regional climate change models are available, and whether they are reliable and credible to use as step-down models for assessing the effect of climate change on the species and its habitat; and

(c) The extent of Federal and State protection and management that would be provided to Magazine Mountain shagreen as a delisted species.

(3) Additional information concerning the range, distribution, population size, and trends of Magazine Mountain shagreen, including the locations of any additional populations of this species.

(4) Current or planned activities within the geographic range of Magazine Mountain shagreen that may affect or benefit the species.

(5) The draft post-delisting monitoring plan.

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 (16 U.S.C. 1531 *et seq.*) directs that a determination as to whether any species is an endangered or threatened species must be made ''solely on the basis of the best scientific and commercial data available.''

Prior to issuing a final rule on this proposed action, we will take into consideration all comments and any additional information we receive. Such information may lead to a final rule that differs from this proposal. All comments and recommendations, including names and addresses, will become part of the administrative record.

You may submit your comments and materials concerning the proposed rule by one of the methods listed in the **ADDRESSES** section. Comments must be submitted to *http://www.regulations.gov* before 11:59 p.m. (Eastern Time) on the date specified in the **DATES** section. We may not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked, by the date specified in the **DATES** section.

We will post your entire comment—including your personal identifying information—on *http://www.regulations.gov*. If you provide personal identifying information in your comment, 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.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Arkansas Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Public Hearing

Section 4(b)(5)(E) of the Act provides for one or more public hearings on this proposal, if requested. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section within 45 days after the date of this **Federal Register** publication (see **DATES**). 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.

Previous Federal Actions

On April 28, 1976, we published a proposed rule in the **Federal Register** (41 FR 17742) to list 32 snail species, including Magazine Mountain shagreen, as endangered or threatened under section 4 of the Act. However, the proposal was withdrawn in 1979 (44 FR 70796, December 10, 1979) for administrative reasons stemming from the new listing requirements of the 1978 amendments to the Act. On July 5, 1988, we published a second proposed rule in the **Federal Register** (53 FR 25179) to list Magazine Mountain shagreen as threatened. On April 17, 1989, we published a final rule in the **Federal Register** (54 FR 15206) listing Magazine Mountain shagreen as threatened. The final rule identified the following threats to Magazine Mountain shagreen: Loss of habitat due to a military proposal to conduct troop and heavy equipment movements and artillery operations on Magazine Mountain; loss of habitat due to development of a new State park on Magazine Mountain that would include construction of new buildings, roads, and trails; increased recreational use due to development of the State park; U.S. Department of Agriculture Forest Service (USFS) use of the land; and increased vulnerability to collecting and adverse habitat modification due to the species' restricted range. On February 1, 1994, we approved the Magazine Mountain Shagreen Recovery Plan (Service 1994, 12 pp.). On July 6, 2009, we initiated a 5-year status review of this species (74 FR 31972). This rule, if finalized, would complete the status review. For additional details on previous Federal actions, see discussion under the Recovery section below.

Species Information

Magazine Mountain shagreen (*Inflectarius magazinensis*) is a medium-sized, dusky brown or buff-colored snail, measuring approximately 0.5 inches (in.; 13 millimeters (mm)) wide and 0.3 in. (7 mm) high. Magazine Mountain shagreen was originally described as a subspecies of *Polygyra edentatus* (Pilsbry and Ferriss 1907, p. 545). In 1940, Pilsbry (1940 in Service 1994, p. 1) placed the snail into the genus *Mesodon* and elevated it to the status of a species based on genitalia. In 1991, Emberton (1991, p. 90) showed there were internal genitalic differences among *Mesodon* species and placed Magazine Mountain shagreen in the genus *Inflectarius,* thereby removing it from *Mesodon*. The morphology of Magazine Mountain shagreen has been summarized by Caldwell *et al.* (2009, p. 2). While the taxonomic name has changed since it was listed in 1989, Magazine Mountain shagreen has not been split from or combined with any other land snail species or subspecies. The entity that is now called *Inflectarius magazinensis* is the same entity that was known as *Mesodon magazinensis*.

Magazine Mountain shagreen is historically known from only the north slope of Magazine Mountain, Logan County, Arkansas (Pilsbry and Ferriss 1907, p. 545; Caldwell *et al.* 2009, p. 4). The south slopes of Magazine Mountain were surveyed extensively by Caldwell (1986 in Service 1994, p. 3) and Caldwell *et al.* (2009, p. 4), but they did not find Magazine Mountain shagreen on the south slopes. Populations occur in the portion of talus (a sloping mass of loose rocks) covered by vegetation or leaf litter at an elevation of 2,200 feet (ft) (670.6 meters (m)) to 2,600 ft (792.5 m) in the Savanna Sandstone formation calved (broken off or splintered into pieces) due to weathering and erosion of interbedded shales (Caldwell *et al.* 2009, p. 4; Service 1994, p. 3). The majority of talus is above 2,200 ft (670.6 m) elevation on the north and west slopes, with Magazine Mountain shagreen populations occurring between 2,400 ft (731.5 m) and 2,600 ft (792.5 m). In the north slope of Bear Hollow, the talus begins at approximately 2,200 ft (670.6 m) and in some calved areas extends to near 2,265 ft (690.4 m) elevation. In Bear Hollow, Magazine Mountain shagreen is restricted to the upper vegetated elevation end of this talus range (Caldwell *et al.* 2009, pp. 4–5).

The rocky slopes formed by the removal of softer, more easily eroded shale on the steep slopes cause the more resistant sandstone capping Magazine Mountain to break off and accumulate along the flanks. This provides the ideal habitat for Magazine Mountain shagreen (Cohoon and Vere 1988 in Caldwell *et al.* 2009, p. 6). The total amount of available habitat for Magazine Mountain shagreen consists of approximately 21.6 acres (ac; 8.75 hectares (ha)) at 27 talus habitats on Magazine Mountain's west and north slopes (Caldwell *et al.* 2009, pp. 4–5).

The geology and forest community of Magazine Mountain were summarized by Caldwell *et al.* (2009, pp. 4–12). The average annual temperature is 5.9 degrees Fahrenheit (°F; 3.3 degrees Celsius (°C)) cooler on the summit than surrounding areas, and mid-summer temperatures are frequently 10 to 25 °F (5.6 to 13.9 °C) cooler. The mean annual precipitation at the summit of Magazine Mountain is 55 in. (139.7 centimeters (cm)), approximately 5 in. (12.7 cm) greater than the lower elevations. The USFS and Arkansas Department of Parks and Tourism (ADPT) own all lands on Magazine Mountain (Service 1994, p. 3).

Little information is available on land snail associations (*e.g.,* presence/absence of other land snails to predict habitat quality or occurrence of Magazine Mountain shagreen). Caldwell *et al.* (2009, pp. 13–14) determined the relative abundance (number of a particular species as a percentage of the total population of a given area) of species found with Magazine Mountain shagreen. Land snails such as the blade vertigo (*Vertigo milium*) and pale glyph (*Glyphyalinia lewisiana*) were found only on the south slope talus, while the oakwood liptooth (*Millerelix*

dorfeuilliana) and immature Succineidae species were found on the north slope talus. Thus, presence of oakwood liptooth and immature Succineidae in habitats suitable for Magazine Mountain shagreen may predict its occurrence despite negative survey results.

Caldwell *et al.* (2009, pp. 15–16) presented the only information on life history and reproductive biology for Magazine Mountain shagreen (see Recovery section below). They also presented the first report on food habits for Magazine Mountain shagreen (Caldwell *et al.* 2009, p. 16). Magazine Mountain shagreen was found during night feeding on oak catkins (flowers), algae-covered rocks, and decaying white oak (*Quercus alba*) leaves. It has generalist feeding habits (able to utilize many food sources) similar to other land snails in the taxonomic family Polygyridae (Blinn 1963, pp. 501–502; Foster 1936, pp. 26–31; Dourson 2008, pp. 155–156; Caldwell *et al.* 2009, p. 16). Thus, food source probably is not a limiting factor for Magazine Mountain shagreen (Caldwell *et al.* 2009, p. 16).

Caldwell *et al.* (2009, p. 15) found no significant differences for ground, atmospheric, and rock crevice maximum temperatures between south and north slopes. They did, however, find significant differences for minimum temperatures. Ground, atmospheric, and rock crevice minimum temperatures were 5.6, 5.2, and 3.6 °F (3.1, 2.9 and 2.0 °C) cooler, respectively, on the north slopes than on the south slopes. Prolonged drought or concomitant warming of temperatures could adversely affect this species by compromising nesting sites, egg masses, and surface feeding (Caldwell *et al.* 2009, p. 15). However, there is no data to establish that such effects are reasonably certain to occur.

Recovery

Section 4(f) of the Act directs us to develop and implement recovery plans for the conservation and survival of endangered and threatened species unless we determine that such a plan will not promote the conservation of the species.

Recovery plans are not regulatory documents and are instead intended to establish goals for long-term conservation of listed species, define criteria that are designed to indicate when the threats facing a species have been removed or reduced to such an extent that the species may no longer need the protections of the Act, and provide guidance to our Federal, State, other governmental and non-governmental partners on methods to minimize threats to listed species. There are many paths to accomplishing recovery of a species, and recovery may be achieved without all criteria being fully met. For example, one or more criteria may be exceeded while other criteria may not yet be accomplished. In that instance, we may determine that the threats are minimized sufficiently and the species is robust enough to delist. In other cases, recovery opportunities may be discovered that were not known when the recovery plan was finalized. These opportunities may be used instead of methods identified in the recovery plan. Likewise, information on the species may be learned that was not known at the time the recovery plan was finalized. The new information may change the extent that criteria need to be met for recognizing recovery of the species. Recovery of a species is a dynamic process requiring adaptive management that may, or may not, fully follow the guidance provided in a recovery plan.

The Magazine Mountain Shagreen Recovery Plan was approved by the Service on February 1, 1994 (Service 1994, 12 pp.). The recovery plan includes the following delisting criteria:

- Magazine Mountain shagreen will be considered recovered when long-term protection of its habitat is achieved; and
- It is determined from 10 years of data that the snail population is stable or increasing.

Long-term protection of habitat will be achieved when a memorandum of understanding (MOU) between the USFS and the Service is developed and implemented. The MOU must delineate measures protecting the species and its habitat, must be continuous in effect, and must require a minimum 2-year written notification prior to cancellation by either party. Criteria for determining what constitutes a stable population were to be determined through implementation of recovery actions (Service 1994, p. 6). Through implementation of these actions, the criteria chosen as the most appropriate for determining a stable population were persistence over time (shown by the number of Magazine Mountain shagreen individuals collected annually), annual catch per unit effort, and size, quality, and stability of habitat.

The recovery plan outlines six primary recovery actions to meet the recovery criteria described above and therefore address threats to the species. The six recovery actions for delisting Magazine Mountain shagreen have been met, as described below. Additionally, the level of protection currently afforded to the species and its habitat and the current status of threats are outlined in the Summary of Factors Affecting the Species section below.

Recovery Action 1: Provide Long-Term Protection for Magazine Mountain Shagreen Through a Memorandum of Understanding (MOU) Between the USFS and the Service To Protect Habitat

To meet the recovery criterion to provide long-term habitat protection for Magazine Mountain shagreen, in 2005, the Service, USFS Ozark-St. Francis National Forest, and ADPT entered into a MOU that provides for long-term cooperation in the management and protection of the species and its habitat on Magazine Mountain. The MOU is a continuing agreement without a designated termination date. Additionally, the USFS designated Magazine Mountain as a Special Interest Area in the 2005 Revised Land Resource Management Plan (USFS 2005, p. 2–43). The Special Interest Area designation prohibits timber harvest, prescribed burning from leaf fall until the end of Magazine Mountain shagreen's reproductive period, application of aerial fire retardant, road construction, and recreational development on talus slopes. Therefore, through development and implementation of the MOU and Special Interest Area, we consider this action complete.

Recovery Action 2: Determine and Monitor Population Parameters, Including Mapping and Monitoring the Distribution of Magazine Mountain Shagreen and Its Habitat and Designing and Implementing a Standard Survey Procedure

Surveys: In developing the monitor strategy for Magazine Mountain shagreen, 10 specific sampling stations were established in 1996; these sampling stations later served as the long-term monitoring locations for the USFS. Each station was marked with permanent markers so that later annual monitoring effort could be repeated at the exact location (Robison 1996, p. 6). The survey protocol uses visual encounter searches (VES) to determine, map, and monitor Magazine Mountain shagreen population parameters and habitat (Robison 1996, pp. 7–24). VES involves field personnel walking through an area or habitat for a prescribed time period systematically searching for animals and has been used effectively with amphibians in habitats that are widely spaced, such as the talus slopes that Magazine Mountain shagreen inhabits (Crump and Scott 1994 in Robison 1996, pp. 8–9). The assumption of VES is that the shorter

duration in time to encounter an animal, the more common and abundant the animal is at any particular site (Robison 1997, p. 7).

Historic surveys for Magazine Mountain shagreen prior to development of the 1994 Recovery Plan were limited to two surveys: (1) A 1903 collection of 114 live specimens and one dead specimen from the north and south slopes of Magazine Mountain (Pilsbry and Ferriss 1906, p. 545), and (2) a comprehensive status review by Caldwell (1986). The specimen collected in 1903 on the south slope has never been verified as Magazine Mountain shagreen by other researchers (Robison 1996, p. 3). Neither survey reported population estimates nor catch per unit effort. Therefore, it is not possible to make a comparative analysis of these collections to subsequent collections that reported number of live and dead snails per search time (see discussion below).

In 1996, two surveys were conducted for Magazine Mountain shagreen at each of the 10 sampling stations (Table 1; Robison 1996, pp. 17–20). Using VES, live Magazine Mountain shagreen were found at four sampling stations on May 24–27, 1996, and four stations on June 6–8, 1996 (Table 1; Robison 1996, p. 19). At all sites, dead Magazine Mountain shagreen shells were encountered before live individuals were discovered (Table 1). Magazine Mountain shagreen shell size was comparable between 1986 and 1996: Mean height/width ratio was 0.55 (range 0.52–0.59, N = 18; Caldwell 1986) and 0.56 (range 0.50–0.61, N = 25; Robison 1996, p. 38), respectively.

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Table 1. Results of timed searches conducted in 1996 and 1997 at 10 Magazine Mountain shagreen (MMS) monitoring stations on Magazine Mountain, Logan County, Arkansas (Robison 1996, pp. 33–35; Robison 1997, pp. 16–17). Time is reported in minutes to first encounter. The number of individuals collected is for a 60-minute search period or number of individuals per hour at each station (catch per unit effort).

Station	Dead MMS Shell						Live MMS					
	24-27 May 1996		6-8 June 1996		19-20 May 1997		24-27 May 1996		6-8 June 1996		19-20 May 1997	
	Number	Time (min)	Number	Time (min)	Number	Time (min)	Number	Time (min)	Number	Time (min)	Number	Time (min)
1	0	0	0	0	0	0	0	0	0	0	0	0
2	1	11	1	10	0	0	0	0	0	0	0	0
3	5	6	0	0	3	8	3	7	0	0	2	13
4	3	5	2	7	1	9	0	0	0	0	0	0
5	3	16	4	12	2	17	2	18	2	18	1	30
6	2	4	1	9	4	8	2	12	1	10	1	19
7	2	12	2	6	1	14	0	0	1	9	1	46
8	3	4	2	7	0	0	1	9	2	13	0	0
9	0	0	0	0	0	0	0	0	0	0	0	0
10	0	0	0	0	0	0	0	0	0	0	0	0
Total # of individuals or shells	19	------	12	------	11	------	8	-------	6	-------	5	------
Average time to encounter	------	8.3	------	8.5	------	11.2	------	11.5	------	12.5	------	27

A third survey was conducted by Robison in May 1997 (Table 1; Robison 1997, pp. 16–17). Live individuals and dead shells were found at four and five sampling stations, respectively (Table 1). Magazine Mountain shagreen shell size (height/width ratio) in 1997 was within the range of shell size measurements collected during the 1986 (Caldwell 1986) and 1996 (Robison 1996, p. 38) surveys.

The USFS conducted Magazine Mountain shagreen population monitoring from 1998 through 2011 using the same sampling protocols and 10 stations established by Robison (1996). Station 10 was dropped from surveys in 2002, with Service approval, as no live or dead Magazine Mountain shagreen had been collected at this station during any previous surveys. One person hour (60 minutes) per station was spent searching for Magazine Mountain shagreen for all survey years (1998–2011, except during 2000, when no surveys were conducted, and during 2007, when three stations were not sampled). The number of live and dead Magazine Mountain shagreen collected at each station from 1998–2011 are shown in Table 2. The amount of time (minutes) that elapsed until the first encounter of live and dead Magazine Mountain shagreen at each station from 1998–2011 are shown in Table 3.

Table 2. Number of individuals located during 60-minute search periods at 10 Magazine Mountain shagreen (MMS) monitoring stations on Magazine Mountain, Logan County, Arkansas, from 1998 to 2011 (USFS unpublished data sheets 1999–2011, USFS 2009). The number of individuals collected is for a 60-minute search period or number of individuals per hour at each station (catch per unit effort). D = dead shells; L = live snails; NS = not sampled; NR = not recorded; DM = data missing from USFS files.

Station	Dead(D) or Live (L)	Year														
		1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	1998-2011
1	D	0	0	NS	1	0	0	0	0	0	NR	0	0	0	0	1
	L	0	1	NS	0	2	0	1	2	0	2	0	0	0	0	8
2	D	0	1	NS	0	0	0	0	2	DM	NR	0	0	0	0	3
	L	0	0	NS	0	0	0	1	0	DM	2	0	0	0	0	3
3	D	0	0	NS	1	0	0	0	0	0	NS	0	0	0	0	1
	L	0	0	NS	0	0	0	0	0	0	NS	0	0	0	0	0
4	D	2	1	NS	2	0	1	1	0	0	NR	1	1	1	0	10
	L	1	0	NS	0	0	0	0	0	0	1	2	0	0	0	4
5	D	0	0	NS	1	1	1	3	0	0	NS	1	3	5	0	15
	L	1	1	NS	1	0	0	3	3	2	NS	3	0	0	1	15
6	D	2	0	NS	3	0	0	4	NR	0	NR	0	1	4	0	14
	L	2	0	NS	2	0	2	3	4	1	1	0	0	0	0	15
	D	4	0	NS	0	0	0	1	0	DM	0	0	0	1	0	6

7	L	0	0	NS	0	0	0	0	2	DM	1	0	0	0	3	6
8	D	0	0	NS	0	0	1	0	0	0	NS	1	1	2	0	5
	L	0	0	NS	0	0	0	1	2	0	NS	1	0	0	0	5
9	D	0	0	NS	0	0	0	0	0	0	NR	0	0	0	0	0
	L	0	0	NS	0	2	0	0	0	1	1	0	0	0	0	4
10	D	0	0	NS	0	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	0
	L	0	0	NS	0	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	0
Totals	D	8	2	NS	8	1	3	9	2	0	NR/NS	3	6	13	0	55
	L	4	2	NS	3	4	2	9	13	4	8	6	0	0	4	59
	D + L	12	4	NS	11	5	5	18	15	4	8	9	6	13	4	114

Table 3. Minutes to first encounter of Magazine Mountain shagreen individual. Results of timed searches conducted by the USFS at 10 Magazine Mountain shagreen (MMS) monitoring stations on Magazine Mountain, Logan County, Arkansas, from 1998 to 2011 (USFS unpublished data sheets 1999–2011, USFS 2009). Numbers reported are for time (minutes) to first encounter of a dead shell or live snail. Timed searches were conducted for 60 minutes at each station in each year, except where otherwise indicated. D = dead shells; L = live snails; NS = not sampled; NR = not recorded; DM = data missing from USFS files.

Station	Dead(D) or Live (L)	Year													
		1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
1	D	0	0	NS	30	0	0	0	0	0	NR	0	0	0	0
	L	0	11	NS	0	8	0	10	1	0	16	0	0	0	0
2	D	0	42	NS	0	0	0	0	10	DM	59	0	0	0	0
	L	0	0	NS	0	0	0	37	0	DM	44	0	0	0	0
3	D	0	0	NS	42	0	0	0	0	0	NS	0	0	0	0
	L	0	0	NS	0	0	0	0	0	0	NS	0	0	0	0
4	D	12	1	NS	52	0	14	15	0	0	NR	55	55	20	0
	L	18	0	NS	0	0	0	0	0	0	50	30	0	0	0
5	D	0	0	NS	12	2	1	30	0	0	NS	1	8	50	0
	L	36	27	NS	2	0	0	32	13	21	NS	30	0	0	60
6	D	45	0	NS	8	0	0	26	6	0	NR	0	42	3	0
	L	16	0	NS	2	0	10	26	10	19	1	0	0	0	0

7	D	53	0	NS	0	0	0	31	0	DM	0	0	0	29	0
	L	0	0	NS	0	0	0	0	3	DM	11	0	0	0	20
8	D	0	0	NS	0	0	6	0	0	0	NS	55	50	12	0
	L	0	0	NS	0	0	0	32	1	0	NS	50	0	0	0
9	D	0	0	NS	0	0	0	0	0	0	NR	0	0	0	0
	L	0	0	NS	0	1	0	0	0	18	7	0	0	0	0
10	D	0	0	NS	0	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS
	L	0	0	NS	0	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS
Average Time to Encounter	D	37	22	NS	29	2	7	26	8	0	59	37	39	29	0
	L	23	19	NS	2	5	10	27	6	19	22	37	0	0	40

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Overall, the number of live Magazine Mountain shagreens collected annually from 1996–2011 indicates the species is persisting over time. Annual fluctuation in numbers of live Magazine Mountain shagreens collected is likely attributable to climatic or temporal conditions or both (Tables 1, 2, and 3). For example, monitoring conducted in mid-June 2009 yielded zero live Magazine Mountain shagreen. However, June 2009 was considerably drier than May 2009 (95 mm versus 301 mm monthly rainfall, respectively; 5 versus 13 days with rainfall, respectively) and likely explains the lack of live specimens observed during the survey, because the snails are more active during times of high humidity and cooler temperatures (USFS 2009, pp. 1, 4–5).

The number of dead Magazine Mountain shagreens collected annually from 1996–2011 has shown greater annual fluctuation than the number of live individuals (Tables 1, 2, and 3). A closely related species, shagreen (*Inflectarius inflectus*), is slightly smaller than Magazine Mountain shagreen with a ''greater diameter'' ranging from 0.37 (9.5 mm) to 0.44 in. (11.3 mm) (mean = 0.43 in. (10.9 mm)) compared to 0.50 (12.7 mm) to 0.55 in. (14.0 mm) (mean = 0.52 in. (13.3 mm)) for Magazine Mountain shagreen (Caldwell *et al.* 2009, p. 2). However, individuals of shagreen (*Inflectarius inflectus*), on which aperture (the main opening of the snail's shell) teeth are reduced, look very similar to Magazine Mountain shagreen. Therefore, accurate identification of dead Magazine Mountain shagreen, and to a much lesser extent live individuals, may be easily confused with the more common and abundant shagreen depending on surveyor experience, which has been variable during the 16-year monitoring period.

There are numerous problems with sampling populations of terrestrial snails, including their rupicolous nature (living or growing on or among rocks), which makes it difficult to locate individuals during surveys; effects of climate variables (*e.g.,* temperature and humidity) on snail activity; and practicality of surveys for nocturnal species such as Magazine Mountain shagreen (Newell 1971 and Bishop 1977 in Robison 1996, p. 7). Surveys are optimally conducted at night in late April to early May, dependent upon the onset of spring (moister conditions at the surface, emergence of oak catkins, temperature) (Caldwell *et al.* 2009, p. 17). A rise in relative humidity and drop in temperature usually causes land snails to become more active (Burch and Pearce 1990 in Robinson 1996, p. 7). Therefore, climatic and temporal variation may explain variation in number of live specimens collected from one survey to the next.

Population size, density, and age structure cannot be reliably estimated for a rupicolous species that spends most of the year deep within the talus slopes of Magazine Mountain (Caldwell *et al.* 2009, p. 4). Therefore, these population parameters were not estimated.

Habitat mapping: All talus habitats inhabited by Magazine Mountain shagreen were assessed and spatially mapped in 2007–2008 (see Species Information; Caldwell *et al.* 2009, pp. 23–31). According to that assessment, the total amount of available habitat for Magazine Mountain shagreen consists of approximately 21.6 ac (8.75 ha) at 27 talus habitats on Magazine Mountain's west and north slopes (Caldwell *et al.* 2009, pp. 4–5). The only other habitat assessment for Magazine Mountain shagreen was conducted in 1986, during a comprehensive status review (Caldwell 1986). In 1986, total habitat available to the species was estimated at 540 ac (218.5 ha). No habitat loss has occurred since 1986, but rather more advanced technology using global positioning satellite mapping of talus habitat and detailed analysis of vegetative communities and climatic variables provided a more accurate assessment of the species' habitat.

Summary of Recovery Action 2: As specified in the recovery plan and discussed above, Robison (1996) developed a standardized monitoring strategy for the USFS, and using that strategy, Magazine Mountain shagreen populations have been monitored annually since 1996. Despite variable climatic and temporal conditions preceding annual population monitoring, 16 years of monitoring data appear to indicate a stable Magazine Mountain shagreen population (Tables 1, 2, and 3), as shown by the species' persistence over time and stability of habitat. Surveys conducted by Caldwell *et al.* (2009) from 2007–2008 reaffirmed USFS monitoring results. In addition, as discussed above, all talus habitats inhabited by Magazine Mountain shagreen were mapped. Therefore, we consider this recovery action complete.

Recovery Action 3: Develop Life-History and Habitat Parameters

The first life-history and ecology information for Magazine Mountain shagreen, including information on habitat (geology and forest community), associations with other land snails, food habits, activity periods, breeding, egg deposition and hatching times, growth rates, and limiting factors, was provided in 2009 as a result of surveys conducted by Caldwell *et al.* (2009).

Magazine Mountain shagreen prefers moist woods with some noteworthy differences in the tree and shrub communities present on the north and south slopes of Magazine Mountain (Caldwell *et al.* 2009). Trees such as American linden (*Tilia americana*), sugar maple (*Acer sacccharum*), white ash (*Fraxinus americana*), and prickly gooseberry (*Ribes cynosbati*) were found only on the north slopes of Magazine Mountain (Caldwell *et al.* 2009, pp. 6–11). Similar associations with land snails are discussed in the Species Information section.

In 1986, Caldwell (1986) failed to find Magazine Mountain shagreen egg masses, but he suspected that eggs were laid deep within the talus (Service 1994, p. 3). Caldwell *et al.* (2009, p. 15–16) located Magazine Mountain shagreen egg masses the second week of May 2007 concurrent with spring rain. The egg masses were not laid deep within the talus as previously hypothesized but were found in the leaf litter covering the talus. Temperatures of the substrate and rock were 63.7 and 64.2 °F (17.6 and 17.9 °C), respectively.

Caldwell *et al.* (2009, p. 15) collected one egg mass containing 13 eggs (diameter 0.1 in. or 2.7 mm) and successfully hatched and reared Magazine Mountain shagreen juveniles in a terrarium at room temperature (73 °F or 23 °C). Ten of 13 eggs hatched after a 5-week incubation period. Magazine Mountain shagreen young hatched at a size of 0.1 in. (3.5 mm).

No live Magazine Mountain shagreen individuals or egg masses were located from June through March during the 2-year survey. Therefore, Caldwell *et al.* (2009, p. 16) suspected that Magazine Mountain shagreen lay eggs only during early spring (late April to early May) and that egg-laying is triggered by spring rains. They noted that the first onset of oak catkins (flowers) concurrent with rain events serves as a visual cue to locate live individuals and egg masses.

As discussed above, Caldwell *et al.* (2009) provide the first life-history and ecology information for Magazine Mountain shagreen. Therefore, we consider this action complete.

Recovery Action 4: Determine the Parameters of a Stable Population

Due to the rupicolous nature (living or growing on or among rocks) of Magazine Mountain shagreen, it is not possible to estimate population size or age structure. The size and quality of habitat available to Magazine Mountain shagreen was defined by Caldwell *et al.*

(2009, p. 4) (see Species Information). While this estimate is substantially less than that estimated by Caldwell (1986; see Species Information), it represents a much more rigorous analysis of available habitat using geospatial mapping software to map habitat based on geology, forest community, and species survey data. It is our opinion based on the Caldwell *et al.* (2009) data and protections afforded Magazine Mountain from the USFS and ADPT that habitat quantity and quality have remained stable since listing in 1989, and threats to habitat identified at listing (see Previous Federal Actions) are no longer threats. In addition, monitoring data collected since 1996 by Robison (1996, 1997), USFS (1998–2011), and Caldwell *et al.* (2009) show that the species is persisting over time despite low numbers of live/dead Magazine Mountain shagreen observed annually (see Tables 1, 2, and 3). Finally, permanent protection and management of habitat supporting Magazine Mountain shagreen on Magazine Mountain indicate that populations are secure and should remain self-sustaining for the foreseeable future. Therefore, we consider this action complete.

Recovery Action 5: Conduct Surveys of Potential Habitat in the Vicinity of Magazine Mountain

Magazine Mountain shagreen surveys have been conducted in similar talus habitats near Magazine Mountain (Caldwell *et al.* 2009, pp. 2–6). These surveys were conducted in the Arkansas River Valley and areas north of the Arkansas River. Mount Nebo and Petit Jean Mountain were chosen for more intensive surveys in 2007 and 2008. Maximum elevation of Petit Jean Mountain (1,180 ft or 359.7 m) and Mount Nebo (1,755 ft or 534.9 m) is less than the minimum elevation (2,200 ft or 670.6 m) of talus habitat occupied by Magazine Mountain shagreen at Magazine Mountain. Mean average rainfall at the summit of Magazine Mountain is 55 in. (139.7 cm), approximately 5 in. (12.7 cm) greater than lower elevations (Service 1994, p. 3). Forest communities of Mount Nebo more closely resemble the south slope of Magazine Mountain, which is not inhabited by Magazine Mountain shagreen. Therefore, the unique combination of biotic and abiotic differences between Magazine Mountain's north and west slopes and other mountains in the Arkansas River Valley (Mount Nebo and Petit Jean Mountain) provide a unique habitat for the endemic Magazine Mountain shagreen (Caldwell *et al.* 2009, pp. 4–6).

Because surveys of potential habitat near Magazine Mountain have been conducted, we consider this action complete.

Recovery Action 6: Develop a Monitoring Plan to Ensure Recovery Has Been Achieved

In conjunction with this proposed rule, we have developed a draft post-delisting monitoring plan (see Post-Delisting Monitoring section below) that includes information on distribution, habitat requirements, and life history of Magazine Mountain shagreen and a monitoring protocol provided by Caldwell *et al.* (2009, pp. 17–18). Therefore, we consider this action complete.

Summary of Factors Affecting the Species

Section 4 of the Act and its implementing regulations (50 CFR part 424) set forth the procedures for listing, reclassifying, or removing species from the Federal Lists of Endangered and Threatened Wildlife and Plants. ''Species'' is defined by the Act as including any species or subspecies of fish or wildlife or plants, and any distinct vertebrate population segment of fish or wildlife that interbreeds when mature (16 U.S.C. 1532(16)). Once the ''species'' is determined, we then evaluate whether that species may be endangered or threatened because of one or more of the five factors described in section 4(a)(1) of the Act. We must consider these same five factors in reclassifying or delisting a species. We may delist a species according to 50 CFR 424.11(d) if the best available scientific and commercial information indicates that the species is neither endangered nor threatened for the following reasons: (1) The species is extinct; (2) the species has recovered and is no longer endangered or threatened; and/or (3) the original scientific data used at the time the species was classified were in error.

Under section 3 of the Act, a species is ''endangered'' if it is in danger of extinction throughout all or a ''significant portion of its range'' and is ''threatened'' if it is likely to become endangered within the foreseeable future throughout all or a ''significant portion of its range.'' The word ''range'' refers to the range in which the species currently exists, and the word ''significant'' refers to the value of that portion of the range being considered to the conservation of the species. The ''foreseeable future'' is the period of time over which events or effects reasonably can or should be anticipated, or trends extrapolated. A recovered species is one that no longer meets the Act's definition of endangered or threatened. Determining whether or not a species is recovered requires consideration of the same five categories of threats specified in section 4(a)(1) of the Act. For species that are already listed as endangered or threatened, the analysis for a delisting due to recovery must include an evaluation of the threats that existed at the time of listing, the threats currently facing the species, and the threats that are reasonably likely to affect the species in the foreseeable future following the downlisting or delisting and the removal of the Act's protections.

The following analysis examines all five factors currently affecting or that are likely to affect Magazine Mountain shagreen within the foreseeable future. In making this final determination, we have considered all scientific and commercial information available, which includes monitoring data collected from 1996 to 2011 (Robison 1996, USFS 2009) and life-history and habitat information (Caldwell *et al.* 2009).

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

The 1989 final rule to list Magazine Mountain shagreen as threatened (54 FR 15206) identified the following habitat threats: Possible negative effects from USFS use of the land, a military proposal that would bring troop training exercises and heavy equipment into the species' habitat, and the development of a new State park and lodge on Magazine Mountain.

The 1989 final listing rule cited the species' restricted range as its greatest vulnerability to land use change or activity that would modify the talus slopes inhabited by the species. A request from the ADPT for a special use permit from the USFS to develop a State park and the associated construction of buildings, roads, trails, pipelines, and recreational activities had the potential to adversely affect Magazine Mountain shagreen and its habitat if talus slopes were disturbed. In 1993, several agencies, including the Service, contributed to an environmental impact statement (EIS) for the development and construction of a State park on the summit of Magazine Mountain (Service 1994, p. 5). Of the five assessed alternatives, the selected alternative included construction of facilities on the south slopes, improvement of existing camping and picnic facilities on the north slopes, additional hiking trails, and a reconstructed homestead. However, it was determined that, with

appropriate management, the selected alternative would not adversely affect Magazine Mountain shagreen. Furthermore, mitigation measures completed as part of the park development and maintenance that helped minimize potential adverse effects to Magazine Mountain shagreen and its habitat included development of a revegetation/erosion/sediment control plan, monitoring of sensitive species habitats, and reduction of foot traffic along bluff lines and rock outcrops. Therefore, development of the State park and its associated recreational and maintenance activities no longer poses a threat to the survival of Magazine Mountain shagreen.

Since the final listing rule was published, the USFS Ozark-St. Francis National Forests have designated the north and west slopes of Magazine Mountain above the 1,600 ft (487.7 m) contour interval as a Special Interest Area. This designation encompasses all of the known range of Magazine Mountain shagreen plus a 600-ft (182.9-m) contour interval buffer. The Special Interest Area designation also protects the area from land management practices that might be detrimental to Magazine Mountain shagreen and its habitat. We expect that the delisting of Magazine Mountain shagreen would not weaken USFS's commitment to the conservation of the Special Interest Area. In 2005, the Service, USFS Ozark-St. Francis National Forests, and ADPT entered into a MOU that provides for long-term cooperation in the management and protection of Magazine Mountain shagreen and its habitat on Magazine Mountain. The MOU is a continuing agreement without a designated termination date. Therefore, USFS land use activities no longer pose a threat to the survival of Magazine Mountain shagreen.

Wildfires have been cited as the single greatest threat to Magazine Mountain shagreen (Caldwell *et al.* 2009, p. 18). The USFS's prescribed fire program and its associated timing and frequency will reduce the likelihood of catastrophic wild fires. The prescribed fire program also provides a buffer around Magazine Mountain shagreen habitat. The ADPT restricts campfires and open flame cooking to designated areas to minimize the potential for wild fires that may potentially threaten Magazine Mountain shagreen and its habitat, as well as State park buildings and structures.

The U.S. Army is no longer considering the use of Magazine Mountain for military training exercises, an activity that was considered an imminent threat to Magazine Mountain shagreen when it was listed. The U.S. Army has no plans to conduct military training exercises on Magazine Mountain in the foreseeable future and withdrew its previous consideration after Magazine Mountain shagreen was listed as threatened in 1989 (Service 1994, p. 5). Therefore, potential U.S. Army military training operations no longer pose a threat to the survival of Magazine Mountain shagreen.

Summary of Factor A: Through management agreements and special designations, habitat supporting Magazine Mountain shagreen on Magazine Mountain is secure, and self-sustaining populations will remain permanently protected and managed to maintain talus habitat. Therefore, we find that the present or threatened destruction, modification, or curtailment of its habitat or range is no longer a threat to Magazine Mountain shagreen.

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

The final rule to list Magazine Mountain shagreen identified overutilization as a potential threat. A knowledgeable collector could adversely affect the population by removing large numbers of individuals. However, to the Service's knowledge, no Magazine Mountain shagreen individuals have been removed from the population for commercial, recreational, scientific, or educational purposes since the species was listed in 1989, except by Caldwell *et al.* (2009), who were permitted through a section 10(a)(1)(A) research permit to remove an egg mass from the wild to learn more about the life history of Magazine Mountain shagreen. The Arkansas Game and Fish Commission (AGFC) requires a permit for collection of individuals for scientific and educational purposes. Recreational collection is not permitted. Likewise, ADPT requires a permit for collection of plants and animals within State park boundaries. The boundary of Magazine Mountain State Park encompasses the top of Magazine Mountain and includes a small portion of the upper talus inhabited by Magazine Mountain shagreen. The State park is managed by ADPT under a special use agreement from, and in concert with, the USFS Ozark National Forest, and the park conserves 2,234 ac (904 ha) of Magazine Mountain's oak-hickory and pine-covered, plateau-like summit. There is no commercial market for Magazine Mountain shagreen, nor is there likely to be a commercial market in the foreseeable future. It is the Service's opinion that, due to the species' restricted range, the AGFC's and ADPT's permitting requirements and restrictions will provide sufficient protection to Magazine Mountain shagreen following delisting. Therefore, overutilization for commercial, recreational, scientific, and educational purposes no longer poses a threat to Magazine Mountain shagreen.

Summary of Factor B: Magazine Mountain shagreen is not sought after for commercial purposes, and recreational collection of animals and plants within Magazine Mountain State Park is prohibited. The AGFC requires a scientific collection permit for scientific, recreational, and educational purposes, and it is the Service's opinion that it is very unlikely that AGFC would permit any activity that would result in overutilization of Magazine Mountain shagreen. Therefore, we find that overutilization for commercial, recreational, scientific, or educational purposes is no longer a threat to Magazine Mountain shagreen and will not become a threat in the foreseeable future.

Factor C. Disease or Predation

The 1989 listing rule for Magazine Mountain shagreen (54 FR 15206) did not list any threats to the species from disease or predation. The best available science does not provide any evidence that either of these factors has become a threat to this species since it was listed in 1989, nor will either become a threat in the foreseeable future. Therefore, we find that disease and predation are not threats to Magazine Mountain shagreen.

Factor D. The Inadequacy of Existing Regulatory Mechanisms

The 1989 final rule to list Magazine Mountain shagreen (54 FR 15206) indicated that no protections other than the USFS Special Interest Area existed to protect Magazine Mountain shagreen and its habitat. The entire range of Magazine Mountain shagreen is now on USFS or ADPT property. Collection of animals is prohibited in the State park, and there is no indication that this prohibition is not effective in preventing collection of this species. In 2005, the Service, USFS Ozark-St. Francis National Forest, and ADPT entered into a MOU that provides for long-term cooperation in the management and protection of Magazine Mountain shagreen and its habitat on Magazine Mountain. The MOU is a continuing agreement without a designated termination date.

Summary of Factor D: We believe that the protected status of the lands where Magazine Mountain shagreen currently exists will continue to provide adequate

regulatory protection for this species. Therefore, we find that lack of regulatory protection is no longer a threat to Magazine Mountain shagreen.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

The 1989 final listing rule for Magazine Mountain shagreen (54 FR 15206) identified the restricted range (Magazine Mountain), temperature, and moisture as potential stressors to Magazine Mountain shagreen. Magazine Mountain shagreen inhabits 27 talus habitats on the north and west slopes of Magazine Mountain, Logan County, Arkansas. Populations occur in the vegetated and leaf litter covered portion of talus rock between 2,200 ft (670.6 m) and 2,600 ft (792.5 m). However, as a result of habitat protection provided by the USFS and ADPT (see analysis under Factors A and D above), vulnerability associated with restricted range is no longer a threat.

The Intergovernmental Panel on Climate Change (IPCC) concluded that evidence of warming of the climate system is unequivocal (IPCC 2007a, p. 30). Numerous long-term climate changes have been observed, including changes in arctic temperatures and ice, widespread changes in precipitation amounts, ocean salinity, wind patterns and aspects of extreme weather including droughts, heavy precipitation, heat waves, and the intensity of tropical cyclones (IPCC 2007b, p. 7). While continued change is certain, the magnitude and rate of change is unknown in many cases. Species that are dependent on specialized habitat types, limited in distribution, or that have become restricted to the extreme periphery of their range will be most susceptible to the effects of climate change.

Estimates of the effects of climate change using available climate models lack the geographic precision needed to predict the magnitude of effects at a scale small enough to discretely apply to the range of Magazine Mountain shagreen. However, data on recent trends and predicted changes for the Southeast United States (Karl *et al.* 2009, pp. 111–116) provide some insight for evaluating the potential threat of climate change to Magazine Mountain shagreen. Since 1970, the average annual temperature of the region has increased by about 2 °F (1.1 °C), with the greatest increases occurring during winter months. The geographic extent of areas in the Southeast region affected by moderate to severe spring and summer drought has increased over the past three decades by 12 and 14 percent, respectively (Karl *et al.* 2009, p. 111). These trends are expected to increase.

Rates of warming are predicted to more than double in comparison to what the Southeast has experienced since 1975, with the greatest increases projected for summer months. Depending on the emissions scenario used for modeling change, average temperatures are expected to increase by 4.5 °F to 9 °F (2.5 °C to 5 °C) by the 2080s (Karl *et al.* 2009, pp. 111). While there is considerable variability in rainfall predictions throughout the region, increases in evaporation of moisture from soils and loss of water by plants in response to warmer temperatures are expected to contribute to the effect of these droughts (Karl *et al.* 2009, pp. 112).

Since Magazine Mountain shagreen prefers cool, moist microhabitats, prolonged drought and concomitant warming of temperatures could adversely affect the species. In particular, nesting sites and egg masses may be affected (Caldwell *et al.* 2009, p. 15). However, there are no data to establish that such effects are reasonably certain to occur. In addition, the species possesses biological traits that may provide resilience to this potential threat. For example, Magazine Mountain shagreen tends to retreat into the talus slopes during dry periods. Egg masses were discovered in 2007 in the leaf litter covering the talus (Caldwell *et al.* 2009, p. 15–16); this tendency for Magazine Mountain shagreen to lay eggs in the leaf litter likely helps protect egg masses from desiccation.

We are not aware of any climate change information specific to the habits or habitat (i.e., talus slopes) of the Magazine Mountain shagreen that would indicate what potential effects climate change and increasing temperatures may have on this species. Therefore, based on the best available information, we do not have any evidence to determine or conclude that climate change is a threat to Magazine Mountain shagreen now or within the foreseeable future.

Summary of Factor E: At this time, we do not have sufficient information to document that climate changes observed to date have had or will have any adverse effect on Magazine Mountain shagreen or its habitat. Vulnerability associated with restricted range is no longer a threat because the entirety of the species' habitat is protected by the USFS and ADPT. Therefore, we find that the other natural or manmade factors considered here do not pose a threat to Magazine Mountain shagreen, nor are they likely to be threats in the foreseeable future. Post delisting monitoring will also afford an opportunity to monitor the status of the species and the impacts of any natural events that may occur for five years.

Conclusion of the 5-Factor Analysis

Under section 3 of the Act, a species is endangered if it is ''in danger of extinction in a significant portion of its range'' and threatened if it is ''likely to become endangered in the foreseeable future throughout all or a significant portion of its range.'' We have carefully assessed the best scientific and commercial information available regarding the threats faced by Magazine Mountain shagreen in developing this proposed rule. Based on the analysis above and given the reduction in threats, Magazine Mountain shagreen does not currently meet the Act's definition of endangered in that it is not in danger of extinction throughout all of its range, or the definition of threatened in that it is not likely to become endangered in the foreseeable future throughout all of its range.

Significant Portion of the Range Analysis

Having determined that Magazine Mountain shagreen no longer meets the definition of endangered or threatened throughout its range, we must next consider whether there are any significant portions of its range that remain in danger of extinction or likely to become endangered. The Act defines ''endangered species'' as any species which is ''in danger of extinction throughout all or a significant portion of its range,'' and ''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 definition of ''species'' is also relevant to this discussion. The Act defines the term ''species'' as follows: ''The term 'species' includes any subspecies of fish or wildlife or plants, and any distinct population segment [DPS] of any species of vertebrate fish or wildlife which interbreeds when mature.'' The phrase ''significant portion of its range'' (SPR) is not defined by the statute, and we have never addressed in our regulations: (1) The consequences of a determination that a species is either endangered or likely to become so throughout a significant portion of its range, but not throughout all of its range; or (2) what qualifies a portion of a range as ''significant.''

Two recent district court decisions have addressed whether the SPR language allows the Service to list or protect less than all members of a

defined ''species'': *Defenders of Wildlife* v. *Salazar,* 729 F. Supp. 2d 1207 (D. Mont. 2010), concerning the Service's delisting of the Northern Rocky Mountain gray wolf (74 FR 15123, April 2, 2009); and *WildEarth Guardians* v. *Salazar,* 2010 U.S. Dist. LEXIS 105253 (D. Ariz. Sept. 30, 2010), concerning the Service's 2008 finding on a petition to list the Gunnison's prairie dog (73 FR 6660, February 5, 2008). The Service had asserted in both of these determinations that it had authority, in effect, to protect only some members of a ''species,'' as defined by the Act (i.e., species, subspecies, or DPS), under the Act. Both courts ruled that the determinations were arbitrary and capricious on the grounds that this approach violated the plain and unambiguous language of the Act. The courts concluded that reading the SPR language to allow protecting only a portion of a species' range is inconsistent with the Act's definition of ''species.'' The courts concluded that once a determination is made that a species (i.e., species, subspecies, or DPS) meets the definition of ''endangered species'' or ''threatened species,'' it must be placed on the list in its entirety and the Act's protections applied consistently to all members of that species (subject to modification of protections through special rules under sections 4(d) and 10(j) of the Act).

Consistent with that interpretation, and for the purposes of this rule, we interpret the phrase ''significant portion of its range'' in the Act's definitions of ''endangered species'' and ''threatened species'' to provide an independent basis for listing; thus there are two situations (or factual bases) under which a species would qualify for listing a species in its entirety: A species may be endangered or threatened throughout all of its range; or a species may be endangered or threatened in only a significant portion of its range. If a species is in danger of extinction throughout an SPR, it, the species, is an ''endangered species.'' The same analysis applies to ''threatened species.'' Therefore, the consequence of finding that a species is endangered or threatened in only a significant portion of its range is that the entire species will be listed as endangered or threatened, respectively, and the Act's protections will be applied across the species' entire range.

We conclude, for the purposes of this rule, that interpreting the SPR phrase as providing an independent basis for listing or for changes in listing status is the best interpretation of the Act because it is consistent with the purposes and the plain meaning of the key definitions of the Act; it does not conflict with established past agency practice (i.e., prior to the 2007 Solicitor's Opinion), as no consistent, long-term agency practice has been established; and it is consistent with the judicial opinions that have most closely examined this issue. Having concluded that the phrase ''significant portion of its range'' provides an independent basis for listing and protecting the entire species, we next turn to the meaning of ''significant'' to determine the threshold for when such an independent basis for listing exists.

Although there are potentially many ways to determine whether a portion of a species' range is ''significant,'' we conclude, for the purposes of this rule, that the significance of the portion of the range should be determined based on its biological contribution to the conservation of the species. For this reason, we describe the threshold for ''significant'' in terms of an increase in the risk of extinction for the species. We conclude that a biologically based definition of ''significant'' best conforms to the purposes of the Act, is consistent with judicial interpretations, and best ensures species' conservation. Thus, for the purposes of this proposed rule and finding, a portion of the range of a species is ''significant'' if its contribution to the viability of the species is so important that, without that portion, the species would be in danger of extinction.

We evaluate biological significance based on the principles of conservation biology using the concepts of redundancy, resiliency, and representation. *Resiliency* describes the characteristics of a species that allow it to recover from periodic disturbance. *Redundancy* (having multiple populations distributed across the landscape) may be needed to provide a margin of safety for the species to withstand catastrophic events. *Representation* (the range of variation found in a species) ensures that the species' adaptive capabilities are conserved. Redundancy, resiliency, and representation are not independent of each other, and some characteristic of a species or area may contribute to all three. For example, distribution across a wide variety of habitats is an indicator of representation, but it may also indicate a broad geographic distribution contributing to redundancy (decreasing the chance that any one event affects the entire species), and the likelihood that some habitat types are less susceptible to certain threats, contributing to resiliency (the ability of the species to recover from disturbance). None of these concepts is intended to be mutually exclusive, and a portion of a species' range may be determined to be ''significant'' due to its contributions under any one of these concepts.

For the purposes of this rule, we determine if a portion's biological contribution is so important that the portion qualifies as ''significant'' by asking whether, *without that portion,* the representation, redundancy, or resiliency of the species would be so impaired that the species would have an increased vulnerability to threats to the point that the overall species would be in danger of extinction (i.e., would be ''endangered''). Conversely, we would not consider the portion of the range at issue to be ''significant'' if there is sufficient resiliency, redundancy, and representation elsewhere in the species' range that the species would not be in danger of extinction throughout its range if the population in that portion of the range in question became extirpated (extinct locally).

We recognize that this definition of ''significant'' establishes a threshold that is relatively high. On the one hand, given that the consequences of finding a species to be endangered or threatened in an SPR would be listing the species throughout its entire range, it is important to use a threshold for ''significant'' that is robust. It would not be meaningful or appropriate to establish a very low threshold whereby a portion of the range can be considered ''significant'' even if only a negligible increase in extinction risk would result from its loss. Because nearly any portion of a species' range can be said to contribute some increment to a species' viability, use of such a low threshold would require us to impose restrictions and expend conservation resources disproportionately to conservation benefit: Listing would be rangewide, even if only a portion of the range of minor conservation importance to the species is imperiled. On the other hand, it would be inappropriate to establish a threshold for ''significant'' that is too high. This would be the case if the standard were, for example, that a portion of the range can be considered ''significant'' only if threats in that portion result in the entire species' being currently endangered or threatened. Such a high bar would not give the SPR phrase independent meaning, as the Ninth Circuit held in *Defenders of Wildlife* v. *Norton,* 258 F.3d 1136 (9th Cir. 2001).

The definition of ''significant'' used in this rule carefully balances these concerns. By setting a relatively high threshold, we minimize the degree to which restrictions will be imposed or resources expended that do not

contribute substantially to species conservation. But we have not set the threshold so high that the phrase ''in a significant portion of its range'' loses independent meaning. Specifically, we have not set the threshold as high as it was under the interpretation presented by the Service in the *Defenders* litigation. Under that interpretation, the portion of the range would have to be so important that current imperilment there would mean that the species would be *currently* imperiled everywhere. Under the definition of ''significant'' used in this finding, the portion of the range need not rise to such an exceptionally high level of biological significance. (We recognize that if the species is imperiled in a portion that rises to that level of biological significance, then we should conclude that the species is in fact imperiled throughout all of its range, and that we would not need to rely on the SPR language for such a rule making.) Rather, under this interpretation we ask whether the species would be endangered everywhere without that portion, *i.e.,* if that portion were completely extirpated. In other words, the portion of the range need not be so important that even being in danger of extinction in that portion would be sufficient to cause the remainder of the range to be endangered; rather, the *complete extirpation* (in a hypothetical future) of the species in that portion would be required to cause the remainder of the range to be endangered.

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 have no reasonable potential 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: (1) The portions may be ''significant,'' and (2) the species may be in danger of extinction there or likely to become so within the foreseeable future. Depending on the biology of the species, its range, and the threats it faces, it might be more efficient for us to address the significance question first or the status question first. Thus, if we determine that a portion of the range is not ''significant,'' we do not need to determine whether the species is endangered or threatened there; if we determine that the species is not endangered or threatened in a portion of its range, we do not need to determine if that portion is ''significant.'' In practice, a key part of the portion status analysis is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats applies only to portions of the species' range that clearly would not meet the biologically based definition of ''significant'', such portions will not warrant further consideration.

Applying the process described above in considering delisting this snail, we evaluated the range of Magazine Mountain shagreen to determine if any areas could be considered a significant portion of its range. As discussed above, a portion of a species' range is significant if it is part of the current range of the species and 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. There is no significant variability in the habitats across the range occupied by Magazine Mountain shagreen, which encompasses approximately 8.75 ha (21.6 ac) at 27 talus habitats on Magazine Mountain's west and north slopes in Logan County, Arkansas. The basic ecological components required for the species to complete its life cycle are present throughout the habitats occupied by Magazine Mountain shagreen. No specific location within the current range of the species provides a unique or biologically significant function that is not found in other portions of the range. Furthermore, the threats discussed during the five-factor analysis above are uniform throughout the range of the species.

In conclusion we have determined that none of the existing or potential threats, either alone or in combination with others, are likely to cause Magazine Mountain shagreen to become endangered or threatened now or within the foreseeable future throughout a significant portion of its range.

On the basis of this evaluation, we believe Magazine Mountain shagreen no longer requires the protection of the Act, and we propose to remove Magazine Mountain shagreen from the Federal List of Endangered and Threatened Wildlife (50 CFR 17.11(h)).

Effects of This Proposed Rule

This rule, if finalized, would revise 50 CFR 17.11(h) to remove Magazine Mountain shagreen from the List of Endangered and Threatened Wildlife. Because no critical habitat was ever designated for this species, this rule would not affect 50 CFR 17.95.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. The prohibitions under section 9(a)(1) of the Act make it illegal for any person subject to the jurisdiction of the United States to import or export; transport in interstate or foreign commerce in the course of a commercial activity; sell or offer for sale in interstate or foreign commerce; or take, possess, sell, deliver, carry, transport, or ship Magazine Mountain shagreen. Section 7 of the Act requires that Federal agencies consult with us to ensure that any action authorized, funded, or carried out by them is not likely to jeopardize the species' continued existence. If this proposed rule is finalized, it would revise 50 CFR 17.11(h) to remove (delist) Magazine Mountain shagreen from the Federal List of Endangered and Threatened Wildlife, and these prohibitions would no longer apply.

Post-Delisting Monitoring

Section 4(g)(1) of the Act requires us to monitor for at least 5 years species that are delisted due to recovery. Post-delisting monitoring refers to activities undertaken to verify that a species delisted due to recovery remains secure from the risk of extinction after the protections of the Act no longer apply. The primary goal of post-delisting monitoring is to monitor the species so that its status does not deteriorate, and if a decline is detected, to take measures to halt the decline so that proposing it as endangered or threatened is not again needed. If, at any time during the monitoring period, data indicate that protective status under the Act should be reinstated, we may initiate listing procedures, including, if appropriate, emergency listing.

Section 4(g) of the Act explicitly requires cooperation with the States in development and implementation of post-delisting monitoring programs, but we remain responsible for compliance with section 4(g) of the Act and, therefore, must remain actively engaged in all phases of post-delisting monitoring. We also seek active participation of other entities that are expected to assume responsibilities for the species' conservation after delisting. In June 2010, USFS, AGFC, and ADPT agreed to be cooperators in the post-delisting monitoring of Magazine Mountain shagreen.

We have prepared a draft Post-Delisting Monitoring Plan for Magazine Mountain Shagreen (*Inflectarius*

magazinensis) (Plan) (Service 2011). The draft plan:

(1) Summarizes the species' status at the time of delisting;

(2) Defines thresholds or triggers for potential monitoring outcomes and conclusions;

(3) Lays out frequency and duration of monitoring;

(4) Articulates monitoring methods, including sampling considerations;

(5) Outlines data compilation and reporting procedures and responsibilities;

(6) Indicates localities selected for post-delisting monitoring; and

(7) Proposes a post-delisting monitoring implementation schedule, including timing and responsible parties.

Concurrent with this proposed delisting rule, we announce the draft plan's availability for public review. The draft plan can be viewed in its entirety at: *http://www.fws.gov/arkansas-es* or on the Federal eRulemaking Portal at *http://www.regulations.gov.* Copies also can be obtained from the U.S. Fish and Wildlife Service, Arkansas Ecological Services Field Office, Conway, Arkansas (see **FOR FURTHER INFORMATION CONTACT** section). We seek information, data, and comments from the public regarding Magazine Mountain shagreen and the post-delisting monitoring strategy. We are also seeking peer review of this draft plan concurrently with the proposed rule's comment period. We anticipate finalizing this plan, considering all public and peer review comments, prior to making a final determination on the proposed delisting rule.

Peer Review

In accordance with our policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), and the OMB's Final Information Quality Bulletin for Peer Review, dated December 16, 2004, we will solicit the expert opinions of at least three appropriate and independent specialists regarding the science in this proposed rule and the draft post-delisting monitoring plan. The purpose of such review is to ensure that we base our decisions on scientifically sound data, assumptions, and analyses. We will send peer reviewers copies of this proposed rule and the draft post-delisting monitoring plan immediately following publication in the **Federal Register**. We will invite peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed delisting and draft post-delisting monitoring plan. We will summarize the opinions of these reviewers in the final decision documents, and we will consider their input and any additional information we receive as part of our process of making a final decision on the proposal and the draft post-delisting monitoring plan. Such communication may lead to a final decision that differs from this proposal.

Required Determinations

Paperwork Reduction Act of 1995

OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), require that Federal agencies obtain approval from OMB before collecting information from the public. The OMB regulations at 5 CFR 1320.3(c) define a collection of information as the obtaining of information by or for an agency by means of identical questions posed to, or identical reporting, recordkeeping, or disclosure requirements imposed on, 10 or more persons. Furthermore, 5 CFR 1320.3(c)(4) specifies that ''ten or more persons'' refers to the persons to whom a collection of information is addressed by the agency within any 12-month period. For purposes of this definition, employees of the Federal government are not included. This proposed rule and draft post-delisting monitoring plan do not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This proposed rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a current valid OMB control number.

National Environmental Policy Act

We have determined that we do not need to prepare an environmental assessment or environmental impact statement, as defined in the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We have determined that there are no tribal lands affected by this proposed rule.

References Cited

A complete list of references cited is available on *http://www.regulations.gov* under Docket Number FWS–R4–ES–2012–0002.

Author

The primary author of this document is Chris Davidson, Arkansas Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

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.

§ 17.11 [Amended]

2. Amend § 17.11(h) by removing the entry for ''*Shagreen, Magazine Mountain*'' under ''SNAILS'' from the List of Endangered and Threatened Wildlife.

Dated: May 30, 2012.

Daniel M. Ashe,

Director, Fish and Wildlife Service.

[FR Doc. 2012–14502 Filed 6–18–12; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register

Vol. 77, No. 118

Tuesday, June 19, 2012

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

Agricultural Research Service

Notice of Intent To Grant Exclusive License

AGENCY: Agricultural Research Service, USDA.

ACTION: Notice of intent.

SUMMARY: Notice is hereby given that the U.S. Department of Agriculture, Agricultural Research Service, intends to grant to US Agriseeds of San Luis Obispo, California, an exclusive license to the variety of pepper described in Plant Variety Protection Certificate Number 200700006, ''TigerPaw-NR'', issued on August 20, 2009.

DATES: Comments must be received on or before July 19, 2012.

ADDRESSES: Send comments to: USDA, ARS, Office of Technology Transfer, 5601 Sunnyside Avenue, Rm. 4–1174, Beltsville, Maryland 20705–5131.

FOR FURTHER INFORMATION CONTACT: June Blalock of the Office of Technology Transfer at the Beltsville address given above; telephone: 301–504–5989.

SUPPLEMENTARY INFORMATION: The Federal Government's rights in this plant variety are assigned to the United States of America, as represented by the Secretary of Agriculture. It is in the public interest to so license this variety as US Agriseeds of San Luis Obispo, California has submitted a complete and sufficient application for a license. The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within thirty (30) days from the date of this published Notice, the Agricultural Research Service receives written evidence and argument which establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Richard J. Brenner,

Assistant Administrator.

[FR Doc. 2012–14835 Filed 6–18–12; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Notice of Intent To Grant Exclusive License

AGENCY: Agricultural Research Service, USDA.

ACTION: Notice of intent.

SUMMARY: Notice is hereby given that the U.S. Department of Agriculture, Agricultural Research Service, intends to grant to the University of Nebraska-Lincoln of Lincoln, Nebraska, an exclusive license to the wheat variety named ''Mattern''.

DATES: Comments must be received on or before July 19, 2012.

ADDRESSES: Send comments to: USDA, ARS, Office of Technology Transfer, 5601 Sunnyside Avenue, Rm. 4–1174, Beltsville, Maryland 20705–5131.

FOR FURTHER INFORMATION CONTACT: June Blalock of the Office of Technology Transfer at the Beltsville address given above; telephone: 301–504–5989.

SUPPLEMENTARY INFORMATION: The Federal Government's rights in this plant variety are assigned to the United States of America, as represented by the Secretary of Agriculture. The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within thirty (30) days from the date of this published Notice, the Agricultural Research Service receives written evidence and argument which establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Richard J. Brenner,

Assistant Administrator.

[FR Doc. 2012–14833 Filed 6–18–12; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Notice of Intent To Grant Exclusive License

AGENCY: Agricultural Research Service, USDA.

ACTION: Notice of intent.

SUMMARY: Notice is hereby given that the U.S. Department of Agriculture, Agricultural Research Service, intends to grant to Oregon State University of Corvallis, Oregon, an exclusive license to the blueberry variety named ''Perpetua.''

DATES: Comments must be received on or before July 19, 2012.

ADDRESSES: Send comments to: USDA, ARS, Office of Technology Transfer, 5601 Sunnyside Avenue, Rm. 4–1174, Beltsville, Maryland 20705–5131.

FOR FURTHER INFORMATION CONTACT: June Blalock of the Office of Technology Transfer at the Beltsville address given above; telephone: 301–504–5989.

SUPPLEMENTARY INFORMATION: The Federal Government's rights in this plant variety are assigned to the United States of America, as represented by the Secretary of Agriculture. The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within thirty (30) days from the date of this published Notice, the Agricultural Research Service receives written evidence and argument which establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Richard J. Brenner,

Assistant Administrator.

[FR Doc. 2012–14834 Filed 6–18–12; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Notice of Intent To Revise and Extend a Currently Approved Information Collection

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 this notice announces the intention of the National Agricultural Statistics Service (NASS) to request revision and extension of a currently approved information collection, the Stocks Reports. Revision to burden hours will be needed due to changes in the size of the target population, sampling design, and/or questionnaire length.

DATES: Comments on this notice must be received by August 20, 2012 to be assured of consideration.

ADDRESSES: You may submit comments, identified by docket number 0535–0007, by any of the following methods:

- *Email: OMBofficer@nass.usda.gov.* Include docket number above in the subject line of the message.
- *Fax:* (202) 720–6396.
- *Mail:* Mail any paper, disk, or CD–ROM submissions to: David Hancock, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW., Washington, DC 20250–2024.
- *Hand Delivery/Courier:* Hand deliver to: David Hancock, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW., Washington, DC 20250–2024.

FOR FURTHER INFORMATION CONTACT: Joseph T. Reilly, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–4333.

SUPPLEMENTARY INFORMATION:

Title: Stocks Reports.

OMB Control Number: 0535—0007.

Expiration Date of Approval: November 30, 2012.

Type of Request: Intent to Seek Approval to Revise and Extend an Information Collection for 3 years.

Abstract: The primary objective of the National Agricultural Statistics Service is to prepare and issue State and national estimates of crop and livestock production, stocks, disposition, and prices. The Stocks Report Surveys provide estimates of stocks of grains, hops, oilseeds, peanuts, potatoes, and rice that are stored off-farm. These off-farm stocks are combined with on-farm stocks to estimate stocks in all positions. Stocks statistics are used by the U.S. Department of Agriculture to help administer programs; by State agencies to develop, research, and promote the marketing of products; and by producers to find their best market opportunity(s). The current expiration date for this docket is November 30, 2012. NASS intends to request that the survey be approved for another 3 years.

Authority: These data will be collected under the authority of 7 U.S.C. 2204(a). Individually identifiable data collected under this authority are governed by Section 1770 of the Food Security Act of 1985 as amended, 7 U.S.C. 2276, which requires USDA to afford strict confidentiality to non-aggregated data provided by respondents. This Notice is submitted in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3501, et seq.) and Office of Management and Budget regulations at 5 CFR part 1320. NASS also complies with OMB Implementation Guidance, ''Implementation Guidance for Title V of the E–Government Act, Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA),'' **Federal Register**, Vol. 72, No. 115, June 15, 2007, p. 33362.

Estimate of Burden: This information collection comprises 11 individual surveys that are conducted 1, 2, 4, 5, or 12 times a year for an estimated total of 40,000 responses. Public reporting burden for this collection of information is estimated to average 15 minutes per response.

Respondents: Farms and businesses.

Estimated Number of Respondents: 8,500.

Estimated Total Annual Burden on Respondents: 10,000 hours.

Copies of this information collection and related instructions can be obtained without charge from David Hancock, NASS Clearance Officer, at (202) 690–2388.

Comments: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, through the use of appropriate automated, electronic, mechanical, technological or other forms of information technology collection methods.

All responses to this notice will become a matter of public record and be summarized in the request for OMB approval.

Signed at Washington, DC, May 30, 2012.

Joseph T. Reilly,

Associate Administrator.

[FR Doc. 2012–14824 Filed 6–18–12; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: 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 intention to request an extension for a currently approved information collection in support of the Single Family Housing Direct Loans and Grants programs. The collection involves the use of Form RD 410–8, ''Applicant Reference Letter.'' The Form will be used to obtain information about an applicant's credit history that might not appear on a credit report and to provide clarification on the promptness of applicant's payments on debts, which enables Rural Housing Service to make better creditworthiness decisions.

DATES: Comments on this notice must be received by August 20, 2012 to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: Migdaliz Bernier, Finance and Loan Analyst, Single Family Housing, Rural Housing Service, U.S. Department of Agriculture, Mail STOP 0783, 1400 Independence Ave. SW., Washington, DC 20250–0783. Phone number 202–690–3833; fax number 202–720–2232. Office hours are from 8:00 a.m. to 4:30 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Form RD 410–8, ''Applicant Reference Letter''.

OMB Number: 0575–0091.

Expiration Date of Approval: November 30, 2012.

Type of Request: Extension of a currently approved information collection.

Abstract: The Rural Housing Service (RHS) must, by law, make available to the applicant, upon request, the source of information used to make an adverse decision. Individual references may be solicited with the clear understanding that if the information is used to deny credit the information will be made available to the applicant upon request. Without this information, the Agency is

unable to determine if a customer would qualify for services.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 6 minutes per response.

Respondents: Individuals and business already extending credit/financing to Section 502 and 504 applicants.

Estimated Number of Respondents: 25,155.

Estimated Number of Responses per Respondent: 1.

Estimated Number of Responses: 25,155.

Estimated Total Annual Burden on Respondents: 2,516.

Copies of this information collection can be obtained from Brigitte Sumter, Regulations and Paperwork Management Branch, at (202) 692–0042.

Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of Rural Housing Service, including whether the information will have practical utility; (b) the accuracy of Rural Housing Service'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 Brigitte Sumter, Regulations and Paperwork Management Branch, 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 also become a matter of public record.

Dated: June 11, 2012.

Tammye Treviño,

Administrator, Rural Housing Service.

[FR Doc. 2012–14910 Filed 6–18–12; 8:45 am]

BILLING CODE 3410–XV–P

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

Meetings

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of meetings.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board) plans to hold its regular committee and Board meetings in Washington, DC, Tuesday and Wednesday, July 10–11, 2012 on the times and location listed below.

DATES: The schedule of events is as follows:

Tuesday, July 10, 2012

9:30–Noon Technical Programs Committee
1:30–2:00 p.m. Budget Committee
2:00–2:30 p.m. Planning and Evaluation Committee
2:45–4:30 p.m. Ad Hoc Committee Meetings: Closed to Public

Wednesday, July 11, 2012

1:30–3:00 p.m. Board Meeting

ADDRESSES: Meetings will be held at the Access Board Conference Room, 1331 F Street NW., Suite 800, Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: For further information regarding the meetings, please contact David Capozzi, Executive Director, (202) 272–0010 (voice); (202) 272–0054 (TTY).

SUPPLEMENTARY INFORMATION: The Board meeting scheduled on the afternoon of Wednesday, July 11, 2012 will be webcast live; visit the Access Board's main Web site at *www.access-board.gov* for further details. For this meeting session, the Access Board will consider the following agenda items:

- Approval of the draft March 14, 2012 meeting minutes (vote)
- Technical Programs Committee Report
- Budget Committee Report (vote)
- Planning and Evaluation Committee Report (vote)
- Ad Hoc Committee Reports
  - Ad Hoc Committee on Passenger Vessels (vote)
  - Ad Hoc Committee on Outdoor Developed Areas (vote)
- Executive Director's Report
- Public Comment, Open Topics

All meetings are accessible to persons with disabilities. An assistive listening system, computer assisted real-time transcription (CART), and sign language interpreters will be available at the Board meeting and committee meetings. Persons attending Board meetings are requested to refrain from using perfume, cologne, and other fragrances for the comfort of other participants (see *www.access-board.gov/about/policies/fragrance.htm* for more information).

David M. Capozzi,

Executive Director.

[FR Doc. 2012–14914 Filed 6–18–12; 8:45 am]

BILLING CODE 8150–01–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Proposed Information Collection; Comment Request; License Transfer and Duplicate License Services

AGENCY: Bureau of Industry and Security, 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 August 20, 2012.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Larry Hall, BIS ICB Liaison, (202) 482–4895, *Lawrence.Hall@bis.doc.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

This collection is needed by the Bureau of Industry and Security (BIS) to provide services to exporters who have either lost their original license and require a duplicate, or who wish to transfer their ownership of an approved license to another party.

Section 750.9 of the Export Administration Regulations (EAR) outlines the process for obtaining a duplicate license when a license is lost or destroyed. Section 750.10 of the EAR explains the procedure for transfer of ownership of validated export licenses. Both activities are services provided

after the license approval process. Each action requires a letter to BIS which includes certain information or information and certification, as explained in the EAR.

II. Method of Collection

Submitted in paper form.

III. Data

OMB Control Number: 0694–0126.

Form Number(s): N/A.

Type of Review: Regular submission (extension of a currently approved information collection).

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 110.

Estimated Time per Response: 16 minutes for a duplicate license; and 66 minutes for a transfer of license.

Estimated Total Annual Burden Hours: 38.

Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: June 14, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–14851 Filed 6–18–12; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–831]

Fresh Garlic From the People's Republic of China: Partial Rescission of the 2010–2011 Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* June 19, 2012.

FOR FURTHER INFORMATION CONTACT: Lingjun Wang or David Lindgren, 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) 482–2316 or (202) 482–3870, respectively.

Background

On November 1, 2011, the Department of Commerce (Department) published in the **Federal Register** a notice of opportunity to request administrative review of, *inter alia,* the antidumping duty order on fresh garlic from the People's Republic of China (PRC) covering the period November 1, 2010, through October 31, 2011.[1] In November 2011, the Department received review requests from PRC producers/exporters of fresh garlic [2] and the Fresh Garlic Producer Association (FGPA) and its individual members (collectively, Petitioners).[3] On December 30, 2011, the Department initiated this review for 120 producers/exporters.[4] Finally, on March 29, 2012, Petitioners timely withdrew their review requests for 100 producers/exporters listed as an attachment to this notice; [5] one company, Zhengzhou Harmoni Spice Co., Ltd. also filed a timely withdrawal of its review request on the same date.

Partial Rescission

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if a party who requested the review withdraws the request within 90 days of the day of publication of notice of initiation of the requested review. The aforementioned requests for review were withdrawn within the 90-day period. Because the requests for review were timely withdrawn and because no other party requested a review of the aforementioned producers/exporters, in accordance with 19 CFR 351.213(d)(1), we are partially rescinding this review with respect to these producers/exporters.

Assessment Rates

The Department will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. For those producers/exporters for which this review has been rescinded and which have a separate rate from a prior segment of this proceeding, antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(2). For those producers/exporters for which this review has been rescinded and which have not been assigned a separate rate from a prior segment of the proceeding, the Department has stated that they belong to the PRC-wide entity and that the administrative review will continue for these companies.[6] In both cases, the Department intends to issue the appropriate liquidation instructions directly to CBP 15 days after publication of this notice.

Notification to Importers

This notice serves as a final reminder to importers for whom this review is being rescinded, as of the publication date of this notice, of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 76 FR 67413 (November 1, 2011).

[2] They are Jinan Farmlady Trading Co., Ltd.; Qingdao Sea-Line International Trading Co., Ltd.; Shandong Jinxiang Zhengyang Import & Export Co., Ltd.; Shenzhen Xinboda Industrial Co., Ltd.; Zhengzhou Harmoni Spice Co., Ltd.; Weifang Hongqiao International Logistic Co., Ltd.

[3] The individual members of the FGPA are Christopher Ranch L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc.

[4] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 76 FR 82268 (December 30, 2011) (*Initiation Notice*).

[5] *See* Attachment 1.

[6] *See Initiation Notice.*

responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This notice is issued and published in accordance with section 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: June 11, 2012.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

Attachment 1

1. APM Global Logistics (Shanghai) Co., Ltd.
2. APS Qingdao
3. American Pioneer Shipping
4. Anhui Dongqian Foods Ltd.
5. Anqiu Friend Food Co., Ltd.
6. Anqiu Haoshun Trade Co., Ltd.
7. Chiping Shengkang Foodstuff Co., Ltd.
8. CMEC Engineering Machinery Import & Export Co., Ltd.
9. Dongying Shunyifa Chemical Co., Ltd.
10. Dynalink Systems Logistics (Qingdao) Inc.
11. Eimskip Logistics Inc.
12. Feicheng Acid Chemicals Co., Ltd.
13. Frog World Co., Ltd.
14. Golden Bridge International, Inc.
15. Hangzhou Guanyu Foods Co., Ltd.
16. Heze Ever-Best International Trade Co., Ltd. (f/k/a Shandong Heze International Trade and Developing Company)
17. Hongqiao International Logistics Co.
18. Intecs Logistics Service Co., Ltd.
19. IT Logistics Qingdao Branch
20. Jinan Solar Summit International Co., Ltd.
21. Jinan Yipin Corporation Ltd.
22. Jining De-Rain Trading Co., Ltd.
23. Jining Highton Trading Co., Ltd.
24. Jining Jiulong International Trading Co., Ltd.
25. Jining Tiankuang Trade Co., Ltd.
26. Jining Trans-High Trading Co., Ltd.
27. Jining Yifa Garlic Produce Co., Ltd.
28. Jinxiang County Huaguang Food Import & Export Co., Ltd.
29. Jinxiang Dacheng Food Co., Ltd.
30. Jinxiang Dongyun Freezing Storage Co., Ltd. (*a/k/a* Jinxiang Eastward Shipping Import and Export Limited Company and Jinxiang Dongyun Import & Export Co.)
31. Jinxiang Fengsheng Import & Export Co., Ltd.
32. Jinxiang Jinma Fruits Vegetables Products Co., Ltd.
33. Jinxiang Meihua Garlic Produce Co., Ltd.
34. Jinxiang Shanyang Freezing Storage Co., Ltd.
35. Jinxiang Shenglong Trade Co., Ltd.
36. Jinxiang Tianheng Trade Co., Ltd.
37. Jinxiang Tianma Freezing Storage Co., Ltd.
38. Jinxiang Yuanxin Import & Export Co., Ltd.
39. Juye Homestead Fruits and Vegetables Co., Ltd.
40. Kingwin Industrial Co., Ltd.
41. Laiwu Fukai Foodstuff Co., Ltd.
42. Laizhou Xubin Fruits and Vegetables
43. Linshu Dading Private Agricultural Products Co., Ltd.
44. Linyi City Hedong District Jiuli Foodstuff Co., Ltd.
45. Linyi City Kangfa Foodstuff Drinkable Co., Ltd.
46. Linyi Katayama Foodstuffs Co., Ltd.
47. Linyi Tianqin Foodstuff Co., Ltd.
48. Ningjin Ruifeng Foodstuff Co., Ltd.
49. Qingdao Apex Shipping Co., Ltd.
50. Qingdao BNP Co., Ltd.
51. Qingdao Cherry Leather Garment Co., Ltd.
52. Qingdao Chongzhi International Transportation Co., Ltd.
53. Qingdao Lianghe International Trade Co., Ltd.
54. Qingdao Saturn International Trade Co., Ltd.
55. Qingdao Sino-World International Trading Co., Ltd.
56. Qingdao Winner Foods Co., Ltd.
57. Qingdao Yuankang International
58. Qufu Dongbao Import & Export Trade Co., Ltd.
59. Rizhao Huasai Foodstuff Co., Ltd.
60. Samyoung America (Shanghai) Inc.
61. Shandong Chengshun Farm Produce Trading Co., Ltd.
62. Shandong China Bridge Imports
63. Shandong Dongsheng Eastsun Foods Co., Ltd.
64. Shandong Garlic Company
65. Shandong Longtai Fruits and Vegetables Co., Ltd.
66. Shandong Wonderland Organic Food Co., Ltd.
67. Shandong Sanxing Food Co., Ltd.
68. Shandong Xingda Foodstuffs Group Co., Ltd.
69. Shandong Yipin Agro (Group) Co., Ltd.
70. Shanghai Ever Rich Trade Company
71. Shanghai Goldenbridge International Co., Ltd.
72. Shanghai Great Harvest International Co., Ltd.
73. Shanghai Medicines & Health Products Import/Export Co., Ltd.
74. Shanghai Yijia International Transportation Co., Ltd.
75. Shenzhen Bainong Co., Ltd.
76. Shenzhen Fanhui Import & Export Co., Ltd.
77. Shenzhen Greening Trading Co., Ltd.
78. T&S International, LLC
79. Taian Eastsun Foods Co., Ltd.
80. Taian Fook Huat Tong Kee Pte. Ltd.
81. Taian Solar Summit Food Co., Ltd.
82. Tianjin Spiceshi Co., Ltd.
83. Taiyan Ziyang Food Co., Ltd.
84. U.S. United Logistics (Ningbo) Inc.
85. V.T. Impex (Shandong) Limited
86. Weifang Chenglong Import & Export Co., Ltd.
87. Weifang Jinbao Agricultural Equipment Co., Ltd.
88. Weifang Naike Foodstuffs Co., Ltd.
89. Weifang Shennong Foodstuff Co., Ltd.
90. Weihai Textile Group Import & Export Co., Ltd.
91. WSSF Corporation (Weifang)
92. Xiamen Huamin Import Export Company
93. Xiamen Keep Top Imp. and Exp. Co., Ltd.
94. Xinjiang Top Agricultural Products Co., Ltd.
95. Xuzhou Heiners Agricultural Co., Ltd.
96. XuZhou Simple Garlic Industry Co., Ltd.
97. You Shi Li International Trading Co., Ltd.
98. Zhangzhou Xiangcheng Rainbow Greenland Food Co., Ltd.
99. Zhengzhou Dadi Garlic Industry Co., Ltd.
100. Zhengzhou Harmoni Spice Co., Ltd.

[FR Doc. 2012–14966 Filed 6–18–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Methodological Change for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as Amended, In Certain Non-Market Economy Antidumping Proceedings

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Announcement of change in methodology.

SUMMARY: After consideration of public comments, the Department of Commerce (''the Department'') will implement a methodological change to reduce export price or constructed export price in certain non-market economy (''NME'') antidumping proceedings by the amount of export

tax, duty, or other charge, pursuant to section 772(c)(2)(B) of the Tariff Act of 1930, as amended (''the Act'').

FOR FURTHER INFORMATION CONTACT:

Albert Hsu, Senior Economist, Office of Policy, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–4491.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to section 772(c)(2)(B) of the Act, the Department is instructed to reduce the export price or constructed export price used in the antidumping margin calculation by ''the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States, other than an export tax, duty, or other charge described in section 771(6)(C) {of the Act}.'' However, the Department's past administrative practice has been not to apply section 772(c)(2)(B) of the Act in NME antidumping proceedings because pervasive government intervention in NMEs precluded proper valuation of taxes paid by NME respondents to NME governments. This practice originated in the less-than-fair-value investigations of pure magnesium and magnesium alloy from the Russian Federation, which the Department then considered to be an NME country. *See Notice of Final Determinations of Sales at Less Than Fair Value: Pure Magnesium and Alloy Magnesium From the Russian Federation,* 60 FR 16440 (March 30, 1995) (''*Russian Magnesium*''), at Comment 10. In those investigations, the Department determined not to reduce the NME respondents' U.S. prices for an export tax paid to the NME government, the Russian Federation. *Id.*

In subsequent litigation challenging that determination, the Department explained its reasoning as follows:

> The {NME} is governed by a presumption of widespread intervention and influence in the economic activities of enterprises. An export tax charged for one purpose may be offset by government transfers provided for another purpose.
>
> * * * * *
>
> To make a deduction for export taxes imposed by a NME government would unreasonably isolate one part of the web of transactions between government and producer. The Department's uniform approach to intra-NME transfers can be seen in its policy regarding transfers (or ''subsidies'') paid by a NME government to a NME producer. The Department—with the approval of the Court of Appeals—has declined to find such transfers to be subsidies given the nature of a {NME}. Such an economy is riddled with distortions, with the government influencing prices and cost structures, regulating investment, wages and private ownership, and allocating credit. Attempts to isolate individual government interventions in this setting—whether they be transfers from the government or from exporters to the government—make no sense.

See Remand Redetermination: *Magnesium Corp. of America, et al.* v. *United States,* at 6–8, dated Oct. 28, 1996 (''Remand Redetermination'') (available at: *http://ia.ita.doc.gov/tlei/index.html*). The U.S. Court of International Trade (''CIT'') upheld the Department's remand results. *See Magnesium Corp. of America* v. *United States,* 20 CIT 1464, 1466 (1996). The U.S. Court of Appeals for the Federal Circuit (''Federal Circuit'') then affirmed the CIT's decision, stating that it agreed with the reasoning put forward in the Department's Remand Redetermination. *See Magnesium Corp. of America* v. *United States,* 166 F.3d 1364, 1370–71 (Fed. Cir. 1999) (''*Mag. Corp. III*'').

However, since *Mag. Corp. III,* the Department has changed its practice with respect to application of the countervailing duty (''CVD'') law to subsidized imports from the People's Republic of China (''the PRC'') and the Socialist Republic of Vietnam (''Vietnam''), which the Department continues to designate as NME countries for antidumping purposes. As explained in the CVD investigations of coated free sheet paper from the PRC and polyethylene retail carrier bags from Vietnam, the present-day Chinese and Vietnamese economies are sufficiently dissimilar from Soviet-style economies that the Department can determine whether the Chinese or Vietnamese governments have bestowed an identifiable and measurable benefit upon a producer, and whether the benefit is specific, including certain measures related to taxation. *See Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination,* 72 FR 60645 (October 25, 2007) (''*CFS Paper*''); ''Whether the Analytical Elements of the *Georgetown Steel* Opinion are Applicable to China's Present-Day Economy,'' dated March 29, 2007 (available at: *http://ia.ita.doc.gov/download/prc-cfsp/CFS%20China.Georgetown%20applicability.pdf*); *Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination,* 74 FR 45811, 45813–14 (September 4, 2009), unchanged in *Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination,* 75 FR 16428 (April 1, 2010) (''*PRCBs*''), and accompanying Issues and Decision Memorandum at III (''Applicability of the CVD Law to Vietnam'').

Pursuant to its determination that subsidies from certain NME governments to NME companies can be identified and measured, the Department has reconsidered its administrative practice that taxes paid by NME companies to these NME governments cannot be identified and measured. Specifically, the Department has proposed a change to the administrative practice explained in *Russian Magnesium,* as upheld in the *Mag. Corp.* cases, with respect to the PRC and Vietnam. *See Proposed Methodology for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as Amended, In Certain Non-Market Economy Antidumping Proceedings; Request for Comment,* 76 FR 4866 (January 27, 2011) (''*Proposed Methodology*''). Under that proposal, the Department, pursuant to section 772(c)(2)(B) of the Act, would reduce export price and constructed export price used in NME dumping margin calculations by the amount of export taxes and similar charges, including value added taxes (''VAT'') not rebated upon export, in less-than-fair-value investigations and administrative reviews of antidumping duty orders. *Id.* This methodology may later be applied to other NMEs, pursuant to a determination that the NME at issue is sufficiently dissimilar from Soviet-style economies.

After consideration of public comments, the Department is hereby adopting the following methodology to implement section 772(c)(2)(B) in antidumping duty investigations and administrative reviews involving merchandise from the PRC and Vietnam.

Methodological Change

In antidumping duty investigations and administrative reviews involving merchandise from the PRC and Vietnam, the Department will determine whether, as a matter of law, regulation, or other official action, the NME government has imposed ''an export tax, duty, or other charge'' upon export of the subject merchandise during the period of investigation or the period of review (*e.g.,* an export tax or VAT that is not fully refunded upon exportation). The Department anticipates that parties would place upon the record copies of laws, regulations, other official

documents, or similar publicly available information that identify the particular tax imposed on certain exports by the PRC or Vietnamese government. The Department will also consider evidence as to whether the particular respondent(s) was, in some manner, exempted from the requirement to pay the export tax, duty, or other charge. The Department anticipates that such evidence would include official documentation of the respondent's exemption.

Provided that the NME government imposed an export tax, duty, or other charge on subject merchandise as contemplated by section 772(c)(2)(B) of the Act, from which the respondent was not exempted, the Department will reduce the respondent's export price and constructed export price accordingly, by the amount of the tax, duty or charge paid, but not rebated. The Department anticipates that, in many instances, the export tax, VAT, duty, or other charge will be a fixed percentage of the price. In such cases, the Department will adjust the export price or constructed export price downward by the same percentage. In other instances where the tax or charge is a flat fee or nominal sum denominated in NME country currency, the Department will determine the ratio of the flat fee to the respondent's export price or constructed export price as denominated in its domestic currency, and then adjust the export price or constructed export price downward by the same ratio.

Analysis of Public Comments

The Department received and carefully considered seventeen comments on the *Proposed Methodology.* Summaries of the comments, grouped by theme, and the Department's responses are provided below.

Selective Treatment of Internal NME Tax Transactions

Opponents of the *Proposed Methodology* contend that the Department cannot engage in selective use of certain NME transactions for dumping margin calculation purposes. Those commenters argue that, if there is a basis to use internal NME tax transactions for antidumping margin calculation purposes, then there is a basis for using other internal NME transactions as well. Opponents of the change further suggest that the proposal also does not consider other cost elements that are presumed to be reflected in a price from a market economy country, but not from an NME country.

Interests favoring the *Proposed Methodology* assert that, because of the tax-free normal values used in NME antidumping methodology proceedings, the proposed modification would result in a preferred tax-neutral dumping margin calculation. Other commenters suggest that the Department should expand its methodological change and adjust for all NME taxes and charges that impact margin calculation, not just export taxes and VAT.

Department's Position: In adopting this methodological change, the Department considers taxes levied by the Chinese and Vietnamese governments to be different from other internal transactions between companies in an NME context. Although we do not know how individual companies in those NME countries set prices, we do know that the government taxes a portion of companies' sales receipts. Consistent with our CVD determinations in *CFS Paper* and *PRCBs,* we can measure a transfer of funds between certain NMEs and companies therein, regardless of the direction the money flows. Given that, and given that we know how much respondent companies receive for the U.S. sale, we have determined it appropriate to take taxes into account, as directed by the statute. *See* section 772(c)(2)(B) of the Act.

Specifically, the statute defines an NME as ''any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.'' *See* section 771(18) of the Act. As a result, when the Department evaluates whether a tax is included in the price of an NME export sale, it cannot take into consideration the same assumptions as those taken into account when performing a similar type of evaluation for a market economy sale, which does operate in accordance with market principles of cost or pricing structures. Accordingly, it is not an issue of price formation (*i.e.,* whether the seller considers tax when forming price) because that is a market economy concept which is inapplicable by the very definition of an NME.

Additionally, because these are taxes affirmatively imposed by the Chinese and Vietnamese governments, we presume that they are also collected.[1] The unrefunded VAT or affirmatively imposed export tax only arises through the fact that there were export sales.

As a result, because the liability arises as a result of export sales, this is where payment originates. Therefore, to achieve what is called for in the statute, the gross price charged to the customer must be reduced to a net price received. In cases involving imports from the PRC or Vietnam, ''included in the price'' means whether the respondent has reported a price which is gross (*i.e.,* inclusive) or net (*i.e.,* exclusive) of tax. As such, if a gross price has been reported, a deduction must be made for those taxes imposed on the sale, and if a net price has been reported, deductions are not required. We note that, in prior cases involving imports from the PRC or Vietnam where the Department was aware that such a tax was imposed, it has typically been expressed as a percentage of the export selling price. Therefore, any such deduction to export price would also be performed on a percentage basis.

We further note that deducting internal NME tax transactions from export price or constructed export price is consistent with the Department's longstanding policy, which is consistent with the intent of the statute, that dumping comparisons be tax-neutral. *See Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27369 (May 19, 1997) (*citing* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, vol. 1, 827, reprinted in 1994 U.S.C.C.A.N. 3773, 4172).

In response to comments that the methodological change does not consider other cost elements that are presumed to be reflected in a price from a market economy country, but not from an NME country, we note that the new methodology does not consider other elements of cost or price because, pursuant to section 773(c)(1)(B) of the Act and consistent with the PRC's and Vietnam's Protocols of Accession to the World Trade Organization (''WTO''), the Department can reject internal costs and prices in an NME country for antidumping and countervailing duty purposes. What is relevant for margin calculation purposes is the net revenue the company ultimately receives on sales made to its U.S. customers, after adjusting for taxes, as provided for by the statute.

Magnesium Corp

Certain commenters argue that the *Proposed Methodology* is inconsistent with the Federal Circuit decision in *Mag. Corp. III,* which sustained the Department's rationale for not deducting

[1] As stated above, the Department's methodological change allows individual companies the opportunity to demonstrate that the particular respondent(s) was, in some manner, exempted from the requirement to pay the export tax, duty, or other charge.

export taxes from U.S. price in the *Russian Magnesium* investigation. Proponents of the proposed methodological change contend that the deduction for VAT, export tax, and other charges from export price or constructed export price is mandatory under the plain language of section 772(c)(2)(B) of the Act. Those parties further note that the Federal Circuit in *Mag. Corp. III* found it within the Department's discretion to determine whether VAT and export taxes should be deducted from USP. To the extent the Department's prior practice had its origins in the *Russian Magnesium* investigation, interests favoring the proposal assert that the current Chinese and Vietnamese economies are different from the Russian economy of that era in that the Department, having found that it can apply the CVD law to the PRC and Vietnam, is able to identify certain other transfers between governments and companies in those countries.

Department's Position: The Federal Circuit did not find that the Department could not apply the relevant statutory provision in an NME context. It simply agreed with the Department's stated rationale *at the time* for not doing so, which the Department applied in a context different from the economies of the present-day PRC and Vietnam. Given the realities of those two economies today, the Department's understanding of the phrase ''if included in such price'' in section 772(c)(2)(B) of the Act has evolved accordingly in the manner described above. Thus, the change in methodology is the consequence of the inapplicability of the reasoning of *Russian Magnesium* to the PRC and Vietnam today.

Application of CVD Law to the PRC and Vietnam

Parties opposing the methodological change contend that the Department's proposal relies heavily upon the Department's analysis in the *CFS Paper* CVD investigation, which is at odds with the Department's previous insistence upon the distinctiveness of the antidumping and CVD regimes as well as the recent CIT decision in *GPX Int'l Tire Corp.* v. *United States,* 715 F. Supp. 2d 1337 (Ct. Int'l Trade 2010) (''*GPX*''), that calls into question the legality of applying the CVD law to the PRC.

Department's Position: As discussed above, the methodological change does rely in part upon the Department's analysis in the *CFS Paper* investigation. Whether or not the proposal is at odds with any previous insistence upon the distinctiveness of the antidumping duty and CVD regimes, the statute requires a deduction for certain taxes from U.S. price. In *CFS Paper* and *PRCBs,* the Department found that it could identify and take into account a government-supplied subsidy in certain NME contexts. Given that a government imposed tax is also a transfer of funds between the government and a company, we have relied upon *CFS Paper* and *PRCBs* solely to recognize this government-imposed tax.

With respect to the CIT decision in *GPX* cited by certain parties, the Department continues to apply the CVD law to the PRC and Vietnam. In that regard, the President on March 13, 2012, signed into law H.R. 4105, ''To apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes.'' H.R. 4105 amended the Act, among other purposes, to confirm that the Department must apply the CVD law to subsidized imports from certain countries designated as NMEs under the AD laws. *See* section 701(f)(1) of the Act. The Federal Circuit has acknowledged that H.R. 4105 overturns its earlier ruling affirming the CIT's judgment in *GPX. See GPX Int'l Tire Corp.* v. *United States,* 2012 U.S. App. LEXIS 9444 (Fed. Cir. May 9, 2012).

Allegedly Distortive Elements of the Proposed Methodology

Some commenters argue that the proposal does not account for how export taxes and VATs actually operate in the PRC, thereby resulting in distortions.

Department's Position: It is correct that the proposal does not attempt to address every aspect of the PRC's and/or Vietnam's respective export tax and VAT systems. This methodological change simply reflects that the statute calls for the Department to adjust U.S. price for export taxes, irrespective of whether they are levied in a market economy or NME context. Indeed, subsequent to implementation, the PRC's and/or Vietnam's VAT and export tax systems may change. We simply are recognizing with this methodological change that the PRC and Vietnam are dissimilar from Soviet-style economies, which was the context in which we adopted the policy not to make the adjustment for VAT and export taxes. As a result, we are planning to apply the relevant statutory provision to merchandise from the PRC and Vietnam. If there is a peculiarity with respect to the system or how it is applied in a given case, parties are encouraged to discuss it, and we will address those comments on a case-by-case basis.

Competitiveness of U.S. Manufacturers

Certain parties comment that the *Proposed Methodology* would negatively affect the competitiveness of U.S. manufacturers that rely upon imported raw materials through likely increases in antidumping margins on merchandise imported from the PRC and Vietnam, thus undermining the objectives of the National Export Initiative (''NEI''). To that end, one commenter suggested that the *Proposed Methodology* is inconsistent with the United States' position in the WTO dispute involving Chinese restrictions on the export of raw materials (*China—Measures Related to the Exportation of Various Raw Materials,* WT/DS394) that PRC export taxes harm U.S. manufacturers that consume PRC-origin merchandise. In contrast, another commenter commends the methodological change for advancing the objectives of the NEI.

Department's Position: The Department disagrees that the methodological change undermines the objectives of the NEI. Those objectives focus on facilitating increased U.S. exports. Moreover, the enforcement of U.S. trade remedy laws is an explicit component of the NEI, and toward that end, tax-neutral dumping margin calculations, *i.e.,* those based on VAT- and export tax-exclusive U.S. price and normal values, result in antidumping duties that further level the playing field for domestic manufacturers and increase their potential export competitiveness. For that reason, we disagree that there is any inconsistency between the Department's proposal and the United States' position in the WTO dispute on Chinese export restrictions. Both represent necessary and appropriate responses to the market- and price-distorting effects of export taxes.

Furthermore, this methodological change is substantively distinct from the positions and arguments raised by the United States in the WTO dispute, which were informed by particular commercial policy concerns related to the availability of raw materials and involved certain WTO rules and obligations that are not at issue here. As noted above, section 772(c)(2)(B) of the Act is a statutory requirement. Given the changes in our practice with regard to the PRC and Vietnam (*i.e.,* the application of the CVD law), we are simply acknowledging that we can now apply section 772(c)(2)(B) of the Act in proceedings involving merchandise from the PRC and Vietnam to ensure tax neutrality in our dumping margin calculations, and make the adjustments

that we would otherwise ordinarily make under the statute.

Implementation

The methodological change detailed above will be applied to future administrative NME proceedings involving merchandise from the PRC and Vietnam initiated after publication of this notice.

Dated: June 12, 2012.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2012–14964 Filed 6–18–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket Number 120531129–2129–01]

Alternative Personnel Management System (APMS) at the National Institute of Standards and Technology

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of Modifications with Request for Comment.

SUMMARY: This notice changes the National Institute of Standards and Technology's (NIST) Alternative Personnel Management System (APMS) published October 21, 1997 (62 FR 54604, 54606), May 6, 2005 (70 FR 23996), July 15, 2008 (73 FR 40500), and July 21, 2009 (74 FR 35841 and 74 FR 35843) to (1) eliminate the required bonus for employees at the cap of their pay band who are appraised at the top two rating levels, and (2) solidify the three-year probationary period, a hallmark of the original NIST demonstration project and later APMS.

DATES: This notice is effective on June 19, 2012. Comments will be accepted until 5:00 p.m. Eastern Time on July 19, 2012.

ADDRESSES: Send or deliver comments to Amy K. Cubert, Supervisory Human Resources Specialist, National Institute of Standards and Technology, Building 101, Room A–123, 100 Bureau Drive Mail Stop 1720, Gaithersburg, MD 20899–1720, Fax: (301) 948–6107 or email comments to *ppschanges@nist.gov.*

FOR FURTHER INFORMATION CONTACT: For questions or comments, please contact Amy K. Cubert at the National Institute of Standards and Technology, (301) 975–3006.

SUPPLEMENTARY INFORMATION:

Background

In accordance with Public Law 99–574, the National Bureau of Standards Authorization Act for fiscal year 1987, the Office of Personnel Management (OPM) approved a demonstration project plan, ''Alternative Personnel Management System (APMS) at the National Institute of Standards and Technology (NIST),'' and published the plan in the **Federal Register** on October 2, 1987 (52 FR 37082). The published demonstration project plan was modified twice to clarify certain NIST authorities (54 FR 21331 of May 17, 1989, and 55 FR 39220 of September 25, 1990). The project plan and subsequent amendments were consolidated in the final APMS plan, which became permanent on October 21, 1997 (62 FR 54604). NIST published three subsequent amendments to the final APMS plan: One on May 6, 2005 (70 FR 23996), which became effective upon publication in the **Federal Register**; one on July 15, 2008 (73 FR 40500), which became effective on October 1, 2008; and one on July 21, 2009 (74 FR 35841), which became effective upon publication in the **Federal Register**. NIST also published a correction on July 21, 2009 (74 FR 35843), which became effective upon publication in the **Federal Register**.

The final APMS plan, as amended, provides for modifications to be made as experience is gained, results are analyzed, and conclusions are reached on how the system is working. This notice formally modifies the APMS plan to (1) eliminate the mandatory minimum bonus for pay-capped employees receiving either a *Superior Contributor* or *Exceptional Contributor* rating of record, and (2) to solidify the three-year probationary period, a feature of the original demonstration project and subsequent Alternative Personnel Management System, for employees in the Scientific and Engineering career path hired into the Excepted and Competitive Service. Comments will be considered and any changes deemed necessary will be made.

Dated: June 13, 2012.

David Robinson,

Associate Director for Management Resources.

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I. Executive Summary

The National Institute of Standards and Technology's (NIST) Alternative Personnel Management System (APMS) is designed to: (1) Improve hiring and allow NIST to compete more effectively for high-quality researchers through direct hiring, selective use of higher-entry salaries, and selective use of recruiting allowances; (2) motivate and retain staff through higher pay potential, a pay-for-performance system, more responsive personnel systems, and selective use of retention allowances; (3) strengthen the manager's role in personnel management through delegation of personnel authorities; and (4) increase the efficiency of personnel systems through installation of a simpler and more flexible classification system based on pay banding through reduction of guidelines, steps, and paperwork in classification, hiring, and other personnel systems, and through automation (52 FR 37082, October 2, 1987). Since implementing the APMS, NIST is more competitive for talent, and NIST managers report significantly more authority to make decisions concerning employee pay.

This amendment seeks to better ensure fiscal responsibility and budget accountability within the pay-for-performance component of the APMS. It also seeks to ensure that management has the ability to adequately evaluate its scientific and engineering professional employees for research results, which may take longer than one year.

NIST's APMS performance rating system is a pay-for-performance system in which eligible employees may receive pay increases and bonuses based on performance. Pay increases are based on an annually determined percentage of the mid-point salary for each pay band in a career path and linked directly to the top four performance ratings. One of the characteristics of the NIST APMS performance management system is a required bonus for high-performing employees who cannot receive a pay increase because they are at the top of their pay band. Specifically, salary-capped employees receiving a *Superior Contributor* or *Exceptional Contributor* rating must receive a bonus at least equivalent to the salary increase that they would have received if their salaries were not capped.

Another feature of NIST's APMS is an extended probationary period of up to three years for employees in the Scientific and Engineering career path (classified as ''ZP''). The extended probationary period was an original component of the NIST Demonstration Project and later in the APMS. The purpose of the extended probationary period was to allow more time to assess scientific and engineering professionals because research results can often be

difficult to evaluate in one year. Since the finalizing of the NIST APMS in 1997, the United States Court of Appeals for the Federal Circuit decided two cases, *Van Wersch* v. *Department of Health & Human Services,* 197 F.3d 1144 (Fed. Cir. 1999), and *McCormick* v. *Department of the Air Force,* 307 F.3d 1339 (Fed. Cir. 2002), which affected NIST's ability to fully utilize its extended probationary period.

This amendment modifies the APMS Plan, which was last amended in July 2009. Specifically, NIST will eliminate the mandatory minimum bonus for employees who are appraised at the top two rating levels, ''Superior Contributor'' and ''Exceptional Contributor.'' It will also identify waiver language needed to retain the original system feature of an extended probationary period of up to three years for employees in the Scientific and Engineering career path hired into the Excepted and Competitive Service. NIST will continually monitor the effectiveness of this amendment.

II. Basis for APMS Plan Modification

A. Performance Bonuses

The need to modify the current NIST APMS Pay for Performance System (PPS) surfaced in early 2011 after the implementation of a two-year pay freeze for Federal employees and the budget crisis that was resolved to narrowly avert a government shutdown. These actions reinforced the uncertainty of the budget for NIST, and, without additional funding for bonuses and pay increases, NIST realized that measures had to be taken to ensure fiscal responsibility in the application of its PPS.

Subsequently, in June 2011, the Office of Management and Budget (OMB) and the Office of Personnel Management (OPM) issued a memorandum titled ''Guidance on Awards for Fiscal Years 2011 and 2012,'' [1] implementing budgetary limits on monetary awards, which had a significant impact on NIST's PPS. In response to these limitations, in August 2011, the Performance Management Board (PMB), responsible for governing and overseeing NIST's APMS, decided to exercise its authority and approved an exception to normal procedures that suspended the mandatory minimum bonus for pay-capped employees who received Exceptional Contributor and Superior Contributor ratings in Fiscal Year 2011. As a result, all performance bonuses in FY11 were granted on a discretionary basis, subject to management controls to ensure that higher-rated employees in the same career path and pay band received commensurate bonuses.

In an effort to more closely align NIST's APMS performance system with the Administration's focus on fiscal responsibility and careful management of all resources, NIST is amending the provisions of the APMS to remove the requirement that a salary-capped employee with an Exceptional Contributor or Superior Contributor rating must receive a bonus at least equivalent to the salary increase that would have been received if the employee's salary were not capped.

B. Three-Year Probationary Period

Since its inception in 1987, NIST has had a provision, first in its OPM-approved Demonstration Project and later in its approved APMS, for an extended probationary period of up to three years for employees in the Scientific and Engineering career path (ZP). Appropriate waivers of laws, rules, and regulations were made at the time. Since then, the Federal Circuit issued two decisions (noted above) that affected NIST's ability to fully exercise the extended probationary period. This notice amends the APMS by identifying the appropriate waivers to permit NIST to apply an extended probationary period of up to three years to employees in the Scientific and Engineering career path.

III. Changes in the APMS Plan

The APMS at NIST, published in the **Federal Register** on October 21, 1997 (62 FR 54604), May 6, 2005 (70 FR 23996), July 15, 2008 (73 FR 40500), and July 21, 2009 (74 FR 35841 and 74 FR 35843), is amended as follows:

1. Performance Bonuses: The subsection titled ''Performance Bonuses'' (70 FR 23996, 23999, May 6, 2005) is deleted in its entirety and replaced with the following:

''Performance Bonuses''

Bonuses are the only cash awards linked to the NIST APMS pay-for-performance system. They are awarded at the end of the performance rating period and may be granted in conjunction with performance pay increases. A pay pool manager may award a bonus to any employee with a performance rating of Contributor or higher. A pay pool manager is a line manager who manages his or her organization's pay increase and bonus fund and has final decision authority over the performance ratings and bonuses of subordinate employees.''

2. Authorities and Waiver of Laws and Regulations Required: The subsection titled ''Authorities and Waiver of Laws and Regulations Required'' (62 FR 54604, 54613, October 21, 1997) is deleted in its entirety and replaced with the following:

''Authorities and Waiver of Laws and Regulations Required'' Public Law 99–574 gave the National Institute of Standards and Technology (NIST) the authority to experiment with several specific personnel system innovations which are otherwise prohibited by law and regulations. In addition to the authorities granted by the original NIST project legislation, the following waivers of law and regulation are included:

Title 5, U.S. Code

- Section 5304, Locality-based comparability payments.
- Section 5333, Minimum rate for new appointments.
- Section 5753–5754, except that relocation bonuses under section 5753 continue to apply.
- Subchapter VI of Chapter 53 Grade and Pay Retention, (To the extent necessary to allow the following modifications: (1) Pay retention does not apply to reductions in pay caused solely by geographic movement; and (2) pay retention does not apply to conversions to the General Schedule as long as the employee's total rate of pay is not reduced).
- Section 7501(1), Adverse actions. (waiving the language ''or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less;'' waived only for positions in the Scientific and Engineering Career path).
- Sections 7511(a)(1)(ii), 7511(a)(1)(B), 7511(a)(1)(C)(ii), Adverse actions (waived only for positions in the Scientific and Engineering Career path).
- Section 7512(4), Adverse actions, (To the extent necessary to allow the following modifications: (1) Exclude reductions in pay that are solely due to recomputation upon geographic movement; and (2) exclude conversions to the General Schedule that do not result in a reduction in the employee's total rate of pay).

Title 5, Code of Federal Regulations

- Sections 315.801, Probationary period; when required, (waived only for positions in the Scientific and Engineering Career path).
- Section 315.802, Length of probationary period, (waived only for positions in the Scientific and Engineering Career path).

[1] *http://www.chcoc.gov/transmittals/TransmittalDetails.aspx?TransmittalID=3997.*

- Section 315.803(b), Agency action during probationary period (general) (waived only for positions in the Scientific and Engineering Career path).
- Section 315.805, Termination of probationers for conditions arising before appointment (waived only for positions in the Scientific and Engineering Career path).
- Section 315.806, Appeal rights to the Merit Systems Protection Board (waived only for employees in the Scientific and Engineering Career path serving a probationary or trial period).
- Section 351.401, Determining Retention Standing.
- Section 351.402, Competitive area in RIF.
- Section 351.403, Competitive level in RIF.
- Sections 351.504(a) and (d), Credit for Performance.
- Section 351.701, Assignment involving displacement.
- Section 531.203, Minimum rate for new appointments.
- Part 575, Subpart A Recruitment Bonuses.
- Part 575, Subpart C Retention Allowances.
- Sections 752.401(c)(2), 752.401(c)(3), 752.401(c)(5), Coverage (waived only for positions in the Scientific and Engineering Career path). Department Administrative Orders.
- Section 202–302, Employment in the Excepted Service (waived to the extent inconsistent with the APMS).
- Section 202–315, Probationary and Trial Periods (waived to the extent inconsistent with the APMS).

[FR Doc. 2012–14918 Filed 6–18–12; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Western and Central Pacific Fisheries Convention Vessel Information Family of Forms

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 August 20, 2012.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov).*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Tom Graham, 808–944–2219 or *Tom.Graham@noaa.gov*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for an extension of a currently approved information collection.

National Marine Fisheries Service (NMFS) has issued regulations under authority of the Western and Central Pacific Fisheries Convention Implementation Act (WCPFCIA; 16 U.S.C. 6901 *et seq.*) to carry out the obligations of the United States under the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Convention), including implementing the decisions of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Commission). The regulations include requirements for the owners or operators of U.S. vessels to: (1) Apply for and obtain a WCPFC Area Endorsement if the vessel is used for fishing for highly migratory species on the high seas in the Convention Area (50 CFR 300.212), and (2) complete and submit a Foreign Exclusive Economic Zone (EEZ) Form if the vessel is used for fishing for highly migratory species in the Convention Area in areas under the jurisdiction of any nation other than the United States (50 CFR 300.213).

The application for WCPFC Area Endorsements calls for specified information about the vessel and its operator that is not already collected via the application for high seas fishing permits issued under 50 CFR 300.13. The Foreign EEZ Form calls for specified information about the vessel, its owners and operators and any fishing authorizations issued by other nations.

This information collected under the two requirements is used by NOAA, the U.S. Coast Guard, and the Commission to monitor the size and composition of the HMS fleets in the Convention Area for compliance-related and scientific purposes.

II. Method of Collection

Respondents must submit some of the information by mail or in person via paper forms, and have a choice of submitting some of the information electronically, by mail, or in person.

III. Data

OMB Control Number: 0648–0595.

Form Number: None.

Type of Review: Regular submission (extension of a currently approved information collection).

Affected Public: Business or other for-profit organizations; individuals or households.

Estimated Number of Respondents: 63.

Estimated Time per Response: WCPFC Area Endorsement Application, 60 minutes; Foreign EEZ Form, 90 minutes.

Estimated Total Annual Burden Hours: 69.

Estimated Total Annual Cost to Public: $63 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.

Dated: June 14, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–14852 Filed 6–18–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Vessel Monitoring System Requirements Under the Western and Central Pacific Fisheries Convention

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 August 20, 2012.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov).*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Tom Graham, (808) 944–2219 or *Tom.Graham@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for an extension of a currently approved information collection. National Marine Fisheries Service (NMFS) has issued regulations under authority of the Western and Central Pacific Fisheries Convention Implementation Act (WCPFCIA; 16 U.S.C. 6901 *et seq.*) to carry out the obligations of the United States under the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Convention), including implementing the decisions of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Commission). The regulations include a requirement for the owners and operators of U.S. vessels that fish for highly migratory species on the high seas in the Convention Area to carry and operate near real-time satellite-based position-fixing transmitters (''Vessel Monitoring System-VMS-units'') at all times except when the vessel is in port. As part of this requirement, vessel owners and operators must transmit: (1) ''On/off reports'' to NMFS whenever the VMS unit is turned off while the vessel is in port, (2) ''activation reports'' to NMFS prior to the first use of a VMS unit, and (3) automatic ''position reports'' from the VMS unit to NOAA and the Commission as part of a VMS operated by the Commission (50 CFR 300.45). Under this information collection, it is expected that vessel owners and operators would also need to purchase, install, and occasionally maintain the VMS units.

The information collected from the vessel position reports is used by NOAA and the Commission to help ensure compliance with domestic laws and the Commission's conservation and management measures, and are necessary in order for the United States to satisfy its obligations under the Convention.

II. Method of Collection

Respondents may submit on/off reports by facsimile or email, and they may submit activation reports by mail, facsimile or email. Position reports are transmitted electronically and automatically from the VMS unit.

III. Data

OMB Control Number: 0648–0596.

Form Number: None.

Type of Review: Regular submission (extension of a currently approved information collection).

Affected Public: Business or other for-profit organizations; individuals or households.

Estimated Number of Respondents: 78.

Estimated Time per Response: VMS unit purchase and installation, 1 hr; Activation Reports, 5 min; on/off reports, 5 min; VMS unit maintenance, 1 hr.

Estimated Total Annual Burden Hours: 192.

Estimated Total Annual Cost to Public: $136,111 in capital costs and 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.

Dated: June 14, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–14865 Filed 6–18–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC067

Marine Mammals; File No. 17350

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that North Slope Borough Department of Wildlife Management, P.O. Box 69, Barrow, AK 99723 [Taqulik Hepa, Responsible Party; Dr. John C. George, Principal Investigator], has applied in due form for a permit to collect, import, export, and receive marine mammal parts for scientific research.

DATES: Written, telefaxed, or email comments must be received on or before July 19, 2012.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the *Features* box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 17350 from the list of available applications.

These documents are also available upon written request or by appointment in the following offices:

Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376; and

Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668; phone (907) 586–7221; fax (907) 586–7249.

Written comments on this application should be submitted to the Chief,

Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by email to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on these applications would be appropriate.

FOR FURTHER INFORMATION CONTACT: Laura Morse or Amy Sloan, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

The North Slope Borough Department of Wildlife Management requests authorization to collect, receive, import and export parts from legal foreign (Russia and Canada) and domestic subsistence-collected marine mammals of the following species: Bearded seal (*Erignathus barbatus*), ringed seal (*Phoca hispida*), spotted seal (*Phoca larga*), ribbon seal (*Phoca fasciata*), bowhead whale (*Balaena mysticetus*), beluga whale (*Delphinapterus leucas*), minke whale (*Balaenoptera acutorostrata*), grey whale (*Eschrichtius robustus*), and harbor porpoise (*Phocoena phocoena*). Parts would be archived and used for research on a variety of health-related analyses such as tissue histology, contaminants analyses, infectious disease research, parasitology studies, and stable isotope work. Additionally, tissues would be collected to augment the National Marine Mammal Tissue Bank or state tissue archives. No animals would be killed for the purpose of providing samples under this permit. No live animal takes are being requested and no incidental harassment of animals would occur. The requested duration of the permit is five years.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activities proposed are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: June 13, 2012.

P. Michael Payne,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–14931 Filed 6–18–12; 8:45 am]

BILLING CODE 3510–22–P

COMMISSION OF FINE ARTS

Notice of Meeting

The next meeting of the U.S. Commission of Fine Arts is scheduled for June 21, 2012, at 10 a.m. in the Commission offices at the National Building Museum, Suite 312, Judiciary Square, 401 F Street NW., Washington, DC 20001–2728. Items of discussion may include buildings, parks, and memorials.

Draft agendas and additional information regarding the Commission are available on our Web site: *www.cfa.gov.* Inquiries regarding the agenda and requests to submit written or oral statements should be addressed to Thomas Luebke, Secretary, U.S. Commission of Fine Arts, at the above address; by emailing *staff@cfa.gov;* or by calling 202–504–2200. Individuals requiring sign language interpretation for the hearing impaired should contact the Secretary at least 10 days before the meeting date.

Dated: June 4, 2012 in Washington, DC.

Thomas Luebke,

Secretary, AIA.

[FR Doc. 2012–14689 Filed 6–18–12; 8:45 am]

BILLING CODE 6331–01–M

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meeting

The following notice of a scheduled meeting is published pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, 5 U.S.C. 552b.

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIMES AND DATES: The Commission has scheduled a meeting for the following date: June 21, 2012 at 1:00 p.m.

PLACE: Three Lafayette Center, 1155 21st St. NW., Washington, DC, Lobby Level Hearing Room (Room 1300).

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission has scheduled this meeting to consider various rulemaking matters, including the issuance of proposed rules and the approval of final rules. The agenda for this meeting is available to the public and posted on the Commission's Web site at *http://www.cftc.gov.* In the event that the time or date of the meeting changes, an announcement of the change, along with the new time and place of the meeting will be posted on the Commission's Web site.

CONTACT PERSON FOR MORE INFORMATION: David A. Stawick, Secretary of the Commission, 202–418–5071.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2012–15000 Filed 6–15–12; 11:15 am]

BILLING CODE 6351–01–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for comment.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau), 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. The Bureau is soliciting comments regarding a proposed generic information collection titled, ''Generic Clearance for Development and/or Testing of Model Forms, Disclosures, Tools, and Other Similar Related Materials.'' The proposed collection has been submitted to the Office of Management and Budget for review and approval. The proposed collection will allow the Bureau to collect information in connection with the development and testing of new model forms, disclosures, tools, and similar related materials pursuant to the CFPB's authority with respect to Federal consumer financial laws and the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, as well as testing of existing model forms and disclosures. A copy of the

submission, including copies of the proposed collection and supporting documentation, may be obtained by contacting the agency contact listed below.

DATES: Written comments are encouraged and must be received on or before July 19, 2012 to be assured of consideration.

ADDRESSES: You may submit comments, identified by the agency name and proposed collection title, to:

- *Agency contact:* Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552; (202) 435–9011; and
- *OMB reviewer:* Shagufta Ahmed, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; (202) 395–7873.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552, (202) 435–9011, or through the internet at *CFPB_Public_PRA@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for Development and/or Testing of Model Forms, Disclosures, Tools and Other Similar Related Materials.

OMB Control Number: 3170–XXXX.

Abstract: The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203 (the Dodd-Frank Act) and Federal consumer financial laws authorize or require the Bureau to develop and prescribe standard model forms, disclosures, tools, and other similar related materials that help to inform consumers about complex financial information related to consumer financial products. Further, such model forms, disclosures, tools, and other similar related materials may assist covered entities in complying with applicable regulations. The model forms, disclosures, tools, and other similar related materials may also include adjustments, additions, exceptions, or revisions to the disclosures under the Dodd-Frank Act and Federal consumer financial laws consistent with the CFPB's statutory authorities. The CFPB expects to collect qualitative data through a variety of collection methods, including interviews and research, to inform the design, development, and implementation of the model form(s).

The information collected through qualitative evaluation methods will inform the design and content of the model form(s), using an iterative process to improve the draft forms. For example, information collected from consumers will help the CFPB to design model forms, disclosures, tools, and similar related materials that are responsive to consumer needs and present complex information in an understandable form. Further, information collection from covered entities will help the CFPB to ensure that any such materials can be implemented as easily and cost effectively as possible. Further, the CFPB is considering testing certain tools with industry participants, including compliance handbooks and other compliance tools. Such testing furthers the goal of assisting covered entities with complying with applicable regulations, and is being considered in response to comments from industry participants requesting voluntary inclusion in certain testing projects.

The development and evaluation process that will be conducted may use think-aloud interviews and usability studies. Data collection tools will include: consent forms; participant questionnaires and protocols for individual interviews. The CFPB may also collect information regarding forms of disclosures and other materials currently used by covered entities with respect to regulations issued by the CFPB. The CFPB further anticipates that it may collect data through the use of internet applications.

The CFPB will only submit a collection for approval under this generic clearance if it meets the following conditions:

- The collections are voluntary;
- The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both the respondents and the Federal government;
- Personally identifiable information (PII) is collected only to the extent necessary, subject to privacy protections, and is not retained;
- Information gathered and released beyond the CFPB will indicate the qualitative nature of the information; and
- Information gathered will yield qualitative information; the collections will not be designed or expected to the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study.

The core objective of the data collection is to help identify, evaluate, and refine specific features of the content or design of the model forms, disclosures, tools, and other similar related materials to maximize effectiveness while minimizing compliance burden. Feedback collected under this generic clearance will provide useful information, but it will not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield statistically significant results from a representative sample.

As a general matter, information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

One of the contemplated design and testing projects described herein has already received emergency approval from OMB and is the collection related to OMB control number 3170–0018.

Type of Review: New generic collection; related to 3170–0018.

Affected Public: Individuals or Households; and businesses or other for-profit institutions.

Annual Burden Estimates: Below is a preliminary estimate of the aggregate burden hours for this generic clearance. This burden analysis is based on estimates of average burden with respect to approximately twelve design and testing projects as well as burden associated with testing of compliance tools with industry participants.

Process	Number of respondents	Number of responses per respondent	Average burden per response (minutes)	Total burden (hours)
Informational outreach	600	1	60	600
Screening	8000	1	15	2000
One-on-one interviews	1500	1	60	1500
Focus Groups	450	1	60	450

Process	Number of respondents	Number of responses per respondent	Average burden per response (minutes)	Total burden (hours)
Travel time to sites	1500		45	1125
Internet application feedback	13000	1	15	3250
Total				8925

The Bureau issued a 60-day **Federal Register** notice on November 11, 2011, 76 FR 67668. Comments were solicited and continue to be 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, including the validity of the methodology and the assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Dated: June 13, 2012.

Chris Willey,

Chief Information Officer, Bureau of Consumer Financial Protection.

[FR Doc. 2012–14857 Filed 6–18–12; 8:45 am]

BILLING CODE 4810–AM–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket CFPB–2012–0018]

Request for Information Regarding Senior Financial Exploitation

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Request for Information.

SUMMARY: Section 1013(g)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act'') requires the Bureau of Consumer Financial Protection (''Bureau'' or ''CFPB'') to facilitate the financial literacy of individuals aged 62 or older (''seniors''), on protection from unfair, deceptive, and abusive practices and on current and future financial choices, including through dissemination of materials on such topics.

In furtherance of this mandate, the CFPB's Office for the Financial Protection of Older Americans (''Office for Older Americans'') seeks information on consumer financial products and services, financial literacy efforts, and fraudulent or deceptive practices impacting the lives of older Americans and their families.

DATES: *Comment Due Date:* August 20, 2012.

ADDRESSES: You may submit comments, identified by Docket No. CFPB–2012–0018, by any of the following methods:

- *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail/Hand Delivery/Courier:* Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau, 1700 G Street NW., Washington, DC 20552.

Instructions: The CFPB encourages the early submission of comments. All submissions must include the document title and docket number. Please note the number of the question to which you are responding at the top of each response (respondents need not answer each question). In general, all comments received will be posted without change to *http://www.regulations.gov.* In addition, comments will be available for public inspection and copying at 1700 G Street NW., Washington, DC 20552, on official business days between the hours of 10:00 a.m. and 5:00 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning 202–435–7275. All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information such as account numbers or Social Security numbers should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: For general inquiries, submission process questions or any additional information, please call Monica Jackson at 202–435–7275. For specific questions on senior financial exploitation, please call James Miner at 202–435–7953.

SUPPLEMENTARY INFORMATION: In support of its statutory mandates under Section 1013(g)(1) and (3) of the Dodd-Frank Act, the Office for Older Americans will monitor certifications or designations of financial advisors who serve seniors and alert the SEC and state regulators of certifications or designations that are identified as unfair, deceptive or abusive. The Office for Older Americans will also make legislative and regulatory recommendations to Congress on best practices for disseminating information to seniors regarding the legitimacy of certifications and designations, and methods through which a senior can identify the financial advisor most appropriate for the senior's needs.

Pursuant to Section 1013(g)(3)(D), the Office for Older Americans is also conducting research to identify best practices for educating seniors on personal finance management. The office for Older Americans intends to use this research to develop goals for programs that provide financial literacy and counseling to seniors.

The Bureau is therefore seeking comments in response to the questions posed below. The questions are grouped into the following categories: (a) Evaluation of senior financial advisor certifications and designations; (b) providing financial advice and planning information to seniors; (c) senior certification and designation information sources; (d) financial literacy efforts; and (e) financial exploitation of older Americans, including veterans of the Armed Forces. Please feel free to respond to any or all of the questions but please be sure to indicate in your comments on which questions you are commenting.

Please note that the Bureau is not soliciting individual borrower complaints in response to this Notice and Request for Information. Nor is the Bureau seeking personally identifying information regarding borrower complaints, from the parties to the complaint or any third party. Responses to this subsection should not contain account numbers, Social Security numbers or other personal information that could be used to identify the complainant or another party identified in a complaint, or in any way otherwise reveal personally identifiable information.

Evaluation of Senior Financial Advisor Certifications and Designations

1. What resources do seniors have for determining the legitimacy, value, and

authenticity of credentials held by their financial advisors and planners? What sources have been found most helpful, accurate, and thorough? Among other things, comments could address issues such as state or organizational level review standards, evaluation practices, or selection criteria to determine the validity of proposed senior certifications or designations.

2. How effective are the existing sources at maintaining the legitimacy, value, and authenticity of credentials held by senior financial advisors and planners?

3. How effectively do existing accountability controls deter the misuse of senior advisor credentials? Examples of accountability controls include revoking credentials, public notices of disapproval, or other disciplinary actions.

Providing Financial Advice and Planning Information to Seniors

4. What resources are available to explain the subject matter expertise presented or implied by specific certifications and designations? How effective are the publicly available sources at disseminating thorough, up-to-date information? How effectively are seniors able to use the available resources to select a financial advisor with appropriate knowledge to address their specific financial needs?

Senior Certification and Designation Information Sources

5. What sources of information on the fraudulent or misleading uses of senior certifications and designations are available? Comments could include, among other things, references to publicly available research or data sets, suggestions for other potentially available research or data, or other information on enforcement, civil, administrative, or criminal cases.

Financial Literacy Efforts

6. What financial education, counseling, or personal finance management programs are tailored to the unique financial needs of older Americans and their families or caregivers? Among these programs, what are the best practices in providing seniors financial literacy and robust, practical information on personal finance management? Possible comments could address methods for improving recognition of unfair or deceptive financial practices; means for helping seniors plan for retirement, long-term care, and economic security; or approaches to consumer credit counseling and other financial literacy or financial protection practices.

Financial Exploitation of Older Americans

7. What types of fraudulent, unfair, abusive or deceptive practices target Americans age 62 and over? Comments could include unique types of financial exploitation or additional information concerning the examples listed below.

a. *Power of Attorney or Guardian Abuse,* whereby an agent under power of attorney or a court-appointed guardian uses his/her fiduciary authority (or a forged power of attorney instrument) to misappropriate the older person's assets and uses them for personal gain rather than for the support of the incapacitated older person; and

b. *Affinity fraud,* in which the characteristics of a trusted advisor such as a member of the clergy or government official are impersonated by those attempting to extract payments or personal information from an older person.

Financial Exploitation of Older Veterans of the Armed Forces

8. What types of fraudulent or deceptive practices target older veterans and/or military retirees? Comments could include unique examples of financial exploitation or additional information concerning the examples listed below.

a. *VA Aid and Attendance fraud,* whereby veterans are advised to transfer retirement funds into irrevocable trusts that cause them to lose access to the funds and also become ineligible for Medicaid benefits; or,

b. *Military pension buyout schemes,* in which veterans are offered cash payments in return for their military pension payouts in a manner that could ultimately deprive the veteran of the majority of his or her pension.

Dated: April 27, 2012.

Meredith Fuchs,

Chief of Staff, Bureau of Consumer Financial Protection.

[FR Doc. 2012–14854 Filed 6–18–12; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF DEFENSE

Department of the Air Force

U.S. Air Force Scientific Advisory Board Notice of Meeting

AGENCY: U.S. Air Force Scientific Advisory Board, Department of the Air Force.

ACTION: Meeting notice.

SUMMARY: Due to difficulties, beyond the control of the U.S. Air Force Scientific Advisory Board or its Designated Federal Officer, the Board was unable to file a **Federal Register** notice for the June 27–28, 2012 meeting of the U.S. Air Force Scientific Advisory Board as required by 41 CFR 102–3.150(a). Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces that the United States Air Force Scientific Advisory Board (SAB) meeting will take place 27–28 June 2012 at the Secretary of the Air Force Technical and Analytical Support Conference Center, 1550 Crystal Drive, Arlington, VA 22202. The meeting will be from 7:30 a.m.–4:40 p.m. on Wednesday, 27 June 2012, with the sessions from 7:30 a.m.–9:30 a.m. open to the public; and 7:30 a.m.–4:30 p.m. on Thursday, 28 June 2012, with the sessions from 7:30 a.m.–10:00 a.m. and 1:30 p.m.–2:00 p.m. open to the public. The banquet from 6:00 p.m.–8:45 p.m. on 28 June 2012 at the Key Bridge Marriott, 1401 Lee Highway, Arlington, VA 22201 will also be open to the public.

The purpose of this Air Force Scientific Advisory Board quarterly meeting is to discuss and deliberate the findings of the FY12 SAB studies covering non-traditional intelligence, surveillance, and reconnaissance in contested environments; ensuring cyber situational awareness for commanders; and extended uses of Air Force Space Command space-based sensors. The draft FY13 SAB study topic Terms of Reference and potential sites for the FY13 Spring Board quarterly meeting will also be discussed.

In accordance with 5 U.S.C. 552b, as amended, and 41 CFR 102–3.155, The Administrative Assistant of the Air Force, in consultation with the Air Force General Counsel, has agreed that the public interest requires some sessions of the United States Air Force Scientific Advisory Board meeting be closed to the public because they will discuss information and matters covered by section 5 U.S.C. 552b(c)(1). Any member of the public wishing to provide input to the United States Air Force Scientific Advisory Board should submit a written statement in accordance with 41 CFR 102–3.140(c) and section 10(a)(3) of the Federal Advisory Committee Act and the

procedures described in this paragraph. Written statements can be submitted to the Designated Federal Officer at the address detailed below at any time. Statements being submitted in response to the agenda mentioned in this notice must be received by the Designated Federal Officer at the address listed below at least five calendar days prior to the meeting which is the subject of this notice. Written statements received after this date may not be provided to or considered by the United States Air Force Scientific Advisory Board until its next meeting. The Designated Federal Officer will review all timely submissions with the United States Air Force Scientific Advisory Board Chairperson and ensure they are provided to members of the United States Air Force Scientific Advisory Board before the meeting that is the subject of this notice.

FOR FURTHER INFORMATION CONTACT: The United States Air Force Scientific Advisory Board Executive Director and Designated Federal Officer, Lt Col Matthew E. Zuber, 240–612–5503, United States Air Force Scientific Advisory Board, 1500 West Perimeter Road, Ste. #3300, Joint Base Andrews, MD 20762, *matthew.zuber@pentagon.af.mil*.

Henry Williams Jr.,

DAF Air Force Federal Register Liaison Officer.

[FR Doc. 2012–14917 Filed 6–18–12; 8:45 am]

BILLING CODE 5001–05–P

DEPARTMENT OF EDUCATION

Notice of Submission for OMB Review; Institute of Education Sciences; National Assessment of Educational Progress (NAEP) 2013 Wave II (Main NAEP Core, Reading, Mathematics, TEL, SD, ELL, and Special Studies)

SUMMARY: The National Assessment of Educational Progress (NAEP) is a federally authorized survey of student achievement at grades 4, 8, and 12 in various subject areas, such as mathematics, reading, writing, science, U.S. history, civics, geography, economics, and the arts.

DATES: Interested persons are invited to submit comments on or before July 19, 2012.

ADDRESSES: Written comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. 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 04874. 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 and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. 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. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: National Assessment of Educational Progress (NAEP) 2013 Wave II (Main NAEP Core, Reading, Mathematics, TEL, SD, ELL, and Special Studies).

OMB Control Number: 1850–0790.

Type of Review: Revision.

Total Estimated Number of Annual Responses: 285,527.

Total Estimated Number of Annual Burden Hours: 106,602.

Abstract: The NAEP is a federally authorized survey of student achievement at grades 4, 8, and 12 in various subject areas, such as mathematics, reading, writing, science, U.S. history, civics, geography, economics, and the arts. In the current legislation that reauthorized NAEP (Pub. L. 107–279), Congress mandated the collection of national education survey data through a national assessment program. The 2013 Wave 2 submittal contains (a) the grades 4, 8, and 12 core (demographic) student background questions, (b) the pilot grades 4, 8, and operational grade 12 reading and mathematics subject-specific student background questions, (c) the pilot grade 8 Technology and Engineering Literacy (TEL) background questions, (d) the grade 4, 8, and 12 reading and mathematics special study background questions, (e) the grade 4 and 8 teacher and the grade 4, 8, and 12 school questionnaires, and (f) Students with Disabilities (SD) and English Language Learner (ELL) worksheets and instructions.

Dated: June 14, 2012.

Darrin A. King,

Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2012–14898 Filed 6–18–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards: Technical Assistance and Dissemination To Improve Services and Results for Children With Disabilities; Technical Assistance Center for Inclusive School-Wide Reform

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

Overview Information

Technical Assistance and Dissemination to Improve Services and Results for Children with Disabilities—Technical Assistance Center for Inclusive School-Wide Reform Notice inviting applications for new awards for fiscal year (FY) 2012.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.326Y.

DATES: *Applications Available:* June 19, 2012.

Deadline for Transmittal of Applications: August 3, 2012.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the Technical Assistance and

Dissemination to Improve Services and Results for Children with Disabilities program is to promote academic achievement and to improve results for children with disabilities by providing technical assistance, supporting model demonstration projects, disseminating useful information, and implementing activities that are supported by scientifically based research.

Priority: In accordance with 34 CFR 75.105(b)(2)(v), this priority is from allowable activities specified in the statute or otherwise authorized in the statute (see sections 663 and 681(d) of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1463 and 1481(d)).

Absolute Priority: For FY 2012 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is:

Technical Assistance Center for Inclusive School-Wide Reform

Background

The purpose of this Technical Assistance Center for Inclusive School-wide Reform is to assist State educational agencies (SEAs) and local educational agencies (LEAs) to successfully implement and sustain inclusive school-wide reform in kindergarten through grade 8 (K–8) programs.

Almost 30 years of research and experience have demonstrated that the education of children with disabilities can be made more effective by having high expectations and ensuring their participation and progress in the general education curriculum in inclusive [1] settings to the maximum extent possible (Individuals with Disabilities Education Act, 2004). National data indicate that more than 60 percent of students with disabilities are educated in general education settings for 80 percent or more of the school day (U.S. Department of Education, 2011a). Students with disabilities, however, continue to lag behind their nondisabled peers in measures of academic achievement. For example, from 2000 to 2011, the percentage of students with disabilities scoring at or above proficiency in both reading and mathematics on the National Assessment of Educational Progress has been persistently lower than the percentage of students without disabilities scoring at or above proficiency (U.S. Department of Education, 2011b).

Research shows that inclusive school-wide reform that includes multi-tiered systems of support (MTSS), practices that support the participation of students with disabilities with their non-disabled peers in academic and extra-curricular activities of the school, school-wide positive behavioral supports (SWPBS), and culturally responsive and universal design for learning principles, hold promise for improving outcomes for students with disabilities. All students, including those with significant disabilities, benefit academically, behaviorally, and socially from practices that support inclusion (Cadwallader, Wagner, & Garza, 2003; Copeland & Cosbey, 2009; Jameson, McDonnell, Johnson, Riesen, & Polychronis, 2007; Rea, McLaughlin, & Walther-Thomas, 2002). Examples of successful practices that support inclusion are: (1) Using collaborative teaching models (Friend, Cook, Hurley-Chamberlain, & Shamberger, 2010); (2) providing time for consultation between general and special education teachers (Wallace, Anderson, & Bartholomay, 2002); (3) promoting university-school partnerships (Causton-Theoharis, Theoharis, Bull, Cosier, & Dempf-Aldrich, 2011; Kozleski, Pugach, & Yinger, 2002); (4) differentiating instruction (Hall, Strangman, & Meyer, 2003); and (5) clearly defining roles for support staff to support inclusion (Giangreco, Suter, & Doyle, 2010). In addition, engaging families in their children's education at home and school fosters successful inclusion for students with disabilities (Henderson & Mapp, 2002).

Students with disabilities benefit when successful practices that promote inclusion are implemented within an MTSS context (Wanzek & Vaughn, 2010). MTSS refers to a continuum of evidence-based, system-wide practices to support academic and behavioral needs, with frequent data-based monitoring for instructional decision-making (Kansas State Department of Education, 2012). Examples of MTSS include response to intervention (RTI) (National Center on Response to Intervention, 2011; Fuchs & Fuchs, 2007) and SWPBS (Sailor et al., 2006; Sugai & Horner, 2009).

Recent research on SWPBS indicates the need to apply culturally responsive principles within the context of MTSS and in conjunction with practices that promote inclusion. For example, SWPBS has been shown to reduce the overall number of office discipline referrals in a school, but not for African American students (Skiba, 2012). Culturally responsive principles promote the development and success of all students and can be incorporated in learning environments by communicating high expectations; reshaping the curriculum to reflect all students' experiences; and engaging students in activities that value their background, knowledge, and experiences (Gay, 2000; King, Artiles, & Kozleski, 2010). Integrating culturally responsive principles within SWPBS has shown promise for students, especially for students from culturally and linguistically diverse backgrounds (Jones, Caravaca, Cizek, Horner, & Vincent, 2006; Vincent, Randall, Cartledge, Tobin, & Swain-Bradway, 2011).

Applying universal design for learning principles within the context of MTSS in conjunction with practices that promote inclusion can also improve outcomes for students with disabilities (Hehir, 2009; Rose & Gravel, 2010). The key principles of universal design for learning include presenting information and content in various ways, promoting multiple ways in which students can express what they know, and stimulating interest and motivation for learning (Rose & Meyer, 2006).

Successful implementation of inclusive school-wide reform is expected to: (1) Increase the number of students with disabilities, including those with significant intellectual disabilities and emotional disturbance, who receive meaningful instruction and related services within general education settings for increased periods of time; (2) decrease the frequency of disciplinary actions involving students with disabilities; and (3) increase the participation of students with disabilities in extracurricular activities. As a result, successful inclusive school-wide reform is expected to improve academic, behavioral, and other social outcomes for students with disabilities.

Priority

The purpose of this priority is to fund a cooperative agreement to support the establishment and operation of a Technical Assistance Center for Inclusive School-wide Reform (Center) that will assist SEAs and LEAs to successfully implement and sustain inclusive school-wide reform in K–8 programs. The Center will provide technical assistance (TA) to SEAs and LEAs to implement inclusive school-wide reform in K–8 programs located in

[1] For the purposes of this priority, ''inclusive'' or ''inclusion'' means an active commitment to equity for all students so as to maximize the participation of all learners, by making learning opportunities relevant and high-quality (National Institute for Urban School Improvement (NIUSI) Leadscape, 2011).

rural,[2] urban, and high-need LEAs.[3] The Center will provide TA that will—

(1) Improve the knowledge and skills of educators, administrators, and support staff to implement successful inclusive school-wide reform;

(2) Increase the capacity of schools to implement successful inclusive school-wide reform in grade-level academic and extracurricular settings; and

(3) Increase the capacity of schools to engage families and communities in promoting successful inclusive school-wide reform.

To be considered for funding under this absolute priority, applicants must meet the application requirements contained in this priority. Any project funded under this absolute priority must also meet the programmatic and administrative requirements specified in the priority.

Application Requirements. An applicant must include in its application—

(a) A logic model that depicts, at a minimum, the goals, activities, outputs, and outcomes of the proposed project. A logic model communicates how a project will achieve its outcomes and provides a framework for both formative and summative evaluations of the project;

Note: The following Web sites provide more information on logic models: *www.researchutilization.org/matrix/logicmodel_resource3c.html* and *www.tadnet.org/model_and_performance.*

(b) A plan to implement the activities described in the *Project Activities* section of this priority;

(c) A plan, linked to the proposed project's logic model, for a formative evaluation of the proposed project's activities. The plan must describe how the formative evaluation will use clear performance objectives to ensure continuous improvement in the operation of the proposed project, including objective measures of progress in implementing the project and ensuring the quality of products and services;

(d) A plan to identify six schools—two schools in three different States—where the achievement or growth of students with disabilities on the State assessments is significantly higher than the State average achievement or growth of students with disabilities. These schools will serve as knowledge development sites to examine the implementation of inclusive school-wide reform, as described in the *Knowledge Development Activities* section of this notice.

The six selected schools must include at least one urban and one rural school and at least two elementary and two middle schools. The remaining two schools may include both elementary and middle school grades (e.g., K–8, 4–8). High schools are not eligible for selection. The six schools selected must have the approval of the OSEP Project Officer.

The proportion of students with disabilities in each of the six schools must be at least equal to the proportion of students with disabilities in the State.

The Center will collect from these six knowledge development schools examples of practices that support inclusion, which together should reflect a range and variety of inclusive practices. Information obtained from these schools will be used to support the TA work described in the *Technical Assistance and Dissemination Activities* section of this priority. The plan for selecting these knowledge development schools must include the criteria the Center will use to make the selection;

(e) A plan for recruiting and selecting a minimum of four SEAs and at least four LEAs in each of those SEAs to receive intensive TA during the course of the grant to build the capacity of schools and educators to implement and sustain inclusive school-wide reform. The plan must include the criteria the Center will use to select these LEAs. The LEAs selected must include one or more rural, urban, and high-need LEAs in each SEA. Each LEA must ensure the participation of a minimum of three schools with at least one elementary and one middle school, or a school with comparable grade levels. All SEAs and LEAs selected must have the approval of the OSEP Project Officer. In total, at least 48 schools will participate across the 16 LEAs;

(f) A budget for a summative evaluation to be conducted by an independent third party;

(g) A budget for attendance at the following:

(1) A one and one half-day kick-off meeting to be held in Washington, DC, after receipt of the award, and an annual planning meeting held in Washington, DC, with the OSEP Project Officer during each subsequent year of the project period.

Note: Within 30 days of receipt of the award, a post-award teleconference must be held between the OSEP Project Officer and the grantee's Project Director or other authorized representative.

(2) A three-day Project Directors' Conference in Washington, DC, during each year of the project period.

(3) Two one and one-half day OSEP Leadership and Leveraging Resources conferences during each year of the project period; and

(4) Two two-day trips annually to attend Department briefings and other meetings, as requested by OSEP; and

(h) A line item in the proposed budget for an annual set-aside of five percent of the grant amount to support emerging needs that are consistent with the proposed project's activities, as those needs are identified in consultation with OSEP.

Note: With approval from the OSEP Project Officer, the Center must reallocate any remaining funds from this annual set-aside no later than the end of the third quarter of each budget period.

Project Activities. To meet the requirements of this priority, the Center, at a minimum, must conduct the following activities:

Knowledge Development Activities

(a) Conduct a review of published studies and other available evidence on inclusive school-wide reform, within the first six months of the project, using standards that are consistent with those used by the What Works Clearinghouse (*http://ies.ed.gov/ncee/wwc/*) and the definitions of ''strong evidence'' and ''moderate evidence'' contained in the notice of final priorities and definitions for discretionary grants programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486), and corrected on May 12, 2011 (76 FR 27637). The research review must summarize available evidence on—

(1) The elements of successful inclusive school-wide reform in K–8 programs, including MTSS, inclusive practices, SWPBS, culturally responsive and universal design for learning principles, and other identified elements that support learning in inclusive settings; and

(2) LEA and school system components of K–8 programs (e.g., staff

[2] For the purposes of this priority, ''rural LEA'' means an LEA that is eligible under the Small Rural School Achievement (SRSA) program or the Rural and Low-Income School (RLIS) program authorized under Title VI, Part B of the Elementary and Secondary Education Act of 1965, as amended (ESEA). Applicants may determine whether a particular LEA is eligible for these programs by referring to the information on the following Department Web sites. For SRSA: *www2.ed.gov/programs/reapsrsa/index.html.* For RLIS: *www.ed.gov/programs/reaprlisp/eligibility.html.*

[3] Section 2102(3) of the ESEA defines a ''high-need LEA'' as an LEA—(a) That serves not fewer than 10,000 children from families with incomes below the poverty line (as that term is defined in section 9101(33) of the ESEA), or for which not less than 20 percent of the children served by the LEA are from families with incomes below the poverty line; and (b) For which there is (1) a high percentage of teachers not teaching in the academic subjects or grade levels that the teachers were trained to teach, or (2) a high percentage of teachers with emergency, provisional, or temporary certification or licensing.

development, leadership support, and organizational resources, policies, and procedures) that facilitate the successful implementation and sustainability of inclusive school-wide reform;

(b) Consult with a group of persons, within the first six months of the project, established under paragraph (b) of the *Leadership and Coordination Activities* section of this notice to augment the knowledge of the inclusive school-wide reform team established under paragraph (a)(1) of the *Leadership and Coordination Activities* section of this notice. Specifically, the purpose of the group is to enhance the team's understanding of inclusive school-wide reform in elementary and middle schools, or schools with comparable grade levels, including reform in urban, rural, and high-needs LEAs. The group must also guide the planning and implementation of the fieldwork to be carried out in the six knowledge development schools in the first year of the project period. The group must guide the development of the protocols and assessments, discussed in paragraph (d) of this section, to be used in this fieldwork;

(c) Conduct fieldwork in the first year of the project period to include three separate one week-long visits at each of the six knowledge development schools. Over the course of each of these visits, the Center will—

(1) Observe instruction of students with disabilities in inclusive settings in a variety of subjects and extracurricular activities;

(2) Conduct interviews with a variety of school and LEA personnel;

(3) Conduct focus groups with teachers, parents, and students; and

(4) Shadow and interview students with disabilities and their parents, as appropriate, to learn more about how students with disabilities experience inclusive settings within their schools;

(d) Develop and then use protocols and assessments to—

(1) Identify and describe any evidence that students with disabilities are improving in academic, behavioral, and other social outcomes within the inclusive settings; and

(2) Identify and describe the system components (e.g., staff development, leadership support, organizational resources, policies, and procedures) that are successful in fostering the implementation and sustainability of inclusive school-wide reform;

(e) Refine the protocols and assessments based on the findings from fieldwork at knowledge development schools in conjunction with the group established under paragraph (b) of the *Leadership and Coordination Activities* section of this notice. The protocols and assessments will be used to evaluate and track improvements in the implementation of inclusive school-wide reform at intensive TA sites described in paragraph (e) in the *Application Requirements* section of this notice;

(f) Complete state-of-knowledge papers by the end of the first 18 months of the project period, based on the—

(1) Literature review conducted under paragraph (a) of the *Knowledge Development Activities* section of this notice; and

(2) A synthesis of the findings from the fieldwork conducted at knowledge development schools in accordance with paragraph (c) of this section; and

(g) Submit all materials developed in accordance with the requirements of this section for review to the group established under paragraph (b) of the *Leadership and Coordination Activities* section of this notice, and, once the materials are approved by the group, disseminate them in accordance with the requirements in the *Technical Assistance and Dissemination Activities* section of this notice.

Technical Assistance and Dissemination Activities

(a) Recruit and select at least four SEAs to receive intensive TA in building the capacity within LEAs to implement and sustain inclusive school-wide reform to support students with disabilities to succeed in general education settings and extracurricular activities;

(b) Develop criteria to select, and then, in collaboration with the SEAs, recruit and select at least four LEAs in each of the four SEAs to receive intensive TA in building capacity to support schools, educators, administrators, and support staff to implement and sustain inclusive school-wide reform. One or more rural, urban, and high-need LEAs in each State must be included. Each LEA must ensure the participation of at least one elementary and one middle school, or schools with comparable grade levels. At least 48 schools must receive intensive TA from the Center during the course of the grant;

(c) In collaboration with the SEAs, apply Knowledge Development findings described in paragraph (f) in the *Knowledge Development Activities* section of this notice to the development of a TA plan for each LEA that is selected to receive intensive TA. The Center must begin providing intensive TA in the second year of the project period. Refine the TA plan using the information gathered from the literature review and the work with the knowledge development schools as data become available;

(d) Provide intensive TA to SEAs to assist with building the capacity of selected LEAs and schools to implement and sustain inclusive school-wide reform to support students with disabilities to succeed in general education settings and extracurricular activities;

(e) At regular intervals, evaluate the outcomes of inclusive school-wide reform, including academic, behavioral, and other social outcomes, in intensive TA schools using the refined protocols and assessments developed in accordance with paragraph (e) of the *Knowledge Development Activities* section of this notice;

(f) Analyze and synthesize data from these protocols and assessments to develop recommendations for improving the implementation of inclusive school-wide reform;

(g) Maintain a Web site that meets government or industry-recognized standards for accessibility and that links to the Web site operated by the Technical Assistance Coordination Center (TACC);

(h) Prepare and disseminate reports, documents, and other materials on inclusive school-wide reform and related topics as requested by OSEP for specific audiences, including families, educators, administrators, policymakers, and researchers. In consultation with the OSEP Project Officer, make selected reports, documents, and other materials available in both English and Spanish, as appropriate;

(i) Prior to developing any new TA product, submit a proposal for each product to the TACC database for approval from the OSEP Project Officer. The development of new products should be consistent with the product definition and guidelines posted on the TACC Web site (www.tadnet.org);

(j) Regularly contribute updated information on the Center's approved and finalized products and services to a database at TACC; and

(k) Coordinate with the National Dissemination Center for Individuals with Disabilities to develop an efficient and high-quality dissemination strategy that reaches broad audiences. The Center must report to the OSEP Project Officer the outcomes of these coordination efforts.

Leadership and Coordination Activities

(a) Assist SEAs to build the capacity of LEAs to—

(1) Establish school-level and LEA-level inclusive school-wide reform teams that include teachers,

administrators, a representative from an institution of higher education (IHE), and family members to support students with disabilities to succeed in general education settings and in extracurricular activities;

(2) Plan and implement inclusive school-wide reform;

(3) Develop and implement a family engagement strategy to involve families in supporting inclusive school-wide reform; and

(4) Develop and implement a strategy for developing the capacity of all stakeholders (students, parents, administrators, educators, and community members) to collaboratively support inclusive school-wide reform;

(b) Consult with a group of persons, referenced in paragraph (b) in the *Knowledge Development Activities* section of this notice, including representatives from SEAs and LEAs, including individuals with disabilities, educators, parents of individuals with disabilities, representatives from IHEs, and researchers, as appropriate on the activities and outcomes of the Center and solicit programmatic support and advice from various participants in the group, as appropriate. The Center may convene meetings, whether in person, by phone or other means, for this purpose, or may consult with group participants individually. The Center must identify the members of the group to OSEP within eight weeks after receipt of the award;

(c) Continually communicate and collaborate with OSEP-funded and other Department-funded projects, including, but not limited to, the Intensive Interventions Center, Center on Positive Behavioral Supports, Center for Technology Implementation, Center on State Implementation and Scaling-up of Evidence-based Practices, the IDEA Partnership Project, the Regional Resource Centers, the National and Regional Parent Technical Assistance Centers, the Regional Educational Laboratories, and relevant Comprehensive Centers. This collaboration could include the joint development of TA products, the coordination of TA services, and planning and holding TA meetings and events. In addition, the Center must build on the expertise and resources of previously and currently supported Department of Education TA centers, such as the National Center on Student Progress Monitoring (NCSPM), the Research Institute on Progress Monitoring (RIPM), the National Center on Response to Intervention (NCRTI), the Center on Instruction (COI), and the Individuals with Disabilities Education Act 2004–Research for Inclusive Settings (IRIS) Center;

(d) Participate in, organize, or facilitate communities of practice that align with the needs of the Center's target audience. Communities of practice should align with the project's objectives to support discussions and collaboration among key stakeholders. The following Web site provides more information on communities of practice: *www.tacommunities.org/community/view/id/1027;* and

(e) Maintain ongoing communication with the OSEP Project Officer through monthly phone conversations and email.

Fourth and Fifth Years of the Project

In deciding whether to continue funding the Center for the fourth and fifth years, the Secretary will consider the requirements of 34 CFR 75.253(a) and in addition-–

(a) The recommendation of a review team consisting of experts selected by the Secretary. This review team will meet in Washington, DC, during the last half of the Center's second year. The Center must budget for travel expenses associated with this meeting;

(b) The timeliness and effectiveness with which all requirements of the negotiated cooperative agreement have been or are being met by the Center; and

(c) Evidence of the degree to which the Center's activities have contributed to changed practices and improved outcomes for students with disabilities.

References

Cadwallader, T., Wagner, M., & Garza, N. (2003). Participation in extracurricular activities. In Wagner, M., Cadwallader, T., & Marder, C. (with Cameto, R., Cardoso, D., Garza, N., Levine, P., & Newman, L.). (2003). Life Outside the Classroom for Youth with Disabilities. A Report from the National Longitudinal Transition Study-2 (NLTS2). Menlo Park, CA: SRI International. Available from *www.nlts2.org/reports/2003_04-2/nlts2_report_2003_04-2_complete.pdf.*

Causton-Theoharis, J., Theoharis, G., Bull, T., Cosier, M., & Dempf-Aldrich, K. (2011). Schools of promise: A school district-university partnership centered on inclusive school reform. *Remedial and Special Education, 32,* 192–205.

Copeland, S.R., & Cosbey, J. (2009). Making progress in the general curriculum: Rethinking effective instructional practices. *Research and Practice for Persons with Severe Disabilities, 33–34* (4–1), 214–227.

Friend, M., Cook, L., Hurley-Chamberlain, D., & Shamberger, C. (2010). Co-Teaching: An illustration of the complexity of collaboration in special education. *Journal of Educational and Psychological Consultation, 20,* 1–27.

Fuchs, L., & Fuchs, D. (2007). A model for implementing responsiveness to intervention. *Teaching Exceptional Children, 39,* 58–63.

Gay, G. (2000). Culturally responsive teaching: Theory, research, and practice. New York: Teachers College Press.

Giangreco, M.F., Suter, J.C., Doyle, M.B. (2010). Paraprofessionals in inclusive schools: A review of recent research. *Journal of Educational and Psychological Consultation, 20,* 41–57.

Hall, T., Strangman, N., & Meyer, A. (2003). Differentiated instruction and implications for UDL implementation. Wakefield, MA: National Center on Accessing the General Curriculum. Retrieved from *aim.cast.org/learn/historyarchive/backgroundpapers/differentiated_instruction_udl.*

Hehir, T. (2009). Policy foundations of universal design for learning. In D.T. Gordon, J.W. Gravel, & L.A. Schifter (Eds.), A policy design for learning (pp. 35–45). Cambridge, MA: Harvard University Press.

Henderson, A.T., & Mapp, K.L. (2002). A New Wave of Evidence: The Impact of School, Family, and Community Connections on Student Achievement. Austin, TX: Southwest Educational Development Laboratory. Retrieved from *www.sedl.org/connections/resources/evidence.pdf.*

Individuals with Disabilities Education Act Amendments of 2004. (2004). Pub. L. No. 108–446, 20 U.S.C. § 1400 et seq.

Jameson, J.M., McDonnell, J., Johnson, J.W., Riesen, T., & Polychronis, S. (2007). A comparison of one-to-one embedded instruction in the general education classroom and one-to-one massed practice instruction in the special education classroom. *Education and Treatment of Children, 30,* 23–44.

Jones, C., Caravaca, L., Cizek, S., Horner, R., Vincent, C.G. (2006). Culturally responsive schoolwide positive behavior support: A case study in one school with a high proportion of Native American students. *Multiple Voices for Ethnically Diverse Exceptional Learners, (9)1, 108–119.*

Kansas State Department of Education. (2012). Kansas multi-tier system of support. Retrieved from *www.kansasmtss.org/.*

King, A., Artiles, A. J., & Kozleski, E. (2010). Professional learning for culturally responsive teaching. Retrieved from *www.equityallianceatasu.org/sites/default/files/Web site_files/exemplarFINAL.pdf.*

Kozleski, E.B., Pugach, M., & Yinger, R. (2002). Preparing teachers to work with students with disabilities: Possible challenges for special and general teacher education (White Paper). Washington, DC: American Association of Colleges for Teacher Education.

National Center on Response to Intervention. (2011). What is RTI? Retrieved from *www.rti4success.org/whatisrti.*

National Institute for Urban School Improvement (NIUSI). (2011). Inclusive Education for Equity. Retrieved from *www.niusileadscape.org/pd/inclusive_education_for_equity.*

Rea, P.J., McLaughlin, V.L., Walther-Thomas, C. (2002). Outcomes for students with

learning disabilities in inclusive and pullout programs. *Exceptional Children, 68,* 203–222.

Rose, D.H., & Gravel, J.W. (2010). Universal design for learning. In E. Baker, P. Peterson, & B. McGaw (Eds.). International Encyclopedia of Education, 3rd Ed. Oxford: Elsevier.

Rose, D.H., & Meyer, A. (2006). A practical reader in Universal Design for Learning. Cambridge, MA: Harvard Education Press.

Sailor, W., Zuna, N., Choi, J., Thomas, J., McCart, A., & Roger, B. (2006). Anchoring schoolwide positive behavior support in structural school reform. *Research & Practice for Persons with Severe Disabilities, 31,* 18–30.

Skiba, R. (2012, February). Interventions for reducing disciplinary disparities and the problem of race neutrality. Paper presented at 2012 National Center on Response to Intervention Disproportionality Technical Workgroup.

Sugai, G., & Horner, R.H. (2009). Responsiveness-to-Intervention and School-Wide Positive Behavior Supports: Integration of Multi-Tiered System Approaches. *Exceptionality, 17*(4), 223–237.

U.S. Department of Education, National Center for Education Statistics. (2011a). Digest of Education Statistics, 2010 (NCES 2011–015), Chapter 2. Washington, DC: Author.

U.S. Department of Education, Institute of Education Sciences. (2011b). National Center for Education Statistics, National Assessment of Educational Progress (NAEP), 2011 Mathematics and Reading Assessments. Washington, DC: Author.

Vincent, C. G., Randall, C., Cartledge, G., Tobin, T.J., Swain-Bradway, J. (2011). Toward a conceptual integration of cultural responsiveness and schoolwide positive behavior support. *Journal of Positive Behavior Interventions,* (*13*)4, 219–229.

Wallace, T., Anderson, A.R., & Bartholomay, T. (2002). Collaboration: An element associated with the success of four inclusive high schools. *Journal of Educational and Psychological Consultation, 13,* 349–381.

Wanzek, J., & Vaughn, S. (2010). Tier 3 interventions for students with significant reading problems. *Theory Into Practice, 49,* 305–314.

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (APA) (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed priorities and requirements. Section 681(d) of IDEA, however, makes the public comment requirements of the APA inapplicable to the priority in this notice.

Program Authority: 20 U.S.C. 1463 and 1481.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 86, 97, 98, and 99. (b) The Education Department debarment and suspension regulations in 2 CFR part 3485.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to IHEs only.

II. Award Information

Type of Award: Cooperative agreement.

Estimated Available Funds: $4,900,000.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2013 from the list of unfunded applicants from this competition.

Maximum Awards: We will reject any application that proposes a budget exceeding $4,900,000 for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 1.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months with an optional additional 24 months based on performance. Applications must include plans for both the 36 month award and the 24 month extension.

III. Eligibility Information

1. *Eligible Applicants:* IHEs, other public agencies, private nonprofit organizations, and for-profit organizations. Applicants may apply as a consortium.

2. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

3. *Other: General Requirements*—(a) The project funded under this competition must make positive efforts to employ and advance in employment qualified individuals with disabilities (see section 606 of IDEA).

(b) Applicants and the grant recipient funded under this competition must involve individuals with disabilities or parents of individuals with disabilities ages birth through 26 in planning, implementing, and evaluating the projects (see section 682(a)(1)(A) of IDEA).

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet, from the Education Publications Center (ED Pubs), or from the program office.

To obtain a copy via the Internet, use the following address: *www.ed.gov/fund/grant/apply/grantapps/index.html.*

To obtain a copy from ED Pubs, write, fax, or call the following: ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–877–433–7827. Fax: (703) 605–6794. If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *www.EDPubs.gov* or at its email address: *edpubs@inet.ed.gov.*

If you request an application package from ED Pubs, be sure to identify this program or competition as follows: CFDA number 84.326Y.

To obtain a copy from the program office, contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Individuals with disabilities can obtain a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the person or team listed under *Accessible Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the application narrative to the equivalent of no more than 70 pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, the references, or the letters of support. However, the page limit does apply to

all of the application narrative section (Part III).

We will reject your application if you exceed the page limit or if you apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:*

Applications Available: June 19, 2012.

Deadline for Transmittal of Applications: August 3, 2012.

Applications for grants under this competition may be submitted electronically using the Grants.gov Apply site (Grants.gov), or in paper format by mail or hand delivery. For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined at the following Grants.gov Web page: *www.grants.gov/applicants/get_registered.jsp.*

7. *Other Submission Requirements:* Applications for grants under this competition may be submitted electronically or in paper format by mail or hand delivery.

a. Electronic Submission of Applications

We are participating as a partner in the Governmentwide Grants.gov Apply site. The Technical Assistance Center for Inclusive School-Wide Reform competition, CFDA number 84.326Y, is included in this project. We request your participation in Grants.gov.

If you choose to submit your application electronically, you must use the Governmentwide Grants.gov Apply site at *www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

You may access the electronic grant application for the Technical Assistance Center for Inclusive School-Wide Reform competition at *www.Grants.gov.* You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.326, not 84.326Y).

Please note the following:

- Your participation in Grants.gov is voluntary.
- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *www.G5.gov.*
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you submit your application in paper format.
- If you submit your application electronically, you must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- If you submit your application electronically, you must upload any narrative sections and all other

attachments to your application as files in a PDF (Portable Document) read-only, non-modifiable format. Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only, non-modifiable PDF or submit a password-protected file, we will not review that material. Additional, detailed information on how to attach files is in the application instructions.

- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by email. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

b. Submission of Paper Applications by Mail

If you submit your application in paper format by mail (through the U.S. Postal Service or a commercial carrier), you must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address:

U.S. Department of Education,
Application Control Center,
Attention: (CFDA Number 84.326Y),
LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. Submission of Paper Applications by Hand Delivery

If you submit your application in paper format by hand delivery, you (or a courier service) must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address:

U.S. Department of Education,
Application Control Center,
Attention: (CFDA Number 84.326Y),
550 12th Street SW., Room 7041,
Potomac Center Plaza, Washington,
DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 and are listed in the application package.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Additional Review and Selection Process Factors:* In the past, the Department has had difficulty finding peer reviewers for certain competitions because so many individuals who are eligible to serve as peer reviewers have conflicts of interest. The Standing Panel requirements under section 682(b) of IDEA also have placed additional constraints on the availability of reviewers. Therefore, the Department has determined that, for some discretionary grant competitions,

applications may be separated into two or more groups and ranked and selected for funding within the specific groups. This procedure will make it easier for the Department to find peer reviewers by ensuring that greater numbers of individuals who are eligible to serve as reviewers for any particular group of applicants will not have conflicts of interest. It also will increase the quality, independence, and fairness of the review process, while permitting panel members to review applications under discretionary grant competitions for which they also have submitted applications. However, if the Department decides to select an equal number of applications in each group for funding, this may result in different cut-off points for fundable applications in each group.

4. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html*.

4. *Performance Measures:* Under the Government Performance and Results Act of 1993 (GPRA), the Department has established a set of performance measures, including long-term measures, that are designed to yield information on various aspects of the effectiveness and quality of the Technical Assistance and Dissemination to Improve Services and Results for Children with Disabilities program. These measures focus on the extent to which projects provide high-quality products and services, the relevance of project products and services to educational and early intervention policy and practice, and the use of products and services to improve educational and early intervention policy and practice.

Grantees will be required to report information on their project's performance in annual reports to the Department (34 CFR 75.590).

5. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made ''substantial progress toward meeting the objectives in its approved application.'' This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Dr. Grace Zamora Durán, U.S. Department of Education, 400 Maryland Avenue SW., room 4088, Potomac Center Plaza (PCP), Washington, DC 20202–2600. Telephone: (202) 245–7328.

If you use a TDD or a TTY, call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue SW., room 5075, PCP, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a TDD or a TTY, call the FRS, toll free, at 1–800–877–8339.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: June 13, 2012.

Alexa Posny,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2012–14940 Filed 6–18–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards: Technical Assistance and Dissemination To Improve Services and Results for Children With Disabilities; Early Childhood Technical Assistance Center

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

Overview Information Technical Assistance and Dissemination To Improve Services and Results for Children With Disabilities—Early Childhood Technical Assistance Center

Notice inviting applications for new awards for fiscal year (FY) 2012.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.326P.

DATES: Applications Available: June 19, 2012.

Deadline for Transmittal of Applications: July 19, 2012.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Programs: The purpose of the Technical Assistance and Dissemination to Improve Services and Results for Children with Disabilities program is to promote academic achievement and to improve results for children with disabilities by providing technical assistance (TA), supporting model demonstration projects, disseminating useful information, and implementing activities that are supported by scientifically based research.

Priority: In accordance with 34 CFR 75.105(b)(2)(v), this priority is from allowable activities specified in the statute or otherwise authorized in the statute (see sections 663 and 681(d)of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1463 and 1481(d)).

Absolute Priority: For FY 2012 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is: *Early Childhood Technical Assistance Center.*

Background: The Office of Special Education Programs (OSEP) is committed to ensuring that all infants, toddlers, and preschool children with disabilities receive effective services in natural environments and inclusive settings that promote positive developmental and learning outcomes. Effective services depend on: (1) The quality of early intervention programs authorized under Part C of IDEA and preschool programs authorized under Part B of IDEA; (2) the coordination of these programs with each other and with other early childhood programs that serve infants, toddlers, and preschool children with disabilities and their families; and (3) the capacity of early childhood programs to scale up and sustain effective implementation components to support the use of evidence-based interventions at the local program level. OSEP has supported the implementation of IDEA Part C early intervention services and Part B preschool services by funding technical assistance (TA) centers that have helped States strengthen their State and local systems and build the capacity of providers to improve developmental and learning outcomes for infants, toddlers, and preschool children with disabilities and their families. OSEP will further this work by funding a cooperative agreement to support the establishment and operation of an Early Childhood Technical Assistance Center (Center). The Center will support States in administering high-quality and effective IDEA Part C early intervention and Part B preschool programs through TA and recommendations for practice.

In recent years, States have faced a growing number of challenges as they implement the IDEA Part C early intervention and Part B preschool programs. In addition to the economic and fiscal challenges at the State and local levels, States are seeing an increase in the number of infants, toddlers, and preschool children with complex needs who are eligible for services under IDEA Part C early intervention and Part B preschool programs (Part C State Performance Plan (SPP)/Annual Performance Report (APR) 2011 Indicator Analyses, FFY 2009–10; Part B SPP/APR 2011 Indicator Analyses, FFY 2009–10). Moreover, given the complexity of and interplay between these programs, many States struggle with difficult systems issues, such as: (1) Ensuring that all children eligible for services under Part C of IDEA are identified and evaluated or screened; (2) maximizing all available funding sources for IDEA Part C services; (3) improving transition services for children who are first served under an IDEA Part C program and then receive IDEA Part B preschool services; (4) collecting valid and reliable child and family outcome data under IDEA Part C early intervention and Part B preschool programs to inform program improvement; and (5) coordinating with other early childhood programs (Infant and Toddler Coordinators Association Tipping Points Survey, 2011; Part C SPP/APR 2011 Indicator Analyses, FFY 2009–10; Part B SPP/APR 2011 Indicator Analyses, FFY 2009–10).

To meet the challenges of implementing IDEA Part C early intervention and Part B preschool programs, program administrators must understand the elements that are necessary to implement high-quality early intervention and preschool programs effectively and efficiently. Ensuring that Part C early intervention and Part B preschool programs are coordinating with other early childhood programs in a State is one such element that could increase a program's effectiveness and efficiency. However, developing a coordinated and integrated early childhood system within a State is a significant challenge because there are multiple early childhood programs (e.g., IDEA Part C early intervention; IDEA Part B preschool; Head Start; Early Head Start; child care; State-funded Pre-K programs) administered by different agencies with different policies, procedures, and funding streams, and infants, toddlers, and preschool children with disabilities are often served by more than one of these programs at a time. Overcoming this overarching challenge to provide a coordinated and integrated early childhood system is critical to ensuring that infants, toddlers, and preschool children with disabilities and their families receive high-quality services from the array of early childhood programs that are available to serve them. As States continue to work towards designing and implementing a coordinated and integrated system of early childhood programs and services through such initiatives as the Race To the Top—Early Learning Challenge (RTT–ELC), it is critical that support be provided to the IDEA Part C early intervention and Part B preschool programs to assist them in aligning resources and policies across multiple levels (e.g., State, regional, local) of the early childhood service system. Such support would help these programs reduce inefficiencies across early childhood programs, and improve the quality of services for infants, toddlers, and preschool children with disabilities and their families.

A challenge at the local program level is the lack of adequately trained personnel who can implement effective services and evidence-based interventions, suggesting that infants, toddlers, and preschool children with disabilities may not be achieving the learning and developmental outcomes that are possible (Bruder, 2010; Odom, 2009). In surveys of State Part C and Part B, Section 619 Coordinators, respondents have expressed concern that personnel who work with infants, toddlers, and preschool children with disabilities and their families are not adequately trained (Bruder, Mogro-Wilson, Stayton, & Dietrich, 2009). Furthermore, although the Division of Early Childhood of the Council for Exceptional Children's (DEC)

recommended practices for personnel working with infants, toddlers, and preschool children with disabilities and their families is a valuable resource on intervention practices used by the field, that resource needs to be updated to include current research on implementing high-quality, coordinated, and integrated early childhood systems; effective services; and evidence-based interventions.

IDEA Part C early intervention and Part B, Section 619 program administrators must ensure that their programs and providers are delivering effective services and evidence-based interventions. To do so, States must have ''implementation components'' in place at the State and local levels to support providers in using effective services and evidence-based interventions. ''Implementation components'' are the organizational supports that allow providers to develop the competence needed to implement effective services and evidence-based interventions in the way they were designed to be delivered (Fixsen, Blasé, Horner, & Sugai, 2009). Examples of implementation components include professional development and training, ongoing consultation and coaching, performance assessments, data systems to support decision making, administrative support to ensure personnel have the resources and skills they need to implement interventions, and systems that align policies and funding mechanisms across multiple levels (e.g., State, regional, local) (Fixsen et al., 2009). Once implementation components are in place and the system's capacity to implement effective services and evidence-based interventions is established, the State will be better equipped to implement, scale up, and sustain a range of effective services and evidence-based interventions across multiple programs (Fixsen et al., 2009).

Establishing high-quality, effective and efficient IDEA Part C early intervention and Part B preschool programs that are coordinated and integrated with other early childhood programs and that have the capacity to support providers in implementing effective services and evidence-based interventions for infants, toddlers, and preschool children with disabilities and their families, requires changes to a State's early childhood services system at multiple levels. TA has been identified as a strategy to facilitate these changes (Blasé, 2009). Recognizing the complexity of systems change, particularly with respect to a system as complex as the system of services through which early childhood services are provided, intensive TA is needed at the State level so that a State can overcome challenges and support local early childhood programs in delivering evidence-based, high-quality, effective, coordinated, and integrated services and interventions to improve developmental and learning outcomes for infants, toddlers, and preschool children with disabilities and their families.

Priority: Under this priority, the Department will fund a cooperative agreement to establish and operate an Early Childhood Technical Assistance Center (Center) to support States in administering IDEA Part C early intervention and Part B preschool programs. Specifically, the Center will provide TA to States to assist them in: (1) Implementing high-quality, effective, and efficient IDEA Part C early intervention and Part B preschool programs; (2) coordinating the IDEA Part C early intervention and Part B preschool programs with one another as well as with other early childhood programs in the State; and (3) implementing effective services and evidence-based interventions in early childhood programs that result in positive developmental and learning outcomes for infants, toddlers, and preschool children with disabilities and their families.

In addition, the Center will develop a set of empirically supported recommendations for practice on: (1) Policies that promote a high-quality, coordinated, and integrated system of early childhood programs; and (2) services and interventions that result in positive developmental and learning outcomes for infants, toddlers, and preschool children with disabilities and their families.

With additional funding in years two through five, the Center will increase its scope of work and assist States in continued development and refinement of the State's child and family outcomes measurement systems for the IDEA Part C early intervention and Part B preschool programs.

To be considered for funding under this absolute priority, applicants must meet the application requirements contained in this priority. Any project funded under this absolute priority also must meet the programmatic and administrative requirements specified in the priority.

Application Requirements. An applicant must include in its application—

(a) A logic model that depicts, at a minimum, the goals, activities, outputs, and outcomes of the proposed project. A logic model communicates how a project will achieve its outcomes and provides a framework for both the formative and summative evaluations of the project;

Note: The following Web sites provide more information on logic models: *www.researchutilization.org/matrix/logicmodel_resource3c.html and www.tadnet.org/model_and_performance.*

(b) A plan to implement the activities described in the *Project Activities* section of this priority;

(c) A plan, linked to the proposed project's logic model, for a formative evaluation of the proposed project's activities. The plan must describe how the formative evaluation will use clear performance objectives to ensure continuous improvement in the operation of the proposed project, including objective measures of progress in implementing the project and ensuring the quality of products and services. This plan must include how the Center will collect data on all components of the Center activities;

(d) A budget for a summative evaluation to be conducted by an independent third party, who must be approved by OSEP;

(e) A budget dedicating a minimum of $300,000 in year one of the project to cover the costs of carrying out the tasks described in paragraph (d) of the *Knowledge Development Activities* section of this priority;

(f) A budget dedicating a minimum of $900,000 annually to cover the costs of carrying out tasks in paragraph (e) of the *Knowledge Development Activities* section of this priority and paragraphs (a)(1)(i)(E), (a)(2)(vi), (a)(3)(iii), and (b) in the *Technical Assistance and Dissemination Activities* section of this priority related to supporting the implementation of effective services and evidence-based interventions that result in positive developmental and learning outcomes for infants, toddlers, and preschool children with disabilities and their families;

(g) A budget for attendance at the following:

(1) A two-day kick-off meeting to be held in Washington, DC, after receipt of the award, and an annual planning meeting held in Washington, DC, with the OSEP Project Officer during each subsequent year of the project period.

Note: Within 30 days of receipt of the award, a post-award teleconference must be held between the OSEP Project Officer and the grantee's Project Director or other authorized representative.

(2) A three-day Project Directors' Conference in Washington, DC, during each year of the project period.

(3) A two-day Leveraging Resources conference in Washington, DC, during each year of the project period.

(4) A three-day Leadership Conference in Washington, DC, during each year of the project period.

(5) Two two-day trips annually to attend Department briefings, Department-sponsored conferences, and other meetings, as requested by OSEP; and

(h) A line item in the proposed budget for an annual set-aside of five percent of the grant amount to support emerging needs that are consistent with the proposed project's activities, as those needs are identified in consultation with OSEP.

Note: With approval from the OSEP Project Officer, the Center must reallocate any remaining funds from this annual set-aside no later than the end of the third quarter of each budget period.

Project Activities. To meet the requirements of this priority, the Center, at a minimum, must conduct the following activities:

Knowledge Development Activities

(a) In the first three months of the project period, identify a minimum of six States to partner with to develop a framework [1] for high-quality, effective, and efficient IDEA Part C early intervention and Part B preschool programs. Each partnering State must have commitments from its IDEA Part C early intervention and Part B preschool programs to participate in the activities of the Center. Factors for consideration in selecting these States could include the type of State lead agency designated to implement IDEA Part C (e.g., health or education); funding mechanisms (use of private and public insurance, family fees, or parent cost participation to pay for IDEA Part C services, and State fund contributions for IDEA Part C and Part B preschool programs); interagency collaboration agreements; eligibility criteria for IDEA Part C (e.g., narrow versus broad eligibility for IDEA services for children with developmental delays or at-risk children or birth-mandate States); staffing of programs (e.g., contracting versus hiring staff); approach to services (multidisciplinary, transdisciplinary, etc.); recipient of an RTT–ELC grant; and performance on APRs. The Center must obtain approval from OSEP on the final selection of partnering States.

(b) In the first two years of the project period, partner with the States identified in response to paragraph (a) of this section to develop, implement, and evaluate a framework for high-quality, effective, and efficient IDEA Part C early intervention and Part B preschool programs. In developing this framework, the Center must work with its partner States to identify, describe, and document the elements that make up IDEA Part C and Part B preschool programs and describe what must exist within each element to create high-quality, effective, and efficient programs. These elements must include, but are not limited to, the following: Governance structure; funding mechanism; interagency agreements and coordination; service delivery model; personnel standards and qualifications; professional development system; TA system; comprehensive data system; accountability and outcome measurement system; and evaluation and program quality and improvement system. The Center must implement an iterative process for the development, implementation, and evaluation of the framework where parts of it are developed, implemented, and evaluated before the entire framework is completed, ensuring that it is an effective framework for the partner States and other States to use.

(c) On an annual basis, compile and analyze data on all States' APRs and updated SPPs for IDEA Part C indicators and Part B indicators that relate to preschool programs, provide an analysis of States' success in meeting compliance and performance indicators, and use the analysis as the basis for providing States a continuum of TA.

(d) In year one of the project, collaborate with the DEC to update the current set of DEC recommended practices related to: (1) Policies that promote a high-quality, coordinated, and integrated early childhood system and provide a foundation necessary to facilitate the use of recommended practices by providers serving infants, toddlers, and preschool children with disabilities and their families; and (2) effective services and evidence-based interventions that result in positive developmental and learning outcomes for infants, toddlers, and preschool children with disabilities and their families. The Center must work with the Early Childhood Personnel Center (that will be updating the DEC's recommended practices related to professional development), if funded by OSEP, to finalize the process to update the recommended practices so that they reflect current research. The recommended practices must be made available at no cost to consumers on the Center's Web site, as required under paragraph (a)(1)(i) in the *Technical Assistance and Dissemination Activities* section of this priority.

(e) Identify, document, and describe the implementation components needed to support the use and sustainability of effective services and evidence-based interventions in early childhood programs that serve infants, toddlers, and preschool children with disabilities and their families, consistent with paragraph (a)(3)(iii)(B) of the *Technical Assistance and Dissemination Activities* section of this priority.

Technical Assistance and Dissemination Activities

(a) Provide a continuum of TA and dissemination activities that improve the quality, effectiveness, and efficiency of early childhood programs that support the use of effective services and evidence-based interventions that result in positive developmental and learning outcomes for infants, toddlers, and preschool children with disabilities and their families. The continuum must include the following:

(1) General TA to States, early childhood programs, professional development providers, faculty at institutions of higher education (IHEs), researchers, early childhood personnel, families, and other relevant stakeholders. At a minimum, the Center must conduct the following activities:

(i) Develop and disseminate reports, products, guidance, implementation tools, and other materials at no cost to the consumer on:

(A) Current recommendations for practice related to—

(1) Policies that promote a high-quality, coordinated, and integrated early childhood system and provide a foundation necessary for providers to use the recommended practices to serve infants, toddlers, and preschool children with disabilities and their families; and

(2) Effective services and evidence-based interventions that result in positive developmental and learning outcomes for infants, toddlers, and preschool children with disabilities and their families.

(B) The framework for high-quality, effective, and efficient IDEA Part C and Part B preschool programs.

(C) The analysis of all State data collected for IDEA Part C indicators that relate to early intervention programs and Part B indicators that relate to preschool programs.

(D) Collecting quality child and family outcome data, and using child and family outcome data for program improvement.

(E) Critical features of the implementation components needed to support the use, scaling up, and sustainability of effective services and evidence-based interventions in early

[1] For the purposes of this priority, ''framework'' means a guide for decision making.

childhood programs at the State and local program levels.

(ii) Maintain a Web site that meets government or industry-recognized standards for accessibility and that links to the Web site operated by the Technical Assistance Coordination Center (TACC).

(iii) In consultation with the OSEP Project Officer, make selected reports, documents, and other materials available in both English and Spanish.

(2) Targeted TA to States and other relevant stakeholders to improve their capacity to implement high-quality, effective, and efficient IDEA Part C early intervention and Part B preschool programs and to support the use of effective services and evidence-based interventions in early childhood programs at the local level. At a minimum, the Center must conduct the following activities:

(i) Assist States in preparing for IDEA Part C early intervention and Part B preschool monitoring and accountability activities related to serving infants, toddlers, and preschool children with disabilities and their families and implementing the State's corrective action plan and improvement activities as appropriate.

(ii) Assist States in meeting IDEA Part C early intervention and Part B preschool program indicator targets in their SPPs when reporting data on their APRs, including child and family outcome data for program improvement; and meeting new requirements in the IDEA Part C regulations issued on September 28, 2011 (76 FR 60140).

(iii) Plan and implement activities, which could include webinars, meetings, video conferences, and Web sites to support States in the continued development and refinement of a child and family outcomes measurement system, including using data for IDEA Part C early intervention and Part B preschool program improvement.

(iv) Assist States in their efforts to better coordinate their early childhood programs to ensure that infants, toddlers, and preschool children with disabilities and their families receive high-quality services and to scale up and sustain effective implementation components in early childhood programs.

(v) Provide a forum for researchers, professional development providers, early childhood personnel, IHE faculty, and other relevant stakeholders to collaborate through learning communities, communities of practice, or other mechanisms to discuss recommended practices related to high-quality early childhood systems, effective services, and evidenced-based interventions in early childhood programs and methods to support their use.

(3) Intensive TA to States to improve their capacity to implement high-quality, effective, and efficient early childhood programs that serve infants, toddlers, and preschool children with disabilities and their families and scale up and sustain effective implementation components to support the use of effective services and evidence-based interventions in early childhood programs at the local level. At a minimum, the Center must conduct the following activities:

(i) Provide TA to States on implementing the framework for high-quality, effective, and efficient IDEA Part C early intervention and Part B preschool programs developed under paragraph (a) in the Knowledge Development Activities section of this priority in the first and second years of the project period.

(ii) In years two through five of the project period, provide TA to States on implementing a high-quality child and family outcomes measurement system that takes into account the following components: purpose of the outcomes measurement system, data collection and transmission, data analysis, reporting, using data, evaluation, and cross-system coordination. In carrying out this activity, the Center must collaborate with the Early Childhood Data Center, if funded by OSEP, to prevent duplication of effort.

(iii) Select a minimum of four States to build their capacity to scale up and sustain effective implementation components to support the use of effective services and evidence-based interventions at the local early childhood program level. The Center must develop a plan and criteria for selecting the States with which they will work. Factors for selecting States for consideration could include the State's early childhood priorities and initiatives; the commitment of the State's multiple early childhood programs to participate in the TA to support the developmental and learning outcomes of infants, toddlers, and preschool children with disabilities and their families; the commitment of the State's IHEs, including community colleges, to prepare preservice personnel on the use of the evidence-based interventions that may be scaled up within the State; the commitment of the early intervention and community-based early childhood programs in high-need communities and high-need local educational agencies (LEAs) [2] to participate in the TA; and the demographic and geographic characteristics of each State, including the percentage of young children who are high-need children with disabilities.[3] The Center must obtain approval from OSEP on the final selection of States. At a minimum, the Center must conduct the following activities with the selected States:

(A) Assist the selected States in identifying effective services and evidence-based interventions for infants, toddlers, and preschool children with disabilities and their families that the States will implement and scale up. Based on the interventions and services identified, the Center must support the implementation and scale up of the interventions and services through direct TA or by contracting with experts in the field.

(B) Assist each selected State to identify and establish a minimum of six implementation sites in early childhood programs at the local level to identify, document, and describe implementation components and their effectiveness. The Center must develop criteria for selecting the implementation sites. These criteria must be designed to ensure that the sites serve children from diverse backgrounds in a variety of settings, including early intervention and community-based early childhood programs in high-need LEAs.

(C) Assist each selected State in developing, implementing, and evaluating a plan to scale up and sustain effective implementation components to support the use of effective services and evidence-based interventions across local early childhood programs within each State, including early intervention and community-based early childhood programs in high-need LEAs.

(b) Establish a national TA network of a cadre of experts on implementation that will support the Center to provide TA to States and local early childhood programs to strengthen their capacity to scale up and sustain effective implementation components.

[2] For the purposes of this priority, the term ''high-need local educational agency'' means an LEA (a) that serves not fewer than 10,000 children from families with incomes below the poverty line; or (b) for which not less than 20 percent of the children served by the LEA are from families with incomes below the poverty line.

[3] For the purposes of this priority, ''high-need children with disabilities'' refers to children (ages birth through 5) who are eligible for services under IDEA, and who may be further disadvantaged and at risk of educational failure because they: (1) Are living in poverty, (2) are homeless, (3) are in foster care, (4) are English learners, (5) are new immigrants, or (6) are migrant.

Leadership and Coordination Activities

(a) Communicate and collaborate, on an ongoing basis, with OSEP-funded TA projects, including the TACC, the Regional Resource Centers Program, and early childhood-focused centers funded by the Departments of Education and Health and Human Services (HHS), as appropriate. This collaboration could include the joint development of products, the coordination of TA services, and the planning and carrying out of TA meetings and events.

(b) Lead the Early Childhood Technical Assistance Consortium (ECTA).[4] The following Web site provides more information on ECTA: *www.ectaconsortium.org/.*

(c) Work with other Federal and State TA efforts to ensure that IDEA Part C early intervention and Part B preschool programs are considered in the development of coordinated early learning and development systems for children ages birth through five and their families. These efforts must include—

(1) In States with RTT–ELC grants, supporting the involvement of IDEA Part C early intervention and Part B preschool programs in planning and implementing RTT–ELC grant activities; and

(2) Supporting the participation of IDEA Part C early intervention and Part B, Section 619 Coordinators on State Advisory Councils on Early Childhood Education and Care.

(d) Work with other Federal and State TA efforts to strengthen linkages between IDEA Part C early intervention and Part B preschool programs and birth through 3rd grade initiatives.

(e) Consult with a group of persons, including representatives from State and local IDEA Part C early intervention and Part B preschool programs; State level administrators from other early child systems (e.g., State Child Care Administrators and Head Start Collaboration Directors); early childhood personnel; parents of infants, toddlers, or preschool children with disabilities; representatives from other OSEP-funded TA projects; representatives from HHS-funded TA projects; faculty in personnel preparation; and researchers, as appropriate, on the activities and outcomes of the Center and solicit programmatic support and advice from various participants in the group, as appropriate. The Center may convene meetings, whether in person, by phone or other means, for this purpose, or may consult with group participants individually. The Center must identify the members of the group to OSEP within eight weeks after receipt of the award.

(f) Prior to developing any new product, submit a proposal for the product to the TACC database for approval from the OSEP Project Officer. The development of new products must be consistent with the product definition and guidelines posted on the TACC Web site (www.tadnet.org).

(g) Contribute, on an ongoing basis, updated information on the Center's approved and finalized products and services to a database at TACC.

(h) Maintain ongoing communication with the OSEP Project Officer through monthly phone conversations and email communication.

Fourth and Fifth Years of Project

In deciding whether to continue funding the Center for the fourth and fifth years, the Secretary will consider the requirements of 34 CFR 75.253(a) and in addition—

(a) The recommendation of a review team consisting of experts selected by the Secretary. This review team will be conducted during a one-day intensive meeting in Washington, DC, during the last half of the project's second year. The Center must budget for travel expenses associated with this one-day intensive review.

(b) The timeliness and effectiveness with which all requirements of the negotiated cooperative agreement have been or are being met by the Center; and

(c) The quality, relevance, and usefulness of the Center's activities and the degree to which the Center's activities have contributed to changed practices in State systems and improved developmental and learning outcomes for infants, toddlers and preschool children with disabilities and their families.

References

Blase, K. (2009). Technical Assistance to Promote Service and System Change. *Roadmap to Effective Intervention Interventions #4.* Tampa, FL: University of South Florida, Technical Assistance Center on Social Emotional Intervention for Young Children.

Bruder, M.B. (2010). Early childhood intervention: A promise to children and families for their future. *Exceptional Children, 76*(3), 339–355.

Bruder, M.B., Mogro-Wilson, C., Stayton, V., and Dietrich, S. (2009). The national status of in-service professional development systems for early intervention and early childhood special education practitioners. *Infants and Young Children, 22*(1), 13–20.

Fixsen, D.L., Blase, K.A., Horner, R., & Sugai, G. (2009). Developing the capacity for scaling up the effective use of evidence-based programs in state departments of education. Chapel Hill, NC: The University of North Carolina at Chapel Hill, FPG Child Development Institute, SISEP.

Infant & Toddler Coordinators Association. (2011). ITCA 2011 Tipping Points Survey—Part C implementation: State Challenges and Responses. Retrieved from *www.ideainfanttoddler.org/board_surveys.htm.*

Odom, S. (2009). The tie that binds: Evidence-based practice, implementation science, and outcomes for children. *Topics in Early Childhood Special Education, 29*(1), 53–61.

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (APA) (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed priorities and requirements. Section 681(d) of IDEA, however, makes the public comment requirements of the APA inapplicable to the priority in this notice.

Program Authority: 20 U.S.C. 1463, and 1481.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 86, 97, 98, and 99. (b) The Education Department debarment and suspension regulations in 2 CFR part 3485.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to IHEs only.

II. Award Information

Type of Award: Cooperative agreement.

Estimated Available Funds: $3,700,000 for the competition announced in this notice for year one. In year two through five we intend to use an estimated $4,500,000 for the competition.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2013 from the list of unfunded applicants from this competition.

Maximum Awards: We will reject any application that proposes a budget

[4] The ECTA Consortium includes national projects that are funded by the Departments of Education and Health and Human Services that provide TA in support of States' efforts in building coordinated early learning and development systems. The purpose of the consortium is to: coordinate early childhood TA efforts that support States in building and sustaining their systems for early learning and development; share knowledge and resources for improving the delivery and impact of TA; identify strategies for working collaboratively; enhance each other's TA efforts; and explore options to leverage resources to benefit respective constituencies.

exceeding $3,700,000 for a single budget period of 12 months in year one and $4,500,000 for a single budget period of 12 months in years two through five. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 1.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months with an optional additional 24 months based on performance. Applications must include plans for both the 36 month award and the 24 month extension.

III. Eligibility Information

1. *Eligible Applicants:* State educational agencies; LEAs, including public charter schools that are considered LEAs under State law; IDEA Part C State lead agencies; the State lead agency designated under RTT–ELC; IHEs; other public agencies; private nonprofit organizations; outlying areas; freely associated States; Indian tribes or tribal organizations; and for-profit organizations.

2. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

3. *Other: General Requirements*—(a) The project funded under this competition must make positive efforts to employ and advance in employment qualified individuals with disabilities (see section 606 of IDEA).

(b) Applicants and the grant recipient funded under this competition must involve individuals with disabilities or parents of individuals with disabilities ages birth through 26 in planning, implementing, and evaluating the projects (see section 682(a)(1)(A) of IDEA).

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet, from the Education Publications Center (ED Pubs), or from the program office.

To obtain a copy via the Internet, use the following address: *www.ed.gov/fund/grant/apply/grantapps/index.html.*

To obtain a copy from ED Pubs, write, fax, or call the following: ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–877–433–7827. Fax: (703) 605–6794. If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *www.EDPubs.gov* or at its email address: *edpubs@inet.ed.gov.*

If you request an application package from ED Pubs, be sure to identify this program or competition as follows: CFDA number 84.326P.

To obtain a copy from the program office, contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Individuals with disabilities can obtain a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the person or team listed under *Accessible Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the application narrative to the equivalent of no more than 70 pages, using the following standards:

- A ''page'' is 8.5″ x 11′, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, the references, or the letters of support. However, the page limit does apply to all of the application narrative section (Part III).

We will reject your application if you exceed the page limit or if you apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:*

Applications Available: June 19, 2012.

Deadline for Transmittal of Applications: July 19, 2012.

Applications for grants under this competition may be submitted electronically using the Grants.gov Apply site (Grants.gov), or in paper format by mail or hand delivery. For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined at the following Grants.gov Web page: *www.grants.gov/applicants/get_registered.jsp*).

7. *Other Submission Requirements:* Applications for grants under this competition may be submitted electronically or in paper format by mail or hand delivery.

a. *Electronic Submission of Applications.*

We are participating as a partner in the Governmentwide Grants.gov Apply site. The Early Childhood Technical Assistance Center competition, CFDA number 84.326P, is included in this project. We request your participation in Grants.gov.

If you choose to submit your application electronically, you must use the Governmentwide Grants.gov Apply site at *www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

You may access the electronic grant application for the Early Childhood Technical Assistance Center competition at *www.Grants.gov.* You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.326, not 84.326P).

Please note the following:

- Your participation in Grants.gov is voluntary.
- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *www.G5.gov.*
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you submit your application in paper format.
- If you submit your application electronically, you must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- If you submit your application electronically, you must upload any narrative sections and all other attachments to your application as files in a PDF (Portable Document) read-only, non-modifiable format. Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only, non-modifiable PDF or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by email. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

b. *Submission of Paper Applications by Mail.*

If you submit your application in paper format by mail (through the U.S. Postal Service or a commercial carrier), you must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.326P), LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: the U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you submit your application in paper format by hand delivery, you (or a courier service) must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.326P), 550 12th Street SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 and are listed in the application package.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Additional Review and Selection Process Factors:* In the past, the Department has had difficulty finding peer reviewers for certain competitions because so many individuals who are eligible to serve as peer reviewers have conflicts of interest. The Standing Panel requirements under section 682(b) of IDEA also have placed additional constraints on the availability of reviewers. Therefore, the Department has determined that, for some discretionary grant competitions, applications may be separated into two or more groups and ranked and selected for funding within the specific groups. This procedure will make it easier for the Department to find peer reviewers by ensuring that greater numbers of individuals who are eligible to serve as reviewers for any particular group of applicants will not have conflicts of interest. It also will increase the quality, independence, and fairness of the review process, while permitting panel members to review applications under discretionary grant competitions for which they also have submitted applications. However, if the Department decides to select an equal number of applications in each group for funding, this may result in different cut-off points for fundable applications in each group.

4. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* Under the Government Performance and Results Act of 1993 (GPRA), the Department has established a set of performance measures, including long-term

measures, that are designed to yield information on various aspects of the effectiveness and quality of the Technical Assistance and Dissemination to Improve Services and Results for Children with Disabilities program. These measures focus on the extent to which projects provide high-quality products and services, the relevance of project products and services to educational and early intervention policy and practice, and the use of products and services to improve educational and early intervention policy and practice.

Grantees will be required to report information on their project's performance in annual reports to the Department (34 CFR 75.590).

5. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made ''substantial progress toward meeting the objectives in its approved application.'' This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Julia Martin Eile, U.S. Department of Education, 400 Maryland Avenue SW., Room 4056, Potomac Center Plaza (PCP), Washington, DC 20202–2600. Telephone: (202) 245–7431.

If you use a TDD or a TTY, call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue SW., Room 5075, PCP, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a TDD or a TTY, call the FRS, toll free, at 1–800–877–8339.

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You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: June 13, 2012.

Alexa Posny,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2012–14942 Filed 6–18–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards: Personnel Development To Improve Services and Results for Children With Disabilities; National Center for Development of Coursework and Training Modules To Improve Services and Results for Children With Disabilities

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

Overview Information; Personnel Development To Improve Services and Results for Children With Disabilities—National Center for Development of Coursework and Training Modules To Improve Services and Results for Children With Disabilities

Notice inviting applications for new awards for fiscal year (FY) 2012.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.325E.

DATES: *Applications Available*: June 19, 2012.

Deadline for Transmittal of Applications: July 30, 2012.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purposes of this program are to (1) help address State-identified needs for highly qualified personnel—in special education, related services, early intervention, and regular education—to work with children, including infants and toddlers, with disabilities; and (2) ensure that those personnel have the necessary skills and knowledge, derived from practices that have been determined, through evidence-based research and experience, to be successful in serving those children.

Priority: In accordance with 34 CFR 75.105(b)(2)(iv), this priority is from allowable activities specified in the statute (see sections 662 and 681 of the Individuals with Disabilities Education Act (IDEA)).

Absolute Priority: For FY 2012 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is: *National Center for Development of Coursework and Training Modules to Improve Services and Results for Children with Disabilities.*

Background: The purpose of this priority is to fund a cooperative agreement to support the establishment and operation of a National Center for Development of Coursework and Training Modules to Improve Services and Results for Children with Disabilities.

Educator effectiveness is a key factor in improving developmental and learning outcomes (*e.g.,* academic, social, emotional, behavioral) for all children, including children with disabilities (birth through age 21); supporting a child's growth toward improved developmental and learning outcomes; and supporting the families of children with disabilities (Jaquith, Mindich, Wei, & Darling-Hammond, 2010; Institute of Medicine (IOM) and National Research Council (NRC), 2012). Use of evidence-based instructional and intervention practices by educators also is linked to improved outcomes for children, including children with disabilities (Blanton, Pugach, & Florian, 2011). Given the importance of educator effectiveness and evidence-based practices in advancing the development and learning of children, it is essential that all educators have the knowledge and skills necessary to use specific, evidence-based instructional and intervention practices to teach diverse learners and ensure that all students, including children with disabilities, can achieve grade-level college- and career-ready standards (Blanton et al., 2011). Educators also must know how to continuously monitor children's progress, make data-based decisions, and work collaboratively with other

educators, related services providers, and families to use assessment data to adjust instruction and implement interventions accordingly to effectively teach diverse learners.

To ensure that educators have the knowledge and skills needed to improve development and learning outcomes for children with disabilities, it is also widely recognized that there is a significant need to improve educators' use of evidence-based practices and that this can be achieved by strengthening the coursework [1] in preservice preparation programs and professional development provided to practicing educators. Policymakers, researchers, and practitioners have called for strengthening preservice preparation and professional development for all educators [2] to ensure that educators have the knowledge and skills necessary to effectively meet the needs of diverse learners and improve outcomes for all children (Blanton, et al., 2011; U.S. Department of Education, 2010b). A recent U.S. Government Accountability Office (GAO) study (GAO–09–573) underscored the ongoing challenges preservice preparation programs have in preparing educators for instructing children with disabilities. The study noted that nearly half of the institutions of higher education (IHEs) surveyed reported receiving assistance from the Department to prepare educators to work with children with disabilities. The majority of IHEs, however, indicated that they could benefit from more information and other technical assistance (TA) related to reforming curricula, identifying evidence-based instructional and intervention practices for working with children with disabilities, and strengthening faculty knowledge of evidence-based practices to meet the developmental, learning, and instructional needs of children with disabilities. Similarly, an examination of professional learning opportunities for educators in the United States indicated the need for critical changes to providing professional development to practicing educators (Wei, Darling-Hammond, & Adamson, 2010). For example, current approaches for providing professional development still rely heavily on some of the least effective approaches to professional development (*e.g.,* short-term, fragmented, and episodic approaches, such as providing instructional content through workshops) that offer little depth in content and few opportunities to integrate learning into practice (Bruder, Mogro-Wilson, Stayton, & Dietrich, 2009; Wei et al., 2010).

Just as the need to strengthen the coursework in preservice training programs and professional development opportunities for practicing educators has grown, so too has the need for changes in how this coursework and professional development are delivered. The National Education Technology Plan (NETP) calls for using the power of technology to provide professional learning opportunities to support educators' continuous professional growth throughout the course of their careers and across all levels of the education system (U.S. Department of Education, 2010a). By using existing and emerging technologies such as application software, social media, and mobile technologies, innovative teaching and learning tools can be developed, and opportunities for disseminating coursework and professional development can be expanded to preservice and practicing educators who live or teach in places where access to high-quality coursework and professional development may not otherwise be available (*e.g.,* high-poverty, rural, or hard-to-reach locations). In addition, educators who have disabilities would benefit from the increased accessibility that technology can provide. Furthermore, for directed (e.g., instructor-led, person-to-person), self-directed (e.g., independent study, asynchronous on-line course), and blended (online and in-person) learning environments, technology can transform the delivery of coursework in preservice preparation and professional development programs. For example, in preservice programs, technology can be used to show real-time or recorded video of educators using evidence-based practices in classroom settings and to connect instruction to field-based learning and real-world practice through the use of virtual classrooms or authentic learning activities (U.S. Department of Education, 2010a). For practicing educators, technology-based learning systems can expand professional development options and provide opportunities to collaborate with peers and leaders (e.g., content-experts, administrators, mentors) in other locations and to receive immediate feedback and instructional support (U.S. Department of Education, 2010a).

The Office of Special Education Programs (OSEP) currently funds two personnel preparation centers focused on developing and disseminating exemplary training modules on evidence-based practices to build the capacity of, and strengthen professional development for, both preservice and practicing educators. The training modules developed by these centers have been discrete, self-contained units of instruction designed to increase educators' knowledge or skills that can stand alone or be used in combination with other components. The grants for both centers are scheduled to end in FY 2012.

One of these centers, the IRIS Center for Training Enhancement (IRIS Center), focuses its TA on preparing kindergarten through grade 12 (K–12) regular and special education personnel to ensure that local educational agencies (LEAs) and schools have personnel with the capacity to provide evidence-based instruction. It also focuses on promoting access to, and greater participation and progress in, the general education curriculum in the least restrictive environment for students with disabilities. For more information about the work of this center, see *http://iris.peabody.vanderbilt.edu.*

Beginning in 2006, OSEP funded CONNECT: The Center to Mobilize Early Childhood Knowledge (CONNECT) to develop Web-based instructional resources, including training modules, for faculty and other professional development providers. This center's instructional resources focus on evidence-based intervention practices for infants, toddlers, and preschool children with disabilities and their families who are served in a variety of learning environments and inclusive settings. For more information on this center, see *http://community.fpg.unc.edu.*

User survey results from both of these centers show that college and graduate students, practicing educators, parents, university faculty, and professional development providers are frequent users of their Web sites (IRIS Center for Training Enhancements, 2012; Winton, Buysse, Rous, Lim, & Epstein, 2012). In these surveys, both centers' Web sites also received high overall ratings for the quality, relevance, and usefulness of the training modules that were developed by the centers. The work of the IRIS Center and CONNECT have been helpful, but additional work is needed. Specifically, it is critical that: (a) Existing training modules be updated to

[1] For the purposes of this priority, the term ''coursework'' means a systematic or prescribed program of instruction for increasing knowledge and skills of educators; and typically is comprised of explicit learning outcomes related to professional practice standards, detailed core content, related professional-level readings and resources, teaching and learning tools, and objective measures of knowledge and skills to evaluate competence in those areas.

[2] For the purposes of this priority, the term ''educators'' includes special education teachers, regular education teachers, related services providers, and early intervention providers.

align with new developments in the field, as needed; (b) resources be expanded to include coursework, in addition to training modules; and (c) more training modules and coursework be developed to address the most pressing demands that today's educators face in classrooms, early childhood programs, and early intervention programs. These demands include, but are not limited to, aligning curricula and instruction to college- and career-ready standards, adapting principles and practical applications of universal design for learning, providing differentiated instruction, implementing positive behavioral interventions and supports using response to intervention frameworks, and using technology effectively and efficiently to improve results for children with disabilities.

For these reasons, OSEP proposes to fund the National Center for Development of Coursework and Training Modules to Improve Services and Results for Children with Disabilities (Center). The Center will build upon, and expand the work of, previous OSEP investments to develop and disseminate exemplary coursework and training modules on evidence-based practices for: (a) IHE faculty of preservice preparation programs; (b) professional development providers working with State educational agencies (SEAs), LEAs, schools, IDEA Part C lead agencies, early intervention service (EIS) providers, and other early childhood programs serving children with disabilities and their families; and (c) practicing educators. Other interested parties also may access the publically available products.

The purpose of the Center under this priority is to develop and promote the use of innovative teaching and learning tools, coursework, and training modules in order to improve the overall quality of preservice preparation and professional development programs, expand the breadth and depth of the content on evidence-based practices that is provided in these programs, and increase the use of evidence-based practices by educators to effectively meet the needs of children with disabilities and their families. Under this priority, the Center must demonstrate applications of technology to support the use of evidence-based practices. The Center must also use technology to efficiently and effectively develop, deliver, and disseminate its products and services.

Priority: The purpose of this priority is to fund a cooperative agreement to support the establishment and operation of a National Center for Development of Coursework and Training Modules to Improve Services and Results for Children with Disabilities (Center). The Center will: (1) Serve as a national resource for teaching and learning tools, coursework,[3] and training modules [4] for building the capacity of educators to use evidence-based [5] instructional and intervention practices in addressing the needs of children with disabilities (birth through age 21), and professional development practices for use with preservice and practicing educators; (2) make available training modules related to these practices that were developed under prior OSEP investments, and update them to align with developments in the field, as needed; (3) develop exemplary teaching and learning tools, coursework, and training modules on the use of these practices that can be integrated into preservice preparation and professional development programs; (4) demonstrate the application of technology in coursework and training modules to support the use of evidence-based practices; (5) use technology to efficiently and effectively develop, deliver, and disseminate Center products and services; and (6) provide TA to support the use of Center products.

To be considered for funding under this absolute priority, applications must meet the application requirements contained in this priority. All projects funded under this absolute priority also must meet the programmatic and administrative requirements specified in the priority.

Application Requirements. An applicant must include in its application—

(a) A logic model that depicts, at a minimum, the goals, activities, outputs, and outcomes of the proposed project. A logic model communicates how a project will achieve its outcomes and provides a framework for both the formative and summative evaluations of the project;

Note: The following Web sites provide more information on logic models: *www.tadnet.org/model_and_performance* and *www.researchutilization.org/matrix/logicmodel_resource3c.html.*

(b) A plan to implement the activities described in the *Project Activities* section of this priority. If there are considerations specific to serving infants, toddlers, and preschool children with disabilities and their families versus students with disabilities in kindergarten through 12th grade, these considerations must be delineated in the plan;

(c) A plan, linked to the proposed project's logic model, for a formative evaluation of the proposed project's activities. The plan must describe how the formative evaluation will use clear performance objectives to offer feedback on the Center's: (1) Identification, development, and dissemination of coursework and training modules on evidence-based practices; and (2) TA provided under this priority. The plan must outline how the Center will use feedback from the formative evaluation to ensure continuous improvement in the operation of the proposed project, including objective measures of progress in implementing the project and ensuring the quality, relevance, and usefulness of products and services;

(d) A budget for a summative evaluation to be conducted by an independent third party. At a minimum, the plan must include an independent review of the quality, relevance, and usefulness of the coursework and training modules developed by the Center; the reach of Center products and services; and the impact of the Center's products and services on preservice programs and their students, as well as on practicing educators' knowledge, skills, and use of evidence-based practices;

(e) A budget for attendance at the following:

(1) A two-day kick-off meeting to be held in Washington, DC, within four weeks after receipt of the award, and an annual planning meeting held in Washington, DC, with the OSEP Project Officer during each subsequent year of the project period.

Note: Within 30 days of receipt of the award, a post-award teleconference must be held between the OSEP Project Officer and the grantee's Project Director or other authorized representative;

(2) The three-day OSEP Project Directors' Conference in Washington,

[3] For the purposes of this priority, the term ''coursework'' means a systematic or prescribed program of instruction for increasing knowledge and skills of educators; and typically is comprised of explicit learning outcomes related to professional practice standards, a detailed outline or narrative of core content, related professional-level readings and resources, teaching and learning tools, and objective measures of knowledge and skills used to evaluate competence in those areas.

[4] For the purposes of this priority, the term ''training modules'' means discrete, self-contained units of instruction designed to increase one's knowledge or skills that can stand alone or be used in combination with other components.

[5] For the purposes of this priority, the term ''evidence-based'' means practices for which there is ''strong evidence'' or ''moderate evidence'' of effectiveness as defined in the Department's notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486), and corrected on May 12, 2011 (76 FR 27637) (*www2.ed.gov/legislation/FedRegister/other/2010-4/121510b.html*).

DC, during each year of the project period;

(3) The three-day Leveraging Resources Conference in Washington, DC, during each year of the project period; and

(4) Three two-day trips annually to attend Department briefings, Department-sponsored conferences, and other meetings, as requested by OSEP.

(f) A budget that demonstrates that not less than 30 percent of each year's proposed annual budget be used for activities (*e.g.,* development of coursework and training modules, TA) related to infants, toddlers, and preschool children with disabilities and their families.

Note: With approval from the OSEP Project Officer, the Center must reallocate any remaining funds from this annual set-aside no later than the end of the third quarter of each budget period; and

(g) A line item in the proposed budget for an annual set-aside of five percent of the grant amount to support emerging needs that are consistent with the proposed project's activities, as those needs are identified in consultation with and approved by OSEP.

Note: With approval from the OSEP Project Officer, the Center must reallocate any remaining funds from this annual set-aside no later than the end of the third quarter of each budget period.

Project Activities. To meet the requirements of this priority, the Center, at a minimum, must conduct the following activities:

Knowledge Development Activities.

(a) In the first six months of the project, identify exemplary coursework and training modules on evidence-based practices that are available from prior OSEP investments and publically available resources from other developers, submit a descriptive summary of the resources in a written report, and update the resources to align with new developments in the field, as needed.

(b) Develop exemplary coursework and training modules on evidence-based practices that are—

(1) Designed for ease of integration into existing curricula and practica for IHE faculty of preservice preparation programs;

(2) Designed for ease of use by professional development providers working with professional development programs at SEAs, LEAs, and schools; or with IDEA Part C lead agencies, EIS providers, and other early childhood programs serving children with disabilities and their families;

(3) Consistent with adult-learning principles and aligned with current professional practice and training standards for educators, and evidence-based research on preservice preparation and professional development of effective educators;

(4) Planned with consideration for delivery and dissemination using various technology-based teaching formats, tools, and modes of delivery, such as, but not limited to, directed, self-directed, blended, and mobile learning using portable devices; and

(5) Developed to address the needs of children with a broad range of disabilities, including disabilities requiring supports and services of varying intensity levels (*e.g.,* ranging from accommodations in a general education classroom to highly individualized, full-time instruction and specialized equipment).

(c) Ensure that, in sum, coursework and training modules address the selection, implementation, and evaluation of specific evidence-based practices; the use of universal design for learning principles and practices; standards-based instruction; continuous performance-based progress monitoring; data-based decision making; and collaboration among other educators and related services providers, and with families related to—

(1) Improving developmental and learning outcomes for children with disabilities;

(2) Providing special education services and supports, and accommodations for children with disabilities; and

(3) Developing (i) individualized family service plans to ensure that infants, toddlers, and preschool children with disabilities are served in natural environments; and (ii) individualized education programs to ensure school-age children with disabilities are served in the least restrictive environment with access to, and opportunities to participate and make progress in, the general education curriculum.

(d) Collaborate with content experts and representatives from preservice preparation programs (four-year, two-year, and graduate programs), and seek input from professional development providers working with SEAs, LEAs, and schools; professional development providers working with IDEA Part C lead agencies, EIS providers, and other early childhood programs serving children with disabilities and their families; professional associations; and other stakeholders, as appropriate, on the needs of preservice and practicing educators, teaching and learning tools, development plans, and product reviews of coursework and training modules on evidence-based practices.

(e) Following the kick-off meeting, and annually thereafter, submit an annual product development plan prepared in collaboration with the OSEP Project Officer, for approval by OSEP prior to the initiation of any product development activity. The plan must address, at a minimum, how the Center will—

(1) Obtain input on coursework and training module topics and content from content experts, representatives from preservice preparation and professional development providers (see *Knowledge Development Activities,* paragraphs (b) and (c) of this priority), professional associations, and other stakeholders, as appropriate;

(2) Identify and select topics and products that meet the needs identified; and

(3) Evaluate the content, quality, relevance, and usefulness of products.

(f) Develop new products consistent with the product definition and guidelines posted on the Technical Assistance Coordinating Center (TACC) Web site (*www.tadnet.org*). Proposed revisions to an approved product development plan may be submitted to or requested by the OSEP Project Officer any time prior to the end of the project period, if changes are needed. The revised plan must be approved by OSEP prior to being adopted.

(g) Develop training guides or materials for IHE faculty and professional development providers that provide information on Center products and services, and content topics; describe how to integrate coursework and training modules into preservice and professional development programs; and explain how coursework and training modules can be used for individual self-directed learning.

(h) Develop self-assessment tools and guides that preservice preparation and professional development providers can use to evaluate program curricula to: (1) Determine where evidence-based practices are, and should be, taught; (2) identify where clinical practice opportunities (*e.g.,* a field placement, internship) are, and should be, embedded to align with preservice or professional development program requirements; (3) identify how and where preservice and practicing educators' knowledge of and skills using evidence-based practices are, and should be, assessed; and (4) document improvements, if any, that have or will be made by the preservice and professional development program based on results from use of self-assessment tools and guides.

(i) Promote the use of existing and emerging technologies to more efficiently and effectively develop, deliver, and disseminate teaching and learning tools, coursework, and training modules on evidence-based practices and provide ongoing TA on the use of Center products and services.

Technical Assistance and Dissemination Activities.

(a) Conduct TA and dissemination activities (*e.g.,* managing Web sites, listservs, and communities of practices; holding conferences and training institutes) on exemplary coursework and training modules on evidence-based practices that can easily be: (1) Integrated into preservice preparation courses and programs at IHEs; (2) incorporated into professional development programs at SEAs, LEAs, and schools; and at IDEA Part C lead agencies, EIS provider programs, and other early childhood programs serving children with disabilities and their families; and (3) used by individual self-directed learners, including educators with disabilities. All coursework and training modules available through the Center, including the evidence base of the practices addressed in the coursework and training modules, must be disseminated as publically available resources on a dedicated Web site that is easily searchable by topic and available for use at no cost. The Web site must meet government or industry-recognized standards for accessibility, must link to the Web site operated by the TACC, and must be accessible in a variety of formats (*e.g.,* accessible online, in downloadable portable document format (PDF) and electronic publication (EPUB) formats, print-on-demand).

(b) Use efficient and effective strategies to develop and provide a continuum of TA to support the delivery of coursework and training modules on using evidence-based practices, including:

(1) General support that is widely available (e.g., one-time, invited conference presentations; information on products, such as newsletters, guidebooks, or research syntheses, downloaded from the Center's Web site by independent users; or brief communications by Center staff with recipients).

(2) Targeted support that is based on needs common to multiple recipients (*e.g.,* conferences and training institutes for a clearly identified target audience, seminars or webinars on topics relevant to integrating Center products into preservice training, facilitating a series of conference calls on topics designed around the needs of recipients, facilitating communities of practice for a target group).

(3) Intensive support that is based on the needs of recipients to attain a specific outcome (*e.g.,* planned, purposeful consultation with a small group of IHE faculty on systemic integration of Center coursework and training models as part of program redesign; ongoing coaching on integration and application of Center products in courses for preservice educators) based on the needs of recipients.

(c) Ensure that the TA provided under this priority is consistent with the evidence base for delivering effective professional development to educators.

(d) Ensure that the TA provided under this priority addresses a range of topics, including, but not limited to, training and coaching on access and use of Center products; integration of evidence-based practices into preservice and professional development training; and strategies for building the capacity of educators for using evidence-based practices with children with disabilities.

(e) Develop and coordinate a national TA network comprised of a cadre of experts that the Center will use to provide training and TA on the use of Center products and services, including: (1) Integrating coursework and training modules into preservice preparation and professional development programs; and (2) assisting faculty and professional development providers in building their capacity to support preservice and practicing educators in identifying, selecting, implementing, and evaluating evidence-based practices for use with infants, toddlers, and preschool children with disabilities and their families, and students with disabilities in kindergarten through 12th grades. The network will also assist the Center with disseminating Center products and other activities, as needed.

(f) Develop and implement an efficient and high-quality dissemination strategy aimed at increasing the reach and potential impact of Center products and services by providing broad audiences with information about the availability and use of Center products and services. The Center must—

(1) Coordinate with the National Dissemination Center for Individuals with Disabilities to implement its dissemination strategy, and report to the OSEP Project Officer the outcomes of these coordination efforts.

(2) Reach primary audiences, including IHE faculty of preservice preparation programs for educators of children with disabilities; and professional development providers working with SEAs, LEAs, and schools, and with IDEA Part C lead agencies, EIS providers, and early childhood programs serving children with disabilities and their families.

(3) Extend outreach efforts to other audiences that also might benefit from Center products and services such as—

(i) Faculty of preservice preparation programs for educators in IHEs that do not have a special education department and programs whose graduates historically have assumed positions in high-poverty schools,[6] persistently lowest-achieving schools,[7] priority schools (in the case of States that have received the Department's approval of a request for ESEA flexibility),[8] or rural

[6] For the purposes of this priority, ''high-poverty school'' means a school in which at least 50 percent of students are eligible for free or reduced-price lunches under the Richard B. Russell National School Lunch Act or in which at least 50 percent of students are from low-income families as determined using one of the criteria specified under section 1113(a)(5) of the Elementary and Secondary Education Act of 1965, as amended (ESEA). For middle and high schools, eligibility may be calculated on the basis of comparable data from feeder schools. Eligibility as a high-poverty school under this definition is determined on the basis of the most currently available data.

[7] For the purposes of this priority, ''persistently lowest-achieving schools'' means, as determined by the State:

(i) Any Title I school in improvement, corrective action, or * * * restructuring that

(a) is among the lowest-achieving five percent of Title I schools in improvement, corrective action, or restructuring or the lowest-achieving five Title I schools in improvement, corrective action, or restructuring in the State, whichever number of schools is greater; or

(b) is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years; and

(ii) any secondary school that is eligible for, but does not receive, Title I funds that:

(a) is among the lowest-achieving five percent of secondary schools or the lowest-achieving five secondary schools in the State that are eligible for, but do not receive, Title I funds, whichever number of schools is greater; or

(b) is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years.

To identify the persistently lowest-achieving schools, a State must take into account both:

(i) the academic achievement of the ''all students'' group in a school in terms of proficiency on the State's assessments under section 1111(b)(3) of the ESEA in reading/language arts and mathematics combined; and

(ii) the school's lack of progress on those assessments over a number of years in the ''all student.''

For the purposes of this priority, the Department considers schools that are identified as Tier I or Tier II schools under the School Improvement Grants Program (see 75 FR 66363) as part of a State's approved FY 2009 or FY 2010 applications to be persistently lowest-achieving schools. A list of these Tier I and Tier II schools can be found on the Department's Web site at *www2.ed.gov/programs/sif/index.html.*

[8] For the purposes of this priority, the term ''priority school'' means a school that has been identified by the State as a priority school pursuant to the State's approved request for ESEA flexibility.

LEAs[9] that have a critical need for effective educators to serve students with disabilities;

(ii) Early intervention and special education professional development providers working in programs and schools with high rates of personnel attrition and where effective professional development opportunities may lead to increased staff retention and equitable distribution of effective educators;

(iii) OSEP-funded personnel development grantees; and

(iv) Individuals with disabilities who are, or are training to be, educators who would benefit from the increased accessibility technology can provide.

(g) Use existing and emerging technologies to develop innovative teaching and learning tools, efficiently and effectively deliver training and TA, and increase the reach of Center products and services. Include, as part of its application, a proposed plan describing the proposed potential uses of existing and emerging technologies, including how the Center will collaborate with technology experts, representatives of other stakeholder groups, and OSEP to identify the proposed potential uses of existing and emerging technologies. The Center's plan for TA and dissemination activities must be approved by OSEP prior to initiating the development of any products or services.

(h) Prepare and disseminate reports, documents, and other materials on evidence-based practice and related topics as requested by OSEP for specific audiences, including, but not limited to, IHE faculty of preservice preparation programs for educators of children with disabilities; professional development providers for SEAs, LEAs, and schools; and professional development providers for IDEA Part C lead agencies, EIS providers, and other early childhood programs serving children with disabilities and their families. In consultation with the OSEP Project Officer and members of the group assembled in accordance with this priority (see *Leadership and Coordination Activities,* paragraph (a) of this priority), the Center must make selected reports, documents, and other materials available in both English and Spanish.

[9] For the purposes of this priority, ''rural local educational agency'' means an LEA that is eligible under the Small Rural School Achievement (SRSA) program or the Rural and Low-Income School (RLIS) program authorized under Title VI, Part B of the ESEA. Eligible applicants may determine whether a particular LEA is eligible for these programs by referring to information on the Department's Web site at *www2.ed.gov/nclb/freedom/local/reap.html.*

Leadership and Coordination Activities.

(a) Consult with a group of persons, including representatives from SEAs and LEAs, including representatives from IDEA Part C and Part B preschool programs, preservice preparation and professional development programs, professional organizations, other OSEP-funded TA projects, project directors of State Professional Development Grants and other Department-funded higher education projects, and researchers, as appropriate, on the activities and outcomes of the Center and solicit programmatic support and advice from various participants in the group, as appropriate. The Center may convene meetings, whether in person, by phone, or other means, for this purpose or may consult with group participants individually. The Center must identify the members of the group to OSEP within eight weeks after receipt of the award.

(b) Communicate and collaborate, on an ongoing basis, with OSEP-funded projects, including the Center on State Implementation and Scaling Up of Evidence-based Practices, the IDEA Partnership Project, OSEP-funded early childhood centers, and the Regional Resource Centers. This collaboration could include the joint development of products, the coordination of TA services, and the planning and carrying out of TA meetings and events.

(c) Contribute, on an ongoing basis, updated information on the Center's approved and finalized products and services to a database at TACC.

(d) Participate in, organize, or facilitate communities of practice if they align with the needs of the project's primary audience. Communities of practice should align with the project's objectives to support discussions and collaboration among key stakeholders. The following Web site provides more information on communities of practice: *www.tadnet.org/communities;* and

(e) Maintain ongoing communication with the OSEP Project Officer through monthly phone conversations and email communication.

Extending the Project for a Fourth and Fifth Year: In deciding whether to continue funding the Center for the fourth and fifth years, the Secretary will consider the requirements of 34 CFR 75.253(a), and in addition—

(a) The recommendation of a review team consisting of experts selected by the Secretary. This review will be conducted during a one-day intensive meeting in Washington, DC, that will be held during the last half of the second year of the project period. The Center must budget for travel expenses associated with this one-day intensive review;

(b) The timeliness and effectiveness with which all requirements of the negotiated cooperative agreement have been or are being met by the Center; and

(c) The quality, relevance, and usefulness of the Center's activities and products, and the degree to which the Center's activities and products have contributed to changed practice and improved knowledge and skills of educators to select, implement, and evaluate the use of evidence-based practices; and increased use of evidence-based practices by educators serving children with disabilities.

References

Blanton, L. P., Pugach, M. C., & Florian, L. for American Association of Colleges of Teacher Education and the National Center for Learning Disabilities. (April 2011). *Preparing General Education Teachers to Improve Outcomes for Students with Disabilities.* Available from *http://aacte.org/.*

Bruder, M. B., Mogro-Wilson, C., Stayton, V. D., & Dietrich, S. L. (2009). The national status of inservice professional development systems for early intervention and early childhood special education practitioners. *Infants and Toddlers, 22*(1), 13–20.

Jaquith, A., Mindich, D., Wei, R.C., & Darling-Hammond, L. (2010). *Teacher professional learning in the United States: Case studies of state policies and strategies.* Oxford, OH: Learning Forward.

Institute of Medicine (IOM) and National Research Council (NRC). 2012. *The early childhood care and education workforce: Challenges and opportunities: A workshop report.* Washington, DC: The National Academies Press.

IRIS Center for Training Enhancements. (2012, March). *Quarterly Report: First Quarter, Year 6 Report.* Nashville, TN: Author.

U.S. Department of Education, Office of Educational Technology. (2010a). *Transforming American Education: Learning Powered by Technology.* Washington, DC: Available from *www2.ed.gov/about/offices/list/os/technology/netp.pdf.*

U.S. Department of Education, Office of Planning, Evaluation and Policy Development. (2010b). *ESEA Blueprint for Reform.* Washington, DC: Available from *www2.ed.gov/policy/elsec/leg/blueprint/index.html.*

U.S. Government Accountability Office. (2009). *Teacher Preparation Multiple Federal Education Offices Support Teacher Preparation for Instructing Students with Disabilities and English Language Learners, but Systemic Departmentwide Coordination Could Enhance This Assistance,* (GAO–09–573). Washington, DC: July 20, 2009. Available from *www.GAO.gov/new.items/d09573.pdf.*

Wei, R.C., Darling-Hammond, L., & Adamson, F. (2010). *Professional development in the United States: Trends and challenges.* Dallas, TX: National Staff Development Council.

Winton, P., Buysse, V., Rous, B., Lim, C–I., & Epstein, D. (2012, March). CONNECT Modules: Usage and Impact. Report to the CONNECT Steering Committee, University of North Carolina, FPG Child Development Institute. Chapel Hill, NC: CONNECT: The Center to Mobilize Early Childhood Knowledge.

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (APA) (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed priorities and requirements. Section 681(d) of IDEA, however, makes the public comment requirements of the APA inapplicable to the priority in this notice.

Program Authority: 20 U.S.C. 1462 and 1481.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 86, 97, 98, and 99. (b) The Education Department debarment and suspension regulations in 2 CFR part 3485. (c) The regulations for this program in 34 CFR part 304.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Cooperative agreement.

Estimated Available Funds: $1,500,000.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2013 from the list of unfunded applicants from this competition.

Maximum Awards: We will reject any application that proposes a budget exceeding $1,500,000 for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 1.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months with an optional additional 24 months based on performance.

Note: Applications must include plans for both the 36 month award and the 24-month extension.

III. Eligibility Information

1. *Eligible Applicants:* SEAs; LEAs, including public charter schools that are considered LEAs under State law; IDEA Part C lead agencies; EIS providers; IHEs; other public agencies; private nonprofit organizations; outlying areas; freely associated States; Indian tribes or tribal organizations; and for-profit organizations.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

3. *Other: General Requirements*—(a) The projects funded under this program must make positive efforts to employ and advance in employment qualified individuals with disabilities (see section 606 of IDEA).

(b) Each applicant and grant recipient funded under this program must involve individuals with disabilities or parents of individuals with disabilities ages birth through 26 in planning, implementing, and evaluating the project (see section 682(a)(1)(A) of IDEA).

IV. Application and Submission Information

1. *Address To Request Application Package:* You can obtain an application package via the Internet, from the Education Publications Center (ED Pubs), or from the program office.

To obtain a copy via the Internet, use the following address: *www.ed.gov/fund/grant/apply/grantapps/index.html.*

To obtain a copy from ED Pubs, write, fax, or call the following: ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–877–433–7827. Fax: (703) 605–6794. If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *www.EDPubs.gov* or at its email address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA number 84.325E.

To obtain a copy from the program office, contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Individuals with disabilities can obtain a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the person or team listed under *Accessible Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition. Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit Part III to the equivalent of no more than 50 pages using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, the references, or the letters of support. However, the page limit does apply to all of the application narrative in Part III.

We will reject your application if you exceed the page limit; or if you apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:*

Applications Available: June 19, 2012.

Deadline for Transmittal of Applications: July 30, 2012.

Applications for grants under this competition may be submitted electronically using the Grants.gov Apply site (Grants.gov), or in paper format by mail or hand delivery. For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application

process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined at the following Grants.gov Web page: *www.grants.gov/applicants/get_registered.jsp.*

7. *Other Submission Requirements:* Applications for grants under this competition may be submitted electronically or in paper format by mail or hand delivery.

a. *Electronic Submission of Applications.*

We are participating as a partner in the Governmentwide Grants.gov Apply site. The National Center for Development of Coursework and Training Modules to Improve Services and Results for Children with Disabilities, CFDA number 84.325E, is included in this project. We request your participation in Grants.gov.

If you choose to submit your application electronically, you must use the Governmentwide Grants.gov Apply site at *www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

You may access the electronic grant application for the National Center for Development of Coursework and Training Modules to Improve Services and Results for Children with Disabilities, CFDA number 84.325E at *www.Grants.gov.* You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.325, not 84.325E).

Please note the following:

- Your participation in Grants.gov is voluntary.
- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at www.G5.gov.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you submit your application in paper format.
- If you submit your application electronically, you must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- If you submit your application electronically, you must upload any narrative sections and all other attachments to your application as files in a PDF (Portable Document) read-only, non-modifiable format. Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only, non-modifiable PDF or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by email. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date. Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are

experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under For Further Information Contact in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

b. *Submission of Paper Applications by Mail.*

If you submit your application in paper format by mail (through the U.S. Postal Service or a commercial carrier), you must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.325E), LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you submit your application in paper format by hand delivery, you (or a courier service) must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.325E), 550 12th Street SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are from 34 CFR 75.210 and are listed in the application package.

2. *Review and Selection Process:* (a) We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

(b) In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Additional Review and Selection Process Factors:* In the past, the Department has had difficulty finding peer reviewers for certain competitions because so many individuals who are eligible to serve as peer reviewers have conflicts of interest. The Standing Panel requirements under section 682(b) of IDEA also have placed additional constraints on the availability of reviewers. Therefore, the Department has determined that, for some discretionary grant competitions, applications may be separated into two or more groups and ranked and selected for funding within specific groups. This procedure will make it easier for the Department to find peer reviewers by ensuring that greater numbers of individuals who are eligible to serve as reviewers for any particular group of applicants will not have conflicts of interest. It also will increase the quality, independence, and fairness of the review process, while permitting panel members to review applications under discretionary grant competitions for which they also have submitted applications. However, if the Department decides to select an equal number of applications in each group for funding, this may result in different cut-off points for fundable applications in each group.

4. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and

send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* Under the Government Performance and Results Act of 1993 (GPRA), the Department has established a set of performance measures, including long-term measures, that are designed to yield information on various aspects of the effectiveness and quality of the Technical Assistance and Dissemination to Improve Services and Results for Children with Disabilities program. For purposes of this priority, the Center will use these measures which focus on the extent to which projects provide high-quality products and services, the relevance of project products and services to educational and early intervention policy and practice, and the use of products and services to improve educational and early intervention policy and practice.

Grantees will be required to report information on their project's performance in annual reports to the Department (34 CFR 75.590).

5. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made ''substantial progress toward meeting the objectives in its approved application.'' This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Sarah Allen, U.S. Department of Education, 400 Maryland Avenue SW., room 4105, Potomac Center Plaza (PCP), Washington, DC 20202–2600. Telephone: (202) 245–7875.

If you use a TDD or a TTY, call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue SW., room 5075, PCP, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a TDD or a TTY, call the FRS, toll free, at 1–800–877–8339.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.*

At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: June 14, 2012.

Alexa Posny,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2012–14944 Filed 6–18–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Amended Notice of Intent Modifying the Scope of the Environmental Impact Statement for the Hydrogen Energy California's Integrated Gasification Combined Cycle Project, Kern County, CA

AGENCY: Department of Energy, DoE.

ACTION: Amended Notice of Intent and Notice of Potential Floodplain and Wetlands Involvement.

SUMMARY: The U.S. Department of Energy (DOE or the Department) is publishing this Amended Notice of Intent to inform the public of changes in the scope of an ongoing environmental impact statement (EIS). In this EIS, DOE will assess the potential environmental impacts of a project proposed by Hydrogen Energy California, LLC, (HECA) pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality's NEPA regulations (40 CFR Parts 1500–1508), and DOE's NEPA regulations (10 CFR Part 1021). DOE's proposed action is to provide financial assistance for the construction and operation of HECA's project, which would produce and sell electricity, carbon dioxide and fertilizer. DOE selected this project for an award of financial assistance through a competitive process under the Clean Coal Power Initiative (CCPI) program. This Amended Notice of Intent provides information about changes to the project's design, HECA's ownership, and DOE's plans for completing the NEPA process that occurred after publication of the original Notice of Intent (NOI) in the **Federal Register** on April 6, 2010 (75 FR 17397–401). HECA's project would demonstrate integrated gasification combined cycle (IGCC) technology with carbon capture in a new electricity generating plant in Kern County, California. The plant would use a blend of 75 percent coal and 25 percent petroleum coke (petcoke) and would capture, sell and sequester carbon dioxide on a commercial scale. It would also produce

and sell fertilizer and other nitrogenous compounds.

The project would gasify the coal and petcoke to produce synthesis gas (syngas), which would then be purified to produce a hydrogen-rich fuel for a combustion turbine that would generate electricity while minimizing emissions of sulfur dioxide, nitrogen oxides, mercury, and particulates compared to conventional coal-fired power plants. In addition, the project would achieve a carbon dioxide (CO_2) capture efficiency of approximately 90 percent at steady-state operation. The captured CO_2 would be compressed and transported via pipeline to the adjacent Elk Hills Oil Field (owned and operated by Occidental of Elk Hills, Inc. (OEHI)) for injection into deep underground oil reservoirs for enhanced oil recovery (EOR), resulting in geologic sequestration.

The EIS will inform DOE's decision on whether to provide financial assistance under its CCPI Program to HECA's project, which has an estimated capital cost of $4 billion. DOE's financial assistance (or ''cost share'') would be limited to $408 million, about 10 percent of the project's total cost. DOE's financial assistance is also limited to certain aspects of the power and manufacturing plants, carbon capture, and sequestration. The EIS will evaluate the potential impacts of DOE's proposed action, the project proposed by HECA and any connected actions, and reasonable alternatives to DOE's proposed action. The purposes of this Amended Notice of Intent are to: (1) Inform the public about DOE's proposed action and HECA's proposed project, including information on features of the project that have changed since publication of the first NOI; (2) describe how DOE intends to coordinate its NEPA review with the California Energy Commission's process for deciding whether to certify the project; (3) solicit comments for DOE's consideration regarding the scope and content of the EIS; (4) invite those agencies with jurisdiction by law or special expertise to be cooperating agencies in preparation of the EIS; and (5) provide notice that the proposed project may involve potential impacts to floodplains and wetlands.

DOE does not have regulatory jurisdiction over the HECA project. Its decisions are limited to whether and under what circumstances it would provide financial assistance to the project. There are a number of state and federal agencies that do have regulatory authority over the project; one of them is the California Energy Commission (CEC), which is responsible for power plant licensing under the Warren-Alquist Act (Cal. Pub. Res. Code § 25500 *et seq.*). This licensing process (referred to as ''certification'') is established by California law and will consider all relevant environmental aspects of HECA's proposed project. Under state law, the certification process fulfills the requirements of the California Environmental Quality Act (CEQA; Cal. Pub. Res. Code § 21000 *et seq.*). CEC will hold public meetings, issue a final staff assessment, conduct evidentiary hearings, and issue a decision based on the hearing record, which will include the CEC's and other parties' assessments. The CEC conducts an independent analysis of the proposed project and prepares an assessment of its potential environmental impacts, potential conditions of certification (*e.g.* mitigation measures), and reasonable alternatives. The CEC also consults with interested Native American tribes and local, regional, state, and federal agencies, and will coordinate its environmental review with other agencies, including the California Department of Conservation, Division of Oil, Gas and Geothermal Resources (DOGGR). Pursuant to California law and a grant of primacy from the United States Environmental Protection Agency regarding Class II wells under section 1425 of the Safe Drinking Water Act, DOGGR has responsibility for permitting EOR injection and extraction wells and will separately permit the OEHI EOR project. DOGGR will coordinate with the CEC.[1]

DOE intends to coordinate its NEPA review of the HECA project with the environmental review conducted by the CEC as lead agency under CEQA. DOE will work closely with the Commission throughout its regulatory processes in order to integrate the NEPA and CEQA processes in an efficient and expeditious manner. It is likely that DOE and the CEC will issue joint documents comprising DOE's NEPA analyses and CEC's environmental and other analyses conducted for its certification process.

DATES: DOE and CEC will hold a joint meeting on July 12, 2012 at the Elk Hills Elementary School, 501 Kern Street, Tupman, CA 93276. For CEC, this meeting will constitute its Site Visit and Informational Hearing, which provide an opportunity for members of the community in the project vicinity to obtain information about the project, to offer comments, and to view the project site. Anyone may present oral comments at the Informational Hearing and no advance notice is needed. HECA LLC (referred to as the Applicant in the certification process) will explain its plans for developing the project and the related facilities and the CEC will explain the licensing process and its role in reviewing the amended Application for Certification. More information about the site visit, informational hearing and the CEC's certification process for this project can be found at *http://www.energy.ca.gov/sitingcases/hydrogen_energy/index.html.* The CEC docket number for this project is 08–AFC–08A.

For DOE, this joint meeting will constitute the public scoping meeting for DOE's NEPA review. The purpose of the scoping process is to establish the alternatives, potential environmental impacts, and other issues DOE should analyze in the EIS. Individuals, businesses, government agencies, and other entities may submit comments via letters, facsimiles, emails and telephone calls (see **ADDRESSES** below) to DOE regarding the alternatives, impacts and issues DOE should consider in its EIS. The public is also invited to attend the scoping meeting and present oral comments and suggestions on these topics. DOE will accept comments on the scope of the EIS until July 27, 2012; it will consider comments submitted after this date to the extent practicable. Additional information about DOE's NEPA review of this project can be found at *http://www.netl.doe.gov/publications/others/nepa/index.html.*

The CEC and DOE will provide more information about the joint meeting at a later date through their Web sites, mailings and public notices. The Site Visit will start at the Elk Hills Elementary School at 5:00 p.m. PDT; buses will take anyone wishing to visit the site from the school to the site and then return them to the school by 6:00 p.m. for the start of the Informational Hearing and Public Scoping Meeting. You need not participate in the site visit to participate in the hearing and scoping meeting. The hearing and meeting will start with presentations by the CEC's hearing officer, the Applicant, CEC staff, DOE, and others. A period for questions and comments will begin after these presentations.

ADDRESSES: Written comments on the scope of the EIS and requests to participate in the public scoping meeting should be addressed to: Mr. Fred Pozzuto, U.S. Department of Energy, National Energy Technology Laboratory, 3610 Collins Ferry Road,

[1] DOE anticipates that, pursuant to Cal. Pub. Res. Code § 21000 *et seq.,* California agencies will impose mitigation measures to address potential impacts and project design elements to verify the sequestration of CO_2 injected for EOR.

P.O. Box 880, Morgantown, WV 26507. Individuals who would like to provide oral or electronic comments should contact Mr. Pozzuto directly by telephone: 304–285–5219; toll-free number: 1–866–269–6493; fax: 412–386–6127; or electronic mail: *heca.eis@netl.doe.gov.*

FOR FURTHER INFORMATION CONTACT: For information about this project or to receive a copy of the draft EIS when it is issued, contact Mr. Pozzuto as described above. For general information on the DOE NEPA process, contact Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance (GC–54), U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585–0103; telephone: 202–586–4600; fax: 202–586–7031; or leave a toll-free message at 1–800–472–2756.

SUPPLEMENTARY INFORMATION:

Background

Since the early 1970s, DOE and its predecessor agencies have pursued research and development programs that include large, technically complex projects in pursuit of innovation in a wide variety of coal technologies through the proof-of-concept stage. However, helping a technology reach the proof-of-concept stage does not ensure its continued development or commercialization. Before a technology can be considered seriously for commercialization, it must be demonstrated at a sufficient scale to prove its reliability and economically competitive performance. The financial risk associated with such large-scale demonstration projects is often too high for the private sector to assume in the absence of strong incentives.

The CCPI program was established in 2002 as a government and private sector partnership to implement the recommendation in President Bush's National Energy Policy to increase investment in clean coal technology. Through cooperative agreements with its private sector partners, the program advances clean coal technologies to commercialization; these technologies often involve combustion improvements, control systems advances, gasifier design, pollution reduction (including greenhouse gas reduction), efficiency increases, fuel processing, and others.

The Congress established criteria for projects receiving financial assistance under this program in Title IV of the Energy Policy Act of 2005 (Pub. L.109–58) (EPACT 2005). Under this statute, CCPI projects must ''advance efficiency, environmental performance, and cost competitiveness well beyond the level of technologies that are in commercial service'' (Pub. L. 109–58, § 402(a)). In February 2009, the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5, 123 Stat. 115 (Feb. 17, 2009)) (ARRA) appropriated $3.4 billion to DOE for ''Fossil Energy Research and Development;'' the Department intends to use a significant portion of these funds to provide financial assistance to CCPI projects.

The CCPI program selects projects for its government-private sector partnerships through an open and competitive process. Potential private sector partners may include developers of technologies, utilities and other energy producers, service corporations, research and development firms, software developers, academia and others. DOE issues funding opportunity announcements that specify the types of projects it is seeking, and invites submission of applications. Applications are reviewed according to the criteria specified in the funding opportunity announcement; these criteria include technical, financial, environmental, and other considerations. DOE selects the projects that demonstrate the most promise when evaluated against these criteria, and enters into a cooperative agreement with the applicant. These agreements set out the project's objectives, the obligations of the parties, and other features of the partnership. Applicants must agree to provide at least 50 percent of their project's cost; for most CCPI projects, the applicant's cost share is much greater.

To date the CCPI program has conducted three rounds of solicitations and project selections. The first round sought projects that would demonstrate advanced technologies for power generation and improvements in plant efficiency, economics, and environmental performance. Round 2 requested applications for projects that would demonstrate improved mercury controls and gasification technology. Round 3, which DOE conducted in two phases, sought projects that would demonstrate advanced coal-based electricity generating technologies which capture and sequester (or put to beneficial use) carbon dioxide emissions. DOE's overarching goal for Round 3 projects was to demonstrate technologies at commercial scale in a commercial setting that would: (1) Operate at 90 percent capture efficiency for CO_2; (2) make progress towards capture and sequestration at less than a 10 percent increase in the cost of electricity for gasification systems and a less than 35 percent increase for combustion and oxycombustion systems; and (3) make progress toward capture and sequestration of 50 percent of the facility's CO_2 output at a scale sufficient to evaluate the full impacts of carbon capture technology on a generating plant's operations, economics and performance. The HECA project was one of two selected in the first phase of Round 3. DOE entered into a cooperative agreement with HECA on September 30, 2009, and began the NEPA process. HECA continued to seek the regulatory authorizations needed for the project, including certification by the CEC and environmental permits from federal, state and other agencies.

On September 2, 2011, SCS Energy California LLC (SCS Energy) acquired HECA from BP Alternative Energy North America Inc., and Rio Tinto Hydrogen Energy LLC. Because SCS Energy intended to make several modifications to the project—including the addition of fertilizer production capabilities—the NEPA and regulatory processes were suspended until HECA submitted an Amended Application for Certification (AFC) to the CEC on May 2, 2012.

Purpose and Need for DOE Action

The purpose and need for DOE action—providing limited financial assistance to HECA's project—remain the same after the change in HECA's ownership: To advance DOE's CCPI program by funding projects that have the best chance of achieving the program's objective as established by the Congress. The objective of the CCPI program is the commercialization of clean coal technologies that improve efficiency, environmental performance, and cost competitiveness well beyond those of technologies that are currently in commercial service.

Site of the Project Proposed by HECA

The location of the project remains the same with only minor changes in the size of the project site. HECA would construct its electricity and fertilizer production facility on a site currently used for agriculture in Kern County, California. The 1,106 acre site (453 acres of which would be used for the project and 653 acres for a controlled buffer area) is in south-central California near the unincorporated community of Tupman, approximately 7 miles west of the city of Bakersfield. The site's topography is characterized by relatively flat, low-lying terrain that slopes very gently from southeast to northwest. The site and surrounding areas are used for agricultural purposes, including cultivation of cotton, alfalfa, and onions.

HECA modified the project's design to better meet market demands. This new design resulted in changes to the project's plot plan and footprint within the site (including the addition of the fertilizer manufacturing plant and the possible addition of a rail loop), but as mentioned above, the size of the site and buffer areas remain nearly unchanged. Unless otherwise noted below, the design is not appreciably different from that set out in the previous NOI and regulatory filings. The basic components and attributes of the project that remain unchanged include:

- The use of IGCC technology, the basic components of which are feedstock delivery, handling, and storage; gasification unit; sour gas shift, low temperature gas cooling, and mercury removal units; acid gas removal unit; sulfur recovery and tail gas compression; CO_2 compression; and combined cycle power block equipment;
- The project's location;
- Capture of 90 percent of the CO_2 generated by the facility;
- Transportation of the CO_2 to the Elk Hills Oil Field for use in EOR and resulting sequestration;
- Advanced air emissions controls;
- Use of brackish water (supplied by the Buena Vista Water Storage District); and
- Zero liquid discharge.

There are some modifications to the project:

- The project will include an integrated manufacturing plant producing approximately 1 million tons per year of nitrogenous compounds such as urea, urea ammonium nitrate (UAN) and anhydrous ammonia to be used in agricultural, transportation and industrial applications.
- A single Mitsubishi Heavy Industries' (MHI) oxygen-blown dry feed gasifier and an MHI 501 GAC copy; combustion turbine will be used. The original project planned to use three gasifiers from a different manufacturer.
- While most of the captured CO_2 (about 87 percent of the amount captured) would continue to be used for EOR at the nearby Elk Hills Oil Field, about 13 percent of the captured CO_2 would be beneficially used to produce urea. The project would provide approximately 3 million tons per year for EOR, rather than the approximately 2 million tons anticipated under the previous design as a result of the change in the gasifier the project now intends to use. The resulting increase in hydrogen production accounts for the additional 1 million tons of CO_2 per year when the project was originally envisioned.
- The facility would use a blend of 75 percent coal and 25 percent petcoke as fuel throughout the life of the facility (previously, HECA planned to use this fuel blend only during the demonstration phase of operation).
- Natural gas would be used for start-up, shut down and equipment outages only, not for routine operation of the turbine as originally planned. A natural gas interconnection would be made to an existing PG&E pipeline approximately 13 miles north of the site, rather than the eight miles originally estimated.
- Potable water would be delivered to the project site from a new West Kern Water District facility located less than one mile away via a new water pipeline, rather than the 7 miles originally anticipated.
- An approximately 2-mile electrical transmission line, rather than the 8-mile line originally anticipated, would connect with a future PG&E switching station east of the project site.
- HECA is considering two alternatives for coal transportation to the site: Alternative 1 would involve a new approximately 5-mile railroad spur that would connect the site to the existing San Joaquin Railroad Buttonwillow line; alternative 2 would involve the previously proposed truck transport of the coal from an existing transloading facility.

Proposed Generating Plant

The HECA project would demonstrate IGCC and carbon capture technology on a commercial scale in a new power plant consisting of a single gasifier with gas cleanup systems, a gas combustion turbine, a heat recovery steam generator, a steam turbine, and associated facilities.

The plant proposed by HECA would gasify coal and petcoke to produce syngas, which would then be processed and purified to produce a hydrogen-rich fuel. The hydrogen would be used to drive the gas combustion turbine. Hot exhaust gas from the gas combustion turbine would generate steam from water in the heat recovery steam generator to drive the steam turbine; both turbines would generate electricity. At full capacity, the plant is expected to use about 4,580 short tons of coal and about 1,140 short tons of petcoke per day (about 162 million short tons and 400,000 short tons per year, respectively).

Combined, the gas combustion and steam turbines would have the capacity to generate 405 MW gross (approximately 300 MW nominal) of low-carbon electricity, slightly more than the 390 MW gross and 288 MW net originally anticipated. This combined-cycle approach of using gas and steam turbines in tandem increases the amount of electricity that can be generated from the feedstock.

The plant would include a system capable of capturing about 90 percent of the CO_2 generated during steady-state operation. Most of the captured CO_2 would be used for EOR at the Elk Hills Field, located approximately three miles southwest of the project's location. This use of captured CO_2 would result in the sequestration of more than 3 million tons per year. Some of the captured CO_2 would be beneficially used to manufacture urea rather than for EOR.

The proposed plant would minimize sulfur dioxide, nitrogen oxides, mercury, and particulate emissions as compared to conventional coal-fired power plants. The project would incorporate state-of-the-art emissions controls that reflect or exceed Best Available Control Technology to reduce air emissions. The actual removals are expected to be similar to those stated in the original NOI.

Solids generated by the gasifier would be accumulated onsite and made available for appropriate recycling or beneficial use, and if these options are not available, disposed of in accordance with applicable laws. Unlike the gasifiers that HECA originally planned to use, the MHI gasifier does not produce solids with fuel value, and therefore solids would not be returned to the gasification process as HECA had originally planned.

In addition to the gasifier and turbines, the power plant's equipment would include stacks, a mechanical-draft cooling tower, syngas cleanup facilities, and particulate filtration systems. The height of the tallest proposed structure would be approximately 305 feet above ground rather than 260 feet as originally proposed. The plant would also require systems for feedstock handling and storage, as well as on-site roads, administration buildings, water and wastewater treatment systems, and management facilities for handling gasification solids.

Proposed Fertilizer Production Facilities

A portion of the clean hydrogen-rich fuel would be used as a feedstock for the ammonia synthesis unit, which would have a capacity of 2,000 short tons per day. The ammonia is used as an intermediate for the production of urea. The project is designed so that it can sell urea, ammonia, and perhaps other nitrogenous compounds.

The project's urea production unit would use pastillation technology, which converts urea melt into high quality urea pastilles (small solid pellets of urea). The unit would have a capacity of about 1,700 short tons per day. The urea, along with other intermediates produced by the plant, could also be used by the urea ammonia nitrate unit to produce 1,500 short tons per day of UAN.

Proposed Linear Facilities

Linear facilities are the pipelines, electrical lines and rail lines used to transport materials and power to and from the plant. The source of process water for the plant would be brackish groundwater supplied by the Buena Vista Water Storage District; approximately 4,600 gallons per minute (average annual basis) would be required for cooling water makeup, steam cycle makeup, and other processes. The process water pipeline would be approximately 15 miles in length. Potable water for drinking and sanitary use would be supplied by the West Kern Water District. The potable water line would be approximately 1 mile in length. The project would recycle water and would incorporate zero liquid discharge (ZLD) technology for process and other wastewater from plant operations. Therefore, there would be no industrial wastewater discharge. Sanitary wastewater would be disposed of in an onsite leach field (e.g., a septic system) in accordance with applicable law.

HECA would connect to the PG&E Midway Substation via a 230 kV Midway-Wheeler Ridge transmission line and a new PG&E switching station. A 230 kV, single pole, double circuit capacity transmission line would be built to provide transmission service for the plant's electricity output. The line would be approximately 2 miles in length.

An approximately 13-mile natural gas supply pipeline would connect with an existing PG&E pipeline north of the project site, and an approximately 3-mile CO_2 pipeline extending from the site to the Elk Hills Oil Field would be used to transport the CO_2 for use in EOR and resulting geologic sequestration. HECA has proposed two alternatives for coal transportation to the site: alternative 1 would involve an approximately 5-mile new industrial railroad spur that would connect the site to the existing San Joaquin Railroad Buttonwillow line; alternative 2 would involve the previously proposed 27-mile route for truck transport of the coal from an existing transloading facility.

Proposed Use of CO_2 for EOR and Sequestration

The project would result in the sequestration of about three million tons of CO_2 per year, rather than the two million tons originally proposed, during the demonstration phase that would be funded in part by DOE. HECA anticipates this rate of sequestration would continue for the operational life of the power plant. The captured CO_2 would be compressed and transported via pipeline to the Elk Hills Oil Field approximately 3 miles from the power plant. The CO_2 would enhance domestic oil production, contributing to the nation's energy security. An additional small amount of the CO_2 produced by the facility would be used to manufacture urea.

The EOR process involves the injection and reinjection of CO_2 to reduce the viscosity and enhance other properties of trapped oil in order to facilitate its flow through the reservoir, improving extraction. During EOR operations, the pore space left by the extracted oil is occupied by the injected CO_2, sequestering it in the geologic formation. EOR operations would be monitored to ensure the injected CO_2 remains in the formation.

Proposed Project Schedule

The project proposed by HECA includes engineering and design, permitting of the plant and associated facilities, equipment procurement, construction, startup, operations, and demonstration of the IGCC technology and CO_2 sequestration through use in EOR operations. HECA anticipates that it would take about four years to construct, commission, and commence operation of the plant. It plans to start construction by June 2013 and commence commercial operation by September 2017. This schedule is contingent upon HECA receiving the necessary regulatory authorizations (which would be preceded by the hearings and other events mandated by the regulatory agencies' procedures) and upon DOE deciding to provide financial assistance for the construction and demonstration phases of the project (a decision that would occur after completion of the EIS).

Connected and Cumulative Actions

Under the cooperative agreement between DOE and HECA, DOE would share the costs of the gasifier, syngas cleanup systems, combustion turbine, steam generator, steam turbine, fertilizer production facilities, supporting facilities and infrastructure, and a demonstration phase in which the project would use captured CO_2 for EOR.[2] Under this agreement, DOE would not share in the cost of the air separation unit, CO_2 EOR and sequestration facilities, or certain other facilities. Accordingly, the EIS will evaluate the potential impacts of these aspects of HECA's project as connected actions.

DOE will also analyze the cumulative impacts of both the proposed project and any connected actions. The cumulative impacts analysis will include analysis of greenhouse gas emissions and global warming, other air emissions, and other incremental impacts that, when added to past, present, and reasonably foreseeable impacts, may have significant effects on the human environment.

Alternatives

NEPA requires that an EIS evaluate the range of reasonable alternatives to an agency's proposed action. The range of reasonable alternatives encompasses those alternatives that would satisfy the underlying purpose and need for agency action. The purpose and need for DOE action—providing limited financial assistance to the HECA IGCC project—are to advance the CCPI program by selecting projects that have the best chance of achieving the program's objective as established by the Congress: the commercialization of clean coal technologies that advance efficiency, environmental performance, and cost competitiveness well beyond the level of technologies that are currently in service. DOE's purpose and need, as well as the range of reasonable alternatives, will differ from those of the CEC.

DOE's NEPA regulations include a process for identifying and analyzing reasonable alternatives in the context of providing financial assistance through a competitive selection of projects proposed by entities outside the federal government. The range of reasonable alternatives in competitions for grants, loans and other financial support is defined in large part by the range of responsive proposals DOE receives. Unlike projects undertaken by DOE itself, the Department cannot mandate what outside entities propose, where they propose to do it, or how they propose to do it beyond establishing requirements in the funding opportunity announcement that further the program's objectives. DOE's decision is limited to selecting among the

[2] Because of the requirements of California law, DOE expects that the HECA project would continue sequestering CO_2 throughout the operational life of the plant.

applications submitted by project sponsors that meet CCPI's goals.

Recognizing that the range of reasonable alternatives in the context of financial assistance and contracting is in large part determined by the number and nature of the proposals submitted, section 216 of DOE's NEPA regulations requires the Department to prepare an ''environmental critique'' that assesses the environmental impacts and issues relating to each of the proposals that the DOE selecting official considers for an award. *See* 10 CFR 1021.216. This official considers these impacts and issues, along with other aspects of the proposals (such as technical merit and financial ability) and the program's objectives, in making awards. DOE prepared a critique of the proposals that were deemed suitable for selection in this round of awards for the CCPI program.

Once DOE selects a project for an award, the range of reasonable alternatives becomes the project as proposed by the applicant, any alternatives still under consideration by the applicant or that are reasonable within the confines of the project as proposed (e.g., the particular location of the generating plant on the 1,106-acre site or the rights-of-way (ROWs) for linear facilities), and a no action alternative. Regarding the no action alternative, DOE assumes for purposes of the EIS that, if it were to decide to withhold financial assistance from the project, the project would not proceed. DOE currently plans to analyze the project as proposed by HECA (with and without any mitigating conditions that DOE or the CEC may identify as reasonable and appropriate); alternatives to HECA's proposal that it is still considering (e.g., the ROWs for linear facilities); and the no action alternative.

As noted above, DOE will analyze any ''project-specific'' alternatives that HECA is still considering such as the coal delivery alternatives, and other reasonable alternatives that may be suggested during the scoping period. HECA is no longer considering other project-specific alternatives identified in the original NOI (i.e., the location of the facility within the site boundaries, alternative routes for the process water supply pipeline, CO_2 pipeline and transmission line).

Under the no action alternative, DOE would not provide funding to HECA. In the absence of financial assistance from DOE, HECA could reasonably pursue two options. It could build the project without DOE funding; the impacts of this option would be essentially the same as those of DOE's proposed action. Or, HECA could choose not to pursue its project, and there would be no impacts from the project. This option would not contribute to the goal of the CCPI program, which is to accelerate commercial deployment of advanced coal technologies that provide the United States with clean, reliable, and affordable energy. However, as required by NEPA, DOE analyzes this option as the no action alternative in order to have a meaningful comparison between the impacts of DOE providing financial assistance and withholding that assistance.

Alternatives considered by HECA in developing its proposed project will be discussed in the EIS. Differences between DOE's range of reasonable alternatives and those considered by the CEC will also be delineated. HECA analyzed several alternative sites and determined that the only reasonable site alternative was its proposed site based on, among other things, the presence or absence of sensitive resources; the availability of land; and the site's proximity to the brackish groundwater supply, to electric transmission and natural gas facilities, and to a CO_2 storage reservoir.[3] The EIS will describe HECA's site selection process. However, DOE does not plan to analyze in detail the alternatives sites considered by HECA because HECA is no longer considering these sites, they were not part of HECA's proposal, and therefore they are no longer reasonable alternatives.

Floodplains and Wetlands

The footprint of the proposed IGCC and manufacturing facility and carbon capture facility would not affect any wetlands or floodplains. Wetland and floodplain impacts, if any, from the construction of pipelines would be avoided by the use of horizontal directional drilling. In the event that the EIS identifies that wetlands or floodplains on the surface would be affected by the project (including its linear facilities) or connected actions, DOE will prepare a floodplain and wetland assessment in accordance with its regulations at 10 CFR Part 1022 and include the assessment in the EIS.

Preliminary Identification of Environmental Issues

The original NOI contained a preliminary list and description of potential environmental issues (75 FR 17397–401); the list of issues would remain the same for the project as modified after SCS Energy's acquisition of HECA. The list includes those impacts and resource areas typically addressed in an EIS for a project of this type: Atmospheric resources; water resources; infrastructure and land use; solid waste; visual resources; floodplains and wetlands; ecological resources; safety and health; construction-related impacts; community impacts; cultural and archaeological resources; threatened and endangered species;[4] and cumulative effects. Currently, no threatened or endangered species have been identified at the proposed plant site; three listed plant species and nine listed wildlife species (rather than the eight as stated in the original NOI) have the potential to occur in the ROWs of the linear facilities.

Additions to or deletions from the list may occur as a result of this scoping process. The level of analysis of issues in the EIS will be in accordance with their level of importance. The most detailed analyses are likely to focus on potential impacts to air, water, and ecological resources.

Issued in Pittsburgh, PA, this 12th day of June 2012.

Anthony V. Cugini,

Director, National Energy Technology Laboratory.

[FR Doc. 2012–14867 Filed 6–18–12; 8:45 am]

BILLING CODE 6450–01–P

[3] HECA initially selected another site; it subsequently decided to move the project when it discovered the existence of sensitive biological resources at the initial site.

[4] No threatened or endangered species have been identified at the proposed plant site; three listed plant species and nine listed wildlife species (rather than the eight as stated in the original NOI) have the potential to occur in the ROWs of the linear facilities.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14421–000]

Freedom Falls, LLC; Notice of Application Tendered for Filing With the Commission and Soliciting Additional Study Requests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Exemption from Licensing.

b. *Project No.:* 14421–000.

c. *Date filed:* June 1, 2012.

d. *Applicant:* Freedom Falls, LLC.

e. *Name of Project:* Freedom Falls Hydroelectric Project.

f. *Location:* On Sandy Stream, in the Town of Freedom, Waldo County,

Maine. The project would not occupy lands of the United States.

g. *Filed Pursuant to:* Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2705, 2708.

h. *Applicant Contact:* Anthony P. Grassi, Freedom Falls LLC, 363 Belfast Road, Camden, ME 04843, (207) 236–4663.

i. *FERC Contact:* Samantha Davidson, (202) 502–6839 or *samantha.davidson@ferc.gov.*

j. *Cooperating agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See,* 94 FERC ¶ 61,076 (2001).

k. Pursuant to section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. Deadline for filing additional study requests and requests for cooperating agency status: July 31, 2012.

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.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. 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 seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

m. The application is not ready for environmental analysis at this time.

n. *The proposed Freedom Falls Hydroelectric Project would consist of:* (1) An existing 90-foot-long, 12-foot-high concrete-capped stone masonry dam with a 25-foot-long, 10-foot-high spillway with two vertical lift sluice gates and a crest elevation of 452.5 feet mean sea level (msl); (2) an existing 1.6-acre impoundment with a normal maximum water surface elevation of 453.0 feet msl; (3) a new intake structure equipped with an 8-foot-high, 5-foot-wide trashrack that would be modified to have 1-inch clear bar spacing, and a 3-foot-high, 4.75-foot-wide slide gate; (4) a new downstream American eel passage facility and working platform; (5) a new 60-foot-long, 30-inch-diameter steel penstock leading to; (6) an existing 20-foot-wide, by 30-foot-long generating room containing a new 38.3 kilowatt turbine-generator unit; (7) a new 20-foot-long, 5-foot-wide tailrace; (8) a new 30-foot-long, 110-volt transmission line; and (9) appurtenant facilities. The proposed project is estimated to generate an average of 66,000 kilowatt-hours annually.

o. 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.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

p. With this notice, we are initiating consultation with the Maine Historic Preservation Commission, as required by 106, National Historic Preservation Act, and the regulations of the Advisory Council on Historic Preservation, 36, CFR, at 800.4.

q. Procedural schedule: The application will be processed according to the following preliminary Hydro Licensing Schedule. Revisions to the schedule will be made as appropriate (e.g., if scoping is waived, the schedule would be shortened).

Issue Deficiency Letter	August 2012.
Issue Notice of Acceptance	October 2012.
Issue Scoping Document ..	November 2012.
Issue Notice of ready for environmental analysis.	January 2013.
Issue Notice of the availability of the EA.	May 2013.

Dated: June 13, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–14877 Filed 6–18–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–351–000]

Cheniere Creole Trail Pipeline Company, L.P.; Notice of Intent To Prepare an Environmental Assessment for the Proposed Creole Trail Expansion Project and Request for Comments on Environmental Issues

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Creole Trail Expansion Project involving construction and operation of facilities by Cheniere Creole Trail Pipeline Company, L.P. (Cheniere) in Beauregard and Cameron Parishes, Louisiana. The Commission will use this EA in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the project. Your input will help the Commission staff determine what issues they need to evaluate in the EA. Please note that the scoping period will close on July 13, 2012.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives should notify their constituents of this proposed project and encourage them to comment on their areas of concern.

Summary of the Proposed Project

Cheniere proposes to construct and operate a new compressor station and associated facilities in Beauregard Parish, Louisiana, and miscellaneous facilities at the existing Sabine Pass Liquefied Natural Gas (LNG) Terminal in Cameron Parish, Louisiana. According to Cheniere, its project would enable bi-directional gas flow on the Creole Trail Pipeline system and allow for the delivery of feed gas to the Sabine Pass Liquefaction Project. The Creole Trail Expansion Project would create 1,530,000 dekatherms per day of new firm reverse flow capacity.

The Creole Trail Expansion Project would consist of the following facilities:

- A new 53,125-horsepower compressor station (Gillis Compressor Station);
- Reconfiguration of three existing meter and regulation (M&R) stations to allow bi-directional flow and increased capacity;
- Approximately 200 feet of 42-inch-diameter pipeline from the existing mainline pipeline into the existing Sabine Pass LNG Terminal; and
- A pig [1] trap and associated valves at the Sabine Pass LNG Terminal.

The general location of the project facilities is shown in appendix 1.[2]

Land Requirements for Construction

Construction of the proposed facilities would disturb about 31.5 acres of land for the aboveground facilities and the pipeline. Following construction, Cheniere would maintain about 15.7 acres for permanent operation of the project's facilities; the remaining acreage would be restored and revert to former uses. Two of the M&R stations are co-located with the proposed Gillis Compressor Station and the other is located approximately 1.0 mile north of the proposed compressor station. The pipeline, pig trap, and associated valves would be located at the Sabine Pass LNG Terminal.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us [3] to discover and address concerns the public may have about proposals. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. We will consider all filed comments during the preparation of the EA.

In the EA we will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- Geology and soils;
- Land use;
- Water resources, fisheries, and wetlands;
- Cultural resources;
- Socioeconomics;
- Vegetation and wildlife;
- Air quality and noise;
- Endangered and threatened species; and
- Public safety.

We will also evaluate reasonable alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

The EA will present our independent analysis of the issues. The EA will be available in the public record through eLibrary. Depending on the comments received during the scoping process, we may also publish and distribute the EA to the public for an allotted comment period. We will consider all comments on the EA before making our recommendations to the Commission. To ensure we have the opportunity to consider and address your comments, please carefully follow the instructions in the Public Participation section beginning on page 4.

With this notice, we are asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues of this project to formally cooperate with us in the preparation of the EA [4]. Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

Consultations Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, we are using this notice to initiate consultation with the Louisiana State Historic Preservation Office (SHPO), and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.[5] We will define the project-specific Area of Potential Effects (APE) in consultation with the SHPO as the project develops. On natural gas facility projects, the APE at a minimum encompasses all areas subject to ground disturbance (examples include construction right-of-way, contractor/pipe storage yards, compressor stations, and access roads). Our EA for this project will document our findings on the impacts on historic properties and summarize the status of consultations under section 106.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send your comments so that the Commission receives them in Washington, DC on or before July 13, 2012.

For your convenience, there are three methods which you can use to submit your comments to the Commission. In all instances please reference the project docket number (CP12–351–000) with your submission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov*.

(1) You can file your comments electronically using the eComment feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. This is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You can file your comments electronically using the eFiling feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

[1] A ''pig'' is a tool that is inserted into and moves through the pipeline, and is used for cleaning the pipeline, internal inspections, or other purposes.

[2] The appendices referenced in this notice will not appear in the **Federal Register**. Copies of appendices were sent to all those receiving this notice in the mail and are available at *www.ferc.gov* using the link called ''eLibrary'' or from the Commission's Public Reference Room, 888 First Street NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

[3] ''We,'' ''us,'' and ''our'' refer to the environmental staff of the Commission's Office of Energy Projects.

[4] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, Part 1501.6.

[5] The Advisory Council on Historic Preservation's regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project.

If we publish and distribute the EA, copies will be sent to the environmental mailing list for public review and comment. If you would like to remove your name from the mailing list, please return the attached Information Request (appendix 2).

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an ''intervenor'' which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are in the User's Guide under the ''e-filing'' link on the Commission's Web site.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site at *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., CP12–351). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/esubscribenow.htm.*

Finally, public meetings or site visits will be posted on the Commission's calendar located at *www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Dated: June 13, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–14879 Filed 6–18–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR12–28–000]

Enstor Grama Ridge Storage and Transportation, L.L.C.; Notice of Filing

Take notice that on June 11, 2012, Enstor Grama Ridge Storage and Transportation, L.L.C. filed to revise its Statement of Operating Conditions to correct, update, and or remove certain provisions and other housekeeping changes as more fully described in the filing.

Any person desiring to participate in this rate 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 Applicant. 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 Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on Monday, June 25, 2012.

Dated: June 13, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–14878 Filed 6–18–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR12–29–000]

Enstor Katy Storage and Transportation, L.P.; Notice of Filing

Take notice that on June 12, 2012, Enstor Katy Storage and Transportation, L.P. filed to revise its Statement of Operating Conditions to correct, update, and or remove certain provisions and other housekeeping changes as more fully described in the filing.

Any person desiring to participate in this rate 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 Applicant. 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 Applicant.

The Commission encourages electronic submission of protests and

interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on Monday, June 25, 2012.

Dated: June 13, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–14873 Filed 6–18–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–1998–000]

South Jersey Energy ISO2, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of South Jersey Energy ISO2, 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 July 5, 2012.

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 email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: June 13, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–14874 Filed 6–18–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–1997–000]

South Jersey Energy ISO1, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of South Jersey Energy ISO1, 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 July 5, 2012.

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 email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: June 13, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–14884 Filed 6–18–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–1995–000]

K Road Modesto Solar LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of K Road Modesto Solar 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 July 5, 2012.

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 email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: June 13, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–14883 Filed 6–18–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–1925–000]

Patton Wind Farm, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Patton Wind Farm, 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 July 5, 2012.

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 email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: June 13, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–14882 Filed 6–18–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–4657–001]

Apple Group LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Apple Group 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 July 5, 2012.

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 email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*. or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: June 13, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–14881 Filed 6–18–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Sunshine Act Meeting

The following notice of meeting is published pursuant to section 3(a) of the government in the Sunshine Act (Pub. L. 94–409), 5 U.S.C. 552b:

AGENCY HOLDING MEETING: Federal Energy Regulatory Commission.

DATE AND TIME: June 21, 2012, 10:00 a.m.

PLACE: Room 2C, 888 First Street NE., Washington, DC 20426.

STATUS: OPEN.

MATTERS TO BE CONSIDERED: Agenda.

* NOTE—Items listed on the agenda may be deleted without further notice.

CONTACT PERSON FOR MORE INFORMATION: Kimberly D. Bose, Secretary, Telephone (202) 502–8400.

For a recorded message listing items struck from or added to the meeting, call (202) 502–8627.

This is a list of matters to be considered by the Commission. It does not include a listing of all documents relevant to the items on the agenda. All public documents, however, may be viewed on line at the Commission's Web site at *http://www.ferc.gov* using the eLibrary link, or may be examined in the Commission's Public Reference Room.

982ND—MEETING

REGULAR MEETING

June 21, 2012, 10:00 a.m.

Item No.	Docket No.	Company
	Administrative	
A–1	AD02–1–000	Agency Business Matters.
A–2	AD02–7–000	Customer Matters, Reliability, Security and Market Operations.
A–3	IN12–16–000	Unidentified Entity.
	Electric	
E–1	RM12–3–000	Revisions to Electric Quarterly Report Filing Process.
E–2	RM11–24–000, AD10–13–000	Third-Party Provision of Ancillary Services; Accounting and Financial Reporting for New Electric Storage Technologies.
E–3	RM10–11–000	Integration of Variable Energy Resources.
E–4	RM12–6–000, RM12–7–000	Revisions to Electric Reliability Organization Definition of Bulk Electric System and Rules of Procedure.
E–5	ER06–456–021, ER06–954–017, ER6–1271–016, ER07–424–012, EL07–57–007.	PJM Interconnection, L.L.C.
E–6	ER06–456–022, ER06–456–023, ER06–954–018, ER06–954–019, ER06–1271–017, ER06–1271–018, ER07–424–013, ER07–424–014, EL07–57–008, EL07–57–009, ER07–1186–002, ER07–1186–003, ER08–229–002, ER08–229–003, ER08–1065–002, ER08–1065–003, ER09–497–003, ER09–497–004, ER10–268–002, ER10–268–003.	PJM Interconnection, L.L.C.
	ER06–880–017, ER06–880–018	PJM Transmission Owners.
E–7	OMITTED.	
E–8	NP10–18–002	North American Electric Reliability Corporation.
E–9	EL12–21–001	*Powerex Corp.* v. *United States Department of Energy, Western Area Power Administration—Sierra Nevada Region.*
E–10	EL11–42–000	Astoria Generating Company L.P.; NRG Power Marketing LLC; Arthur Kill Power, LLC; Astoria Gas Turbine Power LLC; Dunkirk Power LLC; Huntley Power LLC, Oswego Harbor Power LLC and TC Ravenswood, LLC v. New York Independent System Operator, Inc.
E–11	OMITTE.	
E–12	OMITTED.	
E–13	ER12–1600–000	Southwest Power Pool, Inc.
E–14	EL09–61–001	Louisiana Public Service Commission v. Entergy Corporation, Entergy Services, Inc, Entergy Louisiana, L.L.C., Entergy Arkansas, Inc., Entergy Mississippi, Inc., Entergy New Orleans, Inc., Entergy Gulf States Louisiana, LLC and Entergy Texas, Inc.
E–15	OMITTED.	
E–16	OMITTED.	
E–17	OMITTED.	
E–18	EL12–39–000	*Seminole Electric Cooperative, Inc. and Florida Municipal Power Agency* v. *Florida Power Corporation.*
E–19	OMITTED.	

Item No.	Docket No.	Company
E–20	RM10–5–001	Interpretation of Protection System Reliability Standard.
E–21	OMITTED.	
E–22	OMITTED.	
E–23	OMITTED	
E–24	OMITTED.	
E–25	OMITTED.	
E–26	OMITTED.	
E–27	EL10–72–001	Puget Sound Energy, Inc.
Gas		
G–1	RP12–465–000	Equitrans, L.P.
G–2	OR12–11–000	Shell Pipeline Company LP.
G–3	RP12–245–000	TransColorado Gas Transmission Company LLC.
Hydro		
H–1	OMITTED.	
H–2	P–14208–001	Percheron Power, LLC.
H–3	P–2188–201	PPL Montana, LLC.
Certificates		
C–1	CP12–33–000	Caledonia Energy Partners, L.L.C.
C–2	CP12–4–000	Southern Natural Gas Company, L.L.C.
	CP12–9–000	High Point Gas Transmission, LLC.
C–3	CP11–543–000	ANR Pipeline Company.
	CP11–544–000	TC Offshore LLC.
C–4	CP12–5–000	Trunkline Gas Company, LLC.
		Sea Robin Pipeline Company, LLC.
C–5	CP11–13–000	Columbia Gulf Transmission Company.
	CP11–103–000	Texas Eastern Transmission, LP.
C–6	CP12–51–000	Bluewater Gas Storage, LLC.
C–7	CP11–50–000, CP11–50–001	PetroLogistics Natural Gas Storage, LLC.

A free Web cast of this event is available through *www.ferc.gov*. Anyone with Internet access who desires to view this event can do so by navigating to *www.ferc.gov's* Calendar of Events and locating this event in the Calendar. The event will contain a link to its Web cast. The Capitol Connection provides technical support for the free Web casts. It also offers access to this event via television in the DC area and via phone bridge for a fee. If you have any questions, visit *www.CapitolConnection.org* or contact Danelle Springer or David Reininger at 703–993–3100.

Immediately following the conclusion of the Commission Meeting, a press briefing will be held in the Commission Meeting Room. Members of the public may view this briefing in the designated overflow room. This statement is intended to notify the public that the press briefings that follow Commission meetings may now be viewed remotely at Commission headquarters, but will not be telecast through the Capitol Connection service.

Dated: June 14, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–15040 Filed 6–15–12; 4:15 pm]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13315–001]

Yegua Mesa Hydro, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On May 2, 2012, Yegua Mesa Hydro, LLC, filed an application for a successive preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to continue studying the feasibility of the Yegua Mesa Pumped Storage Hydroelectric Project (Yegua Mesa Project or project) to be located near the city of Las Vegas, in San Miguel County, New Mexico. The proposed project would affect lands administered by the Bureau of Land Management. 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 be closed loop and would not be built on an existing body of water. The proposed project would consist of: (1) An upper earthen dam with a height of 94 feet and a length of 11,088 feet; (2) an upper reservoir with a surface area of 380 acres, a capacity of 9,868 acre-feet, and a maximum pool elevation of 6,800 feet mean sea level (msl); (3) a lower earthen dam with a height of 99 feet and a length of 5,597 feet; (4) a lower reservoir with a surface area of 380 acres, a capacity of 9,365 acre-feet, and a maximum pool elevation of 5,380 feet msl; (5) a 27-foot-diameter, 9,690-foot-long steel penstock; (6) a powerhouse containing 4 pump/turbine units with a total installed capacity of 1,100 megawatts; (7) a 14-mile-long, 500-kilovolt transmission line; and (8) appurtenant facilities. The proposed project would have an annual production of 3,993 gigawatthours that would be sold to a local utility.

Applicant Contact: Mr. Brent L. Smith, COO, Symbiotics LLC, 811 SW Naito Parkway Ste. 120, Portland, Oregon 97204; phone: (503) 235–3424.

FERC Contact: Carolyn Templeton; *carolyn.templeton@ferc.gov;* phone: (202) 502–8785.

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. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. 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/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven 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–13315) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: June 13, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–14876 Filed 6–18–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–470–000]

Columbia Gas Transmission, LLC; Notice of Request Under Blanket Authorization

Take notice that on June 1, 2012, Columbia Gas Transmission, LLC (Columbia), 5151 San Felipe, Suite 2500, Houston, Texas 77056, pursuant to its blanket certificate issued in Docket No. CP83–76–000, filed an application in accordance to sections 157.205 and 157.216(b) of the Commission's Regulations under the Natural Gas Act (NGA) as amended, (1) to relocate a consumer tap and (2) to abandon in place Well No. 2519 and approximately 0.12 miles of Line 29079 and related appurtenances located in Marshall County, West Virginia, all as more fully set forth in the application, which is on file with the Commission.

Any questions concerning this application may be directed to Fredric J. George, Senior Counsel Columbia Gas Transmission, LLC, P.O. Box 1273, Charleston, West Virginia 25325–1273, phone (304) 357–2359, or fax (304) 357–3206 or email at *fgeorge@nisource.com.*

This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov,* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, please contact FERC Online Support at FERC *OnlineSupport@ferc.gov* or call toll-free at (866) 206–3676, or, for TTY, contact (202) 502–8659. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages intervenors to file electronically.

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the NGA.

Dated: June 13, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–14880 Filed 6–18–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Commission Staff Attendance

The Federal Energy Regulatory Commission hereby gives notice that members of the Commission's staff may attend the following meetings related to the transmission planning activities of the New York Independent System Operator, Inc. (NYISO):

Joint Inter-Regional Planning Task Force/Electric System Planning Working Group

June 18, 2012, 10:00 a.m.–12:00 p.m., Local Time (teleconference only)
June 26, 2012, 10:00 a.m.–4:00 p.m., Local Time
July 10, 2012, 10:00 a.m.–4:00 p.m., Local Time
July 24, 2012, 10:00 a.m.–4:00 p.m., Local Time
August 6, 2012, 10:00 a.m.–4:00 p.m., Local Time
August 28, 2012, 10:00 a.m.–4:00 p.m., Local Time
September 24, 2012, 10:00 a.m.–4:00 p.m., Local Time

The above-referenced meetings will be held at: NYISO's offices, Rensselaer, NY.

The above-referenced meetings are open to stakeholders.

Further information may be found at *www.nyiso.com.*

The discussions at the meetings described above may address matters at issue in the following proceeding:

Docket No. ER08–1281, *New York Independent System Operator, Inc.*

For more information, contact James Eason, Office of Energy Market Regulation, Federal Energy Regulatory Commission at (202) 502–8622 or *James.Eason@ferc.gov.*

Dated: June 13, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–14875 Filed 6–18–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD12–17–000; RM12–10–000; ER12–502–001; ER12–502–002; ER12–1177–001; ER12–1855–000]

Review of Small Generator Interconnection Agreements and Procedures; Solar Energy Industries Association; California Independent System Operator Corporation; PJM Interconnection, LLC; California Independent System Operator Corporation; Notice of Technical Conference

Take notice that Federal Energy Regulatory Commission (Commission) staff will convene a technical

conference in the above-referenced proceedings on Tuesday, July 17, 2012, from 9:30 a.m. to 4:00 p.m. (EDT) in the Commission Meeting Room at the offices of the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Members of the Commission may attend the conference, which will also be open for the public to attend. Advance registration is not required, but is encouraged. We will provide nametags for those who register on or before July 10, 2012. Participants may register at the following Web page: *https://www.ferc.gov/whats-new/registration/small-generator-7-17-12-form.asp.*

The purpose of this conference is to discuss issues related to a petition for rulemaking recently submitted by the Solar Energy Industries Association (Docket No. RM12–10–000).

This conference is not intended to address the substance of any particular case pending before the Commission. However, discussions at the conference may address matters at issue in the following Commission proceedings that are either pending or within their rehearing period: California Independent System Operator Corporation, Docket No. ER12–502–001 and Docket No. ER12–502–002; PJM Interconnection, LLC, Docket No. ER12–1177–001; California Independent System Operator Corporation, Docket No. ER12–1855–000.

Those interested in speaking at the conference should notify the Commission by close of business June 22, 2012, by completing an online form identifying the topic(s) that they wish to address: *https://www.ferc.gov/whats-new/registration/small-generator-7-17-12-speaker-form.asp.* Due to time constraints, we may not be able to accommodate all those interested in speaking. The Commission will issue a subsequent notice that will provide the detailed agenda for the conference, including panel speakers, and a comment date for filing post-conference comments.

The conference will be transcribed and available by webcast. Transcripts will be available immediately for a fee from Ace Reporting Company (202–347–3700 or 1–800–336–6646). A free webcast of the technical conference in this proceeding is also available. Anyone with Internet access interested in viewing this conference can do so by navigating to the FERC Calendar of Events at *www.ferc.gov* and locating this event in the Calendar. The event will contain a link to its webcast. The Capitol Connection provides technical support for the webcasts and offers the option of listening to the conferences via phone-bridge for a fee. If you have any questions, visit *www.CapitolConnection.org* or call (703) 993–3100.

FERC conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an email to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or 202–208–8659 (TTY), or send a fax to 202–208–2106 with the required accommodations.

For information related to the agenda, please contact Leslie Kerr at *leslie.kerr@ferc.gov* or (202) 502–8540. For information related to logistics, please contact Sarah McKinley at *sarah.mckinley@ferc.gov* or (202) 502–8368.

Dated: June 13, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–14885 Filed 6–18–12; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9688–7]

Notice of Availability of the Benchmark Dose Technical Guidance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Availability.

SUMMARY: The U.S. Environmental Protection Agency is announcing the availability of *Benchmark Dose Technical Guidance* (BMD). This document was developed as part of an agency-wide guidance development program by a technical panel of the EPA's Risk Assessment Forum. Drafts were peer reviewed internally by EPA scientists and externally by experts from academia, industry, and other federal and state government agencies. When appropriate, the EPA intends to use the guidance prospectively in conducting risk assessments.

ADDRESSES: The BMD document is available electronically through the EPA's Web site at *http://www.epa.gov/raf/publications/benchmarkdose.htm.*

FOR FURTHER INFORMATION CONTACT: Dr. Michael W. Broder, Risk Assessment Forum, Office of the Science Advisor (8105R), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; on telephone number (202) 564–3393; facsimile number (202) 564–2070; or email *broder.michael@epa.gov.*

SUPPLEMENTARY INFORMATION: In support of its mission to protect human health and the environment, the EPA routinely conducts risk assessments on chemical agents that may be toxic to humans. A key component of the risk assessment process involves evaluating the dose-response relationship between exposure to the agent and the observed effect. The dose-response assessment is a two-step process: (1) Defining a point of departure (POD); and (2) extrapolating from the POD for relevance to environmental exposures. Traditionally, the no observed adverse effect level (NOAEL) or lowest observed adverse effect level (LOAEL) methods were used for establishing the POD for noncancer endpoints. The BMD method gained favor within the risk assessment community over time because it incorporates and conveys more information than the NOAEL/LOAEL methods. The EPA conducted workshops and symposia about the application of BMD methodology and the development of relevant guidance.

The BMD document focuses on the use of the BMD methodology for human health risk assessments. The document discusses computation of BMD values and their confidence limits, data requirements, dose-response assessment, and reporting recommendations that are specific to BMD values. Although the EPA has generated its own BMD software (*http://www.epa.gov/ncea/BMDS/index.html*), this document supports the use of other relevant, well-documented software packages.

Dated: June 6, 2012.

Glenn Paulson,

Science Advisor.

[FR Doc. 2012–14897 Filed 6–18–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–R01–OW–2012–0201, FRL–9688–9]

Massachusetts Marine Sanitation Device Standard—Notice of Determination

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Determination.

SUMMARY: The Regional Administrator of the Environmental Protection Agency—New England Region, has determined that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the waters of Dighton, Berkley, Freetown, Somerset, Swansea, and Fall River collectively termed Mount Hope Bay.

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

FOR FURTHER INFORMATION CONTACT: Ann Rodney, U.S. Environmental Protection Agency—New England Region, Office of Ecosystem Protection, Oceans and Coastal Protection Unit, Five Post Office Square, Suite 100, OEP06–1, Boston, MA 02109–3912. Telephone: (617) 918–1538. Fax number: (617) 918–0538. Email address: *rodney.ann@epa.gov.*

SUPPLEMENTARY INFORMATION: On April 19, 2012, EPA published a notice that the Commonwealth of Massachusetts had petitioned the Regional Administrator, Environmental Protection Agency, to determine that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the waters of Mount Hope Bay. Twelve comments were received on this petition, all commentors endorsed the designation.

The petition was filed pursuant to Section 312(f)(3) of Public Law 92–500, as amended by Public Laws 95–217 and 100–4, for the purpose of declaring these waters a No Discharge Area (NDA).

Section 312(f)(3) states: After the effective date of the initial standards and regulations promulgated under this section, if any State determines that the protection and enhancement of the quality of some or all of the waters within such State require greater environmental protection, such State may completely prohibit the discharge from all vessels of any sewage, whether treated or not, into such waters, except that no such prohibition shall apply until the Administrator determines that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for such water to which such prohibition would apply.

This Notice of Determination is for the waters of Mount Hope Bay. The NDA boundaries are as follows:

Waterbody/General area	Latitude	Longitude
The northern edge of the NDA boundary on the Taunton River is the Center Street/Elm Street bridge at	41°50′5.90″ N	71°6′29.34″ W
The northern edge of the NDA boundary on the Lees River is the Route 6 bridge at	41°44′24.87″ N	71°11′12.72″ W
The northern edge of the NDA boundary on the Cole River is the Route 6 Bridge at	41°44′47.03″ N	71°12′7.81″ W
The southwestern edge of the NDA boundary is the Rhode Island/Massachusetts border at Swansea at	41°42′43.94″ N	71°13′34.27″ W
The southeastern edge of the NDA boundary is the Rhode Island/Massachusetts border at Fall River at	41°40′30.28″ N	71°11′43.86″ W

The Mount Hope Bay NDA will encompass the tidal waters of Dighton, Berkley, Freetown, Somerset, Swansea, and Fall River to the mean high tide line.

The information submitted to EPA by the Commonwealth of Massachusetts certifies that there are three pumpout facilities within the proposed area available to the boating public. The location, contact information, hours of operation, and water depth are provided at the end of this notice.

Based on the examination of the petition and its supporting documentation, and information from site visits conducted by EPA New England staff, EPA has determined that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the area covered under this determination.

This determination is made pursuant to Section 312 (f)(3) of Public Law 92–500, as amended by Public Laws 95–217 and 100–4.

PUMPOUT FACILITIES WITHIN PROPOSED NO DISCHARGE AREA

Name	Town	Contact information	Hours of operation	Depth (Ft)
Fall River Harbormaster Boat	Fall River	774–644–3609, VHF 16	On Call	N/A
Somerset Harbormaster Boat	Somerset	774–319–3126, VHF 9, 16	8:30 A.M.–8:30 P.M.	N/A
Somerset Land-based Pumpout Station at Town Boat Ramp.	Somerset	N/A Self Serve	8 A.M.–5 P.M. Weekdays; 8 A.M.–6 P.M. Weekends.	3.5

Dated: June 7, 2012.

H. Curtis Spalding,

Regional Administrator, New England Region.

[FR Doc. 2012–14919 Filed 6–18–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9689–3; Docket ID No. EPA–HQ–ORD–2011–0050]

Third External Review Draft Integrated Science Assessment for Ozone and Related Photochemical Oxidants

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public comment period.

SUMMARY: EPA is announcing the availability of the third external review draft of a document titled, ''*Third External Review Draft Integrated Science Assessment for Ozone and Related Photochemical Oxidants*'' (EPA/600/R–10/076C). The document was prepared by the National Center for Environmental Assessment (NCEA) within EPA's Office of Research and Development as part of the review of the National Ambient Air Quality Standards (NAAQS) for ozone.

EPA is releasing this draft document to seek review by the Clean Air Scientific Advisory Committee (CASAC) and the public (meeting date and location to be specified in a separate **Federal Register** notice). The draft document does not represent and should not be construed to represent

any final EPA policy, viewpoint, or determination. EPA will consider any public comments submitted in response to this notice when revising the document.

DATES: The public comment period begins, June 19, 2012, and ends August 20, 2012. Comments must be received on or before August 20, 2012.

ADDRESSES: The ''*Third External Review Draft Integrated Science Assessment for Ozone and Related Photochemical Oxidants*'' will be available primarily via the Internet on the National Center for Environmental Assessment's home page under the Recent Additions and Publications menus at *http://www.epa.gov/ncea*. A limited number of CD–ROM or paper copies will be available. Contact Ms. Marieka Boyd by phone (919–541–0031), fax (919–541–5078), or email (*boyd.marieka@epa.gov*) to request either of these, and please provide your name, your mailing address, and the document title, ''*Third External Review Draft Integrated Science Assessment for Ozone and Related Photochemical Oxidants*'' (EPA/600/R–10/076C) to facilitate processing of your request.

FOR FURTHER INFORMATION CONTACT: For technical information, contact Dr. James Brown, NCEA; telephone: 919–541–0765; facsimile: 919–541–1818; or email: *Brown.James@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Information About the Document

Section 108 (a) of the Clean Air Act directs the Administrator to identify certain pollutants which, among other things, ''cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare'' and to issue air quality criteria for them. These air quality criteria are to ''accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of [a] pollutant in the ambient air. * * *'' Under section 109 of the Act, EPA is then to establish NAAQS for each pollutant for which EPA has issued criteria. Section 109 (d) of the Act subsequently requires periodic review and, if appropriate, revision of existing air quality criteria to reflect advances in scientific knowledge on the effects of the pollutant on public health or welfare. EPA is also to periodically review and, if appropriate, revise the NAAQS, based on the revised air quality criteria.

Ozone (O_3) is one of six principal (or ''criteria'') pollutants for which EPA has established NAAQS. Periodically, EPA reviews the scientific basis for these standards by preparing an Integrated Science Assessment (ISA) (formerly called an Air Quality Criteria Document). The ISA, in conjunction with additional technical and policy assessments, provide the scientific basis for EPA decisions on the adequacy of the current NAAQS and the appropriateness of possible alternative standards. The CASAC, an independent science advisory committee whose existence and whose review and advisory functions are mandated by Section 109(d)(2) of the Clean Air Act, is charged (among other things) with independent scientific review of EPA's air quality criteria.

On September 29, 2008 (73 FR 56581), EPA formally initiated its current review of the air quality criteria for ozone, requesting the submission of recent scientific information on specified topics. A draft of EPA's ''Integrated Review Plan for the Ozone National Ambient Air Quality Standards Review'' (EPA/452/P–09/001) was made available in September 2009 for public comment and was discussed by the CASAC via a publicly accessible teleconference consultation on November 13, 2009 (74 FR 54562). In August 2010, EPA held a workshop to discuss, with invited scientific experts, initial draft materials prepared in the development of the ISA (75 FR 42085). The first external review draft ISA for Ozone and Related Photochemical Oxidants was released on March 4, 2011 (*http://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=217463*). The CASAC panel met at a public meeting on May 19, 2011, to review the draft ISA (76 FR 23809). Subsequently, on August 10, 2011, the CASAC panel provided a consensus letter for their review to the Administrator of the EPA (*http://yosemite.epa.gov/sab/sabproduct.nsf/4620a620d0120f93852572410080d786/45A59F1BC8912FEE852578E80066021C/$File/EPA-CASAC-11-009-unsigned.pdf*). The second external review draft ISA for Ozone and Related Photochemical Oxidants was released on September 30, 2011 (*http://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=226363*). The CASAC panel met at a public meeting on January 9, 2012, to review the draft ISA (76 FR 76725). Subsequently, on March 13, 2012, the CASAC panel provided a consensus letter for their review to the Administrator of the EPA (*http://yosemite.epa.gov/sab/sabproduct.nsf/4620a620d0120f93852572410080d786/1336B2B88034AEB6852579C0007070CA/$File/EPA-CASAC-12-004-unsigned.pdf*).

The third external review draft ISA for Ozone and Related Photochemical Oxidants will be discussed at a public meeting for review by CASAC, and public comments received will be provided to the CASAC review panel. A future **Federal Register** notice will inform the public of the exact date and time of that CASAC meeting.

II. How to Submit Technical Comments to the Docket at *www.regulations.gov*

Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2011–0050 by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: ORD.Docket@epa.gov*.
- *Fax:* 202–566–9744.
- *Mail:* Office of Environmental Information (OEI) Docket (Mail Code: 28221T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460. The phone number is 202–566–1752.
- *Hand Delivery:* The OEI Docket is located in the EPA Headquarters Docket Center, EPA West Building, Room 3334, 1301 Constitution Avenue NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is 202–566–1744. Such deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. If you provide comments by mail or hand delivery, please submit three copies of the comments. For attachments, provide an index, number pages consecutively with the comments, and submit an unbound original and three copies.

Instructions: Direct your comments to Docket ID No. EPA–HQ–ORD–2011–0050. Please ensure that your comments are submitted within the specified comment period. Comments received after the closing date will be marked ''late,'' and may only be considered if time permits. It is EPA's policy to include all comments it receives in the public docket without change and to make the comments available online at *www.regulations.gov,* including any personal information provided, unless a comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information through *www.regulations.gov* or email that you consider to be CBI or otherwise protected. The *www.regulations.gov* Web site is an ''anonymous access''

system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email 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 home page at *www.epa.gov/epahome/dockets.htm.*

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

Dated: June 7, 2012.

Rebecca Clark,

Acting Director, National Center for Environmental Assessment.

[FR Doc. 2012–14776 Filed 6–18–12; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK OF THE UNITED STATES

Economic Impact Policy

This notice is to inform the public that the Export-Import Bank of the United States has received an application for a $22.5 million working capital guarantee to support the export of approximately $21.6 million worth of titanium refining and production equipment to Kazakhstan. The repayment term of the guarantee is 18 months. The U.S. exports will enable the Kazakh firm to establish a maximum production capacity of 7,000 metric tons of titanium per year. Available information indicates that all of the new Kazakh titanium production will be sold in South Korea. Interested parties may submit comments on this transaction by email to *economic.impact@exim.gov* or by mail to 811 Vermont Avenue NW., Room 947, Washington, DC 20571, within 14 days of the date this notice appears in the **Federal Register**.

Angela Mariana Freyre,

Senior Vice President and General Counsel.

[FR Doc. 2012–14856 Filed 6–18–12; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL HOUSING FINANCE AGENCY

[No. 2012–N–06]

Examination Rating System

AGENCY: Federal Housing Finance Agency.

ACTION: Notice with request for comments.

SUMMARY: The Federal Housing Finance Agency (FHFA) is requesting comments on a proposed new examination rating system, which would be used when examining Fannie Mae and Freddie Mac (Enterprises), the Federal Home Loan Banks (Banks), (regulated entity or entities), and the Banks' Office of Finance. The new rating system would be based on a ''CAMELSO'' framework and would require an assessment of seven individual components dealing with Capital, Asset quality, Management, Earnings, Liquidity, Sensitivity to market risk, and Operational risk. The new system would replace those that had been developed by FHFA's predecessor agencies, and FHFA intends to begin using the new ratings system for examinations that commence after January 1, 2013.

DATES: FHFA will accept comments in writing on or before July 19, 2012.

ADDRESSES: You may submit your comments by any *one* of the following methods. Please include the following information in the subject line of your submission: Federal Housing Finance Agency, Notice: Examination Rating System, Notice Number 2012–N–06.

- *Federal eRulemaking Portal: http://www.regulations.gov:* Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by email to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by FHFA.
- *Email:* Comments to Alfred M. Pollard, General Counsel may be sent by email to *RegComments@fhfa.gov.*
- *Hand Delivered/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/Notice Number 2012–N–06, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024. The package should be logged at the Seventh Street entrance Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.
- *U.S. Mail, United Parcel Service, Federal Express or Other Mail Service:* The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: Comments/Notice Number 2012–N–06, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Karen Walter, Senior Associate Director, Division of Examination Programs and Support, (202) 649–3405, *Karen.Walter@fhfa.gov,* or Carol Connelly, Principal Examination Specialist, Division of Examination Programs and Support, (202) 649–3232, *Carol.Connelly@fhfa.gov,* Federal Housing Finance Agency, 400 Seventh Street SW., Washington, DC 20024.

SUPPLEMENTARY INFORMATION:

I. Comments

FHFA invites comments on all aspects of this Notice. Copies of all comments will be posted without change, including any personal information you provide, such as your name, address, and phone number, on the FHFA Web site at *http://www.fhfa.gov.* In addition, copies of all comments received will be available for examination by the public on business days between the hours of 10 a.m. and 3 p.m. at the Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024. To make an appointment to inspect comments, please call the Office of General Counsel at (202) 649–3804.

II. Background

A. Finance Agency's Statutory Authorities

Effective July 30, 2008, the Housing and Economic Recovery Act of 2008 (HERA), Public Law 110–289, 122 Stat. 2654 (2008), created FHFA as an independent agency of the Federal Government and transferred to it the supervisory and oversight responsibilities over the Enterprises and Banks that formerly had been vested in its predecessor agencies, the Office of Federal Housing Enterprise Oversight (OFHEO) and the Federal Housing Finance Board (Finance Board), respectively. HERA provided that the Enterprises and the Banks were to be subject to the supervision and regulation of FHFA, and granted the Director of FHFA general regulatory

authority over those regulated entities. 12 U.S.C. 4511(b). As regulator, FHFA is charged with ensuring that the Banks and Enterprises operate in a safe and sound manner, comply with applicable laws, and carry out their statutory missions. 12 U.S.C. 4513(a). The Director is authorized to exercise whatever incidental powers are necessary or appropriate to fulfilling his duties and responsibilities in overseeing the Banks and Enterprises, and to issue any regulations, guidelines or orders as are necessary to carry out his duties. 12 U.S.C. 4513(a)(2), 4526(a). The Director is also required to conduct an annual on-site examination of each Bank and Enterprise to determine its financial condition and to ensure that it operates in a safe and sound manner, and is authorized to conduct other examinations whenever he deems it to be appropriate or necessary. 12 U.S.C. 4517(a), (b). Both the Finance Board and OFHEO had similar statutory responsibilities prior to HERA.

B. Existing Examination Rating Systems

The FHFA examinations staff continues to use the examination rating systems that had been developed by its predecessor agencies. The FHFA's Division of Federal Home Loan Bank Regulation uses the Federal Home Loan Bank Rating System for assigning examination ratings to the Banks. That system had been developed by the Finance Board and was adopted after having been published for comment in the **Federal Register**. *See* 72 FR 547 (January 5, 2007). That rating system was a numeric system based on a four-point scale. Examiners assigned an overall composite rating to each Bank, as well as individual component ratings for Corporate Governance, Market Risk, Credit Risk, Operational Risk, and Financial Condition and Performance. Examiners assessed each Bank's Affordable Housing Program (AHP) in a separate examination, and incorporated their conclusions about AHP into the ratings for Corporate Governance and Operational Risk. Because of the unique operations of the Bank System's Office of Finance, ratings were assigned only to the areas of Corporate Governance and Operational Risk, based on the annual examination of the Office of Finance.

The FHFA examinations staff also continues to use the rating system developed by OFHEO in connection with its examination of the Enterprises. The OFHEO rating system was based on a non-numeric four-point scale ranging from ''No or Minimal Concerns'' to ''Critical Concerns.'' The composite rating for each of the Enterprises was based on work completed by examination teams as they assigned ratings in the area of Governance, Solvency, Earnings, Credit Risk, Market Risk, and Operational Risk. These ratings were first assigned in the 2007 examination cycle, and were described in the 2008 OFHEO Annual Report to Congress.

III. The Proposed Examination Rating System

FHFA is requesting comments on a proposed rating system, to be known as the Examination Rating System, which would be used in connection with examinations of both the Banks and the Enterprises. The proposed Examination Rating System is attached as an exhibit to this Notice.

Although the Banks and the Enterprises have different business models and engage in different activities, each is a government sponsored enterprise that is charged with supporting the nation's housing finance system. Each regulated entity borrows funds in the capital markets and uses those funds principally to purchase and securitize mortgage loans (in the case of the Enterprises) or to make secured loans to their member institutions (in the case of the Banks). FHFA relies on its annual on-site examinations of those regulated entities, as well as on periodic visitations and off-site monitoring, to ensure that the Banks and the Enterprises operate in a safe and sound manner, comply with applicable laws, and carry out their housing finance missions. On-site examinations ensure that FHFA carries out its oversight responsibilities and constitute the cornerstone of the agency's safety and soundness supervision program. As such, it is important that the manner in which the examinations are conducted and the manner in which the examination findings are organized and presented address key areas of the regulated entities' business that present risks to their financial condition, performance, and safe and sound operations. Although the existing examination rating systems adopted by the Finance Board and OFHEO differ in certain respects, both effectively addressed governance, capital adequacy and earnings, credit risk, market risk, and operational risk, which reflects the similarity in the financial risks to which the Banks and Enterprises are exposed. Therefore FHFA has concluded that they can be assessed by a single examination rating system. Indeed, the individual components of the new rating system pertain to areas of risk that are common to any financial institution, as is evidenced by the similarity of the rating system used by federal banking regulators for depository institutions. By adopting the new Examination Rating System, FHFA intends to further refine its existing means for communicating examination results, so that it may better identify and address supervisory concerns that may arise at the regulated entities.

Like the existing rating systems, the proposed Examination Rating System is a risk-focused system under which each regulated entity and the Office of Finance would be assigned a composite rating based on an evaluation of various aspects of its operations. Specifically, the composite rating of a Bank or an Enterprise would be based on an evaluation and rating of the following seven individual components: Capital, Asset quality; Management; Earnings; Liquidity; Sensitivity to market risk; and Operational risk, and would be referred to as the regulated entity's ''CAMELSO'' rating. That rating system would be similar to the ''CAMELS'' rating system used by the federal banking regulators for depository institutions. For the Banks' joint office, the Office of Finance, the composite rating would be based primarily on an evaluation of two components, Management and Operational risk. Because the Office of Finance principally issues and services joint debt instruments on behalf of the Banks, and does not maintain or fund an investment portfolio, the other components are not relevant to assessing the condition, performance, and risk management of the Office of Finance.

Under the new rating system, each Bank and Enterprise, as well as the Office of Finance, would be assigned a composite numerical rating from ''1'' to ''5.'' A ''1'' rating indicates the lowest degree of supervisory concern, while a ''5'' rating indicates the highest level of supervisory concern. The composite rating of each Bank, the two Enterprises, and the Office of Finance would reflect the ratings of the underlying components, which also would be rated on a scale of ''1'' to ''5.'' As is the case under the current rating system, the composite rating is not an arithmetic average of the component ratings. Instead, the relative importance of each component would be determined on a case-by-case basis, within the parameters established by this rating system.

IV. Request for Comments

As noted above, FHFA requests comments on all aspects of the proposed Examination Rating System. In addition,

FHFA invites specific comments on the following questions:

1. Does the proposed Examination Rating System capture the components of a regulated entity's performance and condition that are most relevant to assigning it a composite rating? If not, what additional or different components should be considered?

2. Is it sufficient for the composite rating for the Office of Finance to be based solely on the Management and Operational Risk components, as is currently the case, or should other factors also be considered? If other factors should be considered, what additional factors should be incorporated and how would those factors fit within the proposed Examination Rating System.

3. Do the factors to be considered under each of the seven individual components (capital, asset quality, management, earnings, liquidity, sensitivity to market risk, and operational risk) address all of the factors that should be considered in assessing those components? If not, what additional or different factors should be considered?

V. Consideration of Differences

Section 1313 of the Safety and Soundness Act, as amended by HERA, requires the Director, prior to promulgating any regulation or taking any other formal or informal action of general applicability and future effect, including the issuance of advisory documents or examination guidance, to consider differences between the Banks and the Enterprises 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. As noted previously, although the operations of the Banks and the Enterprises differ in a number of respects, they are all government sponsored enterprises with a public mission to supporting housing finance, and they all face similar risks with respect to capital adequacy, the quality of their assets and management, earnings, liquidity, market risk and operational risk. The new Examination Rating System principally addresses the manner in which FHFA examiners are to document their assessments of the financial condition and performance of the Enterprises and the Banks in connection with their periodic examinations. Because the system does not direct the Enterprises or the Banks to do anything, it likely does not constitute ''examination guidance'' as that term is used in HERA. Nonetheless, in developing the new rating system, the Director has considered the differences between the Banks and the Enterprises as they relate to the above factors, and has determined that the common risks faced by the Banks and the Enterprises justify the use of a single Examination Rating System for all of the regulated entities. Even so, FHFA requests comments on whether there are any other differences between the Banks and the Enterprises that the Director should consider before adopting the Examination Rating System in final form.

Dated: June 13, 2012.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

FEDERAL HOUSING FINANCE AGENCY

EXAMINATION RATING SYSTEM (Proposed)

I. Introduction and Overview

The FHFA Examination Rating System is a risk-focused rating system under which each Enterprise or Federal Home Loan Bank (regulated entity or entities) and the Office of Finance (OF) is assigned a composite rating based on an evaluation of various aspects of its operations. Specifically, the composite rating of a Federal Home Loan Bank or an Enterprise is based on an evaluation and rating of seven components: Capital, Asset quality; Management; Earnings; Liquidity; Sensitivity to market risk; and Operational risk (CAMELSO). The composite rating of the Office of Finance is based primarily on an evaluation of two components: Management and Operational risk.

Under the rating system, each Federal Home Loan Bank, Enterprise and the OF is assigned a composite rating from ''1'' to ''5.'' A ''1'' rating indicates the lowest degree of supervisory concern, while a ''5'' rating indicates the highest level of supervisory concern. The composite rating of each Federal Home Loan Bank and Enterprise and the OF reflects the ratings of the underlying components, which are also rated on a scale of ''1'' to ''5.'' The composite rating is not an arithmetic average of the component ratings. Instead, the relative importance of each component is determined on a case-by-case basis, within the parameters established by this rating system.

II. Composite Ratings

Composite ratings are based on a careful evaluation of: a Federal Home Loan Bank's or Enterprise's capital, asset quality, management, earnings, liquidity, sensitivity to market risk, and operational risk; and the OF's management and operational risk. A regulated entity will be assigned a composite rating of ''1'' to ''5'' as described below.

Composite 1—The regulated entity is sound in every respect and typically each component is rated ''1'' or ''2.'' Any weaknesses are minor and can be addressed in a routine manner by the board of directors and management. The regulated entity is well positioned to withstand business fluctuations and adverse changes in the economic environment. Risk management practices are effective given the regulated entity's size, complexity and risk profile, and the regulated entity is in substantial compliance with laws, regulations, and regulatory requirements.

Composite 2—The regulated entity is generally sound and most components are rated ''1'' or ''2'' and typically no component is rated more severely than a ''3.'' Weaknesses are moderate and the board and management have demonstrated the ability and willingness to take necessary corrective action. The regulated entity is able to withstand business fluctuations and adverse changes in the economic environment. Risk management practices are satisfactory given the regulated entity's size, complexity and risk profile, and the regulated entity is in substantial compliance with laws, regulations, and regulatory requirements.

COMPOSITE 3—The regulated entity exhibits moderate to severe weaknesses in one or more respects but most components are rated ''3'' or better and no component is rated more severely than a ''4.'' Board and management may have demonstrated a lack of willingness or ability to address identified weaknesses within appropriate timeframes. The regulated entity is generally less capable of withstanding business fluctuations and adverse changes in the economic environment than regulated entities rated a composite ''1'' or ''2.'' Risk management practices typically need improvement given the regulated entity's size, complexity and risk profile, and the regulated entity may be in non-compliance with certain laws, regulations, and regulatory requirements.

Composite 4—The regulated entity generally exhibits severe weaknesses in multiple respects that result in serious deficiencies and unsatisfactory performance given its risk profile. The weaknesses may range from serious to critically deficient, to unsafe or unsound practices that have not been satisfactorily addressed or resolved by the board of directors and management within approved timeframes. The regulated entity is susceptible to further deterioration in condition or performance from business fluctuations and adverse changes in the economic environment. Risk management practices are deficient given the regulated entity's size, complexity and risk profile, and the regulated entity may be in non-compliance with critical laws, regulations and regulatory requirements. The viability of the regulated entity may be threatened if the problems and weaknesses are not satisfactorily resolved within an appropriate timeframe.

Composite 5—The regulated entity exhibits a volume and severity of problems that are beyond the ability of the board of directors or management to correct. The regulated entity exhibits unsafe or unsound practices or conditions. Changes to the board of directors or management are needed and outside financial or other assistance may be needed in order for the regulated entity to be viable. Risk management practices are critically deficient given the regulated entity's size, complexity and risk profile, and the regulated entity may be in significant non-compliance with laws, regulations and regulatory requirements.

III. Component Ratings

The composite rating is derived from the seven component ratings that are described below. Each of the component rating descriptions provides a list of evaluative factors that relate to that component. The listing of evaluative factors is not exhaustive, and is not in order of importance.

CAPITAL—when rating a regulated entity's capital, examiners determine whether the regulated entity has sufficient capital relative to the regulated entity's risk profile. When making this determination, examiners assess:

- the extent to which the regulated entity meets (or fails to meet) applicable capital requirements (laws, regulations, orders, guidance);
- the overall financial condition of the regulated entity;
- the composition of the balance sheet, including the nature and amount of intangible assets, the composition of capital, market risk, and concentration risk;
- the risk exposure represented by off-balance sheet activities;
- the types and quantity of risk inherent in the regulated entity's activities and management's ability to effectively identify, measure, monitor and control each of these risks;
- the potentially adverse consequences these risks may have on the regulated entity's capital;
- the adequacy of the allowance for loan losses and other reserves, as well as the nature, trend and volume of problem assets;
- the quality and strength of earnings and the reasonableness of dividends;
- the regulated entity's prospects and plans for growth, as well as the regulated entity's past experience in managing growth;
- the ability of management to address emerging needs for additional capital; and
- the regulated entity's access to capital markets and other sources of capital.

Capital ratings

1. A rating of 1 indicates: The level and composition of capital is strong relative to the regulated entity's risk profile. The regulated entity meets or exceeds all regulatory and statutory capital requirements and is expected to continue to be well-capitalized considering potential risks to the regulated entity. Capital management practices are strong.

2. A rating of 2 indicates: The level and composition of capital is satisfactory relative to the regulated entity's risk profile. The regulated entity meets or exceeds all regulatory and statutory capital requirements and is expected to continue to be satisfactorily capitalized considering potential risks to the regulated entity. Capital management practices are satisfactory, although minor weaknesses may be identified.

3. A rating of 3 indicates: The level and/or composition of capital needs improvement and does not fully support the regulated entity's risk profile. Although the regulated entity may currently meet or exceed minimum regulatory and statutory capital requirements, capital should be augmented when considering potential risks to the regulated entity. Capital management practices need improvement.

4. A rating of 4 indicates: The level and/or composition of capital is not adequate relative to the regulated entity's risk profile. The regulated entity may not meet all minimum regulatory and statutory capital requirements, and the viability of the regulated entity may be in question. Capital management practices exhibit deficiencies.

5. A rating of 5 indicates: The level and composition of capital are critically deficient and the viability of the regulated entity may be threatened. The regulated entity does not meet minimum regulatory and statutory capital requirements. Outside financial assistance may be needed in order for the regulated entity to be viable.

ASSET QUALITY—when rating a regulated entity's asset quality, examiners determine the quantity of existing and potential credit risk associated with the loan and investment portfolios, real estate owned, and other assets, as well as off-balance sheet transactions, and management's ability to identify, measure, monitor and control credit risk. When making this determination, examiners assess:

- the adequacy of underwriting standards;
- the soundness of credit administration practices;
- the appropriateness of risk identification and rating practices;
- the level, distribution, severity of problem, adversely classified, nonaccrual, restructured, delinquent, and nonperforming assets for both on- and off-balance sheet transactions;
- the adequacy of the allowance for loan losses and other asset valuation reserves;
- the credit risk arising from or reduced by off-balance sheet transactions, such as unfunded commitments, credit derivatives, and lines of credit;

• the diversification and quality of the loan and investment portfolios;
• the extent of securities underwriting activities and exposure to counterparties in trading activities;
• the existence of asset concentrations;
• the level and pace of asset growth;
• the adequacy of loan and investment policies, procedures and practices;
• the ability of management to properly administer its assets, including the timely identification and collection of problem assets;
• the adequacy of internal controls and management information systems; and
• the volume and nature of credit documentation exceptions.

Asset quality ratings

1. A rating of 1 indicates: Asset quality and credit risk management practices are strong. Any identified weaknesses are minor in nature and risk exposure is minimal in relation to the regulated entity's capital protection and management's ability to identify, monitor and mitigate risks.

2. A rating of 2 indicates: Asset quality and credit risk management practices are satisfactory. Identified weaknesses, such as the level and severity of adversely-rated or classified assets, are moderate and in-line with the regulated entity's capital protection and management's ability to identify, monitor and mitigate risks.

3. A rating of 3 indicates: Asset quality or credit risk management practices need improvement. Identified weaknesses, such as the level and severity of adversely rated or classified assets, are significant and not in-line with the regulated entity's capital protection or management's ability to identify, monitor and mitigate risks.

4. A rating of 4 indicates: Asset quality or credit risk management practices are deficient. Identified weaknesses, such as the level of problem assets are significant and inadequately controlled. The weaknesses subject the regulated entity to potential losses, which if left unchecked may threaten the regulated entity's viability.

5. A rating of 5 indicates: Asset quality or credit risk management practices are critically deficient and may represent an imminent threat to the regulated entity's viability.

MANAGEMENT—When rating a regulated entity's or the OF's management, examiners determine the capability and willingness of the board of directors and management, in their respective roles, to identify, measure, monitor, and control the risks of the regulated entity's or the OF's activities and to ensure that the regulated entity's or the OF's safe, sound and efficient operations are in compliance with applicable laws and regulations. When making this determination, examiners assess:

• the level and quality of oversight and support of all regulated entity or OF activities by the board of directors and management;
• the quality and effectiveness of strategic planning;
• the ability of the board of directors and management, in their respective roles, to plan for, and respond to, risks that may arise from changing business conditions or the initiation of new activities or products;
• the adequacy of, and conformance with, appropriate internal policies and controls addressing the operations and risks of significant activities;
• the accuracy, timeliness and effectiveness of management information and risk monitoring systems appropriate for the regulated entity's or the OF's size, complexity and risk profile;
• the ability and willingness to identify, measure, monitor, and control risks across the regulated entity or the OF;
• the adequacy of audits and internal controls to promote effective operations and reliable financial and regulatory reporting; safeguard assets; and ensure compliance with laws, regulations, regulatory requirements, and internal policies;
• the regulated entity's or the OF's compliance with laws and regulations, including Prudential Management and Operational Standards (PMOS), Office of Minority and Women Inclusion (OMWI) and relevant provisions of the Dodd-Frank Act;
• the regulated entity's or the OF's responsiveness to findings made by regulatory authorities, the regulated entity's or the OF's risk management function, internal/external audit functions or outside consultants;
• the depth of management and management succession;
• the extent that the board of directors and management is affected by, or susceptible to, dominant influence or concentration of authority;
• the reasonableness and comparability of compensation and compensation policies and avoidance of self-dealing;
• the ability of the regulated entity or the OF to achieve mission-related goals and requirements, including affordable housing and community investment requirements; and
• the overall performance of the regulated entity or the OF and its risk profile.

Management ratings

1. A rating of 1 indicates: The performance by the board of directors and management, and risk management practices relative to the regulated entity's or the OF's size, complexity and risk profile are strong. All significant risks are consistently and effectively identified, measured, monitored and controlled. The regulated entity or the OF is in substantial compliance with laws, regulations and regulatory requirements, including mission-related and affordable housing goals and requirements. The board of directors and management demonstrate the ability to promptly and successfully address existing and potential problems and risks.

2. A rating of 2 indicates: The performance by the board of directors and management, and risk management practices relative to the regulated entity's or the OF's size, complexity and risk profile are satisfactory. Generally, significant risks and problems are effectively identified, measured, monitored and controlled. The regulated entity or the OF is in substantial compliance with laws, regulations and regulatory requirements, including mission-related and affordable housing goals and requirements. Minor weaknesses may exist, but they are not material to the safety and soundness of the regulated entity or the OF, and are being satisfactorily addressed.

3. A rating of 3 indicates: The performance by the board of directors and management, and/or risk management practices need improvement given the regulated entity's or the OF's size, complexity and risk profile. Problems and significant risks may be inadequately identified, measured, monitored or controlled. The regulated entity or the OF may be in non-compliance with laws, regulations and regulatory requirements, including mission-related and affordable housing goals and requirements. The capabilities of the board of directors or management may be insufficient for the type, size or condition of the regulated entity or the OF.

4. A rating of 4 indicates: The performance by the board of directors and management and/or risk management practices are deficient given the regulated entity's or the OF's size, complexity and risk profile. Operational or performance problems and significant risks are inadequately identified, measured, monitored or controlled, and require immediate

action to preserve the soundness of the regulated entity or the OF. The regulated entity or the OF may be in significant non-compliance with laws, regulations and regulatory requirements, including mission-related and affordable housing goals and requirements.

5. A rating of 5 indicates: The performance by the board of directors and management and/or risk management practices are critically deficient. Problems and significant risks are inadequately identified, measured, monitored or controlled, and may threaten the viability of the regulated entity or the OF. The regulated entity or the OF is in significant non-compliance with laws, regulations and regulatory requirements, including mission-related and affordable housing goals and requirements. The board of directors and management fail to demonstrate the ability or willingness to correct problems and implement appropriate risk management practices.

EARNINGS—when rating a regulated entity's earnings, examiners determine the quantity, trend, sustainability, and quality of earnings. When making this determination, examiners assess:

- the level of earnings, including trends and stability;
- the ability to provide for adequate capital through retained earnings;
- the quality and source of earnings, including the level of reliance on extraordinary gains, nonrecurring events, or favorable tax effects;
- the level of expenses in relations to operations;
- the adequacy of the budgeting systems, forecasting processes, and management information systems in general;
- the adequacy of provisions to maintain the allowance for loan losses and other valuation allowance accounts; and
- the earnings exposure to market risk.

Earnings ratings

1. A rating of 1 indicates: The quality, quantity, and sustainability of earnings are strong. The regulated entity's earnings are more than sufficient to support operations and maintain adequate capital and allowance levels after considering the regulated entity's overall condition, growth and other factors.

2. A rating of 2 indicates: The quality, quantity, and sustainability of earnings are satisfactory. The regulated entity's earnings are sufficient to support operations and maintain adequate capital and allowance levels after considering the regulated entity's overall condition, growth and other factors.

3. A rating of 3 indicates: The quality, quantity, or sustainability of earnings needs improvement. The regulated entity's earnings may not fully support the regulated entity's operations or provide for adequate capital and/or allowance levels in relation to the regulated entity's overall condition, growth, and other factors.

4. A rating of 4 indicates: The quality, quantity, and/or sustainability of earnings is deficient. The regulated entity's earnings are insufficient to support operations and maintain adequate capital and allowance levels.

5. A rating of 5 indicates: The quality, quantity, and/or sustainability of earnings is critically deficient. The regulated entity's earnings are inadequate to cover expenses, and losses may threaten the regulated entity's viability through the erosion of capital.

LIQUIDITY—when rating a regulated entity's liquidity, examiners determine the current level and prospective sources of liquidity compared to funding needs, as well as the adequacy of funds management practices relative to the regulated entity's size, complexity and risk profile. When making this determination, examiners assess:

- the adequacy of liquidity sources to meet present and future needs and the ability of the regulated entity to meet liquidity needs without adversely affecting its operations or condition;
- the availability of assets readily convertible to cash without undue loss;
- the regulated entity's access to money markets and other secondary sources of funding;
- the level and diversification of funding sources, both on- and off-balance sheet;
- the degree of reliance on short-term, volatile sources of funding to fund longer term assets;
- the ability to securitize and sell certain pools of assets; and
- the capability and willingness of management to properly identify, measure, monitor and control the regulated entity's liquidity position, including the effectiveness of funds management strategies, liquidity policies, management information systems and contingency liquidity plans.

Liquidity ratings

1. A rating of 1 indicates: The level of liquidity and the regulated entity's management of its liquidity position are strong. Any identified weaknesses in its liquidity management practices are minor. The regulated entity has reliable access to sufficient sources of funds on favorable terms to meet current and anticipated liquidity needs. The regulated entity meets or exceeds regulatory guidance related to liquidity.

2. A rating of 2 indicates: The level of liquidity and the regulated entity's management of its liquidity position are satisfactory. The regulated entity may have moderate weaknesses in its liquidity management practices, but these are correctable in the normal course of business. The regulated entity has reliable access to sufficient sources of funds on acceptable terms to meet current and anticipated liquidity needs. The regulated entity meets or exceeds regulatory guidance related to liquidity.

3. A rating of 3 indicates: The level of liquidity or the regulated entity's management of its liquidity position needs improvement. The regulated entity may evidence moderate weaknesses in funds management practices, or weaknesses that are not correctable in the normal course of business. The regulated entity may lack ready access to funds on reasonable terms. The regulated entity may not meet all regulatory guidance related to liquidity.

4. A rating of 4 indicates: The level of liquidity or the regulated entity's management of its liquidity position is deficient. The regulated entity may not have or be able to obtain sufficient funds on reasonable terms. The regulated entity does not meet all regulatory guidance related to liquidity.

5. A rating of 5 indicates: The level of liquidity or the regulated entity's management of its liquidity position is critically deficient. The viability of the regulated entity may be threatened and the regulated entity may need to seek immediate external financial assistance to meet maturing obligations or other liquidity needs. The regulated entity does not meet regulatory guidance related to liquidity.

SENSITIVITY TO MARKET RISK— when rating a regulated entity's sensitivity to market risk, examiners determine the degree to which changes in interest rates, foreign exchange rates, commodity prices, or equity prices can adversely affect the regulated entity's earnings or economic capital. When making this determination, examiners assess:

- the sensitivity of the regulated entity's earnings, or the economic value of its capital to adverse changes in interest rates, foreign exchange rates, commodity prices or equity prices;
- the ability of management to identify, measure, monitor and control exposure to market risk given the

regulated entity's size, complexity and risk profile;

• the nature and complexity of interest rate risk exposure arising from non-trading positions; and

• the nature and complexity of market risk exposure arising from trading, asset management activities and foreign operations.

Sensitivity to market risk ratings

1. A rating of 1 indicates: Market risk sensitivity is well controlled and there is minimal potential that the regulated entity's earnings performance or capital position will be adversely affected by market risk sensitivity. Risk management practices are strong for the size, sophistication and market risk accepted by the regulated entity. Earnings and capital provide substantial support for the amount of market risk taken by the regulated entity.

2. A rating of 2 indicates: Market risk sensitivity is satisfactorily controlled and there is moderate potential that the regulated entity's earnings performance or capital position will be adversely affected by market risk sensitivity. Risk management practices are satisfactory for the size, sophistication and market risk accepted by the regulated entity. Earnings and capital provide adequate support for the amount of market risk taken by the regulated entity.

3. A rating of 3 indicates: Market risk sensitivity control needs improvement or there is significant potential that the regulated entity's earnings performance or capital position will be adversely affected by market risk sensitivity. Risk management practices need improvement given the size, sophistication and market risk accepted by the regulated entity. Earnings and capital may not adequately support the amount of market risk taken by the regulated entity.

4. A rating of 4 indicates: Market risk sensitivity control is deficient or there is a high potential that the regulated entity's earnings performance or capital position will be adversely affected by market risk sensitivity. Risk management practices are deficient for the size, sophistication and market risk accepted by the regulated entity. Earnings and capital provide inadequate support for the amount of market risk taken by the regulated entity.

5. A rating of 5 indicates: Market risk sensitivity control is critically deficient or the level of market risk taken by the regulated entity may be an imminent threat to the regulated entity's viability. Risk management practices are critically deficient for the size, sophistication and level of market risk accepted by the regulated entity.

OPERATIONAL RISK—when rating a regulated entity's or the OF's operational risk, examiners determine the exposure to loss from inadequate or failed internal processes, people, and systems, including internal controls and information technology, or from external events, including all direct and indirect economic losses related to legal liability, reputational setbacks, and compliance and remediation costs to the extent such costs are consequences of operational events. When making this determination examiners assess:

• the efficiency and effectiveness of operations and technology;

• the effectiveness of the operational risk framework in identifying and assessing threats posed to operations;

• the quality of operational risk management in the administration of the regulated entity's or the OF's mission-related activities, including affordable housing and community investment activities;

• the organizational structure, including lines of authority and responsibility for adhering to prescribed policies;

• the accuracy of recording transactions;

• the effectiveness of internal controls over financial reporting (*i.e.,* the level of compliance with Sarbanes-Oxley section 404);

• the controls surrounding limits of authorities, including: Safeguarding access to and use of records and assets; segregation of duties;

• the effectiveness of the control environment in preventing and/or detecting errors and unauthorized activity;

• the accuracy, effectiveness and security of information systems, data and management reporting;

• the effectiveness of business continuity planning; and

• the effectiveness, accuracy and security of models

Operational risk ratings

1. A rating of 1 indicates: Operational risk management is strong and the number and severity of operational risk events are low. There is minimal potential that the regulated entity's or the OF's earnings performance or capital position will be adversely affected by the level of operational risk.

2. A rating of 2 indicates: Operational risk management is satisfactory and the number and severity of operational risk events are moderate. There is moderate potential that the regulated entity's or the OF's earnings performance or capital position will be adversely affected by the level of operational risk.

3. A rating of 3 indicates: Operational risk management needs improvement or there is significant potential that the regulated entity's or the OF's earnings performance or capital position will be adversely affected by the level of operational risk. The number and severity of operational risk events are moderate to serious.

4. A rating of 4 indicates: Operational risk management is deficient or there is a high potential that the regulated entity's or the OF's earnings performance or capital position will be adversely affected by the level of operational risk. The number and severity of operational risk events are serious to critical.

5. A rating of 5 indicates: Operational risk management is critically deficient or the level of operational risk taken by the regulated entity or the OF may be an imminent threat to the regulated entity's or the OF's viability. The number and severity of operational risk events may threaten the regulated entity's or the OF's viability.

[FR Doc. 2012–14912 Filed 6–18–12; 8:45 am]

BILLING CODE 8070–01–P

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 applications will also 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.

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 July 13, 2012.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Security Bancshares Corporation;* to become a bank holding company by acquiring 100 percent of the voting shares of Security State Bank of Wewoka, Oklahoma, both in Wewoka, Oklahoma.

Board of Governors of the Federal Reserve System, June 14, 2012.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2012–14895 Filed 6–18–12; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage *de novo,* or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than July 2, 2012.

A Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *North Milwaukee Bancshares, Inc., Milwaukee, Wisconsin,* to continue to engage in the nonbanking activity of extending credit and servicing loans pursuant to section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, June 13, 2012.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2012–14820 Filed 6–18–12; 8:45 am]

BILLING CODE 6210–01–P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–0205; Docket 2012–0001; Sequence 11]

General Services Administration Acquisition Regulation (GSAR) Part 523; Information Collection; Environmental Conservation, Occupational Safety, and Drug-Free Workplace

AGENCY: Office of Acquisition Policy, GSA.

ACTION: Notice of request for comments regarding the reinstatement of a previously existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the General Services Administration will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement regarding Environmental Conservation, Occupational Safety, and Drug-Free Workplace.

Public comments are particularly invited on: Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate and based on valid assumptions and methodology; and ways to enhance the quality, utility, and clarity of the information to be collected.

DATES: Submit comments on or before: August 20, 2012.

FOR FURTHER INFORMATION CONTACT: Mitchell Gasbarra, Procurement Analyst, General Services Acquisition Policy Division, GSA, at telephone (202) 357–5846 or via email to *Mitchell.gasbarra@gsa.gov.*

ADDRESSES: Submit comments identified by Information Collection 3090–02085 by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching the OMB control number. Select the link ''Submit a Comment'' that corresponds with ''Information Collection 3090–0205, Environmental Conservation, Occupational Safety, and Drug-Free Workplace''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 3090–0205, Environmental Conservation, Occupational Safety, and Drug-Free Workplace'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417. Attn: Hada Flowers/IC 3090–0205, Environmental Conservation, Occupational Safety, and Drug-Free Workplace.

Instructions: Please submit comments only and cite Information Collection 3090–0205, Environmental Conservation, Occupational Safety, and Drug-Free Workplace, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

SUPPLEMENTARY INFORMATION:

A. Purpose

The Federal Hazardous Substance Act and Hazardous Material Transportation Act prescribe standards for packaging of hazardous substances. To meet the requirements of the Acts, the General Services Administration Regulation prescribes clause 552.223–72, Hazardous Material Information, to be inserted in solicitations and contracts that provides for delivery of hazardous materials on an f.o.b. origin basis. This information collection will be accomplished by means of the clause, which requires the contractor to identify for each National Stock Number the DOT Shipping Name, DOT Hazards Class, and whether the item requires a DOT label. Contracting Officers and technical personnel use the information to monitor and ensure contract requirements based on law and regulation. Properly identified and labeled items of hazardous material allows for appropriate handling of such items throughout GSA's supply chain system. The information is used in GSA warehouses, stored in an NSN database and provided to GSA customers. Non-Collection and/or a less frequently conducted collection of the information resulting from Clause 552.223–72 would prevent the Government from being properly notified and prepared for arrival and storage of items containing hazardous material. Government activities may be hindered from apprising their employees of; (1) All

hazards to which they may be exposed; (2) Relative symptoms and appropriate emergency treatment; and (3) Proper conditions and precautions for safe use and exposure.

B. Annual Reporting Burden

Respondents: 563.
Responses per Respondent: 3.
Hours per Response: .658.
Total Burden Hours: 1111.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat, 1275 First Street NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 3090–0205, Environmental Conservation, Occupational Safety, and Drug-Free Workplace, in all correspondence.

Dated: June 11, 2012.

Joseph A. Neurauter,

Director, Office of Acquisition Policy, Senior Procurement Executive.

[FR Doc. 2012–14836 Filed 6–18–12; 8:45 am]

BILLING CODE 6820–61–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Initial Review

The meeting announced below concerns Coordinating Center for Research and Training to Promote the Health of People with Developmental and Other Disabilities, FOA DD12–006, initial review.

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting:

Time and Date: 11:00 a.m.–3:00 p.m., July 10, 2012 (Closed).

Place: Teleconference.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c) (4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the initial review, discussion, and evaluation of applications received in response to ''Coordinating Center for Research and Training to Promote the Health of People with Developmental and Other Disabilities, FOA DD12–006, initial review.''

Contact Person for More Information: M. Chris Langub, Ph.D., Scientific Review Officer, CDC, 4770 Buford Highway NE., Mailstop F–46, Atlanta, Georgia 30341, Telephone: (770) 488–3585.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: June 13, 2012.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2012–14922 Filed 6–18–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0547]

Agency Information Collection Activities; Proposed Collection; Comment Request; Survey on the Occurrence of Foodborne Illness Risk Factors in Selected Retail and Foodservice Facility Types (2013–2022)

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information and to allow 60 days for public comment in response to the notice. This notice solicits comments on a survey entitled ''Occurrence of Foodborne Illness Risk Factors in Selected Retail and Foodservice Facility Types (2013–2022).''

DATES: Submit written or electronic comments on the collection of information by August 20, 2012.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov.* Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Ila S. Mizrachi, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–7726, *Ila.Mizrachi@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Survey on the Occurrence of Foodborne Illness Risk Factors in Selected Retail and Foodservice Facility Types (2013–2022)—(OMB Control Number 0910–NEW)

I. Background

In 1998, the U.S. Food and Drug Administration's National Retail Food Team initiated a 10-year voluntary survey to measure trends in the occurrence of foodborne illness risk factors—preparation practices and employee behaviors most commonly reported to the Centers for Disease Control and Prevention (CDC) as contributing factors to foodborne illness outbreaks at the retail level. Specifically, the survey included data collection inspections of various types

of retail and foodservice establishments at 5-year intervals (1998, 2003, and 2008) in order to observe and document trends in the occurrence of the following foodborne illness risk factors:

- Food from Unsafe Sources.
- Poor Personal Hygiene.
- Inadequate Cooking.
- Improper Holding/Time and Temperature.
- Contaminated Equipment/Protection from Contamination.

FDA developed reports summarizing the findings for each of the three data collection periods (1998, 2003, and 2008) (Refs. 1–3). Data from all three data collection periods were analyzed to detect trends in improvement or regression over time and to determine whether progress had been made toward the goal of reducing the occurrence of foodborne illness risk factors in selected retail and foodservice facility types (Ref. 4).

The research obtained from these studies provides FDA a solid foundation for developing a national retail food program model that can be used by Federal, state, local, and tribal agencies to:

- Identify essential food safety program performance measurements;
- Assess strengths and gaps in the design, structure, and delivery of program services;
- Establish program priorities and intervention strategies focused on reducing the occurrence of foodborne illness risk factors; and
- Create a mechanism that justifies program resources and allocates them to program areas that will provide the most significant public health benefits.

Using this 10-year survey as a foundation, FDA is proposing to conduct a new voluntary survey encompassing annual data collections over a 10-year period. The survey will determine the following for each facility type included in the study:

- The foodborne illness risk factors that are in most need of priority attention during each data collection period;
- Trends of improvement or regression in foodborne illness risk factor occurrence over time; and
- The impact of industry food safety management systems in controlling the occurrence of foodborne illness risk factors.

The results of the proposed study will be used to:

- Formulate Agency retail food safety policies and initiatives;
- Identify retail food work plan priorities and allocate resources to enhance retail food safety nationwide;
- Generate nationally representative estimates of the prevalence of foodborne illness risk factors and trends of improvement and regression over time; and
- Recommend best practices and targeted intervention strategies to assist the retail and foodservice industry and state, local, and tribal regulators with reducing foodborne illness risk factors.

The statutory basis for FDA conducting this survey is the Public Health Service Act (the PHS Act) (42 U.S.C. 243, section 311(a)) (Also 21 CFR 5.10(a)(2) and (4)), which requires that FDA provide assistance to state and local governments relative to the prevention and suppression of communicable diseases. In addition, the PHS Act requires that FDA cooperate with and aid state and local authorities in the enforcement of their health regulations and provide advice on matters relating to the preservation and improvement of public health. Additionally, the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301) and Economy Act (31 U.S.C. 1535) require that FDA provide assistance to other Federal, state, and local governmental bodies.

In 2012, FDA will conduct a pilot data collection to practice the use of the data collection form and methods and test exportation of the pilot data into a central repository. Following the pilot, the Agency plans to conduct annual data collections beginning in 2013 with the initial data collection for select restaurant facility types, followed by the initial data collection for select institutional foodservice facility types in 2014 and select retail food store facility types in 2015. The results of the initial data collection for each of the facility types will serve as the baseline measurement from which trends will be analyzed. Two additional data collection periods for each of the facility types are planned at 3-year intervals after the initial data collection for purposes of analyzing trends.

TABLE 1—SUMMARY OF DATA COLLECTION TIME FRAMES [1]

Industry segment	Facility types included in the survey	Year for initial data collection (baseline measurement)	Second data collection period	Third and final data collection period
Restaurants	Full Service Restaurants Fast Food Restaurants	2013	2016	2019
Institutional Foodservice	Hospitals Nursing Homes Elementary Schools (K–6)	2014	2017	2020
Retail Food Stores	Deli Departments/Stores Meat and Poultry Departments/Markets Seafood Departments/Markets Produce Departments/Markets	2015	2018	2021

[1] Data collections for each of the facility types within an industry segment will be conducted using a 3-year interval period. Initial data collection will serve as the baseline. Subsequent collections will provide the data needed to analyze trends.

A description of the facility types included in the proposed survey is included in table 2:

TABLE 2—DESCRIPTION OF THE FACILITY TYPES INCLUDED IN THE SURVEY

Industry segment	Facility type	Description
Restaurants	Full Service Restaurants.	Establishments where customers place their order at their table, are served their meal at the table, receive the service of the wait staff, and pay at the end of the meal.

TABLE 2—DESCRIPTION OF THE FACILITY TYPES INCLUDED IN THE SURVEY—Continued

Industry segment	Facility type	Description
	Fast Food Restaurants	Also referred to as quick service restaurants and defined as any restaurant that is not a full service restaurant.
Institutional Foodservice	Hospitals	Foodservice operations that serve patients, staff, and hospital visitors in a traditional hospital setting. Individuals who are acutely ill to those who are immunocompromised are a target population for data collection.
	Nursing Homes	Foodservice operations that serve highly susceptible populations living in a group care setting. The elderly (55+ years) is the target population for the data collection. Also includes assisted living facilities.
	Elementary Schools (K–6).	Foodservice operations that serve students from one or more grade levels from preschool through Grade 5. Young children are a target population for the data collection.
Retail Food Stores	Deli Departments/ Stores.	Departments in retail food stores where potentially hazardous foods (time/temperature control for safety foods) such as luncheon meats and cheeses are sliced for the customer and where sandwiches and salads are prepared onsite or received from a commissary in bulk containers, portioned, and displayed. Freestanding cheese shops are categorized as delis. Parts of the deli may also include: • Salad bars and other food bars maintained by the deli department manager; • Areas where meat or poultry are cooked and offered for sale as ready-to-eat; • Pizza stands; and • Limited bakery operations attached to or adjacent the deli.
	Meat and Poultry Departments/Markets.	Meat and poultry departments in a retail food store, as well as any freestanding meat market or butcher shop that sells raw meat or poultry directly to the consumer.
	Seafood Departments/ Markets.	Seafood departments in retail food stores and freestanding seafood markets that sell seafood directly to the consumer including the preparation and sale of raw and/or ready-to-eat seafood. In-store sushi bars are considered part of the seafood department for the purposes of the data collection.
	Produce Departments/ Markets.	Areas or departments where produce is cut, prepared, stored, or displayed. A produce department may include salad bars that are managed by the produce manager, as well as juicers.

A geographical information system database containing a listing of businesses throughout the United States will be used as the establishment inventory for the data collections. FDA's Center for Food Safety and Applied Nutrition (CFSAN) Biostatistical Branch, in collaboration with the FDA National Retail Food Team, will perform a series of filtering processes of the various database food establishment categories to ensure establishments are correctly classified and considered eligible to participate in the survey based on the descriptions in table 2.

To further determine the pool of establishments eligible for selection, an effort will be made to exclude operations that handle only prepackaged food items or conduct low-risk food preparation activities. The FDA Food Code contains a grouping of establishments by risk, based on the type of food preparation that is normally conducted within the operation (Ref. 5). The vast majority of selected establishments are to be chosen from risk categories 2 through 4.

FDA has approximately 25 Regional Retail Food Specialists (Specialists) who will serve as the data collectors for the 10-year study. The Specialists are geographically dispersed throughout the United States and possess technical expertise in retail food safety and a solid understanding of the operations within each of the facility types to be surveyed. The Specialists are also standardized by FDA's CFSAN personnel in the application and interpretation of the FDA Model Food Code (Ref. 5). The geographical distribution of Specialists throughout the United States allows for a broad sampling of facility types in all regions of the United States; therefore, establishments will be randomly selected to participate in the study from among all eligible establishments located within a 150-mile radius of each of the Specialists' home locations.

The pilot will include approximately 4 data collection inspections for each of the approximately 25 Specialists, or a total of 100 inspections. In order to obtain a sufficient number of observations to conduct statistically significant analysis, the FDA CFSAN Biostatistical Branch has determined, based on the previous 10-year foodborne illness risk factor study that was performed, that approximately 400 data collection inspections of each facility type are needed during the initial and subsequent data collection periods. The sample for each data collection period will be evenly distributed among Specialists. Given that participation in the study by industry is voluntary and the status of any given randomly selected establishment is subject to change, substitute establishments will be selected for each Specialist for cases where the restaurant facility is misclassified, closed, or otherwise unavailable, unable, or unwilling to participate.

Prior to conducting the data collection, Specialists will contact the state or local jurisdiction that has regulatory responsibility for conducting retail food inspections for the selected establishment. The Specialist will verify with the jurisdiction that the facility has been properly classified for the purposes of the study and is still in operation. The Specialist will also ascertain whether the selected facility is under legal notice from the state or local regulatory authority. If the selected facility is under legal notice, the Specialist will not conduct a data collection, and a substitute establishment will be used. An invitation will be extended to the state or local regulatory authority to accompany the Specialist on the data collection visit.

A standard data collection form will be used by the Specialists during each inspection. The form is divided into three sections: Section 1—Establishment Information; Section 2—Regulatory Authority Information; and Section 3—Foodborne Illness Risk Factor and Food Safety Management System Assessment. Section 3 includes three parts (parts A–C) for tabulating the Specialists' observations of the food employees' behaviors and practices in limiting contamination, proliferation, and survival of food safety hazards (part A);

the industry food safety management being implemented by the facility (part B); and the frequency of food employee hand washing (part C).

The information in Section 1—Establishment Information of the form will be obtained during an interview with the establishment owner or person in charge by the Specialist and will include a standard set of questions. The information in Section 2—Regulatory Authority Information will be obtained during an interview with the program director of the state or local jurisdiction that has regulatory responsibility for conducting inspections for the selected establishment. Section 3, part A will be collected from the Specialists' direct observations of food employee behaviors and practices. Infrequent, nonstandard questions may be asked by the Specialists if clarification is needed on the food safety procedure or practice being observed. For Section 3, part B of the form, Specialists will make direct observations and ask follow up questions of industry management to obtain information on the extent to which the food establishments have developed and implemented food safety management systems. Section 3, part C of the form will involve direct observations of hand washing frequency by the Specialists. No questions will be asked in the completion of this part of the form.

Due to the infrequent and nonstandard nature of the questions that may or may not be asked to clarify direct observations made by the Specialists in completing Section 3, parts A and C of the data collection form, only the burden associated with the information collection related to the completion of Sections 1 and 2 and Section 3, part B of the form is included in burden estimates. For each data collection, the respondents will include the person in charge of the selected facility and the program director of the respective regulatory authority. For the pilot, 25 Specialists will conduct 4 data collection inspections; thus, FDA estimates the number of respondents to be 200 (25 Specialists × 4 data collection inspections × 2 respondents per data collection). The estimate of the hours per response is based on its previous experience with collecting similar information in previous data collection efforts. We estimate that it will take each of the respondents 15 minutes (0.25 hours) to answer the questions related to Sections 1 and 2 and Section 3, part B of the form, for a total of 50 hours. FDA bases its estimate of the number of respondents during the subsequent activities (data collections) on 400 inspections being conducted in each facility type. FDA CFSAN's Biostatistical Branch has determined that 400 inspections are necessary to provide the sufficient number of observations needed to conduct a statistically significant analysis of the data. The data collections in the Restaurant Segment will occur in 2013, 2016, and 2019, and will each consist of 1,600 respondents. We estimate that it will take each respondent 15 minutes (0.25 hours) to answer the questions related to Sections 1 and 2 and Section 3, part B of the form, for a total of 400 hours. The data collections in the Institutional Foodservice Segment will occur in 2014, 2017, and 2020, and will each consist of 2,400 respondents. We estimate that it will take each respondent 15 minutes (0.25 hours) to answer the questions related to Sections 1 and 2 and Section 3, part B of the form, for a total of 600 hours. The data collections in the Retail Food Store Segment will occur in 2015, 2018, and 2021, and will each consist of 3,200 respondents. We estimate that it will take a respondent 15 minutes (0.25 hours) to answer the questions related to Sections 1 and 2 and Section 3, part B of the form, for a total of 800 hours. Thus, the total estimated burden is 5,450 hours.

TABLE 3—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity	No. of respondents	No. of responses per respondent	Total annual responses	Average burden per response	Total hours
2012 Pilot Data Collection to Practice Use of Form and Methods and Exportation of Data Into Central Repository	200	1	200	0.25 (15 minutes)	50
2013 Baseline Data Collection—Restaurant Segment (includes two facility types)	1,600	1	1,600	0.25 (15 minutes)	400
2014 Baseline Data Collection—Institutional Foodservice Segment (includes three facility types)	2,400	1	2,400	0.25 (15 minutes)	600
2015 Baseline Data Collection—Retail Food Store Segment (includes four facility types)	3,200	1	3,200	0.25 (15 minutes)	800
2016 Second Data Collection—Restaurant Segment (includes two facility types)	1,600	1	1,600	0.25 (15 minutes)	400
2017 Second Data Collection—Institutional Foodservice Segment (includes three facility types)	2,400	1	2,400	0.25 (15 minutes)	600
2018 Second Data Collection—Retail Food Store Segment (includes four facility types)	3,200	1	3,200	0.25 (15 minutes)	800
2019 Third and Final Data Collection—Restaurant Segment (includes two facility types)	1,600	1	1,600	0.25 (15 minutes)	400
2020 Third and Final Data Collection—Institutional Foodservice Segment (includes three facility types)	2,400	1	2,400	0.25 (15 minutes)	600
2021 Third and Final Data Collection—Retail Food Store Segment (includes four facility types)	3,200	1	3,200	0.25 (15 minutes)	800

TABLE 3—ESTIMATED ANNUAL REPORTING BURDEN [1]—Continued

Activity	No. of respondents	No. of responses per respondent	Total annual responses	Average burden per response	Total hours
Total					5,450

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

II. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday. (FDA has verified the Web site addresses, but we are not responsible for any subsequent changes to the Web sites after this document publishes in the **Federal Register**.)

1. Report of the FDA Retail Food Program Steering Committee. *Database of Foodborne Illness Risk Factors* (2000). Available at: *http://www.fda.gov/downloads/Food/FoodSafety/RetailFoodProtection/FoodborneIllnessandRiskFactorReduction/RetailFoodRiskFactorStudies/ucm123546.pdf.*

2. *FDA Report on the Occurrence of Foodborne Illness Risk Factors in Selected Institutional Foodservice, Restaurant, and Retail Food Store Facility Types* (2004). Available at: *http://www.fda.gov/Food/FoodSafety/RetailFoodProtection/FoodborneIllnessandRiskFactorReduction/RetailFoodRiskFactorStudies/ucm089696.htm.*

3. *FDA Report on the Occurrence of Foodborne Illness Risk Factors in Selected Institutional Foodservice, Restaurant, and Retail Food Store Facility Types* (2009). Available at: *http://www.fda.gov/downloads/Food/FoodSafety/RetailFoodProtection/FoodborneIllnessandRiskFactorReduction/RetailFoodRiskFactorStudies/UCM224682.pdf.*

4. FDA National Retail Food Team. *FDA Trend Analysis Report on the Occurrence of Foodborne Illness Risk Factors in Selected Institutional Foodservice, Restaurant, and Retail Food Store Facility Types* (1998–2008). Available at: *http://www.fda.gov/downloads/Food/FoodSafety/RetailFoodProtection/FoodborneIllnessandRiskFactorReduction/RetailFoodRiskFactorStudies/UCM224152.pdf.*

5. FDA Model Food Code. Available at: *http://www.fda.gov/Food/FoodSafety/RetailFoodProtection/FoodCode/default.htm.*

Dated: June 13, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–14850 Filed 6–18–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0001]

Dermatologic and Ophthalmic Drugs Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Dermatologic and Ophthalmic Drugs Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the Agency on FDA's regulatory issues.

Date and Time: The meeting will be held on July 26, 2012, from 8 a.m. to 5 p.m.

Location: FDA White Oak Campus, Building 31, the Great Room, White Oak Conference Center (Rm. 1503), 10903 New Hampshire Avenue, Silver Spring, MD 20993–0002. Information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *http://www.fda.gov/AdvisoryCommittees/default.htm;* under the heading ''Resources for You,'' click on ''Public Meetings at the FDA White Oak Campus.'' Please note that visitors to the White Oak Campus must enter through Building 1.

Contact Person: Yvette Waples, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., WO31–2417, Silver Spring, MD 20993–0002, (301) 796–9001, Fax: (301) 847–8533, email: *DODAC@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), and follow the prompts to the desired center or product area. Please call the Information Line for up-to-date information on this meeting. 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. Therefore, you should always check the Agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: On July 26, 2012, during the morning session, the committee will discuss a supplement to biologics license application (BLA) 125156 for LUCENTIS (ranibizumab) injection by Genentech, Inc., for the treatment of diabetic macular edema (DME). Ranibizumab injection is currently approved for the treatment of neovascular (wet) age-related macular degeneration (AMD) and macular edema following retinal vein occlusion (RVO).

During the afternoon session, the committee will discuss new biologics license application (BLA) 125422, ocriplasmin intravitreal injection (proposed tradename, Jetrea) by ThromboGenics, Inc., indicated for the treatment of symptomatic vitreomacular adhesions (sVMA) including macular hole.

FDA intends to make background materials available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before July 13, 2012. Oral presentations from the public will be scheduled between approximately 10

a.m. to 10:30 a.m., and 3 p.m. to 3:30 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before July 6, 2012. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by July 9, 2012.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA 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 Yvette Waples at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: June 12, 2012.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2012–14814 Filed 6–18–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Committee on Infant Mortality; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given of the following meeting:

Name: Advisory Committee on Infant Mortality (ACIM).

Dates and Times: July 10, 2012, 8:30 a.m.–6:00 p.m.; July 11, 2012, 8:30 a.m.–3:00 p.m.

Place: DoubleTree by Hilton Bethesda, 8120 Wisconsin Avenue, Bethesda, MD 20814, (301) 652–2000.

Status: The meeting is open to the public with attendance limited to space availability.

Purpose: The Committee provides advice and recommendations to the Secretary of Health and Human Services on the following: Department of Health and Human Services' programs that focus on reducing infant mortality and improving the health status of infants and pregnant women; and factors affecting the continuum of care with respect to maternal and child health care. It includes outcomes following childbirth; strategies to coordinate the myriad of Federal, state, local and private programs and efforts that are designed to deal with the health and social problems impacting on infant mortality; and the implementation of the Healthy Start Program and *Healthy People 2020* infant mortality objectives.

Agenda: Topics that will be discussed include the following: HRSA Update; MCHB Update; Healthy Start Program Update; and, Update on HHS National Strategy to Address Infant Mortality. Proposed agenda items are subject to change as priorities dictate.

Time will be provided for public comments limited to 5 minutes each. Comments are to be submitted in writing no later than 5:00 p.m. ET on June 26, 2012.

For Further Information Contact: Anyone requiring information regarding the Committee should contact Michael C. Lu, M.D., M.P.H., Executive Secretary, ACIM, Health Resources and Services Administration, Room 18–05, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, Telephone: (301) 443–2170.

Individuals who are submitting public comments or who have questions regarding the meeting and location should contact David S. de la Cruz, Ph.D., M.P.H., HRSA, Maternal and Child Health Bureau, telephone: (301) 443–0543, email: *David.delaCruz@hrsa.hhs.gov.*

Dated: June 12, 2012.

Reva Harris,

Acting Director, Division of Policy and Information Coordination.

[FR Doc. 2012–14825 Filed 6–18–12; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Nursing Workforce Diversity Invitational Summit—"Nursing in 3D: Workforce Diversity, Health Disparities, and Social Determinants of Health"

AGENCY: Department of Health and Human Services, Health Resources and Services Administration (HRSA).

ACTION: Notice of meeting.

SUMMARY: HRSA's Bureau of Health Professions, Division of Nursing, will host an invitational summit that focuses on Nursing Workforce Diversity (NWD), Health Disparities, and the Social Determinants of Health. The goal of this summit is to convene experts, thought leaders, and key workforce diversity stakeholders to identify the full range of academic and health system factors, as well as the social, economic, political, and environmental determinants that influence our ability to diversify the nursing workforce. The goal of the summit is to utilize the social determinants of health frameworks to examine the impact of workforce diversity on health disparities. These activities will inform a broader and formal evaluation of the NWD program.

DATES: Meetings will be held from 7:30 a.m. to 5:00 p.m. on August 16, 2012, and from 8:00 a.m. to 1:00 p.m. on August 17, 2012.

ADDRESSES: Meetings will be held at the Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: For more information, please contact Kristen Hansen, MHSA, RN, NE–BC, Nurse Consultant, Nursing Practice and Workforce Development Branch, Division of Nursing, Bureau of Health Professions, Health Resources and Services Administration, 5600 Fishers Lane, Parklawn Building, Room 9–61, Rockville, MD 20857; telephone: 301.443.2796; email: *KHansen@hrsa.gov*

SUPPLEMENTARY INFORMATION:

Status: The summit will be open to the public. Seating is on a first-come, first-serve basis.

Purpose: The purpose of the summit is to identify the full range of academic and health system factors, as well as the social, economic, political, and economic determinants that influence our ability to diversify the nursing workforce. The goal of the summit is to utilize the social determinants of health framework to examine the impact of

workforce diversity on health disparities.

Agenda: The summit dates are Thursday and Friday, August 16–17, 2012. The agenda will include presentations from experts on Nursing Workforce Diversity, Health Disparities, and Social Determinants of Health. Panel discussions will address ways to integrate the concepts of workforce diversity, health disparities, and social determinants of health into an innovative HRSA grant portfolio.

Requests from the public to make oral comments or to provide written comments to the Committee should be sent to Kristen Hansen, at the contact address above, at least 10 business days prior August 16, 2012. The summit will be open to the public as indicated above, but registration must be completed and attendance will be limited to the space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the contact person listed above at least 10 business days prior to August 16, 2012.

Dated: June 12, 2012.

Mary K. Wakefield,

Administrator, Health Resources and Services Administration.

[FR Doc. 2012–14823 Filed 6–18–12; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Committee on Training in Primary Care Medicine and Dentistry; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given of the following meeting:

Name: Advisory Committee on Training in Primary Care, Medicine and Dentistry (ACTPCMD).

Dates and Times: July 19, 2012, 8:30 a.m.–4:30 p.m. July 20, 2012, 8:00 a.m.–3:00 p.m.

Place: Hilton Washington DC/Rockville, Executive Meeting Center, 1750 Rockville Pike, Rockville, MD 20852.

SUPPLEMENTARY INFORMATION:

Status: The meeting will be open to the public.

Purpose: The ACTPCMD provides advice and recommendations on a broad range of issues, as authorized by sections 222 and 749 of the Public Health Service Act, as amended by the Affordable Care Act.

At this meeting the ACTPCMD will continue work on a report on inter-professional education of primary care providers. Some meeting time will be allotted to performance measures of grant programs over which the ACTPCMD has legislative authority and a national faculty development initiative. The ACTPCMD's reports are submitted to the Secretary of the Department of Health and Human Services; the Committee on Health, Education, Labor and Pensions of the Senate; and the Committee on Energy and Commerce of the House of Representatives.

Agenda: The meeting on Thursday, July 19, 2012, will begin with opening comments from the Health Resources and Services Administration's (HRSA) senior officials. Presentations will be given by experts in family medicine, internal medicine, and pediatrics on a proposal to create a national faculty development initiative. The purpose of this HRSA-supported program is to train clinical educators on methods to teach and assess trainee competencies for twenty-first century practice. Following the presentations, time will be provided for discussion and comment by ACTPCMD members and for public comment. Next on the agenda, elections will be held for chair and two vice chairs. The ACTPCMD will continue work on its tenth report on inter-professional training of primary care providers with an update by the report's writing group, followed by small group assignments. At the end of the morning, new and current members will receive ethics training in a session closed to the public. The afternoon session will be devoted to small and large group work on the tenth report.

The meeting on July 20, 2012, will begin with an update on the Division of Medicine and Dentistry's development of performance measures and methods of longitudinal evaluation for Public Health Service Act Title VII, section 747 and 748 programs, after which the members will have an opportunity to provide comment. Members will continue work on the tenth report in both small and large groups. The afternoon session will include an update and an opportunity to make comment on grant activities within the Primary Care Medical Education Branch of HRSA's Bureau of Health Professions' Division of Medicine and Dentistry. The ACTPCMD will also plan for the next ACTPCMD webinar meeting in the fall, determine report work to be done in the interim, and discuss a potential topic for the next report. An opportunity will be provided for public comment at the end of each day.

FOR FURTHER INFORMATION CONTACT: For further information regarding ACTPCMD, to obtain a roster of members, minutes of the meeting, or other relevant information, contact Jerilyn K. Glass, M.D., Ph.D., Division of Medicine and Dentistry, Bureau of Health Professions, Health Resources and Services Administration, Room 9A–27, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone (301) 443–7271. Information can also be found at the following Web site: *http://www.hrsa.gov/advisorycommittees/bhpradvisory/actpcmd/index.html*.

Dated: June 12, 2012.

Reva Harris,

Acting Director, Division of Policy Review and Coordination.

[FR Doc. 2012–14822 Filed 6–18–12; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Office of Clinical and Preventive Services Funding Opportunity: National HIV Program for Enhanced HIV/AIDS Screening and Engagement in Care

Announcement Type: New.

Funding Announcement Number: HHS–2012–IHS–OCPS–HIV–0001.

Catalog of Federal Domestic Assistance Number: 93.933.

DATES: *Key Dates:*

Application Deadline Date: July 16, 2012.

Review Date: July 30, 2012.

Earliest Anticipated Start Date: September 1, 2012.

Signed Tribal Resolutions Due Date: July 30, 2012.

I. Funding Opportunity Description

Statutory Authority

The Indian Health Service (IHS) is accepting competitive cooperative agreement applications for the Office of Clinical and Preventive Services: National HIV Program for Enhanced HIV/AIDS Screening and Engagement in Care. This program is authorized under: the Snyder Act, 25 U.S.C. 13; the Transfer Act 42 U.S.C. 2001; and the Public Health Service Act, as amended, 42 U.S.C. 241. This program is described in the Catalog of Federal Domestic Assistance under 93.933.

Background

The IHS Office of Clinical and Preventive Services (OCPS), National Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome (HIV/AIDS) Program serves as the primary source for national advocacy, policy development, budget development, and allocation for clinical, preventive, and public health HIV/AIDS programs for the IHS, Area Offices, and Service Units. It provides leadership in articulating the clinical, preventive, and public health needs of American Indian/Alaska Native (AI/AN) communities and developing, managing, and administering program functions related to HIV/AIDS.

Purpose

The purpose of this IHS cooperative agreement is to meet community needs for the enhancement of HIV/AIDS testing activities and the provision of HIV/AIDS-related services among AI/AN people. Such programs are necessary to reduce the incidence of HIV/AIDS and improve quality of life for People Living with HIV/AIDS (PLWHA). The main goals are to: increase the number of AI/AN with awareness of his/her HIV status; and, improve engagement and retention in care among PLWHA. Awardee activities will seek to: increase access to HIV related services, reduce stigma, make HIV testing routine, and improve engagement in care. Emphasis should be placed on increasing routine HIV screening for adults as per 2006 Centers for Disease Control and Prevention (CDC) guidelines, provide pre- and post-test counseling (when indicated), and developing or deploying strategies for engaging PLWHA in appropriate, culturally responsive HIV-related care.

II. Award Information

Type of Award

Cooperative Agreement.

Estimated Funds Available

The total amount of funding identified for the current fiscal year FY 2012 is approximately $180,000. Individual award amounts are anticipated to be between $60,000 and $90,000. Competing and continuation awards issued under this announcement are subject to the availability of funds. In the absence of funding, the IHS is under no obligation to make awards that are selected for funding under this announcement.

Anticipated Number of Awards

Approximately two awards will be issued under this program announcement.

Project Period

The project period will be for five years and will run consecutively from September 1, 2012 to August 31, 2017.

Cooperative Agreement

In the Department of Health and Human Services (HHS), a cooperative agreement is administered under the same policies as a grant. The funding agency (IHS) is required to have substantial programmatic involvement in the project during the entire award segment. Below is a detailed description of the level of involvement required for both IHS and the grantee. IHS will be responsible for activities listed under section A and the grantee will be responsible for activities listed under section B as stated:

Substantial Involvement Description for Cooperative Agreement

A. IHS Programmatic Involvement

Provide funded organizations with ongoing consultation and technical assistance to plan, implement, and evaluate each component of the comprehensive program as described under Recipient Activities above. Consultation and technical assistance will include, but not be limited to, the following areas:

(a) Interpretation of current scientific literature related to epidemiology, statistics, surveillance, Healthy People 2020 Objectives, and other HIV disease control activities;

(b) Design and implementation of program components (including, but not limited to, program implementation methods, surveillance, epidemiologic analysis, outbreak investigation, development of programmatic evaluation, development of disease control programs, and coordination of activities);

(c) Program management best practices;

(d) Conduct visits to assess program progress and mutually resolve problems, travel funding permitted and if needed; and

(e) Coordinate these activities with all IHS HIV activities on a national basis.

B. Grantee Cooperative Agreement Award Activities

- Assist AI/AN communities and Tribal organizations in increasing the number of AI/ANs with awareness of his/her HIV status. The grantee will assist and facilitate reporting of HIV diagnoses to local and State public health authorities in the region as required under existing public health statutes.
- Test at least one previously untested (not tested in the prior five years) patient for every $75.00 in cooperative agreement funds received, inclusive of all ancillary and indirect costs.
- Collaborate with national IHS programs by providing standardized, anonymous HIV surveillance data on a quarterly basis, and in identifying and documenting best practices for implementing routine HIV testing.
- Participate in the development of systems for sharing, improving, and disseminating aggregate HIV data at a national level for purposes of advocacy for AI/AN communities, Government Performance Results Act of 1993 (GPRA), Healthy People 2020 and other national-level activities.
- Develop or deploy services for PLWHA to engage or re-engage (link) them into appropriate medical care, including treatment and prevention services for comorbid conditions.
- Provide a three page mid-year report and no more than a ten page summary annual report at the end of each project year. The report should establish the impact and outcomes of various methods of implementing routine screening tried during the funding period.

III. Eligibility Information

1. Eligibility

This is a full competition.

Eligible Applicants must be one of the following:

i. An Indian Tribe as defined by 25 U.S.C. 1603(14);

ii. A Tribal organization as defined by 25 U.S.C. 1603(26); or

iii. An Urban Indian organization as defined by 25 U.S.C. 1603(29).

Applicants must provide proof of non-profit status with the application, e.g. 501(c)(3).

Note: Please refer to Section IV.2 (Application and Submission Information/Subsection 2, Content and Form of Application Submission) for additional poof of applicant status documents required such as tribal resolutions, proof of non-profit status, etc.

2. Cost Sharing or Matching

The Indian Health Service does not require matching funds or cost sharing for grants or cooperative agreements.

3. Other Requirements

If application budgets exceed the highest dollar amount outlined under

the ''Estimated Funds Available'' section within this funding announcement, your application will be considered ineligible and will not be reviewed for further consideration. IHS will not return your application to you. You will be notified by email or certified mail by the Division of Grants Management of this decision.

Tribal Resolution

Tribal Resolution—A tribal resolution is not required for Urban Indian organization applicants, however all applying Urban Indian organizations must provide proof of non-profit status and a letter from the Board of Directors authorizing the application. Board of Directors letters are required to accompany the application submission. This can be attached to the electronic application. An Indian Tribe that is proposing a project affecting another Indian Tribe must include resolutions from all affected Tribes to be served. Applications by Tribal organizations will not require a specific Tribal resolution if the current Tribal resolution(s) under which they operate would encompass the proposed grant activities. Draft resolutions are acceptable in lieu of an official resolution. However, an official signed Tribal resolution must be received by the Division of Grants Management (DGM) prior to the beginning of the Objective Review. If an official signed resolution is not received by July 30, 2012, the application will be considered incomplete, ineligible for review, and returned to the applicant without further consideration.

Proof of Non-Profit Status

Organizations claiming non-profit status must submit proof. A copy of the 501(c)(3) Certificate must be received with your application submission by the deadline due date of July 16, 2012.

Letters of Intent will not be required under this funding opportunity announcement.

Applicants submitting any of the above additional documentation after the initial application submission due date are required to ensure the information was received by the IHS by obtaining documentation confirming delivery (i.e. FedEx tracking, postal return receipt, etc.).

IV. Application and Submission Information

1. Obtaining Application Materials

The application package and detailed instructions for this announcement can be found at *http://www.Grants.gov* or *http://www.ihs.gov/NonMedicalPrograms/gogp/index.cfm?module=gogp_funding.*

Questions regarding the electronic application process may be directed to Paul Gettys at (301) 443–2114.

2. Content and Form Application Submission

The applicant must include the project narrative as an attachment to the application package. Mandatory documents for all applicants include:

- Table of contents.
- Abstract (one page) summarizing the project.
- Application forms:
  - SF–424, Application for Federal Assistance.
  - SF–424A, Budget Information—Non-Construction Programs.
  - SF–424B, Assurances—Non-Construction Programs.
- Budget Justification and Narrative (must be single spaced and not exceed 5 pages).
- Project Narrative (must not exceed 15 pages).
  - Background information on the Tribe.
  - Proposed scope of work, objectives, and activities that provide a description of what will be accomplished, including a one-page Timeframe Chart.
- Tribal Resolution or Tribal Letter of Support (Tribal Organizations only).
- Letter of Support from Organization's Board of Directors.
- 501(c)(3) Certificate (if applicable).
- Biographical sketches for all Key Personnel.
- Contractor/Consultant resumes or qualifications and scope of work.
- Disclosure of Lobbying Activities (SF–LLL).
- Copy of current Negotiated Indirect Cost rate (IDC) agreement (required) in order to receive IDC.
- Organizational Chart (optional).
- Documentation of current OMB A–133 required Financial Audit (if applicable).

  Acceptable forms of documentation include:
  - Email confirmation from Federal Audit Clearinghouse (FAC) that audits were submitted; or
  - Face sheets from audit reports. These can be found on the FAC Web site: *http://harvester.census.gov/sac/dissem/accessoptions.html?submit=Go+To+Database.*

Public Policy Requirements

All Federal-wide public policies apply to IHS grants with exception of the Discrimination policy.

Requirements for Project and Budget Narratives

A. Project Narrative: This narrative should be a separate Word document that is no longer than 15 pages and must: Be single-spaced, be type written, have consecutively numbered pages, use black type not smaller than 12 characters per one inch, and be printed on one side only of standard size 8–1/2″ x 11″ paper.

Be sure to succinctly answer all questions listed under the evaluation criteria (refer to Section V.1, Evaluation criteria in this announcement) and place all responses and required information in the correct section (noted below), or they will not be considered or scored. These narratives will assist the ORC in becoming more familiar with the grantee's activities and accomplishments prior to this possible grant award. If the narrative exceeds the page limit, only the first 15 pages will be reviewed. The 15-page limit for the narrative does not include the work plan, standard forms, Tribal resolutions, table of contents, budget, budget justifications, narratives, and/or other appendix items.

There are three parts to the narrative: Part A—Program Information; Part B—Program Planning and Evaluation; and Part C—Program Report. See below for additional details about what must be included in the narrative.

Part A: Program Information: 3 pages

Section 1: Needs.

Describe how the Indian Tribe has determined it has the administrative infrastructure to support activities to increase HIV/AIDS screening and assist individuals with accessing care. Explain any previous planning activities the Tribe has completed relevant to this or similar goals.

Part B: Program Planning and Evaluation: 5 pages

Section 1: Program Plans.

Describe fully and clearly the direction the Indian Tribe plans to take in the implementation of this program, including how the Tribe plans to demonstrate improved health and services to the community it serves. Include proposed timelines. The total timeline should be no longer than one page.

Section 2: Program Evaluation.

Describe fully and clearly the improvements that will be made by the awardee to manage the program and identify the anticipated or expected benefits for the Tribe or AI/AN people served.

Part C: Program Report: 7 pages

Section 1: Describe major Accomplishments.

Please identify and describe significant program achievements associated with the delivery of quality health services or outreach services in the past 24 months in implementing previous grants, cooperative agreements, or other related activities. Provide a comparison of the actual accomplishments to the goals established for the project period, or if applicable, provide justification for the lack of progress.

Section 2: Describe major Activities over the last 24 months.

Please identify and summarize recent major health related project activities of the work done during the project period.

B. Budget Narrative: This narrative must describe the budget requested and match the scope of work described the project narrative. The page limitation should not exceed 5 pages.

3. Submission Dates and Times

Applications must be submitted electronically through Grants.gov by 12:00 a.m., midnight Eastern Daylight Time (EDT) on July 16, 2012. Any application received after the application deadline will not be accepted for processing, nor will it be given further consideration for funding. You will be notified by the Division of Grants Management via email or certified mail of this decision.

If technical challenges arise and assistance is required with the electronic application process, contact Grants.gov Customer Support via email to *support@grants.gov* or at (800) 518–4726. Customer Support is available to address questions 24 hours a day, 7 days a week (except on Federal holidays). If problems persist, contact Paul Gettys, Division of Grants Management (DGM) (*Paul.Gettys@ihs.gov*) at (301) 443–5204. Please be sure to contact Mr. Gettys at least ten days prior to the application deadline. Please do not contact the DGM until you have received a Grants.gov tracking number. In the event you are not able to obtain a tracking number, call the DGM as soon as possible.

If an applicant needs to submit a paper application instead of submitting electronically via Grants.gov, prior approval must be requested and obtained (see Section IV.6 below for additional information). The waiver must be documented in writing (emails are acceptable), before submitting a paper application. A copy of the written approval must be submitted along with the hardcopy that is mailed to the DGM. Once your waiver request has been approved, you will receive a confirmation of approval and the mailing address to submit your application. Paper applications that are submitted without a waiver from the Acting Director of DGM will not be reviewed or considered further for funding. You will be notified via email or certified email of this decision by the Grants Management Officer of DGM. Paper applications must be received by the DGM no later than 5:00 p.m., EDT, on the application deadline date. Late applications will not be accepted for processing or considered for funding.

Other Important Due Dates:

Proof of Non-Profit Status: Due date July 30, 2012.

Tribal Resolution: Due date July 30, 2012.

4. Intergovernmental Review

Executive Order 12372 requiring intergovernmental review is not applicable to this program.

5. Funding Restrictions

- Pre-award costs are not allowable.
- The available funds are inclusive of direct and appropriate indirect costs.
- Only one grant/cooperative agreement will be awarded per applicant.
- IHS will not acknowledge receipt of applications.

6. Electronic Submission Requirements

All applications must be submitted electronically. Please use the *http://www.Grants.gov* Web site to submit an application electronically and select the ''Find Grant Opportunities'' link on the homepage. Download a copy of the application package, complete it offline, and then upload and submit the completed application via the *http://www.Grants.gov* Web site. Electronic copies of the application may not be submitted as attachments to email messages addressed to IHS employees or offices.

Applicants that receive a waiver to submit paper application documents must follow the rules and timelines that are noted below. The applicant must seek assistance at least ten days prior to the application deadline.

Applicants that do not adhere to the timelines for Central Contractor Registry (CCR) and/or *http://www.Grants.gov* registration or that fail to request timely assistance with technical issues will not be considered for a waiver to submit a paper application.

Please be aware of the following:

- Please search for the application package in *http://www.Grants.gov* by entering the CFDA number or the Funding Opportunity Number. Both numbers are located in the header of this announcement.
- If you experience technical challenges while submitting your application electronically, please contact Grants.gov Support directly at: *support@grants.gov* or (800) 518–4726. Customer Support is available to address questions 24 hours a day, 7 days a week (except on Federal holidays).
- Upon contacting Grants.gov, obtain a tracking number as proof of contact. The tracking number is helpful if there are technical issues that cannot be resolved and waiver from the agency must be obtained.
- If it is determined that a waiver is needed, you must submit a request in writing (emails are acceptable) to *GrantsPolicy@ihs.gov* with a copy to *Tammy.Bagley@ihs.gov*. Please include a clear justification for the need to deviate from our standard electronic submission process.
- If the waiver is approved, the application should be sent directly to the DGM by the deadline date of July 16, 2012.
- Applicants are strongly encouraged not to wait until the deadline date to begin the application process through Grants.gov as the registration process for CCR and Grants.gov could take up to fifteen working days.
- Please use the optional attachment feature in Grants.gov to attach additional documentation that may be requested by the DGM.
- All applicants must comply with any page limitation requirements described in this Funding Announcement.
- After you electronically submit your application, you will receive an automatic acknowledgment from Grants.gov that contains a Grants.gov tracking number. The DGM will download your application from Grants.gov and provide necessary copies to the appropriate agency officials. Neither the DGM nor the National HIV/AIDS Program will notify applicants that the application has been received.
- Email applications will not be accepted under this announcement.

Dun and Bradstreet (D&B) Data Universal Numbering System (DUNS)

All IHS applicants and grantee organizations are required to obtain a DUNS number and maintain an active registration in the CCR database. The DUNS number is a unique 9-digit identification number provided by D&B which uniquely identifies your entity. The DUNS number is site specific; therefore, each distinct performance site may be assigned a DUNS number. Obtaining a DUNS number is easy, and

there is no charge. To obtain a DUNS number, you may access it through *http://fedgov.dnb.com/webform,* or to expedite the process, call (866) 705–5711.

Effective October 1, 2010, all HHS recipients were asked to start reporting information on subawards, as required by the Federal Funding Accountability and Transparency Act of 2006, as amended (''Transparency Act''). Accordingly, all IHS grantees must notify potential first-tier subrecipients that no entity may receive a first-tier subaward unless the entity has provided its DUNS number to the prime grantee organization. This requirement ensures the use of a universal identifier to enhance the quality of information available to the public pursuant to the ''Transparency Act.''

Central Contractor Registry (CCR)

Organizations that have not registered with CCR will need to obtain a DUNS number first and then access the CCR online registration through the CCR home page at *https://www.bpn.gov/ccr/default.aspx* (U.S. organizations will also need to provide an Employer Identification Number from the Internal Revenue Service that may take an additional 2–5 weeks to become active). Completing and submitting the registration takes approximately one hour to complete and your CCR registration will take 3–5 business days to process. Registration with the CCR is free of charge. Applicants may register online at *https://www.bpn.gov/ccrupdate/NewRegistration.aspx.*

Additional information on implementing the Transparency Act, including the specific requirements for DUNS and CCR, can be found on the IHS Grants Management, Grants Policy Web site: *http://www.ihs.gov/NonMedicalPrograms/gogp/index.cfm?module=gogp_policy_topics.*

V. Application Review Information

The instructions for preparing the application narrative also constitute the evaluation criteria for reviewing and scoring the application. Weights assigned to each section are noted in parentheses. The 15 page narrative should include only the first year of activities; information for multi-year projects should be included as an appendix. See ''Multi-year Project Requirements'' at the end of this section for more information. The narrative section should be written in a manner that is clear to outside reviewers unfamiliar with prior related activities of the applicant. It should be well organized, succinct, and contain all information necessary for reviewers to understand the project fully. Points will be assigned to each evaluation criteria adding up to a total of 100 points. A minimum score of 60 points is required for funding. Points are assigned as follows:

1. Criteria

A. Introduction and Need for Assistance (15 Points)

a. Define the project target population, identify unique characteristics, and describe the impact of HIV on the population.

b. Describe the gaps/barriers in HIV testing for the population.

c. Describe challenges to providing HIV care in the population.

d. Describe the cultural or sociological barriers of the target population in seeking or accessing services.

B. Project Objective(s), Work Plan and Approach (40 points)

a. Objectives

i. Describe the objectives of the program and how they will increase HIV screening in (self-reported) previously untested clients.

ii. Describe how the objectives of the program will improve linkages to care for PLWHA in the community.

b. Work Plan

i. Identify the proposed program activities and explain how these activities will increase and sustain HIV screening.

ii. Describe policy and procedure changes anticipated for testing implementation that include:

1. Support of CDC 2006 Revised Testing Recommendations.

2. Increasing community awareness of new HIV testing and support availability. Include activities meant to address and reduce stigma.

3. Reaching a wide range of persons including diverse age and sex categories. If specific groups will receive specific outreach, explain why and how.

4. Provide a clear timeline with quarterly milestones for project activities.

c. Approach

i. Describe how the program will ensure that clients receive their test results, particularly clients who test positive.

ii. Describe how the program will ensure that individuals with initial HIV positive test results will receive confirmatory tests. If you do not provide confirmatory HIV testing, you must provide a letter of intent or Memorandum of Understanding with an external laboratory documenting the process through which initial HIV positive test results will be confirmed.

iii. Describe the program strategies to linking seropositive patients to care and effectively engaging them in care.

iv. Describe the program procedures for reporting seropositive patients to the appropriate State(s).

v. Describe the program quality assurance strategies.

vi. Describe how the program will ensure client confidentiality.

vii. Describe how the program will ensure that services are culturally sensitive and relevant.

viii. Describe how the program will streamline procedures so as to reduce the overall cost per test administered.

C. Program Evaluation (20 points)

a. Grantee shall provide a plan for monitoring and evaluating implementation of HIV tests and identify best practices related to engagement and retention in care.

b. Evaluation planning must include reporting of the following:

i. Facility-level information on gender, age, and race/ethnicity of persons tested, with no personal identifiers.

ii. Number of HIV tests performed.

iii. Number of HIV tests performed in patients who self-report that they have previously been untested (in the last 5 years).

iv. Number of positive tests.

v. Number of positive tests confirmed.

vi. Number of newly diagnosed HIV infections.

vii. Number of persons with positive tests who receive their results.

viii. Number of persons with positive tests who are actively linked to HIV care, as defined by attendance of at least one medical appointment within three months of diagnosis.

ix. Measures in place to protect confidentiality.

c. Optional Measures:

i. Number of clients refusing testing due to previous knowledge of status.

ii. Sustainability measures undertaken to continue testing following the end of this funding.

D. Organizational Capabilities, Key Personnel and Qualifications (20 points)

This section outlines the broader capacity of the organization to complete the project outlined in the work plan. It includes the identification of personnel responsible for completing tasks and the chain of responsibility for successful completion of the project outlined in the work plan.

a. Describe the organizational structure.

b. Describe what equipment (i.e., phone, Web sites, etc.) and facility space (i.e., office space) will be available for

use during the proposed project. Include information about any equipment not currently available that will be purchased throughout the agreement.

c. List key personnel who will work on the project.

i. Identify staffing plan, existing personnel and new program staff to be hired.

ii. In the appendix, include position descriptions and resumes for all key personnel. Position descriptions should clearly describe each position and duties indicating desired qualifications, experience, and requirements related to the proposed project and how they will be supervised. Resumes must indicate that the proposed staff member is qualified to carry out the proposed project activities and who will determine if the work of a contractor is acceptable.

iii. If the project requires additional personnel beyond those covered by the supplemental grant, (i.e., IT support, volunteers, interviewers, etc.), note these and address how these positions will be filled and, if funds are required, the source of these funds.

iv. If personnel are to be only partially funded by this supplemental grant, indicate the percentage of time to be allocated to this project and identify the resources used to fund the remainder of the individual's salary.

d. Capability.

i. Briefly describe the facility and user population.

ii. Describe the organization's ability to conduct this initiative through: Linkages to treatment and care: partnerships established to refer out of the facility as needed for specialized treatment, care, confirmatory testing (if applicable) and counseling services.

E. Categorical Budget and Budget Justification (5 points)

Provide a clear estimate of the project program costs and justification for expenses for the entire grant period. The budget and budget justification should be consistent with the tasks identified in the work plan. The budget focus should be on increasing and sustaining HIV testing services as well as supporting entry and retention into care.

a. A categorical budget (Form SF 424A, Budget Information Non-Construction Programs) completing each of the budget periods is requested.

b. Budget narrative that serves as justification for all costs, explaining why each line item is necessary or relevant to the proposed project. Include sufficient details to facilitate the determination of allowable costs.

c. Budget justifications should include a brief narrative for the second year.

d. If indirect costs are claimed, indicate and apply the current negotiated rate to the budget. Include a copy of the rate agreement in the appendix.

Multi-Year Project Requirements. Projects requiring second, third, fourth, and/or fifth year must include a brief project narrative and budget (one additional page per year) addressing the developmental plans for each additional year of the project.

Appendix Items

- Work plan, logic model and/or time line for proposed objectives.
- Position descriptions for key staff.
- Resumes of key staff that reflect current duties.
- Consultant or contractor proposed scope of work and letter of commitment (if applicable).
- Current Indirect Cost Agreement.
- Organizational chart(s) highlighting proposed project staff and their supervisors as well as other key contacts within the organization and key community contacts.
- Map of area to benefit project identifying where target population resides and project location(s). Include trails, parks, schools, bike paths and other such applicable information.
- Additional documents to support narrative (i.e. data tables, key news articles, etc.).

2. Review and Selection

Each application will be prescreened by the DGM staff for eligibility and completeness as outlined in the funding announcement. Incomplete applications and applications that are non-responsive to the eligibility criteria will not be referred to the Objective Review Committee (ORC). Applicants will be notified by DGM, via email or letter, to outline minor missing components (i.e., signature on the SF–424, audit documentation, key contact form) needed for an otherwise complete application. All missing documents must be sent to DGM on or before the due date listed in the email of notification of missing documents required.

To obtain a minimum score for funding by the Objective Review Committee, applicants must address all program requirements and provide all required documentation. Applicants that receive less than a minimum score will be considered to be ''Disapproved'' and will be informed via email or regular mail by the IHS Program Office of their application's deficiencies. A summary statement outlining the strengths and weaknesses of the application will be provided to each disapproved applicant. The summary statement will be sent to the Authorized Organizational Representative (AOR) that is identified on the face page (SF–424), of the application within 60 days of the completion of the Objective Review.

VI. Award Administration Information

1. Award Notices

The Notice of Award (NoA) is a legally binding document signed by the Grants Management Officer and serves as the official notification of the grant award. The (NoA) will be initiated by the DGM and will be mailed via postal mail or emailed to each entity that is approved for funding under this announcement. The NoA is the authorizing document for which funds are dispersed to the approved entities and reflects the amount of Federal funds awarded, the purpose of the grant, the terms and conditions of the award, the effective date of the award, and the budget/project period.

Disapproved Applicants

Applicants who received a score less than the recommended funding level for approval, 60 and were deemed to be disapproved by the Objective Review Committee, will receive an Executive Summary Statement from the IHS Program Office within 30 days of the conclusion of the ORC outlining the weaknesses and strengths of their application submitted. The IHS program office will also provide additional contact information as needed to address questions and concerns as well as provide technical assistance if desired.

Approved But Unfunded Applicants

Approved but unfunded applicants that met the minimum scoring range and were deemed by the ORC to be ''Approved'', but were not funded due to lack of funding, will have their applications held by DGM for a period of 1 year. If additional funding becomes available during the course of FY 2012, the approved application maybe re-considered by the awarding program office for possible funding. You will also receive an Executive Summary Statement from the IHS Program Office within 30 days of the conclusion of the ORC.

Note: Any correspondence other than the official NoA signed by an IHS Grants Management Official announcing to the Project Director that an award has been made to their organization is not an authorization to implement their program on behalf of IHS.

2. Administrative Requirements

Cooperative agreements are administered in accordance with the following regulations, policies, and OMB cost principles:

A. The criteria as outlined in this Program Announcement.

B. Administrative Regulations for Grants:

- 45 CFR part 92, Uniform Administrative Requirements for Grants and Cooperative Agreements to State, Local and Tribal Governments.
- 45 CFR, part 74, Uniform Administrative Requirements for Awards and Subawards to Institutions of Higher Education, Hospitals, and other Non-profit Organizations.

C. Grants Policy:

- HHS Grants Policy Statement, Revised 01/07.

D. Cost Principles:

- Title 2: Grant and Agreements, Part 225—Cost Principles for State, Local, and Indian Tribal Governments (OMB Circular A–87).
- Title 2: Grant and Agreements, Part 230—Cost Principles for Non-Profit Organizations (OMB Circular A–122).

E. Audit Requirements:

- OMB Circular A–133, Audits of States, Local Governments, and Non-profit Organizations.

3. Indirect Costs

This section applies to all grant recipients that request reimbursement of indirect costs (IDC) in their grant application. In accordance with HHS Grants Policy Statement, Part II–27, IHS requires applicants to obtain a current IDC rate agreement prior to award. The rate agreement must be prepared in accordance with the applicable cost principles and guidance as provided by the cognizant agency or office. A current rate covers the applicable grant activities under the current award's budget period. If the current rate is not on file with the DGM at the time of award, the IDC portion of the budget will be restricted. The restrictions remain in place until the current rate is provided to the DGM.

Generally, IDC rates for IHS grantees are negotiated with the Division of Cost Allocation (DCA) *http://rates.psc.gov/* and the Department of Interior (National Business Center) *http://www.aqd.nbc.gov/services/ICS.aspx.* If your organization has questions regarding the indirect cost policy, please call (301) 443–5204 to request assistance.

4. Reporting Requirements

Grantees must submit required reports consistent with the applicable deadlines. Failure to submit required reports within the time allowed may result in suspension or termination of an active grant, withholding of additional awards for the project, or other enforcement actions such as withholding of payments or converting to the reimbursement method of payment. Continued failure to submit required reports may result in one or both of the following: (1) The imposition of special award provisions; and (2) the non-funding or non-award of other eligible projects or activities. This requirement applies whether the delinquency is attributable to the failure of the grantee organization or the individual responsible for preparation of the reports.

The reporting requirements for this program are noted below.

A. Progress Reports

Program progress reports are required semi annually, within 30 days after the budget period ends. These reports must include a brief comparison of actual accomplishments to the goals established for the period, or, if applicable, provide sound justification for the lack of progress, and other pertinent information as required. A final report must be submitted within 90 days of expiration of the budget/project period.

B. Financial Reports

Federal Financial Report FFR (SF–425), Cash Transaction Reports are due 30 days after the close of every calendar quarter to the Division of Payment Management, HHS at: *http://www.dpm.psc.gov.* It is recommended that you also send a copy of your FFR (SF–425) report to your Grants Management Specialist. Failure to submit timely reports may cause a disruption in timely payments to your organization.

Grantees are responsible and accountable for accurate information being reported on all required reports: the Progress Reports and Federal Financial Report.

C. Federal Subaward Reporting System (FSRS)

This award may be subject to the Transparency Act subaward and executive compensation reporting requirements of 2 CFR part 170.

The Federal Funding Accountability and Transparency Act of 2006, as amended (''Transparency Act''), requires the Office of Management and Budget (OMB) to establish a single searchable database, accessible to the public, with information on financial assistance awards made by Federal agencies. The Transparency Act also includes a requirement for recipients of Federal grants to report information about first-tier subawards and executive compensation under Federal assistance awards.

Effective October 1, 2010 IHS implemented a Term of Award into all IHS Standard Terms and Conditions, NoAs and funding announcements regarding this requirement. This IHS Term of Award is applicable to all IHS grant and cooperative agreements issued on or after October 1, 2010, with a $25,000 subaward obligation dollar threshold met for any specific reporting period. Additionally, all new (discretionary) IHS awards (where the project period is made up of more than one budget period) and where: (1) the project period start date was October 1, 2010 or after and (2) the primary awardee will have a $25,000 subaward obligation dollar threshold during any specific reporting period will be required to conduct address the FSRS reporting. For the full IHS award term implementing this requirement and additional award applicability information, visit the Grants Management Grants Policy Web site at: *http://www.ihs.gov/NonMedicalPrograms/gogp/index.cfm?module=gogp_policy_topics.* Telecommunication for the hearing impaired is available at: TTY (301) 443–6394.

VII. Agency Contacts

1. Questions on the programmatic issues may be directed to: Lisa C. Neel, MPH, HIV Program Analyst, 801 Thompson Avenue, Suite 200, Rockville, MD 20852, 301–443–4305, *Lisa.neel@ihs.gov.*

2. Questions on grants management and fiscal matters may be directed to: Andrew Diggs, Grants Management Officer, 801 Thompson Avenue, TMP Suite 360, Rockville, MD 20852, 301–443–2262, *Andrew.diggs@ihs.gov.*

VIII. Other Information

The Public Health Service strongly encourages all cooperative agreement and contract recipients to provide a smoke-free workplace and promote the non-use of all tobacco products. In addition, Public Law 103–227, the Pro-Children Act of 1994, prohibits smoking in certain facilities (or in some cases, any portion of the facility) in which regular or routine education, library, day care, health care, or early childhood development services are provided to children. This is consistent with the HHS mission to protect and advance the physical and mental health of the American people.

Dated: June 4, 2012.

Yvette Roubideaux,

Director, Indian Health Service.

[FR Doc. 2012–14891 Filed 6–18–12; 8:45 am]

BILLING CODE 4165–16–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Office of Urban Indian Health Programs Funding Opportunity: Title V HIV/AIDS Program

Announcement Type: New Limited Competition.

Funding Announcement Number: HHS–2012–IHS–UIHP–0001.

Catalog of Federal Domestic Assistance Number: 93.193.

Key Dates

Application Deadline Date: July 16, 2012.

Review Date: July 30, 2012.

Earliest Anticipated Start Date: September 1, 2012.

I. Funding Opportunity Description

Statutory Authority

The Indian Health Service (IHS) is accepting limited competitive grant applications for the Office of Urban Indian Health Programs Title V HIV/AIDS program. This program is authorized under: The Indian Health Care Improvement Act, as amended, 25 U.S.C. 1653. This program is described in the Catalog of Federal Domestic Assistance under 93.193.

Justification for limited competition: The Minority AIDS Initiative funding that the grants are awarded from was awarded to the IHS specifically for Title V urban grantees.

Background. This limited competition announcement seeks to expand the Office of Urban Indian Health Programs' (OUIHP) existing Title V grants to increase awareness of HIV/AIDS status among urban American Indians/Alaska Natives (AI/AN) and to expand, as well as build, the capacity to diagnose and treat HIV/AIDS in the underserved urban AI/AN population. This will provide routine and/or rapid HIV screening, prevention, and pre- and post-test counseling (when appropriate). It will also include referral to services not provided on-site, outreach to high risk urban AI/AN populations, and follow-up with referred patients/clients. Enhancement of urban Indian health program HIV/AIDS activities is necessary to reduce the incidence of HIV/AIDS in the urban Indian communities by increasing access to HIV related services, reducing stigma, and making testing routine.

Purpose

The purpose of this IHS grant announcement is to enhance HIV testing, including rapid testing and/or standard HIV antibody testing, and to provide a more focused effort to address HIV/AIDS prevention, targeting some of the largest urban Indian populations in the United States. It will also include outreach to high risk urban AI/AN populations, referral for services not provided on-site, and follow-up with referred patients/clients. The grantees will attempt to provide routine HIV screening for adults as per 2006 Centers for Disease Control and Prevention (CDC) guidelines and pre- and post-test counseling (when appropriate). These grants will be used to identify best practices to increase capacity at the local level, and assist urban Indian health program sites with meeting HIV testing and treatment needs in urban AI/AN populations in the United States. The nature of these projects will require collaboration with the OUIHP to: (1) Coordinate activities with the IHS National HIV Program; (2) participate in projects in other operating divisions of the Department of Health and Human Services (HHS), such as the CDC, Substance Abuse and Mental Health Services Administration, Health Resource and Services Administration, and the Office of HIV/AIDS Policy; and (3) to the extent permitted by law, submit and share anonymous, non-identifiable data on HIV/AIDS testing, treatment, and education. These grants are also intended to encourage development of sustainable, routine HIV screening programs in urban Indian health program facilities that are aligned with 2006 CDC HIV Screening guidelines (*http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5514a1.htm*). Key features include streamlined consent and counseling procedures (verbal consent, opt-out), a clear HIV screening policy, identifying and implementing any necessary staff training, community awareness, and a clear follow-up protocol for HIV-positive results, including linkages to care. Grantees may choose to bundle HIV tests with sexually transmitted disease (STD) screening.

II. Award Information

Type of Award: Grant.

Estimated Funds Available: The total amount of funding identified for the current fiscal year 2012 is approximately $600,000. Individual award amounts are anticipated to be between $30,000 and $60,000. Competing and continuation awards issued under this announcement are subject to the availability of funds. In the absence of funding, the IHS is under no obligation to make awards that are selected for funding under this announcement.

Anticipated Number of Awards: Approximately 10 awards will be issued under this program announcement.

Project Period: The project period will be for three years and will run consecutively from September 1, 2012 to August 31, 2015.

III. Eligibility Information

1. Eligibility

This funding announcement is limited to Title V Urban Indian organizations, as defined by 25 U.S.C. 1603(29), that meet the following criteria:

- Received State certification to conduct HIV rapid testing (where needed);
- Health professionals and staff have been trained in the HIV/AIDS screening tools, education, prevention, counseling, and other interventions for urban AI/AN;
- Developed programs to address community and group support to sustain risk-reduction skills;
- Implemented HIV/AIDS quality assurance and improvement programs;
- Operate at an IHS defined full ambulatory level (a full ambulatory program is defined as an organization that has a provider on staff at least 40 hours per week) or limited ambulatory level (defined as an organization that has a provider on staff less than 40 hours per week); and
- Must provide proof of non-profit status with the application.

''*Urban Indian organization''* means a nonprofit corporate body situated in an urban center, governed by an urban Indian controlled board of directors, and providing for the maximum participation of all interested Indian groups and individuals, which body is capable of legally cooperating with other public and private entities for the purposes of performing the activities described in [25 U.S.C. 1653(a)]. 25 U.S.C. 1603(29).

Note: Please refer to Section IV.2 (Application and Submission Information/Subsection 2, Content and Form of Application Submission) for additional poof of applicant status documents required such as tribal resolutions, proof of non-profit status, etc.

2. Cost Sharing or Matching

The Indian Health Service does not require matching funds or cost sharing for grants or cooperative agreements.

3. Other Requirements

If application budgets exceed the highest dollar amount outlined under the ''Estimated Funds Available'' section within this funding announcement, your application will be considered ineligible and will not be reviewed for further consideration. IHS will not return your application to you. You will be notified by email or certified mail by the Division of Grants Management of this decision.

Proof of Non-Profit Status Organizations claiming non-profit status must submit proof. A copy of the 501(c)(3) Certificate must be received with your application submission by the deadline due date of July 16, 2012.

Letters of Intent will not be required under this funding opportunity announcement.

Applicants submitting any of the above additional documentation after the initial application submission due date are required to ensure the information was received by the IHS by obtaining documentation confirming delivery (i.e. FedEx tracking, postal return receipt, etc.).

IV. Application and Submission Information

1. Obtaining Application Materials

The application package and detailed instructions for this announcement can be found at *http://www.Grants.gov* or *http://www.ihs.gov/NonMedicalPrograms/gogp/index.cfm?module=gogp_funding.*

Information regarding the electronic application process may be directed to Paul Gettys at (301) 443–2114.

2. Content and Form Application Submission

The applicant must include the project narrative as an attachment to the application package. Mandatory documents for all applicants include:

- Table of contents.
- Abstract (one page) summarizing the project.
- Application forms:
  - SF–424, Application for Federal Assistance.
  - SF–424A, Budget Information—Non-Construction Programs.
  - SF–424B, Assurances—Non-Construction Programs.
- Budget Justification and Narrative (must be single spaced and not exceed 5 pages).
- Project Narrative (must not exceed 20 pages).
  - Background information on the urban Indian organization
  - Proposed scope of work, objectives, and activities that provide a description of what will be accomplished, including a one-page Timeframe Chart.
- Letter of Support from Organization's Board of Directors.
- 501(c)(3) Certificate (if applicable).
- Biographical sketches for all Key Personnel.
- Contractor/Consultant resumes or qualifications and scope of work.
- Disclosure of Lobbying Activities (SF–LLL).
- Copy of current Negotiated Indirect Cost rate (IDC) agreement (required) in order to receive IDC.
- Organizational Chart (optional).
- Documentation of current OMB A–133 required Financial Audit (if applicable).

Acceptable forms of documentation include:

- Email confirmation from Federal Audit Clearinghouse (FAC) that audits were submitted; or
- Face sheets from audit reports. These can be found on the FAC Web site: *http://harvester.census.gov/sac/dissem/accessoptions.html?submit=Go+To+Database*

Public Policy Requirements: All Federal-wide public policies apply to IHS grants with exception of the Discrimination policy.

Requirements for Project and Budget Narratives

A. Project Narrative: This narrative should be a separate Word document that is no longer than 20 pages and must: Be single-spaced, be type written, have consecutively numbered pages, use black type not smaller than 12 characters per one inch, and be printed on one side only of standard size 8½″ × 11″ paper.

Be sure to succinctly answer all questions listed under the evaluation criteria (refer to Section V.1, Evaluation criteria in this announcement) and place all responses and required information in the correct section (noted below), or they will not be considered or scored. These narratives will assist the Objective Review Committee (ORC) in becoming more familiar with the grantee's activities and accomplishments prior to this possible grant award. If the narrative exceeds the page limit, only the first 20 pages will be reviewed. The 20-page limit for the narrative does not include the work plan, standard forms, table of contents, budget, budget justifications, narratives, and/or other appendix items.

There are three parts to the narrative: Part A—Program Information; Part B—Program Planning and Evaluation; and Part C—Program Report. See below for additional details about what must be included in the narrative.

Part A: Program Information
  Section 1: Needs
Part B: Program Planning and Evaluation
  Section 1: Program Plans
  Section 2: Program Evaluation
Part C: Program Report
  Section 1: Describe major activities over the last 24 months.
  Section 2: Describe major accomplishments over the last 24 months.

B. Budget Narrative: This narrative must describe the budget requested and match the scope of work described in the project narrative. The budget narrative should not exceed 5 pages.

3. Submission Dates and Times

Applications must be submitted electronically through Grants.gov by 12:00 a.m., midnight Eastern Daylight Time (EDT) on July 16, 2012. Any application received after the application deadline will not be accepted for processing, nor will it be given further consideration for funding. You will be notified by the Division of Grants Management via email or certified mail of this decision.

If technical challenges arise and assistance is required with the electronic application process, contact Grants.gov Customer Support via email to *support@grants.gov* or at (800) 518–4726. Customer Support is available to address questions 24 hours a day, 7 days a week (except on Federal holidays). If problems persist, contact Paul Gettys, Division of Grants Management (DGM) (*Paul.Gettys@ihs.gov*) at (301) 443–5204. Please be sure to contact Mr. Gettys at least ten days prior to the application deadline. Please do not contact the DGM until you have received a Grants.gov tracking number. In the event you are not able to obtain a tracking number, call the DGM as soon as possible.

If an applicant needs to submit a paper application instead of submitting electronically via Grants.gov, prior approval must be requested and obtained (see Section IV.6 below for additional information). The waiver must be documented in writing (emails are acceptable), *before* submitting a paper application. A copy of the written approval must be submitted along with the hardcopy that is mailed to the DGM. Once your waiver request has been approved, you will receive a confirmation of approval and the mailing address to submit your application. Paper applications that are

submitted without a waiver from the Acting Director of DGM will not be reviewed or considered further for funding. You will be notified via email or certified email of this decision by the Grants Management Officer of DGM. Paper applications must be received by the DGM no later than 5:00 p.m., EDT, on the application deadline date. Late applications will not be accepted for processing or considered for funding.

Other Important Due Dates: Proof of Non-Profit Status: Due date July 16, 2012.

4. Intergovernmental Review

Executive Order 12372 requiring intergovernmental review is not applicable to this program.

5. Funding Restrictions

- Pre-award costs are not allowable.
- The available funds are inclusive of direct and appropriate indirect costs.
- Only one grant/cooperative agreement will be awarded per applicant.
- IHS will not acknowledge receipt of applications.

6. Electronic Submission Requirements

All applications must be submitted electronically. Please use the *http://www.Grants.gov* Web site to submit an application electronically and select the ''Find Grant Opportunities'' link on the homepage. Download a copy of the application package, complete it offline, and then upload and submit the completed application via the *http://www.Grants.gov* Web site. Electronic copies of the application may not be submitted as attachments to email messages addressed to IHS employees or offices.

Applicants that receive a waiver to submit paper application documents must follow the rules and timelines that are noted above. The applicant must seek assistance at least ten days prior to the application deadline.

Applicants that do not adhere to the timelines for Central Contractor Registry (CCR) and/or *http://www.Grants.gov* registration or that fail to request timely assistance with technical issues will not be considered for a waiver to submit a paper application.

Please be aware of the following:

a. Please search for the application package in *http://www.Grants.gov* by entering the CFDA number or the Funding Opportunity Number. Both numbers are located in the header of this announcement.

b. If you experience technical challenges while submitting your application electronically, please contact Grants.gov Support directly at: *support@grants.gov* or (800) 518–4726. Customer Support is available to address questions 24 hours a day, 7 days a week (except on Federal holidays).

c. Upon contacting Grants.gov, obtain a tracking number as proof of contact. The tracking number is helpful if there are technical issues that cannot be resolved and waiver from the agency must be obtained.

d. If it is determined that a waiver is needed, you must submit a request in writing (emails are acceptable) to *GrantsPolicy@ihs.gov* with a copy to *Tammy.Bagley@ihs.gov.* Please include a clear justification for the need to deviate from our standard electronic submission process.

e. If the waiver is approved, the application should be sent directly to the DGM by the deadline date of July 16, 2012, by 5:00pm EDT.

f. Applicants are strongly encouraged not to wait until the deadline date to begin the application process through Grants.gov as the registration process for CCR and Grants.gov could take up to fifteen working days.

g. Please use the optional attachment feature in Grants.gov to attach additional documentation that may be requested by the DGM.

h. All applicants must comply with any page limitation requirements described in this Funding Announcement.

i. After you electronically submit your application, you will receive an automatic acknowledgment from Grants.gov that contains a Grants.gov tracking number. The DGM will download your application from Grants.gov and provide necessary copies to the appropriate agency officials. Neither the DGM nor the OUIHP will notify applicants that the application has been received.

j. Email applications will not be accepted under this announcement.

Dun and Bradstreet (D&B) Data Universal Numbering System (DUNS)

All IHS applicants and grantee organizations are required to obtain a DUNS number and maintain an active registration in the CCR database. The DUNS number is a unique 9-digit identification number provided by D&B which uniquely identifies your entity. The DUNS number is site specific; therefore, each distinct performance site may be assigned a DUNS number. Obtaining a DUNS number is easy, and there is no charge. To obtain a DUNS number, you may access it through *http://fedgov.dnb.com/webform,* or to expedite the process, call (866) 705–5711.

Effective October 1, 2010, all HHS recipients were asked to start reporting information on subawards, as required by the Federal Funding Accountability and Transparency Act of 2006, as amended (''Transparency Act''). Accordingly, all IHS grantees must notify potential first-tier subrecipients that no entity may receive a first-tier subaward unless the entity has provided its DUNS number to the prime grantee organization. This requirement ensures the use of a universal identifier to enhance the quality of information available to the public pursuant to the Transparency Act.

Central Contractor Registry (CCR)

Organizations that have not registered with CCR will need to obtain a DUNS number first and then access the CCR online registration through the CCR home page at *https://www.bpn.gov/ccr/default.aspx* (U.S. organizations will also need to provide an Employer Identification Number from the Internal Revenue Service that may take an additional 2–5 weeks to become active). Completing and submitting the registration takes approximately one hour to complete and your CCR registration will take approximately 3–5 business days to process. Registration with the CCR is free of charge. Applicants may register online at *https://www.bpn.gov/ccrupdate/NewRegistration.aspx.*

Additional information on implementing the Transparency Act, including the specific requirements for DUNS and CCR, can be found on the IHS Grants Management, Grants Policy Web site: *http://www.ihs.gov/NonMedicalPrograms/gogp/index.cfm?module=gogp_policy_topics.*

V. Application Review Information

The instructions for preparing the application narrative also constitute the evaluation criteria for reviewing and scoring the application. Weights assigned to each section are noted in parentheses. The 20 page narrative should include only the first year of activities; information for multi-year projects should be included as an appendix. See ''Multi-year Project Requirements'' at the end of this section for more information. The narrative section should be written in a manner that is clear to outside reviewers unfamiliar with prior related activities of the applicant. It should be well organized, succinct, and contain all information necessary for reviewers to understand the project fully. Points will be assigned to each evaluation criteria adding up to a total of 100 points. A minimum score of 60 points is required

for funding. Points are assigned as follows:

1. Criteria

A. Understanding of the Need and Necessary Capacity (15 points)

1. Understanding of the Problem

a. Define the project target population, identify their unique characteristics, and describe the impact of HIV on the population.

b. Describe the gaps/barriers in HIV testing for the population.

c. Describe the unique cultural or sociological barriers of the target population to adequate access for the described services.

2. Facility Capability

a. Briefly describe your clinic programs and services and how this initiative will assist to commence, compliment, and/or expand existing efforts.

b. Describe your clinic's ability to conduct this initiative through:

- Your clinic's present resources.
- Collaboration with other providers.
- Partnerships established to accept referrals for counseling, testing, and referral and confirmatory blood tests and/or social services for individuals who test HIV positive.
- Linkages to treatment and care: partnerships established to refer out of your clinic for specialized treatment, care, confirmatory testing (if applicable), and counseling services.

B. Work Plan (40 points)

1. Project Goal and Objectives

Address all of the following program goals and objectives of the project. The objectives must be specific as well as quantitatively and qualitatively measurable to ensure achievement of goal(s).

- Implementation Plan.

a. Identify the proposed program activities and explain how these activities will build capacity to meet local level urban AI/AN needs and increase and sustain HIV screening.

b. Describe policy and procedure changes anticipated for implementation that include:

(1) Support of the 2006 CDC Revised HIV Testing Recommendations.

(2) Community awareness.

(3) Age ranges of persons to be screened.

(4) Bundling of HIV testing with STD tests.

(5) Type of HIV Screen/Test (Rapid, Conventional, Western Blot) and who will perform the test (in-house, send-out).

(6) Protocols to integrate strong referrals or care continuity into local system of care.

c. Provide a clear timeline with quarterly milestones for project implementation.

d. Certify that the program identified and agreed to follow the state regulations for HIV testing in their state and how the clinic will follow their state reporting guidelines for seropositive results.

e. Describe how individuals will be selected for testing to identify selection criteria and which group(s)—if any—will be, via state laws or regulations, offered testing in an opt-out format.

f. Describe how the program will ensure that clients receive their test results, particularly clients who test positive.

g. Describe how the program will ensure that individuals with initial HIV-positive test results will receive confirmatory tests. If you do not provide confirmatory HIV testing, you must provide a letter of intent or Memorandum of Understanding with an external laboratory documenting the process through which initial HIV-positive test results will be confirmed.

h. Describe the program strategies for linking potential seropositive patients to care.

i. Describe the program quality assurance strategies.

j. Describe how the program will train, support and retain staff providing counseling and testing.

k. Describe how the program will ensure client confidentiality.

l. Describe how the program will ensure that its services are culturally fluent and relevant.

m. Describe how the program will attempt to streamline procedures so as to reduce the overall cost per test administered.

C. Project Evaluation (20 points)

1. Evaluation Plan

The grantee shall provide a plan for building program capacity to meet the needs of the local level urban AI/AN population as well as monitoring and evaluating the HIV rapid test and/or standard HIV antibody test.

2. Reporting Requirements

The following quantitative and qualitative measures shall be addressed:

- Required Quantitative Indicators (quantitative).

a. Number of tests performed and number of test refusals.

b. Gender, age, sexual orientation, and race/ethnicity of persons receiving services.

c. Number of clients learning of their serostatus for the first time via this testing initiative (unique patients, non-repeated tests).

d. Number of reactive tests and confirmed seropositive (actual and proportion).

e. Number of clients linked to care/treatment or referrals for prevention counseling as defined by attendance of at least one appointment, within three months of diagnosis.

f. Number of individuals receiving their confirmatory test results.

g. Number of patients with positive test result who are re-engaged for care.

h. Number of referral and linkage to other medical and social services such as mental health, substance abuse, safety/domestic violence, and other services as needed.

i. Number of patients not treated/linked to care for HIV and HIV-related morbidities.

- Required Qualitative Information

a. Measures in place to protect confidentiality.

b. Identify barriers of implementation as well as lessons learned for best practices to share with other urban Indian organizations, as well as IHS and Tribal entities.

c. Sustainability plan and measures of ongoing testing in future years, after grant money has been spent.

- Other quantitative indicators may be collected to improve clinic processes and add to information reported; however, they are not required.

a. Number of clients who refused due to prior knowledge of status.

b. Number of rapid versus standard antibody test.

c. Number of false negatives and/or positives after confirmatory testing.

- Develop a plan for obtaining knowledge, attitudes, and behavior data pending official approval of patient survey.

D. Organizational Capabilities Qualifications (10 points)

This section outlines the broader capacity of the organization to complete the project outlined in the work plan. It includes the identification of personnel responsible for completing tasks and the chain of responsibility for successful completion of the project outlined in the work plan.

1. Describe the organizational structure.

2. Describe the ability of the organization to manage the proposed project. Include information regarding similarly sized projects in scope and financial assistance as well as other grants and projects successfully completed.

3. Describe what equipment (i.e., phone, Web sites, etc.) and facility space (i.e., office space) will be available for use during the proposed project. Include information about any equipment not currently available that will be purchased throughout the agreement.

4. List key personnel who will work on the project.

• Identify existing personnel and new program staff to be hired.

• In the appendix, include position descriptions and resumes for all key personnel. Position descriptions should clearly describe each position and duties indicating desired qualifications, experience, and requirements related to the proposed project and how they will be supervised. Resumes must indicate that the proposed staff member is qualified to carry out the proposed project activities and who will determine if the work of a contractor is acceptable.

• Note who will be writing the progress reports.

• If a position is to be filled, indicate that information on the proposed position description.

• If the project requires additional personnel beyond those covered by the supplemental grant, (i.e., Information Technology support, volunteers, interviewers, etc.), note these and address how these positions will be filled and, if funds are required, the source of these funds.

• If personnel are to be only partially funded by this supplemental grant, indicate the percentage of time to be allocated to this project and identify the resources used to fund the remainder of the individual's salary.

E. Categorical Budget and Budget Justification (15 points)

This section should provide a clear estimate of the project program costs and justification for expenses for the entire grant period. The budget and budget justification should be consistent with the tasks identified in the work plan.

The budget focus should be on routinizing and sustaining HIV testing services as well as reducing the cost per person tested.

1. Categorical budget (Form SF 424A, Budget Information Non-Construction Programs) completing each of the budget periods requested.

2. Narrative justification for all costs, explaining why each line item is necessary or relevant to the proposed project. Include sufficient details to facilitate the determination of cost allowability.

3. Budget justification should include a brief program narrative for the second and third years.

4. If indirect costs are claimed, indicate and apply the current negotiated rate to the budget. Include a copy of the rate agreement in the appendix.

Multi-Year Project Requirements (if applicable)

Projects requiring second and/or third year must include a brief project narrative and budget (one additional page per year) addressing the developmental plans for each additional year of the project.

Appendix Items

1. Work plan, logic model and/or time line for proposed objectives.

2. Position descriptions for key staff.

3. Resumes of key staff that reflect current duties.

4. Consultant or contractor proposed scope of work and letter of commitment (if applicable).

5. Current Indirect Cost Agreement.

6. Organizational chart(s) highlighting proposed project staff and their supervisors as well as other key contacts within the organization and key community contacts.

7. Map of area to benefit project identifying where target population resides and project location(s). Include trails, parks, schools, bike paths and other such applicable information.

8. Additional documents to support narrative (i.e. data tables, key news articles, etc.).

1. Review and Selection

Each application will be prescreened by the DGM staff for eligibility and completeness as outlined in the funding announcement. Incomplete applications and applications that are non-responsive to the eligibility criteria will not be referred to the ORC. Applicants will be notified by DGM, via email or letter, to outline minor missing components (i.e., signature on the SF–424, audit documentation, key contact form) needed for an otherwise complete application. All missing documents must be sent to DGM on or before the due date listed in the email of notification of missing documents required.

To obtain a minimum score for funding by the ORC, applicants must address all program requirements and provide all required documentation. Applicants that receive less than a minimum score will be considered to be ''Disapproved'' and will be informed via email or regular mail by the IHS Program Office of their application's deficiencies. A summary statement outlining the strengths and weaknesses of the application will be provided to each disapproved applicant. The summary statement will be sent to the Authorized Organizational Representative (AOR) that is identified on the face page (SF–424), of the application within 60 days of the completion of the Objective Review.

VI. Award Administration Information

1. Award Notices

The Notice of Award (NoA) is a legally binding document signed by the Grants Management Officer and serves as the official notification of the grant award. The (NoA) will be initiated by the DGM and will be mailed via postal mail or emailed to each entity that is approved for funding under this announcement. The NoA is the authorizing document for which funds are dispersed to the approved entities and reflects the amount of Federal funds awarded, the purpose of the grant, the terms and conditions of the award, the effective date of the award, and the budget/project period.

Disapproved Applicants

Applicants who received a score less than the recommended funding level for approval, 60, and were deemed to be disapproved by the Objective Review Committee, will receive an Executive Summary Statement from the IHS Program Office within 30 days of the conclusion of the ORC outlining the weaknesses and strengths of their application submitted. The IHS program office will also provide additional contact information as needed to address questions and concerns as well as provide technical assistance if desired.

Approved But Unfunded Applicants

Approved but unfunded applicants that met the minimum scoring range and were deemed by the ORC to be ''Approved,'' but were not funded due to lack of funding, will have their applications held by DGM for a period of 1 year. If additional funding becomes available during the course of FY2012, the approved application maybe re-considered by the awarding program office for possible funding. You will also receive an Executive Summary Statement from the IHS Program Office within 30 days of the conclusion of the ORC.

Note: Any correspondence other than the official NoA signed by an IHS Grants Management Official announcing to the Project Director that an award has been made to their organization is not an

authorization to implement their program on behalf of IHS.

2. Administrative Requirements

Grants are administered in accordance with the following regulations, policies, and OMB cost principles:

A. The criteria as outlined in this Program Announcement.

B. Administrative Regulations for Grants:

- 45 CFR, Part 92, Uniform Administrative Requirements for Grants and Cooperative Agreements to State, Local and Tribal Governments.
- 45 CFR, Part 74, Uniform Administrative Requirements for Awards and Subawards to Institutions of Higher Education, Hospitals, and other Non-profit Organizations.

C. Grants Policy:

- HHS Grants Policy Statement, Revised 01/07.

D. Cost Principles:

- Title 2: Grant and Agreements, Part 225—Cost Principles for State, Local, and Indian Tribal Governments (OMB Circular A–87).
- Title 2: Grant and Agreements, Part 230—Cost Principles for Non-Profit Organizations (OMB Circular A–122).

E. Audit Requirements:

- OMB Circular A–133, Audits of States, Local Governments, and Non-profit Organizations.

3. Indirect Costs

This section applies to all grant recipients that request reimbursement of indirect costs (IDC) in their grant application. In accordance with HHS Grants Policy Statement, Part II–27, IHS requires applicants to obtain a current IDC rate agreement prior to award. The rate agreement must be prepared in accordance with the applicable cost principles and guidance as provided by the cognizant agency or office. A current rate covers the applicable grant activities under the current award's budget period. If the current rate is not on file with the DGM at the time of award, the IDC portion of the budget will be restricted. The restrictions remain in place until the current rate is provided to the DGM.

Generally, IDC rates for IHS grantees are negotiated with the Division of Cost Allocation (DCA) *http://rates.psc.gov/* and the Department of Interior (National Business Center) *http://www.aqd.nbc.gov/services/ICS.aspx.* If your organization has questions regarding the indirect cost policy, please call (301) 443–5204 to request assistance.

1. Reporting Requirements

Grantees must submit required reports consistent with the applicable deadlines. Failure to submit required reports within the time allowed may result in suspension or termination of an active grant, withholding of additional awards for the project, or other enforcement actions such as withholding of payments or converting to the reimbursement method of payment. Continued failure to submit required reports may result in one or both of the following: (1) The imposition of special award provisions; and (2) the non-funding or non-award of other eligible projects or activities. This requirement applies whether the delinquency is attributable to the failure of the grantee organization or the individual responsible for preparation of the reports.

The reporting requirements for this program are noted below.

- Progress Reports

Program progress reports are required semi annually, within 30 days after the budget period ends. These reports must include a brief comparison of actual accomplishments to the goals established for the period, or, if applicable, provide sound justification for the lack of progress, and other pertinent information as required. A final report must be submitted within 90 days of expiration of the budget/project period.

- Financial Reports

Federal Financial Report FFR (SF–425), Cash Transaction Reports are due 30 days after the close of every calendar quarter to the Division of Payment Management, HHS at: *http://www.dpm.psc.gov.* It is recommended that you also send a copy of your FFR (SF–425) report to your Grants Management Specialist. Failure to submit timely reports may cause a disruption in timely payments to your organization.

Grantees are responsible and accountable for accurate information being reported on all required reports: the Progress Reports and Federal Financial Report.

- Federal Subaward Reporting System (FSRS)

This award may be subject to the Transparency Act subaward and executive compensation reporting requirements of 2 CFR Part 170.

The Federal Funding Accountability and Transparency Act of 2006, as amended (''Transparency Act''), requires the Office of Management and Budget (OMB) to establish a single searchable database, accessible to the public, with information on financial assistance awards made by Federal agencies. The Transparency Act also includes a requirement for recipients of Federal grants to report information about first-tier subawards and executive compensation under Federal assistance awards.

Effective October 1, 2010 IHS implemented a Term of Award into all IHS Standard Terms and Conditions, NoAs and funding announcements regarding this requirement. This IHS Term of Award is applicable to all IHS grant and cooperative agreements issued on or after October 1, 2010, with a $25,000 subaward obligation dollar threshold met for any specific reporting period. Additionally, all new (discretionary) IHS awards (where the project period is made up of more than one budget period) and were: (1) the project period start date was October 1, 2010 or after and (2) the primary awardee will have a $25,000 subaward obligation dollar threshold during any specific reporting period will be required to conduct address the FSRS reporting. For the full IHS award term implementing this requirement and additional award applicability information, visit the Grants Management Grants Policy Web site at: *http://www.ihs.gov/NonMedicalPrograms/gogp/index.cfm?module=gogp_policy_topics.*

Telecommunication for the hearing impaired is available at: TTY (301) 443–6394.

VII. Agency Contacts

1. Questions on the programmatic issues may be directed to: Danielle Steward, Health Systems Specialist, Office of Urban Indian Health Programs, 801 Thompson Avenue, Suite 200, Rockville, MD 20852, (301) 443–4680 or *danielle.steward@ihs.gov.*

2. Questions on grants management and fiscal matters may be directed to: Patience Musikikongo, Grants Management Specialist, 801 Thompson Avenue, TMP Suite 360, Rockville, MD 20852, (301) 443–5204 or *Patience.Musikikongo@ihs.gov.*

VIII. Other Information

The Public Health Service strongly encourages all cooperative agreement and contract recipients to provide a smoke-free workplace and promote the non-use of all tobacco products. In addition, Public Law 103–227, the Pro-Children Act of 1994, prohibits smoking in certain facilities (or in some cases, any portion of the facility) in which regular or routine education, library, day care, health care, or early childhood development services are provided to children. This is consistent with the HHS mission to protect and advance the

physical and mental health of the American people.

Dated: June 4, 2012.

Yvette Roubideaux,

Director, Indian Health Service.

[FR Doc. 2012–14887 Filed 6–18–12; 8:45 am]

BILLING CODE 4165–16–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service; Reimbursement Rates for Calendar Year 2012 Correction

AGENCY: Indian Health Service, HHS.

ACTION: Notice; correction.

SUMMARY: The Indian Health Service published a document in the **Federal Register** on June 6, 2012, concerning rates for inpatient and outpatient medical care provided by Indian Health Service facilities for Calendar Year 2012 for Medicare and Medicaid beneficiaries of other Federal Programs. The document contained five incorrect rates.

FOR FURTHER INFORMATION CONTACT: Mr. Carl Harper, Director, Office of Resource Access and Partnerships, Indian Health Service, 801 Thompson Avenue, Suite 360, Rockville, MD 20852, Telephone 301–443–1553. (This is not a toll-free number.)

Corrections

In the **Federal Register** of June 6, 2012, in FR Doc. 2012–13627, on page 33470, in the second column, under the heading ''Inpatient Hospital Per Diem Rate (Excludes Physician/Practitioner Services)'' ''Lower 48 States: $2,169. Alaska: $2,350.'' should read ''Lower 48 States: $2,165. Alaska: $2,347.'' Under the heading, ''Outpatient Per Visit Rate (Excluding Medicare) ''Lower 48 States: $317.'' should read ''Lower 48 States: $316.'' Under the heading, ''Medicare Part B Inpatient Ancillary Per Diem Rate'' ''Lower 48 States: $477. Alaska: $811.'' should read ''Lower 48 States: $476. Alaska: $810.''

Dated: June 8, 2012.

Randy Grinnell,

Deputy Director, Indian Health Service.

[FR Doc. 2012–14896 Filed 6–18–12; 8:45 am]

BILLING CODE 4165–16–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; 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 confidentialtrade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; R–13 Conference Grants.

Date: July 10–11, 2012.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Room 3An12F, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Lisa A. Newman, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3As19K, Bethesda, MD 20892, 301–435–0965, *newmanla2@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: June 12, 2012.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–14927 Filed 6–18–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy And Infectious Diseases; 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: Microbiology, Infectious Diseases and AIDS Initial Review Group; Acquired Immunodeficiency Syndrome Research Review Committee.

Date: July 11, 2012.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Sujata Vijh, Ph.D., Scientific Review Officer, Scientific Review Program, ARRB/DEA/NIAID/NIH, 6700B Rockledge Drive, MSC 7616, Room 3118, Bethesda, MD 20892–7616, 301–594–0985, *vijhs@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: June 12, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–14930 Filed 6–18–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of 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 conference call of the Interagency Pain Research Coordinating Committee (IPRCC).

The IPRCC full Committee will be having a conference call on Thursday, June 28, 2012. This teleconference will be focused predominantly on a discussion of the proposed list of pain research topics that will be used for the portfolio analysis of Federally-funded pain research. This conference call will be accessible to the public through a call-in number and access code.

Name of Committee: Interagency Pain Research Coordinating Committee (IPRCC).

Type of meeting: Open Meeting.
Date: June 28, 2012.
Time: 1:00 p.m. to 2:30 p.m. *Eastern Time*—Approximate end time.
Agenda: To discuss the proposed list of pain research topics that will be used for the portfolio analysis of Federally-funded pain research.
Place: No in-person meeting; conference call only.
Conference Call: Dial: 800–369–2109, Access Code: 5033271.
Cost: The conference call is free and open to the public.
Contact Person: Dr. Paul Scott, Director, Office of Science Policy and Planning, National Institute of Neurological Disorders and Stroke, NIH, 31 Center Drive, Room 8A03, Bethesda, MD 20892, (301) 496–9271, Email: *IPRCC PublicInquries@mail.nih.gov.*

Please Note: The conference call will be accessible to the public through a call-in number and access code. Members of the public who participate using the conference call phone number will be able to listen to the meeting but will not be heard. If you experience any technical problems with the conference call, please call Customer Service at 866–900–1011.

Individuals who participate by using this electronic service and who need special assistance or other reasonable accommodations should submit a request to the Contact Person listed on this notice at least 7 days prior to the meeting.

This meeting is being published less than 15 days prior to the meeting. This timing allows the IPRCC to get feedback from the IPRCC Working Group, who meets the previous week, while still providing time for the recommendations from the teleconference to be implemented before the October 22, 2012, meeting.

Information about the IPRCC is available on the Web site: *www.iprcc.nih.gov.*

Dated: June 11, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy .

[FR Doc. 2012–14932 Filed 6–18–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings

Pursuant to 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 Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Clinical Trial Planning Grants in Type 1 Diabetes.
Date: July 12, 2012.
Time: 4:00 p.m. to 5:30 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Carol J. Goter-Robinson, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 748, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7791, *goterrobinsonc@extra.niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; NIDDK IBD Genetics Consortium Research Centers U01 Application Review.
Date: July 19, 2012.
Time: 9:00 a.m. to 12:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.
Contact Person: Xiaodu Guo, MD, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 761, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–4719, *guox@extra.niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; NURSA Hub.
Date: August 2, 2012.
Time: 1:00 p.m. to 2:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Barbara A Woynarowska, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 754, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 402–7172, *woynarowskab@niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: June 12, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–14929 Filed 6–18–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Minority Health and Health Disparities; 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 meetings.

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 materials, 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 Minority Health and Health Disparities Special Emphasis Panel; NIMHD Support for Conference and Scientific meetings (R13) 2012–10.
Date: July 20, 2012.
Time: 12:30 p.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6707 Democracy Blvd., Rm. 851, Bethesda, MD 20892 (Telephone Conference Call).
Contact Person: Robert Nettey, M.D., Chief, Scientific Review Officer, National Institutes of Health, National Institute on Minority Health and Health Disparities, 6707 Democracy Blvd., Suite 800, Bethesda, MD 20892, (301) 496–3996, *netteyr@mail.nih.gov.*

Dated: June 12, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–14928 Filed 6–18–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; 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 President's Cancer Panel.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should

notify the Contact Person listed below in advance of the meeting.

Name of Committee: President's Cancer Panel.

Date: July 24, 2012.

Time: 8:30 a.m. to 4:00 p.m.

Agenda: HPV Vaccination as a Model Cancer Prevention Method: State of the, Science and Evidence.

Place: Hilton San Francisco Financial District, 750 Kearny Street, San Francisco, CA 94108.

Contact Person: Abby B. Sandler, Ph.D., Executive Secretary, Chief, Institute Review Office, Office of the Director, 6116 Executive Blvd., Suite 220, MSC 8349, National Cancer Institute, NIH, Bethesda, MD 20892–8349, (301) 451–9399, *sandlera@mail.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 Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/pcp/index.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: June 12, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–14926 Filed 6–18–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; 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 Heart, Lung, and Blood Institute Special Emphasis Panel; NHLBI Conference Grant Review.

Date: July 10–11, 2012.

Time: 8:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Michael P Reilly, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7200, Bethesda, MD 20892, 301–496–9659, *reillymp@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: June 12, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–14925 Filed 6–18–12; 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 Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of an Interagency Autism Coordinating Committee (IACC) meeting.

The purpose of the IACC meeting is for the Secretary of Health and Human Services to welcome new members of the committee and thank previous members for their service. The meeting will include presentations from stakeholders on autism research and policy issues, as well as discussion around newly released IACC documents and plans for future committee activities. The meeting will be open to the public and accessible by live webcast and conference call.

Name of Committee: Interagency Autism Coordinating Committee (IACC).

Type of meeting: Open Meeting.

Date: July 10, 2012.

Time: 9:00 a.m. to 5:00 p.m. *Eastern Time*—Approximate end time.

Agenda: The Secretary of HHS will welcome new members of the committee and thank previous members for their service. The meeting will include presentations on autism research and policy issues, and the committee will discuss plans for future activities.

Place: L'Enfant Plaza Hotel, 408 L'Enfant Plaza, SW., Washington, DC 20024.

Conference Call: Dial: 888–455–5419, Access code: 9404105.

Cost: The meeting is free and open to the public.

Webcast Live: http://videocast.nih.gov/.

Registration: http://www.acclaroresearch.com/oarc/7-10-12/. Pre-registration is recommended to expedite check-in. Seating in the meeting room is limited to room capacity and on a first come, first served basis.

Deadlines: Notification of intent to present oral comments: Tuesday, July 3, 2012 by 5:00 p.m. ET Submission of written/electronic statement for oral comments: Thursday, July 5, 2012 by 5:00 p.m. ET Submission of written comments: Thursday, July 5, 2012 by 5:00 p.m. ET.

Access: (L'Enfant Plaza Metro) Orange, Blue, Yellow, and Green Lines.

Contact Person: Ms. Lina Perez, Office of Autism Research Coordination, National Institute of Mental Health, NIH, 6001 Executive Boulevard, NSC, Room 6182A, Rockville, MD 20852, Phone: (301) 443–6040, Email: *IACCPublicInquiries@mail.nih.gov.*

Please Note: Any member of the public interested in presenting oral comments to the Committee must notify the Contact Person listed on this notice by 5:00 p.m. ET on Tuesday, July 3, 2012, with their request to present oral comments at the meeting. Interested individuals and representatives of organizations must submit a written/electronic copy of the oral statement/comments including a brief description of the organization represented by 5:00 p.m. ET on Thursday, July 5, 2012.

Statements submitted will become a part of the public record. Only one representative of an organization will be allowed to present oral comments on behalf of that organization, and presentations will be limited to three to five minutes per speaker, depending on number of speakers to be accommodated within the allotted time. Speakers will be assigned a time to speak in the order of the date and time when their request to speak is received, along with the required submission of the written/electronic statement by the specified deadline. If special accommodations are needed, please email the Contact Person listed above.

In addition, any interested person may submit written comments to the IACC prior to the meeting by sending the comments to the Contact Person listed on this notice by 5:00 p.m. ET, Thursday, July 5, 2012. The comments should include the name and, when applicable, the business or professional affiliation of the interested person. All written comments received by the deadlines for both oral and written public comments will be provided to the IACC for their consideration and will become part of the public record. The meeting will be open to the public through a conference call phone number and webcast live on the Internet. Members of the public who participate using the conference call phone number will be able to listen to the meeting but will not be heard. If you experience any technical

problems with the conference call or webcast, please email *IACCTechSupport@acclaroresearch.com* or call the IACC Technical Support Help Line at 443–680–0098.

To access the webcast live on the Internet the following computer capabilities are required: (A) Internet Explorer 5.0 or later, Netscape Navigator 6.0 or later or Mozilla Firefox 1.0 or later; (B) Windows® 2000, XP Home, XP Pro, 2003 Server or Vista; (C) Stable 56k, cable modem, ISDN, DSL or better Internet connection; (D) Minimum of Pentium 400 with 256 MB of RAM (Recommended); (E) Java Virtual Machine enabled (Recommended).

Individuals who participate in person or by using these electronic services and who need special assistance, such as captioning of the conference call or other reasonable accommodations, should submit a request to the Contact Person listed on this notice at least 7 days prior to the meeting.

As a part of security procedures, attendees should be prepared to present a photo ID at the meeting registration desk during the check-in process. Pre-registration is recommended. Seating will be limited to the room capacity and seats will be on a first come, first served basis, with expedited check-in for those who are pre-registered.

Schedule is subject to change.

Information about the IACC is available on the Web site: *http://www.iacc.hhs.gov.*

Dated: June 12, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–14934 Filed 6–18–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2012–0018]

National Flood Insurance Program (NFIP); Assistance to Private Sector Property Insurers, Availability of FY 2013 Arrangement

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: Each year, the Federal Emergency Management Agency (FEMA) is required by the Write-Your-Own (WYO) Program Financial Assistance/Subsidy Arrangement (Arrangement) to notify private insurance companies (Companies) and to make available to the Companies the terms for subscription or re-subscription to the Arrangement. In keeping with that requirement, this notice provides the terms to the Companies to subscribe or re-subscribe to the Arrangement.

FOR FURTHER INFORMATION CONTACT: Edward L. Connor, Deputy Associate Administrator for Federal Insurance, Federal Insurance and Mitigation Administration, DHS/FEMA, 1800 South Bell Street, Room 720, Arlington, VA 20598–3020, 202–646–3429 (phone), 202–646–3445 (facsimile), or *Edward.Connor@fema.dhs.gov* (email).

SUPPLEMENTARY INFORMATION: Under the Write-Your-Own (WYO) Program Financial Assistance/Subsidy Arrangement (Arrangement), 82 (as of April, 2012) private sector property insurers sell flood insurance policies and adjust flood insurance claims under their own names based on an Arrangement with the Federal Insurance and Mitigation Administration (FIMA) published at 44 CFR part 62, Appendix A.

The WYO insurers retain an expense allowance and remit the remaining premium to the Federal Government. The Federal Government pays flood losses and pays loss adjustment expenses based on a fee schedule. In addition, under certain circumstances reimbursement for litigation costs, including court costs, attorney fees, judgments, and settlements, are paid by FEMA based on documentation submitted by the WYO insurers.

The complete Arrangement is published in 44 CFR part 62, Appendix A. Each year, FEMA is required to publish in the **Federal Register** and make available to the Companies the terms for subscription or re-subscription to the Arrangement.

Signatory Companies should remain aware that all requirements of the Arrangement, including, but not limited to, financial accounting in issues involving all transactions, must be met. As set forth in Article II.A.1. of Appendix A to Part 62—Federal Emergency Management Agency, Federal Insurance Administration, Financial Assistance/Subsidy Arrangement, the Company is responsible for meeting all fiduciary responsibilities for control and disbursement of funds in connection with policy administration. This includes ensuring that all accounting for policy administration is correct. If errors are made in policy administration, the Company shall be responsible for reimbursing any incorrect allocations, assessment or other moneys compensated to that company by the Federal Government.

The Company is responsible for ensuring that all activities meet the requirements of this Arrangement and of the NFIP Financial Control Plan, 44 CFR part 62, Appendix B. The NFIP WYO Standards Committee may take remedial action in the event any such conduct is not corrected.

FEMA will send a copy of the offer for the FY 2013 Arrangement, together with related materials and submission instructions, to all private insurance companies participating under the current FY 2012 Arrangement.

Any private insurance company not currently participating in the WYO Program but wishing to consider FEMA's offer for FY 2013 may request a copy by writing: DHS/FEMA, Federal Insurance and Mitigation Administration, Attn: Edward L. Connor, Deputy Associate Administrator for Federal Insurance, Federal Insurance and Mitigation Administration, DHS/FEMA, 1800 South Bell Street, Room 720, Arlington, VA 20598–3020, or contact Edward Connor at 202–646–3445 (facsimile), or *Edward.Connor@fema.dhs.gov* (email).

Dated: May 4, 2012.

David L. Miller,

Associate Administrator, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2012–14831 Filed 6–18–12; 8:45 am]

BILLING CODE 9110–11–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Voluntary Customer Survey

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments; Extension of an existing collection of information.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on a proposed information collection requirement concerning a Voluntary Customer Survey. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Written comments should be received on or before August 20, 2012, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Office of Regulations and Rulings, 799 9th Street NW., 5th Floor, Washington, DC 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Office of Regulations and Rulings, 799 9th Street NW., 5th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (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 estimates 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 including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document the CBP is soliciting comments concerning the following information collection:

Title: Voluntary Customer Survey.

OMB Number: 1651–0135.

Abstract: Customs and Border Protection (CBP) plans to conduct a customer survey of international travelers seeking entry into the United States at the twenty highest volume airports in order to determine perceptions of the arrival process at our ports of entry. This voluntary customer survey will be conducted using short computer or verbal surveys of travelers as they move through entry processing areas. Travelers who do not speak English will be given a written version of the survey in their language and may submit their responses in writing. The survey will include questions about wait times, ease of entry processing, and the level of communication, efficiency and professionalism of CBP officers. The results and analysis of the survey responses will be used to identify actionable items to improve services to the traveling public with respect to the entry processes for travelers arriving at United States air ports of entry.

Action: CBP proposes to extend the expiration date of this information collection with no change to the burden hours.

Type of Review: Extension (without change).

Affected Public: Individuals, Travelers.

Estimated Number of Respondents: 21,000.

Estimated Time per Respondent: 5 minutes.

Estimated Total Annual Burden Hours: 1,743.

Dated: June 14, 2012.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2012–14859 Filed 6–18–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Application and Approval To Manipulate, Examine, Sample, or Transfer Goods

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day Notice and request for comments; Extension of an existing collection of information.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the: Application and Approval to Manipulate, Examine, Sample, or Transfer Goods. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Written comments should be received on or before August 20, 2012, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Regulations and Rulings, Office of International Trade, 799 9th Street NW., 5th Floor, Washington, DC 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street NW., 5th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13). The comments should address: (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 estimates 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 including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual cost burden to respondents or record keepers from the collection of information (total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Application and Approval to Manipulate, Examine, Sample, or Transfer Goods.

OMB Number: 1651–0006.

Form Number: CBP Form 3499.

Abstract: CBP Form 3499, ''*Application and Approval to Manipulate, Examine, Sample or Transfer Goods*'', is used as an application to perform various operations on merchandise that is located at a CBP approved bonded facility. This form is filed by importers, consignees, transferees, or owners of merchandise, and is subject to approval by the port director. The data requested on the form identifies the merchandise for which action is being sought and specifies in detail what operation is to be performed. The form may also be approved as a blanket application to manipulate for a period of up to 1 year, for a continuous or repetitive manipulation. CBP Form 3499 is provided for by 19 CFR 19.8 and is accessible at: *http://forms.cbp.gov/pdf/CBP_Form_3499.pdf.*

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Estimated Number of Responses: 151,140.

Estimated Time per Response: 6 minutes.

Estimated Total Annual Burden Hours: 15,114.

Dated: June 14, 2012.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2012–14861 Filed 6–18–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5603–N–46]

Proposed Information Collection; Comment Request: Generic Customer Satisfaction Surveys

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* August 20, 2012.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, Room 9120 or the number for the Federal Information Relay Service (1–800–877–8339).

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Departmental Reports Management Officer, QDAM,, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 708–3400 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Generic—Customer Satisfaction Surveys.

OMB Control Number, if applicable: 2535–0116.

Description of the need for the information and proposed use: Executive Order 12862, ''Setting Customer Service Standards'' requires that Federal agencies provide the highest quality service to our customers by identifying them and determining what they think about our services. The surveys covered in the request for a generic clearance will provide HUD a means to gather this data directly from our customers. HUD will conduct various customer satisfaction surveys to gather feedback and data directly from our customers to determine the kind and quality of services and products they want and expect to receive.

Agency form numbers, if applicable: None.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 13,229. The number of respondents is 117,248, the number of responses is 117,248, the frequency of response is on occasion, and the burden hour per response is .80.

Status of the proposed information collection: This is a request for a reinstatement w/o change of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: June 12, 2012.

Colette Pollard,

Departmental Paperwork Reduction Act Officer, Office of the Chief Information Officer.

[FR Doc. 2012–14869 Filed 6–18–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Proposed Renewal of Information Collection: Payments in Lieu of Taxes

AGENCY: Office of Budget, Interior.

ACTION: Notice and Request for Comments.

SUMMARY: In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of Budget, Office of the Secretary, Department of the Interior (DOI), announces the proposed extension of a public information collection required by the Payments in Lieu of Taxes Act (PILT) and seeks public comments on the provisions thereof. After public review, the Office of Budget will submit a renewal request for the information collection to the Office of Management and Budget (OMB) for review and approval.

DATES: Consideration will be given to all comments received by August 20, 2012.

ADDRESSES: Send your written comments to the U.S. Department of the Interior, Office of the Secretary, Office of Budget, Attn. Niall O'Connor, 1849 C St. NW., MS 4106 MIB, Washington, DC 20240. Send any faxed comments to (202) 208–3911, attn Niall O'Connor. Comments may also be emailed to *Niall_O'Connor@ios.doi.gov*. Individuals providing comments should reference OMB Control Number 1093–0005, ''Payments in Lieu of Taxes (PILT Act), Statement of Federal Land Payments, 43 CFR 44.23(a).'' Before including your address, phone number, email 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.

FOR FURTHER INFORMATION CONTACT: Requests for additional information on this renewed information collection should be directed to Niall O'Connor at U.S. Department of the Interior, Office of the Secretary, Office of Budget, 1849 C St. NW., MS 4106 MIB, Washington, DC 20240. You may also fax requests for further information to (202) 208–3911, or email him at *Niall_O'Connor@ios.doi.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

Office of Management and Budget (OMB) regulations in 5 CFR part 1320, which implement the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities

(see 5 CFR 1320.8(d)). This notice identifies an information collection activity that the Office of Budget is planning to submit to OMB for extension or re-approval.

Public Law 97–258 (31 U.S.C. 6901–6907), as amended, the Payments in Lieu of Taxes (PILT) Act, was designed by Congress to help local governments recover some of the expenses they incur in providing services on public lands. These local governments receive funds under various Federal land payment programs such as the National Forest Revenue Act, the Mineral Lands Leasing Act, and the Taylor Grazing Act. PILT payments supplement the payments that local governments receive under these other programs. While the program is due to expire in 2012, the FY 2013 budget proposes a one-year extension of the current PILT program, maintaining the existing formula for calculating payments to counties. That proposal is currently pending before Congress. This renewal authority is being done in anticipation of reauthorization by Congress.

The PILT Act requires that the Governor of each State furnish the Department of the Interior with a listing of payments disbursed to local governments by the States on behalf of the Federal Government under 12 statutes described in Section 6903 of 31 U.S.C. The Department of the Interior uses the amounts reported by the States to reduce PILT payments to units of general local governments from that which they might otherwise receive. If such listings were not furnished by the Governor of each affected State, the Department would not be able to compute the PILT payments to units of general local government within the States in question.

In fiscal year 2004, administrative authority for the PILT program was transferred from the Bureau of Land Management to the Office of the Secretary of the Department of the Interior. Applicable DOI regulations pertaining to the PILT program to be administered by the Office of the Secretary were published as a final rule in the **Federal Register** on December 7, 2004 (69 FR 70557). The Office of Budget, Office of the Secretary is now planning to extend the information collection approval authority in order to enable the Department of the Interior to continue to comply with the PILT Act.

II. Data

(1) Title: Payments in Lieu of Taxes (PILT Act), Statement of Federal Land Payments, 43 CFR 44).

OMB Control Number: 1093–0005.

Current Expiration Date: December 31, 2012.

Type of Review: Information Collection Renewal.

Affected Entities: State, local, or tribal government.

Estimated annual number of respondents: 43.

Frequency of Response: Annual.

(2) Annual reporting and record keeping burden: Average reporting burden per application: 75 hours.

Total annual reporting: 3,225 hours.

(3) Description of the need and use of the information: The statutorily-required information is needed to compute payments due units of general local government under the PILT Act (31 U.S.C. 6901–6907). The Act requires that the Governor of each State furnish a statement as to amounts paid to units of general local government under 12 revenue-sharing statutes in the prior fiscal year. While the program is due to expire in 2012, the FY 2013 budget proposes a one-year extension of the current PILT program, maintaining the existing formula for calculating payments to counties. That proposal is currently pending before Congress. This renewal is authority is being done in anticipation of reauthorization by Congress.

III. Request for Comments

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 will have practical utility; (b) the accuracy of the agency's estimate of the burden of the information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who respond, including through the use of appropriate automated, electronic, mechanical, or other collection techniques or other forms of information technology.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

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 Office of Management and Budget control number.

All written comments will be available for public inspection in the Main Interior Building, 1849 C Street NW., Washington, DC during normal business hours, excluding legal holidays. For an appointment to inspect comments, please contact Niall O'Connor by telephone on (202) 513–7785, or by email at *Niall_O'Connor@ios.doi.gov* to make an appointment. A valid picture identification is required for entry into the Department of the Interior.

Pam Haze,

Deputy Assistant Secretary, Budget, Finance, Performance, and Acquisition.

[FR Doc. 2012–14915 Filed 6–18–12; 8:45 am]

BILLING CODE 4310–RK–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R2–ES–2012–N128; FXES11130200000C2–112–FF02ENEH00]

Endangered and Threatened Wildlife and Plants; Thick-Billed Parrot Draft Recovery Plan Addendum

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comment.

SUMMARY: We, the Fish and Wildlife Service (Service), announce the availability of our Draft Recovery Plan Addendum for the Thick-billed Parrot under the Endangered Species Act of 1973, as amended (Act). We have developed this draft recovery plan addendum to comply with a December 14, 2010, Stipulated Settlement Agreement between WildEarth Guardians and the Secretary of the Interior. This species is currently found in Mexico and is believed to be extirpated from the United States; however, historically its range also included southern Arizona and possibly southwestern New Mexico. We request review and comment on this addendum from local, State, and Federal agencies; Tribes; and the public. We will also accept any new information on the status of the thick-billed parrot throughout its range to assist in finalizing the addendum to the recovery plan.

DATES: To ensure consideration, we must receive written comments on or before August 20, 2012. However, we will accept information about any species at any time.

ADDRESSES: If you wish to review the draft addendum, you may obtain a copy by visiting our Web site at *http://www.fws.gov/southwest/es/arizona* (type ''thick-billed parrot'' in the document title search field) or *http://www.fws.gov/southwest/es/Documents/R2ES/Thick-billed_Parrot_Draft_Recovery_Plan_Addendum_June_2012.pdf.*

Alternatively, you may contact the Arizona Ecological Services Office, U.S. Fish and Wildlife Service, 2321 West Royal Palm Road, Phoenix, AZ 85021–4951 (602–242–0210, phone). If you wish to comment on the draft addendum, you may submit your comments in writing by any one of the following methods:

- *U.S. mail:* Field Supervisor, at the above address;
- *Hand-delivery:* Arizona Ecological Services Office at the above address;
- *Fax:* (602) 242–2513; or
- *Email: Steve_Spangle@fws.gov.*

For additional information about submitting comments, see the ''Request for Public Comments'' section below.

FOR FURTHER INFORMATION CONTACT: Susan Sferra, Fish and Wildlife Biologist, at the above address and phone number, or email at *Susan_Sferra@fws.gov.*

SUPPLEMENTARY INFORMATION:

Background

Recovery of endangered or threatened animals and plants to the point where they are again secure, self-sustaining members of their ecosystems is a primary goal of our endangered species program and the Act (16 U.S.C. 1531 *et seq.*). Recovery means improvement of the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act. The Act requires the development of recovery plans for listed species, unless such a plan would not promote the conservation of a particular species.

Species' History

Historically the thick-billed parrot's range extended from Mexico into southern Arizona and possibly southwestern New Mexico in the United States. There are no formal historical nesting records for the United States; however, thick-billed parrots visited southeastern Arizona, and in some years large flocks were observed (Snyder *et al.* 1999). At present, this species is believed to be extirpated from the United States, with the last confirmed report of a thick-billed parrot flock in the Chiricahua Mountains of southeastern Arizona in 1938 (Monson and Phillips 1981 in Snyder *et al.* 1999). Extirpation of the U.S. population was likely caused by excessive, unregulated shooting (Snyder *et al.* 1999). In Mexico, this species occurs in the States of Chihuahua, Sonora, Durango, Jalisco, Colima, and Michoacán, spanning the Sierra Madre Occidental.

The thick-billed parrot (*Rhynchopsitta pachyrhyncha*) was listed as an endangered species on June 3, 1970 (35 FR 8491), pursuant to the Endangered Species Conservation Act (ESCA), the precursor of the Endangered Species Act. Based on the different listing procedures for foreign and domestic species under the ESCA, the thick-billed parrot was listed as a ''foreign'' species. When the Endangered Species Act replaced the ESCA, the thick-billed parrot was not carried forward onto the Federal List of Endangered and Threatened Wildlife and Plants (List) for the United States due to an oversight, although the thick-billed parrot remained listed in Mexico. Subsequently, the parrot was proposed to be listed in the United States on July 25, 1980, wherein the proposed listing rule acknowledged that it was always the intention of the Service to list the thick-billed parrot as endangered in the United States (see 45 FR 49844, page 49845). In 2009, the U.S. Department of the Interior's Assistant Solicitor for Fish and Wildlife provided an explanation stating that the species has always been listed as endangered throughout its entire range (see 74 FR 33957). Today, the thick-billed parrot is listed throughout its range, including Mexico and the United States. Critical habitat has not been proposed for the thick-billed parrot.

Although thick-billed parrots are currently extirpated from the United States, the Service has developed this draft recovery plan addendum to comply with the December 14, 2010, Stipulated Settlement Agreement between WildEarth Guardians and the Secretary of the Interior. The Thick-billed Parrot Draft Recovery Plan Addendum was created by adopting the 2009 thick-billed parrot recovery plan for Mexico, ''Programa de Acción para la Conservación de las Especies: Cotorras Serranas (PACE),'' and adding contents required by the Act (such as Recovery Criteria, Management Actions in the United States, and an Implementation Table) as an Addendum. In addition to statutory requirements of the Act, this draft addendum to the PACE addresses the species' historical occurrence in the United States, summarizes information from scientific literature and U.S. and Mexican biologists regarding the status and threats to the thick-billed parrot, and presents additional information required by U.S. recovery planning policy. We support the strategy for recovering the thick-billed parrot set forth in the PACE (2009) and note that this is the first time the U.S. Fish and Wildlife Service (Service) is adopting a Mexican recovery plan for a species to serve as the best available science to inform a U.S. recovery plan.

The PACE was initiated by the Mexican National Commission of Protected Natural Areas (Comisión Nacional de Áreas Protegidas, CONANP) under the 2007 Federal ''Commitment to Conservation'' programs in Mexico. Experts and public officials were brought together to prevent the deterioration of Mexican ecosystems and biodiversity. Thirty-five priority and endangered species were selected, including the thick-billed parrot, with the objective of creating the framework for, coordinating, and promoting the Federal government's efforts to recover these species within the Conservation Program for Species at Risk (PROCER). The focus of the PACE (2009) is on extant populations of the thick-billed parrot; it does not address extirpated thick-billed parrots or their historical range in the United States. As a result, our recovery actions are focused primarily on conservation within the current range of this species in Mexico and, to a lesser degree, on the potential for expansion into the historical range in the United States. Recommended actions for addressing current threats to the species and evaluating recovery may be applied or refined in the future.

The parrot's current range is limited to high elevations of the Sierra Madre Occidental of Mexico, extending from northwestern Chihuahua and northeastern Sonora into Durango and continuing in a southeasterly direction to Jalisco, Colima, and Michoacán. Thick-billed parrots migrate seasonally from their primary breeding (summering) grounds in Chihuahua to wintering areas farther south, possibly migrating 1,000 kilometers (km) (621 miles (mi)) or more between their summering and wintering areas (Snyder et al. 1999, PACE 2009). The northernmost breeding area is Mesa de Guacamayas, located within 80 km (50 mi) of the U.S.-Mexico border (Snyder et al. 1999).

Thick-billed parrots live in gregarious flocks in old-growth mixed-conifer

forests and require a diversity of food resources and the availability of size-specific cavities for nesting. The thick-billed parrot primarily feeds on seeds of several pine species, and to a lesser extent on acorns and terminal buds of pine trees (Snyder *et al.* 1999). As an obligate cavity nester, the thick-billed parrot needs cavities typically found in large-diameter pines and snags. Because of their specialized habitat needs, thick-billed parrot populations have experienced significant historical declines, corresponding to a drastic loss of high-elevation mixed-conifer forests, mainly from a legacy of logging. Only 1 percent of the old-growth forests is estimated to remain, supporting small populations of thick-billed parrots concentrated in a handful of sites.

Threats to the thick-billed parrot include loss of habitat, primarily driven by extensive logging of large mature pines, removal of nesting snags (Snyder *et al.* 1999), and, to a lesser degree, catastrophic forest fires (PACE 2009); low numbers of individuals and small remaining populations, leaving them vulnerable to stochastic events; removal of birds from the wild in Mexico for the illegal pet trade; and climate change, based on projections for the Southwestern United States and northern Mexico predicting warmer, drier, and more drought-like conditions (Hoerling and Eischeid 2007; Seager *et al.* 2007). Extirpation of the thick-billed parrot in the United States was likely caused by excessive, unregulated shooting (Snyder *et al.* 1999). The recovery plan addendum recommends protection of currently occupied habitat; additional research to understand relationships between habitat, migration patterns, and population dynamics; development of a standardized monitoring protocol; development of replacement nesting habitat; verification of occupied wintering habitat; development of forest management plans; and the enforcement of existing environmental and species collection laws. The plan recognizes the need to manage these forest landscapes in both the United States and Mexico to maximize resources for the species.

Recovery Plan Goals

The objective of an agency recovery plan is to provide a framework for the recovery of a species so that protection under the Act is no longer necessary. A recovery plan includes scientific information about the species and provides criteria and actions necessary for us to be able to reclassify the species to threatened status or remove it from the List. Recovery plans help guide our recovery efforts by describing actions we consider necessary for the species' conservation, and by estimating time and costs for implementing needed recovery measures. To achieve its goals, this draft recovery plan addendum identifies the following objectives:

- Support the thick-billed parrot throughout its range in perpetuity.
- Maintain habitat conditions necessary to provide feeding, nesting, and wintering habitat for the thick-billed parrot through time.
- Assess the potential for the United States to support naturally dispersing or actively relocated thick-billed parrots, including a review of U.S. historical habitat, current habitat management, and habitat connectivity with Mexico.

The draft recovery plan addendum contains recovery criteria based on maintaining and increasing population numbers and habitat quality and quantity. The draft recovery plan addendum focuses on protecting populations, managing threats, maintaining habitat, monitoring progress, and building partnerships to facilitate recovery.

As the thick-billed parrot meets recovery criteria, we will review the subspecies' status and consider downlisting, and, ultimately, removal from the List.

Request for Public Comments

Section 4(f) of the Act requires us to provide public notice and an opportunity for public review and comment during recovery plan development. It is also our policy to request peer review of recovery plans (July 1, 1994; 59 FR 34270). In an appendix to the approved recovery plan, we will summarize and respond to the issues raised by the public and peer reviewers. Substantive comments may or may not result in changes to the recovery plan; comments regarding recovery plan implementation will be forwarded as appropriate to Federal or other entities so that they can be taken into account during the course of implementing recovery actions. Responses to individual commenters will not be provided, but we will provide a summary of how we addressed substantive comments in an appendix to the approved recovery plan.

We invite written comments on the draft recovery plan addendum. In particular, we are interested in additional information regarding the current threats to the species and the costs associated with implementing the recommended recovery actions. We provide an English translation of the PACE in Appendix B of the addendum; however, we will not address comments specific to the content of the PACE, as this document was finalized by CONANP in 2009.

Before we approve our draft addendum, we will consider all comments we receive by the date specified in **DATES** above. Methods of submitting comments are in the **ADDRESSES** section above.

Public Availability of Comments

Before including your address, phone number, email 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.

Comments and materials we receive will be available, by appointment, for public inspection during normal business hours at our office (see **ADDRESSES**).

References Cited

A complete list of all references cited herein is available upon request from the U.S. Fish and Wildlife Service, Branch of Recovery (see **FOR FURTHER INFORMATION CONTACT** section).

Authority

We developed our draft recovery plan addendum under the authority of section 4(f) of the Act, 16 U.S.C. 1533(f). We publish this notice under section 4(f) Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: June 6, 2012.

Benjamin Tuggle,

Regional Director, Southwest Region.

[FR Doc. 2012–14853 Filed 6–18–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–IA–2012–N147; FXIA16710900000P5–123–FF09A30000]

Endangered Species; 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 to conduct certain activities with endangered species. With some exceptions, the Endangered Species Act

(ESA) prohibits activities with listed species unless Federal authorization is acquired that allows such activities.

DATES: We must receive comments or requests for documents on or before July 19, 2012.

ADDRESSES: Brenda Tapia, Division of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 212, Arlington, VA 22203; fax (703) 358–2280; or email D*MAFR@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, (703) 358–2104 (telephone); (703) 358–2280 (fax); *DMAFR@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I request copies of applications or comment on submitted applications?

Send your request for copies of applications or comments and materials concerning any of the applications to the contact listed under **ADDRESSES**. Please include the **Federal Register** notice publication date, the PRT-number, and the name of the applicant in your request or submission. We will not consider requests or comments sent to an email or physical address not listed under **ADDRESSES**. If you provide an email address in your request for copies of applications, we will attempt to respond to your request electronically.

Please make your requests or comments as specific as possible. Please confine your comments to issues for which we seek comments in this notice, and explain the basis for your comments. Include sufficient information with your comments to allow us to authenticate any scientific or commercial data you include.

The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) those that include citations to, and analyses of, the applicable laws and regulations. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed above (see **ADDRESSES**).

B. May I review comments submitted by others?

Comments, including names and street addresses of respondents, will be available for public review at the street address listed under **ADDRESSES**. The public may review documents and other information applicants have sent in support of the application unless our allowing viewing would violate the Privacy Act or Freedom of Information Act. Before including your address, phone number, email 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.

II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), along with Executive Order 13576, ''Delivering an Efficient, Effective, and Accountable Government,'' and the President's Memorandum for the Heads of Executive Departments and Agencies of January 21, 2009—Transparency and Open Government (74 FR 4685; January 26, 2009), which call on all Federal agencies to promote openness and transparency in Government by disclosing information to the public, we invite public comment on these permit applications before final action is taken.

III. Permit Applications

A. Endangered Species

Applicant: Southwest Fisheries Science Center, La Jolla, CA; PRT–844694

The applicant requests reissuance of the permit to import and/or introduce from the sea, biological samples collected from wild and captive-bred animals of Kemp's ridley sea turtle *(Lepidochelys kempii),* hawksbill sea turtle *(Eretmochelys imbricata),* leatherback sea turtle *(Dermochelys coriacea),* green sea turtle *(Chelonia mydas),* loggerhead sea turtle *(Caretta caretta),* and olive ridley sea turtle *(Lepidochelys olivacea)* for the purpose of scientific research. Samples are collected from live or salvaged specimens. This notification covers activities conducted by the applicant over a period of 5 years.

Applicant: Bryce Carlson, West Lafayette, IN; PRT–00568A

The applicant requests a permit to import: hair and tissue samples collected noninvasively from gorilla *(Gorilla gorilla),* chimpanzee *(Pan troglodytes),* and red colobus *(procolobus rufomitratus tephrosceles)* from the wild for the purpose of enhancement of the survival of the species for scientific research. This notification covers activities to be conducted by the applicants over a 5-year period.

Applicant: Loraine & John Shea, Covington, LA; PRT–050694

The applicants request renewal of their captive-bred wildlife registration under 50 CFR 17.21(g) for the golden parakeet *(Aratinga guarouba),* cuban parrot *(Amazona leucocephala),* vinaceous parrot *(Amazona vinacea),* and red-browed parrot *(Amazona rhodocorytha)* to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Diamond G of Morgan City, LLC, Encinal, TX; PRT–75404A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx *(Oryx dammah)* to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Diamond G of Morgan City, LLC, Encinal, TX; PRT–75534A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx *(Oryx dammah)* from the captive herd maintained at their facility, 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: Spirit Wild Productions, Ltd., China Springs, TX; PRT–76154A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx *(Oryx dammah)* to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Spirit Wild Productions, Ltd., China Springs, TX; PRT–76153A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx *(Oryx dammah)* from the captive herd maintained at their facility, 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: Michael Cone, Alice, TX; PRT–76246A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx *(Oryx dammah)* to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Michael Cone, Alice, TX; PRT–76245A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx *(Oryx dammah)* from the captive herd maintained at their facility, 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.

Multiple Applicants

The following applicants each request a permit to import the sport-hunted trophy of one male bontebok *(Damaliscus pygargus pygargus)* culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Sabin Johnson, Hobe Sound, FL; PRT–71350A
Applicant: Nicholas Spiak, Greer, SC; PRT–46676A
Applicant: Steven Presnal, Wind Lake, WI; PRT–74920A
Applicant: Joseph Sultan, Belmont, MA; PRT–73620A
Applicant: Gary Young, Windfield, WV; PRT–75765A
Applicant: Stephen Finney, Stockton, NJ; PRT–75918A
Applicant: Eric Anderson, Abingdon, MD; PRT–76196A
Applicant: Jayson Anderson, Corona, CA; PRT–76255A
Applicant: Joshua Anderson, Corona, CA; PRT–76254A

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2012–14855 Filed 6–18–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF INTERIOR

Bureau of Land Management

[LLCO956000 L14200000.BJ0000]

Notice of Filing of Plats

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Filing of Plats; Colorado.

SUMMARY: The Bureau of Land Management (BLM) Colorado State Office is publishing this notice to inform the public of the intent to file the land survey plats listed below and afford all affected parties a proper period of time to protest this action prior to the plat filing.

DATES: Unless there are protests of this action, the filing of the plats described in this notice will happen on July 19, 2012.

ADDRESSES: BLM Colorado State Office, Cadastral Survey, 2850 Youngfield Street, Lakewood, Colorado 80215–7093.

FOR FURTHER INFORMATION CONTACT: Randy Bloom, Chief Cadastral Surveyor for Colorado, (303) 239–3856.

SUPPLEMENTARY INFORMATION: The plat and field notes of the dependent resurvey and survey in Township 7 North, Range 92 West, Sixth Principal Meridian, Colorado, were accepted on May 24, 2012.

The plat incorporating the field notes of the remonumentation of certain corners in Township 15 South, Range 97 West, Sixth Principal Meridian, Colorado, was accepted on May 25, 2012.

The plat and field notes of the dependent resurvey and subdivision of sections 4 and 5 in Township 47 North, Range 1 East, New Mexico Principal Meridian, Colorado, were accepted on June 4, 2012.

The plat and field notes of the dependent resurvey and survey in Township 48 North, Range 1 East, New Mexico Principal Meridian, Colorado, were accepted on June 4, 2012.

Randy Bloom,

Chief Cadastral Surveyor for Colorado.

[FR Doc. 2012–14913 Filed 6–18–12; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–SER–FOMA–08530;5017–7143–409]

DRAFT General Management Plan and Draft Environmental Impact Statement, Fort Matanzas National Monument, Florida

AGENCY: National Park Service, Interior.

ACTION: Notice of Availability of the Draft General Management Plan and Environmental Impact Statement.

SUMMARY: Pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C), the National Park Service (NPS) announces the availability of a draft Environmental Impact Statement (EIS) for the General Management Plan (GMP) for Fort Matanzas National Monument (Monument), Florida.

Consistent with NPS laws, regulations, and policies and the purpose of the Monument, the draft EIS/GMP describes the NPS preferred alternative—Alternative B—to guide the management of the Monument over the next 15 to 20 years. The preferred alternative incorporates various management prescriptions to ensure protection, access and enjoyment of the Monument's resources.

An up-to-date GMP is needed to address how visitors access and use the Monument and the facilities needed to support those uses, how resources are managed, and how the NPS manages its operations. Recent studies have enhanced the NPS's understanding of resources, resource threats, and visitor use in the Monument.

DATES: The NPS will accept comments from the public on the draft EIS/GMP for at least 60 days, starting from the date the Environmental Protection Agency publishes this Notice of Availability. The date, time, and location of the public meetings on the draft EIS/GMP will be announced through the NPS Planning, Environment, and Public Comment (PEPC) Web site: *http://parkplanning.nps.gov/FOMA* and media outlets.

ADDRESSES: Electronic copies of the draft EIS/GMP will be available online at *http://parkplanning.nps.gov/FOMA.* To request a copy, contact Fort Matanzas National Monument Superintendent Gordie Wilson, One South Castillo Drive, St. Augustine, FL, 32804. Comments may be submitted by several methods. The preferred method is commenting via the internet on the PEPC Web site above. An electronic public comment form is provided on this Web site. You may also mail comments to Superintendent, Fort Matanzas National Monument, One South Castillo Drive, St. Augustine, FL, 32804. Finally, you may hand-deliver comments to the monument. Before including your address, phone number, email address, or other personal identifying information in your comment, please 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. We will always make submissions from organizations or businesses, and from individuals identifying themselves as representatives of or officials of organizations or businesses, available for public inspection in their entirety. A limited number of compact disks and printed copies of the Draft GMP/EIS will be made available at Fort Matanzas National Monument headquarters, 8635 A1A South, St. Augustine, FL 32080.

SUPPLEMENTARY INFORMATION: Public meetings, newsletters, and internet updates have kept the public informed and involved throughout the planning process. The draft GMP provides a framework for management, use, and development of the national park for the next 15 to 20 years. It presents and analyzes three alternatives: Alternative A (no action) provides a baseline for evaluating changes and impacts of the two action alternatives. Alternative B is the NPS Preferred Alternative. It would manage the Monument in a manner consistent with its history as a small military outpost within a sometimes harsh, but beautiful and rich natural environment. There would be minimal development of new facilities. Some expansion of existing parking lots could occur to improve visitor safety by reducing parking on road shoulders during peak periods. There would be increased emphasis on the interpretation of the natural environment. Driving on the Atlantic Ocean beach of Anastasia Island would continue to be prohibited in accordance with NPS regulation. Alternative B provides a higher level of resource protection than Alternative C. Alternative C would focus on interpretive and educational opportunities on the north end of the Anastasia Island (west of Highway A1A) section of the park, concentrating on the New Deal era visitor center and the land donations and other activities of St. Augustine organizations to restore and commemorate the Fort for local residents and tourists. The central and southern ends of Anastasia Island and the east side of Highway A1A would continue to be managed to protect and conserve the natural resources of the zone. Some additional land on the west side of Highway A1A would be available for trail development. In addition, following approval of the GMP, the NPS would seek to promulgate of a special regulation to allow driving on part of the Atlantic Ocean Beach of Anastasia Island. This process would include an Off Road Vehicle Plan and Environmental Impact Statement. Alternative C provides a higher level of recreational opportunities than Alternative B. The three alternatives are described in detail in chapter 2 of the draft plan. The key impacts of implementing the three alternatives are detailed in chapter 4 and summarized in chapter 2.

FOR FURTHER INFORMATION CONTACT: Fort Matanzas National Monument Superintendent Gordie Wilson, One South Castillo Drive, St. Augustine, FL 32804 or telephone at (904) 829–6506, ext. 221.

The responsible official for this Draft EIS is the Regional Director, NPS Southeast Region, 100 Alabama Street SW., 1924 Building, Atlanta, Georgia 30303.

Dated: June 12, 2012.

Gordon Wissinger,

Acting Regional Director, Southeast Region.

[FR Doc. 2012–14899 Filed 6–18–12; 8:45 am]

BILLING CODE 4312–76–P

DEPARTMENT OF JUSTICE

[OMB Number 1105–NEW]

Agency Information Collection Activities; Proposed collection, comments requested: Leased/Charter Flight Personnel Expedited Clearance Request

ACTION: 30-day Notice of Information Collection Under Review.

The Department of Justice, U.S. Marshals Service will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with established review procedures of the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 77, Number 72, page 22346, on April 13, 2012, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until July 19, 2012. This process is conducted in accordance with 5 CFR 1320.10.

All comments and suggestions, or questions regarding additional information, to include obtaining a copy of the proposed information collection instrument with instructions, should be directed to Nicole Feuerstein, U.S. Marshals Service, CS–3, 10th Fl., 2604 Jefferson Davis Hwy., Alexandria, VA 22301 (Phone: 202–307–5168).

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Comments should address one or more of the following four points:

1. Evaluate whether the proposed collection of information is necessary for the proper pperformance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including the use of automated, electronic, mechanical, or other technological collection techniques of other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

1. *Type of information collection:* New collection.
2. *The title of the form/collection:* Leased/Charter Flight Personnel Expedited Clearance Request.
3. *The agency form number, if any, and the applicable component of the department sponsoring the collection:* Form USM–271, U.S. Marshals Service, Department of Justice.
4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary—Individuals or households. This form is to be completed by people applying to become contract flight crew members. It is required so that USMS can perform an expedited background check before workers may be hired to transport USMS and Bureau of Prisons prisoners.
5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 80 respondents will complete a 5 minute form.
6. *An estimate of the total public burden (in hours) associated with this collection:* There are an estimated 7 annual total burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Justice Management Division, United States Department of Justice, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Washington, DC 20530.

Dated: June 13, 2012.

Jerri Murray,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2012–14842 Filed 6–18–12; 8:45 am]

BILLING CODE 4410–04–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Water Act

Notice is hereby given that on May 29, 2012, a proposed Consent Decree in *United States* v. *Enterprise Products Operating and Mid-America Pipeline Company,* Civ. A. No. 12–190, was lodged with the United States Court for the District of Nebraska.

The Complaint filed in this action asserts claims against the Defendants pursuant to Sections 301, 309 and 311 of the Clean Water Act, 33 U.S.C. 1311, 1319, 1321, stemming from three discharges of natural gasoline from a pipeline owned and operated by Defendants that occurred in 2007, 2010 and 2011 in Yutan, Nebraska, Niles, Kansas, and Onawa, Iowa respectively. The Consent Decree requires the Defendants to undertake specified measures to improve their reporting of spills from the pipeline and prevent pipeline ruptures caused by third parties. Defendants will also pay a civil penalty of $1,042,000 for the discharges.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either emailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Enterprise Products Operating and Mid-America Pipeline Company,* 90–5–1–1–06074/1.

During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, to *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or emailing a request to ''Consent Decree Copy'' (*EESCDCopy.ENRD@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–5271. If requesting a copy from the Consent Decree Library by mail, please enclose a check in the amount of $9.00 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if requesting by email or fax, forward a check in that amount to the Consent Decree Library at the address given above.

Robert E. Maher, Jr.,

Acting Deputy Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2012–14815 Filed 6–18–12; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on June 12, 2012, the United States, on behalf of the U.S. Department of Agriculture, Forest Service, filed a Complaint and on June 13, 2012, lodged a proposed Consent Decree in *United States* v. *The Stearns Co., Ltd., and Stearns Enterprises, Inc.,* Case No. 12-cv-191–JMH (E.D. Ky.), relating to the Lower Rock Creek Mines Site in McCreary County, Kentucky (the ''Site''). The Complaint seeks reimbursement from defendants, The Stearns Co., Ltd., and Stearns Enterprises, Inc., of environmental response costs incurred by the Forest Service at the Site and the entry of a declaratory judgment with respect to the Forest Service's future response costs under Sections 107(a) and 113(g) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (''CERCLA''), 42 U.S.C. 9607(a) and 9613(g).

The proposed Consent Decree resolves the claims in the Complaint. Under the proposed Consent Decree, the defendants agree to the entry of a judgment in favor of the United States in the amount of $31.8 million; the judgment can be satisfied, however, solely through the transfer of Defendants' real property interests (comprised primarily of mineral rights in the Site property) to the United States (reuniting the Forest Service's fee interest in the Site property with the mineral rights) and recoveries, if any, under Defendants' insurance policies. In addition, defendants agree to withdraw their application, pending with the U.S. Department of Interior's Office of Surface Mining and Enforcement, for a ''compatibility determination'' under the Surface Mining Control and Reclamation Act of 1977 with respect to defendants' mineral rights at the Site, thus avoiding the potential litigation were DOI to act adversely on defendants' application.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either emailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *The Stearns Co., Ltd., and Stearns Enterprises, Inc., Case No. 12-cv-191–JMH (E.D. Ky.),* D.J. Ref. 90–11–3–10012.

During the public comment period, the Consent Decree may be examined at the Daniel Boone National Forest Supervisor's Office, 1700 Bypass Road, Winchester, KY 40391. This office is open 8:00 a.m. to 4:30 p.m. Monday through Friday, except Federal Holidays; telephone number (859) 745–3100. The Consent Decree may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or emailing a request to ''Consent Decree Copy'' (*EESCDCopy.ENRD@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–5271. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $12.75 (.25 cents per page reproduction cost) payable to the U.S. Treasury, or if by email or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Maureen Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2012–14840 Filed 6–18–12; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OMB No. 1121–0240]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: Survey of General Purpose Law Enforcement Agencies, 2012.

The Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. The proposed information collection was previously published in the **Federal Register** Volume 77, Number 72, page 22347, on April 13, 2012, allowing for a 60-day public comment period.

The purpose of this notice is to allow an additional 30 days for public comment until July 19, 2012. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–7285.

Written comments and suggestions from the pubic and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate 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;
—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Enhance the quality, utility, and clarity of the information to be collected; and
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information

1. *Type of information collection:* Re-instatement of previously approved data collection, Survey of General Purpose Law Enforcement Agencies (SGPLEA), 2012.

2. *The title of the form/collection:* Survey of General Purpose Law Enforcement Agencies (SGPLEA), 2012.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form labels are SGPLEA, Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice.

4. *Affected Public Who Will be Asked or Required to Respond, as well as a Brief Abstract:* General purpose law state and local law enforcement agencies, including police departments, sheriffs, and constables at the state, county and municipal level, including tribal law enforcement agencies. Abstract: The Bureau of Justice Statistics (BJS) proposes to implement a Survey of General Purpose Law Enforcement Agencies (SGPLEA). This survey builds upon the previous eight waves of the BJS-sponsored surveys in the Law Enforcement Management and Administrative Statistics (LEMAS) Program. The SGPLEA will continue to generate nationally-representative estimates of the nature of law enforcement agencies and personnel by focusing on a smaller set of core issues in contemporary policing. With the revision to the SGPLEA, BJS will produce law enforcement statistics that will include a consistent set of core items and topical supplements that will vary from wave to wave. In addition to core issues concerning the number and type of agencies, the nature and diversity of law enforcement personnel, employee wages and benefits, agency budgets and organizational responses to contemporary law enforcement issues, the supplemental components of the 2012 SGPLEA will collect information on the following categories:

a. Recruitment and Retention of Staff
b. Community Policing
c. Information Systems
d. Officer Safety
e. Uses of Force

5. *An Estimate of the Total Number of Respondents and the Amount of Time Estimated for an Average Respondent to Respond:* Based on pilot testing with a draft of the 2012 SGPLEA instrument, the reduction in the total number of variables included in SGPLEA form compared to the 2007 LEMAS forms, and the increased burden on smaller law enforcement agencies, BJS estimates that 3,200 respondents will complete the SGPLEA survey form with an average burden per respondent of 3 hours.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Suite 2E–508, Washington, DC 20530.

Dated:June 13, 2012.

Jerri Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2012–14841 Filed 6–18–12; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Notice of Termination, Suspension, Reduction, or Increase in Benefit Payments

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Office of Workers' Compensation Programs (OWCP) sponsored information collection request (ICR) revision titled, ''Notice of Termination, Suspension, Reduction, or Increase in Benefit Payments,'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995.

DATES: Submit comments on or before July 19, 2012.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain,* on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–OWCP, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Telephone: 202–395–6929/Fax: 202–395–6881 (these are not toll-free numbers), email: *OIRA_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: Coal mine operators, their representatives, or their

insurers who have been identified as responsible for paying Black Lung benefits to an eligible miner or an eligible surviving dependent of the miner, are called Responsible Operators (ROs). ROs who pay benefits are required to report any change in the benefit amount to the Division of Coal Mine Workers' Compensation within the OWCP. Form CM–908, when properly completed and submitted, notifies the agency of the change in the beneficiary's benefit amount and the reason for the change. Federal Mine Safety and Health Act of 1977 as amended, section 432 (30 U.S.C. 942) and regulations 20 CFR 725.621 necessitate this information collection.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under OMB Control Number 1240–0030. The current OMB approval is scheduled to expire on June 30, 2012; however, it should be noted that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. New requirements would only take effect after OMB approval. This ICR is classified as a revision, because the OWCP has made certain changes for Form CM–908; however, those changes are not expected to change respondent burden. For example, the OWCP has added the DOL seal and removed a reference to the no longer existent Employment Standards Administration. In addition, the OWCP has added a notice that additional assistance is available for respondents with disabilities and improved accessibility for such persons who access the form on the Internet. The OWCP has also added some functionality to ensure consistency and accuracy for some responses. For additional information, see the related notice published in the **Federal Register** on March 7, 2012 (77 FR 13636).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should reference OMB Control Number 1240–0030. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL–OWCP.

Title of Collection: Notice of Termination, Suspension, Reduction, or Increase in Benefit Payments.

OMB Control Number: 1240–0030.

Affected Public: Private Sector—businesses or other for profits.

Total Estimated Number of Respondents: 325.

Total Estimated Number of Responses: 5,000.

Total Estimated Annual Burden Hours: 1,000.

Total Estimated Annual Other Costs Burden: $4,800.

Dated: June 13, 2012.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2012–14862 Filed 6–18–12; 8:45 am]

BILLING CODE 4510–CK–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Tax Performance System

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Employment and Training Administration (ETA) sponsored information collection request (ICR) titled, ''Tax Performance System,'' to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.).

DATES: Submit comments on or before July 19, 2012.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the *RegInfo.gov* Web site, *http://www.reginfo.gov/public/do/PRAMain,* on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–ETA, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Telephone: 202–395–6929/Fax: 202–395–6881 (these are not toll-free numbers), email: *OIRA_submission@omb.eop.gov.*

FOR FURTHER INFORMATION: Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The Tax Performance System (TPS) gathers and disseminates information on the timeliness and accuracy of state unemployment insurance (UI) tax operations. The Department is required to review the timeliness, accuracy, and completeness of certain tax collections of states using the TPS. The TPS Operations Handbook, ET–407, prescribes the operation of this program. TPS data now are an integral part of UI PERFORMS, the performance management system for the UI program. UI PERFORMS incorporates a strategic planning process of identifying priorities; ongoing collection and monitoring of valid data to measure performance; identification of areas of potential improvement; and development of specific action steps to improve performance, followed by use of available data to determine whether the action steps are successful.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of

law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under OMB Control Number 1205–0332. The current OMB approval is scheduled to expire on June 30, 2012; however, it should be noted that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on January 23, 2012 (77 FR 3287).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1205–0332. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL–ETA.

Title of Collection: Tax Performance System.

OMB Control Number: 1205–0332.

Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Respondents: 52.

Total Estimated Number of Responses: 52.

Total Estimated Annual Burden Hours: 90,428.

Total Estimated Annual Other Costs Burden: $0.

Dated: June 14, 2012.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2012–14894 Filed 6–18–12; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Office of the Secretary

Dominican Republic—Central America—United States Free Trade Agreement; Notice of Request for Public Comments on Submission #2011–03 (Dominican Republic)

AGENCY: Bureau of International Labor Affairs, U.S. Department of Labor.

ACTION: Request for comments from the public.

SUMMARY: The Office of Trade and Labor Affairs (OTLA) requests public comments and specific information related to Submission #2011–03, which was accepted for review pursuant to Article 16.4.3 of the Dominican Republic—Central America—United States Free Trade Agreement (CAFTA–DR). The submission alleges that the Government of the Dominican Republic (GODR) failed to fulfill its obligations under Chapter 16 of the CAFTA–DR (the Labor Chapter) through actions or lack thereof that denied workers in the sugar sector their rights under the laws of the Dominican Republic relating to freedom of association, the right to organize, child labor, forced labor, the right to bargain collectively, and acceptable conditions of work. The submission is posted on the ILAB Web site at *http://www.dol.gov/ilab/programs/otla/DRSubmission2011.pdf*.

DATES: Written comments are due no later than 5 p.m. July 2, 2012.

Submission of Comments: Submitters of information are requested to provide their submission to OTLA in English at the email or physical address below by 5:00 p.m. on July 2, 2012. Information may be submitted by any of the following methods:

(1) By email to: *FRFTADOMINICANREPUBLIC@dol.gov*.

(2) *Federal eRulemaking Portal: http://www.regulations.gov*. The portal includes instructions for submitting comments. Parties submitting responses electronically are encouraged not to submit paper copies.

(3) *By facsimile (fax):* Joshua Kagan, OTLA, at 202–693–4851.

(4) *Mail, Express Delivery, Hand Delivery, and Messenger Service:* Joshua Kagan, U.S. Department of Labor, OTLA, Bureau of International Labor Affairs, 200 Constitution Avenue NW., Room S–5303, Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Please contact Joshua Kagan, OTLA, U.S. Department of Labor, 200 Constitution Avenue NW., Room S–5303, Washington, DC 20210. Email: *kagan.joshua.m@dol.gov*. Telephone: (202) 693–4882. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Article 16.4.3 of the Labor Chapter of the CAFTA–DR provides for the receipt and review of public communications (''submissions'') regarding labor law matters in Central America and the Dominican Republic. A **Federal Register** notice issued on December 21, 2006, informed the public that the OTLA had been designated as the office to serve as the contact point for implementing the CAFTA–DR's labor provisions. The same **Federal Register** notice informed the public of the Procedural Guidelines that OTLA would follow for the receipt and review of public submissions (71 FR 76691 (2006)). These Procedural Guidelines are available at *http://www.dol.gov/ilab/programs/otla/proceduralguidelines.htm*.

On February 22, 2012, Submission #2011–03 was accepted for review pursuant to Article 16.4.3 of the CAFTA–DR, and a **Federal Register** notice announcing this decision was published on March 15, 2012 (77 FR 15397 (2012)). OTLA is now in the process of conducting its review of the submission to determine its findings on the allegations in the submission. As part of this review, OTLA has received information from stakeholders, visited the Dominican Republic, met with organizations and individuals, and conducted interviews with workers and their representatives, management and other sugar industry representatives, and the government. In addition, OTLA, via this notice, seeks information from the general public relevant to the submission as part of its review process. Comments submitted should, to the greatest extent possible:

1. Provide facts relating to the enforcement of the GODR's laws related to freedom of association, the right to organize, child labor, forced labor, the right to bargain collectively, and acceptable conditions of work in the sugar sector;
2. Relate to events occurring after March 1, 2007;
3. Include the source of the information received, such as a legal document, an interview, a report from another organization, or if appropriate to the facts at hand, personal experience; as well as the title, name

and date of the source if possible (please note the instructions regarding information submitted in confidence below);

4. Comments containing allegations of labor rights violations should specify: (a) which Dominican labor law related to freedom of association, the right to organize, child labor, forced labor, the right to bargain collectively, and acceptable conditions of work is alleged to have been violated; (b) the location and time of the alleged violation; (c) the number of workers affected; (d) the specific action, or lack thereof, by the GODR related to the allegation; and (e) if applicable, when and how the GODR was notified of the allegation.

In accordance with Section H of the Procedural Guidelines, OTLA solicits specific information relevant to the review of Submission 2011–3 and the GODR's protection of the specified labor rights covered by Article 16.8 of the CAFTA–DR from the public in the form of written document in Word or Power Point in English. Comments submitted to OTLA in response to this Notice will be posted online and included in the public file and thus will become publicly accessible. As provided in Section E of the Procedural Guidelines, information submitted by a person or another Party to the OTLA in confidence shall be treated as exempt from public inspection if the information meets the requirements of 5 U.S.C. 552(b) or as otherwise permitted by law. Each person or Party requesting such treatment shall clearly mark ''submitted in confidence'' on each page or portion of a page so submitted and furnish an explanation as to the need for exemption from public inspection. If the material is not accepted in confidence, it will be returned promptly to the submitter with an explanation for the action taken. OTLA will be sensitive to the needs of an individual's confidentiality and will make every effort to protect such individual's interests.

Signed at Washington, DC, on June 12, 2012.

Carol Pier,

Acting Deputy Undersecretary for International Affairs.

[FR Doc. 2012–14951 Filed 6–18–12; 8:45 am]

BILLING CODE 4510–28–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–81,071; TA–W–81,071A]

II–VI, Inc., Infrared Optics-Saxonburg Division, Saxonburg, PA; Leased Workers From Adecco, Carol Harris, Unlimited Staffing, and Staffmark, Working On-Site at II–VI, Inc., Infrared Optics-Saxonburg Division, Saxonburg, PA; Notice of Revised Determination on Reconsideration

The initial investigation, initiated on November 10, 2011, resulted in a negative determination, issued on February 8, 2012, that was based on the findings that the subject firm did not experience a decline in sales or production nor did the subject firm shift production to a foreign country during the relevant period. The determination was applicable to workers and former workers of II–VI, Inc., Infrared Optics-Saxonburg Division, Saxonburg, Pennsylvania. The Department's Notice of negative determination was published in the **Federal Register** on February 14, 2012 (77 FR 8281). The workers' firm is engaged in activities related to the production of infrared and CO_2 laser optics and related materials.

The workers of II–VI, Inc., Infrared Optics-Saxonburg Division, Saxonburg, Pennsylvania, were previously certified eligible to apply for TAA under TA–W–64,895. The certification did not include on-site leased workers from Adecco, Carol Harris, Unlimited Staffing, and Staffmark.

To support the request for reconsideration, the petitioner supplied additional information regarding a shift in production to a foreign country to supplement that which was gathered during the initial investigation.

Based on information provided during the reconsideration investigation, the Department determines that worker separations at the subject firm are related to a shift in the production of like or directly competitive articles to a foreign country.

Conclusion

After careful review of the additional facts obtained on reconsideration, I determine that workers of II–VI, Inc., Infrared Optics-Saxonburg Division, Saxonburg, Pennsylvania, who were engaged in employment related to production of infrared and CO_2 laser optics and related materials, meet the worker group certification criteria under Section 222(a) of the Act, 19 U.S.C. 2272(a). In accordance with Section 223 of the Act, 19 U.S.C. 2273, I make the following certification:

All workers of II–VI, Inc., Infrared Optics-Saxonburg Division, Saxonburg, Pennsylvania (TA–W–81,071) who became totally or partially separated from employment on or after January 27, 2011, through April 27, 2014, and all workers in the group threatened with total or partial separation from employment on April 27, 2012 through April 27, 2014, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended; and all leased workers from Adecco, Carol Harris, Unlimited Staffing, and Staffmark, working on-site at II–VI, Inc., Infrared Optics-Saxonburg Division, Saxonburg, Pennsylvania, (TA–W–81,071A) who became totally or partially separated from employment on or after February 13, 2010, through April 27, 2014, and all workers in the group threatened with total or partial separation from employment on April 27, 2012 through April 27, 2014, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 27th day of April, 2012.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–14907 Filed 6–18–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2012–0021]

Establishing Indicators to Determine Whether State Plan Operations Are at Least as Effective as Federal OSHA: Stakeholder Meeting; Extension of Comment Period

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice; extension of comment period.

SUMMARY: The Occupational Safety and Health Administration (OSHA) is extending the comment period for its notice to gather information and ideas about establishing definitions and measures to determine whether OSHA-approved State Plans for occupational safety and health (State Plans) are at least as effective as the Federal OSHA program as required by the Occupational Safety and Health Act of 1970.

DATES: Submit information or comments, or a request to extend the comment period, on or before July 6, 2012. All submissions must bear a postmark or provide other evidence of the submission date.

ADDRESSES: Submit comments by any of the following methods:

Electronically: Submit comments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for making electronic submissions.

Facsimile: If submissions, including attachments, are not longer than 10 pages, commenters may fax submissions to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, or messenger or courier service: Submit one copy of the comments to the OSHA Docket Office, Docket No. OSHA–2012–0021, U.S. Department of Labor, Room N–2625, 200 Constitution Avenue NW., Washington, DC 20210. The Docket Office accepts deliveries (hand, express mail, and messenger and courier service) during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m.–4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and the OSHA docket number (i.e., OSHA–2012–0021). OSHA will place all submissions, including any personal information provided, in the public docket without revision, and will make these submissions available online at *http://www.regulations.gov.*

Docket: To read or download submissions or other material in the docket (e.g., exhibits listed below), go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. The *http://www.regulations.gov* index lists all documents in the docket; however, some information (e.g., copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

Extension of comment period: Submit requests for an extension of the comment period on or before July 6, 2012, to the Directorate of Cooperative and State Programs, Room N–3700, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, or by fax to (202) 693–1671.

FOR FURTHER INFORMATION CONTACT: *For general and press inquiries contact:* Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–1725; email: *meilinger.francis2@dol.gov.*

For technical information contact: Doug Kalinowski, Director, OSHA Directorate of Cooperative and State Programs, Room N–3700, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–2200; email: *kalinowski.doug@dol.gov.*

SUPPLEMENTARY INFORMATION:

Extension of Comment Period

OSHA is extending the comment period of the notice (77 FR 31647, May 29, 2012) that invited interested parties to participate in an informal stakeholder meeting to be held on June 25, 2012. The purpose of this meeting is to provide a forum to gather information and ideas on key outcome and activity based indicators and how OSHA can use such indicators to assess the effectiveness of State Plans. This notice requested comments by June 11, 2012. However, OSHA is extending the comment period for those who may be unable to attend the stakeholder meeting, for more time for commenters to review the proposed measures and questions to be discussed, and for comments that may arise in light of the discussion at the stakeholder meeting. This extension allows for such interested parties to submit their comments.

Authority and Signature

This document was prepared under the direction of David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health.

Signed at Washington, DC, on June 14, 2012.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2012–14900 Filed 6–18–12; 8:45 am]

BILLING CODE 4510–26–P

LEGAL SERVICES CORPORATION

Sunshine Act Meeting; Notice

DATE AND TIME: The Audit Committee of the Legal Services Corporation's Board of Directors will meet June 25, 2012. The meeting will commence at 2:30 p.m., Eastern Daylight Time, and will continue until the conclusion of the Committee's agenda.

LOCATION: F. William McCalpin Conference Center, Legal Services Corporation Headquarters, 3333 K Street NW., Washington DC 20007.

PUBLIC OBSERVATION: Members of the public who are unable to attend in person but wish to listen to the public proceedings may do so by following the telephone call-in directions provided below but are asked to keep their telephones muted to eliminate background noises. To avoid disrupting the meeting, please refrain from placing the call on hold. From time to time, the presiding Chair may solicit comments from the public.

CALL-IN DIRECTIONS FOR OPEN SESSIONS:

- Call toll-free number: 1–866–451–4981;
- When prompted, enter the following numeric pass code: 5907707348
- When connected to the call, please immediately ''MUTE'' your telephone.

STATUS OF MEETING: Open.

MATTERS TO BE CONSIDERED:

1. Approval of agenda
2. Approval of minutes of the Committee's meeting of April 15, 2012
3. Review of Audit Committee charter and consider and act on possible changes thereto
4. Public comment
5. Consider and act on other business
6. Consider and act on motion to adjourn the meeting

CONTACT PERSON FOR INFORMATION: Katherine Ward, Executive Assistant to the Vice President & General Counsel, at (202) 295–1500. Questions may be sent by electronic mail to *FR_NOTICE_QUESTIONS@lsc.gov.*

NON-CONFIDENTIAL MEETING MATERIALS: Non-confidential meeting materials will be made available in electronic format at least 24 hours in advance of the meeting on the LSC Web site, at *http://www.lsc.gov/board-directors/meetings/board-meeting-notices/non-confidential-materials-be-considered-open-session.*

ACCESSIBILITY: LSC complies with the American's with Disabilities Act and Section 504 of the 1973 Rehabilitation Act. Upon request, meeting notices and materials will be made available in alternative formats to accommodate individuals with disabilities. Individuals who need other accommodations due to disability in order to attend the meeting in person or telephonically should contact Katherine Ward, at (202) 295–1500 or *FR_NOTICE_QUESTIONS@lsc.gov,* at least 2 business days in advance of the meeting. If a request is made without advance notice, LSC will make every effort to accommodate the request but cannot guarantee that all requests can be fulfilled.

Dated: June 15, 2012.

Victor M. Fortuno,

Vice President & General Counsel.

[FR Doc. 2012–15022 Filed 6–15–12; 11:15 am]

BILLING CODE 7050–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of Permit Applications Received under the Antarctic Conservation Act of 1978.

SUMMARY: The National Science Foundation (NSF) is required to publish a notice of permit applications received to conduct activities regulated under the Antarctic Conservation Act of 1978.

DATES: Interested parties are invited to submit written data, comments, or views with respect to this permit application by July 19, 2012. This application may be inspected by interested parties at the Permit Office, address below.

ADDRESSES: Comments should be addressed to Permit Office, Room 755, Office of Polar Programs, National Science Foundation, 4201 Wilson Boulevard, Arlington, Virginia 22230.

FOR FURTHER INFORMATION CONTACT: Polly A. Penhale at the above address or (703) 292–7420.

SUPPLEMENTARY INFORMATION: The National Science Foundation, as directed by the Antarctic Conservation Act of 1978 (Pub. L. 95–541), as amended by the Antarctic Science, Tourism and Conservation Act of 1996, has developed regulations for the establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas a requiring special protection. NSF has published regulations under the Antarctic Conservation Act at Title 45 Part 670 of the Code of Federal Regulations. This is the required notice of permit applications received. The regulations establish such a permit system to designate Antarctic Specially Protected Areas.

The applications received are as follows:

1. Permit Application: 2013–008.

Applicant Celia Lang, Lockheed Martin IS&GS, Antarctic Support Contract, 7400 S. Tucson Way, Centennial, CO 80112–3938.

Activity for Which Permit is Requested

Take. The applicant plans to periodically ''herd'' native mammals and seabirds that enter aircraft runways, roads, and ice pier at McMurdo Station, or the pier or general station area at Palmer Station. The presence of these animals pose operation safety concerns as well as potential harm to the animals. The herding method uses non-lethal and humane techniques to cause as little disturbance as possible to the animals. The primary technique consists of personnel slowly approaching the animals with their airs outstretched to the sides, and continuing in the animal's direction until they have been moved approximately 20–30 feet from the operational area (e.g. runways, roads, etc.). Individuals tasked with herding the animals will be trained in the proper technique.

Location

McMurdo Station, Ross Island, and Palmer Station, Anvers Island.

Dates

July 9, 2012 to August 31, 2017.

2. Permit Application: 2013–009.

Applicant Kristin M. O'Brien, Institute of Arctic Biology, University of Alaska Fairbanks, P.O. Box 757000, Fairbanks, AK 99775–7000.

Activity for Which Permit is Requested

Enter Antarctic Specially Protected Areas. The applicant plans to fish using benthic trawls and fish traps/pots in the Antarctic Peninsula area for capturing Antarctic fishes to study their physiology and biochemistry. Benthic Otter trawling is restricted to areas with smooth bottom surfaces in order to avoid damaging the net. Only a few such areas have been identified during previous field seasons. These areas include regions SW of Low Island, Western Bransfield Strait (ASPA 152), off of the S. shore of Brabant Island, in the vicinity of Astrolabe Needle in Dallmann Bay (ASPA 153), the SE. shore of Livingston Island, and a more distant area off the S. shore of Elephant Island.

Location

SW of Low Island, Western Bransfield Strait (ASPA 152), off of the S. shore of Brabant Island, in the vicinity of Astrolabe Needle in Dallmann Bay (ASPA 153), the SE. shore of Livingston Island, and a more distant area off the S. shore of Elephant Island.

Dates

April 1, 2013 to July 1, 2013.

Nadene G. Kennedy,

Permit Officer, Office of Polar Programs.

[FR Doc. 2012–14838 Filed 6–18–12; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on U.S. Advanced Pressurized Power Reactor; Notice of Meeting

The ACRS Subcommittee on U.S. Advanced Pressurized Power Reactor (US–APWR) will hold a meeting on July 9–10, 2012, Room T–2B3, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance

The agenda for the subject meeting shall be as follows:

Monday, July 9, 2012—8:30 a.m. Until 5:00 p.m.; Tuesday, July 10, 2012—8:30 a.m. Until 12:00 p.m.

The Subcommittee will review Chapter 15, ''Transient and Accident Analysis,'' of the Safety Evaluation Reports (SERs) with open items associated with the US–APWR design certification and the Comanche Peak Combined License Application (COLA). They will also review Topical Reports ''MUAP–07011, ''Large Break LOCA Code Applicability Report for US–APWR,'' and MUAP–07013, ''Small Break LOCA Methodology for US–APWR.'' The Subcommittee will hear presentations by and hold discussions with the NRC staff, Mitsubishi Heavy Industries (MHI), Luminant Generation Company LLC, and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Mr. Girija Shukla (Telephone 301–415–6855 or Email: *Girija.Shukla@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and

participation in ACRS meetings were published in the **Federal Register** on October 17, 2011, (76 FR 64127–64128).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (240–888–9835) to be escorted to the meeting room.

Dated: June 11, 2012.

Antonio Dias,

Technical Advisor, Advisory Committee on Reactor Safeguards.

[FR Doc. 2012–14886 Filed 6–18–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS), Meeting of the ACRS Subcommittee on Regulatory Policies & Practices, Notice of Meeting

The ACRS Subcommittee on Regulatory Policies & Practices will hold a meeting on July 10, 2012, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The agenda for the subject meeting shall be as follows:

Tuesday, July 10, 2012—1:30 p.m. Until 5:00 p.m.

The Subcommittee will review the Draft Regulatory Guide 1.59, ''Design Basis Floods for Nuclear Power Plants.'' The Subcommittee will hear presentations by and hold discussions with the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Derek Widmayer (Telephone 301–415–7366 or email: *Derek.Widmayer@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2011, (76 FR 64127–64128).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (240–888–9835) to be escorted to the meeting room.

Dated: June 11, 2012.

Antonio Dias,

Technical Advisor, Advisory Committee on Reactor Safeguards.

[FR Doc. 2012–14889 Filed 6–18–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS) Meeting of the ACRS Subcommittee on Plant License Renewal; Notice of Meeting

The ACRS Subcommittee on Plant License Renewal will hold a meeting on July 10, 2012, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Tuesday, July 10, 2012—1:30 p.m. until 5:00 p.m.

The Subcommittee will review the license renewal application for the Seabrook Unit 1 plant and the associated draft Safety Evaluation Report (SER) with open items. The Subcommittee will hear presentations by and hold discussions with the NRC staff, NextEra Energy Seabrook, and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Kent Howard (Telephone 301–415–2989 or Email: *Kent.Howard@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2011, (76 FR 64126–64127).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (Telephone 240–888–9835) to be escorted to the meeting room.

Dated: June 12, 2012.

Antonio Dias,

Technical Advisor, Advisory Committee on Reactor Safeguards.

[FR Doc. 2012–14888 Filed 6–18–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS) Meeting of the ACRS Subcommittee on Planning and Procedures; Notice of Meeting

The ACRS Subcommittee on Planning and Procedures will hold a meeting on July 10, 2012, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance, with the exception of a portion that may be closed pursuant to 5 U.S.C. 552b (c)(2) and (6) to discuss organizational and personnel matters that relate solely to the internal personnel rules and practices of the ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.

The agenda for the subject meeting shall be as follows:

Tuesday, July 10, 2012—12:00 p.m. until 1:00 p.m.

The Subcommittee will discuss proposed ACRS activities and related matters. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Antonio Dias (Telephone 301–415–6805 or Email: *Antonio. Dias@nrc.gov*) five days prior to the meeting, if possible, so that arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2011, (76 FR 64126–64127).

Information regarding changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with the DFO if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (240–888–9835) to be escorted to the meeting room.

Dated: June 12, 2012.

Cayetano Santos,

Chief, Reactor Safety Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2012–14892 Filed 6–18–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0002]

Sunshine Act Meetings

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATE: Weeks of June 18, 25, July 2, 9, 16, 23, 2012.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of June 18, 2012

There are no meetings scheduled for the week of June 18, 2012.

Week of June 25, 2012—Tentative

There are no meetings scheduled for the week of June 25, 2012.

Week of July 2, 2012—Tentative

There are no meetings scheduled for the week of July 2, 2012.

Week of July 9, 2012—Tentative

Tuesday, July 10, 2012

9:30 a.m. Strategic Programmatic Overview of the Operating Reactors Business Line (Public Meeting) (Contact: Trent Wertz, 301–415–1568).

This meeting will be webcast live at the Web address *www.nrc.gov.*

Week of July 16, 2012—Tentative

There are no meetings scheduled for the week of July 16, 2012.

Week of July 23, 2012—Tentative

There are no meetings scheduled for the week of July 23, 2012.

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* 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/public-involve/public-meetings/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 Bill Dosch, Chief, Work Life and Benefits Branch, at 301–415–6200, TDD: 301–415–2100, or by email at *william.dosch@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 email to *darlene.wright@nrc.gov.*

Dated: June 14, 2012.

Rochelle C. Bavol,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2012–15001 Filed 6–15–12; 11:15 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0133]

NRC Form 5, Occupational Dose Record for a Monitoring Period

AGENCY: Nuclear Regulatory Commission.

ACTION: Solicitation of public comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) is seeking public comment on the proposed draft NRC Form 5, ''Occupational Dose Record for a Monitoring Period.'' The current NRC Form 5 is being revised to align with current regulations. We are required to publish this notice in the **Federal Register** under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35).

DATES: Please submit any comments or questions by July 20, 2012.

ADDRESSES: You may access information and comment submissions related to this document, which the NRC possesses and are publically available, by searching on *http://www.regulations.gov* under Docket ID NRC–2012–0133. You may submit comments by the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0133. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.
- *Fax comments to:* RADB at 301–492–3446.

For additional direction on accessing information and submitting comments, see ''Accessing Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Doris Lewis, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–251–7559; email: *Doris.Lewis@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2012–0133 when contacting the NRC about the availability of information regarding this document. You may access information related to this document by the following methods:

- *Federal Rulemaking Web Site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0133.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly-available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced. The proposed draft NRC Form 5 can be found electronically under ADAMS Accession No. ML12135A226.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2012–0133 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed. The NRC posts all comment submissions at *http://www.regulations.gov* as well as entering the comment submissions into ADAMS, and the NRC does not edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information in their comment submissions that they do not want to be publicly disclosed. Your request should state that the NRC will not edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Background

On December 4, 2007 (72 FR 68043), NRC published a **Federal Register** Notice regarding changes to Title 10 of the *Code of Federal Regulations* (10 CFR) parts 19, 20 and 50. Specific changes to 10 CFR part 20 included a definition change to the total effective dose equivalent (TEDE), which allowed NRC licensees to use the effective dose equivalent (for external exposures) in place of the deep dose equivalent in determining the TEDE value. Section 20.2206(a) specifies seven categories of licensees that are required to report occupational radiation dose information to the NRC annually and Section 20.2206(b) allows licensees to submit this information in paper format on NRC Form 5, ''Occupational Dose Record for a Monitoring Period,'' or in an equivalent paper or electronic format. The change to 10 CFR parts 19, 20 and 50 became effective on February 15, 2008. The current NRC Form 5 can be found on NRC's Public Web page, *http://www.nrc.gov/reading-rm/doc-collections/forms/nrc5.pdf.*

III. Discussion

The NRC staff believes that the current NRC Form 5 should be modified to align with the existing TEDE definition in 10 CFR part 20. To ensure that the NRC is well informed of all of the benefits and burdens associated with revising the current NRC Form 5, the NRC is seeking input from stakeholders regarding the proposed draft NRC Form 5. Specifically, the NRC- and Agreement State-licensees who are required to comply with Section 20.2206(b) or compatible State regulations should submit comments regarding (1) the layout of the proposed draft NRC Form 5, (2) estimated economic costs associated with modifying existing information technology (IT) systems to include the new ''Effective Dose Equivalent for External Exposures (EDEX)'' field, (3) estimated economic savings associated with calculating EDEX for certain occupational employees, and (4) the clarity of the instructions provided for completing the proposed draft NRC Form 5, specifically concerning the use of EDEX and the new directions for blocks 11a and 11b. Stakeholders and interested parties also may provide other options for the current NRC Form 5, issues with the current NRC Form 5, or other information for NRC's consideration associated with the current NRC Form 5. The NRC staff will use this feedback in developing a new NRC Form 5 and a new NRC Form 4, ''Cumulative Occupational Dose History.''

Dated at Rockville, Maryland, this 12th day of June 2012.

For the Nuclear Regulatory Commission.

Stephanie Bush-Goddard,

Chief, Division of Systems Analysis, Office of Nuclear Regulatory Research.

[FR Doc. 2012–14872 Filed 6–18–12; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. MC2012–26; Order No. 1368]

Post Office Box Service Enhancements

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: This notice establishes a docket to provide the Postal Service with a mechanism for an elective filing concerning enhanced services for Post Office Box service. It also addresses the status of a related Complaint proceeding.

DATES: *Postal Service's elective filing due:* July 9, 2012.

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 at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction
II. Notice of Filings
III. Ordering Paragraphs

I. Introduction

In Docket No. C2012–1, the Associated Mail and Parcel Centers, the National Alliance of Retail and Ship Centers, and 11 additional organizations (Complainants) jointly filed a complaint with the Commission concerning the Postal Service's introduction of enhanced services that it offers to post office box customers at certain retail locations.[1] The Postal Service filed a motion to dismiss the Complaint.[2]

In Order No. 1366, the Commission denied the Motion to Dismiss as to Complainants' claims under sections 3633 and 3642.[3] Because it is not clear whether the Complaint raises material issues of law or fact, and to efficiently and effectively fulfill its statutory responsibilities while affording the Complainants and the Postal Service a forum to air their views, the Commission indicated that it would establish this docket as a placeholder for an elective filing by the Postal Service under 39 CFR 3020.30 concerning its enhanced services for Post Office Box service. *Id.* at 14. The Commission ordered that the Complaint be held in abeyance until July 9, 2012, to permit the Postal Service to make the elective filing. Further, it noted that the Complaint would be held in abeyance during the pendency of proceedings in this docket.

II. Notice of Filings

The Commission establishes Docket No. MC2012–26 to consider the Postal Service's filing under 39 CFR 3020.30. If the Postal Service elects to make that filing, the Commission will issue an order establishing procedures and appointing a Public Representative.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. MC2012–26.
2. The Postal Service's elective filing is due on or before July 9, 2012.
3. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2012–14902 Filed 6–18–12; 8:45 am]

BILLING CODE 7710–FW–P

[1] Complaint Regarding Postal Service Offering Enhanced Services Product for Competitive PO Boxes, March 15, 2012 (Complaint).

[2] Motion of the United States Postal Service to Dismiss Complaint, April 4, 2012 (Motion to Dismiss).

[3] Docket No. C2012–1, Order No. 1366, Order on Motion to Dismiss Holding Complaint in Abeyance Pending Further Proceeding, June 13, 2012, at 15.

POSTAL REGULATORY COMMISSION

[Docket No. CP2012–32; Order No. 1367]

Postal Rate Changes

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service notice of rate and changes affecting Inbound Air Parcel Post at Universal Postal Union (UPU) rates. This notice informs the public of the filing, addresses preliminary procedural matters, and invites public comment.

DATES: *Comments are due:* June 21, 2012.

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 at 202–789–6820.

SUPPLEMENTARY INFORMATION: *Notice of filing.* On June 11, 2012, the Postal Service filed a notice, in accordance with 39 CFR 3015.5, announcing changes in rates not of general applicability for Inbound Air Parcel Post at Universal Postal Union (UPU) rates.[1] The intended effective date is July 1, 2012. *Id.* at 1. The timing of the filing comports with the requirement, in rule 3015.5, that notice of this type of rate change be submitted at least 15 days before the effective date.

Description of product and approach to rates. Air parcels are inbound parcels eligible to receive transportation by air, as opposed to surface. *Id.,* Attachment 1 at 1. The rates apply when there is no contractual relationship with the tendering postal operator. The Postal Service asserts that the rates presented here comport with the controlling Governors' Decision No. 09–15 because they are the highest possible inward land rates for which the United States is eligible based on inflation increases and other factors. *Id.* at 1–2.

Contents of Notice. The Notice incorporates by reference the Postal Service's explanation of Inbound Air Parcel Post (at UPU Rates) provided in the initial dockets established for consideration of (i) the addition of this product to the competitive product list and (ii) the appropriate ratesetting mechanism.[2] Notice at 2. It includes the following attachments:

- Attachment 1—an application for non-public treatment of certain data and Information, including notice of an alternative approach to identifying third parties with a known proprietary interest in the materials;
- Attachment 2—a redacted copy of Governors' Decision No. 09–15 (issued November 16, 2009) indicating three attachments relevant to it;
- Attachment 3—a redacted version of the new rates; and
- Attachment 4—a certification concerning certain cost and pricing matters, including representations regarding anticipated positive cost coverage for the individual product and the absence of cross-subsidy.

The Notice also includes the Postal Service's assertion that it has established that the new rates for Inbound Air Parcel Post (at UPU Rates)

[1] Notice of the United States Postal Service of Filing Changes in Rates Not of General Applicability and Application for Non-Public Treatment of Materials Filed Under Seal, June 11, 2012 (Notice). No classification changes are involved. Notice at 2.

[2] *See id.,* Attachment 2; Docket Nos. MC2010–11 and CP2010–11, Order No. 362, Order Adding Inbound Air Parcel Post at UPU Rates to Competitive Product List, December 15, 2009, at 8–9.

are in compliance with the requirements of 39 U.S.C. 3633(a)(2) and therefore has met its burden of providing notice to the Commission of changes in rates within the scope of Governors' Decision No. 09–15. *Id.* at 3.

Related administrative matters. The Commission establishes Docket No. CP2012–32 for consideration of matters raised in the Notice. It has posted the public portions of the instant filing at *http://www.prc.gov.* Interested persons are encouraged to review the Notice, Attachments, and predecessor dockets (which are also available for review at the referenced Web site).

The Commission designates James F. Callow as the Public Representative to represent the interests of the general public in this proceeding. Interested persons may submit comments on whether the Postal Service's filings in this case are consistent with 39 U.S.C. 3632, 3633, and 39 CFR part 3015. Comments are due June 21, 2012.

It is ordered:

1. The Commission establishes Docket No. CP2012–32 for consideration of the matters raised in the Postal Service's June 11, 2012 Notice.

2. Comments by interested persons are due no later than June 21, 2012.

3. Pursuant to 39 U.S.C. 505, James F. Callow is appointed to serve as an officer of the Commission (Public Representative) to represent the interest of the general public in this proceeding.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2012–14890 Filed 6–18–12; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 204; OMB Control No. 3235–0647; SEC File No. 270–586.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (''PRA''), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information provided for in Rule 204 (17 CFR 242.204) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*). The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

Rule 204 requires that, subject to certain limited exceptions, if a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency it must immediately close out the fail to deliver position by purchasing or borrowing securities by no later than the beginning of regular trading hours on the settlement day following the day the participant incurred the fail to deliver position. Rule 204 is intended to help further the Commission's goal of reducing fails to deliver by maintaining the reductions in fails to deliver achieved by the adoption of temporary Rule 204T, as well as other actions taken by the Commission. In addition, Rule 204 is intended to help further the Commission's goal of addressing potentially abusive ''naked'' short selling in all equity securities.

The information collected under Rule 204 will continue to be retained and/or provided to other entities pursuant to the specific rule provisions and will be available to the Commission and self-regulatory organization (''SRO'') examiners upon request. The information collected will continue to aid the Commission and SROs in monitoring compliance with these requirements. In addition, the information collected will aid those subject to Rule 204 in complying with its requirements. These collections of information are mandatory.

Several provisions under Rule 204 will impose a ''collection of information'' within the meaning of the Paperwork Reduction Act.

I. Allocation Notification Requirement: As of December 31, 2011, there were 4,695 registered broker-dealers. Each of these broker-dealers could clear trades through a participant of a registered clearing agency and, therefore, become subject to the notification requirements of Rule 204(d). If a broker-dealer has been allocated a portion of a fail to deliver position in an equity security and after the beginning of regular trading hours on the applicable close-out date, the broker-dealer has to determine whether or not that portion of the fail to deliver position was not closed out in accordance with Rule 204(a), we estimate that a broker-dealer will have to make such determination with respect to approximately 2.09 equity securities per day.[1] We estimate a total of 2,472,762 notifications in accordance with Rule 204(d) across all broker-dealers (that were allocated responsibility to close out a fail to deliver position) per year (4,695 broker-dealers notifying participants once per day [2] on 2.09 securities, multiplied by 252 trading days in a year). The total estimated annual burden hours per year will be approximately 395,642 burden hours (2,472,762 multiplied by 0.16 hours/notification).

II. Demonstration Requirement for Fails to Deliver on Long Sales: As of January 31, 2012, there were 191 participants of NSCC, the primary registered clearing agency responsible for clearing U.S. transactions that were registered as broker-dealers.[3] If a participant of a registered clearing agency has a fail to deliver position in an equity security at a registered clearing agency and determines that such fail to deliver position resulted from a long sale, we estimate that a participant of a registered clearing agency will have to make such determination with respect to approximately 35 securities per day.[4]

[1] As stated in the adopting release for Interim Final Temporary Rule 204T, the Commission's Office of Economic Analysis (''OEA'') estimates that there are approximately 9,809 fail to deliver positions per settlement day. Across 4,695 broker-dealers, the number of securities per broker-dealer per day is approximately 2.09 equity securities. During the period from January to July 2008, approximately 4,321 new fail to deliver positions occurred per day. The National Securities Clearing Corporation (''NSCC'') data for this period includes only securities with at least 10,000 shares in fails to deliver. To account for securities with fails to deliver below 10,000 shares, the figure is multiplied by a factor of 2.27. The factor is estimated from a more complete data set obtained from NSCC during the period from September 16, 2008 to September 22, 2008. It should be noted that these numbers include securities that were not subject to the close-out requirement of Rule 203(b)(3) of Regulation SHO. Exchange Act Release No. 58733 (Oct. 14, 2008), 73 FR 61706, 61718 n.107 (Oct. 17, 2008) (''Rule 204T Adopting Release'').

[2] Because failure to comply with the close-out requirements of Rule 204(a) is a violation of the rule, we believe that a broker-dealer would make the notification to a participant that it is subject to the borrowing requirements of Rule 204(b) at most once per day.

[3] Those participants not registered as broker-dealers include such entities as banks, U.S.-registered exchanges, and clearing agencies. Although these entities are participants of a registered clearing agency, generally these entities do not engage in the types of activities that will implicate the close-out requirements of the rule. Such activities of these entities include creating and redeeming Exchange Traded Funds, trading in municipal securities, and using NSCC's Envelope Settlement Service or Inter-city Envelope Settlement Service. These activities rarely lead to fails to deliver and, if fails to deliver do occur, they are small in number and are usually closed out within a day.

[4] OEA estimates approximately 68% of trades are long sales and applies this percentage to the

We estimate a total of 1,684,620 demonstrations in accordance with Rule 204(a)(1) across all participants per year (191 participants checking for compliance once per day on 35 securities, multiplied by 252 trading days in a year). The total approximate estimated annual burden hour per year will be approximately 269,540 burden hours (1,684,620 multiplied by 0.16 hours/documentation).

III. Pre-Borrow Notification Requirement: As of January 31, 2012, there were 191 participants of NSCC, the primary registered clearing agency responsible for clearing U.S. transactions that were registered as broker-dealers.[5] If a participant of a registered clearing agency has a fail to deliver position in an equity security and after the beginning of regular trading hours on the applicable close-out date, the participant has to determine whether or not the fail to deliver position was closed out in accordance with Rule 204(a), we estimate that a participant of a registered clearing agency will have to make such determination with respect to approximately 51 equity securities per day.[6] We estimate a total of 2,454,732 notifications in accordance with Rule 204(c) across all participants per year (191 participants notifying broker-dealers once per day on 51 securities, multiplied by 252 trading days in a year). The total estimated annual burden hours per year will be approximately 392,758 burden hours (2,454,732 @ 0.16 hours/documentation).

IV. Certification Requirement: If the broker-dealer determines that it has not incurred a fail to deliver position on settlement date in an equity security for which the participant has a fail to deliver position at a registered clearing agency or has purchased securities in accordance with the conditions specified in Rule 204(e), we estimate that a broker-dealer will have to make such determinations with respect to approximately 2.09 securities per day. As of December 31, 2011, there were 4,695 registered broker-dealers. Each of these broker-dealers may clear trades through a participant of a registered clearing agency. We estimate that on average, a broker-dealer will have to certify to the participant that it has not incurred a fail to deliver position on settlement date in an equity security for which the participant has a fail to deliver position at a registered clearing agency or, alternatively, that it is in compliance with the requirements set forth in Rule 204(e), 2,472,762 times per year (4,695 broker-dealers certifying once per day on 2.09 securities, multiplied by 252 trading days in a year). The total approximate estimated annual burden hour per year will be approximately 395,642 burden hours (2,472,762 multiplied by 0.16 hours/certification).

V. Pre-Fail Credit Demonstration Requirement: If a broker-dealer purchases or borrows securities in accordance with the conditions specified in Rule 204(e) and determines that it has a net long position or net flat position on the settlement day on which the broker-dealer purchases or borrows securities we estimate that a broker-dealer will have to make such determination with respect to approximately 2.09 securities per day.[7] As of December 31, 2011, there were 4,695 registered broker-dealers. We estimate that on average, a broker-dealer will have to demonstrate in its books and records that it has a net long position or net flat position on the settlement day for which the broker-dealer is claiming credit, 2,472,762 times per year (4,695 broker-dealers checking for compliance once per day on 2.09 securities, multiplied by 252 trading days in a year). The total approximate estimated annual burden hour per year will be approximately 395,642 burden hours (2,472,762 multiplied by 0.16 hours/demonstration).

The total aggregate annual burden for the collection of information undertaken pursuant to all five provisions is thus 1,849,224 hours per year (395,642 + 269,540 + 392,758 + 395,642 + 395,642).

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

The Commission may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

Please direct your written comments to: Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, Virginia 22312 or send an email to: *PRA_Mailbox@sec.gov.*

Dated: June 14, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–14909 Filed 6–18–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 12b–1; SEC File No. 270–188; OMB Control No. 3235–0212.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

number of fail to deliver positions per day. OEA estimates that there are approximately 9,809 fail to deliver positions per settlement day. Across 191 broker-dealer participants of the NSCC, the number of securities per participant per day is approximately 51 equity securities. 68% of 51 securities per day is approximately 35 securities per day. The 68% figure is estimated as 100% minus the proportion of short sale trades found in the Regulation SHO Pilot Study. *See http://www.sec.gov/news/studies/2007/regshopilot020607.pdf.*

[5] *See supra* note 3.

[6] OEA estimates that there are approximately 9,809 fail to deliver positions per day. Across 191 broker-dealer participants of the NSCC, the number of securities per participant per day is approximately 51 equity securities. During the period from January to July 2008, approximately 4,321 new fail to deliver positions occurred per day. The NSCC data for this period includes only securities with at least 10,000 shares in fails to deliver. To account for securities with fails to deliver below 10,000 shares, the figure is grossed-up by a factor of 2.27. The factor is estimated from a more complete data set obtained from NSCC during the period from September 16, 2008 to September 22, 2008. It should be noted that these numbers include securities that were not subject to the close-out requirement of Rule 203(b)(3) of Regulation SHO.

[7] *See supra* note 1.

Rule 12b–1 under the Investment Company Act of 1940 (17 CFR 270.12b–1) permits a registered open-end investment company (''fund'' or ''mutual fund'') to bear expenses associated with the distribution of its shares, provided that the mutual fund complies with certain requirements, including, among other things, that it adopt a written plan (''rule 12b–1 plan'') and that it has in writing any agreements relating to the rule 12b–1 plan. The rule in part requires that (i) the adoption or material amendment of a rule 12b–1 plan be approved by the mutual fund's directors, including its independent directors, and, in certain circumstances, its shareholders; (ii) the board review quarterly reports of amounts spent under the rule 12b–1 plan; and (iii) the board, including the independent directors, consider continuation of the rule 12b–1 plan and any related agreements at least annually. Rule 12b–1 also requires mutual funds relying on the rule to preserve for six years, the first two years in an easily accessible place, copies of the rule 12b–1 plan and any related agreements and reports, as well as minutes of board meetings that describe the factors considered and the basis for adopting or continuing a rule 12b–1 plan.

Rule 12b–1 also prohibits funds from paying for distribution of fund shares with brokerage commissions on their portfolio transactions. The rule requires funds that use broker-dealers that sell their shares to also execute their portfolio securities transactions, to implement policies and procedures reasonably designed to prevent: (i) The persons responsible for selecting broker-dealers to effect transactions in fund portfolio securities from taking into account broker-dealers' promotional or sales efforts when making those decisions; and (ii) a fund, its adviser or principal underwriter, from entering into any agreement under which the fund directs brokerage transactions or revenue generated by those transactions to a broker-dealer to pay for distribution of the fund's (or any other fund's) shares.

The board and shareholder approval requirements of rule 12b–1 are designed to ensure that fund shareholders and directors receive adequate information to evaluate and approve a rule 12b–1 plan and, thus, are necessary for investor protection. The requirement of quarterly reporting to the board is designed to ensure that the rule 12b–1 plan continues to benefit the fund and its shareholders. The recordkeeping requirements of the rule are necessary to enable Commission staff to oversee compliance with the rule. The requirement that funds or their advisers implement, and fund boards approve, policies and procedures in order to prevent persons charged with allocating fund brokerage from taking distribution efforts into account is designed to ensure that funds' selection of brokers to effect portfolio securities transactions is not influenced by considerations about the sale of fund shares.

Based on information filed with the Commission by funds, Commission staff estimates that there are approximately 6,771 mutual fund portfolios that have at least one share class subject to a rule 12b–1 plan.[1] However, many of these portfolios are part of an affiliated group of funds, or mutual fund family, that is overseen by a common board of directors. Although the board must review and approve the rule 12b–1 plan for each fund separately, we have allocated the costs and hourly burden related to rule 12b–1 based on the number of fund families that have at least one fund that charges rule 12b–1 fees, rather than on the total number of mutual fund portfolios that individually have a rule 12b–1 plan.[2] Based on information filed with the Commission, the staff estimates that there are approximately 375 fund families with common boards of directors that have at least one fund with a rule 12b–1 plan.

Based on previous conversations with fund representatives, Commission staff estimates that for each of the 375 mutual fund families with a portfolio that has a rule 12b–1 plan, the average annual burden of complying with the rule is 425 hours. This estimate takes into account the time needed to prepare quarterly reports to the board of directors, the board's consideration of those reports, and the board's initial or annual consideration of whether to continue the plan.[3] We therefore estimate that the total hourly burden per year for all funds to comply with current information collection requirements under rule 12b–1, is 159,375 hours (375 fund families × 425 hours per fund family = 159,375 hours).

If a currently operating fund seeks to (i) adopt a new rule 12b–1 plan or (ii) materially increase the amount it spends for distribution under its rule 12b–1 plan, rule 12b–1 requires that the fund obtain shareholder approval. As a consequence, the fund will incur the cost of a proxy.[4] Based on previous conversations with fund representatives, Commission staff estimates that approximately three funds per year prepare a proxy in connection with the adoption or material amendment of a rule 12b–1 plan. Funds typically hire outside legal counsel and proxy solicitation firms to prepare, print, and mail such proxies. The staff further estimates that the cost of each fund's proxy is $32,174. Thus the total annual cost burden of rule 12b–1 to the fund industry is $96,522 (3 funds requiring a proxy × $32,174 per proxy).

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.

The collections of information required by Rule 12b–1 are necessary to obtain the benefits of the rule. Notices to the Commission will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid control number.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-

[1] This estimate is based on information from the Commission's NSAR database.

[2] This allocation is based on previous conversations with fund representatives on how fund boards comply with the requirements of rule 12b–1. Despite this allocation of hourly burdens and costs, the number of annual responses each year will continue to depend on the number of fund portfolios with rule 12b–1 plans rather than the number of fund families with rule 12b–1 plans. The staff estimates that the number of annual responses per fund portfolio will be four per year (quarterly, with the annual reviews taking place at one of the quarterly intervals). Thus, we estimate that funds will make 27,084 responses (6,771 fund portfolios × 4 responses per fund portfolio = 27,084 responses) each year.

[3] We do not estimate any costs or time burden related to the recordkeeping requirements in rule 12b–1, as funds are either required to maintain these records pursuant to other rules or would keep these records in any case as a matter of business practice.

[4] In general, a fund adopts a rule 12b–1 plan before it begins operations. Therefore, the fund is not required to obtain the approval of its public shareholders because the fund's shares have not yet been offered to the public.

Simon, 6432 General Green Way, Alexandria, VA 22312; or send an email to: *PRA_Mailbox@sec.gov.*

Dated: June 14, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–14908 Filed 6–18–12; 8:45 am]

BILLING CODE 8011–01–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, June 21, 2012 at 2:00 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Gallagher, 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, June 21, 2012 will be:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

Other matters relating to enforcement proceedings; and

Disclosure of non-public information.

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: June 14, 2012.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2012–15057 Filed 6–15–12; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67202; File No. SR–ISE–2012–54]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Extension of the Price Improvement Mechanism Pilot Program

June 14, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 11, 2012, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange 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 is proposing to extend two pilot programs related to its Price Improvement Mechanism (''PIM''). The text of the proposed rule amendment is as follows, with proposed deletions in [brackets], and proposed additions in *italics:*

Rule 723. Price Improvement Mechanism for Crossing Transactions

* * * * *

Supplementary Material to Rule 723

.01–.02 No Change.

.03 Initially, and for at least a Pilot Period expiring on *July 18, 2013* [July 18, 2012], there will be no minimum size requirements for orders to be eligible for the Price Improvement Mechanism. During the Pilot Period, the Exchange will submit certain data, periodically as required by the Commission, to provide supporting evidence that, among other things, there is meaningful competition for all size orders within the Price Improvement Mechanism, that there is significant price improvement for all orders executed through the Price Improvement Mechanism, and that there is an active and liquid market functioning on the Exchange outside of the Price Improvement Mechanism. Any data which is submitted to the Commission will be provided on a confidential basis.

.04 No Change.

.05 Paragraphs (c)(5), (d)(5) and (d)(6) will be effective for a Pilot Period expiring on *July 18, 2013* [July 18, 2012]. During the Pilot Period, the Exchange will submit certain data relating to the frequency with which the exposure period is terminated by unrelated orders. Any data which is submitted to the Commission will be provided on a confidential basis.

.06–.07 No Change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange currently has two pilot programs related to its PIM.[3] The

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release Nos. 50819 (December 8, 2004), 69 FR 75093 (December 15, 2004) (Approving the PIM pilot (the ''Approval Order'')); 52027 (July 13, 2005), 70 FR 41804 (July 20, 2005) Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to a One-Year Pilot Extension for the Price Improvement Mechanism); 54146 (July 14, 2006), 71 FR 41490 (July 21, 2006) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to a One-Year Pilot Extension Until July 18, 2007 for the Price Improvement Mechanism); 56106 (July 19, 2007), 72 FR 40914 (July 25, 2007) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to a One-Week Extension for the Price Improvement Mechanism Pilot Program); and 56156 (July 27, 2007), 72 FR 43305 (August 3, 2007) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to an Extension for the Price Improvement Mechanism Pilot Program); 58197 (July 18, 2008), 73 FR 43810 (July 28, 2008) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Extension of the Price Improvement Mechanism Pilot Program); 60333 (July 17, 2009), 74 FR 36792 (July 24, 2009) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Extension of the Price Improvement Mechanism Pilot Program); and 62513 (July 16, 2010), 75 FR 43221 (July 23, 2010) (Notice of Filing and Immediate Effectiveness of Proposed Rule

Continued

current pilot period provided in paragraphs .03 and .05 of the Supplementary Material to Rule 723 is set to expire on July 18, 2012.[4] Paragraph .03 provides that there is no minimum size requirement for orders to be eligible for the Price Improvement Mechanism. Paragraph .05 concerns the termination of the exposure period by unrelated orders. In accordance with the Approval Order, the Exchange has continually submitted certain data in support of extending the current pilot programs. The Exchange proposes to extend these pilot programs in their present form, through July 18, 2013, to give the Exchange and the Commission additional time to evaluate the effects of these pilot programs before requesting permanent approval of the rules. To aid the Commission in its evaluation of the PIM Functionality, ISE will also continue to provide additional PIM-related data as requested by the Commission.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the ''Exchange Act'') for this proposed rule change is found in Section 6(b)(5), in that the proposed rule change is designed to promote just and equitable principles of trade, 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. In particular, the Exchange believes the pilot programs are consistent with the Exchange Act because they provide opportunity for price improvement for all orders executed in the Exchange's Price Improvement Mechanism. The Exchange further believes it is appropriate to extend the pilot periods to provide the Exchange and Commission more data upon which to evaluate the rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

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[5] and Rule 19b–4(f)(6) thereunder.[6] Because the 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) by its terms, become operative prior to 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, the proposed rule change has become effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act[7] and Rule 19b–4(f)(6)(iii) thereunder.[8]

At any time within 60 days of the filing of the proposed rule change, the Commission may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ISE–2012–54 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2012–54. This file number should be included on the subject line if email 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 Commissions Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F 7 Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the ISE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2012–54 and should be submitted by July 10, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–14906 Filed 6–18–12; 8:45 am]

BILLING CODE 8011–01–P

Change Relating to the Extension of the Price Improvement Mechanism Pilot Program).

[4] *See* Securities Exchange Act Release No. 64931 (July 20, 2011), 76 FR 44642 (July 26, 2011) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Extension of the Price Improvement Mechanism Pilot Program).

[5] 15 U.S.C. 78s(b)(3)(A)(iii).

[6] 17 CFR 240.19b–4(f)(6).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission deems this requirement to have been met.

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67196; File No. SR–NYSEArca–2012–57]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Relating to the Listing and Trading of QAM Equity Hedge ETF Under NYSE Arca Equities Rule 8.600

June 13, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on June 1, 2012, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') 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 substantially prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade the following under NYSE Arca Equities Rule 8.600 (''Managed Fund Shares''): QAM Equity Hedge ETF. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, 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 proposes to list and trade the following Managed Fund Shares [3] (''Shares'') under NYSE Arca Equities Rule 8.600: QAM Equity Hedge ETF (''Fund'').[4] The Shares will be offered by AdvisorShares Trust (''Trust''), a statutory trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company.[5] The investment adviser to the Fund is AdvisorShares Investments, LLC (''Adviser''). Commerce Asset Management serves as investment sub-adviser to the Fund (''Sub-Adviser'') and provides day-to-day portfolio management of the Fund. Foreside Fund Services, LLC (''Distributor'') is the principal underwriter and distributor of the Fund's Shares. The Bank of New York Mellon Corporation (''Administrator'') serves as administrator, custodian, and transfer agent for the Fund.

Commentary .06 to Rule 8.600 provides that, if the investment adviser to the investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect a ''fire wall'' between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such investment company portfolio. In addition, Commentary .06 further requires that personnel who make decisions on the open-end fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the open-end fund's portfolio.[6] Commentary .06 to Rule 8.600 is similar to Commentary .03(a)(i) and (iii) to NYSE Arca Equities Rule 5.2(j)(3); however, Commentary .06 in connection with the establishment of a ''fire wall'' between the investment adviser and the broker-dealer reflects the applicable open-end fund's portfolio, not an underlying benchmark index, as is the case with index-based funds. The Adviser is not affiliated with a broker-dealer. The Sub-Adviser is affiliated with Commerce Square Trading, LLC, a broker-dealer, and has implemented a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the portfolio. In the event (a) the Adviser or the Sub-Adviser becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser becomes affiliated with a broker-dealer, it will implement a fire wall with respect to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1) (''1940 Act'') organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Investment Company Units, listed and traded on the Exchange under NYSE Arca Equities Rule 5.2(j)(3), seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index, or combination thereof.

[4] The Commission approved NYSE Arca Equities Rule 8.600 and the listing and trading of certain funds of the PowerShares Actively Managed Exchange-Traded Funds Trust on the Exchange pursuant to Rule 8.600 in Securities Exchange Act Release No. 57619 (April 4, 2008), 73 FR 19544 (April 10, 2008) (SR–NYSEArca–2008–25). The Commission also previously approved listing and trading on the Exchange of a number of actively managed funds under Rule 8.600. *See, e.g.,* Securities Exchange Act Release Nos. 60460 (August 7, 2009), 74 FR 41468 (August 17, 2009) (SR–NYSEArca–2009–55) (order approving listing of Dent Tactical ETF); 61365 (January 15, 2010), 75 FR 4124 (January 26, 2010) (SR–NYSEArca–2009–114) (order approving listing and trading of Grail McDonnell Fixed Income ETFs); 60981 (November 10, 2009), 74 FR 59594 (November 18, 2009) (SR–NYSEArca–2009–79) (order approving listing of five fixed income funds of the PIMCO ETF Trust); 62502 (July 15, 2010), 75 FR 42471 (July 21, 2010) (SR–NYSEArca–2010–57) (order approving listing of AdvisorShares WCM/BNY Mellon Focused Growth ADR ETF); and 63076 (October 12, 2010), 75 FR 63874 (October 18, 2010) (SR–NYSEArca–2010–79) (order approving listing of Cambria Global Tactical ETF).

[5] The Trust is registered under the 1940 Act. On September 16, 2011, the Trust filed with the Commission an amendment to its registration statement on Form N–1A under the Securities Act of 1933 (15 U.S.C. 77a) (''Securities Act'') and under the 1940 Act relating to the Fund (File Nos. 333–157876 and 811–22110) (''Registration Statement''). The description of the operation of the Trust and the Fund herein is based, in part, on the Registration Statement. In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. *See* Investment Company Act Release No. 28822 (July 20, 2009) (File No. 812–13488) (''Exemptive Order'').

[6] An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (''Advisers Act''). As a result, the Adviser and Sub-Adviser and their related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

such broker-dealer regarding access to information concerning the composition and/or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding such portfolio.

Principal Investment Strategies

According to the Registration Statement, the Fund seeks investment results that exceed the risk adjusted performance of approximately 50% of the long/short equity hedge fund universe as defined by the HFRI Equity Hedge (Total) Index (''HFRI Index'') constituents.[7] The Fund is a ''fund of funds'' that seeks to achieve its investment objective, under normal circumstances,[8] by investing at least 60% of its portfolio in both long and short positions in exchange-traded funds (''ETFs'') [9] and exchange-traded notes (''ETNs'') [10] that offer diversified exposure to global regions, countries, investment styles (*i.e.,* value, growth), sectors, and industries, as well as exchange-traded currency and commodity trusts (collectively, with ETFs and ETNs, ''Underlying ETPs''),[11] including Underlying ETPs that invest in short duration debt, cash, other cash equivalents, and other highly liquid instruments based on the Sub-Adviser's current analysis. The Sub-Adviser seeks to achieve the Fund's investment objective by taking long and short positions in Underlying ETPs that the Sub-Adviser believes, in the aggregate, will track the performance of a selected universe of long/short equity hedge funds.[12] The Underlying ETPs in which the Fund will invest will primarily be index-based ETFs that hold substantially all of their assets in securities that offer diversified exposure to global regions, countries, investment styles, sectors, and industries.

In managing the Fund's portfolio, among other proprietary analytics, the Sub-Adviser will utilize Markov Processes International, LLC's (''MPI'') Dynamic Style Analysis (''DSA'') patented hedge fund analysis software to help select the Fund's investments and determine the allocation among such investments. The Sub-Adviser will identify approximately 50 market factors that track the aggregated exposure and approximate the returns of the selected universe of long/short equity hedge funds. The Sub-Adviser will use DSA and other proprietary analytics to define and track the various market factors and relative exposures and to adjust the Fund's portfolio as necessary. At any given time, such market factors may include country exposure, sector exposure, industry exposure, and currency exposure. In seeking to achieve its investment objective, the Fund will seek to remain invested at all times in securities or derivatives (as described below) that provide the desired exposures to market factors.

The Fund's portfolio typically will consist of up to 50 Underlying ETPs and other securities, as described below. Under normal circumstances, the Fund's largest or maximum investment in any single issuer will range between 5% and 10% of the Fund's portfolio.

The Fund, through its investment in Underlying ETPs, may invest in closed-end funds, pooled investment vehicles that are registered under the 1940 Act and whose shares are listed and traded on U.S. national securities exchanges.

The Fund, through its investment in Underlying ETPs, may invest in the equity securities of foreign issuers, including the securities of foreign issuers in emerging countries. Emerging or developing markets exist in countries that are considered to be in the initial stages of industrialization.[13]

The Fund, through its investment in Underlying ETPs, may invest in shares of real estate investment trusts (''REITs''), which are pooled investment vehicles which invest primarily in real estate or real estate-related loans.

Other Investment Practices and Strategies

To respond to adverse market, economic, political or other conditions, the Fund may invest 100% of its total assets, without limitation, in high-quality debt securities and money market instruments either directly or through Underlying ETPs. The Fund may be invested in this manner for extended periods depending on the Sub-Adviser's assessment of market conditions. Debt securities and money market instruments include shares of mutual funds, commercial paper, certificates of deposit, bankers' acceptances, U.S. Government securities, repurchase agreements, and bonds that are BBB or higher.

Under normal circumstances, the Fund may hold up to 40% of its portfolio in other investments. For example, on a day-to-day basis, the Fund may hold money market instruments, cash or cash equivalents, and/or Underlying ETPs that invest in these and other highly liquid instruments, to collateralize its derivative positions.

The Fund, or the Underlying ETPs in which it invests, may invest in U.S. Treasury zero-coupon bonds. These securities are U.S. Treasury bonds which have been stripped of their unmatured interest coupons, the coupons themselves, and receipts or certificates representing interests in such stripped debt obligations and coupons. Interest is not paid in cash during the term of these securities, but is accrued and paid at maturity.

The Fund or an Underlying ETP may invest in equity securities, which represent ownership interests in a company or partnership and consist of common stocks, preferred stocks,

[7] The HFRI Index contains more than 2,400 funds. Instead of the Fund having an investment objective to outperform the HFRI Index, the Fund's investment objective is to outperform 50% of the constituents in the HFRI Index.

[8] The term ''under normal circumstances'' includes, but is not limited to, the absence of extreme volatility or trading halts in the equity markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption, or any similar intervening circumstance.

[9] For purposes of this proposed rule change, ETFs are securities registered under the 1940 Act such as those listed and traded on the Exchange under NYSE Arca Equities Rules 5.2(j)(3) (Investment Company Units), 8.100 (Portfolio Depositary Receipts), and 8.600 (Managed Fund Shares).

[10] For purposes of this proposed rule change, ETNs are securities that are registered pursuant to the Securities Act such as those listed and traded on the Exchange pursuant to NYSE Arca Equities Rule 5.2(j)(6). ETNs are debt obligations of investment banks that are traded on exchanges and the returns of which are linked to the performance of market indexes. In addition to trading ETNs on exchanges, investors may redeem ETNs directly with the issuer on a weekly basis, typically in a minimum amount of 50,000 units, or hold the ETNs until maturity.

[11] Underlying ETPs include, in addition to ETFs and ETNs, the following securities: Trust Issued Receipts (as described in NYSE Arca Equities Rule 8.200); Commodity-Based Trust Shares (as described in NYSE Arca Equities Rule 8.201); Currency Trust Shares (as described in NYSE Arca Equities Rule 8.202); Commodity Index Trust Shares (as described in NYSE Arca Equities Rule 8.203); and closed-end funds. The Underlying ETPs all will be listed and traded in the U.S. on registered exchanges.

[12] According to the Registration Statement, long/short equity hedge funds typically buy stocks, ETFs, ETNs, or currencies that the hedge fund managers expect will appreciate, and concurrently either sell short stocks, ETFs, ETNs, or currencies that the hedge fund managers expect will decline in value or to hedge market or sector exposures.

[13] According to the Registration Statement, the risks of investing in these markets are similar to the risks of international investing in general, although the risks are greater in emerging and developing markets. Countries with emerging or developing securities markets tend to have economic structures that are less stable than countries with developed securities markets. This is because their economies may be based on only a few industries and their securities markets may trade a small number of securities. Prices on these exchanges tend to be volatile, and securities in these countries historically have offered greater potential for gain (as well as loss) than securities of companies located in developed countries.

warrants to acquire common stock, securities convertible into common stock, and investments in master limited partnerships.

The Fund or an Underlying ETP may invest in American Depositary Receipts (''ADRs''), as well as Global Depositary Receipts (''GDRs'', together with ADRs, ''Depositary Receipts''), which are certificates evidencing ownership of shares of a foreign issuer. Depositary Receipts will be sponsored. These certificates are issued by depositary banks and generally trade on an established market in the United States or elsewhere. The underlying shares are held in trust by a custodian bank or similar financial institution in the issuer's home country. The depositary bank may not have physical custody of the underlying securities at all times and may charge fees for various services, including forwarding dividends and interest and corporate actions. Depositary Receipts are alternatives to directly purchasing the underlying foreign securities in their national markets and currencies. However, Depositary Receipts continue to be subject to many of the risks associated with investing directly in foreign securities.

The Fund, or the Underlying ETPs in which it invests, may invest in U.S. government securities. Securities issued or guaranteed by the U.S. government or its agencies or instrumentalities include U.S. Treasury securities, which are backed by the full faith and credit of the U.S. Treasury and which differ only in their interest rates, maturities, and times of issuance. U.S. Treasury bills have initial maturities of one-year or less; U.S. Treasury notes have initial maturities of one to ten years; and U.S. Treasury bonds generally have initial maturities of greater than ten years. Certain U.S. government securities are issued or guaranteed by agencies or instrumentalities of the U.S. government including, but not limited to, obligations of U.S. government agencies or instrumentalities such as Fannie Mae, Freddie Mac, the Government National Mortgage Association (Ginnie Mae), the Small Business Administration, the Federal Farm Credit Administration, the Federal Home Loan Banks, Banks for Cooperatives (including the Central Bank for Cooperatives), the Federal Land Banks, the Federal Intermediate Credit Banks, the Tennessee Valley Authority, the Export-Import Bank of the United States, the Commodity Credit Corporation, the Federal Financing Bank, the Student Loan Marketing Association, the National Credit Union Administration, and the Federal Agricultural Mortgage Corporation (Farmer Mac).

The Fund may not (i) with respect to 75% of its total assets, purchase securities of any issuer (except securities issued or guaranteed by the U.S. Government, its agencies or instrumentalities, or shares of investment companies) if, as a result, more than 5% of its total assets would be invested in the securities of such issuer; or (ii) acquire more than 10% of the outstanding voting securities of any one issuer. For purposes of this policy, the issuer of the underlying security will be deemed to be the issuer of any respective Depositary Receipt.[14]

The Fund may not invest 25% or more of its total assets in the securities of one or more issuers conducting their principal business activities in the same industry or group of industries. This limitation does not apply to investments in securities issued or guaranteed by the U.S. Government, its agencies or instrumentalities, or shares of investment companies. The Fund will not invest 25% or more of its total assets in any investment company that so concentrates. For purposes of this policy, the issuer of the underlying security will be deemed to be the issuer of any respective Depositary Receipt.[15]

While the Fund may invest up to 40% of its total assets in put and call options on indices (and enter into related closing transactions), exchange-listed futures contracts, and options on futures contracts, the Adviser expects that, under normal market conditions, the Fund will invest no more than 15% in such options and 15% in such futures on a daily basis.

The Fund may conduct foreign currency transactions on a spot (*i.e.,* cash) or forward basis (*i.e.,* by entering into forward contracts to purchase or sell foreign currencies up to 10% of its total assets). Currency transactions made on a spot basis are for cash at the spot rate prevailing in the currency exchange market for buying or selling currency.

The Fund may enter into repurchase agreements with financial institutions, which may be deemed to be loans. The Fund follows certain procedures designed to minimize the risks inherent in such agreements. These procedures include effecting repurchase transactions only with large, well-capitalized, and well-established financial institutions whose condition will be continually monitored by the Sub-Adviser. The Fund may enter into reverse repurchase agreements without limit as part of the Fund's investment strategy. Reverse repurchase agreements involve sales by the Fund of portfolio assets concurrently with an agreement by the Fund to repurchase the same assets at a later date at a fixed price.

The Fund may invest up to 15% of its total assets in swap agreements, including, but not limited to, total return swaps, index swaps, and interest rate swaps. The Fund may utilize swap agreements in an attempt to gain exposure to the securities in a market without actually purchasing those securities, or to hedge a position. In seeking to establish a long or short position in such instruments, the Fund may use swaps based on published indices, including international indices.

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment), including Rule 144A securities and loan participation interests. The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid securities. Illiquid securities include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.[16]

According to the Registration Statement, the Fund will seek to qualify for treatment as a Regulated Investment

[14] The diversification standard is set forth in Section 5(b)(1) of the 1940 Act.

[15] *See* Form N–1A, Item 9. The Commission has taken the position that a fund is concentrated if it invests more than 25% of the value of its total assets in any one industry. *See, e.g.,* Investment Company Act Release No. 9011 (October 30, 1975), 40 FR 54241 (November 21, 1975).

[16] The Commission has stated that long-standing Commission guidelines have required open-end funds to hold no more than 15% of their net assets in illiquid securities and other illiquid assets. *See* Investment Company Act Release No. 28193 (March 11, 2008), 73 FR 14618 (March 18, 2008), footnote 34. *See also* Investment Company Act Release No. 5847 (October 21, 1969), 35 FR 19989 (December 31, 1970) (Statement Regarding ''Restricted Securities''); Investment Company Act Release No. 18612 (March 12, 1992), 57 FR 9828 (March 20, 1992) (Revisions of Guidelines to Form N–1A). A fund's portfolio security is illiquid if it cannot be disposed of in the ordinary course of business within seven days at approximately the value ascribed to it by the fund. *See* Investment Company Act Release No. 14983 (March 12, 1986), 51 FR 9773 (March 21, 1986) (adopting amendments to Rule 2a-7 under the 1940 Act); Investment Company Act Release No. 17452 (April 23, 1990), 55 FR 17933 (April 30, 1990) (adopting Rule 144A under the Securities Act).

Company (''RIC'') under the Internal Revenue Code.[17]

Except for Underlying ETPs that may hold non-U.S. issues, the Fund will not otherwise invest in non-U.S.-registered issues.

The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage. That is, while the Fund will be permitted to borrow as permitted under the 1940 Act, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*i.e.,* 2Xs and 3Xs) of the Fund's broad-based securities market index (as defined in Form N–1A).[18] The Fund will not invest in leveraged or inverse leveraged Underlying ETPs.

Net Asset Value

The Fund will calculate NAV by: (i) Taking the current market value of its total assets; (ii) subtracting any liabilities; and (iii) dividing that amount by the total number of Shares owned by shareholders. The Fund will calculate NAV once each business day as of the close of normal trading on the New York Stock Exchange (''NYSE'') (normally, 4:00 p.m., Eastern Time). In calculating NAV, the Fund generally will value investment portfolios at market price. If market prices are unavailable or the Fund thinks that they are unreliable, or when the value of a security has been materially affected by events occurring after the relevant market closes, the Fund will price those securities at fair value as determined in good faith using methods approved by the Board of Trustees.

The use of fair valuation in pricing a security involves the consideration of a number of subjective factors and, therefore, is susceptible to the unavoidable risk that the valuation may be higher or lower than the price at which the security might actually trade if a reliable market price were readily available.

Creation and Redemption of Shares

The Fund will offer and issue Shares on a continuous basis at NAV only in aggregated lots of 50,000 or more Shares (each a ''Creation Unit'' or ''Creation Unit Aggregation''), generally in exchange for: (i) A basket of equity securities (''Deposit Securities''); and (ii) an amount of cash (''Cash Component''). Shares are redeemable only in Creation Unit Aggregations, and, generally, in exchange for portfolio securities and a specified cash payment.

A ''creator'' will enter into an authorized participant agreement (''Participant Agreement'') with the Distributor or use a Depository Trust Company (''DTC'') participant who has executed a Participant Agreement (''Authorized Participant''), and deposit into the Fund a portfolio of securities closely approximating the holdings of the Fund and a specified amount of cash, together totaling the NAV of the Creation Unit(s), in exchange for 50,000 Shares of the Fund (or multiples thereof).

All orders to purchase Creation Units must be received by the Distributor no later than the close of the regular trading session on the NYSE (ordinarily 4:00 p.m., Eastern Time) on the date such order is placed in order for the purchase of Creation Units to be effected based on the NAV of Shares of the Fund as next determined on such date after receipt of the order in proper form.

Shares may be redeemed only in Creation Units at their NAV next determined after receipt of a redemption request in proper form by the Fund through the Administrator and only on a business day. With respect to the Fund, the Administrator, through the National Securities Clearing Corporation, will make available immediately prior to the opening of business on the Exchange (currently 9:30 a.m., Eastern Time) on each business day, the portfolio of securities (''Fund Securities'') that will be applicable to redemption requests received in proper form on that day. Fund Securities received on redemption may not be identical to Deposit Securities which are applicable to creations of Creation Units. Unless cash redemptions are available or specified for the Fund, the redemption proceeds for a Creation Unit generally will consist of Fund Securities plus cash in an amount equal to the difference between the NAV of the Shares being redeemed, as next determined after a receipt of a request in proper form, and the value of the Fund Securities less a redemption transaction fee, as described in the Registration Statement. In the event that the Fund Securities have a value greater than the NAV of the Shares, a compensating cash payment equal to the differential will be required to be made by or through an Authorized Participant by the redeeming shareholder.

The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600. The Exchange represents that, for initial and/or continued listing, the Fund will be in compliance with Rule 10A–3 under the Exchange Act,[19] as provided by NYSE Arca Equities Rule 5.3. A minimum of 100,000 Shares for the Fund will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.

Availability of Information

The Fund's Web site (*www.advisorshares.com*), which will be publicly available prior to the public offering of Shares, will include a form of the prospectus for the Fund that may be downloaded. The Fund's Web site will include additional quantitative information updated on a daily basis, including, for the Fund, (1) daily trading volume, the prior business day's reported closing price, NAV and mid-point of the bid/ask spread at the time of calculation of such NAV (''Bid/Ask Price''),[20] and a calculation of the premium and discount of the Bid/Ask Price against the NAV, and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund will disclose on its

[17] 26 U.S.C. 851. One of several requirements for RIC qualification is that the Fund must receive at least 90% of the Fund's gross income each year from dividends, interest, payments with respect to securities loans, gains from the sale, or other disposition of stock, securities, or foreign currencies, or other income derived with respect to the Fund's investments in stock, securities, foreign currencies, and net income from an interest in a qualified publicly traded partnership (''90% Test''). A second requirement for qualification as a RIC is that the Fund must diversify its holdings so that, at the end of each fiscal quarter of the Fund's taxable year: (a) At least 50% of the market value of the Fund's total assets is represented by cash and cash items, U.S. Government securities, securities of other RICs, and other securities, with these other securities limited, in respect to any one issuer, to an amount not greater than 5% of the value of the Fund's total assets or 10% of the outstanding voting securities of such issuer; and (b) not more than 25% of the value of its total assets are invested in the securities (other than U.S. Government securities or securities of other RICs) of any one issuer or two or more issuers which the Fund controls and which are engaged in the same, similar, or related trades or businesses, or the securities of one or more qualified publicly traded partnership (''Asset Test'').

[18] The Fund's broad-based securities market index, which is to be determined, will be identified in an amendment to the Registration Statement.

[19] 17 CFR 240.10A–3.

[20] The Bid/Ask Price of the Fund will be determined using the mid-point of the highest bid and the lowest offer on the Exchange as of the time of calculation of the Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

Web site the Disclosed Portfolio, as defined in NYSE Arca Equities Rule 8.600(c)(2), that will form the basis for the Fund's calculation of NAV at the end of the business day.[21]

On a daily basis, the Adviser will disclose for each portfolio security and other financial instrument of the Fund the following information on the Fund's Web site: Ticker symbol (if applicable), name of security and financial instrument, number of shares or dollar value of each security and financial instrument held in the portfolio, and percentage weighting of the security and financial instrument in the portfolio. The Web site information will be publicly available at no charge.

In addition, a basket composition file, which includes the security names and share quantities required to be delivered in exchange for the Fund's Shares, together with estimates and actual cash components, will be publicly disseminated daily prior to the opening of the NYSE via the National Securities Clearing Corporation. The basket represents one Creation Unit of the Fund.

Investors can also obtain the Trust's Statement of Additional Information (''SAI''), the Fund's Shareholder Reports, and the Trust's Form N–CSR and Form N–SAR, filed twice a year. The Trust's SAI and Shareholder Reports are available free upon request from the Trust, and those documents and the Form N–CSR and Form N–SAR may be viewed on-screen or downloaded from the Commission's Web site at *www.sec.gov*. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last-sale information for the Shares will be available via the Consolidated Tape Association (''CTA'') high-speed line and, for the Underlying ETPs, will be available from the national securities exchange on which they are listed. In addition, the Portfolio Indicative Value, as defined in NYSE Arca Equities Rule 8.600(c)(3), will be widely disseminated at least every 15 seconds during the Core Trading Session by one or more major market data vendors.[22] The dissemination of the Portfolio Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of the Fund on a daily basis and to provide a close estimate of that value throughout the trading day. The intra-day, closing, and settlement prices of the portfolio investments (*e.g.,* Underlying ETPs, put and call options, futures contracts, forward contracts, money market funds, and options on futures contracts) will also be readily available from the national securities exchanges trading such securities, automated quotation systems, published or other public sources, or on-line information services such as Bloomberg or Reuters.

Additional information regarding the Trust and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions, and taxes is included in the Registration Statement. All terms relating to the Fund that are referred to, but not defined in, this proposed rule change are defined in the Registration Statement.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund.[23] Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the securities and/or the financial instruments comprising the Disclosed Portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4:00 a.m. to 8:00 p.m., Eastern Time in accordance with NYSE Arca Equities Rule 7.34 (Opening, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Equities Rule 7.6, Commentary .03, the minimum price variation (''MPV'') for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00 for which the MPV for order entry is $0.0001.

Surveillance

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products (which include Managed Fund Shares) to monitor trading in the Shares. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

The Exchange's current trading surveillance focuses on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange may obtain information via the Intermarket Surveillance Group (''ISG'') from other exchanges that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.[24] In addition, the Exchange could obtain information from the U.S. exchanges, all of which are ISG members, on which the Underlying ETPs, Depositary Receipts, futures, options, and other applicable portfolio securities are listed and traded. The Exchange may obtain surveillance information from all securities exchanges listing and/or trading the securities held by the Fund.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its

[21] Under accounting procedures followed by the Fund, trades made on the prior business day (''T'') will be booked and reflected in NAV on the current business day (''T+1''). Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

[22] Currently, it is the Exchange's understanding that several major market data vendors widely disseminate Portfolio Indicative Values taken from CTA or other data feeds.

[23] *See* NYSE Arca Equities Rule 7.12, Commentary .04.

[24] For a list of the current members of ISG, see *www.isgportal.org.* The Exchange notes that not all components of the Disclosed Portfolio for the Fund may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

Equity Trading Permit (''ETP'') Holders in an Information Bulletin (''Bulletin'') of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Unit Aggregations (and that Shares are not individually redeemable); (2) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Portfolio Indicative Value will not be calculated or publicly disseminated; (4) how information regarding the Portfolio Indicative Value is disseminated; (5) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Bulletin will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Bulletin will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Exchange Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4:00 p.m., Eastern Time each trading day.

2. Statutory Basis

The basis under the Exchange Act for this proposed rule change is the requirement under Section 6(b)(5) [25] that an exchange have rules that are 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, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Equities Rule 8.600. The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Sub-Adviser is affiliated with a broker-dealer, and has implemented a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the portfolio. In addition, the Sub-Adviser is subject to procedures designed to prevent the use and dissemination of material, non-public information regarding such portfolio. The Exchange may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. In addition, the Exchange could obtain information from the U.S. exchanges, all of which are ISG members, on which the Underlying ETPs, Depositary Receipts, futures, options, and other applicable portfolio securities are listed and traded. The Fund seeks to achieve its investment objective, under normal circumstances, by investing at least 60% of its portfolio in both long and short positions in Underlying ETPs. The listing and trading of such Underlying ETPs is subject to rules of the exchanges on which they are listed and traded, as approved by the Commission. Except for Underlying ETPs that may hold non-U.S. issues, the Fund will not otherwise invest in non-U.S.-registered issues. Options, futures, and options on futures contracts in which the Fund invests will be U.S. exchange-listed. The Fund will invest no more than 15% of total assets in such options and 15% of total assets in such futures on a daily basis. The Fund may invest up to 15% of its total assets in swap agreements, including, but not limited to, total return swaps, index swaps, and interest rate swaps. The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment), including Rule 144A securities and loan participation interests. The Fund will not invest in leveraged or inverse leveraged Underlying ETPs. The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. In addition, a large amount of information will be publicly available regarding the Fund and the Shares, thereby promoting market transparency. Moreover, the Portfolio Indicative Value will be widely disseminated through the facilities of the CTA or by one or more major market data vendors at least every 15 seconds during the Exchange's Core Trading Session. On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund will disclose on its Web site the Disclosed Portfolio that will form the basis for the Fund's calculation of NAV at the end of the business day. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services, and quotation and last-sale information will be available via the CTA high-speed line. The Web site for the Fund will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information. Moreover, prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable, and trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings, the Portfolio Indicative Value, the Disclosed Portfolio, and quotation and last-sale information for the Shares.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an additional type of actively managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings, the Portfolio Indicative Value, the Disclosed Portfolio, and quotation and last-sale information for the Shares.

[25] 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

Within 45 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 or disapprove 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 email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2012–57 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2012–57. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549, on official business days between 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at *www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2012–57 and should be submitted on or before July 10, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–14905 Filed 6–18–12; 8:45 am]

BILLING CODE 8011–01–P

[26] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67194; File No. SR–NYSEMKT–2012–08]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Amending Commentary .10 To Exchange Rule 903 Allowing the NYSE Amex Options To Open Short Term Option Series That Are Opened by Other Securities Exchanges in Option Classes Selected by Other Exchanges Under Their Respective Short Term Option Rules

June 13, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on June 12, 2012, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Commentary .10 to Exchange Rule 903 to allow the NYSE Amex Options to open Short Term Option Series (''Weeklies'') that are opened by other securities exchanges in option classes selected by other exchanges under their respective short term option rules. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, 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 this proposed rule change is to amend Commentary .10 to Exchange Rule 903 to allow the Exchange to open Short Term Option Series (''Weeklies'') that are opened by other securities exchanges in option classes selected by other exchanges under their respective short term option rules.[3]

Currently, the Exchange may select up to 5 currently listed option classes on which Weeklies options may be opened in the Weeklies Program and the Exchange may also match any option classes that are selected by other

[3] On July 12, 2005, the Commission approved the Weeklies Program on a pilot basis. *See* Securities Exchange Act Release No. 52014 (July 12, 2005), 70 FR 41244 (July 18, 2005) (Amex–2005–035). The Weeklies Program was made permanent on June 23, 2010. *See* Securities Exchange Act Release No.62370 (June 23, 2010), 75 FR 37870 (June 30, 2010) (SR–NYSEAmex–2010–62).

securities exchanges that employ a similar program under their respective rules. For each option class eligible for participation in the Weeklies Program, the Exchange may open up to 30 Short Term Option Series for each expiration date in that class.

This proposal seeks to allow the Exchange to open Weeklies option series that are opened by other securities exchanges in option classes selected by other exchanges under their respective short term option rules. This change is being proposed notwithstanding the current cap of 30 series per class under the Weeklies Program. This is a competitive filing and is based on existing rules of The NASDAQ Stock Market LLC for the NASDAQ Options Market (''NOM'') and NASDAQ OMX PHLX, Inc. (''PHLX'') and Chicago Board Options Exchange, Incorporated (''CBOE'').[4]

NYSE Amex Options is competitively disadvantaged since it operates a substantially similar Weeklies Program as NOM, PHLX and CBOE but is limited to listing a maximum of 30 series per options class that participates in its Weeklies Program (whereas PHLX, NOM and CBOE are not similarly restricted).

The Exchange is not proposing any changes to the Weeklies Program other than the ability to open Weeklies option series that are opened by other securities exchanges in option classes selected by other exchanges under their respective short term option rules.

The Exchange notes that the Weeklies Program has been well-received by market participants, in particular by retail investors. The Exchange believes that the current proposed revision to the Weeklies Program will permit the Exchange to meet increased customer demand and provide market participants with the ability to hedge in a greater number of option classes and series.

With regard to the impact of this proposal on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority (''OPRA'') have the necessary systems capacity to handle the potential additional traffic associated with trading of an expanded number of series for the classes that participate in the Weeklies Program.

The proposed increase to the number of series per classes eligible to participate in the Weeklies Program is required for competitive purposes as well as to ensure consistency and uniformity among the competing options exchanges that have adopted similar Weeklies Programs.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[5] in general, and furthers the objectives of Section 6(b)(5),[6] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes that expanding the Weeklies Program will result in a continuing benefit to investors by giving them more flexibility to closely tailor their investment decisions and hedging decisions in a greater number of securities. The Exchange also believes that expanding the Weeklies Program will provide the investing public and other market participants with additional opportunities to hedge their investment thus allowing these investors to better manage their risk exposure. While the expansion of the Weeklies Program will generate additional quote traffic, the Exchange does not believe that this increased traffic will become unmanageable since the proposal remains limited to a fixed number of classes.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition 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 significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[7] and Rule 19b–4(f)(6) thereunder.[8]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal is substantially similar to those of other exchanges that have been approved by the Commission and permit such exchanges to open Weekly option series that are opened by other securities exchanges under their respective short term option rules.[9] Therefore, the Commission designates the proposal operative upon filing.[10]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEMKT–2012–08 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission,

[4] *See* Securities Exchange Act Release Nos. 65775 (November 17, 2011), 76 FR 72473 (November 23, 2011) (SR–NASDAQ–2011–138) ; 65776 (November 17, 2011), 76 FR 72482 (November 23, 2011) (SR–PHLX–2011–131); and 66563 (March 9, 2012), 77 FR 15426 (March 15, 2012).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[9] *See supra* note 4.

[10] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEMKT–2012–08. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 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–NYSEMKT–2012–08 and should be submitted on or before July 10, 2012.[11]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–14904 Filed 6–18–12; 8:45 am]

BILLING CODE 8011–01–P

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67156A; File No. SR–ICC–2012–09]

Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Schedule 502 of the ICE Clear Credit LLC Rules to Amend the Reference Entity Name for Three Credit Default Swap Contracts and the Reference Obligation International Securities Identification Number Associated With One Credit Default Swap Contract; Correction

June 13, 2012.

AGENCY: Securities and Exchange Commission.

ACTION: Notice; correction.

SUMMARY: The Securities and Exchange Commission published a document in the **Federal Register** on June 13, 2012, concerning a Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Schedule 502 of the ICE Clear Credit LLC Rules to Amend the Reference Entity Name for Three Credit Default Swap Contracts and the Reference Obligation International Securities Identification Number Associated with One Credit Default Swap Contract. The document contained a typographical error in one section designation.

FOR FURTHER INFORMATION CONTACT: Shahriar Hafizi, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549, (202) 551–7226.

Correction

In the **Federal Register** of June 13, 2012 in FR Doc. 2012–35462, on page 35464, in the twenty-fifth line of the first column, correct the reference to ICE Clear Credit LLC's Web site to *https://www.theice.com/publicdocs/regulatory_filings/ICEClearCredit_052912.pdf.*

Dated: June 13, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–14858 Filed 6–18–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67195; File No. SR–NYSEArca–2012–51]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Accuvest Global Long Short ETF (Formerly the Mars Hill Global Relative Value ETF)

June 13, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on May 31, 2012, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon receipt of this filing by the Commission. 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 reflect a change to the means of achieving the investment objective, and the size of a Creation Unit (as described below) applicable to, the Accuvest Global Long Short ETF (''Fund'') (formerly known as the Mars Hill Global Relative Value ETF). The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, 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.

[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).

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 Commission has approved listing and trading on the Exchange of shares (''Shares'') of the Mars Hill Global Relative Value ETF, a series of AdvisorShares Trust (''Trust''),[5] under NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares. The Shares are offered by the Trust, a statutory trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company.[6]

The investment adviser to the Fund is AdvisorShares Investments, LLC (''Adviser''). On December 1, 2011, the sub-adviser to the Fund changed from Mars Hill Partners, LLC to Accuvest Global Advisors LLC (''Accuvest'' or ''Sub-Adviser''), and the name of the Fund changed to the Accuvest Global Long Short ETF. Shareholders of the Fund were notified of the change to the Sub-Adviser and the name of the Fund in an amendment to the Registration Statement on Form N–1A on December 1, 2011. The Adviser and Sub-Adviser are not affiliated with a broker-dealer.

In this proposed rule change, the Exchange proposes to reflect a change in the Registration Statement to the description of the measures the Sub-Adviser will utilize to implement the Fund's investment objective.[7] As reflected in the Prior Release, the investment objective of the Fund is to provide average annual returns in excess of the total return of the MSCI World Index (''Index''), with comparable volatility and little to no correlation with the Index. The Registration Statement states that the investment objective of the Fund is to provide average annual returns in excess of the total return of the Index, deleting the words ''with comparable volatility and little to no correlation with the Index.''

The Adviser seeks to make the following changes to representations made in the Prior Release:

(1) According to the Prior Release, the Sub-Adviser seeks to achieve the Fund's investment objective by taking long positions in the Underlying ETFs that invest in what it believes to be the most relatively attractive global regions and countries within those regions, and by establishing an equivalent dollar amount of short positions in the Underlying ETFs that invest in what it believes to be the most relatively unattractive global regions and countries within those regions. The Registration Statement was amended to state that the Sub-Adviser seeks to achieve the Fund's investment objective by taking long positions in the Underlying ETFs that invest in what it believes to be the most relatively attractive global regions and countries within those regions, and by taking short positions, by entering into short sales, in the Underlying ETFs that invest in what it believes to be the most relatively unattractive global regions and countries within those regions. Thus, the Sub-Adviser no longer would take into account the dollar equivalency of the short positions. The purpose of this change is to provide additional flexibility to the Sub-Adviser to meet the Fund's investment objective by altering the Fund's long positions based on the Sub-Adviser's assessment of the relative attractiveness or unattractiveness of global regions without having to establish dollar equivalency with the Fund's short positions, and *vice versa.*

(2) According to the Prior Release, by maintaining a core portfolio construction of equal long and short dollar exposure, the Sub-Adviser seeks to minimize the influence of directional trends and market exposure (''beta''), and seeks to profit from the relative performance between long and short positions in global regions, countries, styles, or sectors. The Prior Release also stated that, from time-to-time, the Sub-Adviser may also add directional exposure of up to 50% net long or net short exposure on top of its core long/short portfolio, and that, in doing so, the Sub-Adviser seeks to generate additional profits for the Fund by being net long when stock markets are rising and net short when markets are falling.

In eliminating the equivalent position requirement, as described in (1) above, under this proposal the Sub-Adviser would no longer seek to minimize the influence of directional trends and beta. In addition, the representation in the preceding paragraph was revised in the Registration Statement to state that, in establishing the long and short positions referenced above, the Fund seeks to profit from the relative performance between the long and short positions in global regions, countries, styles, or sectors. From time to time, the Fund may have directional exposure to seek to profit by being net long when stock markets are rising and net short when markets are falling. The purpose of this change is to provide additional flexibility to the Sub-Adviser to meet the Fund's investment objective by focusing on the relative performance between long and short positions in global regions, countries, styles, or sectors, rather than equal long and short dollar exposure. The Sub-Adviser also could establish added directional exposure of any amount based on the Sub-Adviser's market assessment, and, without the 50% net long or net short exposure limitation, in order to maximize potential returns, in furtherance of the Fund's investment objective.

The Adviser represents that, while the Fund's investment objective is being slightly revised, the Adviser believes the investment objective is not changing in a significant way because (1) the Fund will continue to aim to achieve average annual returns in excess of the total return of the Index; (2) the Fund will continue to take long and short positions in the securities in which it invests, but the revised representations will provide additional flexibility to the Sub-Adviser to meet the Fund's stated investment objective by focusing on the relative performance between long and short positions in global regions, countries, styles, or sectors, rather than equal long and short dollar exposure or limited added directional exposure; and (3) the Fund will continue to assess the most relatively attractive or unattractive global regions and countries within those regions, respectively, but the

[5] *See* Securities Exchange Act Release No. 61842 (April 5, 2010), 75 FR 18554 (April 12, 2010) (SR–NYSEArca–2010–10) (''Prior Order''). *See also* Securities Exchange Act Release No. 61683 (March 10, 2010), 75 FR 13194 (March 18, 2010) (SR–NYSEArca–2010–10) (''Prior Notice,'' and together with the Prior Order, ''Prior Release'').

[6] The Trust is registered under the Investment Company Act of 1940 (''1940 Act'') (15 U.S.C. 80a–1). On December 1, 2011, the Trust filed with the Commission an amendment to its registration statement on Form N–1A under the Securities Act of 1933 (15 U.S.C. 77a) (''1933 Act'') and under the 1940 Act relating to the Fund (File Nos. 333–157876 and 811–22110) (as amended, ''Registration Statement''). The description of the operation of the Trust and the Fund herein is based, in part, on the Registration Statement. In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. *See* Investment Company Act Release No. 28822 (July 20, 2009) (File No. 812–13488) (''Exemptive Order'').

[7] The changes described herein were effective upon filing with the Commission of an amendment to the Trust's Registration Statement, dated December 1, 2011. *See* note 6, *supra.* The Adviser represents that, with the exception of the increase in the size of a Creation Unit from 25,000 Shares to 50,000 Shares or more, as described in note 8, *infra,* the Adviser and Sub-Adviser have managed and will continue to manage the Fund in the manner described in the Prior Release, and will not implement the changes described herein until the instant proposed rule change is operative.

revised representations will provide a better opportunity for the Fund to maximize potential returns for investors based primarily on the Adviser's and Sub-Adviser's assessment of such relative attractiveness or unattractiveness. The Adviser believes the revised representations will permit the Adviser and Sub-Adviser, through such additional flexibility, to better achieve the Fund's stated investment objective to achieve average annual returns in excess of the total return of the Index.[8]

Except for the changes noted above, all other representations made in the Prior Release remain unchanged, including representations regarding implementation of ''fire walls'' by any additional Fund advisers and sub-advisers affiliated with a broker-dealer, and Underlying ETFs in which the Fund invests. The Fund will continue to comply with all initial and continued listing requirements under NYSE Arca Equities Rule 8.600. All terms referenced but not defined herein are defined in the Prior Release.

2. *Statutory Basis*

The basis under the Act[9] for this proposed rule change is the requirement under Section 6(b)(5)[10] that an exchange have rules that are 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, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will continue to be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Equities Rule 8.600. The Index, which is referenced in the Fund's investment objective, is a global, broad-based index of large capitalization companies. The Fund invests in Underlying ETFs that are primarily index-based ETFs that hold substantially all of their assets in securities representing a specific index. The Underlying ETFs in which the Fund invests will be traded on a U.S. national securities exchange. Except for Underlying ETFs that may hold non-U.S. issues, the Fund will not otherwise invest in non-U.S.-registered issues. The Fund will continue to comply with all initial and continued listing requirements under NYSE Arca Equities Rule 8.600.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the Adviser represents that, while the investment objective of the Fund is being slightly revised, it is not changing in a significant way. The Adviser represents that the purpose of the change relating to establishing long and short positions without reference to a dollar equivalency requirement is to provide additional flexibility to the Sub-Adviser to meet the Fund's investment objective by focusing on the relative performance between long and short positions in global regions, countries, styles, or sectors, rather than equal long and short dollar exposure or limited added directional exposure.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that the Fund invests in Underlying ETFs that are primarily index-based ETFs that hold substantially all of their assets in securities representing a specific index. The Underlying ETFs in which the Fund invests are traded on a U.S. national securities exchange. The additional flexibility afforded to the Adviser and Sub-Adviser under the proposed change will permit the Adviser and Sub-Adviser to better achieve provide [sic] the Fund's objective to achieve average annual returns in excess of the total return of the MSCI World Index. Such added flexibility also will provide a better opportunity for the Fund to maximize potential return for investors based primarily on the Adviser's and Sub-Adviser's assessment of the most relatively attractive or unattractive global regions and countries within those regions, respectively. Except for the changes noted above, all other representations made in the Prior Release remain unchanged.

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 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, provided that the self-regulatory organization 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 or such shorter time as designated by the Commission, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[11] and Rule 19b–4(f)(6) thereunder.[12]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[13] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing.

The Commission notes that, under the proposal, the Fund will continue to: (1) Aim to achieve average annual returns in excess of the total return of the Index;

[8] The Exchange notes that the Prior Notice stated that the Trust will issue and sell Shares of the Fund only in Creation Units of 25,000 Shares on a continuous basis at their net asset value next determined after receipt, on any Business Day (as defined in the Registration Statement). The size of a Creation Unit was increased to 50,000 Shares from 25,000 Shares prior to the Fund's initial offering and commencement of listing and trading on the Exchange, and the change was reflected in an amendment to the Trust's registration statement on Form N–1A under the 1933 Act and 1940 Act, dated March 16, 2010 (File Nos. 333–157876 and 811–22110), which reflects the 50,000 Share Creation Unit size. The Adviser represents that the 50,000 Share Creation Unit size is consistent with the Fund's Exemptive Order, which does not specifically limit the Fund's Creation Unit size. The Exchange notes that the Commission has approved the listing and trading of other issues of Managed Fund Shares that have applied a minimum Creation Unit size of 50,000 shares or greater. *See, e.g.,* Securities Exchange Act Release Nos. 65458 (September 30, 2011), 76 FR 62112 (October 6, 2011) (SR–NYSEArca–2011–54) (order approving listing and trading of WisdomTree Dreyfus Australia and New Zealand Debt Fund); 66112 (January 5, 2012), 77 FR 1761 (January 11, 2012) (SR–NYSEArca–2011–80) (order approving listing and trading of Rockledge SectorSAM ETF).

[9] 15 U.S.C. 78a.

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6). The Commission notes that the Exchange has satisfied the five-day pre-filing notice requirement.

[13] 17 CFR 240.19b–4(f)(6)(iii).

(2) take long and short positions in the securities in which it invests, but with additional flexibility to meet its stated investment objective by focusing on the relative performance between long and short positions in global regions, countries, styles, or sectors, rather than equal long and short dollar exposure or limited added directional exposure; and (3) assess the most relatively attractive or unattractive global regions and countries within those regions, respectively, but with a better opportunity to maximize potential returns for investors based primarily on the Adviser's and Sub-Adviser's assessment of such relative attractiveness or unattractiveness. The Commission further notes that, except for the changes noted herein, all other representations made in the Prior Release remain unchanged, including representations regarding implementation of ''fire walls'' by any additional Fund advisers and sub-advisers affiliated with a broker-dealer and Underlying ETFs in which the Fund invests. In addition, the Fund will continue to comply with all initial and continued listing requirements under NYSE Arca Equities Rule 8.600.

For the foregoing reasons, the Commission believes that the proposed change does not raise novel or unique regulatory issues that should delay the implementation of the Fund's proposed changes. In addition, the Commission believes it is consistent with the protection of investors and the public interest to waive the 30-day operative delay, as a waiver would allow the Advisor and Sub-Advisor the flexibility to invest in ways they believe will result in greater returns for investors, with the goal of achieving average annual returns in excess of the total return of the Index, without undue delay.[14] Accordingly, the Commission waives the 30-day operative delay requirement.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2012–51 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2012–51. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549, on official business days between 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at *www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2012–51 and should be submitted on or before July 10, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–14849 Filed 6–18–12; 8:45 am]

BILLING CODE 8011–01–P

[14] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Public Notice for Waiver for Aeronautical Land-Use Assurance at Saline County Regional Airport, Benton, AR

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of Intent for Waiver of Aeronautical Land-Use.

SUMMARY: The Federal Aviation Administration (FAA) is considering a proposal to change a portion of the airport from aeronautical use to nonaeronautical use and to authorize the conversion of the airport property. The proposal consists of one parcel of land containing a total of approximately 3.19 acres located on the west side of the airport at the corner of Hazel Street and 4th Street.

The parcel was originally acquired as part of a donation to the County of Saline in 1999. The land comprising this parcel is outside the forecasted need for aviation development and, thus, is no longer needed for indirect or direct aeronautical use. The airport wishes to develop this land for compatible commercial, nonaeronautical use. The income from the conversion of this parcel will benefit the aviation community by reinvestment in the airport.

Approval does not constitute a commitment by the FAA to financially assist in the conversion of the subject airport property nor a determination of eligibility for grant-in-aid funding from the FAA. The disposition of proceeds from the conversion of the airport property will be in accordance with FAA's Policy and Procedures Concerning the Use of Airport Revenue, published in the **Federal Register** on February 16, 1999. In accordance with Section 47107(h) of Title 49, United States Code, this notice is required to be published in the **Federal Register** 30 days before modifying the land-use assurance that requires the property to be used for an aeronautical purpose.

DATES: Comments must be received on or before July 19, 2012.

ADDRESSES: Send comments on this document to Mr. Edward N. Agnew, Federal Aviation Administration, Manager, Arkansas/Oklahoma Airports Development Office, 2601 Meacham Boulevard, Fort Worth, TX 76137.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Westbrook, Airport Chairman, Saline County Regional Airport Commission, P.O. Box 1628, Benton, AR 72018, telephone (501) 672–9809, or Mr.

John E. Michener, Federal Aviation Administration, Arkansas/Oklahoma Airports Development Program Manager, 2601 Meacham Boulevard, Fort Worth, TX 76137, telephone (817) 222–5687, FAX (817) 222–5987. Documents reflecting this FAA action may be reviewed at the above locations.

Issued in Fort Worth, Texas, on June 7, 2012.

Joseph G. Washington,

Acting Manager, Airports Division, FAA, Southwest Region.

[FR Doc. 2012–14864 Filed 6–18–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA 2012–0006–N–6]

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration, DOT.

ACTION: Notice and Request for Comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Requirements (ICRs) abstracted below have been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICRs describes the nature of the information collection and their expected burden. The **Federal Register** notice with a 60-day comment period soliciting comments on the following collection of information was published on April 4, 2012 (77 FR 20478).

DATES: Comments must be submitted on or before July 19, 2012.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Brogan, Office of Safety, Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1200 New Jersey Ave. SE., Mail Stop 17, Washington, DC 20590 (telephone: (202) 493–6292), or Ms. Kimberly Toone, Office of Information Technology, RAD–20, Federal Railroad Administration, 1200 New Jersey Ave. SE., Mail Stop 35, Washington, DC 20590 (telephone: (202) 493–6132). (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION:

The Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, Section 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. 44 U.S.C. 3506, 3507; 5 CFR 1320.5, 1320.8(d)(1), 1320.12. On April 4, 2012, FRA published a 60-day notice in the **Federal Register** soliciting comment on ICRs for which the agency was seeking OMB approval. 77 FR 20478. FRA received no comments in response to this notice.

Before OMB decides whether to approve a proposed collection of information, it must provide 30 days for public comment. 44 U.S.C. 3507(b); 5 CFR 1320.12(d). Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30 day notice is published. 44 U.S.C. 3507 (b)-(c); 5 CFR 1320.12(d); *see also* 60 FR 44978, 44983, Aug. 29, 1995. OMB believes that the 30 day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect. 5 CFR 1320.12(c); *see also* 60 FR 44983, Aug. 29, 1995.

The summary below describes the nature of the information collection requirements (ICRs) and the expected burden, and are being submitted for clearance by OMB as required by the PRA.

Title: Railroad Signal System Requirements.

OMB Control Number: 2130–0006.

Type of Request: Extension with change of a previously approved information collection.

Affected Public: 754 Railroads.

Abstract: The regulations pertaining to railroad signal systems are contained in 49 CFR Parts 233 (Signal System Reporting Requirements), 235 (Instructions Governing Applications For Approval of A Discontinuance or Material Modification of a Signal System), and 236 (Rules, Standards, and Instructions Governing the Installation, Inspection, Maintenance, and Repair of Systems, Devices, and Appliances). Section 233.5 provides that each railroad must report to FRA within 24 hours after learning of an accident or incident arising from the failure of a signal appliance, device, method, or system to function or indicate as required by Part 236 of this Title that results in a more favorable aspect than intended or other condition hazardous to the movement of a train. Section 233.7 sets forth the specific requirements for reporting signal failures within 15 days in accordance with the instructions printed on Form FRA F 6180.14. Finally, Section 233.9 sets forth the specific requirements for the ''Signal System Five Year Report.'' It requires that every five years each railroad must file a signal system status report. The report is to be prepared on a form issued by FRA in accordance with the instructions and definitions provided. Title 49, Part 235 of the Code of Federal Regulations, sets forth the specific conditions under which FRA approval of modification or discontinuance of railroad signal systems is required and prescribes the methods available to seek such approval. The application process prescribed under Part 235 provides a vehicle enabling FRA to obtain the necessary information to make logical and informed decisions concerning carrier requests to modify or discontinue signaling systems. Section 235.5 requires railroads to apply for FRA approval to discontinue or materially modify railroad signaling systems. Section 235.7 defines material modifications and identifies those changes that do not require agency approval. Section 235.8 provides that any railroad may petition FRA to seek relief from the requirements under 49 CFR part 236. Sections 235.10, 235.12, and 235.13 describe where the petition must be submitted, what information must be included, the organizational format, and the official authorized to sign the application. Section 235.20 sets forth the process for protesting the granting of a carrier application for signal changes or relief from the rules, standards, and instructions. This section provides the information that must be included in the protest, the address for filing the protest, the item limit for filing the protest, and the requirement that a person requesting a public hearing explain the need for such a forum. Section 236. 110 requires that the test results of certain signaling apparatus be recorded and specifically identify the tests required under sections 236.102–109; sections 236.377–236.387; sections 236.576; 236.577; and section 236.586–589. Section 236.110 further provides that the test results must be recorded on pre-printed or computerized forms provided by the carrier and that the forms show the name of the railroad, place and date of the test conducted, equipment tested, test results, repairs, and the condition of the apparatus. This section also requires that the employee conducting the test must sign the form and that the record be retained at the office of the supervisory official having the proper

authority. Results of tests made in compliance with sections 236.587 must be retained for 92 days, and results of all other tests must be retained until the next record is filed, but in no case less than one year. Additionally, section 236.587 requires each railroad to make a departure test test of cab signal, train stop, or train control devices on locomotives before that locomotive enters the equipped territory. This section further requires that whoever performs the test must certify in writing that the test was properly performed. The certification and test results must be posted in the locomotive cab with a copy of the certification and test results retained at the office of the supervisory official having the proper authority. However, if it is impractical to leave a copy of the certification and test results at the location of the test, the test results must be transmitted to either the dispatcher or one other designated official who must keep a written record of the test results and the name of the person performing the test. All records prepared under this section are required to be retained for 92 days. Finally, section 236.590 requires the carrier to clean and inspect the pneumatic apparatus of automatic train stop, train control, or cab signal devices on locomotives every 736 days, and to stencil, tag, or otherwise mark the pneumatic apparatus indicating the last cleaning date.

Form Number(s): FRA F 6180.47; FRA F 6180.14.

Annual Estimated Burden Hours: 444,637 hours.

Title: U.S. DOT Crossing Inventory Form.

OMB Control Number: 2130–0017.

Type of Request: Extension with change of a currently approved collection.

Affected Public: 650 Railroads/50 States.

Abstract: Form FRA F 6180.71 is a voluntary form, and is used by States and railroads to periodically update certain site specific highway-rail crossing information which is then transmitted to FRA for input into the National Inventory File. This information has been collected on the U.S. DOT–AAR Crossing Inventory Form (previous designation of this form) since 1974 and maintained in the National Inventory File database since 1975. The primary purpose of the National Inventory File is to provide for the existence of a uniform database which can be merged with accidents data and used to analyze information for planning and implementation of crossing safety programs by public, private, and governmental agencies responsible for highway-rail crossing safety. Following the official establishment of the National Inventory in 1975, the Federal Railroad Administration (FRA) assumed the principal responsibility as custodian for the maintenance and continued development of the U.S. DOT/AAR National Highway-Rail Crossing Inventory Program. The major goal of the Program is to provide Federal, State, and local governments, as well as the railroad industry, information for the improvement of safety at highway-rail crossings. Good management practices necessitate maintaining the database with current information. The data will continue to be useful only if maintained and updated as inventory changes occur. FRA previously cleared the reporting and recordkeeping burden for this form under Office of Management and Budget (OMB) Clearance Number 2130–0017. OMB approved the burden for this form through July 31, 2006. FRA is requesting a new three year approval from OMB for this information collection.

Form Number(s): FRA F 6180.71.

Annual Estimated Burden Hours: 8,054 hours.

Addressee: Send comments regarding this information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 Seventeenth Street NW., Washington, DC, 20503, Attention: FRA Desk Officer. Comments may also be sent electronically via email to the Office of Information and Regulatory Affairs (OIRA) at the following address: *oira_submissions@omb.eop.gov.*

Comments are invited on the following: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this notice in the **Federal Register**.

Authority: 44 U.S.C. 3501–3520.

Issued in Washington, DC on June 14, 2012.

Rebecca Pennington,

Chief Financial Officer, Federal Railroad Administration.

[FR Doc. 2012–14933 Filed 6–18–12; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety Actions on Special Permit Applications

AGENCY: Pipeline And Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of actions on Special Permit Applications.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR part 107, Subpart B), notice is hereby given of the actions on special permits applications in (May to May 2012). The mode of transportation involved are identified by a number in the ''Nature of Application'' portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft. Application numbers prefixed by the letters EE represent applications for Emergency Special Permits. It should be noted that some of the sections cited were those in effect at the time certain special permits were issued.

Issued in Washington, DC, on June 12, 2012.

Donald Burger,

Chief, Special Permits and Approvals Branch.

S.P No.	Applicant	Regulation(s)	Nature of special permit thereof
MODIFICATION SPECIAL PERMIT GRANTED			
10898–M	Hydac Corporation Bethlehem, PA.	49 CFR 173.302	To modify the special permit to authorize additional accumulators both ASME and PED.

S.P No.	Applicant	Regulation(s)	Nature of special permit thereof
12706–M	RAGASCO AS Raudoss, NO	49 CFR 173.34; 173.201; 173.301; 173.304.	To modify the special permit to authorize an alternative test and inspection procedure.
7945–M	Pacific Scientific Duarte, CA	49 CFR 175.3 173.304(a)(1)	Too modify the special permit to authorize additional 2.2 hazardous materials in non-DOT specification cylinders.
11606–M	Safety-Kleen Systems, Inc. Plano, TX.	49 CFR 173.28(b)(2)	To modify the special permit to authorize double stacking of pallets used for shipping and to authorize approved third party transporters to transport the material authorized in the permit.
14467–M	Brenner Tank, LLC Fond Du Lac, WI.	49 CFR 178.345–2	To modify the special permit to authorize construction of series 400 cargo tanks using certain materials not authorize in 178.345(2) as materials of construction and to add additional UNS Designation tanks.
12135–M	Daicel Safety Systems, Inc. Hyogo Prefecture 671–1681.	49 CFR 173.302(h); 173.302; 173.306(d)(3).	To modify the special permit to authorize a new design of non-DOT specification cylinders (pressure vessels) for use as components of automobile vehicle safety systems.
15531–M	National Aeronautics and Space Administration (NASA) Washington, DC.	49 CFR Section 173.302(a)	To modify the special permit originally issued on an emergency basis to authorize on-going use.
15442–M	Linde Gas North America LLC Murray Hill, NJ.	49 CFR 180.212(a) and 180.212(b)(2).	To modify the special permit originally issued on an emergency basis to authorize on-going use.
NEW SPECIAL PERMIT GRANTED			
15393–N	Savannah Acid Plant LLC Savannah, GA.	49 CFR 173.31(d)(1)(vi)	To authorize the transportation in commerce of sulfuric acid in tanks cars that have not had both sides of the rupture disc inspected prior to shipment. (mode 2)
EMERGENCY SPECIAL PERMIT GRANTED			
15634–N	SodaStream USA Inc., Cherry Hill, NJ.	49 CFR 171.2(k)	To authorize the transportation in commerce of certain used DOT 3AL cylinders that contain CO2, but not necessarily in an amount qualifying as hazardous material. (mode 1)
DENIED			
11516–M	Request by The Testor Corporation Rockford, IL May 17, 2012. To modify the special permit to authorize an additional Division 2.1 material.		

[FR Doc. 2012–14692 Filed 6–18–12; 8:45 am]
BILLING CODE 4909–60–M

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety Notice of Delays in Processing of Special Permits Applications

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications delayed more than 180 days.

SUMMARY: In accordance with the requirements of 49 U.S.C. 5117(c), PHMSA is publishing the following list of special permit applications that have been in process for 180 days or more. The reason(s) for delay and the expected completion date for action on each application is provided in association with each identified application.

FOR FURTHER INFORMATION CONTACT: Ryan Paquet, Director, Office of Hazardous Materials Special Permits and Approvals, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH–30, 1200 New Jersey Avenue Southeast, Washington, DC 20590–0001, (202) 366–4535.

Key to "Reason for Delay"

1. Awaiting additional information from applicant.
2. Extensive public comment under review.
3. Application is technically complex and is of significant impact or precedent-setting and requires extensive analysis.
4. Staff review delayed by other priority issues or volume of special permit Applications.

Meaning of Application Number Suffixes

N—New application
M—Modification request
R—Renewal request
P—Party to exemption request

Issued in Washington, DC, on June 12, 2012.

Donald Burger,

Chief, General Approvals and Permits.

Application No.	Applicant	Reason for delay	Estimated date of completion
Modification to Special Permits			
14372–M	Kidde Aerospace and Defense Wilson, NC	3	06–30–2012
15258–M	Air Products and Chemicals, Inc., Tamaqua, PA	3	07–31–2012
10964–M	Kidde Aerospace & Defense, Wlson, NC	3	07–31–2012

Application No.	Applicant	Reason for delay	Estimated date of completion
	New Special Permit Applications		
15080–N	Alaska Airlines, Seattle, WA	1	06–30–2012
15494–N	Johnson Controls Battery Group, Inc., Milwaukee, WI	3	07–31–2012
15504–N	FIBA, Technologies, Inc., Millbury, MA	3	07–31–2012
15510–N	TEMSCO Helicopters, Inc., Ketchikan, AK	3	07–31–2012
15515–N	National Aeronautics and Space Administration (NASA), Houston, TX	4	07–31–2012
15334–N	Floating Pipeline Company Incorporated, Halifax, Nova Scotia	3	07–31–2012
	Party to Special Permits Application		
14372–P	L'Hotellier France	3	07–31–2012
13548–P	Interstate Battery System of The Redwoods, Eureka, CA	4	07–31–2012
13548–P	PLEJ Battery, Inc., DBA Interstate Battery of the Southern Tier, Inc., Corning, NY	4	07–31–2012
15537–P	Austin Powder Company, Cleveland, OH	3	07–31–2012
8451–P	Lockheed Martin Corporation, Bethesda, MD	3	07–31–2012
	Renewal Special Permmits Applications		
12283–R	Interstate Battery of Alaska, Anchorage, AK	3	06–30–2012

[FR Doc. 2012–14698 Filed 6–18–12; 8:45 am]

BILLING CODE 4910–60–M

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket ID PHMSA–2012–0146]

Pipeline Safety: Government/Industry Pipeline Research and Development Forum, Public Meeting

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of public meeting.

SUMMARY: The Pipeline and Hazardous Materials Safety Administration (PHMSA) and the National Association of Pipeline Safety Representatives are hosting a Government/Industry Pipeline Research and Development (R&D) Forum. The R&D Forums are held periodically to generate a National research agenda that will foster solutions for the many challenges with pipeline safety and with protecting the environment.

The forum allows public, government and industry pipeline stakeholders to discuss the technical gaps and challenges for future research. The forum is also intended to help reduce duplication of programs, factor ongoing research efforts, leverage resources and broaden synergies. The national research agenda coming out of these events is aligned with the needs of the pipeline safety mission, makes use of the best available knowledge and expertise, and considers stakeholder perspectives. Specifically the forum will:

- Identify key pipeline technical challenges facing industry and government;
- Disseminate information on current research efforts; and
- Identify new research that can help to meet known challenges.

The Forum will be structured with a combination of general sessions to provide introductory, panel, and summary presentations, and concurrent working group sessions.

DATES: The R&D Forum will be held July 18, 2012, from 8:00 a.m. until approximately 5:00 p.m. EDT and July 19, 2012, from 8:00 a.m. to 4:40 p.m. EDT. Name badge pickup and onsite registration will be available starting at 7:00 a.m. EDT each day.

ADDRESSES: The forum will be held at The Westin Arlington Gateway, 801 North Glebe Road, Arlington, Virginia, 22203, Phone: 703–717–6200, Web site: *http://www.WestinArlingtonGateway.com/*. Please contact the Westin directly to make room reservations. When making your hotel reservation, please use the Room Block Name: ''DOT R&D Forum.'' There will be a room rate of $169/night for the nights of July 17 and 18. A very small block of rooms is also available at this rate on the night of July 19. The deadline for securing a room at the rate of $169/night is June 30. The meeting rooms will be posted at the hotel on the days of the forum.

The Hotel is Americans with Disabilities Act (ADA) compliant having 12 ADA accessible guest rooms. All public spaces are ADA accessible. Contact the Westin for more information.

Refer to the meeting Web site for updated registration information, agenda, and times at *https://primis.phmsa.dot.gov/meetings/MtgHome.mtg?mtg=77*. Please note that the forum will not be webcast due to the numerous concurrent running sessions. All presentations will be available on the meeting Web site within days following the forum.

FOR FURTHER INFORMATION CONTACT: James Merritt at 303–683–3117, or by email at *james.merritt@dot.gov*.

SUPPLEMENTARY INFORMATION:

Preliminary Agenda

July 18

- Overcoming Challenges with the PHMSA Program (General Session)
- Panel 1—National Perspectives on Key Challenges (General Session)
- Panel 2—Current Research Roadmaps (General Session)
- Panel 3—Advancing Technology into the Market (General Session)
- Working Group Overview (General Session)
- Working Groups Phase 1 (Concurrent Sessions)
  - —Working Group 1: Threat Prevention
  - —Working Group 2: Leak Detection/Mitigation & Storage
  - —Working Group 3: Anomaly Detection/Characterization
  - —Working Group 4: Anomaly Repair & Remediation
  - —Working Group 5: Design/Materials/Welding-Joining/Valves

July 19

- Working Groups Phase 2 (Concurrent Sessions)
- Working Groups Phase 3 (Concurrent Sessions)
- Working Group Reports-Out (General Session)
- Summary and Next Steps (General Session)

Issued in Washington, DC, on June 14, 2012.

Linda Daugherty,

Deputy Associate Administrator for Policy and Programs.

[FR Doc. 2012–14903 Filed 6–18–12; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety Notice of Application for Special Permits

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of Applications for Special Permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR Part 107, Subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein. Each mode of transportation for which a particular special permit is requested is indicated by a number in the ''Nature of Application'' portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft.

DATES: Comments must be received on or before July 19, 2012.

ADDRESSES: *Address Comments to:* Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue Southeast, Washington, DC, or at *http://regulations.gov.*

This notice of receipt of applications for special permit is published in accordance with Part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on June 12, 2012.

Donald Burger,

Chief, General Approvals and Permits.

NEW SPECIAL PERMITS

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permit thereof
15617–N		Veolia ES Technical Solutions, L.L.C. Flanders, NJ.	49 CFR 173.192, 177.848	To authorize the transportation in commerce of waste phosgene in alternative packaging being transported to a disposal facility without meeting the segregation requirements for Division 2.3 gas Zone A materials within the transport vehicle. (mode 1)
15638–N		Lantis Productions Inc. dba Lantis Fireworks & Lasers Draper, UT.	49 CFR 172.101, 172.204(c)(3), 173.27,; 175.30(a)(1), 175.320.	Authorizes the transportation of Fireworks, Division 1.3G, UNO335 by cargo aircraft only, which is otherwise forbidden for air transportation. (mode 3)
15642–N		Praxair Distribution, Inc. Danbury, CT.	49 CFR 180.205 and 180.209(a)(b), 180.213(b), and 180.213(f)(2).	To authorize the transportation in commerce of DOT Specification 3AL cylinders, cylinders manufactured under DOT–SP 12440, and ISO 7866 cylinders containing certain compressed gases when retested by a 100% ultrasonic examination in lieu of the internal visual and the hydrostatic retest. (modes 1, 2, 3, 4, 5)
15650–N JL		Shepherd & Associates San Fernando, CA.	49 CFR 173.416	To authorize the continued transportation in commerce of certain DOT Specification 20WC radioactive material packagings after October 1, 2008. (mode 1)

[FR Doc. 2012–14696 Filed 6–18–12; 8:45 am]

BILLING CODE 4909–60–M

DEPARTMENT OF TRANSPORTATION

Pipeline And Hazardous Materials Safety Administration

Office of Hazardous Materials Safety Notice of Applications for Modification of Special Permit

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHIMSA), DOT.

ACTION: List of Applications for Modification of Special Permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR Part 107, Subpart B), notice is hereby given that the Office of Hazardous Materials Safety has

received the applications described herein. This notice is abbreviated to expedite docketing and public notice. Because the sections affected, modes of transportation, and the nature of application have been shown in earlier **Federal Register** publications, they are not repeated here. Requests for modification of special permits (e.g. to provide for additional hazardous materials, packaging design changes, additional mode of transportation, etc.) are described in footnotes to the application number. Application numbers with the suffix ''M'' denote a modification request. These applications have been separated from the new application for special permits to facilitate processing.

DATES: Comments must be received on or before July 5, 2012.

ADDRESSES: ADDRESS COMMENTS TO:Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue Southeast, Washington DC or at *http://regulations.gov*.

This notice of receipt of applications for modification of special permit is published in accordance with Part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on June 11, 2012.

Donald Burger,

Chief, General Approvals and Permits.

MODIFICATION SPECIAL PERMITS

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permit thereof
3549–M		Sandia National Laboratories Albuquerque, NM.	49 CFR 172.101; 173.54; 173.56; 173.62.	To modify the special permit to authorize the transportation in commerce of additional Division 1.1 hazardous materials.
11629–M		U.S. Department of Defense Scott AFB, IL.	49 CFR 106; 107; 171–180	To modify the special permit to authorize the transportation in commerce of additional Division 1.2 and 1.3 hazardous materials.
12102–M		EQ Industrial Services, Inc. Ypsilanti, MI.	49 CFR 173.56(i); 173.56(b)	To modify the special permit to authorize additional Class 1 materials authorized to be transported as Division 4.1.
13102–M		Robertshaw Industrial Products dba Invensys Controls Maryville, TN.	49 CFR 173.150(b); 173.222(c); 173.306(a); 173.322.	To modify the special permit to authorize the transportation in commerce of additional Division 2.1 and 3 hazardous materials.
14509–M		Pacific Consolidated Industries, LLC Riverside, CA.	49 CFR 173.302(a)(1), 173.304a(a)(1), 175.3.	To modify the special permit to authorize the transportation in commerce of cylinders containing oxidizing gases without a rigid outer packaging capable of passing the Flame Penetration and Resistance Test and the Thermal Resistance Test.
15372–M		Takata de Mexico, S.A. C.V. de Ciudad Frontera.	49 CFR 173.301(a), 173.302(a), 178.65(f)(2).	To modify the special permit to authorize the manufacture and filling of additional pressure vessels for use as components of airbag safety systems.
15540–M		Andrew Airways, Inc. Kodiak, AK.	49 CFR 175.310(c)	To modify the special permit originally issued on an emergency basis and make it permanent.

[FR Doc. 2012–14693 Filed 6–18–12; 8:45 am]

BILLING CODE 4909–60–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 56–A

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 56–A, Notice Concerning Fiduciary Relationship—Illinois Type Land Trust.

DATES: Written comments should be received on or before August 20, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, at (202) 622–3634, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Form 56–A, Notice Concerning Fiduciary Relationship—Illinois Type Land Trust.

OMB Number: 1545–1683.

Form Number: 56–A.

Abstract: Form 56–A will be used by trustees of Illinois Land Trusts to report the creation of such trusts and any changes to the trust such as the adding or removing of a beneficiary or a change in the power of direction of the trust.

Current Actions: There are no changes being made to this form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Responses: 10,000.

Estimated Time per Respondent: 2 hrs., 12 minutes.

Estimated Total Annual Burden Hours: 22,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: June 4, 2012.

Gerald G. Shields,

IRS Reports Clearance Officer.

[FR Doc. 2012–14843 Filed 6–18–12; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL REGISTER

Vol. 77 Tuesday,

No. 118 June 19, 2012

Part II

Commodity Futures Trading Commission

17 CFR Parts 1, 16, and 38

Core Principles and Other Requirements for Designated Contract Markets; Final Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1, 16, and 38

RIN 3038–AD09

Core Principles and Other Requirements for Designated Contract Markets

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is adopting new and amended rules, guidance, and acceptable practices to implement certain statutory provisions enacted by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''). The final rules, guidance and acceptable practices, which apply to the designation and operation of contract markets, implement the Dodd-Frank Act's new statutory framework that, among other things, amends section 5 of the Commodity Exchange Act (''the Act'' or ''CEA'') concerning designation and operation of contract markets, and adds a new CEA section 2(h)(8) to mandate the listing, trading and execution of certain swaps on designated contract markets (''DCMs'').

DATES: *Effective date:* The rules will become effective August 20, 2012. *Compliance date:* The compliance date for contract markets that have obtained designation on, or prior to, the date of publication of this release: Designated contract markets must comply with the rules adopted in this release (except § 38.151(a)) by October 17, 2012; and must comply with § 38.151(a) in accordance with the timeline described in **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Nancy Markowitz, Deputy Director, 202–418–5453, *nmarkowitz@cftc.gov*, Nadia Zakir, Special Counsel, 202–418–5720, *nzakir@cftc.gov*, or Aaron Brodsky, Attorney-Advisor, 202–418–5349, *abrodsky@cftc.gov*, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

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IV. Text of Final Rules

I. Background

A. Title VII of the Dodd-Frank Act

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street

Reform and Consumer Protection Act.[1] Title VII of the Dodd-Frank Act[2] amended the CEA[3] to establish a comprehensive, new regulatory framework for swaps and security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight.

B. The Dodd-Frank Act Amendments Applicable to Designated Contract Markets

In this final rulemaking, the Commission is establishing the regulatory obligations that each DCM must meet in order to comply with section 5 of the CEA, as amended by the Dodd-Frank Act, initially upon designation and thereafter on an ongoing basis.

Section 735 of the Dodd-Frank Act amended section 5 of the CEA pertaining to the designation and operation of contract markets, by: (i) Eliminating the eight criteria that must be met for designation as a contract market, contained in former section 5(b) of the CEA; (ii) amending most of the core principles, including incorporating most of the substantive elements of the former designation criteria, and requiring that all DCMs demonstrate compliance with each of the core principles as a condition of obtaining and maintaining designation as a contract market; and (iii) adding five new core principles, including Core Principle 13 (Disciplinary Procedures), Core Principle 20 (System Safeguards), Core Principle 21 (Financial Resources), Core Principle 22 (Diversity of Boards of Directors), and Core Principle 23 (Securities and Exchange Commission).[4]

In addition, section 723(a)(3) of the Dodd-Frank Act added section 2(h)(8) of the CEA to require, among other things, that swaps that are required to be cleared must be executed either on a DCM or on a Swap Execution Facility (''SEF''),[5] unless no DCM or SEF makes the swap ''available to trade.''[6] Section 5h(a)(1) of the CEA, as amended by the Dodd-Frank Act, also prohibits any person from operating a facility for the trading and processing of swaps unless the facility is registered as a SEF or a DCM. Accordingly, unless otherwise specified in this release, each of the 23 core principles and the final implementing regulations, guidance and acceptable practices, apply to all ''contracts'' listed on a DCM, which will include swaps, futures and options contracts. The rules adopted in this release also implement relevant provisions related to the trading and execution of swaps on DCMs.

On December 22, 2010, the Commission published proposed regulations to implement the statutory provisions of the Dodd-Frank Act relevant to the designation and operation of DCMs (''DCM NPRM''), under part 38 of the Commission's regulations.[7]

The proposed rulemaking was subject to an initial 60-day comment period, which closed on February 22, 2011. The comment period was subsequently reopened on two separate occasions, each time for an additional 30 days.[8] The Commission received numerous written comments from members of the public, and Commission staff participated in several meetings with market participants, including representatives of both currently-designated and prospective contract markets.[9]

In this notice of final rulemaking, the Commission is adopting many of the proposed rules, guidance, and acceptable practices. However, as a result of the written comments received and dialogue with market participants, the Commission has revised and/or eliminated a number of regulations that were proposed in the DCM NPRM, and in a number of instances, has codified guidance and/or acceptable practices in lieu of the proposed rules.

The Commission also received a number of comments pertaining to the costs and/or benefits of certain proposed regulations. The Commission has undertaken an extensive review of the costs and benefits of the regulations being adopted in this release pursuant to section 15(a) of the CEA,[10] as is further discussed in the cost benefit consideration section of this final rulemaking. As discussed in that section, the Commission has determined that the final rules appropriately balance the costs and benefits associated with oversight of DCMs pursuant to the

[1] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010) (''Dodd-Frank Act'').

[2] Pursuant to section 701 of the Dodd-Frank Act, Title VII may be cited as the ''Wall Street Transparency and Accountability Act of 2010.''

[3] 7 U.S.C. 1 *et seq.* (amended 2010).

[4] New Core Principle 13 is verbatim of former Designation Criterion 6.

[5] The Commission proposed rules governing the registration and operation of SEFs in a separate, rulemaking titled ''Core Principles and Other Requirements for Swap Execution Facilities.'' 76 FR 1214, Jan. 7, 2011. The core principles applicable to DCMs pursuant to section 5 of the Act and the core principles applicable to swap execution facilities pursuant to section 5h of the Act include, in a number of instances, similar or identical language. Although the Commission's interpretation of specific language in section 5 of the Act may inform its interpretation of similar or identical language in section 5h of the Act, and vice versa, the Commission may interpret the core principles applicable to each category of registered entity in light of that category's unique market characteristics and regulatory functions and responsibilities.

[6] *See* section 723(a) of the Dodd-Frank Act. The Commission separately proposed rules implementing the ''made available to trade'' mandate. *See* 76 FR 77728, Dec. 14, 2011.

[7] 75 FR 80572, Dec. 22, 2010 (''DCM NPRM''). The DCM NPRM also proposed revisions to related regulations under parts 1 and 16.

[8] *See* 76 FR 14825, Mar. 18, 2011; *see also* 76 FR 25274, May 4, 2011.

[9] The Commission received comment letters from numerous parties, including the following: ACM Capital Management; Alice Corporation; Alternative Investment Management Association; American Bankers Association and ABA Securities Association; American Gas Association; Argus Media, Inc. (''Argus''); Better Markets, Inc. (''Better Markets''); BJ D'Milli; BlackRock, Inc. (''BlackRock''); Bloomberg; CBOE Futures Exchanges (''CFE''); CME Group Inc. (''CME'') (CME's comments were submitted on behalf of its four DCMs: the Chicago Mercantile Exchange, Inc., the Board of Trade of the City of Chicago, Inc., the New York Mercantile Exchange, Inc., and the Commodity Exchange, Inc.); Citadel; Committee on Capital Markets Regulation; Committee on Futures and Derivatives Regulation of the New York City Bar Association; DC Energy; The Depository Trust & Clearing Corporation; East Coast Petroleum; ELX Futures, L.P. (''ELX''); Eris Exchange, LLC (''Eris''); Electric Trade Association; FIA/FSR/IIB/IRI/ISDA/SIFMA/US Chamber of Commercial (jointly); Green Exchange LLC (''GreenX''); ICAP; IntercontinentalExchange, Inc. (''ICE'') (ICE's comments were submitted on behalf of its four regulated futures exchanges: ICE Future US, Chicago Climate Futures Exchange, ICE Futures Europe, and ICE Futures Canada); International Swaps and Derivatives Association (''ISDA''); Kansas City Board of Trade (''KCBT''); Markit; MarkitSERV; Minneapolis Grain Exchange, Inc. (''MGEX''); Noble Energy; NYSE Liffe US LLC (''NYSE Liffe''); Nodal Exchange, LLC (''Nodal''); Todd Petzel; OneChicago LLC Futures Exchange (''OCX''); Swaps and Derivatives Market Association; Tradeweb; Trading Technologies International, Inc. (''Trading Technologies''); Wholesale Markets Brokers' Association; Working Group of Commercial Energy Firms (Hunton and Williams); and joint letter from CME, NYSE Liffe, GreenX, Eris Exchange, CBOE Futures Exchange, KCBT and MGEX (''CME Joint Comment Letter''). A number of comment letters solely addressed the implementation phasing for Dodd-Frank rulemakings. Those comments are outside the scope of this rulemaking and are more appropriate to the recent rulemaking pertaining to ''Swap Transaction Compliance and Implementation Schedule: Clearing and Trade Execution Requirements under section 2(h) of the CEA.'' *See* 76 FR 58186, Sep. 20, 2011.

[10] 7 U.S.C. 19.

CEA, as amended by the Dodd-Frank Act.

The Commission is hereby adopting final regulations to implement section 5 of the CEA, as well as the requirements of sections 2(h)(8) and 5h(a)(1) of the CEA, as amended by the Dodd-Frank Act, as applicable to DCMs. The final regulations will eliminate the guidance on compliance with the designation criteria for DCMs, implement new and revised regulations for the core principles, and codify certain requirements and practices that have evolved over the years and are commonly accepted in the industry.

The final regulations adopted herein will become effective 60 days after publication in the **Federal Register**. Contract markets that have obtained designation prior to or at the time of the publication of this release must comply with the new and revised rules adopted in this release, except § 38.151(a), within 60 days of the effective date of this release; and must comply with § 38.151(a) in accordance with the timeline described in the discussion of that rule below.

II. Final Rules

A. Repeal of Designation Criteria

Section 735 of the Dodd-Frank Act eliminated the eight DCM designation criteria in former CEA section 5(b), and largely incorporated the substance of those criteria into the core principles. Accordingly, the Commission is eliminating the guidance on compliance with the designation criteria for DCMs contained in appendix A to part 38.[11]

B. Adoption of Rules and Revised Guidance and Acceptable Practices

To implement section 735 of the Dodd-Frank Act, the Commission proposed a number of new and revised rules, guidance, and acceptable practices to implement the new and revised core principles. As described in the DCM NPRM, the Commission evaluated the preexisting regulatory framework for overseeing DCMs, which consisted largely of guidance and acceptable practices, in order to update those provisions and to determine which core principles would benefit from having new or revised derivative regulations. Based on that review, and in view of the Dodd-Frank Act's amendments to section 5(d)(1) of the CEA,[12] which specifically provides the Commission with discretion to determine, by rule or regulation, the manner in which boards of trade comply with the core principles, the Commission proposed revised guidance and acceptable practices for some core principles and, for several core principles, proposed to codify rules in lieu of guidance and acceptable practices.[13]

Summary of Comments

The Commission received a number of comments generally pertaining to the proposed codification of rules in lieu of guidance and/or acceptable practices. Several commenters contended that the principles-based regime has permitted the U.S. futures markets to prosper and keep pace with rapidly changing technology and market needs, and that a rules-based regime will stifle growth, innovation, and competition.[14] Others noted that the futures markets' resilience throughout the financial crisis is evidence in support of the effectiveness of a principles-based regime.[15] Commenters also argued that the prescriptive nature of the rules will result in increased costs for DCMs and for the Commission [16] and that current industry best practices are subject to change and are only able to evolve through continuous improvement and innovation, which is only possible under a flexible regime.[17] Several commenters provided comments on the codification of specific rules in lieu of guidance and/or acceptable practices, which are addressed below, in the discussion of the respective rules.

Discussion

This final rulemaking largely adopts the framework of rules, guidance and acceptable practices that was proposed in the DCM NPRM, with certain substantive revisions to the regulations, as described in this release. For several core principles, the Commission is maintaining the rules, guidance and acceptable practices, as proposed, with appropriate revisions arising from the Commission's consideration of comments. In several instances, this final rulemaking converts proposed rules to guidance and/or acceptable practices for various DCM compliance practices.

In determining whether to codify a compliance practice in the form of a rule or guidance/acceptable practice, the Commission was guided by whether the practice consisted of a commonly-accepted industry practice. Where there is a standard industry practice that the Commission has determined to be an acceptable compliance practice, the Commission believes that the promulgation of clear-cut regulations will provide greater legal certainty and transparency to DCMs in determining their compliance obligations, and to market participants in determining their obligations as DCM members, and will facilitate the enforcement of such provisions. Several of the rules adopted in this notice of final rulemaking largely codify practices that are commonly accepted in the industry and are currently being undertaken by most, if not all, DCMs.

In the context of each individual rule, the Commission also was guided by comments that provided a basis for greater flexibility or, in some instances, for greater specificity, in respect to the stated compliance obligation.

In addition, the Commission's determination to codify certain compliance practices as rules, rather than as guidance/acceptable practices, is based on its long experience in regulating DCMs. In numerous instances, the rules codify practices that have evolved from the Division of Market Oversight's (''DMO'') recommendations in the context of Rule Enforcement Reviews (''RERs'').[18]

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[11] As proposed in the DCM NPRM, appendix A to part 38 will contain the application form for contract market designation.

[12] Former Core Principle 1 stated, among other things, that boards of trade ''shall have reasonable discretion in establishing the manner in which they comply with the core principles.'' This ''reasonable discretion'' provision underpinned the Commission's use of core principle guidance and acceptable practices. Section 735 of the Dodd-Frank Act amended this provision to include the proviso that ''[u]nless otherwise determined by the Commission by rule or regulation * * *,'' boards of trade shall have reasonable discretion in establishing the manner in which they comply with the core principles. *See* 7 U.S.C. 7(d)(1)(amended 2010).

[13] Guidance provides DCMs and DCM applicants with contextual information regarding the core principles, including important concerns which the Commission believes should be taken into account in complying with specific core principles. In contrast, the acceptable practices are more specific than guidance and provide examples of how DCMs may satisfy particular requirements of the core principles; they do not, however, establish mandatory means of compliance. Acceptable practices are intended to assist DCMs by establishing non-exclusive safe harbors. The safe harbors apply only to compliance with specific aspects of the core principle, and do not protect the contract market with respect to charges of violations of other sections of the CEA or other aspects of the core principle.

[14] CME Comment Letter at 3–4 (Feb. 22, 2011); Eris Comment Letter at 1–2 (Feb. 22, 2011); GreenX Comment Letter at 1 (Feb. 22, 2011); ICE Comment Letter at 3 (Feb. 22, 2011); KCBT Comment Letter at 1, 9 (Feb. 22, 2011).

[15] CME Comment Letter at 3 (Feb. 22, 2011); ICE Comment Letter at 2 (Feb. 22, 2011); KCBT Comment Letter at 9 (Feb. 22, 2011); Eris Comment Letter at 3 (June 3, 2011).

[16] CME Comment Letter at 3 (Feb. 22, 2011); GreenX Comment Letter at 2 (Feb. 2, 2011); MGEX Comment Letter at 2 (Feb. 22, 2011).

[17] CME Comment Letter at 3 (Feb. 22, 2011); GreenX Comment Letter at 2, 11 (Feb. 22, 2011).

[18] As noted in the DCM NPRM, the RERs are the cornerstone of the Commission's oversight program,

Some commenters claimed that the Commission's approach was overly prescriptive and inconsistent with the core principle framework.[19] While maintaining the core principle framework as part of the Dodd-Frank Act, Congress revised DCM Core Principle 1 to specifically provide the Commission with discretion to determine, by rule or regulation, the manner in which boards of trade are to comply with the core principles.[20] Accordingly, in circumstances where a standard industry practice has developed, the Commission is adopting rules in order to provide greater legal certainty and transparency to DCMs and market participants. In other circumstances, the Commission is maintaining the guidance and acceptable practices framework, particularly where the Commission experienced that a standard compliance approach has not evolved within the industry over the years. In those instances, the final regulations maintain the flexibility for DCMs to determine the specific manner in which they choose to satisfy their compliance obligations.

Several commenters claimed that the codification of additional rules will increase the Commission's costs of regulating DCMs. The Commission believes that a regulatory framework consisting of a higher proportion of rules, in addition to guidance and acceptable practices, may in fact be less costly to administer, as DCMs will have a clear understanding of what is required in order to demonstrate compliance with the core principles. The costs and benefits of this final rulemaking are described further in the Cost Benefit Consideration discussion of this release.

C. General Regulations (Subpart A)

The regulations in this final rulemaking are codified in a series of subparts under part 38. The general regulations consisting of §§ 38.1 through 38.10[21] are codified in subpart A, and the regulations applicable to each of the 23 core principles are codified in subparts B through X, respectively.[22]

1. § 38.1—Scope

The Commission proposed non-substantive revisions to § 38.1 that corrected cross-references to other sections of the Commission's regulations. Section 38.1 is adopted as proposed.

2. § 38.2—Applicable Provisions

Proposed § 38.2 specified the Commission regulations that are applicable to DCMs. In addition to revising the heading, the proposed revisions to § 38.2 updated the list of Commission regulations that are applicable to DCMs, including the relevant regulations that have been codified, or are proposed to be codified, upon the Commission's finalization of the relevant rulemakings that culminated upon enactment of the Dodd-Frank Act. These included regulations relating to real-time reporting of swaps and the determination of appropriate block size for swaps under part 43, requirements for swap data recordkeeping and reporting under part 45, designation requirements for swap data repositories under part 49, and position limits under part 150 and/or part 151, as applicable.

Discussion

The Commission is revising § 38.2 to specify the Commission regulations from which DCMs will be exempt. The original intent of § 38.2 was to exempt DCMs from various Commission regulations under Title 17 that were codified prior to the CFMA. Proposed § 38.2 listed the specific regulations with which DCMs were required to comply, with the understanding that the DCM was exempt from those not listed. In this final rulemaking, to add clarity, the Commission is revising the title of the rule to ''Exempt Provisions'' and is modifying § 38.2 to reflect the list of regulations from which DCMs are exempt. Those regulations include: § 1.35(e)–(j), § 1.39(b), § 1.44, § 1.53, § 1.54, § 1.59(b) and (c), § 1.62, § 1.63(a) and (b) and (d) and(f), § 1.64, § 1.69, part 8, § 100.1, § 155.2, and part 156. While § 38.2 likely will be amended if and when the referenced rules are eliminated from the regulations or modified, this revised approach will eliminate the need for the Commission to continually update § 38.2 when new regulations with which DCMs must comply are codified.

3. § 38.3—Procedures for Designation

§ 38.3(a)—Application Procedures

Among the proposed revisions to § 38.3, which contains the application and designation procedures for DCM applicants, the Commission proposed to eliminate the 90-day expedited review procedures for DCM applications, which currently are codified in § 38.3(a)(2). The proposed modification would result in all DCM applications being subject to the statutory 180-day review procedures provided under section 6(a) of the CEA and § 38.3(a)(1) of the Commission's regulations.[23]

As noted above, the Dodd-Frank Act eliminated the standalone DCM designation criteria. Accordingly, the Commission proposed re-designating appendix A to include a new DCM application form (''Form DCM'') that contains comprehensive instructions and a list of necessary information and documentation required to initiate a DCM designation proceeding. All new applicants seeking designation would submit to the Commission a completed form, including the information required in each exhibit.[24]

The DCM NPRM also proposed certain revisions to § 38.3 that would require DCM applications and certain related DCM filings to be filed with the Secretary of the Commission in an electronic format, via the Internet, email, or other means of direct electronic submission as approved by the Commission.[25]

Summary of Comments

Two commenters discussed the proposed elimination of the 90-day expedited review process for DCM applications in § 38.3(a)(1). Nodal expressed support for the proposed elimination of the 90-day review procedures.[26] Eris opposed the proposed elimination and commented, among other things, that Form DCM should result in a streamlined and standardized review process and that eliminating the 90-day accelerated review process would place new entities at a competitive disadvantage because it

serving as a key tool for monitoring a DCM's compliance with the core principles, and also as a primary means for identifying industry trends and DCM best practices for self-regulation. *See* DCM NPRM at 80574–75 for a more detailed discussion of RERs.

[19] *See e.g.,* CME Comment Letters (Feb. 22, 2011, Apr. 18, 2011, Jun. 3, 2011 and Aug. 3, 2011); MGEX Comment Letter (Jun. 3, 2011); GreenX Comment Letter (Feb. 22, 2011).

[20] 7 U.S.C. 7(d)(1)(amended 2010).

[21] The DCM NPRM did not propose any revisions to § 38.6 of the Commission's regulations.

[22] Each of these subparts begins with a regulation containing the language of the core principle.

[23] 7 U.S.C. 8(a).

[24] Form DCM would also be used by applicants amending a pending application and existing DCMs applying for an amendment to their order of designation.

[25] The proposed electronic filing requirements would specifically apply to DCM applications, reinstatements, requests for transfer of designations, requests for withdrawal of application for designation, and vacation of designations. As explained in the DCM NPRM, the proposed revisions would make the DCM application filing process consistent with the electronic process used for filing rule and product submissions under parts 39 and 40 of the Commission's regulations. *See* 17 CFR parts 39 and 40. In addition to these substantive revisions, many of the proposed revisions to § 38.3 were non-substantive and were intended to clarify the rule.

[26] Nodal Comment Letter at 5 (Feb. 22, 2011).

would delay their time to market, which is critical for new entrants.[27]

Discussion

The Commission is adopting proposed § 38.3(a) with one modification.

As described in the DCM NPRM, the Commission proposed eliminating the 90-day accelerated review process based on its experience in processing DCM applications. Specifically, the Commission has found that in the interest of meeting the expedited approval timeline, applicants seeking expedited review often filed incomplete or draft applications without adequate supporting materials. Accordingly, the 90-day review process required the expenditure of significant Commission resources as well as the applicant's resources, and often resulted in placing the DCM designation requests on the 180-day review track. It is the Commission's view that the 180-day review period is a more reasonable timeframe for the review of designation requests and will result in more efficient use of the applicant's and the Commission's resources.

In regards to Eris' specific claim that elimination of the 90-day accelerated review process would place new entities at a competitive disadvantage by delaying their time to market, the Commission notes that eliminating the 90-day review process will not prevent Commission staff from reviewing and/or rendering a determination on a DCM application before the 180-day period ends, particularly in instances where a DCM application is substantially complete, does not raise novel issues, and/or where a DCM applicant timely provides supplemental or follow-up responses or documentation necessary for a designation determination.[28] Similarly, while the Commission recognizes that Form DCM will provide the added benefit of a more streamlined and standardized procedure for submitting and reviewing DCM applications, such benefits will not necessarily result in an expedited Commission determination. Rather, the completeness of the application and timely response to Commission staff's requests will determine the timeframe within which the Commission reviews a DCM application.

To account for potential changes in the Commission's prospective technological capabilities, the Commission is slightly modifying the proposed text of § 38.3(a) to clarify that a board of trade must file Form DCM electronically ''in a format and manner specified by the Secretary of the Commission.''

The Commission is also making several minor non-substantive and organizational revisions to Form DCM. Additionally, the Commission is clarifying that the exhibits submitted in connection with Form DCM should include a description of how the applicant meets the definition of ''board of trade'' (as defined in section 1a(2) of the CEA). Applicants must submit all applicable exhibits simultaneous with the submission of completed Form DCM. Form DCM and all exhibits must be substantially complete prior to submission.

Sec. 38.3(b)—Reinstatement of Dormant Designation

Proposed § 38.3(b) required that a dormant DCM, prior to listing or relisting products for trading, must reinstate its designation under the procedures of paragraphs (a)(1) and (2) of § 38.3. The proposed rule provided that applications for reinstatement of designation may rely upon previously-submitted materials that pertain to, and accurately describe, current conditions. The Commission did not receive any comments on § 38.3(b) and is adopting this provision as proposed.

Sec. 38.3(c)—Delegation of Authority

Proposed § 38.3(c) delegated authority to the Director of the Division of Market Oversight (or such other employees as the Director may designate) to notify an applicant seeking designation in the event that the application is materially incomplete and that the 180-day review period is stayed. The Commission did not receive any comments on § 38.3(c) and is adopting this provision as proposed.

Sec. 38.3(d)—Request for Transfer of Designation

The Commission proposed new § 38.3(d) to formalize the procedures that a DCM must follow when requesting the transfer of its DCM designation and positions comprising open interest, in anticipation of a corporate event (e.g., a merger, corporate reorganization, or change in corporate domicile) which results in the transfer of all or substantially all of the DCM's assets to another legal entity. Proposed § 38.3(d)(2) required a DCM to submit to the Commission a request for transfer of designation no later than three months prior to the anticipated corporate change. If a DCM did not know or could not reasonably have known of the anticipated change three months prior to the change, it was required to immediately file the request as soon as it did know of such change. The proposed rule required, that in either case, the request must include a series of submissions, including, among other things, the underlying agreement that governs the corporate change, a narrative description of the corporate change that includes the reason for the change and its impact on the DCM, a discussion of the transferee's ability to comply with the CEA and the Commission's regulations, the governing documents of the transferee, and a list of contracts, agreements, transactions or swaps for which the DCM requests transfer of open interest.

Proposed § 38.3(d) also required, as a condition of approval, that the DCM submit a representation that it is in compliance with the CEA, including the DCM core principles, and the Commission's regulations. In addition, the proposed rule required a DCM to submit various representations by the transferee, including, but not limited to, a representation that the transferee will assume responsibility for complying with all applicable provisions of the CEA and the Commission's regulations and that none of the proposed rule changes will affect the rights and obligations of any participant to which open positions are transferred.

Summary of Comments

CME contended that the proposed rule is overly prescriptive because it applies a ''one-size-fits-all approach'' even though the circumstances of each transfer are likely to be unique.[29] While CME did not oppose the three-month advance notification requirement, it did oppose what it believed to be the broad scope of the additional documentation required to be submitted simultaneously with such notification.[30] CME stated that the required information is unnecessary and is likely to result in later notification to the Commission.[31] As an alternative, CME recommended that the Commission tailor the information it requires based on the nature of the requested transfer.[32]

CME also contended that if a DCM could not have reasonably known of an anticipated change three months in advance, then it cannot ''immediately'' file both the request and all of the required submissions once it does know, because preparing the

[27] Eris Comment Letter at 4 (Feb. 22, 2011).

[28] Section 6(a) of the Act provides that ''the Commission shall approve or deny an application for designation or registration as a contract market * * * within 180 days of the filing of the application.'' 7 U.S.C. 8(a).

[29] CME Comment Letter at 11 (Feb. 22, 2011).

[30] *Id.*

[31] *Id.*

[32] *Id.*

submissions takes time. CME suggested that the rule be amended to require that the documentation be filed ''promptly'' as soon as the DCM knows of the change, rather than ''immediately.'' [33]

Discussion

In response to CME's contention that each transfer is likely to be unique, and its opposition to some of the documentation required by the rule, the Commission notes that the specific information requirements contained in the proposed rule are necessary to enable the Commission to determine that the transfer is in compliance with the CEA. The required documents, such as the transfer agreement, governing documents, list of contracts to be transferred, and compliance representations, are relevant to the Commission's determination of the DCM's ongoing compliance with the CEA. Such documentation is also relatively standard in transfer transactions. The Commission recognizes, however, that there may be some variations in the form of governance documents or underlying agreements for each transfer. Accordingly, DCMs may provide the substance of the required information in the form available to them.

In response to CME's suggestion that the rule be amended to require that the documentation be filed ''promptly'' as soon as the DCM knows of the change, rather than ''immediately,'' the Commission notes that the proposed rule specifically stated that in situations where a DCM could not have reasonably known of an anticipated change three months in advance, the DCM must immediately file the request as soon as it knows of such change, with an explanation as to the timing of the request. The Commission believes that in the context of this rule, use of the term ''promptly'' rather than ''immediately'' would not provide a meaningful distinction, as the rule simply requires DCMs to provide the documentation as soon as they know of the change.

As described in connection with § 38.3(a), the Commission is slightly modifying the proposed text to clarify that a DCM must file a request for transfer of designation electronically ''in a format and manner specified by the Secretary of the Commission.'' The Commission is adopting the remainder of the rule as proposed.

[33] *Id.*

Sec. 38.3(e)—Request for Withdrawal of Application for Designation

Proposed § 38.3(e) specified the procedures that a DCM must follow for withdrawing an application for designation. The Commission did not receive any comments on this provision. The Commission is slightly modifying the proposed text to clarify that an applicant must file a request for withdrawal of application for designation electronically ''in a format and manner specified by the Secretary of the Commission.'' The Commission is adopting the remainder of the rule as proposed.

Sec. 38.3(f)—Request for Vacation of Designation

Proposed § 38.3(f) specified the procedures that a DCM must follow for vacating its designation. The Commission did not receive any comments on this provision. The Commission is adopting it as proposed, with a slight modification to the proposed text to clarify that a DCM must file a request for vacation of designation electronically ''in a format and manner specified by the Secretary of the Commission.''

Sec. 38.3(g)—Requirements for Existing Designated Contract Markets

Proposed § 38.3(g) required that each existing DCM provide the Commission with a signed certification of its compliance with each of the 23 core principles and the Commission's regulations under part 38, within 60 days of the effective date of the publication of the final rules proposed in the DCM NPRM. The failure of any existing DCM to provide such certification would be grounds for revocation of the DCM's designation status. The Commission requested comments on whether the 60 day period is sufficient, and if not, what period of time may be more appropriate, and why.

Summary of Comments

Multiple commenters opposed the proposed 60-day timeframe for existing DCMs to certify compliance with the core principles and associated regulations. Commenters suggested several alternative timeframes, including 90 days,[34] 120 days,[35] 180 days,[36] 12 months,[37] and 18 months.[38] KCBT argued that the proposed effective date is unreasonable and would be burdensome for DCMs, and suggested that the Commission work with each DCM to create a reasonable compliance timeframe.[39]

Commenters stated that a 60-day timeframe would be unreasonable given the expenditure of resources and detailed analysis required as a result of significant changes to existing core principles and the addition of new core principles. GreenX stated that Core Principle 21 (Financial Resources) may require DCMs to obtain new investment or financing arrangements.[40] KCBT stated that it will take DCMs time to convert programs and processes from current acceptable practices to adherence to what it sees as prescriptive objectives and deadlines.[41] Nodal, which is currently operating as an exempt commercial market (''ECM''), stated that 60 days is an unnecessarily harsh timeframe for an existing business to transform its operations and demand changes from its support providers.[42] Finally, NYSE Liffe claimed that even 90 or 120 days would be insufficient because certain proposals, such as Core Principles 2 (Compliance with Rules), 4 (Prevention of Market Disruption), and 20 (System Safeguards), will require the implementation of automated systems that require significant time to implement coding and conduct testing.[43] NYSE Liffe further claimed that the DCM's management and boards will have to review and approve rule changes before they can be implemented, and that the DCM will also have to negotiate and execute changes to contracts with third-party service providers.[44] CME disagreed with the assertion that the proposed new regulations simply codify practices that are commonly accepted in the industry, and argued that the rules will necessitate strategic, operational, system, and rule changes.[45] CME claimed that it would need a minimum of 180 days just to assess the impact of the new regulations and to identify, design, and plan the projects necessary to implement them.[46]

MGEX stated that a ''catch all'' certification is of limited value given that DCMs spend ''countless hours and dollars'' demonstrating that they are in compliance with core principles through RERs and responding to other

[34] Nodal Comment Letter at 4 (Feb. 22, 2011).

[35] CFE Comment Letter at 6–7 (Feb. 22, 2011).

[36] GreenX Comment Letter at 21 (Feb. 22, 2011).

[37] MGEX Comment Letter at 2 (Feb. 22, 2011), and at 1 (June 3, 2011).

[38] NYSE Liffe Comment Letter at 14 (Feb. 22, 2011).

[39] KCBT Comment Letter at 2 (Feb. 22, 2011).

[40] GreenX Comment Letter at 21 (Feb. 22, 2011).

[41] KCBT Comment Letter at 2 (Feb. 22, 2011).

[42] Nodal Comment Letter at 4 (Feb. 22, 2011).

[43] NYSE Liffe Comment Letter at 14 (Feb. 22, 2011).

[44] *Id.*

[45] CME Comment Letter at 12 (Feb. 22, 2011).

[46] *Id.*

Commission inquiries.[47] MGEX also questioned whether it can conclude with any certainty that it is in compliance with the new and revised core principles and regulations.[48] MGEX requested that the certification requirement be stricken, or if the requirement is deemed necessary, that the process be limited to providing a signed letter attesting to compliance (and that all application forms and documentation that are required with a formal application should be waived for existing DCMs).[49] MGEX also requested that current DCMs that are already compliant with the existing core principles should be grandfathered.[50]

Nodal stated that the proposed rules do not address how a DCM applicant that is operating as an ECM pursuant to a grandfathering order can comply with the DCM requirements, and suggested that the Commission stagger certain compliance timeframes to accommodate entities that are operating pursuant to grandfather relief and that may potentially seek to operate as a DCM.[51]

Discussion

The Commission acknowledges commenters' concerns regarding the 60-day time frame for existing DCMs to certify compliance with the core principles and is eliminating this requirement from the final rules. In addition, the Commission has determined that existing DCMs may need additional time to comply with the rules being adopted in this release, and is therefore allowing DCMs an additional 60 days after the effective date of this release to comply with all of the new and revised final rules, except for § 38.151(a), as described in this release. All DCMs are expected to be in compliance with the final rules by that date. Albeit, the new and revised core principles, as amended by the Dodd-Frank Act, took effect on July 16, 2011, and all DCMs were required to be in compliance with each of the new and revised core principles as of that date. The Commission further notes that all DCMs will continue to be subject to compliance reviews by the Commission, including RERs.

With respect to Nodal's comments regarding the impact of the effective date of the DCM and SEF rules on ECMs, the Commission issued orders whereby entities operating as exempt commercial markets pursuant to section 2(h)(3)–(7) of the CEA, or as exempt boards of trade pursuant to section 5d of the CEA, could receive grandfather relief to continue to operate in accordance with those provisions notwithstanding their deletion from the CEA effective July 15, 2011, by the Dodd-Frank Act.[52] The continued operation and compliance timeframes for exempt boards of trade and exempt commercial markets are addressed by those orders, and accordingly, are outside the scope of this rulemaking.

4. § 38.4—Procedures for Listing Products and Implementing Designated Contract Market Rules

The proposed amendments to § 38.4 were largely intended to conform the rule to §§ 40.3 (Voluntary submission of new products for Commission review and approval) and 40.5(b) (Voluntary submission of rules for Commission review and approval).[53] Those rules were recently revised in the separate release pertaining to ''Provisions Common to Registered Entities.''[54]

Summary of Comments

In comments submitted both in connection with this rulemaking and with the proposed rulemaking for ''Provisions Common to Registered Entities,''[55] CME stated that the proposed procedures for listing products would increase the burdens associated with new product submissions and rule changes and would create new and costly bureaucratic inefficiencies, competitive disadvantages in the global marketplace, and impediments to innovation.[56] CME stated that there has been no showing that the current streamlined process undermines market integrity, and that the process in fact has facilitated growth and innovation.[57]

CFE stated that a number of the regulations proposed in the DCM NPRM require DCMs to provide notification and reports to the Commission, but that the proposed regulations do not specify the manner in which the required notifications and reports should be submitted to the Commission.[58] CFE requested that the Commission designate a single email address for the submission of all DCM notifications and reports.[59]

Discussion

The Commission is adopting the rule as proposed. The rule conforms to revisions to part 40 that were made in a separate rulemaking for ''Provisions Common to Registered Entities.''[60] In that rulemaking, the Commission, among other things, revised and eliminated several proposed documentation provisions in order to respond to comments that the submission of documentation in connection with new rules and rule amendments would be burdensome. The Commission also noted that the final rules will conserve both Commission and registered entity resources and will be less burdensome than existing practice. CME's comments on these provisions were addressed in the part 40 rulemaking, and are outside the scope of this rulemaking.''[61]

In response to CFE's comment, the Commission notes that all filings submitted pursuant to part 38 should be filed electronically with the Secretary of the Commission, in a format and manner determined by the Secretary, at *submissions@cftc.gov* and the Division of Market Oversight at *DMOSubmissions@cftc.gov.*

5. § 38.5—Information Relating to Contract Market Compliance

Sec. 38.5(a)—Requests for Information; § 38.5(b)—Demonstration of Compliance; and, Sec. 38.5(d)—Delegation of Authority

The provisions in § 38.5 address requirements for DCMs to provide information relating to contract market compliance. Proposed § 38.5(a) required that a DCM must file with the Commission information related to its business as a DCM, including information relating to data entry and trade details, upon Commission request. Proposed § 38.5(b) required that a DCM must file with the Commission a written demonstration that the DCM is in compliance the core principles, upon Commission request. Proposed § 38.5(d) delegates the Commission's authority to seek information as set forth in paragraph § 38.5(b) to the Director of the Division of Market Oversight, or such other employees as the Director may designate. As noted in the DCM NPRM, except for technical revisions, the aforementioned proposed rules were not substantively modified from their current versions. The Commission did

[47] MGEX Comment Letter at 2 (Feb. 22, 2011).

[48] *Id.*

[49] *Id.*

[50] MGEX Comment Letter at 1 (June 3, 2011).

[51] Nodal Comment Letter at 4 (Feb. 22, 2011).

[52] *See* 75 FR 56513, Sept. 16, 2010; *see also* 76 FR 42508, Jul. 14, 2011.

[53] Section 40.3 was amended to require additional information to be provided by registered entities submitting new products for the Commission's review and approval. Section 40.5(b) codified a new standard for the review of new rules or rule amendments as established under the Dodd-Frank Act. 75 FR 44776, Jul. 27, 2011.

[54] *Id.*

[55] *Id.*

[56] CME Comment Letter at 10, 13 (Feb. 22, 2011).

[57] *Id.*

[58] CFE Comment Letter at 7 (Feb. 22, 2011).

[59] *Id.*

[60] 75 FR 44776, July 27, 2011.

[61] *Id.*

not receive any comments on these rules and adopts them as proposed.

Sec. 38.5(c)—Equity Interest Transfers

Proposed § 38.5(c) required DCMs to file with the Commission a notice of the transfer of ten percent or more of its equity, no later than the business day following the date on which the DCM enters into a firm obligation to transfer the equity interest.[62] The proposed rule required that the notification include several submissions, including any relevant agreements (including preliminary agreements), changes to relevant corporate documents, a chart outlining any new ownership or corporate or organizational structure, a brief description of the purpose and any impact of the equity interest transfer, and a representation from the DCM that it meets all of the requirements of section 5(d) of the Act and Commission regulations thereunder. The proposed rule also required that DCMs notify the Commission of the consummation of the transaction on the day in which it occurs. Proposed § 38.5(c)(3)[63] required that when there is a change in ownership, the DCM must certify, no later than two business days following the date on which the change in ownership occurs, that the DCM meets all of the requirements of section 5(d) of the CEA, as amended by the Dodd-Frank Act, and the provisions of part 38 of the Commission's regulations. The proposed rule also required that the DCM include, as part of its certification, an explanation of whether any aspects of the DCM's operations will change as a result of the change in ownership and, if so, that the DCM must provide a description of the changes.

Summary of Comments

Two commenters stated that they do not object to the general notification requirement, but contended that the submissions required to be simultaneously filed with the initial notification do not lend themselves to preparation within the 24-hour time frame proposed in the rules.[64] NYSE Liffe proposed that a period of ten business days to provide the additional information would allow more time for the DCM to provide accurate and meaningful information.[65] NYSE Liffe also requested clarification that the requirement to provide ''preliminary agreements'' only pertains to agreements that have been executed, and not to drafts that may have been exchanged for purposes of discussion.[66]

CME stated that a representation from a DCM that it meets all of the requirements of section 5(d) of the CEA is more appropriate as a requirement upon consummation of the equity interest transfer, rather than with the initial notification.[67]

MGEX stated that as a mutual association with a membership-based ownership structure, it frequently experiences changes in membership and ownership.[68] MGEX stated that notice to the Commission seems reasonable for single event situations where a new party obtains a ten percent or more interest at one time, but disagreed with the rationale for the requirement to recertify again as part of such event.[69] Instead, MGEX suggested that the Commission should inquire only if there is a concern over such an event.[70]

Discussion

The Commission is adopting the proposed rule with certain revisions.

The Commission is revising the rule to provide that the DCM must submit to the Commission a notification of each transaction involving the transfer of ten percent or more of the equity interest in the designated contract market, and that such notification must be provided at the earliest possible time but in no event later than ten business days following the date upon which the designated contract market enters into a legally binding obligation to transfer the equity interest.

The Commission acknowledges NYSE Liffe and CME's concerns regarding the timing of the submission filing requirement and therefore has extended the time period to up to ten business days for a DCM to file notification with the Commission upon entering into an agreement to transfer an equity interest of ten percent or more. While DCMs may take up to ten business days to submit a notification, the DCM must provide Commission staff with sufficient time, prior to consummating the equity interest transfer, to review and consider the implications of the change in ownership, including whether the change in ownership will adversely impact the operations of the DCM or the DCM's ability to comply with the core principles and the Commission's regulations thereunder. The rule further reminds DCMs that any aspect of an equity interest transfer described that necessitates the filing of a rule as defined in part 40 of the Commission regulations must comply with the rule submission requirements, including timing of filing, of section 5c(c) of the CEA and part 40, and all other applicable Commission regulations.

In response to CME's comment that the representation from a DCM that it meets all of the requirements of section 5(d) of the CEA is more appropriate as a requirement upon consummation of the equity interest transfer, and NYSE Liffe's comment that the Commission clarify that ''preliminary agreements'' do not include draft documents, the Commission is revising the rule to eliminate references to the specific documents that must be provided with the notification. Rather, the Commission may upon receiving a notification of the equity interest transfer, where necessary, request appropriate documentation pursuant to its authority under § 38.5 of the Commission's regulations. Such documentation may include: (i) Relevant agreement(s), including any preliminary agreements (not including draft documents); (ii) associated changes to relevant corporate documents; (iii) chart outlining any new ownership or corporate or organizational structure, if available; (iv) a brief description of the purpose and any impact of the equity interest transfer; and, (v) a certification, upon consummation of the equity interest transfer that the designated contract market continues to meet all of the requirements of section 5(d) of the Act and Commission regulations adopted thereunder.

The Commission acknowledges MGEX's comment but believes that the rule is necessary. The Commission must oversee and ensure the continued compliance of all DCMs with the core principles and the Commission's regulations. In order to fulfill its oversight obligations, and to ensure that DCMs maintain compliance with their self-regulatory obligations, the Commission must undertake an effective due diligence review of the impact of ownership transfers. Accordingly, the Commission adopts the proposed rule, with the aforementioned modifications.

[62] *See generally,* DCM NPRM for an explanation of the proposed 10 percent threshold.

[63] The Commission proposed redesignating § 38.5(d) as § 38.5(c).

[64] CME Comment Letter at 13 (Feb. 22, 2011) (noting that associated changes to relevant corporate documents are unlikely to be finalized until closer to the transfer date); NYSE Liffe Comment Letter at 13 (Feb. 22, 2011) (noting that the information will have to be collected and formatted).

[65] NYSE Liffe Comment Letter at 14 (Feb. 22, 2011).

[66] *Id.*

[67] CME Comment Letter at 13 (Feb. 22, 2011).

[68] MGEX Comment Letter at 2 (Feb. 22, 2011).

[69] *Id.* at 3.

[70] *Id.*

6. § 38.7—Prohibited Use of Data Collected for Regulatory Purposes

Proposed § 38.7 [71] prohibited DCMs from using proprietary data or personal information submitted by any person to the DCM for regulatory purposes, for business or marketing purposes. In the DCM NPRM, the Commission noted that nothing in the proposed provision should be viewed as prohibiting a DCM from sharing such information with another DCM or SEF for regulatory purposes, where necessary.

Summary of Comments

Several commenters argued that the restriction on the use of proprietary or personal information is too broad. CME stated that the proposed rules should distinguish between proprietary and personal information that is provided to a DCM exclusively for regulatory purposes and information that is provided to a DCM for both regulatory and non-regulatory purposes.[72] CME claimed that a DCM should be permitted to use the latter type of information for business or marketing purposes, provided that the DCM has transparent rules and policies which disclose what information collected by the DCM will be used exclusively for the furtherance of its self-regulatory obligations and how such confidential information will be protected.[73] CME also contended that a DCM should not be precluded from using proprietary or personal information that is provided for regulatory purposes for business or marketing purposes where the market participant has specifically agreed to such use.[74] MGEX agreed with the underlying purpose of the proposed rule but suggested allowing market participants to opt-out of having their information used for business or marketing purposes.[75]

ELX stated that the standard should rest on whether the use and manner of use of the information violates the reasonable expectation of confidentiality on the part of the disclosing firm.[76] For example, ELX stated that senior officers of the exchange should have access to such data to understand the markets they are responsible for overseeing even if they don't have a ''compliance'' moniker in their title.[77] ELX also stated that an exchange should be able to consolidate proprietary data in an anonymous fashion to explain its markets without running afoul of the proposed rule.[78] ELX also claimed that a DCM should be able to use its discretion to convey proprietary information for business or marketing purposes back to employees of the firm that supplied the data.[79] For example, ELX stated that a DCM should be permitted to explain to a trading desk how the activities of its firm have changed or could be conducted more cost-effectively.[80]

Discussion

The Commission has considered the comments and is amending proposed § 38.7 to allow DCMs to use proprietary or personal information for business or marketing purposes if the person from whom they collect or receive such information clearly consents to the use of its information in such a manner. In response to CME and ELX's comments, the Commission notes that a DCM could use information that it receives for both regulatory and non-regulatory purposes for business or marketing purposes (or could convey proprietary information back to employees of the firm that supplied the data) if the source of the information clearly consents to the use in such a manner. The Commission is also amending the proposed rule to prohibit a DCM from conditioning access to its trading facility based upon such consent.

Finally, as stated in the preamble to the proposed rule and amplified above, the Commission notes that § 38.7 is intended to protect regulatory information provided by market participants to DCMs from unauthorized commercial use.[81] The Commission notes consistent with the requirements of the final rule, DCMs should have rules to safeguard regulatory information from misuse. The Commission would expect such rules, among other things, to restrict access to such information within the DCM to avoid improper use of such information for commercial purposes.

7. § 38.8—Listing of Swaps on a Designated Contract Market

Proposed § 38.8(a) required a DCM to notify the Commission, prior to or upon listing its first swap contract, of the manner in which it will fulfill each of the requirements under the amended CEA and part 38 with respect to the listing, trading, execution and reporting of swap transactions.

Proposed § 38.8(b) required a DCM, before it lists swaps, to request from the Commission a unique, alphanumeric code for the purpose of identifying the DCM. The rule required a DCM to do so pursuant to the swap recordkeeping and reporting requirements under then-proposed part 45 of the Commission's regulations. Proposed § 38.8(b) also codified the obligations of DCMs to comply with the provisions of part 45, which set forth the recordkeeping and reporting requirements for DCMs with respect to swaps.[82]

Summary of Comments

CFE argued that a DCM should be allowed to offer trading in swaps in the same manner that a SEF is permitted to do so, and that it would be costly and unnecessary to require a DCM to create a separate SEF in order to offer trading in swaps instead of just permitting the DCM to adopt separate rules that permit the trading of swaps on the DCM consistent with the SEF requirements.[83] CFE argued that a DCM should not have to create a separate entity, board, board committees, membership application and approval process, and rule set in order to offer trading in swaps in the same manner that a SEF can do when it already has all of those components in place and can simply add any required components for SEFs.[84]

ELX stated that the DCM NPRM did not make clear what criteria will be used to distinguish between a swap contract and a futures contract, and claimed that this ambiguity will cause uncertainty and redundant costs for boards of trade that would prefer to follow a DCM model without having to adopt a parallel set of rules and procedures.[85] ELX cited compliance with section 727 of the Dodd-Frank Act and § 38.10 as one area where clarity is needed.[86]

Discussion

The Commission is adopting the rule as proposed, with one clarification. CFE's comments take issue with provisions in the Dodd-Frank Act that are not within the Commission's discretion to revise. Swaps are permitted to be traded on a SEF or a DCM, pursuant to rules promulgated for each entity.[87] Accordingly, swaps

[71] The DCM NPRM did not propose any revisions to current § 38.6 (Enforceability), and this provision remains unchanged.

[72] CME Comment Letter at 13–14 (Feb. 22, 2011).

[73] *Id.*

[74] *Id.*

[75] MGEX Comment Letter at 3 (Feb. 22, 2011).

[76] ELX Comment Letter at 3 (Feb. 22, 2011).

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *See* 75 FR 80572, 80577, note 37, Dec. 22, 2010.

[82] *See* ''Swap Data Recordkeeping and Reporting Requirements,'' Proposed Rule, 75 FR 76573, Dec. 8, 2010.

[83] CFE Comment Letter at 1 (Feb. 22, 2011).

[84] *Id.* at 2.

[85] ELX Comment Letter at 4 (Feb. 22, 2011).

[86] *Id.* at 5.

[87] *See* CEA section 2(h)(8), 7 U.S.C. 2(h)(8). *See also* 17 CFR 38.9 (''A board of trade that operates a designated contract market and that intends to

traded on a DCM must be traded pursuant to DCM rules. As noted in the Final Exemptive Order issued July 14, 2011,[88] DCMs may list and trade swaps after July 16, 2011 without further exemptive relief. In that Order, the Commission noted that if a DCM intends to trade swaps pursuant to the rules, processes, and procedures currently regulating trading on its DCM, the DCM may need to amend or otherwise update its rules, processes, and procedures in order to address the trading of swaps.[89] In response to ELX, the determining factors in distinguishing between swaps and futures are outside of the scope of this proceeding. The CEA provided a definition for swaps under section 1a(47), and the Commission published proposed rules and interpretive guidance to further define the term on May 23, 2011.[90]

The Commission is modifying § 38.8(b), consistent with the Commission's final Swap Data Recordkeeping and Reporting Requirements Rule,[91] to require DCMs to generate and assign a unique swap identifier at, or as soon as technologically practicable following, the time of execution of the swap. The unique swap identifier (''USI'') must have two alphanumeric components. The first component is the unique alphanumeric code assigned to the DCM by the Commission for the purpose of identifying the DCM with respect to USI creation. DCMs must obtain this first alphanumeric component from the Commission prior to executing any swap on its facility.[92] The second component is an alphanumeric code generated and assigned to that swap by the automated systems of the DCM, which shall be unique to that swap and different with respect to all such codes generated and assigned by that DCM to all other swaps. Each DCM must generate and assign a USI at, or as soon as technologically practicable, following the time of execution of the swap. The DCM is required to transmit the USI to the SDR, each swap counterparty, and the registered derivative clearing organization (''DCO'') (if the swap is cleared). The DCM, similar to all registered entities and counterparties, is required to use the USI to identify the swap in ''all recordkeeping and all swap data reporting pursuant to [part 45].'' This clarification is based upon the final rulemaking that implements swap data recordkeeping and reporting requirements under part 45 of the Commission's regulations.[93]

8. § 38.9—Boards of Trade Operating Both a Designated Contract Market and a Swap Execution Facility

Proposed § 38.9(a) codified the requirement that a board of trade that operates a DCM and that intends to operate a SEF must separately register pursuant to the SEF registration requirements and, on an ongoing basis, must separately comply with the SEF core principles under section 5h of the CEA, as amended by the Dodd-Frank Act, and the applicable Commission regulations to be codified under part 37 of the Commission regulations.[94]

Proposed § 38.9(b) codified the statutory requirement that any board of trade that is a DCM and intends to operate as an independent SEF may use the same electronic trade execution system for listing and executing swaps, provided that the board of trade makes it clear to market participants whether the electronic trading of such swaps is taking place on or through the DCM or the SEF.[95]

Summary of Comments

CME requested clarification as to whether the regulation is intended to create a more substantive obligation on the part of DCMs and SEFs given that market participants typically interface with electronic platforms through proprietary or third-party front end systems that are not controlled by the DCM.[96]

ICE noted that while the proposed rule prescribed how a DCM can list swaps, it did not describe how the core principles, written for futures contracts, apply to a DCM listing swaps. ICE requested clarification that a swap can be executed on a DCM using the same execution methods as on a SEF, such as a request for quote (''RFQ'') mechanism.[97] Finally, ICE stated that, like a SEF, a DCM should be able to allow the bilateral execution of swaps where there is no clearing mandate.[98] ICE claimed that without these clarifications, there will be a bias away from the trading of swaps on DCMs in favor of SEFs, and that the rulemaking would frustrate Congress' intention of also having swaps trade on DCMs.[99]

Alice Corporation states that organizations that choose to operate both a SEF and DCM should be able to meet the requirements of both entities with a single organization.[100] Alice Corporation also stated that it offers the ability to fill a large size order with multiple contracts on an all-or-nothing basis, as customers with large orders sometimes wish to execute with a single contracts.[101] Alice stated that this design would enable automatic execution of block size trades, and questioned whether an impartially offered price discount for volume would be acceptable to the Commission.[102]

Discussion

The Commission is adopting the rule as proposed. In response to CME's comment, the Commission notes that it would not be sufficient for a board of trade that operates both a DCM and a SEF to simply have DCM rules that might identify whether a transaction is being executed on a DCM or a SEF. Instead, a consolidated DCM/SEF trading screen must identify whether the execution is occurring on the DCM or the SEF, irrespective of how proprietary or third-party front end

also operate a swap execution facility must separately register…and on an ongoing basis, comply with the core principles under Section 5h of the Act, and the swap execution facility rules under part 37 of this chapter'').

[88] 76 FR 42508, Jul. 14, 2011.

[89] *Id.* at 42,518, n. 131. On July 27, 2011, DMO staff sent a notification letter to all existing DCMs stating that if the DCM intends to list swaps prior to the effective date of the final rules implementing part 38, it must include with its initial submission of the terms and conditions of a swap contract (pursuant to section 5c(c) of the CEA, as amended by the Dodd-Frank Act) any amendments to its rules that are necessary to provide for the trading of swaps, including a concise explanation and analysis of any systems and oversight procedures that the DCM proposes to revise in order to accommodate the trading of swaps. The information requested in the July 27 letter is separate from the request in proposed section 38.8(a); however, information provided in response to the July 27 letter may support, in part, the requirement under section 38.8(a) to provide a written demonstration detailing how the DCM is addressing its self-regulatory obligations with respect to swap transactions.

[90] 76 FR 29818, May 23, 2011.

[91] 77 FR 2136, Jan. 13, 2012.

[92] The Commission will establish a formal process by which DCMs can obtain a USI identifier.

[93] 77 FR 2136, Jan. 13, 2012.

[94] *See* notice of proposed rulemaking pertaining to ''Core Principles and Other Requirements for Swap Execution Facilities.'' 76 FR 1214, Jan. 7, 2011.

[95] Section 5h(c) of the CEA, as amended by the Dodd-Frank Act, provides:

IDENTIFICATION OF FACILITY USED TO TRADE SWAPS BY CONTRACT MARKETS.—A board of trade that operates a contract market shall, to the extent that the board of trade also operates a swap execution facility and uses the same electronic trade execution system for listing and executing trades of swaps on or through the contract market and the swap execution facility, identify whether the electronic trading of such swaps is taking place on or through the contract market or the swap execution facility.

[96] CME Comment Letter at 14 (Feb. 22, 2011).

[97] ICE Comment Letter at 10 (Feb. 22, 2011).

[98] *Id.*

[99] *Id.*

[100] Alice Corporation Comment Letter at 3 (May 31, 2011).

[101] *Id.*

[102] *Id.*

systems eventually present that data to market participants. Section 5h(c) of the CEA, as amended by the Dodd-Frank Act, clearly requires that a board of trade that operates both a DCM and SEF identify to market participants whether each swap is being executed on the DCM or the SEF.

With respect to comments requesting clarification that a swap can be executed on a DCM using execution methods other than a central limit order book [103] the Commission notes that swaps executed on a DCM are subject to all rules and requirements applicable to futures and options traded on DCMs.[104] In particular, all swaps traded on a DCM must be executed through the DCM's trading facility, except as otherwise expressly permitted by Core Principle 9,[105] and are subject to the Commission's rules pertaining to DCMs. Only certain Commission rules, for example, those relating to the real-time and regulatory reporting of swaps, will be different for swaps in relation to futures. In response to ICE's comment that a DCM, like a SEF, should be able to allow the bilateral execution of swaps where there is no clearing mandate, the Commission notes that ICE's position is based on the proposed SEF rules, which are not yet finalized.[106] Moreover, the Commission further notes that under the CEA, a DCM must be a board of trade, which is defined under section 1a(2) of the CEA, 7 U.S.C. 1a(2), as an organized exchange or other trading facility.[107] As defined under the CEA, both an organized exchange,[108] and other trading facility [109] require, among other things, multiple participants to execute or trade contracts or transactions, by accepting bids or offers made by other participants that are open to multiple participants in the facility or system, or through the interaction of multiple bids or offers within a system with a pre-determined nondiscretionary automated trade matching and execution algorithm.

The Commission has considered Alice Corporation's comments, and notes that while a board of trade that is a single corporate entity may operate both a DCM and a SEF, DCMs and SEFs have separate core principles and requirements, and any entity that operates both must separately meet the statutory and regulatory requirements of each facility. In response to Alice Corporation's further comment that counterparties on a DCM should be able to offer volume-based quotes, it is unclear whether Alice Corporation's comment is being offered in the context of acceptable methods of trading on a DCM's central marketplace or in the context of off-exchange transactions. If the former, the Commission reiterates that the acceptable methods of trading on a DCM's central marketplace are specifically determined under the CEA, which requires at a minimum that DCMs must be ''trading facilities,'' though even in that context the Commission has accepted trading systems beyond pure price-and-time algorithms. If Alice Corporation's reference to volume-based quotes is some sort of off-exchange trading methodology, the Commission reiterates that its analysis of such a proposal would be conducted under Core Principle 9. The comment does not offer sufficient information to analyze the suggestion at this time.

9. § 38.10—Reporting of Swaps Traded on a Designated Contract Market

Proposed § 38.10 codified the compliance obligations of DCMs with respect to real-time reporting of swap transactions and swap data recordkeeping and reporting obligations, as was required under then-proposed parts 43 [110] and 45 [111] of the Commission's regulations, respectively.

Summary of Comments and Discussion

CME referred the Commission to comments it submitted on February 7, 2011 with respect to proposed rulemakings under part 43 (real-time public reporting of swap transaction data) and part 45 (swap data recordkeeping and reporting requirements).[112]

Rule 38.10 references the reporting requirements contained under parts 43 and 45, but does not contain the substantive obligations associated with the requirements. Accordingly, CME's comments were considered in connection with the final rulemakings under parts 43 and 45.

The Commission is adopting this provision as proposed, with certain clarifications to conform the rule to the regulations under parts 43 and 45. Specifically, proposed § 38.10 required that each DCM, with respect to swaps traded on or through the DCM, report specified swap data to an SDR. The Commission is modifying § 38.10 to clarify that DCMs must maintain and report specified swap data for swaps traded ''on or pursuant'' to the rules of the DCM. The clarification is consistent with the rulemakings that implement real-time reporting of swap transaction data and swap data recordkeeping and reporting requirements under parts 43 and 45 of the Commission's regulations.[113]

D. Core Principles

As noted above, this release reorganizes part 38 to include subparts A through X. Each of subparts B through X includes relevant regulations applicable to the 23 core principles. This final rulemaking codifies within each subpart the statutory language of the respective core principle.[114]

[103] ICE Comment Letter at 2–3 (Feb. 22, 2011); Alice Corporation Comment Letter at 3 (May 31, 2011).

[104] Section 723 of the Dodd-Frank Act provides that the execution of swaps subject to the clearing requirement of section 2(h)(1) of the CEA must occur either on a DCM or on a SEF, unless no DCM or SEF makes the swap available to trade.

[105] Core Principle 9 provides, in relevant part, that ''[t]he rules of the board of trade may authorize, for bona fide business purposes:

(i) Transfer trades or office trades;

(ii) An exchange of—

(I) Futures in connection with a cash commodity transaction;

(II) Futures for cash commodities; or

(III) Futures for swaps; or

(iii) A futures commission merchant, acting as principal or agent, to enter into or confirm the execution of a contract for the purchase or sale of a commodity for future delivery if the contract is reported, recorded, or cleared in accordance with the rules of the contract market or a derivatives clearing organization. 7 U.S.C. 5(d)(9).

[106] The Commission further notes that pursuant to Core Principle 21, all contracts traded on a DCM must be cleared through a registered DCO, irrespective of the clearing mandate.

[107] The CEA requires that DCMs must be boards of trade, as defined under the CEA. *See, e.g.,* 7 U.S.C. 7(a) (stating the a board of trade may apply for designation as a contract market); *see also* 7 U.S.C. 7(d) (core principles apply to board of trade).

[108] As defined in section 1a(37) of the CEA, the term ''organized exchange'' means a trading facility that: (A) Permits trading: (i) By or on behalf of a person that is not an eligible contract participant; or (ii) by persons other than on a principal-to-principal basis; or (B) has adopted (directly or through another nongovernmental entity) rules that: (i) Govern the conduct of participants, other than rules that govern the submission of orders or execution of transactions on the trading facility; and (ii) include disciplinary sanctions other than the exclusion of participants from trading.

[109] As defined in section 1a(51) (A) of the CEA, the term ''trading facility'' means a person or group of persons that constitutes, maintains, or provides a physical or electronic facility or system in which multiple participants have the ability to execute or trade agreements, contracts, or transactions—(i) by accepting bids or offers made by other participants that are open to multiple participants in the facility or system; or (ii) through the interaction of multiple bids or multiple offers within a system with a pre-determined nondiscretionary automated trade matching and execution algorithm. *See* section 1a(51)(B) and (C) for exclusions and special rules application to trading facility.

[110] *See* ''Real Time Public Reporting of Swap Transaction Data,'' Proposed Rule, 75 FR 76139, Dec. 7, 2010.

[111] *See* ''Swap Data Recordkeeping and Reporting Requirements,'' Proposed Rule, 75 FR 76573, Dec. 8, 2010.

[112] CME Comment Letter at 14 (Feb. 22, 2011).

[113] 75 FR 76140, Dec. 7, 2010; 75 FR 76574, Dec. 8, 2010.

[114] As noted in the DCM NPRM, in two instances the language of the core principle, as codified, was slightly revised to add references to the CEA where

1. Subpart B—Designation as Contract Market

In the DCM NPRM, the Commission proposed to codify the statutory text of Core Principle 1 in § 38.100.[115] The Commission is adopting § 38.100 as proposed.

2. Subpart C—Compliance With Rules

Section 5(d)(2) of the CEA, as amended by the Dodd-Frank Act, requires that a DCM establish, monitor, and enforce compliance with its rules, including rules regarding access requirements and the terms and conditions of any contract to be traded on the contract market, and rules prohibiting abusive trade practices.[116] A DCM must also have the capacity to detect and investigate potential rule violations and to sanction any person that violates its rules. In addition, a DCM's rules must provide it with the ability and authority to perform the obligations and responsibilities required under Core Principle 2, including the capacity to carry out such international information sharing agreements that the Commission may require.

The Commission proposed several rules implementing amended Core Principle 2, as further described below.

i. § 38.150—Core Principle 2

Proposed § 38.150 codified the text of section 5(d)(2) of the CEA.

CME commented that a DCM cannot be expected to carry out international or other informational sharing agreements to which it is not a party, and should not be compelled by regulation to enter into such agreements.[117] KCBT opposed the requirement that a DCM establish rules and enter into informational-sharing agreements, particularly when such agreements contain specific requirements that are unsuitable to a DCM or conditions with which the DCM is unable to comply.[118]

Discussion

The Commission is adopting § 38.150 as proposed. Section 38.150 simply codifies the statutory language of the core principle. The Commission, therefore, does not have discretion to amend the requirements or obligations imposed by the statute.[119]

ii. § 38.151—Access Requirements

Sec. 38.151(a)—Jurisdiction

Proposed § 38.151(a) required that prior to granting a member or market participant access to its markets, the DCM must require the member or market participant to consent to its jurisdiction.

Summary of Comments

CFE stated that the term ''market participant'' used in the proposed rule should be limited to non-members of a DCM that have the ability to enter orders directly into a DCM's trade matching system for execution, and that the term should not include non-members that do not have this ability.[120] CFE further commented that the proposed rule should not apply to customers whose orders pass through a member's system before receipt by a DCM because, according to CFE, in that instance the customer order is being received by the DCM from the member.[121] CFE also asserted that customers that submit orders through a member do not have the privilege of trading on a DCM and thus the proposed rule should not apply to them.[122]

CME recommended that the Commission withdraw the proposed rule.[123] It contended that requiring clearing firms to obtain every customer's consent to the regulatory jurisdiction of each DCM would be costly.[124] Moreover, CME commented that even if such consent were obtained, the proposed rule would be entirely ineffective in achieving the Commission's desired outcome.[125] CME explained that if a non-member who had consented to the exchange's jurisdiction under the proposed rule committed a rule violation and subsequently elected not to cooperate in the investigation or disciplinary process, the exchange's only recourse would be to deny the non-member access and, if appropriate, refer the matter to the Commission.[126] CME further explained that a DCM's enforcement options, and the regulatory outcomes, do not change based on whether or not there is a record of the non-member consenting to jurisdiction, but rather depend on whether the non-member chooses to participate in the DCM's investigative and disciplinary processes.[127]

ICE contended that the proposed rule should distinguish between direct-access and intermediated market participants.[128] Furthermore, ICE stated that a trader should be specifically subject to the jurisdiction and the disciplinary process of the DCM only when the privilege of trading on a DCM is specifically granted by the DCM.[129] Likewise, KCBT explained that even if a non-member consents to KCBT jurisdiction, but later fails to abide by such consent, KCBT's only recourse would be to revoke such participant's market access.[130] Therefore, KCBT questioned the benefit of implementing the proposed rule.[131]

NYSE Liffe sought clarification regarding the type of market participant covered by the proposed rule.[132] NYSE Liffe requested that the Commission confirm that, unless NYSE Liffe permits market participants direct access to its trading platform, it would not consider a DCM to be ''granting'' market participants access to its markets, thus necessitating that it require market participants to consent to the DCM's jurisdiction.[133]

Discussion

The Commission is adopting § 38.151(a) as proposed. While acknowledging the comments described above, the Commission believes that § 38.151(a) codifies jurisdictional requirements necessary to effectuate the statutory mandate of Core Principle 2 that a board of trade ''shall have the capacity to detect, investigate, and apply appropriate sanctions to any person that violates any rule of the

the statutory language simply cited to the CEA section without citing to the statute. These non-substantive edits were made to sections 38.100 and 38.1200.

[115] Section 735 of the Dodd-Frank Act amended Core Principle 1 by adding that compliance with the core principles, and any other rule or regulation that the Commission may impose under section 8a(5) of the CEA, is a necessary condition to obtain and maintain designation as a contract market, and by adding the condition that ''unless otherwise determined by the Commission by rule or regulation,'' DCMs have reasonable discretion in establishing the manner in which they comply with the core principles. 7 U.S.C. 7(d)(1).

[116] Section 735 of the Dodd-Frank Act amended section 5 of the CEA to eliminate DCM designation criteria and amends several core principles, including Core Principle 2. Core Principle 2 was amended to include language formerly found in Designation Criterion 8—Ability to Obtain Information, and to specifically require that a DCM have the ability to detect, investigate, and sanction rule violations.

[117] CME Comment Letter at 15 (Feb. 22, 2011).

[118] KCBT Comment Letter at 3 (Feb. 22, 2011).

[119] Section 5(d)(2)(C) of the CEA, as amended by the Dodd-Frank Act, states that ''[t]he rules of the contract market shall provide the board of trade with the ability and authority to obtain any necessary information to perform any function described in this subsection, including the capacity to carry out such international information sharing agreements as the Commission may require.'' 7 U.S.C. 7(d)(2).

[120] CFE Comment Letter at 2 (Feb. 22, 2011).

[121] *Id.*

[122] *Id.*

[123] CME Comment Letter at 17 (Feb. 22, 2011).

[124] *Id.* at 16.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] ICE Comment Letter at 12–13 (Feb. 22, 2011).

[129] *Id.* at 15.

[130] KCBT Comment Letter at 2 (Feb. 22, 2011).

[131] *Id.*

[132] NYSE Liffe Comment Letter at 11 (Feb. 22, 2011).

[133] *Id.*

contract market.'' In the Commission's view, settled jurisdiction—established by a DCM prior to granting members and market participants access to its markets—is necessary to effectively investigate and sanction persons that violate DCM rules. In particular, a DCM should not be in the position of asking market participants to voluntarily submit to jurisdiction and cooperate in investigatory proceedings after a potential rule violation has been found. Similarly, market participants should be clear that their trading practices are subject to the rules of a DCM, including rules that require cooperation in investigatory and disciplinary processes. For the avoidance of doubt, the Commission notes that the scope of § 38.151(a) is not limited to market participants with direct market access, or limited as otherwise suggested by CFE, ICE and NYSE Liffe. To the contrary, persons whose trades are intermediated, persons who are customers of member firms, and persons whose access to the exchange is granted by or through member firms are within the scope of § 38.151(a).

The Commission notes commenters' suggestion that a DCM's ultimate recourse against non-members who fail to cooperate in investigations or disciplinary proceedings is to deny such non-members access to the exchange and, if appropriate, refer them to the Commission. The Commission confirms that denial of access and referral to the Commission are the appropriate steps for a DCM to take when a market participant fails to cooperate in an investigation or disciplinary proceedings. The Commission expects that DCMs will in fact follow these steps. However, the Commission does not agree that this absolves DCMs from their responsibility to establish jurisdiction over members and market participants as an initial condition of trading. Finally, the Commission recognizes that DCMs may need additional time to secure existing market participants' agreements to jurisdiction. Accordingly, the Commission is granting DCMs up to 180 days following the applicable effective date of the rules being adopted in this release to comply with the requirements of § 38.151(a) with respect to existing members and market participants. Each DCM may determine for itself how it will secure such agreements. For example, a DCM could utilize its clearing firms to secure the agreement. With respect to new members and market participants, DCMs will be subject to § 38.151(a) on the effective date of the rules being adopted in this release.

Sec. 38.151(b)—Impartial Access by Members, Market Participants and Independent Software Vendors

Proposed § 38.151(b) required that a DCM provide its members, market participants and independent software vendors (''ISVs'') with impartial access to its markets and services, including: (1) access criteria that are impartial, transparent, and applied in a non-discriminatory manner, and (2) comparable fee structures for members, market participants and ISVs, receiving equal access to, or services from, the DCM. In regards to the proposed rule's comparable fee structure requirement, the DCM NPRM preamble discussion of proposed § 38.151(b) stated that ''[f]ee structures may differ among categories if such fee structures are reasonably related to the cost of providing access or services to a particular category.''[134]

Summary of Comments

Chris Barnard supported this requirement, stating that the only reason for charging different fee structure would relate to differing costs of providing access or service to a particular category.[135] CFE commented that the Commission's application of the requirement to have comparable fee structures is too narrow.[136] CFE stated that it is in a DCM's best interest to set fees at levels that encourage participation on the DCM (rather than to exclude participants) because having greater participation leads to greater contract volume and thus more transaction revenue for the DCM.[137] CFE agreed that a DCM should be able to have fee structures that differ among categories and did not believe that the only permitted differentiation should be based on cost.[138]

CME stated that the fee restrictions imposed by the proposed rule exceed the Commission's authority under the Dodd-Frank Act, and questioned the basis for the proposed rule.[139] In particular, CME argued that the agency lacks authority to set or limit fees charged by DCMs.[140]

ELX stated that exchanges must have some flexibility in implementing fees in order to allow new markets to effectively build a customer base.[141] According to ELX, not all customers ''receive the same commission'' from their FCM, IB or executing broker, and it is artificial to require exchanges to forego their flexibility in pricing to build a marketplace.[142] ELX further stated that competition should not be rigidly regulated at the exchange level while other regulated entities doing business with customers are permitted to use competitive pricing.[143]

ICE noted that the discriminatory conduct prohibited by the proposed rule would be subject to review by the Commission as an ''access denial'' issue under part 9 of the Commission's regulations.[144] Moreover, ICE asserted that in its view, there has been no pattern of DCMs denying access to their markets that warrants the proposed rule.[145] ICE added that the proposed rule should not require access requirements for traders who do not apply for, and are not granted access to, the trading platform by the DCM.[146]

KCBT objected to the Commission's mandate of access and fee equality, stating that the mandate may not take into consideration all aspects of an exchange's varying fee or access structures, including beneficial rate structures for high-volume traders or market maker programs.[147] Consequently, KCBT urged the Commission to withdraw from its attempt to impose fee restrictions on DCMs.[148]

MGEX stated that in general, it is in the best interest of the DCM to have open and available markets and services.[149] Therefore, MGEX argued that the proposed rule is unnecessary and infringes on the business judgment of the DCM.[150]

Trading Technologies stated that the Commission should modify its proposed impartial access rules to require that DCM co-location service fees be reasonably related to the cost of providing such services.[151]

[134] *See* DCM NPRM at 80579. As an example, the preamble further stated that ''if a certain category required greater information technology or administrative expenses on the part of the DCM, then a DCM may recoup those costs in establishing fees for that category or member or market participant.'' *Id.*

[135] Barnard Comment Letter at 2 (Feb. 22, 2011).

[136] CFE Comment Letter at 3 (Feb. 22, 2011).

[137] *Id.*

[138] *Id.*

[139] CME Comment Letter at 8–9 (Feb. 22, 2011).

[140] *Id.*

[141] ELX Comment Letter at 3 (Feb. 22, 2011).

[142] *Id.* at 4.

[143] *Id.*

[144] ICE Comment Letter at 15 (Feb. 22, 2011).

[145] *Id.* at 15.

[146] *Id.*

[147] KCBT Comment Letter at 3 (Feb. 22, 2011).

[148] *Id.*

[149] MGEX Comment Letter at 3 (Feb. 22, 2011).

[150] *Id.*

[151] Trading Technologies Comment Letter at 4 (Jun. 3, 2011). The Commission recently addressed co-location fees in a separate proposed rulemaking for ''Co-location/Proximity Hosting Services.'' *See* notice of proposed rulemaking, 75 FR 33198, Jun. 11, 2010.

Discussion

The Commission is adopting the rule as proposed, with the modifications and clarifications described below.

The Commission believes that the proposed rule falls within the Commission's authority under the Dodd-Frank Act. As an initial matter, Congress, under the Dodd-Frank Act, expressly authorized the Commission to promulgate rules implementing requirements for DCMs, including access requirements.[152] Moreover, the statutory language of Core Principle 2 expressly requires that DCMs ''establish, monitor and enforce compliance with the rules of the contract market, including: (1) Access requirements[.]'' [153] Though the CEA does not specify that DCMs provide ''impartial'' access, the Commission believes that a reasonable reading of the CEA is that it permits rules that would promote impartial access.

The Commission has considered comments that claimed that the rule is unnecessary, and believes that impartial access rules are necessary in order to prevent the use of discriminatory access requirements as a competitive tool against certain participants. In particular, access to a DCM should be based on the financial and operational soundness of a participant, not on factors that could bar access and result in discriminatory access or act as a barrier to entry. Any participant should be able to demonstrate financial soundness by showing either that it is a clearing member of a DCO that clears products traded on that DCM, or that it has clearing arrangements in place with such a clearing member. Furthermore, granting impartial access to participants that satisfy a DCM's access requirements will likely enhance the DCM's liquidity and the overall transparency of the swaps and futures markets.

In regards to comments pertaining to the proposed rule's treatment of fees, the Commission believes that commenters have misinterpreted the proposed requirement for comparable fee structures for categories of market participants receiving equal access to the DCM. The requirement in proposed § 38.151(b) neither sets nor limits fees charged by DCMs. Rather, it states only that the DCM set non-discriminatory fee classes for those receiving access to the DCM as a way to implement the requirement of impartial access to DCMs. DCMs may establish different categories of market participants, but may not discriminate within a particular category. Accordingly, contrary to CME's comment claiming that the fee restrictions imposed by the proposed rule exceed the Commission's authority under the Dodd-Frank Act, the rule does not set or impose fees on DCMs.

To clarify the DCM NPRM preamble discussion of the proposed rule's fee requirement, and in response to CFE and KCBT's comment that a DCM should be able to differentiate among categories by using factors other than cost, the Commission notes that when a DCM determines its fee structure, it may consider other factors in addition to the cost of providing a member, market participant or ISV with access. The proposed requirement that DCMs have a comparable fee structure for categories of market participants was not designed to be a rigid requirement that fails to take into account legitimate business justifications for offering different fees to different categories of entities seeking access. The Commission recognizes that DCMs may also consider services they receive from members, market participants or ISVs (in addition to costs) when determining their fee structure. Market making is an example of one type of service that could merit a fee discount.

To address comments submitted in connection with proposed § 38.151(a) pertaining to the uncertainty of the term ''market participant,'' the Commission is replacing the term ''market participant'' in proposed § 38.151(b) with the phrase ''persons with trading privileges.''

The Commission is adopting the remainder of the rule as proposed.

Sec. 38.151(c)—Limitations on Access

Proposed § 38.151(c) required a DCM to establish and impartially enforce rules governing any decision by the DCM to deny, suspend, or permanently bar a member's or market participant's access to the contract market. Any decision by a DCM to deny, suspend, or permanently bar a member's or market participant's access to the DCM must be impartial and applied in a non-discriminatory manner.

Summary of Comments

CFE, ICE, and NYSE Liffe commented on the uncertainty of the term ''market participant'' as used in paragraphs (a), (b), and (c) of proposed § 38.151.[154]

Discussion

To address comments pertaining to the uncertainty of the term ''market participant,'' the Commission is replacing the term ''market participant'' in proposed § 38.151(c) with the phrase ''persons with trading privileges.''

iii. § 38.152—Abusive Trading Practices Prohibited

As proposed, § 38.152 required a DCM to prohibit the following abusive trading practices: front-running, wash trading, pre-arranged trading, fraudulent trading, money passes, and any other trading practices that the DCM deems to be abusive. Additionally, a DCM permitting intermediation would be required to prohibit additional trading practices, including trading ahead of customer orders, trading against customer orders, accommodation trading, and improper cross-trading. The proposal also required a DCM to prohibit any other manipulative or disruptive trading practices prohibited by the Act or by the Commission pursuant to regulation.[155]

Summary of Comments

CME and MGEX stated that the proposed rule is too vague because it does not specifically define the enumerated prohibited trade practices.[156] CME also stated that DCMs should have reasonable discretion to establish rules appropriate to their markets that are consistent with the CEA and that satisfy the core principles.[157] CME additionally commented that prearranged trading, which is identified in the proposed rule as a prohibited trade practice, may be permissible at DCMs that allow for block trading, exchange for related position transactions, and pre-execution communications, subject to specified conditions.[158]

Chris Barnard commented that the proposed rule refers to the prohibition of ''any other manipulative or disruptive trading practices prohibited by the Act

[152] *See* CEA section 5(d)(1)(A)(ii) (Core Principle 1), 7 U.S.C. 7(d)(1).

[153] CEA section 5(d)(2)(A)(i) (Core Principle 2), 7 U.S.C. 7(d)(2).

[154] CFE Comment Letter at 2 (Feb. 22, 2011); ICE Comment Letter at 14 (Feb. 22, 2011); NYSE Liffe Comment Letter at 11 (Feb. 22, 2011).

[155] Section 747 of the Dodd-Frank Act amended section 4c(a) of the CEA, 7 U.S.C. 6c(a), by adding three disruptive practices which make it: unlawful for any person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that—

(A) Violate bids or offers;

(B) Demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period; or

(C) Is, is of the character of, or is commonly known as the trade as 'spoofing' (bidding or offering with the intent to cancel the bid or offer before execution).

[156] CME Comment Letter at 17 (Feb. 22, 2011) (CME also argued that the proposed regulation was superfluous given that Core Principle 12 already requires a DCM to establish and enforce rules to protect markets and market participants from abusive practices); MGEX Comment Letter at 3 (Feb. 22, 2011).

[157] CME Comment Letter at 17 (Feb. 22, 2011).

[158] *Id.* at 17–18.

or by the Commission,'' which is important in order to cover new disruptive practices as they emerge, including spoofing.[159] Better Markets commented that it is unclear whether any of the practices associated with high frequency trading will be prohibited by the Commission.[160] Better Markets recommended that the Commission expand its list of prohibited trade practices to include exploiting a large quantity or block trade, price spraying, rebate harvesting, and layering the market, as all four of those practices involve fraudulent trading.[161]

Discussion

The Commission is adopting § 38.152 as proposed, subject to the modification described below.

In response to CME and MGEX's concerns regarding the perceived vagueness of the enumerated trading practices, the Commission notes that the definitions of the respective abusive trading practices are commonly known within the industry. Moreover, the enumerated practices in the proposed rule are commonly prohibited within the industry and are typically already prohibited in DCM rulebooks.[162] Although the Commission believes, as noted by CME, that a DCM should have reasonable discretion to establish rules for their markets, the Commission believes that, at a minimum, a DCM must prohibit the abusive trading practices identified in the rule. Indeed, in the RERs conducted by Commission staff to examine DCMs' core principle compliance, Commission staff has found that it is essential for a DCM to be able to demonstrate the capacity to detect, investigate, and enforce the trading violations prohibited under the rule. Consistent with CME's comments on this issue, the Commission clarifies that in certain limited circumstances, as provided under the CEA and the Commission regulations, pre-arranged trading, including block trading and exchange for related position transactions, are permissible at DCMs. Accordingly, the Commission is amending proposed § 38.152 to clarify that a DCM must prohibit pre-arranged trading except as otherwise permitted in part 38 of this chapter. The Commission confirms that pre-execution communications are permissible if allowed by a DCM's rules that have been certified to or approved by the Commission.

In response to Chris Barnard's comment about the inclusion of ''spoofing'' as a prohibited trade practice, the Commission notes that section 747 of the Dodd-Frank Act amended section 4c(a) of the CEA and includes spoofing as a disruptive trading practice. In the final rule, DCMs are required to prohibit any other manipulative or disruptive trading practices prohibited by the Act. Additionally, the Commission notes that Better Markets' comments regarding Core Principle 2 and high frequency trading are addressed in the context of Core Principle 4.

iv. § 38.153—Capacity To Detect and Investigate Rule Violations

Proposed § 38.153 required that a DCM have arrangements and resources for effective rule enforcement.[163] This included the authority to collect information and examine books and records of members and market participants. Additionally, the proposed rule required a DCM to have, in addition to appropriate resources for trade practice surveillance programs, appropriate resources to enforce all of its rules.

Summary of Comments

CFE requested that the Commission clarify the term ''market participant.''[164] CFE claimed that if the term ''market participant'' were to be interpreted to apply to all customers and not just those customers with direct electronic access to the DCM, then the rule would greatly expand a DCM's regulatory responsibilities over participants with whom it has no direct relationship or connection.[165] CFE further asserted that the rule would greatly increase costs for the DCM and that it would be very difficult for a DCM to undertake the same examination responsibilities for customers that do not have a direct relationship with the DCM that are applicable to a DCM member.

CME stated that the proposed rule appears to imply that the entire class of non-member, non-registered market participants will be subject to the panoply of recordkeeping requirements currently applicable only to members, registrants, and direct access clients of CME.[166] Additionally, CME commented that the proposed rule does not detail which books, records and information the DCM must be able to obtain from non-member market participants.[167]

Discussion

The Commission is adopting this provision as proposed, subject to the modification described below.

The Commission is cognizant that a broad interpretation of the term ''market participant'' could significantly increase the regulatory responsibilities for DCMs. As noted above, the use of ''market participant'' may be interpreted to capture a wider range of persons than the Commission intended. Therefore, in response to the commenters' concerns, the Commission is replacing the term ''market participant'' with ''persons under investigation'' in the final rule. Thus, a DCM must have the authority to collect books and records from its members, and from any persons under investigation, for effective enforcement of its rules. The books and records collected by the DCM should encompass all information and documents that are necessary to detect and prosecute rule violations.

v. § 38.154—Regulatory Services Provided by a Third Party

As the Commission stated in the DCM NPRM, the CEA ''provides that a DCM may comply with applicable core principles by delegating relevant functions to a registered futures association or another registered entity'' (collectively, a ''regulatory service provider'').[168] Proposed § 38.154(a) required that a DCM that contracts with a regulatory service provider ensure that its regulatory service provider has sufficient capacity and resources to provide timely and effective regulatory services. The proposed rule also made clear that a DCM ''will at all times remain responsible for the performance of any regulatory services received, for compliance with the [DCM's] obligations under the CEA and Commission regulations, and for the regulatory service provider's performance on its behalf.''[169]

Proposed § 38.154(b) required that a DCM maintain adequate compliance staff to supervise any services performed by a regulatory service provider. The proposed rule also required that the DCM hold regular meetings with its regulatory service provider to discuss current work and other matters of regulatory concern. The DCM must also conduct periodic reviews of the adequacy and

[159] Barnard Comment Letter at 3 (May 20, 2011).

[160] Better Markets Comment Letter at 5 (Feb. 22, 2011).

[161] *Id.* at 5–8.

[162] *See e.g.,* CME Rule 534 (Wash Trades Prohibited), and MGEX Rule 743.00 (Accommodation or Wash Trades Forbidden).

[163] As noted in the DCM NPRM, proposed regulation 38.153 was based on the former application guidance for Core Principle 2.

[164] CFE Comment Letter at 2 (Feb. 2, 2011).

[165] *Id.*

[166] CME Comment Letter at 18 (Feb. 22, 2011).

[167] *Id.*

[168] *Id.* at 80580.

[169] 75 FR 80572, 80612, Dec. 22, 2010.

effectiveness of services provided on its behalf.

Proposed § 38.154(c) required a DCM that utilizes a regulatory service provider to retain exclusive authority over certain areas, including the cancellation of trades, issuance of disciplinary charges against members or market participants, and denials of access to the trading platform for disciplinary reasons. While the proposed rule permitted a DCM to retain exclusive authority in other areas of its choosing, it required that the decision to open an investigation into a possible rule violation reside with the regulatory service provider.

Summary of Comments

MGEX, KCBT and CME asserted that the proposed rule was overly burdensome or unnecessary.[170] MGEX expressed general opposition to proposed § 38.154, stating that if a service has been delegated to another registered entity pursuant to a Commission-approved agreement, then this ''should be sufficient and no other formal agreement is necessary.'' [171] KCBT contended that proposed § 38.154 is overly burdensome and duplicative, particularly when a DCM contracts with a regulatory service provider that is also a DCM required to comply with the same core principles.[172] KCBT noted that it currently is a party to a services agreement with another DCM and that it will be costly and unnecessary to perform periodic reviews and hold regular meetings with this regulatory service provider.[173]

Similarly, CME contended that the proposed rule was overly prescriptive and suggested that the rules would better serve as guidance and acceptable practices.[174] In particular, CME pointed to the requirements that a DCM conduct periodic reviews of the services provided and hold regular meetings with the regulatory service provider to discuss ongoing investigations, trading patterns, market participants, and any other matters of regulatory concern.[175] CME stated that ''[w]hile it may well be that it is constructive for the DCM to hold regular meetings with its service provider and 'discuss market participants,' the core principle should stand on its own and the DCM should have the flexibility to determine how best to demonstrate compliance with the core principle.'' [176]

CME further objected to the requirement that exclusive authority to open investigations remain with the regulatory service provider.[177] While it argued that the regulatory service provider ''should have the independence to open an investigation at its discretion, [CME] sees no reason why the DCM cannot also direct the regulatory service provider to open an investigation.'' [178] Additionally, CME and KCBT both objected to the requirement in proposed § 38.154(c) that all decisions concerning the cancellation of trades remain within the exclusive authority of the DCM.[179] CME and KCBT argued that a DCM may be better served by granting such authority to a regulatory service provider.[180]

NYSE Liffe expressed support for the idea that a DCM will remain ultimately responsible for meeting its regulatory obligations even when it contracts with a regulatory service provider.[181] However, NYSE Liffe requested clarification regarding what authority must be maintained by a DCM when it uses a third-party regulatory service provider.[182] NYSE Liffe pointed to the requirement in proposed § 38.154(c) that a DCM must retain ''exclusive authority'' in certain areas and requested further clarification as to the definition of ''exclusive authority.'' [183] In particular, NYSE Liffe requested guidance as to whether a DCM retains ''exclusive authority'' if its regulatory service provider prepares and presents an investigation report to a DCM's review panel, or assists DCM staff in presenting the matter, as long as the ultimate decision to bring a disciplinary action remains with the DCM's review panel.[184] Additionally, NYSE Liffe sought guidance as to whether a regulatory service provider would be permitted to ''prosecute a disciplinary proceeding * * * so long as the ultimate decision to impose a penalty on a respondent, including a possible denial of access to the trading platform, resides with a hearing panel formed pursuant to the DCM's rules?'' [185]

Discussion

The Commission is adopting § 38.154(a) and (b), as proposed, and is adopting § 38.154(c) with certain modifications.

In the past, the Commission has described acceptable ''contracting'' and ''delegating'' arrangements for the performance of core principle functions by third-parties.[186] The Commission proposed § 38.154 to clarify its previous guidance on such arrangements. In particular, the Commission does not draw substantive distinctions between ''contracting'' and ''delegating'' arrangements as they pertain to core principle compliance functions. Regardless of the term by which a DCM may refer to its utilization of a third-party, the Commission believes that the same regulatory requirements are applicable for purposes of part 38. For purposes of part 38, the Commission refers to such arrangements as ''delegation.'' The Commission also notes that DCMs must remain responsible for carrying out any function delegated to a third party, and that DCMs must ensure that the services received will enable the DCM to remain in compliance with the CEA's requirements. The Commission believes that proposed § 38.154 effectively establishes a system for administering regulatory services provided to DCMs by third party regulatory service providers. The Commission is of the view that the rule generally provides an appropriate balance between flexibility and ensuring that a DCM properly oversees the actions of its regulatory service provider to ensure accountability and effective performance.

The Commission acknowledges comments asserting that the rule is overly burdensome or unnecessary but believes that a DCM that elects to use a regulatory service provider must properly supervise the quality and effectiveness of the regulatory services provided on its behalf. The Commission believes that proper supervision will require that a DCM have complete and timely knowledge of relevant work performed by the DCM's regulatory service provider on its behalf. The Commission also believes that such knowledge can only be acquired through the periodic reviews and regular meetings required under proposed § 38.154.

Additionally, the Commission acknowledges CME and KCBT's comments regarding the cancellation of trades but believes that the potential economic consequences of trade

[170] MGEX Comment Letter at 3 (Feb. 22, 2011); KCBT Comment Letter at 3 (Feb. 22, 2011); CME Comment Letter at 19 (Feb. 22, 2011).

[171] MGEX Comment Letter at 3 (Feb. 22, 2011).

[172] KCBT Comment Letter at 3 (Feb. 22, 2011).

[173] *Id.*

[174] CME Comment Letter at 18–19 (Feb. 22, 2011).

[175] *Id.*

[176] CME Comment Letter at 19 (Feb. 22, 2011).

[177] *Id.*

[178] *Id.*

[179] CME Comment Letter at 19 (Feb. 22, 2011); KCBT Comment Letter at 3 (Feb. 22, 2011).

[180] *Id.*

[181] NYSE Liffe Comment Letter at 9 (Feb. 22, 2011).

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.* at 10.

[186] *See* 66 FR 42256, 42266, Aug. 10, 2001.

cancellations on a DCM's members and market participants are such that a DCM should retain exclusive authority over the cancellation of trades.

The Commission has considered CME's comment regarding the importance of allowing a DCM to open investigations into possible rule violations. The Commission believes that a DCM should have the ability to request that its regulatory service provider conduct an investigation on a market participant or to conduct such an investigation on its own. Consequently, the Commission is modifying § 38.154(c) by removing the requirement that the decision to open an investigation into possible rule violations reside exclusively with the regulatory service provider.

Lastly, in response to the request by NYSE Liffe for additional guidance regarding whether certain regulatory decisions must be retained by a DCM, the Commission believes that a DCM would retain ''exclusive authority'' under § 38.154(c) if it permits a regulatory service provider to present, or assist DCM staff to present, an investigation report or evidence to a disciplinary panel as long as the decisions to bring a disciplinary action and impose a disciplinary penalty on a respondent, including the decision to deny access, remains with the DCM or the DCM's disciplinary bodies.

vi. § 38.155—Compliance Staff and Resources

In proposed § 38.155(a), the Commission required that a DCM establish and maintain sufficient compliance staff and resources to conduct a number of enumerated tasks, such as audit trail reviews, trade practice surveillance, market surveillance, and real time market monitoring. The proposed rule also required that the DCM have sufficient compliance staff to address unusual market or trading events and to conduct and complete any investigations in a timely manner.

In proposed § 38.155(b), the Commission required a DCM to monitor the size and workload of its compliance staff annually to ensure that staff and resources are adequate. In the preamble to the proposed rule, the Commission clarified that it was not proposing that compliance staff size be determined based on a specific formula. Rather, the Commission intended ''to leave to the discretion of each individual DCM to determine the size of the staff it needs to effectively perform its self-regulatory responsibilities.'' [187] In making this determination, the proposed rule also set forth certain factors that should be considered in determining the appropriate level of compliance resources and staff.

Summary of Comments

NYSE Liffe noted that in proposed § 38.154(b), ''a DCM that contracts with a regulatory service provider must still maintain sufficient compliance staff.'' [188] NYSE Liffe suggested that § 38.155 take into consideration whether a DCM has contracted with a regulatory service provider in determining the appropriate level of compliance staff and resources.[189] NYSE Liffe also requested that the Commission ''make clear that a DCM meets its requirement to have sufficient compliance staff to address unusual market or trading events where its regulatory services provider has sufficient resources for addressing these unusual events.'' [190]

Chris Barnard requested that the Commission amend § 38.155 to require DCMs to have a chief compliance officer ''working within a job description, structures, rules and procedures that act to maintain its independence.'' [191]

Discussion

The Commission believes that proposed § 38.155 effectively sets forth the requirement that DCMs must establish and maintain sufficient compliance staff to enforce compliance with its rules as required under Core Principle 2, and accordingly, the Commission is adopting § 38.155 as proposed.

The Commission is of the view that having adequate staff to perform a DCM's compliance and enforcement responsibilities is essential to the effectiveness of its self-regulatory programs, including market surveillance, audit trail, trade practice surveillance, and disciplinary programs. The Commission believes (as noted by NYSE Liffe) that the staff of a regulatory service provider may be taken into consideration when determining whether a DCM has sufficient compliance staff. However, the Commission notes that pursuant to § 38.154(b), each DCM must still retain sufficient compliance staff to supervise the quality and effectiveness of any services provided by a regulatory service provider on its behalf.

The Commission acknowledges Chris Barnard's comment that a DCM should be required to designate a chief compliance officer but notes that the Dodd-Frank Act mandates that certain regulated entities, such as SEFs, swap data repositories, and derivatives clearing organizations, designate chief compliance officers. There is no explicit statutory requirement for DCMs. Therefore, the Commission does not believe it is appropriate to require DCMs to appoint a chief compliance officer. However, it is current industry practice for DCMs to designate an individual as chief regulatory officer, and it will be difficult for a DCM to meet the requirements of § 38.155 without a chief regulatory officer or similar individual to supervise its regulatory program, including any services rendered to the DCM by a regulatory service provider.

vii. § 38.156—Automated Trade Surveillance System

Proposed § 38.156 required a DCM to maintain an automated trade surveillance system capable of detecting and investigating potential trade practice violations. The automated trade surveillance would be required to maintain all data reflecting the details of each order entered into the trading system, including order modifications and cancellations, and data reflecting transactions executed on the DCM. The proposed rule required the automated surveillance system to process this data on a trade date plus one day basis (''T+1 basis''). Additionally, according to the rule, the automated trade surveillance system would be required to provide users with the ability to compute, retain and compare trading statistics; compute profit and loss; and reconstruct the sequence of trading activity.

Summary of Comments

CME commented that an exchange does not capture order details, modifications or cancellations for open-outcry orders in an automated manner unless such orders are transmitted to the floor via the exchange's order routing system, or with respect to privately negotiated transactions.[192] CME asserted that it has been unable to design a system that automates the actual investigation of potential trade practice violations, and that it would not be able to do so within 60 days of the final rules taking effect.[193] CME further argued that it is unclear whether the regulation applies to electronic trading or open outcry trading.[194] CME challenged the use of what it deems as ''broad and ambiguous'' terms to describe

[187] DCM NPRM at 80580.

[188] NYSE Liffe Comment Letter at 10 (Feb. 22, 2011). *See also* DCM NPRM at 80612.

[189] NYSE Comment Letter at 10 (Feb. 22, 2011).

[190] *Id.*

[191] Barnard Comment Letter at 3 (May 20, 2011).

[192] CME Comment Letter at 20 (Feb. 22, 2011).

[193] *Id.*

[194] *Id.*

capabilities that a DCM's automated trade surveillance system is required to have, including the capability to detect and flag specific trade execution patterns and anomalies; compute, retain and compare trading statistics; and compute trade gains, losses, and futures-equivalent positions.[195] CME recommended that the Commission reconsider the requirements of this regulation and consider a more flexible, core principles-based approach.[196]

MGEX agreed with the proposed requirement that a DCM's automated surveillance system must maintain all trade data and order data on a T+1 basis, but opposed the proposed requirement that a DCM compute, retain and compare trading statistics.[197] MGEX contended that this information is not a trade data item and requested that this requirement be removed from the final rule.[198]

NYSE Liffe commented that it would take significant time to determine the types of changes to existing automated systems required to implement the proposed rules, including § 38.156, and recommended that the Commission provide existing DCMs with at least 18 months from the effective date of the rule to certify compliance with the final regulations.[199]

Better Markets commented that an automated trade surveillance system, which records orders, modifications of orders, and cancellations, must allow for such data to be time-stamped at intervals consistent with the capabilities of high frequency traders that use the DCM's systems to transact.[200]

Discussion

The Commission is adopting proposed § 38.156, with one modification.

The requirement that an automated trade surveillance system maintain all data reflecting the details of each order entered into the trading system is being moved to § 38.552 (Elements of an acceptable audit trail program). Specifically, the Commission believes that § 38.552(b) is the more logical place in the Commission's rules to address this aspect of a DCM's automated surveillance system because paragraph (b) specifies the requirements for a DCM's audit trail program, including a history of all orders and trades.

In response to CME's comment regarding a system that automates the actual investigation, the Commission notes that CME has misinterpreted the proposed rule, as § 38.156 applies to a DCM's automated surveillance system and not to the actual investigation which the Commission expects would be carried out by a DCM's compliance staff with the assistance of automated surveillance tools. The Commission confirms that the speed and timing of capturing information through an automated trade surveillance system is different for open-outcry than for electronic trading, as CME stated in its comments; this is addressed in the discussion concerning § 38.552.

In regards to CME's comment pertaining to the breadth of the rule, while the Commission acknowledges that computing, retaining, and comparing trading statistics may not specifically be a trade data item, the Commission believes that these analytical tools are a necessary component of an effective trade surveillance system. The Commission notes that timing concerns raised by NYSE Liffe regarding compliance with the final rules are addressed above in the § 38.3 discussion. Additionally, the Commission notes that Better Markets' comments regarding Core Principle 2 and high frequency trading are addressed in the context of Core Principle 4.

viii. § 38.157—Real-Time Market Monitoring

Proposed § 38.157 codified existing practices at DCMs for real-time monitoring of electronic trading, and reflected the growth of electronic trading in the U.S. futures markets, as well as the Commission's experience in designating new contract markets since passage of the CFMA.[201] Proposed § 38.157 required a DCM to conduct real-time market monitoring of all trading activity on its electronic trading platform to ensure orderly trading and identify market or system anomalies. The proposed rule further required a DCM to have the authority to cancel trades and adjust trade prices when necessary, and that any price adjustments or trade cancellations must be transparent to the market and subject to clear, fair and publicly-available standards.

Summary of Comments

In its comments, CME reiterated its belief that the proposed rules are overly prescriptive.[202] CME argued that the standards set in the proposed rule are unreasonably high.[203] CME pointed to the requirement that a DCM ''conduct real-time market monitoring of all trading activity on its electronic trading platform(s) to ensure orderly trading and identify any market or system anomalies'' and argued that it is not clear whether any DCM could comply with these standards.[204]

Better Markets stated that when conducting real-time market monitoring, DCMs should have the capability to monitor high frequency trading.[205] Better Markets argued that this process should include ''monitoring of orders and cancellations, each time-stamped at intervals consistent with the capabilities of [high frequency traders].''[206]

Discussion

The Commission is adopting § 38.157, as proposed, subject to the modification described below.

In regard to the CME's comment, the Commission believes that § 38.157, as proposed, enables a DCM to effectively monitor its electronic markets and grants a DCM the flexibility to determine the best way to conduct real-time market monitoring. The Commission also believes that the proposed rule correctly mandates that a DCM conduct real-time market monitoring of all trading activity that occurs on its electronic trading platform(s) in order to detect disorderly trading and market or system anomalies, and take appropriate regulatory action.

The Commission recognizes that real-time market monitoring cannot ensure orderly trading at all times, but it should be able to identify disorderly trading when it occurs. Therefore, the Commission is modifying the first sentence of proposed § 38.157 to remove the requirement to ''ensure orderly trading'' and instead state that ''a designated contract market must conduct real-time market monitoring of all trading activity on its electronic trading platform(s) to identify disorderly trading and any market or system anomalies.'' In response to Better Markets' comments, the Commission believes that § 38.157 is sufficient to establish a DCM's obligations with respect to real-time market monitoring of all trading on a DCM's electronic trading platform, including high frequency trading. The Commission will continue to assess the impact of high

[195] *Id.*

[196] *Id.*

[197] MGEX Comment Letter at 4 (Feb. 22, 2011).

[198] *Id.*

[199] NYSE Liffe Comment Letter at 14 (Feb. 22, 2011).

[200] Better Markets Comment Letter at 9 (Feb. 22, 2011).

[201] *See* DCM NPRM at 80581.

[202] CME Comment Letter at 20–21 (Feb. 22, 2011).

[203] *Id.*

[204] CME Comment Letter at 20–21 (Feb. 22, 2011) (citing DCM NPRM at 80613, with emphasis added by CME).

[205] Better Markets Comment Letter at 9 (Feb. 22, 2011).

[206] *Id.*

frequency trading on the markets regulated by the Commission.

The Commission believes that § 38.157 effectively establishes a DCM's obligations with respect to real-time market monitoring of trading activity on its electronic trading platforms. Accordingly, the Commission is adopting § 38.157 as modified above.

ix. § 38.158—Investigations and Investigation Reports

Sec. 38.158(a)—Procedures

Proposed paragraph (a) of § 38.158 required that a DCM have procedures to conduct investigations of possible rule violations. The proposed rule required that an investigation must be commenced upon Commission staff's request or upon discovery of information by the DCM indicating a possible basis for finding that a violation has occurred or will occur.

Summary of Comments

CME argued that the proposed rule diminishes any discretion on behalf of DCMs to determine the matters that warrant a formal investigation, because at the time of discovery or upon receipt of information, and before a review occurs, there always may be a possible basis that a violation has occurred or will occur.[207] CME agreed that written referrals from the Commission, law enforcement authorities, other regulatory agencies, or other SROs should result in a formal investigation in every instance.[208] However, CME contended that the DCM should have reasonable discretion to determine how it responds to complaints and other referrals, including the discretion to follow-up with a less formal inquiry in certain situations.[209]

Discussion

The Commission is adopting § 38.158(a) as proposed, subject to a minor modification. The Commission confirms that in certain circumstances a DCM should have reasonable discretion regarding whether or not to open an investigation, as noted by CME. Consequently, the Commission is revising paragraph (a) of § 38.158 to reflect that an investigation must be commenced upon receipt of a request from Commission staff or upon the discovery or receipt of information by the DCM that indicates a ''reasonable basis'' for finding that a violation ''may have'' occurred or will occur.

Sec. 38.158(b)—Timeliness

Proposed § 38.158(b) required that an investigation be completed in a timely manner, which is defined in the proposed rule as 12 months after an investigation is opened, absent mitigating factors. The mitigating factors identified in the proposed rule included the complexity of the investigation, the number of firms or individuals involved as potential wrongdoers, the number of potential violations to be investigated, and the volume of documents and data to be examined by compliance staff.

Summary of Comments

CME expressed general support for the proposed rule, but recommended that the list of possible mitigating circumstances also include the domicile of the subjects and cooperative enforcement matters with the Commission, since the DCM may not have independent control over the pace of the investigation.[210] CME also requested that the Commission make clear that the time period necessary to prosecute an investigation once it is referred for enforcement action is independent of the 12-month period referenced in the regulation.[211]

Discussion

The Commission is adopting the rule as proposed.

The Commission believes that a 12-month period to complete an investigation is appropriate and timely. Although the Commission believes, as noted by CME, that additional mitigating factors could justifiably contribute to a delay in completing an investigation within a 12-month period the Commission notes that the factors included in the proposed rule were not intended to be an exhaustive list of mitigating circumstances. In the Commission's view, the factors listed in the proposed rule represent some of the more common examples that could delay completing an investigation within the 12-month period. The Commission also confirms that § 38.158 only applies to the investigation phase of a matter.

Sec. 38.158(c)—Investigation Reports When a Reasonable Basis Exists for Finding a Violation

Proposed § 38.158(c) sets forth the elements and information that must be included in an investigation report when there is a reasonable basis for finding a rule violation, including: (i) The reason for the investigation; (ii) a summary of the complaint, if any; (iii) the relevant facts; (iv) compliance staff's analysis and conclusions; (v) a recommendation as to whether disciplinary action should be pursued; and (vi) the member or market participant's disciplinary history.

Summary of Comments

CME commented that rule violations can range from very minor to egregious and not every rule violation merits formal disciplinary action.[212] CME argued that minor transgressions can effectively be addressed by the issuance of a warning letter by CME compliance staff, and that the Commission should amend the rule accordingly to account for this possibility.[213]

CME and ICE opposed the requirement that a DCM include a respondent's disciplinary history in the investigative report that is submitted to a review panel.[214] CME commented that a respondent's disciplinary history is not relevant to the consideration of whether that respondent has committed a further violation of the DCM's rules.[215] However, CME noted that an exception would be where the prior disciplinary offense is an element of proof for the rule violations for which compliance staff is asking the review panel to issue charges, such as a violation of a previously issued ''cease and desist'' order.[216] ICE stated that unless the rule violations that are the subject of the investigative report involve pervasive recordkeeping violations, only substantive violations in the respondent's history would be relevant to the review panel's deliberations.[217]

Discussion

The Commission is adopting the rule as proposed, subject to one modification to address the comments from CME and ICE.

The Commission confirms, as CME noted, that ''minor transgressions'' can be addressed by a DCM's compliance staff with the issuance of warning letters and this is discussed below in § 38.158(e). However, as further discussed below in §§ 38.158(d) and (e), no more than one warning letter may be issued to the same person or entity found to have committed the same rule violation within a rolling 12-month period.

The Commission also agrees with CME and ICE that a respondent's disciplinary history is not always

[207] CME Comment Letter at 21 (Feb. 22, 2011).

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *Id.* at 22.

[212] *Id.*

[213] *Id.*

[214] CME Comment Letter at 21–22 (Feb. 22, 2011); ICE Comment Letter at 15 (Feb. 22, 2011).

[215] CME Comment Letter at 35 (Feb. 22, 2011).

[216] *Id.*

[217] ICE Comment Letter at 15 (Feb. 22, 2011).

relevant to the consideration of whether a respondent has committed a further violation of a DCM's rules. As a result, this requirement is being eliminated from the final rule. The Commission notes, however, that all disciplinary sanctions, including sanctions imposed pursuant to an accepted settlement offer, must take into account the respondent's disciplinary history.

Sec. 38.158(d)—Investigation Reports When No Reasonable Basis Exists for Finding a Violation

Proposed § 38.158(d) sets forth the elements and information that must be included in an investigation report when it has been determined that no reasonable basis exists for finding a rule violation, including: (i) The reason the investigation was initiated; (ii) a summary of the complaint, if any; (iii) the relevant facts; and (iv) compliance staff's analysis and conclusions. The proposed rule also required that if a DCM's compliance staff recommends that a warning letter be issued, the investigation report must also include the potential wrongdoer's disciplinary history.

Summary of Comments

CME recommended that the Commission amend the proposed rule to account for a DCM's ability to close a case administratively and still issue a warning letter without disciplinary committee approval, as the CME Market Regulation Department currently has such authority.[218]

Discussion

The Commission is adopting § 38.158(d) as proposed, subject to one modification.

The Commission is eliminating the provision in paragraph (d) that discussed the concept of warning letters because the Commission does not believe that a DCM would need to limit the number of warning letters that can be issued when a rule violation has not been found. For example, Commission staff has found in its RERs that some DCMs issue warning letters as reminders or for educational purposes. The Commission notes, however, that this modification does not impact the limitation on the number of warning letters that may be issued—by a disciplinary panel or by compliance staff—to the same person for the same violation in a rolling 12-month period when a rule violation is found to have been committed.

Sec. 38.158(e)—Warning Letters

Proposed § 38.158(e) provided that a DCM may authorize its compliance staff to issue a warning letter or to recommend that a disciplinary committee issue a warning letter. The proposed rule also provided that no more than one warning letter for the same potential violation may be issued to the same person or entity during a rolling 12-month period.

Summary of Comments

CME and MGEX opposed the requirement that a DCM may only issue one warning letter to the same person for the same rule violation in a rolling 12-month period.[219] CME stated that the rule is unduly prescriptive and fails to take into consideration important factors that are relevant to a DCM when evaluating potential sanctions in a disciplinary matter.[220] CME stated that the DCM should have discretion to determine the appropriate sanctions in all cases.[221] MGEX contended that the requirement will effectively prohibit a DCM from using warning letters as an educational tool or reminder.[222] According to MGEX, the proposed rule forces DCMs to adopt summary fines and prevents them from pursuing minor infractions, which may lead to additional unintended consequences outside of the purpose of the Dodd-Frank Act.[223] MGEX recommended that the Commission remove this requirement and provide the DCM more flexibility in determining the proper methodology for enforcing rules, regulations, and procedures.[224]

Discussion

The Commission is adopting § 38.158(e) with certain modifications, including to convert a portion of the rule to guidance.

The Commission acknowledges the comments from CME and MGEX concerning the issuance of warning letters but believes that in order to ensure that warning letters serve as effective deterrents, and to preserve the value of disciplinary sanctions, the Commission believes that no more than one warning letter may be issued to the same person or entity found to have committed the same rule violation within a rolling 12-month period.[225] As discussed in the DCM NPRM, while a warning letter may be appropriate for a first-time violation, the Commission does not believe that more than one warning letter in a rolling 12-month period for the same violation is ever appropriate.[226] This provision will remain as a rule. A policy of issuing repeated warning letters, rather than issuing meaningful sanctions, to members and market participants who repeatedly violate the same or similar rules denigrates the effectiveness of a DCM's rule enforcement program.[227] Furthermore, the section of the proposed rule governing warning letters is consistent with what Commission staff has advised DCM applicants in the past and with recommendations made in prior RERs.[228]

The Commission notes that the final rule does not include the reference that a warning letter issued in accordance with this section is not a penalty or an indication that a finding of a violation has been made because paragraph (e) only addresses warning letters that are issued for a finding of a violation. Also, the provision requiring a copy of a warning letter issued by compliance staff to be included in the investigation report is being eliminated from the final rule because the Commission has determined that such a requirement is unnecessary.

As noted above, the Commission believes that minor transgressions can be addressed by the issuance of a warning letter by a DCM's compliance staff. Accordingly, in order to provide a DCM with flexibility in this regard, the Commission is moving this provision of the rule to the guidance section of Core Principle 2. The text of the guidance provides that the rules of a DCM may authorize compliance staff to issue a warning letter to a person or entity under investigation or to recommend that a disciplinary panel take such action.

x. § 38.159—Ability To Obtain Information

Proposed § 38.159 required a DCM to have the ability and authority to obtain any necessary information to perform any function required under proposed subpart C (Compliance with rules) of the Commission's regulations. This would include the capacity to carry out any international information sharing agreements required by the

[218] CME Comment Letter at 22 (Feb. 22, 2011).

[219] CME Comment Letter at 22–23 (Feb. 22, 2011); MGEX Comment Letter at 4 (Feb. 22, 2011).

[220] CME Comment Letter at 22 (Feb. 22, 2011).

[221] *Id.*

[222] MGEX Comment Letter at 4 (Feb. 22, 2011).

[223] *Id.*

[224] *Id.*

[225] For purposes of this rule, the Commission does not consider a ''reminder letter'' or such other similar letter to be any different than a warning letter.

[226] *See* DCM NPRM at 80581.

[227] *See id.* at 80581.

[228] *See* 1998 Rule Enforcement Review of Kansas City Board of Trade; and Rule Enforcement Review of the Minneapolis Grain Exchange (Aug. 27, 2009).

Commission. Proposed § 38.159 also provided ''that information sharing agreements can be established with other designated contract markets and swap execution facilities, or the Commission can act in conjunction with a DCM to carry out such information sharing.'' [229]

Summary of Comments

CME and KCBT stated that a DCM should not be mandated to carry out international or other informational sharing agreements to which it is not a party and should not be compelled by Commission regulation to enter into agreements, particularly when such agreements contain terms determined by other parties, which conceivably could include terms or conditions unsuitable to a DCM or conditions that a DCM is unable to comply with.[230]

Discussion

The Commission is adopting § 38.159 as proposed. In response to CME and KCBT's comments, § 38.159 clarifies and codifies the Core Principle 2 requirement that a DCM have the ability and authority to obtain necessary information to perform its rule enforcement obligations. The core principle specifically requires that the rules of the DCM provide it with the ability and authority to perform any function described in the core principle, including capacity to carry out such international information sharing agreements, as the Commission may require. The rule provides that information sharing agreements can be established with other DCMs or SEFs, or that the Commission can act in conjunction with a DCM to carry out such information sharing.[231] The Commission notes that the language of § 38.159, including the language to which CME objects, is substantially similar to the language of Core Principle 2. The Commission also notes that while the rule requires DCMs to have the capacity to carry out such information sharing agreements, as is required by the statute, the rule does not mandate or prescribe the specific terms of such agreements, and thus, DCMs would have the ability to collaborate on the terms of such agreements. The Commission believes that § 38.159 appropriately implements the requirements of section 5(d)(2)(C) of the CEA and is adopting § 38.159 as proposed.

xi. § 38.160—Additional Rules Required

Proposed § 38.160 required a DCM to adopt and enforce any additional rules that it believes are necessary to comply with the requirements of this subpart C.

The Commission has determined to codify proposed § 38.160 as guidance for Core Principle 2 in appendix B, rather than a rule, in order to provide DCMs with added flexibility in adopting rules that they believe are necessary to comply with this core principle. Consistent with this determination, the Commission is replacing proposed § 38.160 with new § 38.160 (titled ''Additional sources for compliance'') that simply permits DCMs to rely upon the guidance in appendix B of this part to demonstrate to the Commission compliance with § 38.150 of this part.

3. Subpart D—Contracts Not Readily Subject To Manipulation

The Dodd-Frank Act did not revise the statutory text of Core Principle 3 (Contracts Not Readily Subject to Manipulation). DCMs historically have complied with the requirements of Core Principle 3 through the guidance provided in Guideline No. 1, which was codified in former appendix A to part 40, which is now superseded by appendix C under part 38 of this final rulemaking. In the DCM NPRM, the Commission proposed to maintain the guidance under former Guideline No. 1 in new appendix C, but with certain proposed revisions, as the central mode of compliance for DCMs under Core Principle 3. In addition to the guidance, the DCM NPRM proposed two rules under Core Principle 3. Proposed § 38.200 codified the statutory language of Core Principle 3, and proposed § 38.201 referred applicants and DCMs to the guidance in appendix C to part 38 for purposes of demonstrating to the Commission their compliance with the requirements of § 38.200.

In the DCM NPRM, the Commission proposed certain revisions to former Guideline No. 1, including: (1) Codifying the provision in appendix C of part 38, and eliminating it from part 40; (2) re-titling the guidance as ''Demonstration of Compliance That a Contract is not Readily Susceptible to Manipulation;'' and (3) amending and updating the guidance to expand the provision to include swap transactions.

Proposed appendix C to part 38 was intended to act as a source for new and existing DCMs to reference for best practices when developing products to list for trading. The amended guidance provided greater detail to DCMs regarding the relevant considerations in demonstrating compliance with Core Principle 3 when designing a contract and submitting supporting documentation and data to the Commission at the time the DCM submits: (1) The terms and conditions of a new contract under §§ 40.2 or 40.3, or (2) amendments to terms and conditions under §§ 40.5 or 40.6. Specifically, proposed appendix C to part 38 provided guidance regarding: (1) The forms of supporting information a new contract submission should include; (2) how to estimate deliverable supplies; (3) the contract terms and conditions that should be specified for physically delivered contracts; (4) how to demonstrate that a cash-settled contract is reflective of the underlying cash market, is not readily subject to manipulation or distortion, and is based on a cash price series that is reliable, acceptable, publicly available and timely; (5) the contract terms and conditions that should be specified for cash-settled contracts; (6) the requirements for options on futures contracts; (7) the terms and conditions for non-price based futures contracts; and (8) the terms and conditions for swap contracts.

Estimating Deliverable Supply

Summary of Comments

CME commented on the proposed guidance pertaining to estimating deliverable supply in paragraph (b)(1)(i)(A) of proposed appendix C.[232] CME contended that the proposed definition of deliverable supply is restrictive and inconsistent with long-standing industry practice.[233] Specifically, CME objected to the proposed provision that states that ''an appropriate estimate of deliverable supply excludes supplies that are committed to some commercial use.'' [234] CME stated that DCMs have historically estimated deliverable supplies by including in their calculations all supplies that are stored in the delivery territory or that move through the

[229] DCM NPRM at 80614.

[230] CME Comment Letter at 15 (Feb. 22, 2011); KCBT Comment Letter at 3 (Feb. 22, 2012).

[231] As noted in the DCM NPRM, this proposed language is virtually identical to the language found in the guidance for former Designation Criterion 8.

[232] CME Comment Letter at 38 (Feb. 22, 2011). Proposed paragraph (b)(1)(i)(A) of appendix C provided guidance on how to estimate the deliverable supply of a commodity that underlies a futures contract. The estimated deliverable supply should reflect the amount of that commodity that can reasonably be expected to be readily available to long traders to take delivery and short traders to make delivery at the expiration of a futures contract. This information is used by Commission staff when considering a contract's terms and conditions in determining whether a contract is readily susceptible to manipulation. DCM NPRM at 80631.

[233] CME Comment Letter at 38 (Feb. 22, 2011).

[234] *See* proposed paragraph (b)(1)(i)(A), appendix C. DCM NPRM at 80631.

delivery territory, including a determination of amounts committed to commercial use.[235] CME asserted that the proposed rulemaking does not identify any problems with continuing to use the current methodology in these markets, and claimed that if the proposed standard is adopted, it will impose additional costs on exchanges and market participants, including requiring exchanges to survey market participants annually with no defined benefit.[236]

Moreover, CME argued that the requirement that DCMs submit monthly deliverable supply estimates ''for at least the most recent five years for which data sources permit'' to be used by the Commission to review a DCM's certification or approval request for a new contract or related rule amendment is onerous for DCMs.[237] Instead, CME suggested that the Commission require monthly estimates of deliverable supply for the most recent three years.[238]

Discussion

The Commission acknowledges CME's comments regarding the proposed guidance for estimating deliverable supply but notes that a DCM has historically been required to estimate deliverable supplies, which has required that a DCM consult with market participants on a regular basis. In that regard, contrary to CME's claim, the proposed guidance stating that exchanges should survey market participants should not impose additional costs on exchanges. As noted above, Commission staff will continue to work with exchange staff to determine how the deliverable supply for a certain commodity should be estimated. Moreover, the Commission confirms, as noted by CME, that the term ''commercial use'' may not be appropriate and could cause confusion. Accordingly, the Commission is eliminating the sentence in proposed paragraph (b)(1)(i)(A) that references the term ''commercial use,'' and is replacing it with the term ''long-term agreement.'' Specifically, the Commission will clarify in paragraph (b)(1)(i)(A) that an estimate of deliverable supply would not include supply that is committed for long-term agreements (i.e., the amount of supply that would not be available to fulfill the delivery obligations arising from current trading).

The Commission is further clarifying in paragraph (b)(1)(i)(A) of the guidance that an exchange may include all or a portion of the supply that is committed for long-term agreements if it can demonstrate that those supplies are consistently and regularly made available to the spot market for traders to acquire at prevailing economic values. Specifically, the Commission is adding language to paragraph (b)(1)(i)(A) to provide that if the estimated deliverable supply that is committed for long-term agreements, or a significant portion thereof, can be demonstrated by the exchange to be consistently and regularly made available to the spot market for short traders to acquire at prevailing economic values, then those ''available'' supplies committed for long-term contracts may be included in the exchange's estimate of deliverable supply for that commodity.[239]

Similarly, in paragraph (b)(1)(i)(C) of the guidance, the Commission is eliminating the term ''commercial use'' and replacing it with the term ''committed for long-term agreements.''

The Commission further agrees with CME that three years of monthly estimates of deliverable supply is sufficient for the Commission to use to determine whether or not a contract is readily susceptible to manipulation or distortion. In this regard, the Commission is amending paragraphs (a)(2), (b)(1)(i)(A), (b)(1)(i)(B), and (b)(1)(i)(C) to reflect a three year obligation.

Calculation of Price Indices

Summary of Comments

CME commented on the proposed guidance for calculating price indices in paragraphs (c)(3)(ii) and (g)(ii) of appendix C.[240] CME stated that the guidance may not be applicable for some markets where there may not be eight independent entities in the entire industry, and that in those situations, the cash settlement survey should include transactions representing at least 51 percent of the total production of the commodity in question.[241]

Argus stated that it is important that the examination of a referenced index price should recognize the differences in markets and instrument types, and that the methodologies used to determine an index price may vary depending on the characteristics of the market in question.[242] Accordingly, Argus recommended that any review of the integrity of a price index should be flexible enough to account for differences in markets and instrument types.[243] Argus also requested that the Commission clarify that the proposed guidance for calculation of prices is applicable only to DCMs or SEFs, and does not apply to independent price data providers of price indices.[244] Argus stated that as a market data price provider it obtains price data that is voluntarily provided to it by market participants, and that it has no means of requiring participants to provide that data.[245] In that regard, Argus contended that for less liquid markets, there may only be a few market participants willing to provide data to Argus to use to determine a price series for a commodity.[246] Argus noted that, in contrast, a DCM or SEF has the ability to use market transactions traded on its platform, or to survey market participants that trade on its platform, to determine a cash settlement price.[247] Thus, Argus stated that the guidance in paragraph (c)(3)(ii) should not apply to market data price providers.[248]

Discussion

In light of the concerns raised in the comments above, the Commission is

[235] CME Comment Letter at 38 (Feb. 22, 2011).

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] In adding this language, the Commission is responding to CME's March 28, 2011 comment letter which stated that the Commission should define what it understands as ''long-term agreement,'' stating that requiring DCMs to consult with market participants to estimate deliverable supply on a monthly basis would be a substantial burden.

[240] CME Comment Letter at 38–39 (Feb. 22, 2011). Proposed paragraphs (c)(3)(ii) and (g)(ii) of appendix C addressed calculation procedures for safeguarding against potential attempts to artificially influence a cash settlement price for futures contracts settled by cash settlement. The guidance provided that if the cash price is determined by a survey of cash market sources, the survey should include either: (1) at least four independent entities (if such sources do not take a position); or (2) eight entities (if such sources trade for their own accounts).

[241] CME Comment Letter at 38 (Feb. 22, 2011). Proposed c(3)(ii) and (g)(ii) of appendix C provided that: ''Where a designated contract market itself generates the cash settlement price series, the designated contract market should establish calculation procedures that safeguard against potential attempts to artificially influence the price. For example, if the cash settlement price is derived by the designated contract market based on a survey of cash market sources, the designated contract market should maintain a list of such entities which all should be reputable sources with knowledge of the cash market. In addition, the sample of sources polled should be representative of the cash market, and the poll should be conducted at a time when trading in the cash market is active. The cash-settlement survey should include a minimum of four independent entities if such sources do not take positions in the commodity (e.g., if the survey list is comprised exclusively of brokers) or at least eight independent entities if such sources trade for their own accounts (e.g., if the survey list is comprised of dealers or merchants).''

[242] Argus Comment Letter at 4 (Feb. 22, 2011).

[243] *Id.*

[244] *Id.* at 4–6.

[245] *Id.*

[246] *Id.*

[247] *Id.*

[248] *Id.*

eliminating the last sentence of paragraphs (c)(3)(ii) and (g)(ii), which provides that ''[t]he cash-settlement survey should include a minimum of four independent entities if such sources do not take positions in the commodity (e.g., if the survey list is comprised exclusively of brokers) or at least eight independent entities if such sources trade for their own accounts (e.g., if the survey list is comprised of dealers or merchants).'' The Commission notes that the guidance in appendix C to part 38 is not a restrictive list of acceptable methodologies. The Commission will continue to review a contract's susceptibility to manipulation on a contract-by-contract basis, including taking into account the characteristics of the underlying market with respect to the price methodology used by independent price data providers.

The Commission is also making several clarifying amendments to appendix C to part 38. The Commission is amending the guidance in paragraph (c)(2) pertaining to a DCM's evaluation of the susceptibility of a cash-settled contract to manipulation. Specifically, the Commission is adding the phrase ''[i]n a manner that follows the determination of deliverable supply as noted above in b(1)'' to the first sentence in paragraph (c)(2). This will clarify that for cash-settled contracts based on physical commodities, an exchange should analyze the size and liquidity of the cash market that underlies the listed contract as it would if the contract were settled through physical delivery.

The Commission also is amending paragraph (c)(4)(i)(E) regarding Maximum Price Fluctuations Limits for cash-settled contracts, to clarify that for broad-based stock index futures contracts, rules should be adopted to coordinate with New York Stock Exchange (''NYSE'') declared Circuit Breaker Trading Halts.[249] However, because there are proposals for alternative market coordination currently being considered (other than the Circuit Breaker Trading Halt), the guidance will be amended to add the proviso ''or other market coordinated Circuit Breaker mechanism.''[250]

Finally, the Commission is amending paragraph (e)(1), regarding Security Futures Contracts, to eliminate the sentence that states ''[a] designated contract market should follow the appropriate guidance regarding physically delivered security futures products that are settled through physical delivery or cash settlement.'' The sentence was included in the guidance and is being eliminated because part 41 Security Futures Products governs trading in those contracts including the minimum requirements that an underlying security or security index must have and maintain to be listed for trading on a DCM.

4. Subpart E—Prevention of Market Disruption

The Dodd-Frank Act amended current Core Principle 4 by: (i) Changing the title of the core principle from ''Monitoring of Trading'' to ''Prevention of Market Disruption;'' and (ii) specifying the methods and procedures DCMs must employ in discharging their obligations under Core Principle 4. The amendments to Core Principle 4 emphasize that DCMs must take an active role not only in monitoring trading activities within their markets, but in preventing market disruptions. The rules proposed for this core principle largely codified the relevant provisions of the existing Application Guidance and Acceptable Practices for Core Principle 4, as contained in appendix B to part 38, and included new requirements that clarified and strengthened certain DCM obligations arising under the amended core principle.

i. § 38.251—General Requirements

Core Principle 4 requires DCMs to conduct real-time monitoring of trading and have the ability to comprehensively and accurately reconstruct trading.[251] Accordingly, these requirements are set forth in proposed § 38.251. Further, the proposed rule required that intraday trade monitoring must include the capacity to detect abnormal price movements, unusual trading volumes, impairments to market liquidity, and position-limit violations. Proposed § 38.251 also required that, where the DCM cannot reasonably demonstrate that its manual processes are effective in detecting and preventing abuses, the DCM must implement automated trading alerts to detect potential problems.

The Commission invited comment on whether DCMs should be required to monitor the extent of high frequency trading, and whether automated trading systems should include the ability to detect and flag high frequency trading anomalies.

Summary of Comments

Several commenters asserted that their current regulatory systems do not allow for effective real-time monitoring of position limits. CME opined that requiring real-time monitoring capabilities across every instrument for vague terms such as ''abnormal price movements,'' ''unusual trading volumes,'' and ''impairments to market liquidity'' does not provide DCMs with sufficient clarity with respect to what specific capabilities satisfy the standard.[252] CME specifically stated that the Commission should clarify and appreciate the unique aspects of different types of trading venues and distinguish where requirements are different.[253] CME also stated that the regulations should distinguish between trading conducted on an electronic venue and trading conducted in an open-outcry venue.[254] MGEX stated that the automated trading alert requirement of proposed § 38.251 ''seems to add more burden and cost than potentially providing any real value.''[255] KCBT requested that the Commission remove this requirement and stated that customer reportable positions are received once daily on a T+1 basis and that it is impractical to require DCMs to monitor for intraday compliance with position limits.[256]

ICE stated that it has previously made the Commission aware of the difficulties inherent in trying to monitor positions on a real-time basis, and that the only way to accurately determine whether an intraday position limit violation has occurred is on the basis of information available on a T+1 basis.[257] ICE also requested that the Commission delete the phrase ''impairments to market liquidity'' from the rule, arguing that the wording is vague and has ''no foundation'' in the core principle.[258]

With respect to the monitoring of high frequency trading, several commenters stated that such monitoring would be problematic.[259] MGEX and CME raised concerns over the absence of a definition for high frequency trading, which CME claimed can include many

[249] *See* discussion of NYSE circuit breakers, available at: *http://usequities.nyx.com/markets/nyse-equities/circuit-breakers.*

[250] *See supra* discussion of section 38.255.

[251] 7 U.S.C. 7(d)(4).

[252] CME Comment Letter at 24 (Feb. 22, 2011).

[253] *Id.*

[254] *Id.*

[255] MGEX Comment Letter at 4 (Feb. 22, 2011). MGEX also stated that the Commission should adopt a more flexible core principle approach. *See* MGEX Comment Letter at 2 (June 3, 2011).

[256] KCBT Comment Letter at 4 (Feb. 22, 2011).

[257] ICE Comment Letter at 11 (Feb. 22, 2011).

[258] *Id.*

[259] KCBT Comment Letter at 4 (Feb. 22, 2011); MGEX Comment Letter at 4 (Feb. 22, 2011); CME Comment Letter at 24–25 (Feb. 22, 2011).

different trading strategies.[260] CME questioned whether the Commission had unique concerns about high frequency traders, and further remarked that the Commission has not articulated what purpose would be served by singling out high frequency trading for special monitoring.[261] CME further stated that empirical studies have consistently demonstrated that high frequency trading fosters tighter markets, greater liquidity and enhanced market efficiency.[262]

CME stated that ''[a]s a practical matter, however, CME Group, and we imagine other DCMs, certainly have the capability to monitor the messaging frequency of participants in their markets and can quickly and easily identify which participants generate high messaging traffic.'' [263] CME also stated that it requires registered users who predominantly enter orders via an automated trading system to be identified as automated traders and that their orders are identified in the audit trail as originating from automated systems.[264] Finally, CME noted that its systems were designed to identify anomalies or transaction patterns that violate their rules or might otherwise be indicative of some other risk to the orderly functioning of the markets.[265]

Better Markets opined that the Dodd-Frank Act provides the Commission with an opportunity to get ahead of high frequency and algorithmic trading and that, while hedgers undoubtedly need market liquidity, high frequency traders generate volume that does not reliably generate liquidity for market participants.[266] In addition, Better Markets commented that many widely used tactics of high frequency traders are specifically designed to influence pricing decisions by providing false signals of market price levels and depth, and, as a result, the Commission must take an expressly restrictive approach to high frequency trading.[267]

Discussion

The Commission is adopting proposed § 38.251, with certain modifications, including converting portions of the rule to guidance.

The Commission is modifying § 38.251 to eliminate the obligation to monitor, on an intraday basis, for ''impairments to market liquidity.'' The Commission is also revising the rule to clarify what must be included in real-time monitoring as compared to monitoring of intraday trading that may not need to be done in real time. Monitoring of market conditions, price movements and trading volumes in order to detect and attempt to resolve abnormalities must be accomplished in real time in order to achieve, as much as is possible, the statute's new emphasis on preventive actions. It is acceptable, however, to have a program that detects, on a T+1 basis, trading abuses and position-limit violations that occur intraday.

In addition, the rule is now being supplemented with guidance and acceptable practices in appendix B to part 38. The Commission believes that monitoring for market anomalies is a key part of a DCM's ability to demonstrate its ''capacity and responsibility to prevent manipulation, price distortion, and disruptions of the delivery or cash-settlement process,'' as required by the statute. Moreover, given the number of listed contracts and the volumes of trading on any particular DCM, the Commission believes that automated trading alerts, preferably in real time, are the most effective means of detecting market anomalies. While having an effective automated alerts regime will be set forth as a method of monitoring in guidance, a DCM will maintain flexibility in meeting the requirement of the rule by, for example, demonstrating the effectiveness of an alternate method of monitoring.

With respect to position-limit monitoring, the DCM NPRM did not require that such limits necessarily be monitored in real time. However, DCMs must have the ability to monitor such limits, including for intraday violations, at a minimum on a T+1 basis. Therefore, the requirement to monitor for position-limit violations is clarified in the rule and further described in the guidance and acceptable practices in appendix B, giving the DCM some flexibility in meeting the requirement.

As for the Commission's inquiry about requiring additional monitoring of high-frequency trading, the Commission recognizes that DCMs should be capable of monitoring for the types of trading that may be characterized as ''high frequency,'' but has decided not to implement, in this rulemaking, further rules pertaining to the monitoring of high frequency trading. The Commission is encouraged that there are efforts underway, both within and outside the Commission, to define and develop approaches for better monitoring of high-frequency and algorithmic trading. This is particularly evident from recent work done at the behest of the Commission's Technology Advisory Committee (TAC).[268] Further, the United Kingdom government's Foresight Project also commissioned a recently released report on the future of computer trading in financial markets, which aims to assess the risks and benefits of automated buying and selling. This project may assist the Commission's further development of a regulatory framework for high frequency trading activities.[269]

ii. § 38.252—Additional Requirements for Physical-Delivery Contracts

Proposed § 38.252 required, among other things, that for physical-delivery contracts, DCMs must monitor each contract's terms and conditions as to whether there is convergence of the futures price to the cash price of the underlying commodity and must take meaningful corrective action, including addressing conditions that interfere with convergence, or if appropriate, change contract terms and conditions, when lack of convergence impacts the ability to use the markets for making hedging decisions and for price discovery.

The Commission requested comments on what other factors, in addition to the delivery mechanism, a DCM should be required to consider in determining whether convergence is occurring.

Summary of Comments

CME, MGEX and KCBT all opposed what they deemed to be a prescriptive rule, and noted that most of the requirements in proposed § 38.252 are currently acceptable practices under appendix B for the monitoring of trading.[270] These commenters contended that the requirements in proposed § 38.252 should remain as acceptable practices.[271]

ICE also noted that for certain products it is inherently more difficult to statistically determine convergence of futures to cash market prices.[272]

Discussion

The Commission is adopting § 38.252, with certain modifications, including

[260] MGEX Comment Letter at 4 (Feb. 22, 2011); CME Comment Letter at 24–25 (Feb. 22, 2011).

[261] CME Comment Letter at 25 (Feb. 22, 2011).

[262] *Id.*

[263] *Id.*

[264] *Id.*

[265] *Id.*

[266] Better Markets Comment Letter at 7 (Jun. 3, 2011).

[267] *Id.*

[268] *See, e.g.,* reports associated with the TAC available at *http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/tacpresentation030111_ptfs2.pdf.*

[269] *See* ''The Future of Computer Trading in Financial Markets'' available at *http://www.bis.gov.uk/foresight/our-work/projects/current-projects/computer-trading.*

[270] CME Comment Letter at 25 (Feb. 22, 2011); MGEX Comment Letter at 5 (Feb. 22, 2011); KCBT Comment Letter at 4–5 (Feb. 22, 2011).

[271] *Id.*

[272] ICE Comment Letter at 12 (Feb. 22, 2011).

converting a portion of the rule to acceptable practices.

The Commission is retaining as a rule the general obligation that DCMs monitor physical-delivery contracts with respect to their terms and conditions as they relate to the underlying market and monitor the adequacy of deliverable supplies to meet futures delivery requirements. The DCM must also make a good-faith effort to resolve conditions that threaten reasonable convergence or the adequacy of deliverable supplies. While the Commission acknowledges ICE's comment that for certain products it may be more difficult to ascertain convergence because of the absence of reliable cash prices, the Commission is of the view that a DCM must monitor the performance of its contracts to ensure they continue to perform their economic functions.

In order to provide DCMs with additional flexibility in meeting their monitoring obligations associated with physical-delivery contracts, the specific elements of such monitoring that were initially included in the proposed rule are now included in acceptable practices under appendix B of part 38, rather than in the rule.

iii. § 38.253—Additional Requirements for Cash-Settled Contracts

In addition to requirements that DCMs monitor the pricing and methodologies for settling cash-settled contracts, proposed § 38.253 required that, where a DCM contract is settled by reference to the price of a contract or instrument traded in another venue, including a price or index derived from prices on another exchange, the DCM must have rules that require the traders on the DCM's market to provide the DCM with their positions in the reference market as the traders' contracts approach settlement. In the alternative, § 38.253 provided that the DCM may have an information sharing agreement with the other venue or designated contract market.

Summary of Comments

Argus commented that it is inappropriate to require DCMs to monitor the ''availability and pricing of the commodity making up the index to which the contract will be settled'' where the index price is generated based upon transactions that are executed off the DCM's market.[273]

CME disagreed with what it contended was the prescriptive nature of the proposed rule, and noted that many of the requirements in proposed § 38.253 are currently acceptable practices for trade monitoring.[274] CME suggested that the requirements in § 38.253 remain as acceptable practices.[275] CME further stated that the Commission is uniquely situated to add regulatory value to the industry by reviewing for potential cross-venue rule violations, and noted that the Commission is the central repository for position information delivered to it on a daily basis and in a common format, across all venues.[276] CME also asserted that the Commission would be imposing an onerous burden on DCMs and their customers by requiring the reporting of information that the Commission already receives or will be receiving.[277] CME also stated that the alternative proposal, that the DCM enter into an information-sharing agreement with the other venue, also will result in additional costs to both entities, and that it may not be practical or prudent for a DCM to enter into such an agreement with the other venue.[278] CME noted that its rules already allow it to request such information from market participants on an as-needed basis.[279]

Nodal stated that DCMs that are a party to an industry agreement (such as the International Information Sharing Memorandum of Understanding & Agreement) should satisfy the information sharing requirement in this rule by virtue of such agreement.[280]

Discussion

The Commission is codifying proposed § 38.253, with certain modifications, including to convert a portion of the rule to acceptable practices. The Commission removed from the rule the requirement that DCMs monitor the availability and pricing of the commodity making up the index to which the contract will be settled. Section 38.253(a) requires that DCMs monitor the pricing of the index to which the contract is settled, and that DCMs monitor the continued appropriateness of the index to which the contract is settled and take steps to resolve conditions, including amending contract terms where necessary, where there is a threat of manipulation, disruptions, or distortions. For cash-settled contracts, the Commission believes that a DCM must have the ability to determine whether a trader in its market is manipulating the instrument or index to which the DCM contract settles.

In regards to § 38.253(b), as the CME noted, the Commission does obtain certain position information in the large-trader reporting systems for futures and swaps. However, the Commission may not routinely obtain such position information, including where a DCM contract settles to the price of a non-U.S. futures contract or a cash index. Notwithstanding the continued importance of a DCM's obligation to monitor across other venues in such circumstances, the Commission believes that the rule need not set forth the specific methods to accomplish such monitoring. Accordingly, the Commission sets forth the specific methods of accomplishing the cross-venue monitoring under acceptable practices. Specifically, the rule requires that the monitoring of cash-settled contracts must include access to information on the activities of its traders' in the reference market. The acceptable practices for this rule provides that a DCM, at a minimum, gather such information, either directly or through information sharing agreements, to traders' position and transactions in the reference market for traders of a significant size in the DCM contract, near the settlement of the contract.

iv. § 38.254—Ability To Obtain Information

To ensure that DCMs have the ability to properly assess the potential for price manipulation, price distortions, and the disruption of the delivery or cash-settlement process, proposed § 38.254 provided that each DCM require that traders in their market keep records, including records of their activity in the underlying commodity and related derivative markets and contracts, and make such records available, upon request, to the designated contract market.[281] The proposed rule further required that DCMs with participants trading through intermediaries must either use a comprehensive large-trader reporting system or be able to demonstrate that it can obtain position data from other sources in order to conduct an effective surveillance program.

Summary of Comments

CME opposed the proposed rule and recommended that the types of records that the DCM should require traders to keep should be covered in acceptable

[273] Argus Comment Letter at 6 (Feb. 22, 2011).

[274] CME Comment Letter at 26 (Feb. 22, 2011).

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] *Id.*

[279] *Id.*

[280] Nodal Comment Letter at 5 (Feb. 22, 2011).

[281] The pre-existing acceptable practice for Core Principle 4 provides that DCMs, at a minimum, should have routine access to the positions and trading of their market participants.

practices.[282] KCBT contended that it is unnecessary and burdensome for a DCM to require traders to keep such records.[283] Similarly, MGEX raised concerns about the burden that will be placed on its traders as a result of the proposed record-keeping obligation, and noted that, for contracts not traded on the DCM, it is unclear what records a DCM must tell its trader to keep.[284]

Discussion

The Commission is adopting § 38.254 as proposed, but is allowing, as an acceptable practice in appendix B, that DCMs limit the requirement of § 38.254(b) to those transactions or positions that are reportable under the DCM's large-trader reporting system or where the market participant otherwise holds substantial positions.

The Commission has considered the comments, but does not believe that this rule is unnecessary or that the requirements should instead be codified as acceptable practices. The Commission notes that a trader's burden to keep such records is sound commercial practice, and that a trader of a reportable size is already required, under Commission's regulations § 18.05 for futures and options and § 20.6 for swaps, to keep records of such activity and to make them available to the Commission upon request. In addition, the Commission has found trader records to be an invaluable tool in its surveillance efforts, and believes that the DCM, as a self-regulatory organization, should have direct access to such information in order to discharge its obligations under the DCM core principles, and in particular Core Principle 4.

v. § 38.255—Risk Controls for Trading

Proposed § 38.255 required DCMs to have in place effective risk controls including, but not limited to, pauses and/or halts to trading in the event of extraordinary price movements that may result in distorted prices or trigger market disruptions. Additionally, the rule provided that where a DCM's contract is linked to, or a substitute for, other contracts on the DCM or on other trading venues, including where a contract is based on the price of an equity security or the level of an equity index, risk controls should, to the extent possible, be coordinated with those other contracts or trading venues. In the preamble of the DCM NPRM, the Commission requested comments on what types of pauses and halts are necessary and appropriate for particular market conditions. The preamble of the DCM NPRM also recognized that pauses and halts comprise only one category of risk controls, and that additional controls may be necessary to reduce the potential for market disruptions. The preamble specifically listed several risk controls that the Commission had in mind, including price collars or bands, maximum order size limits, stop-loss order protections, kill buttons, and any others that may be suggested by commenters. The Commission invited comments on the appropriateness of the listed risk controls, and posed the following questions: What other DCM risk controls are appropriate or necessary to reduce the risk of market disruptions? Which risk controls should be mandated, and how?

Summary of Comments

Several commenters asserted that DCMs should have discretion to determine the specific risk controls that should be implemented within their markets.[285] CME commented that the marketplace would benefit from some standardization of the types of pre-trade risk controls employed by DCMs and other trading venues, and expressed support for an acceptable practice framework that includes pre-trade quantity limits, price banding, and messaging throttles, but argued that the specific parameters of such controls should be determined by the DCMs.[286]

Various commenters also stated that there are effective ways to prevent market disruptions other than pauses and halts, and that the appropriate controls may depend on a number of factors, such as the product, number of market participants, and the market's liquidity. CME contended that the Commission should not impose rules that mandate coordination of such risk controls.[287] NYSE Liffe argued that a DCM should be able to take into account other controls, but should not be required to adopt identical controls.[288] MGEX stated that forcing market coordination of trading pauses and halts is unnecessary, and that if market instability moves from one contract market to another, the next market should be able to pause or halt trading as it determines necessary.[289] ICE stated that a temporary price floor or ceiling can work better than a pause or halt since trading can continue uninterrupted, thereby offering the earliest opportunity for price reversal should the market deem a sudden large move to be an overreaction or error.[290] ICE also stated that pauses and halts are not the only effective way to prevent market disruption, and that by being prescriptive, the Commission is freezing innovation in preventing market disruptions.[291]

Finally, Better Markets asserted that the proposed rules are extremely useful, but incomplete.[292] Better Markets stated that there should be a ''speed limit'' to serve as a buffer against the potential for an uncontrolled spiral of disruption fueled by HFTs, and that the rule should require that bids be kept open for minimum durations and that positions be held for minimum durations.[293]

Discussion

The Commission is adopting proposed § 38.255, with certain modifications, including converting a portion of the rule to acceptable practices. As stated in the DCM NPRM, the Commission believes that pauses and halts are effective risk management tools that must be implemented by DCMs to facilitate orderly markets. As the Commission noted in the DCM NPRM, risk controls such as trading pauses and halts, among other things, can allow time for participants to analyze the market impact of new information that may have caused a sudden market move, allow new orders to come into a market that has moved dramatically, and allow traders to assess and secure their capital needs in the face of potential margin calls. Automated risk control mechanisms, including pauses and halts, have proven to be effective and necessary in preventing market disruptions and, therefore, will remain as part of the rule.

The Commission notes that the pauses and halts are intended to apply in the event of extraordinary price movements that may trigger or propagate systemic disruptions. Accordingly, in response to ICE and other commenters that question the necessity of pauses and halts over other forms of risk controls, the Commission notes that a DCM's ability to pause or halt trading in extraordinary

[282] CME Comment Letter at 26 (Feb. 22, 2011).

[283] KCBT Comment Letter at 5 (Feb. 22, 2011).

[284] MGEX Comment Letter at 5 (Feb. 22, 2011).

[285] CME Comment Letter at 26 (Feb. 22, 2011); KCBT Comment Letter at 5 (Feb. 22, 2011); ICE Comment Letter at 11–12 (Feb. 22, 2011); CFE Comment Letter at 4 (Feb. 22, 2011); NYSE Liffe Comment Letter at 11 (Feb. 22, 2011); ELX Comment Letter at 4 (Feb. 22, 2011); MGEX Comment Letter at 5 (Feb. 22, 2011); ICE Comment Letter at 12 (Feb. 22, 2011); Barnard Comment Letter at 3 (Feb. 22, 2011).

[286] CME Comment Letter at 27 (Feb. 22, 2011).

[287] *Id.*

[288] NYSE Liffe Comment Letter at 11 (Feb. 22, 2011).

[289] MGEX Comment Letter at 5 (Feb. 22, 2011).

[290] ICE Comment Letter at 12 (Feb. 22, 2011).

[291] *Id.*

[292] Better Markets Comment Letter at 9 (Feb. 22, 2011).

[293] *Id.*

circumstances and, importantly, to restart trading through the appropriate reopening procedures, will allow DCMs to mitigate the propagation of shocks that are of a systemic nature and to facilitate orderly markets. Furthermore, DCMs must ensure that such pauses and halts are effective for their specific order-routing and trading environment and are adapted to the specific types of products traded.

Following the DCM NPRM's publication, the Pre-Trade Functionality Subcommittee of the CFTC Technology Advisory Committee (''TAC'') issued a report that recommended the implementation of several trade risk controls at the exchange level.[294] The controls recommended in the Subcommittee report were consistent, in large part, with the trade controls referenced in the preamble to the DCM NPRM, and which are being adopted in this final rulemaking.[295] The TAC accepted the Subcommittee report, which specifically recommended that exchanges implement pre-trade limits on order size, price collars around the current price, intraday position limits (of a type that represent financial risk to the clearing member), message throttles, and clear error-trade and order-cancellation policies.[296] The Subcommittee report noted that ''[s]ome measure of standardization of pre-trade risk controls at the exchange level is the cheapest, most effective and most robust path to addressing the Commission's concern [for preserving market integrity].'' [297]

The Commission believes that the implementation of the specific automated trade risk controls listed in the DCM NPRM is generally desirable, but also recognizes that such controls should be adapted to the unique characteristics of the markets to which they apply. Indeed, any controls should consider the delicate balance between avoiding a market disruption while not impeding a market's price discovery function. Controls that unduly restrict a market's ability to respond to legitimate market events will interfere with price discovery.

Accordingly, consistent with many of the comments on this subject, the Commission is enumerating specific types of automated risk controls, in addition to pauses and halts, that may be implemented by DCMs in the acceptable practices rather than in the rule, in order to give DCMs greater discretion to select among the enumerated risk controls, or to create new risk controls that may be more appropriate or necessary for their markets. DCMs also will have discretion in determining the parameters for the selected controls. Specifically, the acceptable practices for Core Principle 4 provide that DCMs should have appropriate trade risk controls adapted to the unique characteristics of the markets to which they apply that are designed to prevent market disruptions without unduly interfering with that market's price discovery function. The acceptable practices also enumerate several of the pre-trade controls cited by the Joint CFTC/Securities and Exchange Commission (''SEC'') Advisory Committee, specifically: Pre-trade limits on order size, price collars or bands around the current price, message throttles, and daily price limits.[298]

Additionally, in response to commenters' concerns, the Commission is moving the language in the proposed rule concerning the coordination of risk controls among other markets or exchanges to the acceptable practices. Specifically, a DCM with a contract that is linked to, or is a substitute for, other contracts, either on its market or on other trading venues, must, to the extent practicable, coordinate its risk controls with any similar controls placed on those other contracts. If a contract is based on the price of an equity security or the level of an equity index, such risk controls must, to the extent practicable, be coordinated with any similar controls placed on national security exchanges.

Independent of this rulemaking, the Joint CFTC/SEC Advisory Committee recommended that the SEC and CFTC require that the pause rules of the exchanges and FINRA be expanded to cover all but the most inactively traded and listed equity securities, ETFs, and options and single stock futures on those securities.[299]

vi. § 38.256—Trade Reconstruction

The Dodd-Frank Act added language to Core Principle 4 providing that a DCM must have the ability to comprehensively and accurately reconstruct all trading on its trading facility. These audit-trail data and reconstructions must also be made available to the Commission in a form, manner, and time as determined by the Commission. Proposed § 38.256 codified these requirements.

Summary of Comments

CME argued that audit trial data is extremely detailed and voluminous and that the DCMs should be given adequate time to prepare the trading data before it is supplied to the Commission.[300] CME suggested that the wording ''in a form, manner, and time as determined by the Commission'' be replaced with ''such reasonable time as determined by the Commission.[301]

Chris Barnard expressed support for the trade reconstruction requirement but requested that the rule be clarified to ensure that the trade reconstruction requirement includes all trading events, including the entry of bids and offers in the order of their occurrence, as well as executed trades in order.[302]

Discussion

The Commission is clarifying the rule slightly so that the audit trail data must be available to the Commission ''in a form, manner, and time that is acceptable to the Commission.'' The revised wording is consistent with § 38.950(a), which requires that DCMs maintain records in a form and manner that is acceptable to the Commission.

The Commission believes that the DCM audit-trail requirements contained in § 38.551 and § 38.552 clarify the DCM's obligation for reconstruction of trading and are sufficient to meet Mr. Barnard's concerns.

[294] ''Recommendations on Pre-Trade practices for Trading Firms, Clearing Firms and Exchanges involved in Direct Market Access,'' March 1, 2011, available at *http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/tacpresentation030111_ptfs2.pdf.*

[295] The DCM NPRM specifically mentioned position limits that must be monitored for intraday violations, daily price limits, trading pauses, reasonability tests for order price and size, stop logic functionality, and trade-cancellation policies in the form of ''no-bust'' ranges.

[296] See ''Pre-Trade Functionality Subcommittee of the CFTC Technology Advisory Committee report, ''Recommendations on Pre-Trade Practices for Trading Firms, Clearing Firms, and Exchanges Involved in Direct Market Access,'' at 4–5 (March 1, 2011), accepted by the TAC and available at: *http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/tacpresentation030111_ptfs2.pdf.*

[297] *Id.* at 4.

[298] The DCM NPRM did not specifically address whether DCMs should require market participants to certify that their electronic systems were adequately tested before trading on a DCM, nor did it specifically address pre-trade, post trade or emergency controls and supervision of electronic systems. The Commission may address electronic system testing, controls, and supervision-related issues in a subsequent proceeding.

[299] The Joint CFTC–SEC Advisory Committee on Emerging Regulatory Issues was established a few days after the dramatic securities market events of May 6, 2010, called by some the ''Flash Crash.'' The Committee is charged with addressing regulatory issues of mutual concern to the CFTC and SEC. *See* ''Recommendations Regarding Regulatory Responses to the Market Events of May 6, 2010,'' (Feb. 18, 2011) available at *http://www.cftc.gov/MarketReports/StaffReportonMay6MarketEvents/index.htm.*

[300] CME Comment Letter at 27 (Feb. 22, 2011).

[301] *Id.*

[302] Barnard Comment Letter at 2 (May 20, 2011).

vii. § 38.257—Regulatory Service Provider

Proposed § 38.257 provided that a DCM must comply with the regulations in subpart E through a dedicated regulatory department, or by delegation of that function to a regulatory service provider over which the DCM has supervisory authority.

Discussion

The Commission did not receive any comments on the proposed rule, and is adopting the rule as proposed.

viii. § 38.258—Additional Rules Required

Proposed § 38.258 required a DCM to adopt and enforce any additional rules that it believed were necessary to comply with the requirements of subpart E.

Discussion

Though the Commission did not receive any comments on the proposed rule, the Commission is of the view that the obligations in the proposed rule are more appropriate in the guidance. Accordingly, the proposed rule is moved to guidance. Consistent with this determination, the Commission is replacing proposed § 38.258 with new § 38.258 (titled ''Additional sources for compliance'') that simply permits DCMs to rely upon the guidance and acceptable practices in appendix B of this part to demonstrate to the Commission compliance with Core Principle 4.

5. Subpart F—Position Limitations or Accountability

Core Principle 5 under section 5(d)(5) of the CEA requires that DCMs adopt for each contract, as is necessary and appropriate, position limitations or position accountability. The Dodd-Frank Act amended Core Principle 5 by adding that for any contract that is subject to a position limitation established by the Commission pursuant to section 4a(a) of the CEA, the DCM shall set the position limitation of the board of trade at a level not higher than the position limitation established by the Commission. At the time of the publication of the DCM NPRM, the federal position limits established by the Commission were codified in part 150 of the Commission's regulations, and the Commission had proposed rules to replace part 150 with new requirements in part 151, consistent with the requirements of the Dodd-Frank Act. The Commission published the final rules for ''Position Limits for Futures and Swaps'' on November 18, 2011.[303] That final rulemaking requires DCMs to comply with part 150 (Limits on Positions) until such time that the Commission replaces part 150 with the new part 151 (Limits on Positions).[304] In that final release, the Commission requires that exchanges adopt their own position limits for 28 physical commodity contracts subject to federal limits, and provides acceptable practices for establishing position limits in other commodity contracts. The Commission also established alternative acceptable practices of adopting position accountability rules in lieu of position limits for non-spot months in those other commodity contracts. Proposed § 38.301 required that each DCM must comply with the requirements of part 151 as a condition of its compliance with Core Principle 5.

Summary of Comments

CME stated that the proposed position limits in the part 151 rulemaking may affect the price discovery mechanism of the U.S. futures markets and asked that the Commission give careful consideration to the comments it submitted in the part 151 rulemaking.[305]

Discussion

The Commission is adopting the rule, with one modification. The rule is being revised to add an additional clause that requires DCMs to continue to meet the requirements of part 150 of the Commission's regulations—the current position limit regulations—until such time that compliance is required under part 151. This clarification will ensure that DCMs are in compliance with the Commission's regulations under part 150 in the interim period—until the compliance date for the new position limits regulations takes effect. CME's comments were more appropriate to the Position Limit rulemaking proceeding, and they were addressed in that rulemaking.[306]

6. Subpart G—Emergency Authority

The Dodd-Frank Act made minor, non-substantive changes to Core Principle 6 under section 5(d)(6) of the CEA. In implementing the core principles, the Commission proposed to retain most of the former Application Guidance associated with Core Principle 6 (found in appendix B to part 38 of the Commission's regulations) with some revisions and additions.

Proposed § 38.350 codified the statutory text of the core principle. Proposed § 38.351 referred applicants and DCMs to the guidance and acceptable practices in appendix B to part 38 for purposes of demonstrating to the Commission their compliance with the requirements of subpart G. The proposed guidance provided that a DCM should have the authority to intervene as necessary to maintain fair and orderly trading and to prevent or address manipulation or disruptive trading practices, whether the need for intervention arises exclusively from the DCM's own market or as part of a coordinated, cross-market intervention. The proposed guidance also provided that the DCM rules should include procedures and guidelines to avoid conflicts of interest in accordance with new provisions proposed in § 40.9 and to include alternate lines of communication and approval procedures in order to be able to address, in real time, emergencies that may arise. The proposed guidance also clarified that the DCM must have rules that allow it to take such market actions as may be directed by the Commission.

The proposed rulemaking also proposed certain acceptable practices, including that the DCM have: (i) Procedures and guidelines for decision-making and implementation of emergency intervention in the market, and (ii) the authority to: Liquidate or transfer open positions in the market,[307] suspend or curtail trading in any contract, require market participants in any contract to meet special margin requirements, and allow it to take such market actions as the Commission may direct.

Summary of Comments

KCBT contended that liquidation of positions and special margin requirements are more appropriately addressed in the rules and procedures relevant to Derivatives Clearing Organizations.[308] CME commented that the Commission should revise the proposed guidance to make clear that DCMs have the flexibility and independence necessary to address market emergencies.[309]

Discussion

The Commission adopts proposed §§ 38.350 and 38.351, without modification.

In response to the comments pertaining to the proposed guidance, the

[303] *See* ''Position Limits for Futures and Swaps,'' 76 FR 71626, Nov. 18, 2011.

[304] *Id.* at 71632.

[305] CME Comment Letter at 27 (Feb. 22, 2011).

[306] 76 FR 71626, Nov. 18, 2011.

[307] In situations where a swap is traded on more than one platform, emergency action to liquidate or transfer open interest must be directed, or agreed to, by the Commission or Commission staff.

[308] KCBT Comment Letter at 6 (Feb. 22, 2011); *see also* 76 FR 69334, Nov. 8, 2011.

[309] CME Comment Letter at 28 (Feb. 22, 2011).

Commission is making slight revisions to the guidance to clarify that DCMs retain the authority to independently respond to emergencies in an effective and timely manner consistent with the nature of the emergency, as long as all such actions taken by the DCM are made in good faith to protect the integrity of the markets.

In response to KCBT's comments, the Commission notes that the statute requires DCMs, in consultation and cooperation with the Commission, to adopt rules permitting them to liquidate open positions and impose special margin requirements under their emergency authority.

7. Subpart H—Availability of General Information

Core Principle 7 requires that DCMs make available to the public accurate information concerning the contract market's rules and regulations, contracts and operations. The Dodd-Frank Act amended Core Principle 7 by adding a provision requiring the board of trade to make public the rules and specifications describing the operation of the DCM's electronic matching platform or trade execution facility.[310] Since passage of the CFMA, the types of information and the various practices for providing information have become standardized across the industry as DCMs have adopted practices that comply with the current guidance and acceptable practices for Core Principle 7. Accordingly, proposed § 38.401 in subpart H codified these practices. In addition, the Commission proposed several additional provisions to ensure that pertinent information is available to the Commission, market participants and the public, as described below.

The Commission also proposed to codify the statutory text of the core principle in § 38.400, and is adopting the rule, as proposed.

i. § 38.401(a)—General

Proposed § 38.401(a) required DCMs to have in place procedures, arrangements and resources for disclosing to market authorities, market participants, and the public accurate and relevant information pertaining to: (i) Contract terms and conditions, (ii) rules and regulations applicable to the trading mechanism; and (iii) rules and specifications pertaining to the operation of the electronic matching platform or trade execution facility. Under the proposed rule, DCMs are required to ensure that market authorities, market participants, and the public have available all material information pertaining to new product listings, new or amended governance, trading and product rules, or other changes to information previously disclosed by the DCM, within the time period prescribed in proposed § 38.401(c). Section 38.401(a) of the proposed regulation required that DCMs provide the required information to market participants and the public by posting such information on their Web site, as set forth in proposed § 38.401(c).

Discussion

The Commission did not receive comments on the proposed rule, and is adopting the proposed rule with minor, non-substantive modifications.[311]

ii. § 38.401(b)—Accuracy Requirement

Proposed § 38.401(b) required that each DCM have procedures in place to ensure that any information or communication with the Commission is accurate and complete, and further that no false or misleading information is submitted and that no material information is omitted. Similarly, the proposed rule required that each DCM have procedures in place to ensure the accuracy and completeness of any information made available to market participants and the public, including information that is made available on its Web site.

Summary of Comments

NYSE Liffe expressed concern that the requirement to provide ''accurate and complete'' information in ''any communication'' with the Commission would chill dialogue between DCMs and Commission staff.[312] NYSE Liffe argued that in addition to submitting formal filings with the Commission, DCM staff frequently interact with Commission staff on a more informal basis, and in some cases DCM staff may speak without complete information.[313] NYSE Liffe asserted that a DCM may feel constrained from directly responding to Commission inquiries or from reaching out to Commission staff if it is concerned that the information it provides to the Commission may later prove to be inaccurate or incomplete.[314] Accordingly, NYSE Liffe requested clarification that the proposed rule will only apply to formal filings made with the Commission.[315] NYSE Liffe also noted that while it makes every effort to accurately post information required to be made public, for several data elements, it must rely on data sent to it by clearing service providers and member firms.[316] NYSE Liffe argued that it would be inappropriate to set a strict liability standard over aggregated data that part 16 of the Commission's rules requires the DCM to make public when it does not entirely control the generation of component parts of that data.[317]

Discussion

The Commission is adopting proposed § 38.401(b), with certain revisions. While DCMs must provide the Commission with accurate and complete information, the Commission recognizes that the proposed rule text may raise concerns with DCMs in freely communicating with Commission staff in certain instances. Accordingly, the Commission is revising the rule to clarify that a DCM must ''provide information that it believes, to the best of its knowledge, is accurate and complete, and must not omit material information'' with respect to any communication with the Commission, and any information required to be transmitted or made available to market participants and the public, including on its Web site or otherwise. The requirements of § 38.401(b) are intended to be, and should be interpreted as being, consistent with the false reporting provision under section 9(a)(3) of the CEA, 7 U.S.C. 13. The amended rule accommodates the possibility that DCMs may not exercise complete control over all of the information that they receive from third-parties and later make public.

iii. § 38.401(c)—Notice of Regulatory Submissions

The Commission historically has required DCMs to update their rulebooks upon the effectiveness of a rule amendment, product listing or rule certification that has been filed with the Commission. While proposed § 38.401(c) maintained the general requirement for posting rules in the DCM rulebook upon their effectiveness, the Commission believed that market participants and the public would benefit from notifications of proposed rule amendments, product listing (or de-listings) and rule certifications in advance of their taking effect.[318]

[310] This requirement, while new to the text of Core Principle 7, was previously required as part of former Designation Criteria 4.

[311] The Commission is revising § 38.401(a) to clarify several internal references.

[312] NYSE Liffe Comment Letter at 12 (Feb. 22, 2011).

[313] *Id.*

[314] *Id.*

[315] *Id.*

[316] *Id.* at 13.

[317] *Id.*

[318] This is especially relevant when the Commission determines to stay the certification of a DCM submission, as provided by the Dodd-Frank

Accordingly, proposed § 38.401(c) required each DCM to post on its Web site all rule filings and submissions that it makes to the Secretary of the Commission. The proposed rule required that this information be posted on the DCM's Web site simultaneous with the filing of such information with the Commission. The DCM NPRM stated that, where applicable, the DCM Web site should make clear that the posted submissions are pending before the Commission.[319] This requirement was designed to provide market participants with advance notice of rule amendments and certifications, consistent with the goal of Core Principle 7 to make pertinent information available to market participants and the public. This proposed posting requirement was in addition to the obligation of DCMs to update their rulebooks upon the effectiveness of a rule submission or certification.

To the extent that a DCM requests confidential treatment of certain information filed or submitted to the Commission, the proposed rule required the DCM to post the public portions of the filing or submission on its Web site.

Summary of Comments

CME and KCBT both contended that the requirement that DCMs post regulatory submissions on their Web site simultaneously with their filing with the Commission is duplicative, as the Commission already posts these submissions on the CFTC Web site.[320] CME and KCBT further argued that they use other methods to communicate regulatory changes to the public, including bulletins, email notifications, and press releases.[321] CME requested that if the Commission does choose to retain this requirement, that a DCM be given a minimum of one business day to post such filings, rather than having to post ''simultaneously'' with the Commission filing.[322] CME noted that even a one-day standard would be a significantly higher standard than the Commission holds itself to with respect to posting the filings it receives from DCMs today.[323]

Discussion

The Commission is adopting the proposed rule, with certain modifications. The Commission believes it is important for market participants and the public to have advance notice of rule amendments and certifications prior to their taking effect, consistent with the goal of Core Principle 7 to make pertinent information available to market participants and the public. Where applicable, the DCM Web site should make clear that the posted submissions have been submitted to the Commission, but are not yet in effect. For example, a DCM could post its submissions or information filed with the Commission on a separate web page that is designated as ''regulatory filings'' or ''proposed rulebook amendments.'' The Commission notes that the requirement to make information available to the public necessitates that such information can be accessed by visitors to the Web site without the need to register, log in, provide a user name or obtain a password, as is the current practice under Commission regulations.[324] In response to CME, the Commission notes that it adopted a similar requirement in the final rulemaking pertaining to Provisions Common to Registered Entities.[325] In that final rulemaking, the Commission codified in § 40.5(a)(6) the requirement that a registered entity submitting a voluntary rule submission post such submission on its Web site concurrent with the filing of such submission with the Commission.[326] Consistent with § 40.5, the Commission is revising the posting requirement in the proposed rule from ''simultaneous'' to ''concurrently'' with the filing of the information with the Commission. The proposed rule is also being revised to clarify that the posting requirement applies to any information or ''submission'' provided to the Commission.

iv. § 38.401(d)—Rulebook

Proposed § 38.401(d) codified the pre-existing DCM practices pertaining to updating DCM rulebooks.[327] The proposed rule required that DCMs post and routinely update, their rulebooks, which appear on their Web sites. The proposed rule required that each DCM update its rulebook the day that a new product is listed or a new or amended rule takes effect. The proposed rule further required that DCM Web sites be readily accessible to the public, and that the information posted therein be available to visitors to the Web site without requiring registration, log-in, or user name or password.

Discussion

The Commission did not receive comments regarding this proposed rule and is adopting the rule as proposed. As noted in the DCM NPRM, the vast majority of DCMs maintain Web sites that comply with the requirements in the rule.

8. Subpart I—Daily Publication of Trading Information

Core Principle 8 requires that DCMs make available to the public accurate information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts on the contract market. The Dodd-Frank Act did not amend Core Principle 8. Accordingly, proposed § 38.451 codified the pre-existing acceptable practices, which largely required that DCMs comply with § 16.01 (Trading volume, open contracts, prices and critical dates) of the Commission's regulations.

In addition, the Commission proposed certain revisions to § 16.01, consistent with the Dodd-Frank Act amendments to the CEA, including revisions regarding the information a reporting market must record and publish on futures, swap, and options contracts on a commodity.[328] Specifically, the proposed amendments to part 16 specified the type of information that DCMs or SEFs must publish daily regarding the swaps contracts traded. The proposed rule required that DCMs and SEFs publish specified information for each trading day, for each swap, class of swaps, option on a swap, or class of options on a swap, as appropriate. For swap contracts that are standard-sized contracts (i.e., contracts that have a set contract size for all contracts), the proposed rule required the reporting of volume and open interest for swaps and options on swaps in terms of number of contracts traded, similar to how futures contracts currently are reported. For swap contracts that are non-standard-sized (i.e., contracts whose contract size can

Act, for a 90-day review period, thereby triggering a public comment period.

[319] The DCM NPRM noted, for example, that a DCM's Web site may contain a separate web page for ''regulatory filings'' or ''rule certifications'' for posting submissions or certifications pertaining to new product listings, new rules, rule amendments or changes to previously-disclosed information. DCM NPRM at 80586.

[320] CME Comment Letter 28–29 (Feb. 22, 2011); KCBT Comment Letter at 6 (Feb. 22, 2011).

[321] CME Comment Letter at 29 (Feb. 22, 2011); KCBT Comment Letter at 6 (Feb. 22, 2011).

[322] CME Comment Letter at 29 (Feb. 22, 2011).

[323] *Id.*

[324] *See* former acceptable practices to Core Principle 7. 17 CFR part 38, appendix B (2010).

[325] *See* 76 FR 44776, 44794, July 27, 2011.

[326] *Id.*

[327] As noted above, the requirement to maintain an accurate and updated rulebook does not relieve DCMs of their obligations under proposed paragraph (c) to post on their Web sites all rule filings and submissions submitted to the Commission.

[328] The term commodity also includes ''excluded commodities.''

vary for each transaction), the proposed rule required that the volume and open interest be reported in terms of total notional value traded for that trading day.

The Commission also proposed to amend § 16.01(b) to require each DCM or SEF to publish for each trading day, by commodity and contract month or by tenor of the swap, the opening price, high price, low price and settlement price of the swap or option on swap contract.

The Commission requested comments on end-of-day price reporting for swaps. Specifically, the Commission requested comments on the following issues:

- For interest rate swaps, because the tenor on an interest rate swap can be one of thousands of possible periods, what would be an appropriate manner to display end-of-day prices for each interest rate swap?
- Would certain end-of-day swap price reporting be more meaningful than others? If so, which methods of price reporting would be more meaningful and why?
- Would certain end-of-day swap price reporting be misleading? If so, which methods of price reporting would be misleading and why?

The Commission also proposed to revise § 16.01 to require reporting markets to report directly to the Commission pursuant to the requirements of 16.01(d), information pertaining to the total volume of block trades that are included in the total volume of trading.

Finally, the Commission also proposed to codify the statutory text of the core principle in § 38.450, and is adopting the rule, as proposed.

Summary of Comments

Several commenters discussed the revised reporting requirements that were proposed in § 16.01. Eris stated that DCMs and SEFs should be held to the same reporting standards for interest rate swaps.[329] In particular, Eris commented that a DCM or SEF should report real-time, intraday prices for par swaps at standard maturities, publish open interest grouped in maturity buckets based on the remaining tenor of each instrument, and publish at the end of day the settlement curve from the clearinghouse as well as the specific settlement values applied to each cleared swap.[330] Specifically, Eris recommended: (1) That daily open interest should be published publicly in a summary fashion with open interest grouped in maturity buckets based on the remaining tenor of each instrument, (2) that end of day pricing should be based upon a market-driven curve where the clearinghouse's methodology to generate the daily settlement curve, as well as all of the inputs and components of the settlement curve, are made transparent to the full trading community, and (3) the clearinghouse should publish the specific daily settlement values applied to each cleared swap, without revealing open interest at a granular level.[331]

Better Markets recommended that proposed § 16.01 also require the daily publication of the number of orders and order cancellations separately for futures, options and swaps.[332] According to Better Markets, that data would indicate the levels of high frequency trading activity within market segments.[333]

CME stated that while it does not object to reporting block trades that are included in the daily volume of trading, this new requirement will require it to ascertain what systems changes will be necessary and how long such changes will take to implement.[334] CME also stated that the end of day price reporting of interest rate swaps should be addressed as a separate initiative outside of the DCM and SEF rulemakings given the state of change in the swaps markets and how the market is expected to evolve as a result of regulatory reforms underway.[335]

Discussion

The Commission is codifying § 16.01 as proposed, with a technical revision to renumber paragraph (a).

The Commission recognizes that the end-of-day reporting for interest rate swaps by each DCM and SEF may require a more flexible reporting scheme to take into account the venue in which the interest-rate swap is cleared. In this respect, the daily settlement curve (the yield curve for particular interest rate (e.g., LIBOR, TIBOR, Euribor, etc.)) at each clearinghouse may differ based on the assumptions of the curve. The Commission has considered the proposed reporting standard put forth by Eris, however, in light of the novelty of swaps trading on DCMs, the Commission believes that the more detailed reporting obligations under § 16.01 are warranted at this time. The Commission did not receive any objections to the additional reporting of block trades or to the swaps reporting standards. The Commission further clarifies that in making information available to the general public, as required in 16.01(e), DCMs should ensure that such information can be accessed by visitors to the Web site without the need to register, log in, provide a user name or obtain a password.[336]

Better Markets' comments pertaining to high frequency trading are addressed under the general discussion in Core Principle 4 pertaining to HFTs.

9. Subpart J—Execution of Transactions

The Dodd-Frank Act revised Core Principle 9 to read as follows:

> The board of trade shall provide a competitive, open and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade. * * * The rules of the board of trade may authorize, for bona fide business purposes:
> (a) Transfer trades or office trades;
> (b) An exchange of:
> (1) Futures in connection with a cash commodity transaction;
> (2) Futures for cash commodities; or
> (3) Future for swaps; or
> (c) A futures commission merchant, acting as principal or agent, to enter into or confirm the execution of a contract for the purchase or sale of a commodity for future delivery if the contract is reported, recorded, or cleared in accordance with the rules of the contract market or a derivatives clearing organization.[337]

In view of Congress' revisions to Core Principle 9, and the Commission's own experience over the past decade in overseeing compliance with former Core Principle 9[338] and related regulation 1.38,[339] the Commission proposed a number of new and revised rules, guidance and acceptable practices in order to implement the revised core principle, which requires DCMs to

[329] Eris Comment Letter at 4 (Feb. 22, 2011).

[330] *Id.* at 4–5.

[331] *Id.*

[332] Better Markets Comment Letter at 9 (Feb. 22, 2011).

[333] *Id.*

[334] CME Comment Letter at 29 (Feb. 22, 2011).

[335] *Id.*

[336] *See e.g.,* former acceptable practices to Core Principle 7 (imposing similar requirement with respect to rulebooks). 17 CFR part 38, appendix B (2010).

[337] 7 U.S.C. 7(d)(9). The language that provides that off-exchange transactions are permitted for bona fide business purposes if authorized by the board of trade's rules was formerly contained in Designation Criteria 3.

[338] Former Core Principle 9 provided as follows: ''[T]he board of trade shall provide a competitive, open and efficient market and mechanism for executing transactions.''

[339] As described in the DCM NPRM, regulation 1.38 (Execution of Transactions) of the Commission's regulations requires, among other things, that all purchases and sales of a commodity for future delivery or a commodity option on or subject to the rules of a DCM be executed by open and competitive methods, with certain exceptions for transactions that are executed noncompetitively pursuant to a DCM's rules. *See* DCM NPRM, 75 FR at 80588 (discussing regulation 1.38).

provide a competitive, open and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade.

Proposed § 38.500 codified the statutory text of Core Principle 9.[340] Proposed § 38.501 specified the manner in which transactions on the DCM's centralized market must be executed, and set forth the requirements applicable to transactions that are executed off of the DCM's centralized market, and incorporated certain clarifications pertaining to the allowable types of off-exchange transactions. Proposed § 38.502 implemented the core principle's requirement that DCMs provide a market and mechanism for executing transactions that protects the price discovery process of trading in its centralized market. The rule proposed a centralized market trading requirement for all contracts listed on a DCM.

Proposed § 38.503 set forth revised rules and related guidance pertaining to block transactions in futures contracts, including the appropriate size, price and reporting of block trades; proposed § 38.504 set forth rules pertaining to block transactions in swap contracts. Finally, the DCM NPRM proposed new and revised rules under Core Principle 9 that clarified other off-exchange transactions, referred to collectively as ''exchanges of derivatives for related positions'' and office trades and transfer trades.

Summary of Comments and Discussion

The Commission received a significant number of comments on all aspects of the proposed rules under Core Principle 9, comprising both general and specific comments pertaining to the Commission's interpretation of Core Principle 9 and various other aspects of the proposed rules.

In particular, commenters raised numerous questions pertaining to the centralized market trading requirement rule's delisting requirement for non-compliant contracts and the available alternatives for trading such contracts.[341] Commenters also raised questions pertaining to certain aspects of the proposed rules for block transactions and exchanges of derivatives for related position transactions.[342] The Commission has considered these comments, along with comments pertaining to other aspects of the proposed rules under Core Principle 9, and believes that additional time is appropriate before finalizing the proposed rules for Core Principle 9. In particular, the Commission plans and expects to take up the proposed rules under Core Principle 9 when it considers the final SEF rulemaking. The additional time will allow the Commission to consider the available alternatives for contracts that may not comply with the proposed centralized market trading requirement (including listing contracts on a SEF), as well as the related implications of the rules for off-exchange transactions, including block transactions and exchange of derivatives for relates position transactions (''EDRPs''). At that time, the Commission will address the comments received in connection with proposed §§ 38.501–38.506.

10. Subpart K—Trade Information

Section 5(d)(10) of the CEA (Core Principle 10), as amended by the Dodd-Frank Act, requires DCMs to capture, verify, and retain detailed trade information (*i.e.,* audit trail data) for all transactions in their markets. The core principle requires DCMs to maintain rules and procedures that provide for the recording and safe storage of all identifying trade information in a manner that enables the DCM to assist in the prevention of customer and market abuses and to provide evidence of any rule violations. The Dodd-Frank Act did not substantively revise Core Principle 10, and therefore, the application guidance and acceptable practices for former Core Principle 10 provided the basis for the Commission's proposed audit trail regulations in subpart K.[343] In addition, the Commission also looked to the issues that arose in the context of RERs pertaining to Core Principle 10.

The Commission proposed to codify the statutory text of Core Principle 10 in proposed § 38.550, and is adopting that rule as proposed.

i. § 38.551—Audit Trail Required

Proposed § 38.551 is based on the application guidance and acceptable practices for former Core Principle 10.[344] Proposed § 38.551 established the overarching requirement that a DCM's audit trail program must help to ensure that the DCM can appropriately monitor and investigate any potential customer and market abuse. The proposed rule also provided that the audit trail data captured by a DCM must be sufficient to reconstruct all transactions within a reasonable period of time, and to provide evidence of any rule violations that may have occurred. The proposed rule further provided that audit trails must be sufficient to track customer orders from the time of receipt through fill, allocation, or other disposition. Proposed § 38.551 applied equally to open-outcry and electronic trading.[345]

Summary of Comments

Two commenters stated that the proposed rule is too prescriptive.[346] CME argued that the proposals were a departure from a principles-based regulatory regime and would stifle growth and innovation.[347] Similarly, MGEX argued that prescriptive rules would impose additional burdens and costs upon DCMs.[348]

Chris Barnard agreed with the proposed requirement that all DCMs have the ability to reconstruct all trading.[349] Mr. Barnard suggested that the requirement that an exchange be able to reconstruct trading should include ''all trading events, including the entry of bids and offers in the order of their occurrence, as well as executed trades * * *'' in order to permit

[340] The Commission is finalizing regulation 38.500 in this release.

[341] *See, e.g.,* CME Comment Letter at 4–8, 29–30 (Feb. 22, 2011); CME Comment Letter at 2–6 (April 18, 2011); CME Joint Comment Letter at 2–6 (June 3, 2011); CME Comment Letter (Aug. 3, 2011); BlackRock Comment Letter at 2–3 (Feb. 22, 2011); ICE Comment Letter at 3–6 (Feb. 22, 2011); CFE Comment Letter at 4–7 (Feb. 22, 2011); CFE Comment Letter (June 3, 2011); OCX Comment Letter at 2–5 (Feb. 22, 2011); Eris Comment Letter at 1–3 (Feb. 22, 2011); Eris Comment Letter at 3 (June 3, 2011); GreenX Comment Letter at 8–11 (Feb. 22, 2011); GreenX Comment Letter at 4 (April 18, 2011); and, GreenX Comment Letter (June 3, 2011).

[342] *See, e.g.,* ICE Comment Letter at 7 (Feb. 22, 2011); CME Comment Letter at 31 (Feb. 22, 2011); ELX Comment Letter at 3 (Feb. 22, 2011); and, KCBT Comment Letter at 6 (Feb. 22, 2011).

[343] The Commission previously expressed the regulatory requirements of former Core Principle 10 through its application guidance for that core principle. *See* 17 CFR part 38, app. B, Application Guidance and Acceptable Practices for Core Principle 10. It also provided additional insight regarding the core principle through detailed acceptable practices that all DCMs could use to demonstrate compliance with former Core Principle 10. The acceptable practices explained that ''the goal of an audit trail is to detect and deter customer and market abuse.'' *Id.* at (b)(1). It also outlined the elements of an effective audit trail. Those elements included original source documents, which help to establish the accuracy and authenticity of an audit trail. Also included is a transaction history database and electronic analysis capability, which allow a DCM to more easily access and review audit trail data to identify possible trading abuses and rule violations. Finally, the acceptable practices pointed to a DCM's safe storage capability, emphasizing that audit trail data must be stored in a manner that protects it from unauthorized alteration, accidental erasure, or other loss.

[344] 17 CFR part 38, app. B, Core Principle 10, Application Guidance and Acceptable Practices.

[345] 75 FR 80572, 80617–80618, Dec. 22, 2010.

[346] CME Comment Letter at 33–34 (Feb. 22, 2011); and MGEX Comment Letter at 7 (Feb. 22, 2011).

[347] CME Comment Letter at 34 (Feb. 22, 2011).

[348] MGEX Comment Letter at 7 (Feb. 22, 2011).

[349] Barnard Comment Letter at 2 (May 20, 2011).

exchanges to fully reconstruct and verify all trading activities.[350]

Discussion

The Commission is adopting § 38.551 as proposed. While the Commission acknowledges CME and MGEX's comments, the Commission does not believe that requiring an exchange to capture and retain all audit trail data—to ensure that the exchange can reconstruct all transactions on its markets—places an undue burden on exchanges or stifles innovation. As noted above, the requirement that DCMs capture and retain all audit trail data is central to ensuring that the DCM can appropriately monitor and investigate any potential customer and market abuse, as required by the core principle. The Commission is not persuaded that this requirement would unduly burden DCMs, as these requirements are the same as the responsibilities currently outlined in the Acceptable Practices and Application Guidance for Core Principle 10. In addition, exchanges are free to decide the manner and the technology they use to capture and retain audit trail data. The Commission is not prescribing how this should be done and therefore does not believe that this requirement will stifle innovation.

The Commission also notes that the text of § 38.551 defines certain regulatory outcomes that exchanges must achieve, but does not prescribe a specific means by which exchanges must achieve those outcomes. Accordingly, the rule is not prescriptive as it permits an exchange to achieve the required outcome in a number of ways.

Proposed § 38.551 required that a DCM ''must capture and retain all audit trail data necessary to detect, investigate, and prevent customer and market abuses.'' [351] The creation and retention of a comprehensive audit trail enables exchanges to properly reconstruct any and all trading events and to conduct a thorough forensic review of all trade information. The Commission believes that the ability to reconstruct trading is a fundamental element of a DCM's surveillance and rule enforcement programs.

ii. § 38.552—Elements of an Acceptable Audit Trail Program

Proposed § 38.552 established the four elements of an acceptable audit trail program. First, proposed § 38.552(a) required a DCM's audit trail to include original source documents, defined to include unalterable, sequentially-identified records on which trade execution information is originally recorded, whether manually or electronically. Additionally, the proposal required that customer order records indicate the terms of the order, the account identifier that relates to the account owner, and the time of the order entry. Finally, proposed § 38.552(a) required that, for open-outcry trades, the time of report of order execution also be captured in the audit trail.

Second, proposed § 38.552(b) required that a DCM's audit trail program must include a transaction history database. Proposed § 38.552(b) specified the trade information required to be included in a transaction history database, including a history of all orders and trades; all data input in the trade matching system for clearing; the categories of participants for which trades were executed (i.e., customer type indicator or ''CTI'' codes); timing and sequencing data sufficient to reconstruct trading; and identification of each account to which fills were allocated.

Third, proposed § 38.552(c) required that a DCM's audit trail program have electronic analysis capability for all data in its transaction history database, and that such electronic analysis capability allow the exchange to reconstruct trades in order to identify possible rule violations.

Finally, proposed § 38.552(d) required that a DCM's audit trail program include the ability to safely store all audit trail data, and to retain data in accordance with the recordkeeping requirements of DCM Core Principle 18 and associated regulations. Safe storage capability required a DCM to protect its audit trail data from unauthorized alteration, accidental erasure, or other loss.

Summary of Comments

In addition to submitting general comments asserting that the proposed rules are overly prescriptive, CME stated that while it currently maintains a database that includes a history of all orders and trades for electronic trading, the open outcry trading venue ''does not support an electronic transaction history database that captures the history of all orders, including orders that may be cancelled prior to execution.'' [352] CME requested that, in the event that open-outcry orders are not entered into an electronic order routing system, the Commission clarify the requirements to take into account the distinctions between electronic and open-outcry trading.[353]

Better Markets requested that the Commission consider the impact that high-frequency traders may have on creation and maintenance of an exchange's audit trail data.[354] Specifically, Better Markets commented that each of the elements of an exchange's audit trail, including all customer orders, should be ''time-stamped at intervals consistent with the capabilities of [high-frequency traders] * * *'' [355]

Discussion

The Commission is adopting § 38.552 as proposed, with certain revisions in response to comments received, and additional clarifications as explained below.

First, in response to CME's comment that the Commission's audit trail rules should recognize the distinctions between electronic trading and open outcry trading, the Commission is revising § 38.552(b) to specify that a transaction history database must include a history of all trades, whether executed electronically or via open-outcry. However, order information must be included in the database only to the extent that such orders are entered into an electronic trading system. In addition, § 38.552(b) also clarifies that order data includes modifications and cancellations of such orders. This reflects a regulatory requirement previously proposed as part of § 38.156, but moved to § 38.552(b) in the final rules. The final rules further revise § 38.552(b)(2) by replacing the customer type indicators listed in the proposed rule with the term ''customer type indicator code.''

The final rules also revise § 38.552(c) to include the requirement that an exchange's electronic analysis capability must provide it with the ability to reconstruct trading and identify possible trading violations.[356]

The Commission acknowledges Better Markets' comments regarding audit trail data with respect to high-frequency trading. However, the Commission believes that the audit trail rules adopted herein, particularly the requirements that an exchange retain and maintain all data necessary to permit it to reconstruct trading, will help ensure that information and trades entered into an electronic trading system by high-frequency traders will be collected and retained as any other

[350] *Id.*

[351] DCM NPRM at 80617–18.

[352] CME Comment Letter at 33 (Feb. 22, 2011).

[353] *Id.*

[354] Better Markets Comment Letter at 9 (Feb. 22, 2011).

[355] *Id.* at 10.

[356] The text added to regulation 38.552(c) is language originally proposed in regulation 38.156 and has now been deleted from regulation 38.156.

audit trail data would be collected and retained.

The Commission believes that the four elements set forth in § 38.552 are necessary to ensure that a DCM can capture and retain sufficient trade-related information, can reconstruct trading promptly, and has the necessary tools to detect and deter potential customer and market abuses through its audit trail. Specifically, original source documents must include all necessary trade information to reconstruct trading on the DCM. The transaction history database facilitates rapid access and analysis of all original source documents, thereby aiding DCMs in monitoring for customer and market abuses, while electronic analysis capability helps ensure effective use of audit trail data by requiring appropriate tools to use in conjunction with a DCM's transaction history database. Safe storage capability enables a DCM to properly preserve and protect the audit trail data so that it is readily available for the DCM to use in any future investigation or inquiry into possible violations of DCM rules.

With the clarifications and revisions discussed above, the Commission adopts § 38.552 as the elements required of an acceptable audit trail program.

iii. § 38.553—Enforcement of Audit Trail Requirements

Proposed § 38.553 established the elements of an effective audit trail enforcement program. The proposed rule was organized in two parts. First, proposed § 38.553(a) required a DCM to develop an effective audit trail enforcement program. The proposed rule provided that an effective enforcement program must, at a minimum, review all members and market participants annually to verify their compliance with all applicable audit trail requirements.

Proposed § 38.553(a) was further divided into two paragraphs. Paragraph (a)(1) set forth minimum review criteria for an electronic trading audit trail, including annual examinations by DCMs of randomly selected samples of front-end audit trail data from order routing systems to ensure the presence and accuracy of required audit trail data. In addition, paragraph (a)(1) required that exchanges: Review the processes used by members and market participants to assign and maintain exchange user identifications; review usage patterns associated with user identifications; and review account numbers and CTI codes in trade records to test for accuracy and improper usage. Paragraph (a)(2) of proposed § 38.553 established minimum review criteria for open-outcry trading, requiring DCMs to conduct annual reviews of all members and market participants to verify their compliance with their trade timing, order ticket, and trading card requirements.

Second, proposed § 38.553(b) required DCMs to develop programs to ensure effective enforcement of their audit trail and recordkeeping requirements. This requirement applied equally to both open-outcry and electronic trading. Proposed § 38.553(b) required exchanges' enforcement programs to identify members and market participants that routinely failed to comply with the requirements of Core Principle 10 and to levy meaningful sanctions when deficiencies were found. Such sanctions could not include more than one warning letter or other non-financial penalty for the same violation within a rolling 12 month period.

Summary of Comments

As noted above with respect to other rules, several commenters requested clarification of the term ''market participant'' in § 38.553(a) and § 38.553(b), including questioning who qualifies as a ''market participant.'' [357] Specifically, MGEX and NYSE Liffe suggested that the term ''market participant'' should be limited to only those participants who have direct access to the trading platform.[358] CME commented that the Commission should limit the requirement for annual audit trail reviews to the ''clearing firm level rather than the market participant level'' because conducting an annual audit trail and recordkeeping review of ''every participant who enters an order into [a trading system would be] exceptionally onerous, costly and unproductive.'' [359] Additionally, MGEX argued that exchanges should be permitted to conduct annual reviews by testing a sample of market participants in order to make the annual reviews of audit trail and recordkeeping requirements ''more efficient, adequate and less burdensome.'' [360]

In response to the proposed § 38.553(b)'s requirement for sufficient sanctions for violations of audit trail and recordkeeping requirements, MGEX argued that such a requirement is ''arbitrary and counterproductive.'' [361] MGEX proposed that the Commission should simply require exchanges to have an adequate audit trail program, including adequate enforcement of the audit trail requirements.[362] MGEX argued that such an approach would allow an exchange to develop ''what works best for their business while meeting intended audit trail requirements.'' [363]

Discussion

The Commission adopts proposed § 38.553, with certain amendments.

The Commission has considered the comments pertaining to this rule and believes that the term ''market participants,'' as used in §§ 38.553(a) and 38.553(b), requires clarification. Accordingly, ''market participants'' is amended to instead state ''persons and firms subject to designated contract market recordkeeping rules'' throughout § 38.553. The Commission recognizes that the term ''market participants'' may be viewed to capture a wider range of persons than the Commission intended to subject to the proposed regulation. Therefore, this amendment to § 38.553 clarifies that its requirements apply to those individuals and firms that are subject to DCM recordkeeping rules.

The Commission does not believe that sampling-based reviews of audit trail and recordkeeping requirements are adequate to reasonably ensure compliance with audit trail rules. Sections 38.553(a) and 38.553(b) require audit trail enforcement programs that will yield some certainty with respect to exchanges' accurate and consistent access to all data necessary to reconstruct all transactions in their markets and provide evidence of customer and market abuses. Absent reliable audit trail data, an exchange's ability to detect or investigate customer or market abuses may be severely diminished.

The Commission does not believe that requiring exchanges to issue no more than one warning letter for the same violation within a rolling 12-month time period is arbitrary and counterproductive. The proposed requirement to limit DCMs to no more than one warning letter for the same violation within a rolling 12-month time period helps ensure that exchanges levy meaningful fines and sanctions to deter recidivist behavior. However, the Commission is amending § 38.553(b) to clarify that its requirements with respect to warning letters only apply where exchange compliance staff finds an actual rule violation, rather than just the suspicion of a violation.

[357] CME Comment Letter (Feb. 22, 2011); NYSE Liffe Comment Letter (Feb. 22, 2011); MGEX Comment Letter (Feb. 22, 2011).

[358] MGEX Comment Letter at 7 (Feb. 22, 2011); NYSE Liffe Comment Letter at 12 (Feb. 22, 2011).

[359] CME Comment Letter at 33(Feb. 22, 2011).

[360] MGEX Comment Letter at 7 (Feb. 22, 2011).

[361] *Id.*

[362] *Id.*

[363] *Id.*

The Commission notes that § 38.553 reflects staff's findings and recommendations in recent RERs regarding DCMs' audit trail enforcement programs, including recommendations regarding more frequent audit trail reviews and larger sanctions for audit trail violations. The proposed rule also reflects the Commission's directive to DCMs in recent RERs to develop audit trail programs for electronic trading that are comparable in rigor and scope to their audit trail programs for open-outcry trading.[364] Accordingly, the Commission is adopting § 38.553 with the aforementioned modifications.

11. Subpart L—Financial Integrity of Transactions

The Dodd-Frank Act amended the text of Core Principle 11 largely to incorporate the language from former Designation Criteria 5.[365]

This core principle requires that a DCM establish and enforce rules and procedures for ensuring the financial integrity of transactions entered into, on, or through the facilities of the contract market, including the clearing and settlement of the transactions with a DCO. Core Principle 11 also requires that a DCM establish and enforce rules to ensure: (i) The financial integrity of any futures commission merchant (''FCM'') and introducing broker (''IB''); and (ii) the protection of customer funds. Because the substance of this core principle is unchanged, the Commission interpreted the statutory provisions in the same manner as they are currently interpreted. The Commission proposed to codify current practices carried out by the industry, as well as practices listed in the application guidance for Core Principle 11 and former Designation Criterion 5. In addition, based upon its experience, the Commission proposed some new practices and requirements for DCMs in implementing Core Principle 11.[366] Among other rules, the Commission proposed to codify the statutory text of Core Principle 11 in § 38.600, and is adopting the rule as proposed.

i. § 38.601—Mandatory Clearing

Proposed § 38.601 provided that all transactions executed on or through a DCM, other than transactions in security futures products, be cleared through a Commission-registered DCO.

Summary of Comments

CME commented that the mandatory clearing requirement should not apply to swaps traded on a DCM because not all swap contracts will be required to be cleared, such as foreign exchange swaps and swaps for end users.[367] CME further stated that this requirement would put a DCM at a competitive disadvantage to a SEF without justification, and recommended that the Commission revise proposed § 38.601 to exclude swaps from the clearing rule.[368]

Discussion

The Commission is adopting the proposed rule, with certain amendments. The Commission believes that the language of the core principle specifically imposes a clearing obligation for all transactions executed on a DCM (as is the current practice) and has therefore not revised the rule to exclude swaps.[369]

However, the Commission has revised the rule to make clear that transactions in security futures products that are executed on or through a DCM are also subject to the mandatory clearing requirement. Such products may be cleared either through a DCO or through a clearing agency registered pursuant to section 17A of the Securities Exchange Act of 1934.[370]

ii. § 38.602—General Financial Integrity

Proposed § 38.602 provided that DCMs must adopt rules establishing minimum financial standards for both member FCMs and IBs and non-intermediated market participants.

Summary of Comments

ICE contended that the Commission has expanded the standard in Core Principle 11 by requiring DCMs to establish minimum financial standards for all of their members and non-intermediated market participants.[371] ICE further stated that many DCMs eliminated specific financial standards for their non-FCM members and instead require that non-FCM member transactions be guaranteed by a clearing member.[372] As a result, ICE requested confirmation that a DCM rule requiring such clearing arrangements to be in place would satisfy proposed § 38.602.[373] ICE also requested confirmation that a DCM rule requiring an FCM to maintain capital in accordance with applicable Commission regulations would satisfy the DCM's duty to set financial requirements for its FCM members.[374]

Discussion

The Commission is adopting the rule as proposed. In response to ICE's comments, the Commission confirms that a DCM rule requiring that transactions by a non-FCM member be guaranteed by a clearing member will satisfy § 38.602.[375]

However, a DCM rule requiring an FCM to maintain capital in accordance with applicable Commission regulations will not, in itself, satisfy the DCM's duty to set minimum financial standards for its FCM members. The term ''minimum financial standards'' used in § 38.602 is not intended to cover only capital requirements. Rather, § 38.602 should be read in conjunction with § 38.604, which requires surveillance by a DCM of financial and related information from each of its members. The Commission notes that a DCM's duty to set financial standards for its FCM members involves setting capital requirements, conducting surveillance of the potential future exposure of each FCM as compared to its capital, and taking appropriate action in light of the results of such surveillance.

[364] *See* Rule Enforcement Review of the Minneapolis Grain Exchange (August 27, 2009), and Rule Enforcement Review of ICE Futures U.S. (Feb. 2, 2010).

[365] Former Designation Criterion 5 stated that ''the board of trade shall establish and enforce rules and procedures for ensuring the financial integrity of transactions entered into by or through the facilities of the contract market, including the clearance and settlement of the transactions with a derivatives clearing organization.'' 17 CFR Part 38, app. A (2010).

[366] The Commission received five comment letters that discussed proposed regulations 38.600 through 38.607. The comments were received from ICE Comment Letter (Feb. 22, 2011), ELX Comment Letter (Feb. 22, 2011), MGEX Comment Letter (Feb. 22, 2011), KCBT Comment Letter (Feb. 22, 2011), and CME Comment Letter (Feb. 22, 2011).

[367] CME Comment Letter at 34 (Feb. 22, 2011).

[368] *Id.*

[369] Although the DCM and SEF Financial Integrity Core Principles are similar, the SEF core principle contains the language ''including the clearance and settlement of the swaps pursuant to section 2(h)(1).'' Section 5h(f)(7) of the CEA, 7 U.S.C. 7b–2(f)(7), as added by section 733(f) of the Dodd-Frank Act. The DCM core principle states ''including the clearance and settlement of the transactions with a derivatives clearing organization.'' The Commission reads section 2(h)(1) as a limitation on the clearing obligation for SEFs, and as a result, proposed regulation 37.701 requires all transactions executed on a SEF to be cleared unless the transaction is exempted from clearing under section 2(h)(7) of the CEA or the Commission determines that the clearing requirement under section 2(h)(1) of the CEA is inapplicable. Since Congress did not provide for a limitation on the clearing obligation in the DCM core principle, all transactions executed on or through a DCM must be cleared through a Commission-registered DCO.

[370] 15 U.S.C. 78a *et seq.* (2010)

[371] ICE Comment Letter at 12 (Feb. 22, 2011).

[372] *Id.* at 13.

[373] *Id.*

[374] *Id.*

[375] The Commission notes that this requirement does not speak to DCO requirements under, for example, Core Principle D (Risk Management) for its clearing members.

iii. § 38.603—Protection of Customer Funds

Proposed § 38.603 provided that DCMs must adopt rules for the protection of customer funds, including the segregation of customer and proprietary funds, the custody of customer funds, the investment standards for customer funds, intermediary default procedures and related recordkeeping.

Summary of Comments

KCBT stated that because its rules incorporate by reference the requirements of the CEA, the requirement to implement exchange rules that mirror Commission regulations is duplicative, unnecessary and burdensome.[376] In addition, KCBT noted that its clearing corporation already has rules in place to address intermediary default procedures.[377]

Discussion

The Commission is adopting the rule as proposed. In response to the comments, the Commission confirms that DCMs must adopt rules as required under § 38.603. Establishing such rules is important because it will provide evidence: (i) that each DCM has focused attention on the specific regulations promulgated under the CEA; and (ii) that such regulations are appropriately implemented. Section 38.603 does not specify the exact rules to be implemented by each DCM, but sets forth the substance of what the rules of each DCM must address.

In response to KCBT's comment that its clearing corporation already has rules in place to address intermediary default procedures, the Commission notes that DCO rules protect the DCO, not fellow customers. Nonetheless, the performance of the functions required by § 38.603 may be allocated between a DCO and DCM pursuant to appropriate written agreements. Such agreements would have to include an arrangement between the DCO and DCM that the DCO would undertake the responsibility to protect the individual customers of the DCM.

iv. § 38.604—Financial Surveillance

Proposed § 38.604 required that a DCM must routinely receive and promptly review financial and related information from its members, and conduct ongoing financial surveillance of the risk created by the positions taken by an FCM's customers. To meet this requirement, the DCM must have rules pertaining to minimum financial standards of intermediaries that include, among other things, rules prescribing minimum capital requirements for member FCMs and IBs.[378] The DCM must also have rules pertaining to the protection of customer funds that must include, among other things, that each DCM must continually survey the obligations of each FCM created by its customers' positions and, as appropriate, compare those obligations to the financial resources of the FCM. If the obligations of a member FCM appear excessive as compared to the FCM's capital, a DCM should take appropriate action, including contacting the FCM or the FCM's designated self-regulatory organization (''DSRO'').

Summary of Comments

KCBT commented that it already reviews on a daily basis the open positions and percentage of open interest held by each clearing member, and ''pay/collect information'' based upon open positions and reportable positions.[379] KCBT is concerned that the use of the terms ''continually'' and ''excessive'' in the proposed regulation is vague.[380] In addition, KCBT noted that the DSRO should continue to review the obligations of each firm for which it is the DSRO because the DSRO has access to all customer positions being carried by the FCM in all markets and thus is in a better position to ensure that the FCM has sufficient capital for the overall positions being carried by the FCM.[381]

Discussion

The Commission is adopting the rule as proposed and notes that the rule codifies existing industry practice. In response to comments raised by KCBT, the Commission notes that the term ''continually'' in the proposed rule requires that a DCM survey the obligations of each FCM created by the positions of its customers throughout the trading day, not just based upon end-of-day positions. Financial risk can shift dramatically throughout the day as a result of the combination of price move and new trades, making it difficult for a DCM to fulfill its obligations to establish and enforce rules to ensure: (i) the financial integrity of FCMs and IBs and (ii) the protection of customer funds pursuant to Core Principle 11, if such DCM limited its monitoring to daily. FCMs and IBs could be exposed to excessive risk if they are taking on risky positions during the day with the expectation that those risks will be offset prior to the daily review period set by the DCM. The Commission also notes that an arrangement between a DCO and a DCM, whereby the DCO is responsible to a DCM for the performance of certain functions, including the monitoring required pursuant to § 38.604, will continue to be permitted by the Commission.

In response to KCBT's comment regarding the vagueness of the word ''excessive,'' the Commission expects a DCM to exercise professional judgment in monitoring the risks of its FCMs as compared to their available capital, and to take follow-up action to inquire into and address any exceptional situations. This monitoring should occur in addition to any DSRO review.

v. § 38.605—Requirements for Financial Surveillance Program

Proposed § 38.605 required DCMs, as self-regulatory organizations (''SROs''), to comply with the standards of amended § 1.52 to ensure the financial integrity of intermediaries by establishing and carrying out an SRO program for the examination and financial supervision of intermediaries. Section 1.52, as proposed to be amended, sets forth the required elements of SRO supervisory programs and permits one or more SROs to establish, subject to Commission approval, a joint audit plan to provide for the SRO supervision of members of more than one SRO. As noted in the DCM NPRM, proposed amendments to § 1.52 included references to existing guidance to SROs contained in the Financial and Segregation Interpretation No. 4–1 (Advisory Interpretation for Self-Regulatory Organization Surveillance Over Members' Compliance with Minimum Financial, Segregation, Reporting, and Related Recordkeeping Requirements), and Addendums A and B to Financial and Segregation Interpretation No. 4–1, and Financial and Segregation Interpretation No. 4–2 (Risk-Based Auditing), which guided the practices of members of the Joint Audit Committee (''JAC'') operating a joint audit plan that had been approved by the Commission.[382]

Discussion

No comments were received pertaining to the proposed rules, and the Commission is adopting proposed

[376] KCBT Comment Letter at 7 (Feb. 22, 2011).

[377] *Id.*

[378] An FCM that is a clearing member will also have additional obligations to the DCO as a result of its clearing membership.

[379] *See* KCBT Comment Letter at 7 (Feb. 22, 2011).

[380] *Id.*

[381] *Id.*

[382] *See* 73 FR 52832, Sept. 11, 2008 (requesting comments prior to the Commission's approval of the most recent Joint Audit Committee agreement, which approval was granted March 18, 2009). *See also,* DCM NPRM, 75 FR at 80596.

§ 38.605 and § 1.52 without modification.

The Commission notes that the staff guidance contained in Division of Trading and Markets Financial and Segregation Interpretations 4–1 and 4–2, and related Addendums A and B to Financial and Segregation Interpretations 4–1, remains effective. Accordingly, while the revised § 1.52(b)(4) provides that an SRO's financial surveillance program must include the onsite examination of each member FCM no less frequently than once every 18 months, Financial and Segregation Interpretation No. 4–2 provides that FCMs should generally be subject to an onsite examination at least once every 9 to 18 months, with examination cycles exceeding 15 months only for registrants with a demonstrated history of strong compliance and risk management in order to provide flexibility for unexpected events or to vary examination dates.

While § 1.52 now codifies long established staff positions, and SRO practice, with respect to the manner in which SROs execute their financial surveillance and supervisory programs with respect to member intermediaries, the Commission will continue to evaluate options to further enhance the manner in which intermediaries are supervised and to strengthen the protection of customer funds.

vi. § 38.606—Financial Regulatory Services Provided by a Third Party

Proposed § 38.606 provided that DCMs may satisfy their financial surveillance responsibilities under proposed §§ 38.604 and 38.605 by outsourcing such responsibilities to a registered futures association or other regulated entity, including, for example, a DCO. Proposed § 38.606 provided that a DCM must ensure that the regulatory service provider has the capacity and resources to conduct the necessary financial surveillance and, notwithstanding the use of a regulatory service provider, the DCM remains responsible for compliance with its financial surveillance obligations.

Summary of Comments

MGEX commented that the proposed requirements seem reasonable, and stated that the requirements could be satisfied under the current delegation and information sharing agreements such as the Commission-approved JAC Agreement for Services.[383] MGEX also commented that DCMs should not be required to audit third party regulatory providers because that would frustrate the purpose, efficiency, and economic value of outsourcing to a third party.[384]

Discussion

The Commission is adopting the proposed rule without modification. In response to MGEX's comments, the Commission notes that § 38.606 would not be satisfied solely by relying on a DCM's JAC Agreement. The current JAC Agreement does not cover the type of financial surveillance specified in § 38.604, nor does it, by its terms, serve as an outsourcing regulatory services agreement for the type of outsourcing contemplated under § 38.606. Accordingly, in order to satisfy the requirements of both §§ 38.604 and 38.605, a regulatory services agreement must specifically include the following: (i) the regulatory services to be performed, which to satisfy § 38.604 must include intraday monitoring of FCM obligations and positions; (ii) to whom and for whom such services are to be provided; and (iii) a statement or representation that the provider of the services has the capacity and resources to perform the identified services.

vii. § 38.607—Direct Access

Proposed § 38.607 required a DCM that allows customers direct access to its contract market to implement certain direct access controls and procedures in order to provide member FCMs with tools to manage their financial risk. The proposed rule contemplated that an FCM would continue to have primary responsibility for overall risk management, but that the DCM would be required to establish an automated risk management system permitting an FCM to set appropriate risk limits for each customer with direct access to the contract market.

Summary of Comments

CME supports risk controls at both the DCM and DCO levels, and also at clearing firm and direct access client levels.[385] CME supports the discretion that the proposed rules provide a DCM in terms of the control model for access, and recommended a level of standardization with respect to the types of DCM pre-trade controls in the form of acceptable practices.[386] ELX recommended that the Commission consider allowing an FCM to bypass use of DCM-provided controls if an FCM has its own controls that a DCM tests and deems to be sufficient.[387] MGEX commented that the Commission should not mandate that a DCM provide the technology as a prescriptive rule, and further claimed that such tools are the FCM's responsibility and DCMs should not be required to assume these responsibilities.[388]

Discussion

After reviewing the comments discussed above, the Commission is adopting the proposed rule without modification and believes that risk controls are appropriate at the FCM, DCO and DCM levels. The Commission notes that it is impossible for an FCM to protect itself without the aid of the DCM when a customer has direct access to a DCM and thus completes trades that are the financial responsibility of such customer's FCM before the FCM's systems have an opportunity to prevent the execution of such trades. As a result, DCMs allowing customers direct access to their markets must implement certain controls and procedures to allow FCMs to manage their risk. As stated in the proposed rule, these controls would not be required for a DCM that permits only intermediated transactions and does not permit direct access.

The responsibility to utilize these controls and procedures remains with the FCM. Each FCM permitting direct access must use DCM-provided controls, regardless of the purported efficacy of an FCM's controls.[389] This principle is supported by CME's comment letter, the Commission's Technology Advisory Committee report (the ''DMA Report''),[390] and the FIA Report on Market Access Risk Management

[383] MGEX Comment Letter at 8 (Feb. 22, 2011).

[384] *Id.*

[385] CME Comment Letter at 34 (Feb. 22, 2011).

[386] *Id.*

[387] ELX Comment Letter at 5 (Feb. 22, 2011).

[388] MGEX Comment Letter at 8 (Feb. 22, 2011).

[389] The efficacy of these controls also hinge, in part, on the proper functioning of the electronic systems of DCMs, FCMs and direct access market participants, and thus, necessitates that such electronic systems are routinely tested and monitored. Accordingly, the Commission may address additional electronic system testing and supervision-related issues in the future.

[390] *See* Pre-Trade Functionality Subcommittee of the CFTC Technology Advisory Committee report, ''Recommendations on Pre-Trade Practices for Trading Firms, Clearing Firms, and Exchanges Involved in Direct Market Access'' (March 1, 2011), accepted by the TAC and available at: *http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/tacpresentation030111_ptfs2.pdf*. The DMA Report recommends specific controls that should be adopted by each FCM and DCM and notes that ''the exchanges are the point furthest downstream, so coordination at this level has the greatest leverage to impact the industry as a whole.'' DMA Report at p. 4. The controls provided by the DCM serve as the backstop, in the event that an FCM's controls are insufficient. The DMA Report notes that, although the recommendations may seem redundant, it ''strongly believes that an approach of multiple, redundant checks across the supply chain offers the most robust protection to markets.'' *Id.* at p. 5.

Recommendations (the ''FIA Report'').[391]

As discussed in the DCM NPRM, the Technical Committee of the International Organization of Security Commissions (''IOSCO'') published a final report on principles for direct electronic access in August of 2010 (the ''IOSCO DEA Report'') stating that, in an automated trading environment, the only controls that can effectively enforce limitations on risk are automated controls.[392] Further, the IOSCO DEA Report noted that a market should not permit direct electronic access unless effective systems and controls are in place to enable risk management, including automated pre-trade controls enabling intermediaries to implement appropriate trading limits.[393] The IOSCO DEA Report stated that ''[t]here is no convincing rationale for not using automated credit limit system filters * * * it will be critical for intermediaries, third party vendors and markets to cooperate in putting into place appropriate systems and controls.'' [394] One example provided in the report was that a market could provide and operate an automated system (i.e., software and hardware) that would be used by the intermediary and clearing firm.[395]

Further, the FIA's working group, consisting of DCMs, clearing firms, and trading firms, recommended that pre-trade controls be set at the exchange level, and that the controls be mandatory to ensure that there are no latency disadvantages.[396] In a publication in January 2011, the FIA reported that the majority of exchanges have policies and tools in place that comply with those recommendations.[397] The DMA Report also discussed the latency for an FCM that elects to use a DCM's controls as compared to an FCM that does not.[398] This disadvantage is eliminated if each DCM requires all FCMs to use the DCM-provided protections.

12. Subpart M—Protection of Markets and Market Participants

Core Principle 12, as amended by the Dodd-Frank Act, requires that DCMs establish and enforce rules to protect markets and market participants from abusive practices committed by any party, including abusive practices committed by a party acting as an agent for a participant, and promote fair and equitable trading on the contract market.

The Commission proposed to codify the statutory text of the core principle in § 38.650, and is adopting the rule as proposed.

i. § 38.651—Additional Sources for Compliance

Proposed § 38.651 required that a DCM have and enforce rules that are designed to promote fair and equitable trading and to protect the market and market participants from abusive practices including fraudulent, noncompetitive or unfair actions, committed by any party. The rule also required that DCMs must have methods and resources appropriate to the nature of the trading system and the structure of the market to detect trade practice and market abuses and to discipline such behavior, in accordance with Core Principles 2 and 4, and the associated regulations in subparts C and E of this part, respectively. The proposed rule required that DCMs also must provide a competitive, open and efficient market and mechanism for executing transactions in accordance with Core Principle 9 and the associated regulations under subpart J of this part.

Summary of Comments

Chris Barnard and Better Markets referenced a discussion from the DCM NPRM preamble that provided that a DCM must establish rules that require the fair, equitable, and timely provision of information regarding prices, bids, and offers to market participants.[399] Mr. Barnard requested that the Commission amend the wording of proposed §§ 38.650 and 38.651 to include this language and Better Markets requested that the proposed rules prohibit privileged access to data feeds, arguing that the practice is disruptive of fair and equitable trading.[400]

Discussion

The Commission is adopting the rule with a technical modification to revise the heading of the rule from ''Additional sources for compliance'' to the more appropriate ''Protection of markets and market participants.'' All other aspects of the proposed rule will remain unchanged.

The Commission believes that Mr. Barnard's concerns are adequately addressed by the rules adopted in this release. As an initial matter, § 38.650 simply codifies the language of Core Principle 12 and thus cannot be amended by the Commission. Additionally, the broad requirement to promote ''fair and equitable trading'' contained in §§ 38.650 and 38.651, as well as the Core Principle 9 requirement to provide a ''competitive, open, and efficient market and mechanism for executing transactions,'' are sufficient to capture the obligation to provide fair, equitable, and timely information regarding prices, bids, and offers. With respect to Better Markets' comment, the Commission notes that the language from the DCM NPRM cited by Better Markets was not intended to preclude co-location. Instead, the DCM NPRM provides that a market should be fair and equitable in its information distribution, meaning all participants in co-location agreements should pay the same price for a given level of service and access. This does not mean that everyone in the market is required to get information at the same time, but rather that every member of a connection or access type class must be treated equally in terms of service and cost. The faster access to price, bid, and offer information afforded by co-location is no different than the faster access to information afforded to traders in the pits prior to the markets becoming electronic. The Commission believes that prohibiting co-location, or requiring that co-location services be throttled to a point that all participants are able to consume information or access the matching engine at the same speed, would not be practical or reasonable. The Commission also notes that it recently addressed co-location fees in a separate proposed rulemaking for ''Co-location/Proximity Hosting Services.'' [401]

13. Subpart N—Disciplinary Procedures

Core Principle 13 is a new core principle, created by section 735 of the Dodd-Frank Act. The core principle incorporates the concepts from former Designation Criterion 6 (Disciplinary Procedures) and former DCM Core Principle 2.[402] The core principle

[391] *See* FIA report on ''Market Access Risk Management Recommendations'' (April 2010), available at: *http://www.futuresindustry.org/downloads/Market_Access-6.pdf.* (''FIA Report'').

[392] IOSCO, Final Report of the IOSCO Technical Committee, ''Principles for Direct Electronic Access to Markets,'' at 20, IOSCO Doc. FR08/10 (August 12, 2010), available at *http://www.iosco.org/library/pubdocs/pdf/IOSCOPD332.pdf.*

[393] *Id.*

[394] *Id.* at p. 22.

[395] *Id.*

[396] *See e.g.,* FIA Report.

[397] *See* Leslie Sutphen, ''Exchange Survey Finds Wide Range of Risk Controls in Place'' (January 2011), at 28, available at: *http://www.futuresindustry.org/downloads/RC-survey.pdf.*

[398] *See* DMA Report at p. 4.

[399] Better Markets Comment Letter at 10 (Feb. 22, 2011) and Barnard Comment Letter at 4 (May 20, 2011) (citing DCM NPRM at 80597).

[400] *Id.*

[401] *See,* Notice of proposed rulemaking, 75 FR 33198, Jun. 11, 2010.

[402] Compare former CEA section 5(b)(6) and section 5(d)(2) with CEA section 5(d)(13) as amended by the Dodd-Frank Act. Prior to the

Continued

specifically requires that DCMs establish and enforce disciplinary procedures that authorize the DCM to discipline, suspend or expel market participants and members that violate the DCM's rules, or delegate the function to third parties.

Summary of Comments

Several commenters submitted letters discussing the disciplinary procedures contained in subpart N. While the comments were generally supportive of the Commission's objectives, commenters expressed a general desire for the Commission to rely on a more principles-based approach, and argued that the proposed rules were overly prescriptive. Some commenters also articulated specific concerns regarding several rules that they believed would adversely impact DCMs.

Discussion

The Commission thoroughly reviewed and considered all comments received and, where appropriate, made modifications to the proposed rules, including converting some proposed rules into guidance. These modifications, explained further below, have resulted in changes to the numbering of the proposed regulations and in a reduction in the number of separately-enumerated rules, from 16 proposed rules to 12 final rules.

The Commission proposed to codify the statutory text of the core principle in proposed § 38.700, and adopts the rule as proposed. The Commission is also adding § 38.712 to refer applicants and DCMs to the guidance in appendix B to part 38.

i. § 38.701—Enforcement Staff

Proposed § 38.701 required that a DCM establish and maintain sufficient enforcement staff and resources to effectively and promptly prosecute possible rule violations within the jurisdiction of the contract market. The proposed rule also required a DCM to monitor the size and workload of its enforcement staff annually and increase its resources and staff as appropriate. The Commission recognized that at some DCMs, compliance staff also serves as enforcement staff. That is, they both investigate cases and present them before disciplinary panels. These proposed rules were not intended to prohibit that practice.

The Commission believes that adequate staff and resources are essential to the effective performance of a DCM's disciplinary program. This has repeatedly been reflected in Commission staff's findings and recommendations in recent RERs, in which DMO staff recommended that DCMs increase their compliance and/or enforcement staff levels and monitor the size of their staff and increase the number of staff appropriately as trading volume increases, new responsibilities are assigned to staff, or internal reviews demonstrate that work is not completed in an effective or timely manner.

Proposed § 38.701 also provided that a DCM's enforcement staff may not include members of the exchange or persons whose interests conflict with their enforcement duties. Moreover, the proposed rule prohibited a member of the enforcement staff from operating under the direction or control of any person or persons with trading privileges at the contract market. These provisions sought to ensure the independence of enforcement staff, and help promote disciplinary procedures that are free of potential conflicts of interest.

Summary of Comments

MGEX noted that, as a combined DCM/DCO, it interprets the rule to allow staff to serve as enforcement and review staff for both the DCM and DCO divisions of MGEX, and any other entities that become a combined DCM/DCO.[403]

Discussion

The Commission is adopting the rule as proposed. The Commission believes that adequate staff and resources are essential to the effective performance of a DCM's disciplinary program. This has repeatedly been reflected in Commission staff's findings and recommendations in recent RERs, in which Commission staff recommended that DCMs increase their compliance and/or enforcement staff levels and monitor the size of their staff and increase the number of staff appropriately as trading volume increases, new responsibilities are assigned to staff, or internal reviews demonstrate that work is not completed in an effective or timely manner.[404]

The Commission notes that MGEX's interpretation regarding the sharing of compliance staff across a combined DCM/DCO is acceptable, provided that the combined DCM/DCO has sufficient staff to meet the DCM's regulatory compliance needs in an effective and timely manner. In addition, with respect to DCM matters, staff must be accountable to the DCM and its Regulatory Oversight Committee. The Commission also notes, however, that its a priori acceptance of integrated compliance staff is limited to the unique circumstances of a fully integrated exchange and clearing house.

ii. § 38.702—Disciplinary Panels

Proposed § 38.702 required a DCM to establish one or more Review Panels and one or more hearing panels (together, ''disciplinary panels'') to fulfill its obligations under this section. The composition of both panels was required to meet the composition requirements of proposed § 40.9(c)(3)(ii)[405] and could not include

passage of the Dodd-Frank Act, the standards for DCMs' disciplinary practices were found in Designation Criterion 6 and the statutory language, guidance, and acceptable practices for former Core Principle 2. Designation Criterion 6 required that a DCM establish and enforce disciplinary procedures that authorized it to discipline, suspend, or expel members or market participants that violated the rules of the DCM, or similar methods for performing the same functions, including delegation of the functions to third parties. Paragraph (a)(2) of the application guidance for former Core Principle 2 required DCMs to have the ''arrangements, resources, and authority [necessary] for effective rule enforcement,'' and the ''authority and ability to discipline and limit, or suspend the activities of a member or market participant pursuant to clear and fair standards.'' 17 CFR part 38, app. B, Application Guidance for Core Principle 2 at (a)(2) (2010). In addition, paragraph (b)(4) of the former core principle's acceptable practices required any DCM that wished to take advantage of the acceptable practice's safe harbor to have ''prompt and effective disciplinary action for any violation * * * found to have been committed.'' 17 CFR part 38, app. B, Acceptable Practices for Core Principle 2 at (b)(4) (2010). Paragraph (b)(4) also referenced part 8 of the Commission's regulations as an example that DCMs could follow to comply with Core Principle 2. 17 CFR 8.01 *et seq.* In its experience, the Commission has found that many DCMs' disciplinary programs do in fact model the disciplinary structures and processes in part 8. While the acceptable practices for former Core Principle 2 offered the disciplinary procedures in part 8 as an example of appropriate disciplinary procedures, DCMs were exempt from part 8 pursuant to regulation 38.2. The disciplinary procedures proposed herein do not re-subject DCMs to part 8 of the Commission's regulations, but rather propose new disciplinary procedures for inclusion in part 38.

[403] MGEX Comment Letter at 8 (Feb. 22, 2011).

[404] *See* Rule Enforcement Review of the Minneapolis Grain Exchange (Aug. 27, 2009), Rule Enforcement Review of ICE Futures U.S. (Feb. 2, 2010), Rule Enforcement Review of the Chicago Board of Trade and the Chicago Mercantile Exchange (Sep. 13, 2010), and Rule Enforcement Review of New York Mercantile Exchange and Commodity Exchange (August 30, 2011) for findings and recommendations pertaining to the adequate size of DCM compliance and enforcement staffs.

[405] Section 40.9(c)(3)(ii), as proposed in the separate release titled ''Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest'', provided that ''Each Disciplinary Panel shall include at least one person who would not be disqualified from serving as a Public Director by regulation 1.3(ccc)(1)(i)–(vi) and (2) of this chapter (a ''Public Participant''). Such Public Participant shall chair each Disciplinary Panel. In addition, any

any members of the DCM's compliance staff, or any person involved in adjudicating any other stage of the same proceeding. Paragraph (b) of the proposed rule provided that a Review Panel must be responsible for determining whether a reasonable basis exists for finding a violation of contract market rules, and for authorizing the issuance of a notice of charges against persons alleged to have violated exchange rules. If a notice of charges is issued, then paragraph (c) of the proposed rule helped to ensure an impartial hearing by requiring a separate hearing panel to adjudicate the matter and issue sanctions. While proposed § 38.702 required DCMs to empanel distinct bodies to issue charges and to adjudicate charges in a particular matter, the rule permitted DCMs to determine for themselves whether their review and hearing panels are separate standing panels or ad hoc bodies whose members are chosen from a larger ''disciplinary committee'' to serve in one capacity or the other for a particular disciplinary matter.

Summary of Comments

A number of commenters opposed the two-panel approach described in proposed § 38.702. CME stated that the Commission should rely on core principles, rather than what it sees as a prescriptive approach, as DCMs may have an established structure or may develop new structures that clearly satisfy the objective of the core principle, but that may not precisely comply with the language.[406] CME illustrated two practices it believed may be precluded by the text of proposed § 38.702: (1) CME's Market Regulation staff determines whether certain non-egregious rule violations merit referral to a Review Panel and they issue warning letters on an administrative basis; and (2) CME's hearing panel adjudicates a disciplinary case prior to the issuance of charges pursuant to a supported settlement agreement.[407]

ELX contended that the proposed rule would impose the need to create processes and procedures for certain functions already carried out by its Compliance Director, who is supervised by the Regulatory Oversight Committee.[408] ELX suggested that a DCM should be able to obtain a waiver from the two-panel requirement if it already has been designated as a contract market and currently operates under an alternative structure with respect to disciplinary procedures that have sufficient controls.[409]

MGEX argued that the rule is overly prescriptive, that there is no reasonable basis for the distinction between the two panels, and that one panel would maximize resources and streamline the process for all involved.[410] MGEX argued that staff is able to differentiate between the roles, and that the Commission should simply have the right to inquire if it has a question surrounding disciplinary panels or processes.[411]

Discussion

The Commission is adopting the proposed rule with certain modifications to address comments. The Commission considered commenters' views and believes that the proposed rule can be modified to address concerns without diminishing the purpose of the proposed rule. Accordingly, the final rule will require DCMs to have one or more disciplinary panels, without imposing a specific requirement for DCMs to maintain a ''review panel'' and a ''hearing panel.'' The final rules replace specific panel names (i.e. ''review panel'' and ''hearing panel'') with a generic reference to the ''disciplinary panel'' throughout part 38. However, even under a single-panel approach, individuals who determine to issue charges in a particular disciplinary matter may not also adjudicate the matter. The final text of § 38.702 permits flexibility in the structure of DCMs' disciplinary bodies, but not in the basic prohibition against vesting the same individuals with the authority to both issue and adjudicate charges in the same matter. The modifications reflected in the final text of § 38.702, together with the revisions made to the final text of § 38.703, permit DCMs to rely on their senior-most compliance officer (i.e., a DCM's Chief Regulatory Officer), rather than on a disciplinary panel, to issue disciplinary charges, as suggested by ELX. However, the Commission notes that the adjudication of charges must still be performed by a disciplinary panel. Finally, the composition and conflicts requirements for disciplinary panels will be adopted with one modification, by replacing the reference to § 40.9(c)(3)(ii) with a reference to the more general ''part 40.''

iii. § 38.703—Review of Investigation Report

The introductory paragraph of proposed § 38.703 required a Review Panel to promptly review an investigation report received pursuant to proposed § 38.158(c), and to take action on any investigation report received within 30 days of such receipt. Under paragraph (a) of the proposed rule, after receipt of the investigation report, if a Review Panel determined that additional investigation or evidence was needed, it would be required to promptly direct the compliance staff to conduct further investigation. In the alternative, under paragraph (b) of the proposed rule, if a Review Panel determined that no reasonable basis existed for finding a violation, or that prosecution was unwarranted, it would be permitted to direct that no further action be taken, and that a written statement be provided setting forth the facts and analysis supporting the decision.

Finally, under paragraph (c) of the proposed rule, if a Review Panel determined that a reasonable basis existed for finding a violation and adjudication was warranted, it was required to direct that the person or entity alleged to have committed the violation be served with a notice of charges.

Summary of Comments

While CME agreed that an investigation report should include the subject's disciplinary history, CME disagreed with the requirement in proposed § 38.158 that the disciplinary history be included in the version of the investigation report sent to the Review Panel.[412] CME believed that the disciplinary history should not be considered by the Review Panel at all when determining whether to issue formal charges, arguing that a market participant's disciplinary history is not relevant to the consideration of whether it committed a further violation of DCM rules.[413]

Discussion

Consistent with revisions to proposed § 38.702, the Commission is modifying proposed § 38.703 to provide greater flexibility to market participants in determining an approach to disciplinary panels. The Commission is eliminating

registered entity specified in paragraph (c)(3)(i) of this section shall adopt rules that would, at a minimum: (A) Further preclude any group or class of participants from dominating or exercising disproportionate influence on a Disciplinary Panel and (B) Prohibit any member of a Disciplinary Panel from participating in deliberations or voting on any matter in which the member has a financial interest.'' *See* 75 FR 63732, Oct. 18, 2010.

[406] CME Comment Letter at 35 (Feb. 22, 2011).

[407] *Id.*

[408] ELX Comment letter at 5 (Feb. 22, 2011).

[409] *Id.*

[410] MGEX Comment Letter at 9 (Feb. 22, 2011).

[411] *Id.*

[412] CME Comment Letter at 35 (Feb. 22, 2011).

[413] *Id.* While the Commission largely agrees with CME's comment, the Commission directs interested parties to regulation 38.158 for a further discussion of the required components of investigation reports.

all but paragraph (c) of the proposed rule, and is moving paragraph (c) to § 38.704 (Notice of charges), which the Commission is renumbering as § 38.703. The revisions to proposed rules § 38.702 and § 38.703 will provide DCMs with the flexibility to follow a single-panel approach, provided that a single panel does not perform the function of issuing and adjudicating the same charges. In addition, a DCM will have the flexibility to allow its senior-most regulatory officer, such as its Chief Regulatory Officer, to review an investigation report and determine whether a notice of charges should be issued in a particular matter.

iv. § 38.704—Notice of Charges

Proposed § 38.704 described the minimally acceptable contents of a notice of charges (''notice'') issued by a Review Panel. The rule required that the notice adequately state the acts, conduct, or practices in which the respondent is alleged to have engaged; state the rule, or rules, alleged to have been violated; and prescribe the period within which a hearing on the charges may be requested. Further, the proposed rule also required that the notice advise the respondent charged that he is entitled, upon request, to a hearing on the charges. Paragraphs (a) and (b) of the proposed rule provided that a DCM may adopt rules providing that: (1) The failure to request a hearing within the time prescribed in the notice, except for good cause, may be deemed a waiver of the right to a hearing; and (2) the failure to answer or expressly deny a charge may be deemed to be an admission of such charge.

Discussion

No comments were received regarding proposed § 38.704, and the Commission is adopting the proposed rule with certain modifications.

Given that paragraphs (a) and (b) of proposed § 38.704 allowed, but did not require, a DCM to issue rules regarding failures to request a hearing and expressly answer or deny a charge, the Commission believes that the language in these paragraphs is better suited as guidance rather than a rule. The Commission will adopt this language as guidance in appendix B to part 38.

In addition to the aforementioned revisions, and as described above, the Commission is moving paragraph (c) of proposed § 38.703 to proposed § 38.704, and is renumbering proposed § 38.704 as § 38.703.

v. § 38.705—Right to Representation

Proposed § 38.705 required that, upon being served with a notice of charges, a respondent must have the right to be represented by counsel or any other representative of his or her choosing in all succeeding stages of the disciplinary process. Together with proposed §§ 38.704 (requiring an adequate notice of charges to the respondent), 38.708 (conferring the right to hearing), and 38.710 (hearing procedures), § 38.705 helped ensure basic fairness for respondents in disciplinary proceedings.

Summary of Comments

CME commented that the language of this rule should be limited to avoid conflicts in representation and, accordingly, requested that the rule be revised to clarify that a respondent may not be represented by: (1) A member of the DCM's disciplinary committees; (2) a member of the DCM's Board of Directors; (3) an employee of the DCM; and (4) a person substantially related to the underlying investigation, such as a material witness or other respondent.[414]

Discussion

The Commission is adopting the proposed rule with certain modifications. The Commission acknowledges CME's concern and is amending the proposed rule to incorporate CME's suggestion to clarify that a respondent must have the right to be represented by legal counsel or any other representative of its choosing in all succeeding stages of the disciplinary process, except any member of the designated contract market's board of directors or disciplinary panel, any employee of the designated contract market, or any person substantially related to the underlying investigations, such as material witness or respondent. Additionally, as a result of the rule deletions and modifications discussed above, proposed § 38.705 as modified is being adopted as § 38.704.

vi. § 38.706—Answer to Charges

Proposed § 38.706 provided that a respondent must be given a reasonable period of time to file an answer to a charge. In general, paragraphs (a) through (c) of the proposed rule provided that the rules of the DCM may require that: (1) The answer must be in writing and include a statement that the respondent admits, denies or does not have and is unable to obtain sufficient information to admit or deny each allegation; (2) failure to file an answer on a timely basis shall be deemed an admission of all allegations in the notice of charges; and (3) failure in an answer to deny expressly a charge shall be deemed to be an admission of such charge.

Discussion

Although no specific comments were received on proposed § 38.706, commenters generally requested greater flexibility to establish their own disciplinary procedures.[415] The Commission believes that proposed § 38.706 is a rule where greater flexibility can reasonably be accorded. Accordingly, the Commission is maintaining as a rule the requirement that a respondent must be given a reasonable period of time to file an answer to a notice of charges, and is condensing the remainder of the proposed rule by replacing subparagraphs (a), (b), and (c) with a requirement that any rules adopted by a DCM governing the requirements and timeliness of a respondent's answer to charges must be ''fair, equitable, and publicly available.'' Finally, as a result of the rule deletions and modifications discussed above, proposed § 38.706 as modified is being adopted as § 38.705.

vii. § 38.707—Admission or Failure To Deny Charges

Proposed § 38.707 provided that, if a respondent admits or fails to deny any of the violations alleged in a notice of charges, then a hearing panel may find that the violations admitted or not denied have in fact been committed. If a DCM adopted a rule concerning the admission or failure to deny charges, then paragraphs (a) through (c) of the proposed rule provided that: (1) The hearing panel must impose a sanction for each violation found to have been committed; (2) the DCM must promptly notify the respondent in writing of any sanction to be imposed and advise the respondent that they may request a hearing on such sanction within the period of time stated in the notice; and (3) the rules of the DCM may provide that if the respondent fails to request a hearing within the period of time stated in the notice, then the respondent will be deemed to have accepted the sanction.

Discussion

Although the Commission did not receive specific comments pertaining to the proposed rule, the Commission is moving the entire rule, with certain modifications, to the guidance in appendix B. Given that proposed § 38.707 allowed, but did not require, a DCM to issue rules regarding a respondent's admission or failure to

[414] CME Comment Letter at 35 (Feb. 22, 2011).

[415] *See generally,* CME Comment Letter (Feb. 22, 2011); and MGEX Comment Letter (Feb. 22, 2011).

deny charges, the Commission believes that the proposed rule is better suited as guidance in appendix B to part 38 rather than a rule. The Commission believes adopting the proposed rule as guidance, rather than a rule, will grant DCMs greater flexibility in administering their obligations, consistent with the general comments seeking the same. Furthermore, the text that will now be included as guidance is being modified to reflect the single-panel approach adopted in § 38.702, replacing specific panel names with a generic reference to the ''disciplinary panel.''

viii. § 38.708—Denial of Charges and Right to Hearing

Proposed § 38.708 provided that in every instance where a respondent has requested a hearing on a charge that he or she denies, or on a sanction set by the hearing panel pursuant to proposed § 38.707, the respondent must be given the opportunity for a hearing in accordance with the requirements of proposed § 38.710. The DCM's rules were permitted to provide that, except for good cause, the hearing must be concerned only with those charges denied or sanctions set by the hearing panel under proposed § 38.707 for which a hearing has been requested.

Discussion

The Commission did not receive comments pertaining to this rule, but is adopting the proposed rule with modifications.

The Commission is revising the proposed rule to reflect the single-panel approach adopted in § 38.702, replacing specific panel names with a generic reference to the ''disciplinary panel.'' In order to provide DCMs with greater flexibility in establishing disciplinary procedures, the Commission also is removing the section of the proposed rule which was optional—allowing a DCM's rules to provide that, except for good cause, a hearing must be concerned only with those charges denied or sanctions set by the panel for which a hearing has been requested. Finally, as a result of the withdrawal of certain preceding rules discussed above, proposed § 38.708 as modified is being adopted as § 38.706.

ix. § 38.709—Settlement Offers

Proposed § 38.709 provided the procedures a DCM must follow if it permits the use of settlements to resolve disciplinary cases. Paragraph (a) of the proposed rule stated that the rules of a DCM may permit a respondent to submit a written offer of settlement any time after an investigation report is completed. The proposed rule permitted the disciplinary panel presiding over the matter to accept the offer of settlement, but prohibited the panel from altering the terms of the offer unless the respondent agreed. In addition, paragraph (b) of the proposed rule provided that the rules of the DCM may allow a disciplinary panel to permit the respondent to accept a sanction without admitting or denying the rule violations upon which the sanction is based.

Paragraph (c) of proposed § 38.709 stated that a disciplinary panel accepting a settlement offer must issue a written decision specifying the rule violations it has reason to believe were committed, and any sanction imposed, including any order of restitution where customer harm has been demonstrated. Importantly, paragraph (c) also provided that if an offer of settlement is accepted without the agreement of a DCM's enforcement staff, the decision must carefully explain the disciplinary panel's acceptance of the settlement. Finally, paragraph (d) of proposed § 38.709 allowed a respondent to withdraw his or her offer of settlement at any time before final acceptance by a disciplinary panel. If an offer is withdrawn after submission, or is rejected by a disciplinary panel, the respondent must not be deemed to have made any admissions by reason of the offer of settlement and must not be otherwise prejudiced by having submitted the offer of settlement.

Discussion

Although no specific comments were received in regards to this proposed rule, the Commission is adopting the provisions of the proposed rule as guidance in appendix B. The Commission believes that adopting the proposed rule as guidance rather than a rule will grant DCMs greater flexibility in administering their obligations, consistent with the general comments seeking the same. Furthermore, the Commission is revising the guidance text to make it consistent with its modifications regarding the single-panel approach adopted in § 38.702 and the customer restitution revisions adopted below with respect to proposed § 38.714.

x. § 38.710—Hearings

Proposed § 38.710 required a DCM to adopt rules that provide certain minimum requirements for any hearing conducted pursuant to a notice of charges. In general, sections (a)(1) through (a)(7) of the proposed rule required the following: (1) A fair hearing; (2) authority for a respondent to examine evidence relied on by enforcement staff in presenting the charges contained in the notice of charges; (3) the DCM's enforcement and compliance staffs must be parties to the hearing and the enforcement staff must present its case on those charges and sanctions that are the subject of the hearing; (4) the respondent must be entitled to appear personally at the hearing, have the authority to cross-examine persons appearing as witnesses at the hearing, and call witnesses and present evidence as may be relevant to the charges; (5) the DCM must require persons within its jurisdiction who are called as witnesses to participate in the hearing and produce evidence; (6) a copy of the hearing must be made and become a record of the proceeding if the respondent has requested a hearing; and (7) the rules of the DCM may provide that the cost of transcribing the record must be borne by a respondent who requests a transcript. Additionally, proposed paragraph (b) specified that the rules of the DCM may provide that a sanction be summarily imposed upon any person within its jurisdiction whose actions impede the progress of a hearing.

Summary of Comments

Two commenters requested that the Commission revise proposed § 38.710(a)(2). CFE commented that proposed § 38.710(a)(2) should limit a respondent's access only to evidence a DCM plans to introduce at a hearing.[416] CFE further requested the exclusion of evidence covered under attorney-client privilege, attorney work product privilege, or other confidential reports and methodologies, including the disclosure of the name of a confidential complainant.[417] CFE also argued that investigation and examination materials prepared by a DCM should be protected from disclosure as internal work product unless the DCM intends to introduce them at the hearing.[418]

CME similarly argued that proposed § 38.710(a)(2) should be revised so that a respondent may not access protected attorney work product, attorney-client communications, and investigative work product (such as investigation and exception reports).[419]

Discussion

The Commission is adopting paragraph (a) of the proposed rule with certain modifications, and is converting paragraph (b) of the proposed rule to guidance in appendix B.

[416] CFE Comment Letter at 5 (Feb. 22, 2011).

[417] *Id.*

[418] *Id.*

[419] CME Comment Letter at 36 (Feb. 22, 2011).

The Commission has considered CFE and CME's comments, and believes that a DCM should be permitted to withhold certain documents from a respondent in certain circumstances, and thus, is revising proposed § 38.710(a)(2) (now § 38.707(a)(2)) accordingly. Because proposed § 38.710(b) (which provided that the DCMs' rules may provide that a sanction may be summarily imposed upon any person whose actions impede the progress of a hearing) was an optional requirement for DCMs, the Commission is adopting this language as guidance in appendix B to part 38. Furthermore, the Commission is eliminating proposed § 38.710(a)(7), an optional rule that in certain cases allowed for the cost of transcribing the record of the hearing to be borne by the respondent. The Commission also is revising the rule text to make it consistent with its modifications regarding the single-panel approach adopted in § 38.702 and its modifications to proposed § 38.712 discussed below. Finally, as a result of the withdrawal and renumbering of the rules discussed above, proposed § 38.710 as modified is being adopted as § 38.707.

xi. § 38.711—Decisions

Proposed § 38.711 detailed the procedures that a hearing panel must follow in rendering disciplinary decisions. The proposed rule required that all decisions include: (1) A notice of charges or a summary of the charges; (2) the answer, if any, or a summary of the answer; (3) a summary of the evidence produced at the hearing or, where appropriate, incorporation by reference in the investigation report; (4) a statement of findings and conclusions with respect to each charge, and a careful explanation of the evidentiary and other basis for such findings and conclusions with respect to each charge; (5) an indication of each specific rule with which the respondent was found to have violated; and (6) a declaration of any penalty imposed against the respondent, including the basis for such sanctions and the effective date of such sanctions.

Discussion

No comments were received on proposed § 38.711. The Commission is adopting § 38.711 as proposed with minor modifications to reflect the single-panel approach adopted in § 38.702, and replacing specific panel names with a generic reference to the ''disciplinary panel.'' In addition, as a result of the withdrawal and renumbering of preceding rules discussed above, proposed § 38.711 as modified is being adopted as § 38.708.

xii. § 38.712—Right To Appeal

Proposed § 38.712 provided the procedures that a DCM must follow in the event that the DCM's rules authorize an appeal of adverse decisions in all or in certain classes of cases. Notably, the proposed rule required a DCM that permits appeals by disciplinary respondents to also permit appeals by its enforcement staff. For DCMs that permit appeals, the language in paragraphs (a) through (d) of proposed § 38.712 generally required the DCM to: (1) Establish an appellate panel that is authorized to hear appeals; (2) ensure that the appellate panel composition is consistent with § 40.9(c)(iv) of the Commission's regulations and does not include any members of the DCM's compliance staff, or any person involved in adjudicating any other stage of the same proceeding; (3) except for good cause shown, conduct the appeal or review solely on the record before the hearing panel, the written exceptions filed by the parties, and the oral or written arguments of the parties; and (4) issue a written decision of the appellate panel and provide a copy to the respondent promptly following the appeal or review proceeding.

Discussion

Although no specific comments were received on proposed § 38.712, the Commission is converting the proposed rule to guidance in appendix B. Given that proposed § 38.712 allowed, but did not require, a DCM to issue rules regarding a respondent's right to appeal, the Commission is moving this provision to guidance in appendix B to part 38. The Commission believes that adopting the proposed rule as guidance rather than a rule, will grant DCMs greater flexibility in administering their obligations, consistent with the general comments seeking the same.

The Commission notes that the reference to § 40.9(c)(iv) in the proposed rule was a technical error. Instead, proposed § 38.712 should have referenced the composition requirements of an appellate panel outlined in § 40.9(c)(3)(iii). Accordingly, the Commission is replacing the reference to § 40.9(c)(iv) with a reference to the more general ''part 40'' in the guidance text. Furthermore, the Commission is revising the guidance text to reflect the single-panel approach now adopted in § 38.702, replacing specific panel names with a generic reference to the ''disciplinary panel.''

xiii. § 38.713—Final Decisions

Proposed § 38.713 required that each DCM establish rules setting forth when a decision rendered under this subpart N will become the final decision of the DCM.

Discussion

No comments were received in regards to the proposed rule, and the Commission is adopting the proposal without modification. However, as a result of the renumbering of certain preceding rules discussed above, proposed § 38.713 is being adopted as § 38.709.

xiv. § 38.714—Disciplinary Sanctions

Proposed § 38.714 required that every disciplinary sanction imposed by a DCM must be commensurate with the violations committed and must be clearly sufficient to deter recidivism or similar violations by other market participants. Additionally, the proposed rule required that, in the event of demonstrated customer harm, any disciplinary sanction must include full customer restitution. In evaluating appropriate sanctions, the proposed rule required the DCM to take into account a respondent's disciplinary history.[420]

Summary of Comments

CFE supported the goal articulated in proposed § 38.714, but argued that in certain situations, the requirement for customer restitution should not apply where it may not be possible for a DCM to determine the amount of customer harm, which parties may have been harmed, and/or how the harm was allocated among potentially aggrieved parties.[421] CFE requested that the Commission clarify that the requirement to include customer restitution in a disciplinary sanction does not apply to the extent that a DCM is unable to determine with reasonable certainty what the restitution should be, to whom to provide restitution, and/or how to allocate restitution.[422]

Chris Barnard argued that sanctions should include a public reprimand and/or be published.[423]

[420] Proposed regulation 38.158(c), which was proposed with respect to Core Principle 2, required that a copy of a member or market participant's disciplinary history be included in the compliance staff's investigation report.

[421] CFE Comment Letter at 6 (Feb. 22, 2011).

[422] *Id.*

[423] Barnard Comment Letter at 2, 4 (May 20, 2011) (Barnard stated that under a properly functioning sanctions regime, sanctions must be: (1) Significantly greater than potential benefits derived from a breach of rules; (2) targeted at those parties who stand to gain from a breach of rules, whether natural or legal persons; and (3) include a public reprimand and/or be published).

Discussion

The Commission is adopting the proposed rule with certain modifications. The Commission has considered CFE's comment, and is revising the proposed rule so that it does not require customer restitution if the amount of restitution, or the recipient, cannot be reasonably determined. Furthermore, the Commission is revising the proposed rule to clarify that a respondent's disciplinary history should be taken into account in all sanction determinations, including sanctions imposed pursuant to an accepted settlement offer. The Commission also notes that final disciplinary actions taken against registered persons and entities are recorded in the National Futures Association's Background Affiliation Status Information Center (''BASIC'') database, which is available to the public online. Finally, as a result of the renumbering of preceding rules discussed above, the Commission is renumbering the proposed rule as § 38.710.

xv. § 38.715—Summary Fines for Violations of Rules Regarding Timely Submission of Records, Decorum, or Other Similar Activities

Proposed § 38.715 permitted a DCM to adopt a summary fine schedule for violations of rules relating to timely submission of accurate records required for clearing or verifying each day's transactions, decorum, attire, or other similar activities. Under the proposed rule, a DCM may authorize its compliance staff to summarily impose minor sanctions against persons within the DCM's jurisdiction for violating such rules. The proposed rule made clear that a DCM should issue no more than one warning letter in a rolling 12-month period for the same violation before sanctions are imposed. Additionally, the proposed rule specified that a summary fine schedule must provide for progressively larger fines for recurring violations.

Summary of Comments

CME objected to the restriction of one letter of warning per rolling 12-month period.[424]

Discussion

The Commission is partially adopting the proposed rule, and is converting the remaining portion of the rule to guidance in appendix B.

The Commission is maintaining as a rule the provision in the proposed rule that prohibits a DCM from issuing more than one warning letter per rolling 12-month period for the same violation. Commission staff has consistently recommended in RERs that DCMs must engage in progressive discipline in order to deter recidivism.

The Commission is converting the remainder of proposed § 38.715 to guidance in appendix B because the proposed rule allowed, but did not require, a DCM to adopt a summary fine schedule.

Finally, the proposed rule is being renumbered in its adopted form from § 38.715 to § 38.711, and is retitled as ''Warning letters.''

xvi. § 38.716—Emergency Disciplinary Actions

Proposed § 38.716 provided that a DCM may impose a sanction, including a suspension, or take other summary action against a person or entity subject to its jurisdiction upon a reasonable belief that such immediate action is necessary to protect the best interest of the marketplace. The proposed rule also provided that any emergency action taken by the DCM must be in accordance with certain procedural safeguards that protect the respondent, including the right to be served with notice before the action is taken or otherwise at the earliest possible opportunity after action has been taken; the right to be represented by legal counsel in any proceeding subsequent to the emergency disciplinary action; the right to a hearing as soon as reasonably practical; and the right to receive a written decision on the summary action taken by the DCM.

Discussion

No comments were received on proposed § 38.716. Given that proposed § 38.716 allowed, but did not require, a DCM to adopt rules regarding emergency disciplinary actions, the Commission is moving the text of proposed § 38.716 to guidance in appendix B to part 38.

Due to the renumbering described above, the Commission is also replacing proposed § 38.712 with new § 38.712 (titled ''Additional sources for compliance'') that simply permits DCMs to rely upon the guidance in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 38.700 of this part.

14. Subpart O—Dispute Resolution

The Dodd-Frank Act re-designated former Core Principle 13 as Core Principle 14. Aside from renumbering the core principle, the language of the core principle remained substantively unchanged. The core principle governs the obligations of DCMs to implement and enforce a dispute resolution program for their market participants and market intermediaries.[425]

In addition to proposing to codify the statutory text of the core principle in proposed § 38.750, the Commission proposed to maintain the guidance and acceptable practices.

Discussion

No comments were received on proposed § 38.750, § 38.751, or the proposed guidance under Core Principle 14. The Commission is adopting the rules and guidance as proposed.

15. Subpart P—Governance Fitness Standards

Other than to re-designate former Core Principle 14 as Core Principle 15, the Dodd-Frank Act did not revise the text of this core principle. Core Principle 15 requires DCMs to establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, members of the contract market, and any other persons with direct access to the facility (including any parties affiliated with any of the persons described in this core principle). In the DCM NPRM, the Commission proposed to codify the statutory text of the core principle in § 38.800. The Commission did not receive comments pertaining to proposed § 38.800, and is adopting the rule as proposed.

As noted in the DCM NPRM, the substantive regulations implementing Core Principle 15 were proposed in a separate rulemaking that also would implement Core Principles 16 (Conflicts of Interest), 17 (Composition of Governing Boards of Contract Markets) and 22 (Diversity of Boards of Directors).[426] Until such time as the Commission may adopt the substantive rules implementing Core Principle 15, the Commission is maintaining the current Guidance under part 38 applicable to Governance Fitness Standards (formerly Core Principle 14). Accordingly, the existing Guidance from appendix B of Part 38 applicable to Core Principle 15 is being codified under the revised appendix B adopted in this final rulemaking.[427] At such time as the

[424] CME Comment Letter at 36 (Feb. 22, 2011).

[425] 17 CFR part 38, app. B.

[426] See ''Governance Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities; Additional Requirements Regarding the Mitigation of Conflicts of Interest,'' Notice of Proposed Rulemaking, 76 FR 722, January 6, 2011. CME submitted a comment letter discussing proposed regulation 38.801 in connection with 76 FR 722.

[427] The Commission is also adding regulation 38.801 to simply permit DCMs to continue to rely

Continued

Commission may adopt the final rules implementing Core Principle 15, appendix B will be amended accordingly.

CME submitted a comment letter discussing proposed § 38.801 in connection with the separate proposed rulemaking implementing Core Principle 15. CME's comments will be considered in connection with that rulemaking.

16. Subpart Q—Conflicts of Interest

The Dodd-Frank Act re-designated current Core Principle 15 (Conflicts of Interest) as Core Principle 16, and in all other respects, did not substantively amend the core principle. The Commission proposed to codify the statutory text of the core principle in proposed § 38.850, and is codifying the statutory text of Core Principle 16 in § 38.850 as proposed.

As noted in the DCM NPRM, the substantive regulations implementing Core Principle 16 were proposed in two separate rulemakings that also would implement Core Principles 15 (Governance Fitness Standards), 17 (Composition of Governing Boards of Contract Markets) and 22 (Diversity of Boards of Directors).[428] Until such time as the Commission may adopt the substantive rules implementing Core Principle 16, the Commission is maintaining the current guidance and acceptable practices under Part 38 applicable to Conflicts of Interest (formerly Core Principle 15). Accordingly, the existing Guidance and Acceptable Practices from appendix B of part 38 applicable to Core Principle 16 are being codified in the revised appendix B adopted in this final rulemaking.[429] At such time as the Commission may adopt the final rules implementing Core Principle 16, appendix B will be amended accordingly.

CME submitted a comment letter that referenced comments it submitted in connection with the separate rulemakings implementing Core Principle 16. CME's comments will be considered in connection with those rulemakings.

17. Subpart R—Composition of Governing Boards of Contract Markets

The Dodd-Frank Act re-designated former Core Principle 16 (Composition of Governing Boards of Mutually Owned Contract Markets) as Core Principle 17, and revised the title of the core principle to ''Composition of Governing Boards of Contract Markets.'' In addition, while the core principle formerly applied only to mutually owned DCMs, and required such DCMs to ensure that the composition of their governing boards included market participants, the amended core principle was amended to require the governance arrangements of all DCM to be designed to permit the consideration of the views of market participants.[430] The Commission proposed to codify the statutory text of the core principle in proposed § 38.900, and is adopting the rule as proposed.

As noted in the DCM NPRM, the substantive regulations implementing Core Principle 17 were proposed in a separate rulemaking that also would implement Core Principles 15 (Governance Fitness Standards), 16 (Conflicts of Interest), and 22 (Diversity of Boards of Directors).[431] The rules implementing Core Principle 17 will be adopted in that separate rulemaking.

18. Subpart S—Recordkeeping

Core Principle 18, as amended by section 735 of the Dodd-Frank Act, requires all DCMs to maintain records of all activities related to their business as contract markets, in a form and manner acceptable to the Commission, for at least five years.[432]

The Commission proposed to codify the statutory text of the core principle in § 38.950, and is adopting the rule as proposed.

i. § 38.951—Additional Sources for Compliance

Proposed § 38.951 required all DCMs to maintain records, including trade records and investigatory and disciplinary files, in accordance with Commission regulation § 1.31, and in accordance with proposed Commission regulation § 45.1 with respect to swap transactions.[433] The proposed rule reiterated DCMs' obligation to comply with § 1.31(a), which requires that DCM books and records be readily accessible for the first two years of the minimum five-year statutory period, and be open to inspection by any representatives of the Commission or the United States Department of Justice.[434] Section 1.31(a) also requires DCMs to promptly provide either copies or original books and records upon request of a Commission representative.[435] As noted in the preamble, the proposed rule also incorporated by reference § 1.31(b)'s description of the acceptable methods of storing books and records.[436] Finally, proposed § 38.951 also incorporated by reference the requirements set forth in § 1.31(c) regarding electronic storage systems, and the requirements in § 1.31(d) regarding retention of trading cards and of other trade, order, and financial reports.[437] Separately, proposed § 38.951 also required DCMs to comply with the recordkeeping requirements in § 45.1 with respect to swaps transactions.[438]

Summary of Comments

MGEX argued that the proposed rule is too prescriptive in requiring that all records and data must be indexed and duplicated.[439] MGEX also commented that the requirement to retain records for ''at least 5 years'' created uncertainty and requested clarification on how long records must be kept.[440] MGEX questioned the rationale for obligating DCMs to keep Commission-required data separate from other data.[441] Further, MGEX stated that ''DCMs should not be substitute storage facilities for Commission data, nor should they be required to relocate and resubmit data that has already been submitted to the Commission.''[442] Chris Barnard recommended that records should be required to be kept indefinitely rather than for at least five years.[443]

upon the guidance in appendix B to demonstrate to the Commission compliance with regulation 38.800.

[428] *See* ''Governance Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities; Additional Requirements Regarding the Mitigation of Conflicts of Interest,'' Notice of Proposed Rulemaking, 76 FR 722, January 6, 2011; and ''Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest,'' 75 FR 63732, Oct. 18, 2010.

[429] The Commission is also adding regulation 38.851 to simply permit DCMs to continue to rely upon the guidance in appendix B to demonstrate to the Commission compliance with section 38.850.

[430] 7 U.S.C. 7(d)(17).

[431] *See* ''Governance Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities; Additional Requirements Regarding the Mitigation of Conflicts of Interest,'' Notice of Proposed Rulemaking, 76 FR 722, January 6, 2011. CME submitted a comment letter discussing proposed regulation 38.801 in connection with 76 FR 722.

[432] *See* section 5(d)(18) of the CEA, 7 U.S.C. 7(d)(18).

[433] *See* DCM NPRM at 80622.

[434] *Id.*

[435] *Id.*

[436] *Id.* at 80601.

[437] *Id.* at 80622.

[438] *See* proposed regulation 38.951. At the time of the DCM NPRM, the part 45 rules were proposed. See 75 FR 80622, Dec. 22, 2010. The part 45 rules were recently codified. *See* 77 FR 2136, Jan. 13, 2012.

[439] MGEX Comment Letters at 9 (Feb. 22, 2011) and at 3 (June 3, 2011).

[440] *Id.* (requesting a limit on the length of time a DCM should be required to hold data).

[441] *Id.*

[442] *Id.*

[443] Barnard Comment Letter at 4 (Feb. 22, 2011).

Discussion

The Commission is adopting the proposed rules under Core Principle 18 with the modification described below.

The Commission acknowledges MGEX's comment but notes that § 38.951 incorporates recordkeeping requirements to which DCMs are already subject by direct operation of § 1.31. Even if the Commission were to amend § 38.951 as requested, many of the concerns expressed by MGEX would remain, including the obligation to keep certain data separately. In this regard, the Commission notes that the Acceptable Practices for former Core Principle 17 stated that § 1.31 ''governs recordkeeping requirements under the Act.'' [444] Upon adopting §§ 38.950 and 38.951, § 1.31 will still govern significant elements of recordkeeping under the Act. Accordingly, the Commission is largely adopting § 38.951 as proposed. The Commission is making one modification to the proposed rule, however, by replacing the reference to § 45.1 with a reference to the more general ''part 45.''

In response to MGEX's request for clarification regarding the requirement to retain records for ''at least 5 years,'' the Commission notes that the recordkeeping requirement for swaps is governed by rules that were recently codified in part 45, which requires DCMs to maintain all requisite records from the date of the creation of the swap through the life of the swap and for a period of at least five years from the final termination of the swap.[445] With respect to all other records, DCMs can satisfy their recordkeeping requirement pursuant to § 38.950 by retaining such records for five years, unless the Commission determines prior to the expiration of the five-year term that the records must be retained for a longer period of time. The Commission also notes that the ''at least 5 years'' obligation is required under statute. Specifically, as noted in the preamble of the proposed rule, one notable difference between the former Core Principle 18, and the current amended version, is that while records were previously required to be maintained ''for a period of 5 years,'' Core Principle 18 now requires that records must be retained for ''at least 5 years.'' [446] Accordingly, the proposed rule required a DCM maintain records of all activities related to its business as a DCM in a form and manner acceptable to the Commission for at least five years.[447] Similarly, in response to Chris Barnard's recommendation that the records be held indefinitely, the Commission believes that the current statutory requirement to maintain records for at least 5 years is sufficient at this time, but notes that it may extend the time period if it determines that an extended recordkeeping time is necessary.

19. Subpart T—Antitrust Considerations

The Dodd-Frank Act renumbered former Core Principle 18 as Core Principle 19, and in all other respects, maintained the statutory text of the core principle. As noted in the DCM NPRM, the Commission believed that the existing guidance to this Core Principle remained appropriate. Accordingly, other than to codify the statutory text of Core Principle 19 into proposed § 38.1000, the Commission did not propose any amendments to the pre-existing guidance under part 38.

Proposed § 38.1001 referred applicants and DCMs to the guidance in appendix B to part 38 for purposes of demonstrating to the Commission their compliance with the requirements of proposed § 38.1000.

Discussion

No comments were received in regards to the proposed rule and guidance, and the Commission is adopting the rule and guidance as proposed.

20. Subpart U—System Safeguards

Core Principle 20 is a new core principle created by the Dodd-Frank Act, and pertains to the establishment of system safeguards by all DCMs. Core Principle 20 specifically requires DCMs to: (1) Establish and maintain a program of risk oversight to identify and minimize sources of operational risk through the development of appropriate controls and procedures and the development of automated systems that are reliable, secure, and have adequate scalable capacity; (2) establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for the timely recovery and resumption of operations and the fulfillment of the responsibilities and obligations of the DCM; and (3) periodically conduct tests to verify that backup resources are sufficient to ensure continued order processing and trade matching, price reporting, market surveillance, and maintenance of a comprehensive and accurate audit trail. The rules proposed under subpart U implement these requirements. The Commission proposed to codify the statutory text of the core principle in proposed § 38.1050, and adopts the rule as proposed.

i. § 38.1051—General Requirements

The rules proposed under § 38.1051 (a) and (b) would require a DCM's program of risk analysis and oversight to address six categories of risk analysis and oversight, including information security; business continuity-disaster recovery (''BC–DR'') planning and resources; capacity and performance planning; systems operations; systems development and quality assurance; and physical security and environmental controls.

The proposed rule in § 38.1051(c) specifically would require each DCM to maintain a BC–DR plan and BC–DR resources sufficient to enable resumption of trading and of all of the responsibilities and obligations of the DCM during the next business day following any disruption of its operations, either through sufficient infrastructure and personnel resources of its own or through sufficient contractual arrangements with other DCMs or disaster recovery service providers.

The proposed rule also would require each DCM to notify Commission staff of various system security-related events, including prompt notice of all electronic trading halts and systems malfunctions in § 38.1051(e)(1), timely advance notice of all planned changes to automated systems that may impact the reliability, security, or adequate scalable capacity of such systems in § 38.1051(f)(1), and timely advance notice of all planned changes to programs of risk analysis and oversight in § 38.1051(f)(2). The proposed rule also required DCMs to provide relevant documents to the Commission in § 38.1051(g) and to conduct regular, periodic, objective testing and review of its automated systems in § 38.1051(h). Moreover, proposed § 38.1051(i) would require each DCM, to the extent practicable, to coordinate its BC–DR plan with those of the members and market participants upon whom it depends to provide liquidity, to initiate coordinated testing of such plans, and to take into account in its own BC–DR plan, the BC–DR plans of relevant telecommunications, power, water, and other essential service providers.

Summary of Comments

CME commented that recovery time objectives (''RTOs'') in each catastrophic

[444] *See* 17 CFR part 38, app. B, Application Guidance and Acceptable Practices for Core Principle 17.

[445] 77 FR 2136, Jan. 13, 2012.

[446] *See* preamble to proposed regulation 38.950. 75 FR 80601, Dec. 22, 2010.

[447] *See* proposed regulation 38.950(a). 75 FR 80622, Dec. 22, 2010.

situation should consider the impact on all market participants and independent technology services providers in the context of determining a proper RTO.[448] CME also objected to what it considers to be an overly broad requirement in § 38.1051(e)(1) to notify Commission staff promptly of all electronic trading halts and systems malfunctions.[449] CME argued that required reporting should be limited to any material system failures. Further, CME criticized § 38.1051(f)(1), arguing that the mandate that DCMs provide the Commission with timely advance notice of all planned changes to automated systems that may impact the reliability, security, or adequate scalable capacity of such systems is overly burdensome, and not cost effective.[450] Additionally, CME argued that the § 38.1051(f)(2) requirement that DCMs provide timely advance notice of all planned changes to their program of risk analysis and oversight is too broad and generally unnecessary.[451] Finally, CME noted that it does not control, or generally have access to, the details of the disaster recovery plans of its major vendors.[452]

Discussion

The Commission is adopting the proposed rule, with the modifications described below. As noted in the DCM NPRM, automated systems play a central and critical role in today's electronic financial market environment, and the oversight of core principle compliance by DCMs with respect to automated systems is an essential part of effective oversight of both futures and swaps markets. Advanced computer systems are fundamental to a DCM's ability to meet its obligations and responsibilities.[453]

The Commission has considered CME's comment, and believes that timely advance notice of all planned changes to address system malfunctions is not necessary and is revising the rule to provide that DCMs only need to promptly advise the Commission of all significant system malfunctions. With respect to planned changes to automated systems or risk analysis and oversight programs, the revised rule will require timely advance notification of material changes to automated systems or risk analysis and oversight programs. Finally, the rule does not require DCMs to control or have access to the details of the disaster recovery plans of its major vendors. Rather, the rule suggests coordination to the extent possible.

21. Subpart V—Financial Resources

New Core Principle 21 requires DCMs to have adequate financial resources to discharge their responsibilities, and specifically requires that DCMs maintain financial resources sufficient to cover operating costs for a period of at least one year, calculated on a rolling basis.

i. § 38.1100—Core Principle 21, and § 38.1101(a) and (c) General Rule and Computation of Financial Resources Requirement

Proposed § 38.1100 codifies the statutory text of the core principle and is being adopted as proposed.

Proposed § 38.1101(a)(1) and (3) required DCMs to maintain sufficient financial resources to cover operating costs for at least one year, calculated on a rolling basis, at all times. Proposed § 38.1101(a)(2) would require any entity operating as both a DCM and a DCO to comply with both the DCM financial resources requirements, and also the DCO financial resources requirements in § 39.11.[454] Proposed § 38.1101(c) required a DCM to make a reasonable calculation of the financial resources it needs to meet the requirements of proposed § 38.1101(a) at the end of each fiscal quarter.

Summary of Comments

OCX requested that the Commission define whether ''operating costs'' are gross or net.[455] GreenX recommended that the Commission expressly state that ''operating costs'' should be determined from a cash flow statement perspective.[456]

Chris Barnard recommended that each DCM calculate and regularly publish its solvency ratio, defined as the DCM's available financial resources divided by the DCM's financial resources requirement.[457] Chris Barnard stated that the Commission should be notified when this ratio falls below 105 percent.[458]

KCBT stated that the proposed requirements would result in duplication for entities that operate both a DCM and a DCO, because proposed § 39.11 imposed similar requirements on DCOs.[459] KCBT stated that its DCO was established as its wholly-owned subsidiary corporation for purposes of limiting liability and that as a ''privately-owned, for-profit corporation, it should be able to determine its own levels of capital resources and deployment.''[460] KCBT referenced this rationale in response to proposed § 38.1101(a)(3), (b), (e), and (f).[461]

Discussion

The Commission is adopting proposed § 38.1101 (a) and (c) with the modification described below. The Commission notes that specifically defining ''operating costs'' could result in unintended restrictions on DCMs. The Commission will maintain the flexibility of the proposed rule by not further defining ''operating costs'' and instead permitting each DCM to have reasonable discretion in determining the methodology it will use to make the calculation. For these reasons, the Commission also declines to incorporate a solvency ratio requirement to the final rules.

Finally, the Commission has revised the text of § 38.1101(a)(2) (redesignated as paragraph (a)(3)) to clarify that a DCM that is also registered with the Commission as a DCO must demonstrate that it has sufficient resources to operate the combined entity as both a DCM and DCO,[462] and further, that such combined entity need only file single quarterly financial resources reports in accordance with § 39.11(f). The Commission is not requiring a dually-registered entity to file two separate reports because the operating resource requirements for a DCM and DCO are the same, and the combined DCM/DCO is required to have sufficient financial resources to cover its operating costs as a combined entity. The DCO financial resource requirements in § 39.11 differ from those in § 38.1101 only insofar as they add a requirement for default resources, which is applicable only to a

[448] CME Comment Letter at 36 (Feb. 22, 2011).

[449] *Id.* at 37.

[450] *Id.*

[451] *Id.*

[452] *Id.*

[453] *See* 75 CFR 80572, 80601–80602, Dec., 22, 2010.

[454] *See* 76 FR 69334, Nov. 8, 2011. Commission regulation 39.11 establishes requirements that a DCO will have to meet in order to comply with DCO Core Principle B (Financial Resources), as amended by the Dodd-Frank Act. Amended Core Principle B requires a DCO to possess financial resources that, at a minimum, exceed the total amount that would enable the DCO to meet its financial obligations to its clearing members notwithstanding a default by the clearing member creating the largest financial exposure for the DCO in extreme but plausible conditions; and enable the DCO to cover its operating costs for a period of 1 year, as calculated on a rolling basis.

[455] OCX Comment Letter at 5 (Feb. 22, 2011).

[456] GreenX Comment Letter at 19 (Feb. 22, 2011).

[457] Barnard Comment Letter at 5 (May 20, 2011).

[458] *Id.*

[459] KCBT Comment Letter at 8 (Feb. 22, 2011).

[460] *Id.*

[461] *Id.*

[462] The Commission anticipates that a corporate entity that operates more than one registered entity may share certain costs, and may allocate those costs among the registered entities as determined by the Commission on a case by case basis.

DCM/DCO acting in its capacity as a DCO.

ii. § 38.1101(b)—Types of Financial Resources

Under proposed § 38.1101(b), financial resources available to DCMs to satisfy the applicable financial requirements would include the DCM's own capital (assets in excess of liabilities) and any other financial resource deemed acceptable by the Commission. A DCM would be able to request an informal interpretation from Commission staff on whether a particular financial resource would be acceptable.

Summary of Comments

OCX stated that the proposed rule may encourage DCMs to cut services in order to reduce their operational need for cash.[463]

Several commenters recommended that the Commission include specific examples of financial resources that might satisfy the requirement. OCX inquired whether firm commitments from owners to honor capital calls would be acceptable under the proposed rule.[464] CME contended that the intent of Congress was to construe the terms ''financial resources'' broadly and include anything of value at the DCM's disposal, including operating revenues.[465] CME stated that if Congress wanted to exclude operating revenues from what would be considered financial resources, Congress could have incorporated an ''equity concept.''[466]

GreenX contended that the Commission should continue to permit flexibility for DCMs, but also requested that the Commission provide specific examples of which assets can be included in the calculation of ''financial resources.''[467] GreenX requested confirmation that accounts receivable and other assets that are reasonably expected to result in payments to the DCM, as well as subordinated loans, are acceptable financial resources.[468] GreenX also stated that committed lines of credit and similar facilities should be considered ''good'' financial resources, and that such interpretation is standard in the ordinary business world.[469] GreenX stated that the proposed increase in the amount of financial resources needed by DCMs, and the restrictions on the use of debt financing, would impede the ability of start-ups to become and remain DCMs.[470]

GreenX proposed language to replace proposed § 38.1101(a)(3), (b), and (e) that would provide that a DCM ''be required to maintain sufficient financial resources to cover its projected operating costs for a period of at least one year, including unencumbered, liquid assets equal to at least six months of such projected operating costs, and that committed lines of credit or various debt instruments may be included in calculating those financial resources, as long as the DCM is not incurring indebtedness secured by its assets and counting both those assets and the indebtedness as part of its financial resources.''[471] GreenX further contended that if the Commission is unwilling to accept this language, the Commission should: (i) clearly specify that the ''financial resources'' requirement in proposed § 38.1101(a)(3) is a separate requirement from the liquidity requirement in proposed § 38.1101(e), and (ii) delete the language in the proposed liquidity requirement suggesting that proposed § 38.1101(e) is part of the proposed one year's required operating costs coverage.[472] Absent revision, GreenX stated that the current proposal could result in a requirement of up to 18 months of financial resources if a DCM used a line of credit to satisfy the liquidity requirement.[473] Moreover, if this provision is not changed, GreenX recommended that the Commission undertake a cost-benefit analysis of requiring DCMs to maintain financial resources in excess of one year's operating costs.[474] GreenX also stated that the Commission should not adopt a ''one-size-fits-all approach'' to the financial resources requirements as between DCOs and DCMs, since different circumstances and different purposes support differential treatment.[475]

Discussion

The Commission is adopting the proposed rule with one modification.

The provision in § 38.1101(b) stating that acceptable financial resources include a DCM's own capital and ''any other financial resource deemed acceptable by the Commission'' was meant to capture other types of resources on a case-by-case basis and provide flexibility to both DCMs and the Commission. Accordingly, the Commission notes that a DCM's own capital means its assets minus its liabilities calculated in accordance with the Generally Accepted Accounting Principles (''GAAP''). The Commission believes that if a certain financial resource is deemed to be an asset under GAAP, it is appropriate for inclusion in the calculation for this rule, and the rule has been revised accordingly. To the extent a certain financial resource is not considered an asset under GAAP, but based upon the facts and circumstances a DCM believes that the particular asset should be so considered, Commission staff will work with the DCM to determine whether such resource is acceptable. In response to comments pertaining to the acceptable forms of financial resources, the Commission may consider projected revenues as an acceptable financial resource for established DCMs that can demonstrate a historical record of revenue; but not for DCM applicants, relatively new DCMs or DCMs with no such record.

The Commission believes that GreenX misinterprets the relationship of § 38.1101(a)(3) and § 38.1101(e). The Commission clarifies that the one-year financial resources requirements in § 38.1101(a)(3) and the six month liquidity requirement in § 38.1101(e) could be met by using the same financial resources. GreenX is correct that if a sufficient portion of the financial resources used for the one-year financial resources requirement in § 38.1101(a)(3) are illiquid, it is possible that an entity could be required to have 18 months of financial resources to meet the requirements of these two sections. However, the Commission is requiring only one-year of financial resources, six months of which must be liquid financial resources. Each DCM may exercise discretion in determining how to meet this requirement (*e.g.,* six months of liquid financial resources combined with six months of illiquid ones, 12 months of liquid financial resources, or 12 months of illiquid financial resources with a line of credit

[463] OCX Comment Letter at 5 (Feb. 22, 2011).

[464] *Id.*

[465] CME Comment Letter at 37 (Feb. 22, 2011).

[466] *Id.*

[467] GreenX Comment Letter at 19 (Feb. 22, 2011).

[468] *Id.*

[469] *Id.* at 18.

[470] GreenX Comment Letter at 14 (Feb. 22, 2011).

[471] *Id.* at 17.

[472] *Id.* GreenX recommended striking the words in proposed regulation 38.1101(e) ''to meet the requirements of paragraph (a) of this section'' and ''If any portion of such financial resources is not sufficiently liquid.''

[473] *Id.* at 14–15.

[474] *Id.* at 17–18.

[475] GreenX discussed the significantly different roles played by DCMs and DCOs (*i.e.,* DCMs do not guarantee or novate trades and their capital is not at risk in the event of a default) and further states that the ''Commission should not adopt a one-size-fits-all approach and should not treat DCOs and DCMs in the same manner where different circumstances and different purposes support differential treatment.'' GreenX notes that ''the role of financial resources (and letters of credit) in the DCM context is to ensure that DCMs can continue to operate in the ordinary course of business and make payments as they become due, which does not have the same time sensitivity that it does in the DCO context.'' *See* GreenX Comment Letter at 17 (Feb. 22, 2001).

covering six months of financial resources). Indeed, the Commission notes that most, if not all, DCMs have considerably more financial resources than the minimum one-year required by this rule. In addition, if a DCM does not have this liquidity, it is not achieving the goal of the core principle, as it will be unable to pay its creditors. Further, the language of the core principle does not limit the resource requirement to one year, as it specifically states that a DCM's financial resources are adequate if the value of such resources exceeds one year of operating costs. Also in response to GreenX, the costs and benefits associated with all of the rules being adopted in this release, including § 38.1101, are discussed in the cost benefit section of the release.

In response to GreenX's comment regarding the financial resources requirements of DCOs and DCMs, the Commission notes that the financial resources requirements in § 38.1101, for DCMs, and in § 39.11, for DCOs, are different. In addition to the requirement to maintain financial resources sufficient to cover operating costs for one year, § 39.11 also requires DCOs to possess a certain level of default resources.[476] As GreenX correctly notes, DCMs do not guarantee or novate trades and a ''one-size-fits-all'' approach is not being applied here.

iii. § 38.1101(d)—Valuation of Financial Resources

Proposed § 38.1101(d) required DCMs to calculate the current market value of each financial resource used to meet their obligations under these proposed rules, no less frequently than at the end of each fiscal quarter. The proposed rule required DCMs to perform the valuation at other times as appropriate. As the Commission noted in the DCM NPRM, the proposed rule is designed to address the need to update valuations in circumstances where there may have been material fluctuations in market value that could impact a DCM's ability to meet its obligations on a rolling basis as required by proposed § 38.1101(a). The proposed rule requires that when valuing a financial resource, the DCM reduce the value, as appropriate, to reflect any market or credit risk specific to that particular resource, *i.e.,* apply a haircut.[477] Under the proposed rule, DCMs would be permitted to exercise discretion in determining the applicable haircuts, although such haircuts would be subject to Commission review and acceptance.

Summary of Comments

GreenX recommended an explicit statement that the use of GAAP principles in calculating the market value of each financial resource in meeting obligations under the rules would satisfy the requirements of this subsection, without limiting other potential methods of complying.[478]

Discussion

The Commission is adopting the proposed rule without modification. In response to GreenX's comment, the Commission notes that GAAP does not include haircuts, but valuation under GAAP does take into account current market values. The Commission expects each DCM to monitor the value of its resources to be certain that the calculation of the value of its assets reflects current market conditions in accordance with GAAP. A haircut is not intended to be applied in the ordinary course, but to be used in those unusual market circumstances that require an accounting intervention. As stated in the DCM NPRM, the Commission will permit DCMs discretion to, in the first instance, choose an appropriate haircut methodology. The Commission will evaluate the appropriateness of such methodology on a case-by-case basis.

iv. § 38.1101(e)—Liquidity of Financial Resources

Proposed § 38.1101(e) required that DCMs maintain unencumbered liquid financial assets, such as cash or highly liquid securities, equal to at least six months' operating costs. As noted in the DCM NPRM, the Commission believes the requirement to have six months' worth of unencumbered liquid financial assets would give a DCM time to liquidate the remaining financial assets it needs to continue operating for the last six months of the required one-year period. A DCM would be permitted to use a committed line of credit or similar facility to satisfy the requirement, in the event that the DCM does not have six months' worth of unencumbered liquid financial assets.

The Commission notes that a DCM may only use a committed line of credit or similar facility to meet the liquidity requirements set forth in proposed § 38.1101(e). Accordingly, a committed line of credit or similar facility is not listed in proposed § 38.1101(b) as a financial resource available to a DCM to satisfy the requirements of proposed § 38.1101(a).

Summary of Comments

CME stated that the liquidity measurement is only relevant in the context of winding-down, and claims that a three month period, rather than six months, is a more accurate assessment of how long it would take for a DCM to wind down.[479]

GreenX requested clarification of the terms ''unencumbered'' and ''committed.''[480] GreenX suggested that assets should be considered unencumbered even if they are ''subject to security interests or adverse claims, as long as the DCM can use and expend those assets in the ordinary course without requiring consent of lenders or claimants.''[481] GreenX also requested that the Commission clarify whether ''committed'' is intended to mean anything other than a line of credit or similar facility that has been extended pursuant to a legally binding agreement.[482] Finally, GreenX recommended that the Commission expressly state that lines of credit and similar facilities incurred from banks and other commercial financial institutions on market standard terms will presumptively qualify as good ''committed lines of credits and similar facilities'' for purposes of proposed § 38.1101.[483] GreenX requested that any requirements applicable for lines of credit be specified in the final regulations.[484]

Discussion

The Commission is adopting the proposed rule without modification.

The Commission believes that a six month period is appropriate for a wind down period and notes that commenters did not provide any support for the claim that a wind down would take only three months.

In response to GreenX's request for clarification, the Commission notes that it is using ''unencumbered'' in the ''normal commercial sense'' to ''refer to assets that are not subject to a security interest or other adverse claims.''[485] By ''committed line of credit or similar facility,'' the Commission means a committed, irrevocable contractual obligation to provide funds on demand with preconditions limited to the execution of appropriate agreements. In other words, a facility with a material adverse financial condition restriction would not be acceptable. The purpose of

[476] *See* 76 FR 69334, Nov. 8, 2011.

[477] A ''haircut'' is a deduction taken from the value of an asset to reserve for potential future adverse price movements in such asset.

[478] GreenX Comment Letter at 19 (Feb. 22, 2011).

[479] CME Comment Letter at 37 (Feb. 22, 2011).

[480] GreenX Comment Letter at 18 (Feb. 22, 2011).

[481] *Id.*

[482] *Id.*

[483] *Id.*

[484] *Id.*

[485] *Id.*

this requirement is for a DCM to have no impediments to accessing its line of credit at the time it needs liquidity. Further, DCMs are encouraged to periodically check their line of credit arrangements to confirm that no operational difficulties are present.

v. § 38.1101(f)—Reporting Requirements

Proposed § 38.1101(f) required DCMs, at the end of each fiscal quarter, or at any time upon Commission request, to report to the Commission: (i) the amount of financial resources necessary to meet the requirements set forth in the regulation; and (ii) the value of each financial resource available to meet those requirements. The proposed rule also required a DCM to provide the Commission with a financial statement, including the balance sheet, income statement, and statement of cash flows, of the DCM or of its parent company (if the DCM does not have an independent financial statement and the parent company's financial statement is prepared on a consolidated basis).

Under the proposed rule, a DCM was required to provide the Commission with sufficient documentation explaining the methodology it used to calculate its financial requirements, and the basis for its valuation and liquidity determinations. The proposed rule also required the DCM to provide copies of any agreements establishing or amending a credit facility, insurance coverage, or any similar arrangement that evidences or otherwise supports its conclusions. The Commission, in its sole discretion, would determine the sufficiency of the documentation provided. According to the proposed rule, the DCM would have 17 business days [486] from the end of the fiscal quarter to file the report, unless it requests an extension of time from the Commission.

Summary of Comments

Three commenters requested an extended deadline for filing the financial reports required as a result of the proposed rule. CFE stated that for DCMs that are public, or have financial statements consolidated with those of a public company, the filing deadlines should be the same as those required by the SEC for Forms 10–Q and 10–K.[487] CME provided a similar comment stating that the proposed 17 day filing deadline is not feasible and that instead, the requirement should be consistent with the SEC's reporting requirements.[488] Similarly, GreenX stated that it has procedures in place to comply with the SEC's requirements and that the proposed requirements in this rule would require new programming and resources.[489] GreenX recommended extending the reporting deadline to 30 calendar days, noting that this is still more burdensome than the requirements imposed by the SEC on national securities exchanges.[490] Rather than recommending an extended deadline, KCBT objected to the proposed quarterly filings and stated that the annual submissions that it provides to the Commission should suffice.[491]

In addition to the comments received regarding the reporting deadline, two commenters requested clarification as to the confidentiality of any filings made pursuant to proposed § 38.1101(f).[492] Further, CME requested clarification that consolidated financial statements covering multiple DCMs, and DCOs where relevant, comply with the proposed rule.[493]

Discussion

The Commission is adopting the proposed rule with certain amendments.

The Commission is persuaded that the proposed 17 business day filing deadline may be overly burdensome. The SEC requires its quarterly reports on Form 10–Q to be filed with the SEC 40 calendar days after the end of the fiscal quarter for accelerated filers and 45 calendar days after the end of the fiscal quarter for all other SEC-registered entities.[494] The SEC requires annual reports on Form 10–K to be filed with the SEC 60 calendar days after the end of the fiscal year for large accelerated filers, 75 calendar days for other accelerated filers and 90 calendar days for non-accelerated filers.[495] The Commission has extended the 17 business day proposed filing deadline to 40 calendar days for the required reports for the first three quarters. This revision to the rule will harmonize the Commission's financial resource filing requirement with the SEC's requirements for its Form 10–Q. Similarly, the Commission has extended the filing deadline for the fourth quarter report to 60 days in order to harmonize the requirement with the SEC's filing deadline for the Form 10–K. However, to the extent that a DCM is also registered as a DCO, the DCM must file its quarterly financial reports in accordance with the requirement of § 39.11 (which requires that reports be filed within 17 business days after the end of each fiscal quarter). The shorter time frame for submission of a dual registrant's quarterly financial reports is based on the heightened significance of financial oversight for the clearinghouse, which serves as the central counterparty for all cleared transactions.

The Commission has considered KCBT's comments, but does not believe that annual submissions are sufficient. The Commission believes that prudent financial management requires DCMs to prepare and review financial reports more frequently than annually, and expects that DCMs currently are reviewing their finances on at least a quarterly basis.

In response to the comments requesting clarification on the confidentiality of the filings made pursuant to the financial resources regulations, the Commission does not plan to make such reports public. However, where such information is, in fact, confidential, the Commission encourages DCMs to submit a written request for confidential treatment of such filings under the Freedom of Information Act (''FOIA''),[496] pursuant to the procedures established in § 145.9 of the Commission's regulations.[497] The determination of whether to disclose or exempt such information in the context of a FOIA proceeding would be governed by the provisions of part 145, and any other relevant provision.

In response to the request for clarification in regard to consolidated financial statements, the Commission clarifies that consolidated financial statements would comply with the rule.

Section 38.1101(g) delegates authority to perform certain functions that are reserved to the Commission under § 38.1101 to the Director of the Division of Market Oversight.

22. Subpart W—Diversity of Boards of Directors

Core Principle 22 is a new core principle that was added by the Dodd-Frank Act. The core principle requires that publicly traded DCMs must endeavor to recruit individuals to serve on their board of directors from among

[486] This filing deadline is consistent with the deadline imposed on FCMs for the filing of monthly financial reports. *See* 17 CFR regulation 1.10(b).

[487] CFE Comment Letter at 6 (Feb. 22, 2011).

[488] CME Comment Letter at 38 (Feb. 22, 2011).

[489] GreenX Comment Letter at 20 (Feb. 22, 2011) (GreenX also stated that normal year-end adjustments typically require much more than 17 business days to complete).

[490] *Id.*

[491] KCBT Comment Letter at 8 (Feb. 22. 2011).

[492] CFE Comment Letter at 6 (Feb. 22, 2011); CME Comment Letter at 37–38 (Feb. 22, 2011).

[493] CME Comment Letter at 37–38 (Feb. 22, 2011).

[494] *See* 17 CFR 249.308a.

[495] *See* 17 CFR 249.310.

[496] 5 U.S.C. 552 *et seq.* (2010).

[497] 17 CFR 145.9 (2010).

a broad and culturally diverse pool of qualified candidates.

In the DCM NPRM, the Commission proposed to codify the statutory text of the core principle in proposed § 38.1150, and is adopting § 38.1150 as proposed.

As noted in the DCM NPRM, the substantive regulations implementing Core Principle 22 were proposed in a separate rulemaking that also would implement Core Principles 15 (Governance Fitness Standards), 16 (Conflicts of Interest), and 17 (Composition of Governing Boards of Contract Markets).[498] The rules implementing Core Principle 22 will be adopted in that separate rulemaking.

CME submitted a comment letter responding to the DCM NPRM that referenced comments it submitted in connection with that rulemaking. CME's comments will be considered in connection with that rulemaking.

23. Subpart X—Securities and Exchange Commission

The Dodd-Frank Act added new Core Principle 23, requiring that DCMs keep any records relating to swaps defined in CEA section 1a(47)(A)(v), as amended by the Dodd-Frank Act, open to inspection and examination by the SEC.[499] Consistent with the text of this core principle, the Commission proposed guidance under part 38 that provided that each DCM should have arrangements and resources for collecting and maintaining accurate records pertaining to any swap agreements defined in section 1a(47)(A)(v) of the amended CEA.

i. § 38.1200—Core Principle 23, § 38.1201 (Additional Sources for Compliance), and Guidance in Appendix B

The Commission proposed a combination of rules and guidance to implement the core principle. Proposed § 38.1200 codified the statutory text of the core principle. Proposed § 38.1201 referred applicants and DCMs to the guidance in appendix B to part 38 for purposes of demonstrating to the Commission their compliance with the requirements of the core principle. The proposed guidance stated that DCMs should have arrangements and resources for collecting and maintaining accurate records pertaining to any swaps agreements defined in section 1a(47)(A)(v) of the Act.

Summary of Comments

CME requested guidance on what records need to be retained and for how long they must be retained.[500]

Discussion

The Commission is adopting the proposed rules and guidance, with the modifications described below.

In response to CME's comment, the Commission notes that the guidance provides that DCMs should retain ''any'' records relevant to swaps defined under CEA section 1a(47)(a)(v), and that the DCM should leave such records open to inspection and examination, for a period of five years. Commission staff consulted with representatives from the SEC, who confirmed that SEC's relevant recordkeeping requirements typically extend for a period of five years.[501] The five year requirement is also consistent with the recordkeeping requirement under Core Principle 18 and § 1.31 of the Commission's regulations.

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'')[502] requires federal agencies, in promulgating rules, to consider the impact of those rules on small entities. The rules adopted herein will affect designated contract markets (''DCMs''). The Commission has previously established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its rules on small entities in accordance with the RFA.[503] The Commission previously determined that DCMs are not small entities for the purpose of the RFA.[504] The Commission received no comments on the impact of the rules contained herein on small entities. Therefore, the Chairman, on behalf of the Commission and pursuant to 5 U.S.C. 605(b), certifies that the rules will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

This final rulemaking contains information collection requirements. The Paperwork Reduction Act (''PRA'')[505] imposes certain requirements on federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The Commission proposed to amend collection 3038–0052 to allow for an increase in response hours for the proposed rulemaking amending part 38, which included the increase in burden hours that will result from the amendments to rules 1.52 and 16.01 that are also part of this rulemaking.[506] Notably, most of the collection burdens associated with part 38 are covered by a currently approved collection of information for part 38, or by other existing or pending collections of information. Thus, only those burdens that are not covered elsewhere are included in the Commission's proposed amendment.

The title of the collection will continue to be ''Part 38—Designated Contract Markets.'' The Commission submitted the amended collection to the Office of Management and Budget (''OMB'') for its review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. Pursuant to a notice of action from OMB in March 2011, approval of the amended collection is pending a resubmission of the proposed information collection that includes a description of the comments received on the collection and the Commission's responses thereto, which will be made available by OMB at *www.reginfo.gov.*

Responses to this collection of information will be mandatory. The Commission will protect proprietary information gathered according to the FOIA and 17 CFR part 145, ''Commission Records and Information.'' In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public ''data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.''[507] The Commission is also required to protect certain information

[498] *See* ''Governance Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities; Additional Requirements Regarding the Mitigation of Conflicts of Interest,'' Notice of Proposed Rulemaking, 76 FR 722, January 6, 2011. CME submitted a comment letter discussing proposed regulation 38.801 in connection with 76 FR 722.

[499] 7 U.S.C. 7; *see also* section 5(d)(23) of the CEA, as amended by the Dodd-Frank Act.

[500] CME Comment Letter at 38 (Feb. 22, 2011).

[501] *See* 76 FR 10982, Feb. 28, 2011, (Proposed regulation 818(b) requires security-based swap execution facilities to keep books and records ''for a period of not less than five years,'' the first two years in an easily accessible place). Rule 17a–1(b) (240.17a–1(b) requires national securities exchanges, among others, to keep books and records for a period of not less than five years, the first two years in an easily accessible place, subject to a destruction and disposition provisions, which allows exchanges to destroy physical documents pursuant to an effective and approved plan regarding such destruction and transferring/indexing of such documents onto some recording medium.).

[502] 5 U.S.C. 601 *et seq.* (2010).

[503] 47 FR 18618–21, Apr. 30 1982.

[504] *Id.*

[505] 44 U.S.C. 3501 *et seq.*

[506] *See* 75 FR 80572, 80603, Dec. 22, 2010 .

[507] 7 U.S.C. 12.

contained in a government system of records according to the Privacy Act of 1974.[508]

Proposed Collection

In its existing collection of information for part 38, the Commission estimated 300 hours average response time from each respondent for the collection of designation and compliance information.[509] Based on its experience with administering registered entities' submission requirements since implementation of the Commodity Futures Modernization Act of 2000,[510] the Commission estimated in the DCM NPRM that the response time for the designation and compliance collections in the proposed rule would generally increase the information collection burden by 10 percent. This increase is due to the introduction of swaps trading on DCMs permitted under section 723(a)(3) of the Dodd-Frank Act and the addition of new core principles with which DCMs must comply, excepting Core Principle 21 (Financial Resources), for which a separate burden estimate is discussed below, and the burdens associated with any information collection requirements that are being accounted for in other existing or pending collections. With respect to all but financial resources compliance, the Commission estimated in the DCM NPRM that it would collect information from 17 respondents.[511] Accordingly, a 10 percent estimated increase would result in 30 additional hours per respondent and 510 additional hours annually for all respondents for designation and compliance.

With respect to Core Principle 21, the Commission estimated in the DCM NPRM that each of the 17 anticipated respondents may expend up to 10 hours quarterly for filings required under the proposed regulations, totaling 40 hours annually for each respondent and 680 hours across all respondents with respect to compliance with Core Principle 21.

Commission staff estimated that respondents could expend up to an additional $3,640 annually based on an hourly wage rate of $52 (30 hours + 40 hours × $52) to comply with the proposed rules. This would result in an aggregated additional cost of $61,880 per annum (17 respondents × $3,640).

Summary of Comments and Discussion

Estimated Burden Hours for Compliance for Part 38 Amendments

The Commission received several comments regarding the estimated hours of burden for compliance with the proposal to amend part 38.[512]

In particular, the Commission confirms that that the new DCM application form, Form DCM, provides a roadmap of required documentation, balances the needs of the Commission with the needs of the marketplace, and should result in a streamlined and standardized review process, as was noted by Eris.[513]

Other commenters suggested that the 60 days proposed in § 38.3(g) for existing DCMs to certify compliance with the core principles and the rules implementing them would be unduly burdensome.[514] As discussed in the preamble, the Commission is eliminating this provision from the final rules.

CME stated that it would be costly to comply with the proposed § 38.151(a) requirement that clearing firms obtain every customer's consent to the regulatory jurisdiction of each DCM.[515] The Commission believes that § 38.151(a) codifies requirements necessary to effectuate Core Principle 2's statutory mandate; a DCM must have an agreement in place prior to granting members and market participants access to its markets in order to ensure that the DCM has the capacity to detect, investigate, and apply appropriate sanctions to persons that violate DCM rules. Any incremental costs associated with this rule are covered by the 10 percent increase contained in the Commission's amended information collection.

CME stated that an increased documentation burden associated with the submission process would greatly increase the cost and timing for DCMs to list products, without providing any corresponding benefit to the marketplace.[516] CME stated that the Commission indicated that the proposed rules for Provisions Common to Registered Entities will increase the overall collection burden on registered entities by approximately 8,300 hours per year.[517] The referenced burden was accounted for in the Commission's information collection for the part 40 rules that were adopted in July, 2011, however, and therefore the burden associated with that collection is not duplicated here.[518] Notwithstanding this, the Commission believes that any DCM must have an agreement with its customers such that the customer agrees to cooperate with the DCM, where necessary, in order for the DCM to perform its statutory functions.

Similarly, CME commented on the burdens associated with rules implementing Core Principles 8 and 18, in particular, the requirement to separately identify block trading in daily volume reports.[519] The burden associated with block trading is accounted for in the information collection associated with the Commission's Real-Time Public Reporting of Swap Transaction Data rulemaking.[520] To avoid double-counting, no adjustment is being made to the amendment to this part 38 collection.

In addition, MGEX commented on the rules implementing the general recordkeeping requirements of Core Principle 18.[521] Core Principle 18 incorporates by reference § 1.31 of the Commission regulations and the recordkeeping requirements in the Commission's Swap Data, Recordkeeping, and Reporting Requirements rulemaking.[522] The § 1.31 requirements are already covered by the existing information collection for part 38, with the incremental costs associated with the introduction of swap trading, if a DCM elects to do so, covered by the 10 percent increase contained in the Commission's amended information collection. The recordkeeping requirements in the proposed Swap Data, Recordkeeping, and Reporting Requirements rulemaking are accounted for in the information collection request that was developed for that rulemaking. To avoid double-counting, no adjustment is being made to the amendment to the part 38 information collection in response to the comment.

With respect to the information collection in rules implementing Core

[508] 5 U.S.C. 552a.

[509] 66 FR 42256, 42268, Aug. 10, 2001.

[510] Public Law 106–554, 114 Stat. 2763 (2000).

[511] The number of designated contract markets increased from 13 to 17 since the last amendment to Collection 3038–0052 and from 17 to 18 since the DCM NPRM was published in the **Federal Register**.

[512] As noted above, the Commission is not finalizing proposed regulations 38.501—38.506 at this time, and expects and plans to do so when it considers the final SEF rulemaking, The Commission will consider all comments related to these provisions at such time.

[513] Eris Comment Letter at 4 (Feb. 22, 2011).

[514] *See, e.g.,* GreenX Comment Letter at 21 (Feb. 22, 2011); KCBT Comment Letter at 2 (Feb. 22, 2011); Nodal Comment Letter at 4 (Feb. 22, 2011); NYSE Liffe Comment Letter at 14 (Feb. 22, 2011); CME Comment Letter at 12 (Feb. 22, 2011); and CFE Comment Letter at 7 (Feb. 22, 2011).

[515] CME Comment Letter at 16 (Feb. 22, 2011).

[516] CME Comment Letter at 10 (Feb. 22, 2011).

[517] *See* 75 FR 67282, 67290, Nov. 2, 2010.

[518] *See* Collection 3038–0093.

[519] CME Comment Letter at 30–31 (Feb. 22, 2011).

[520] *See* ''Real Time Public Reporting of Swap Transaction Data,'' 77 FR 2909, Jan. 20, 2012.

[521] MGEX Comment Letter at 9 (Feb. 22, 2011).

[522] *See* ''Swap Data Recordkeeping and Reporting Requirements,'' 77 FR 2136, Jan. 13, 2012.

Principle 10, CME and MGEX commented that establishing specific audit trail requirements would be burdensome, costly, and unnecessary.[523] DCM compliance with Core Principle 10 should predate the enactment of the Dodd-Frank Act, however, and the information collections associated with Core Principle 10 are covered by the Commission's existing part 38 information collection. Any burden increase associated with the maintenance of additional records resulting from the introduction of swap trading, if a DCM elects to do so, has been accounted for in the 10 percent increase in designation and compliance costs discussed above.

CME submitted a comment regarding the information collection burdens associated with rules that were proposed to implement new Core Principle 20, which requires each DCM to maintain a business continuity-disaster recovery plan and to report system security-related events and all planned changes to automated systems that may impact the reliability, security, or scalability of the systems.[524] In response to CME's concerns that the rule would require reporting of insignificant system events, the Commission is adopting final rules that require reporting only of significant system malfunctions and advance notification only of material system changes. The resulting burden reduction eliminates the need to increase the proposed part 38 information collection amendment.

Finally, MGEX commented that the hours estimated for designation and compliance and the additional new annual cost of compliance with the proposed rules were extremely low, and claimed that due to the vast number of additional requirements, the total burden is becoming ''unwieldy and excessive.'' [525] MGEX did not provide any estimate of what costs would be more accurate for purposes of the part 38 information collection, and thus the Commission could not evaluate alternative estimates to determine whether they would be more appropriate than what was proposed, which was based on past Commission experience with existing collections of information and which accounts only for those collections of information that are not now or will not be covered by other collections of information.

Estimated Burden Hours for Core Principle 21

In addition to the general increase proposed for the existing part 38 collection discussed above, the Dodd-Frank Act established new Core Principle 21 (Financial Resources) that requires respondents to have adequate financial, operational and managerial resources.[526] In order to demonstrate compliance with Core Principle 21, each respondent will need to file specific reports with the Commission on a quarterly basis, which would result in four quarterly responses per respondent per year. In the proposed rulemaking, the Commission estimated that each respondent would expend 10 hours to prepare each filing required under the proposed regulations, and the Commission estimated that it would receive filings from 17 respondents.

The Commission received several comments on the proposed financial resources collection. KCBT stated that the financial resources rules, as proposed, would result in duplicative reporting for entities that operate as both a DCM and DCO.[527] In response to this comment, the Commission is now finalizing the rules with revisions that clarify that a DCM that also is registered with the Commission as a DCO is obligated only to file its financial resources reports under the DCO rules, though it nonetheless must maintain the financial resources necessary to satisfy the operating cost requirements of the DCM and the DCO separately.

CFE, GreenX, and KCBT requested that the Commission extend the proposed deadline for filing of financial resources reports from 17 days after the end of each quarter, in particular to accommodate DCMs that are public companies, or that have financial statements that are consolidated with those of a public company, so that the filing requirements would be aligned with the requirements for SEC forms 10–Q and 10–K, which are longer.[528] GreenX stated that failing to extend the time for filing to align with the SEC filing requirements, for which it and other public companies already have procedures and controls in place, would result in unnecessary new programming and staff resources.[529] KCBT objected to the quarterly filing requirement and suggested that annual reporting would be sufficient.[530]

The Commission is not persuaded that an annual reporting requirement would be sufficient in terms of financial management on the part of the DCM or regulatory oversight on the part of the Commission. With respect to regulatory oversight, the adoption of an annual reporting requirement alone would result in a need for periodic checks by the Commission on financial resources compliance by DCMs between annual reports. The multiple unscheduled checks that would be necessary each year, in the form of calls for a demonstration of compliance by a DCM, as well as more formal rule enforcement reviews, would burden the Commission's examination resources. If DCMs are required to report on a quarterly basis, DCMs may be able to demonstrate risks toward which the Commission's resources should be directed. Moreover, unscheduled checks would most likely be more burdensome for DCMs than quarterly reporting. Thus, the Commission is adopting both quarterly and annual reporting requirements in these final rules.

However, in response to the comments, the Commission is adopting final rules that would mitigate the burden that would result from the adoption of filing deadlines that do not align with SEC filing requirements. Accordingly, the final rules establish a deadline for the filing of financial resources reports of 40 calendar days after the end of the quarter for the first three quarters of a DCM's fiscal year, and 60 calendar days after the end of the DCM's fourth quarter.

Final Burden Estimate

The final rules require each respondent to file information with the Commission. Information collections are included in several of the general provisions being adopted in Subpart A, as well as in certain regulations implementing Core Principles 5, 7, 8, 10, 11, 13, 18, 20, and 21. The Commission has carefully evaluated the comments discussed above and determined that the 10 percent general increase by which the Commission seeks to amend its part 38 collection of information is appropriate. The 10 percent increase is intended to cover only the burdens associated with collections of information that are not already covered in the existing part 38 information collection, or in other existing collections or collections that are being established with other rulemakings.

[523] CME Comment Letter at 33 (Feb. 22, 2011) and MGEX Comment Letter at 7 (Feb. 22, 2011).

[524] CME Comment Letter at 36–37 (Feb. 22, 2011).

[525] MGEX Comment Letter at 9–10 (Feb. 22, 2011).

[526] *See* section 735(b) of the Dodd-Frank Act.

[527] KCBT Comment Letter at 7–9 (Feb. 22, 2011).

[528] CFE Comment Letter (Feb. 22, 2011), GreenX Comment Letter (Feb. 22, 2011), KCBT Comment Letter (Feb. 22, 2011).

[529] GreenX Comment Letter at 19–20 (Feb. 22, 2011).

[530] KCBT Comment Letter at 8–9 (Feb. 22, 2011).

The 10 percent increase tracks the already approved part 38 information collection, which accounted for the many one-time or infrequent information collections contained in part 38 over the assumed life of a DCM. As a general rule, the information collections in this rulemaking that are not already covered have the same characteristics: The required filing of one-time certifications and demonstrations of compliance by existing DCMs; the filing of occasional exemptive requests; reporting of material events that are expected to occur infrequently; the expansion of a DCM's existing audit trail program to cover swap transactions, if the DCM determines to list swaps; and the one-time or infrequent system changes needed to report transactions, such as EDRPs, that are not covered in the information collection requests of other rulemakings.

The changes sought by the commenters that are being adopted would only marginally reduce the overall information collection burden. Thus the Commission has determined not to reduce its burden estimates. Accordingly, the Commission expects that with respect to all but financial resources compliance, a 10 percent estimated increase would result in 30 additional hours per respondent and 540 additional hours annually for all respondents for designation and compliance.

With respect to Core Principle 21, the Commission expects that each of the 18 anticipated respondents may expend up to 10 hours quarterly for filings required under the regulations, totaling 40 hours annually for each respondent and 720 hours across all respondents with respect to compliance with Core Principle 21.

Aggregate Information Burden

In conclusion, amended collection 3038–0052 will result in respondents expending up to an additional $3,640 annually based on an hourly wage rate of $52 (30 hours + 40 hours × $52) to comply with the proposed rules. This would result in an aggregated additional cost of $65,520 per annum (18 respondents × $3,640). This final burden estimate accounts for the 18 respondents that the Commission believes will be affected by the final rule, rather than the 17 initially proposed.[531] Otherwise, there is no change from the rule as proposed.

C. Cost Benefit Considerations

Background on Designated Contract Markets

Designated contract markets (''DCMs'') were established by the Commodity Futures Modernization Act of 2000 (''CFMA'') as one of two forms of Commission-regulated markets for the trading of futures and options contracts based on an underlying commodity, index, or instrument. Specifically, the CFMA established, under section 5 of the CEA, eight designation criteria and 18 core principles governing the designation and operation of DCMs. To implement the CFMA, the Commission codified regulations under part 38 consisting largely of guidance and acceptable practices which were illustrative of the types of matters an applicant or DCM may address and at times provided a safe harbor for demonstrating compliance, but did not necessarily mandate the principle means of compliance.

Section 735 of the Dodd-Frank Act amended section 5 of the CEA by: (1) Eliminating the eight designation criteria contained in former section 5(b) of the CEA; (2) revising the existing core principles, including the incorporation of many of the substantive elements of the former designation criteria; and (3) adding five new core principles, thereby requiring applicants and DCMs to comply with a total of 23 core principles as a condition of obtaining and maintaining designation as a contract market.

The Dodd-Frank Act also amended Core Principle 1 to provide that in its discretion, the Commission may determine by rule or regulation the manner in which DCMs comply with the Core Principles.[532] Accordingly, in proposing this rulemaking, the Commission undertook a comprehensive evaluation of its existing DCM rules, guidance, and acceptable practices associated with each core principle in order to update those provisions and determine which core principles would benefit from new or revised regulations. As described in this notice of final rulemaking, in addition to codifying new rules for several core principles, the Commission also is maintaining the guidance and acceptable practices, with necessary modifications, in many instances. The Commission believes that the promulgation of bright-line requirements in those instances where an industry best practice has developed will better serve the goals of the Dodd-Frank Act, and will provide the industry and market participants with greater specificity and regulatory transparency, and will improve the Commission's ability to effectively enforce its regulations.

The Commission's Cost Benefit Consideration

Section 15(a) of the CEA requires the Commission to ''consider the costs and benefits'' of its actions in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.[533]

To further the Commission's consideration of the costs and benefits imposed by its regulations, the Commission requested in the DCM NPRM that commenters provide data and any other information or statistics on which they relied to reach any conclusions regarding the costs and benefits of the proposed rules.[534] The Commission received one comment that provided quantitative information pertaining to the costs relevant to the Commission's proposed rules for Core Principle 9.[535] A number of commenters did, however, express the general view that there would be significant costs associated with implementing and complying with the proposed rules, with some commenters generally stating their belief that the costs would outweigh any potential benefits.[536] Given the lack of quantitative data provided in the comments or publicly available, the Commission has provided a qualitative description of the costs that would be incurred by DCMs.[537] In a

[531] The DCM NPRM referenced 17 respondents. The number of respondents was revised to 18 to include Eris, which was designated on October 28, 2011.

[532] The Dodd-Frank Act amended Core Principle 1 to clarify that boards of trade have reasonable discretion in establishing the manner in which they comply with the core principles, ''[u]nless otherwise determined by the Commission by rule or regulation.'' 7 U.S.C. 7(d)(1).

[533] 7 U.S.C. 19(a).

[534] 75 FR at 80605, Dec. 22, 2010.

[535] CME Comment Letter (Aug. 3, 2011). As discussed above, the Commission will consider all comments related to the proposed rules implementing Core Principle 9 when it finalizes those rules. The Commission expects and plans to finalize the rules implementing Core Principle 9 when it finalizes the SEF rulemaking.

[536] *See, e.g.,* comment letters from CME (Feb. 22, 2011, Apr. 18, 2011, Jun. 3, 2011 and Aug. 3, 2011), MGEX (Feb. 22, 2011 and Jun. 3, 2011), and GreenX (Feb. 22, 2011).

[537] Moreover, for each core principle, the first section of the regulation is a codification of the statutory language of the core principle as a rule—and accordingly, the Commission did not consider the costs and benefits of these rules because they do not reflect the exercise of discretion by the Commission. Where the Commission includes additional regulations for a core principle, the Commission considered the costs and benefits.

number of instances, the Commission is adopting rules that codify existing norms and best practices of DCMs (often reflected in existing guidance and acceptable practices and recommendations made in recent Rule Enforcement Reviews (''RERs''). In those cases, the existing norms or best practices serve as the baseline—that is, the point from which the Commission considers the incremental costs and benefits of the regulations adopted in this release. In other cases, however, there is no existing baseline either because the requirements arise under the new or revised core principles, or because the Commission determined to revise existing requirements or practices.

To assist the Commission and the public in assessing and understanding the economic costs and benefits of the final rule, the Commission has analyzed the costs of those regulations adopted in this rulemaking that impose additional requirements on DCMs above and beyond the baseline described above. In most instances, quantification of costs is not reasonably feasible because costs depend on the size and structure of DCMs, which vary markedly, or because quantification required information or data in the possession of the DCMs to which the Commission does not have access, and which was not provided in response to the NPRM. The Commission notes that to the extent that the regulations adopted in this rulemaking result in additional costs, those costs will be realized by DCMs in order to protect market participants and the public. In adopting these final regulations, the Commission attempted to take the least-prescriptive means necessary to promote the interests of the Dodd-Frank Act without impacting innovation and flexibility.

The following costs and benefits are organized, for the most part, by core principle. For each DCM core principle,[538] the Commission summarizes the final regulations, describes and responds to comments discussing the costs and benefits of the proposed regulations, and considers the costs and benefits of the associated regulations, followed by a consideration of those costs and benefits in light of the five factors set out in § 15(a) of the CEA. In addition, the Commission considers the costs and benefits associated with the codification of rules in place of guidance and acceptable practices. The Commission notes that many of its regulations refer to requirements that are contained in other rulemakings, some of which have been finalized and others which are still before the Commission. The costs and benefits of these regulations are discussed in connection with those other rulemakings.

The Commission further notes that certain final rules, including §§ 38.3(b), (c), (e), and (f), 38.5(a) and (b) and 38.256, 38.257, and 38.258 are essentially unchanged from existing rules applicable to DCMs and are not discussed further in this section, since they do not impose new costs and benefits as a result of the Commission's rulemaking.

Finally, the Commission is obligated to estimate the burden of, and provide supporting statements for, any collections of information it seeks to establish under considerations contained in the Paperwork Reduction Act,[539] and to seek approval of those requirements from the Office of Management and Budget. Therefore, the estimated burden and support for the collections of information in this rulemaking, as well as the consideration of comments thereto, are discussed in the Paperwork Reduction Act section of this rulemaking as required by that statute.

(1) Rules in Lieu of Guidance and Acceptable Practices

Appendices A and B to part 38 of the Commission's regulations provide guidance and acceptable practices for DCMs to comply with the CFMA DCM core principles and designation criteria. In this release, the Commission is codifying as rules certain of these obligations of DCMs. The rules codify certain DCM practices that Commission staff has historically recommended in RERs as appropriate under the guidance and acceptable practices, which are already followed by DCMs. In certain cases, the rules are less prescriptive than the existing guidance and acceptable practices they replace, and the rules therefore maintain the flexibility for DCMs to determine many aspects of their compliance programs.

Summary of Comments

As described in this release, the Commission received a number of comments opposing the codification of rules in lieu of guidance and acceptable practices. In response to commenters' concerns, the Commission is converting some of the proposed rules, in whole or in part, to guidance or acceptable practices.

CME, GreenX, MGEX, and KCBT expressed concern with the costs imposed by the conversion of guidance and acceptable practices to rules, stating that rules are more costly and burdensome to DCMs and will increase costs to the Commission[540] and end-users of derivatives.[541] CME claimed that there is no public policy benefit to what it described as ''one-size fits all rules.''[542] OCX and CME questioned the benefit of what they viewed as the prescriptive tone of the proposed rules.[543] Commenters also asserted that converting guidance and acceptable practices to rules may hinder or deter innovation for DCMs.[544]

Discussion

As explained throughout this release, in several instances the Commission has converted compliance obligations that were previously proposed as rules to guidance and acceptable practices (in whole or in part) in order to accommodate certain comments raised by market participants. In determining whether to codify a compliance practice in the form of a rule or guidance and acceptable practices, the Commission was guided by: (i) The comment letters that provided a basis for greater flexibility or, in some instances, for greater specificity, with respect to the stated compliance obligation; (ii) whether the practice consisted of a widely-accepted industry practice; and

[538] The costs and benefits of Core Principles 15, 16, 17, and 22 are discussed in connection with separate rulemakings for ''Governance Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities; Additional Requirements Regarding the Mitigation of Conflicts of Interest,'' 76 FR 722, Jan. 6, 2011, and ''Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest,'' 75 FR 63732, Oct. 18, 2010. The substantive regulations implementing Core Principles 15, 16, 17, and 22 were proposed in those separate rulemakings. Until such time as the Commission may adopt the final substantive rules implementing these core principles, the Commission is maintaining the current guidance and acceptable practices under part 38 relevant to Core Principles 15 and 16. Accordingly, the existing guidance and acceptable practices from appendix B to part 38 relevant to these core principles is being codified in the revised appendix B adopted in this final rulemaking. This will not result in additional costs because the Commission is simply codifying existing Guidance and Acceptable Practices. At such time as the Commission may adopt the final rules implementing these core principles, appendix B will be amended accordingly.

[539] 44 U.S.C. 3501 *et seq.*

[540] *See* CME Comment Letters (Feb. 22, 2011, Apr. 18, 2011, Jun. 3, 2011 and Aug. 3, 2011); MGEX Comment Letter (Jun. 3, 2011); GreenX Comment Letter (Feb. 22, 2011); KCBT Comment Letter at 9 (Feb. 22, 2011).

[541] CME Comment Letter at 3 (Feb. 22, 2011).

[542] CME Comment Letter at 8 (Feb. 22, 2011).

[543] OCX Comment Letter at 1–2 (Feb. 22, 2011); CME Comment Letter at 2–3 (Feb. 22, 2011).

[544] *See e.g.,* ICE Comment Letter at 1–2 (Feb. 22, 2011), Eris Comment Letter at 2 (Feb. 22, 2011), CME Comment Letter at 3–4 (Feb. 22, 2011), GreenX Comment Letter at 1 (Feb. 22, 2011).

(iii) whether the proposed rules were of a discretionary nature, and thus, were more appropriate as guidance and/or acceptable practices. In other circumstances, the Commission believes that maintaining certain regulations as rules will better serve market participants and the public by providing greater transparency and specificity and by improving the ability of the Commission to effectively enforce its regulations.

While CME claimed that the codification of rules is more costly to the Commission,[545] the Commission does not believe that rules are necessarily more costly to administer than guidance and acceptable practices. To the contrary, guidance and acceptable practices may be more costly to the Commission than rules because of the potential need to review individual exchange actions that do not meet the provisions of guidance and acceptable practices to determine if they comply with the underlying core principle. The Commission also notes that many of the rules are general in nature, allow for innovation and flexibility, and are not intended to be ''one size fits all.'' In response to the comment that rules will be more costly for end-users, the Commission notes that these regulations apply to DCMs, not to end-users, and are intended to protect market participants.

Commenters have suggested that as markets evolve or DCMs innovate, rules may become outdated and may no longer be consistent with evolving industry practice.[546] The Commission notes that in such instances, DCMs could petition the Commission for exemptive orders in order to implement new methods of compliance or request that the Commission propose revisions to its rules. The Commission notes that in accordance with Executive Order 13579, it will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.[547]

Commenters also stated that converting guidance and acceptable practices to rules may hinder or deter innovation for DCMs.[548] The Commission notes, in response to comments received, that many of the rules that commenters interpret as possibly having an effect on innovation, such as those that relate to technology (including certain rules under Core Principle 4, Prevention of Market Disruption), have been moved to guidance and acceptable practices in the final rule in order to provide DCMs with greater flexibility.

Costs

Costs to DCMs

As noted above, the rules finalized in this release generally are designed to codify existing industry practice, and implement new or revised core principles. However, the Commission is cognizant of the possibility that less established DCMs may require more significant modifications to their existing programs to comply with these rules if they do not currently follow industry practices. Nevertheless, it is likely less costly for DCMs to demonstrate compliance with rules than to demonstrate compliance with guidance and acceptable practices, which may require significantly more communications and exchange of documents with Commission staff. Accordingly, the primary cost imposed on DCMs as a result of converting guidance and acceptable practices to rules is the potential inability of DCMs to choose a different method of complying with the core principles as DCMs innovate or industry standards evolve. This cost may be present in each instance throughout this document where the Commission is replacing guidance or acceptable practices with rules. However, the Commission has made every attempt to provide sufficient flexibility to allow DCMs to continue to pursue the most efficient methods of compliance, within the rules, guidance and acceptable practice structure adopted in this release.

It also is possible that certain DCMs are currently engaged in practices that they consider to be in compliance with core principles, but which do not precisely follow existing guidance or acceptable practices (perhaps because the DCM considers a somewhat different method of complying with the core principle to be more efficient given the nature of the DCM). In such an instance, a DCM would now need to change those practices to be in full compliance with the rule. The Commission is not aware of any specific examples of DCMs that consider themselves to be in compliance with core principles, while not following the Commission's guidance or acceptable practices. Therefore, the Commission is unable to quantify the cost associated with this potential scenario. However, all DCMs should be in compliance with existing guidance and acceptable practices, and the Commission does not believe that DCMs employing variant practices can object to the cost of complying with existing guidance and acceptable practices.

As discussed above, the Commission notes that many of the rules that could affect innovation, such as those that relate to technology, have been moved to guidance and acceptable practices in the final rule in order to provide DCMs with added flexibility. However, even with guidance and acceptable practices in place of rules, innovation costs may still exist to a degree since the Commission may need to modify guidance and acceptable practices as industry practices evolve. Furthermore, as is the case under current guidance and acceptable practices, a DCM that devises a new method of complying with a core principle may incur certain costs to demonstrate such compliance to the Commission. It is not feasible to quantify these costs since the Commission has no way to predict how industry practices will evolve or what rule adjustments will be needed.

Costs to Market Participants and the Public

If converting guidance and acceptable practices to rules hinders or deters innovation for DCMs, commenters have asserted that DCMs may decline to innovate to the same extent that they innovate at present, potentially depriving market participants and the public of important advancements. However, costs to market participants as a result of converting some of the guidance and acceptable practices to rules should be minimal since existing requirements, including guidance and acceptable practices, would also need to be adjusted as important advancements occur, and commenters provided no specific examples of how converting the guidance and acceptable practices to rules would deter innovation. It is not feasible to quantify these costs since the Commission has no way to predict how DCMs will innovate or industry practices will evolve.

Benefits

Benefits to DCMs, Market Participants, and the Public

The codification of rules in lieu of guidance and acceptable practices provides specificity and transparency to DCMs, market participants, and the public. It also increases the likelihood of prompt compliance with the core

[545] CME Comment Letter at 2–4 (Feb. 22, 2011).

[546] *See e.g.,* CME Comment Letter at 3 (Feb. 22, 2011), Eris Comment Letter at 3 (Jun. 3, 2011), ICE Comment Letter at 10–11 (Feb. 22, 2011).

[547] 76 FR 41587, July 14, 2011.

[548] *See e.g.,* ICE Comment Letter at 1–2 (Feb. 22, 2011), Eris Comment Letter at 2 (Feb. 22, 2011), CME Comment Letter at 3 (Feb. 22, 2011), GreenX Comment Letter at 1 (Feb. 22, 2011).

principles because DCMs will have a clear understanding of what is required in order to demonstrate compliance with the applicable core principle. In turn, a DCM's ability to achieve prompt compliance with the rules instills confidence in market participants and the public who utilize the markets to offset risk and who utilize prices derived from the price discovery process of trading in centralized DCM markets. Specific enforceable standards also promote more efficient and effective enforcement by the Commission.

The costs and benefits of each of the rules, including rules that replace guidance or acceptable practices, are set out below in the cost-benefit discussion for the general compliance regulations under part 38 and for each core principle.

(2) General Compliance Regulations Under Part 38 [549]

Sec. 38.3(a) (Application procedures)

Rule § 38.3 sets forth the application and approval procedures for new DCM applicants. Rule § 38.3(a) specifies the application process, including the new requirement that the board of trade file the DCM Application Form (''Form DCM'') electronically. Rule § 38.3(a) also eliminates the 90-day expedited approval procedures for DCM applications. Accordingly, all DCM applications will be reviewed within the 180-day period governed by procedures specified in CEA section 6(a).[550]

Summary of Comments and Discussion

The Commission did not receive comments on the costs associated with filling out Form DCM.

Eris contended that eliminating the 90-day accelerated review process would place new entities at a competitive disadvantage because it would delay their time to market, which they believe is critical for new entrants.[551]

The Commission has found that, in the interest of meeting the expedited approval timeline, applicants seeking expedited review often file incomplete or draft applications without adequate supporting materials. This has resulted in the expenditure of significant amounts of staff time reviewing incomplete or draft applications, necessitating numerous follow-up conversations with applicants, and usually resulting in the removal of applications from the expedited review timeline. Additionally, some applications raise new or unique issues that require additional time for the Commission to review. Notably, since the passage of the CFMA, eleven DCM applicants have requested expedited treatment, but, for some of the reasons noted above, only three were designated within the shortened timeframe.[552] Moreover, eliminating the accelerated 90-day review process will not prevent DCMs from coming to market in an expeditious manner because the rule does not prevent the Commission from continuing to review applications within a shorter timeframe if DCM applicants submit substantially complete applications.

Costs

Form DCM is designed to elicit a demonstration that an applicant can satisfy each of the DCM core principles. Toward this end, Form DCM requires submission of information about an applicant's intended operations. Much of this information has been required of applicants under previous regulations. Accordingly, the use of Form DCM does not represent a substantive departure from the Commission's practices over the past decade. With respect to new core principles, Form DCM captures information that tracks statutory requirements and applicable Commission implementing regulations. In fact, by providing greater specificity and transparency as to what is expected from an applicant and by reducing the need for Commission staff to request, and the applicant to provide, supplementary information, Form DCM should reduce costs for applicants by minimizing the flow of documentation and discussions between DCM applicants and Commission staff needed for applicants to submit a complete application.

As noted above, eliminating the 90-day expedited review period is unlikely to impose additional costs on DCMs or to result in competitive disadvantage because it does not prevent the Commission from continuing to review applications within a shorter timeframe if DCM applicants submit substantially complete applications.

Benefits

The new application form has several benefits for DCM applicants. The new form is designed to ensure that applicants are in compliance with the DCM Core Principles—as required by the statute. The form improves upon existing practice by standardizing the information that a DCM must provide. The form includes comprehensive instructions that will guide DCM applicants and specify lists of documents and information that must be provided as exhibits. The Commission anticipates that the new application form will streamline the DCM designation process, both for DCM applicants and the Commission. The form will provide applicants with greater specificity and transparency regarding the type of information that is required. The use of the standardized form is expected to reduce the amount of time Commission staff will need to review applications, which should enable qualified DCMs to begin operating sooner. Other than the specific requirements necessitated by the new and revised core principles, and applicable regulations, the majority of information required under the new form consists of information that the Commission historically has required.

With respect to the elimination of the expedited review period, the Commission determined in the proposal that the 90-day accelerated review process was inefficient and impracticable. Applicants seeking expedited review often filed incomplete or draft applications, without adequate supporting materials, in the interest of meeting the expedited approval timeline.[553] This required Commission staff to expend significant amounts of time reviewing incomplete or draft applications and usually resulted in removal of the application from the expedited review timeline. Eliminating the expedited process is consistent with

[549] Proposed regulations 38.1 and 38.2 are not discussed because they impose no requirements on market participants. Regulation 38.1 updates internal references within part 38 and regulation 38.2 specifies the regulations from which DCMs will be exempt. Proposed regulations 38.3(b), (c), (e), and (f) are essentially unchanged from existing rules and impose no new costs or benefits. Additionally, regulation 38.6 is not being revised by this release.

[550] 7 U.S.C. 8(a).

[551] Eris Comment Letter at 4 (Feb. 22, 2011). Eris was designated as a contract market on October 28, 2011.

[552] The three applicants that were designated within the shortened timeframe included NYSE Liffe, Chicago Climate Futures Exchange (''CCFE''), and GreenX. The remaining applications that were not approved during the expedited timeframe included: Inet Futures Exchange, OneChicago, CBOE Futures Exchange, U.S. Futures Exchange, ELX Futures, The Trend Exchange, NQLX Futures Exchange, and Cantor Futures. The Commission notes that while NYSE Liffe, CCFE, and GreenX became designated within 90 days, they each submitted multiple draft DCM applications that were processed and reviewed by Commission staff for significantly longer than 90 days.

[553] For example, while NYSE Liffe, GreenX, and CCFE became designated 79, 88, and 60 days, respectively, after they submitted their applications, they each submitted several versions of draft applications that required numerous follow-up conversations with Commission staff. While GreenX technically became designated within 88 days, the Commission actually processed GreenX's application in draft form for nearly a year.

the statutory 180-day review period, and should result in a better use of Commission resources. During the 180-day review period, applicants will have adequate time to respond to Commission staff requests for additional information, resulting in a more efficient process for applicants and for the Commission.[554]

Section 15(a) Factors

1. *Protection of market participants and the public.* Given the critical role that DCMs play in the financial markets, a role that now includes providing a marketplace for the trading of swaps as well as futures and options, it is essential that the Commission conduct a comprehensive and thorough review of all DCM applications. Such review is essential for the protection of market participants and the public insofar as it serves to limit the performance of DCM functions to only those entities that have provided adequate demonstration that they are capable of satisfying the core principles. The new Form DCM and the elimination of the 90-day application review period will enable the Commission to more efficiently and accurately determine whether it is appropriate to designate a DCM applicant as a contract market.

2. *Efficiency, competitiveness, and financial integrity.* The Commission expects that the use of Form DCM will promote efficiency, competitiveness, and financial integrity by requiring at the outset all information the Commission deems necessary to consider an application for designation as a contract market. As discussed above, the Commission's experience with lengthy reviews of draft applications and other materially incomplete submissions highlights the need for a streamlined and formalized process. By replacing a series of provisions under current § 38.3(a) with a streamlined Form DCM, and by eliminating the 90-day expedited application review period, the Commission is promoting increased efficiency by providing specific guidance to applicants and DCMs before they undertake the application process, and by facilitating the submission of a materially complete final application. This also will reduce the need for the submission of supplemental materials and repeated consultation between applicants and Commission staff. The result will be a more cost effective and expeditious review and approval of applications. This will benefit potential and existing DCMs as well as free Commission staff to handle other regulatory matters.

In addition, the use of Form DCM will make available to the public the Commission's informational requirements so that all prospective applicants have a heightened understanding of what is involved in the preparation and processing of an application. Form DCM will promote greater transparency in the process and will enhance competition among DCMs by making it easier for qualified applicants to undertake and navigate the application process in a timely manner.

Form DCM is designed to address an applicant or a DCM's ability to comply with the core principles, which form the bedrock of the Commission's oversight, and which Congress determined are essential to ensure the financial integrity of transactions and derivatives markets, generally. In particular, the required information in the Form DCM (Exhibits I–J—Financial Information and M and T—Compliance) elicit important information supporting the applicant or DCM's ability to operate a financially sound DCM and appropriately manage the risks associated with its role in the financial markets.

3. *Price discovery.* The Commission does not anticipate that use of Form DCM or the elimination of the 90-day review period will impact the price discovery process.

4. *Sound risk management policies.* The Commission expects that the use of Form DCM will promote sound risk management practices by requiring applicants and DCMs to examine their proposed risk management program through a series of detailed exhibits and submissions. The submission of exhibits relating to risk management, including exhibits I–J (Financial Information) and M, O, and T (Compliance) aid Commission staff's analysis and evaluation of an applicant's ability to comply with the core principles.

5. *Other public interest considerations.* The standardization and streamlining of the DCM application process benefits the public in terms of more efficient use of Commission resources and more cost-effective and transparent requirements for applicants and DCMs. DCMs play a key role in the financial markets, and this role takes on even greater significance now that swaps may be traded on DCMs. A coherent and comprehensive approach to DCM designation is needed to ensure that only qualified applicants will be approved and that they are capable of satisfying the requirements of the core principles and Commission regulations.

Sec. 38.3(d) (Request for transfer of designation) and § 38.5 (Information relating to contract market compliance)

Rule § 38.3(d) is a new rule that formalizes the procedures under which a DCM may request the transfer of its designation to a new legal entity as a result of a corporate event such as a merger or corporate reorganization. Rule § 38.5(c)[555] is a new rule that requires that the DCM must submit to the Commission a notification of each transaction involving the transfer of ten percent or more of the equity interest in the designated contract market, and that such notification must be provided at the earliest possible time but in no event later than ten business days following the date upon which the designated contract market enters into a legally binding obligation to transfer the equity interest. As described in the preamble, upon receiving a notification of an equity interest transfer, the Commission may request, where necessary, additional information and specific documentation from the DCM pursuant to its authority under § 38.5, although such documentation is no longer required with the initial notification. The Commission did not receive any comments discussing the costs or benefits of proposed §§ 38.3(d) or 38.5(c).

Costs

Under § 38.3(d), only DCMs that wish to request the transfer of their designation will incur the one-time cost associated with filing the request with the Commission and preparing the underlying documents and representations that must be included with the request. The Commission notes that it has historically requested that DCMs file similar information in the event of a transfer of designation. The Commission is reducing the burden associated with the proposed regulations by clarifying that DCMs have the flexibility to determine the appropriate form of the documents they are required to submit. The Commission estimates that the submissions and notifications required under § 38.3(d) will take around two hours to compile at a cost of approximately $104.

The Commission is also reducing the burden associated with proposed

[554] This rule is consistent with the Commission's elimination of the 90-day expedited review procedures for derivatives clearing organization applications under part 39. *See* ''Derivatives Clearing Organization General Provisions and Core Principles,'' 76 FR 69334, 69337, Nov. 8, 2011.

[555] The provisions in regulation 38.5 regarding requests for information and demonstrations of compliance (paragraphs (a) and (b) in the final rules) were largely unchanged after Dodd-Frank and will not be discussed in this rulemaking because they do not result in any incremental costs or benefits.

§ 38.5(c) by eliminating the requirement that DCMs must provide a series of documents and a representation along with the notification of an equity interest transfer. DCMs that enter into agreements that could result in equity interest transfers of 10 percent or more will incur one-time costs associated with preparing and submitting the required notification for each event. The Commission estimates that the initial notification required under § 38.5(c) will take around one hour to compile at a cost of approximately $52.

Benefits

Section 38.3(d) formalizes the procedures that a DCM must follow when requesting the transfer of its DCM designation and positions comprising open interest in anticipation of a corporate event. The provision requiring three months advance notice of an anticipated corporate change will provide the Commission with sufficient time to evaluate the anticipated change and determine the likely impact of the change on the DCM's governance and obligations, as well as the impact of the change on the rights and obligations of market participants holding open positions. The rule will permit the Commission to evaluate the transferee's ability to comply with the applicable laws and regulations. The rule also requires DCMs to submit a representation that they are in compliance with the applicable laws and regulations. This requirement provides regulatory specificity to DCMs regarding their obligations.

Section 38.5 provides Commission staff with an opportunity to determine whether a change in ownership at a DCM resulting from an equity interest transfer will adversely impact the operations of the DCM, or the DCM's ability to comply with the Core Principles and the Commission's regulations. Section 38.5 ensures that DCMs remain mindful of their self-regulatory responsibilities when negotiating the terms of significant equity interest transfers.

Section 15(a) Factors (§§ 38.3(d) and 38.5(c))

1. *Protection of market participants and the public.* Given the critical role that DCMs play in the financial markets, a role that now includes providing a marketplace for the trading of swaps as well as futures and options, it is essential that the Commission conduct a comprehensive and thorough review of all requests for transfer of designation and notifications of equity interest transfers. Such review is essential for the protection of market participants and the public insofar as it serves to limit the performance of DCM functions to only those entities that have provided adequate demonstration that they are capable of satisfying the core principles. The new formalized procedures for transfers of designation and equity interest transfers will provide the Commission with the opportunity to determine the impact those transfers are likely to have on a DCM's ability to comply with the core principles and on the market.

2. *Efficiency, competitiveness, and financial integrity.* The Commission expects that the formalized procedures for requesting a transfer of designation and for notifying the Commission of an equity interest transfer will promote efficiency, competitiveness, and financial integrity by providing the Commission with the opportunity to obtain the information the Commission deems necessary to consider such requests. The result will be more cost effective review and approval of requests for transfer of designation and equity interest. This will benefit DCMs. Financial integrity is also promoted as the transferee's ability to meet core principles will be examined.

3. *Price discovery.* The Commission does not anticipate that the formalized process for requesting a transfer of designation or notifying the Commission of an equity interest transfer will impact the price discovery process.

4. *Sound risk management policies.* The Commission expects that the formalized processes for transfers of designation and equity interests will promote sound risk management practices by requiring DCMs to examine their proposed risk management program through a series of submissions that aid Commission staff's analysis and evaluation of a DCM's ability to comply with the core principles.

5. *Other public interest considerations.* The standardization and streamlining of the transfer of designation and equity interest transfer process benefits the public by permitting more efficient use of Commission resources and more cost-effective requirements for DCMs. A coherent and comprehensive approach to transfers of designations and equity interests is needed to ensure that all DCMs continue to satisfy the requirements of the core principles and Commission regulations.

Sec. 38.3(g) (Requirements for existing designated contract markets)

Proposed rule § 38.3(g) required existing DCMs to certify compliance with each of the core principles within 60 days of the effective date of the final rules. In response to comments, the Commission has eliminated this requirement from the final rules. The Commission believes that the removal of this provision will decrease costs for DCMs.

Sec. 38.4 (Procedures for Listing Products)

Section 38.4 conforms the prior regulation to that of new rules in part 40 of the Commission's regulations.[556] There are no costs imposed by the conforming changes beyond those discussed in connection with that rulemaking.

Sec. 38.7 (Prohibited use of data collected for regulatory purposes)

Rule § 38.7 is a new rule that prohibits a DCM from using for business or marketing purposes proprietary or personal information that it collects from market participants unless the market participant clearly consents to the use of its information in such a manner.[557]

Costs

The Commission notes that in response to general comments that did not discuss costs or benefits, it has amended this provision to allow DCMs to use this information for business or marketing purposes if the market participant clearly consents to the use of its information in such a manner. The costs imposed by this provision are limited to the cost a DCM might incur in obtaining a market participant's consent to use its information for the purposes described above. The Commission does not prescribe the method by which a DCM must obtain such consent and believes that the burden of doing so would be minimal and would likely involve sending an email or a letter.

Benefits

This rule protects market participants' information provided to a DCM for regulatory purposes from being used to advance the commercial interests of the DCM. The rule eliminates incentives on the part of DCMs to use market participants' proprietary or personal information for their own commercial gain. The rule does, however, afford market participants the flexibility to

[556] "Provisions Common to Registered Entities," 76 FR 44776, Jul. 27, 2011.

[557] The Commission notes that the requirements of regulation 38.7 are in line with similar rules intended to provide privacy protections to certain consumer information finalized in a separate rulemaking implementing regulations under the Fair Credit Reporting Act. *See* 76 FR 43879, Jul. 22, 2011.

consent to a DCM's use of their personal information for commercial purposes if they so desire.

Section 15(a) Factors

1. *Protection of market participants and the public.* This rule protects market participants and the public by ensuring that information they provide to DCMs for regulatory purposes it not used inappropriately to advance the commercial interests of the DCM without their consent.

2. *Efficiency, competitiveness, and financial integrity.* This rule encourages greater participation in the markets by ensuring market participants that their proprietary and personal information will not be used by DCMs without their consent. Increased participation by market participants will foster greater liquidity, tighter spreads, and more competitive markets. The rule also promotes efficient and competitive markets by ensuring that DCMs do not use access to their market participants' data (without their consent) as a source of competitive advantage.

3. *Price discovery.* Fostering a competitive environment, as mentioned above, aids in the compilation of information traded in markets to further price discovery.

4. *Sound risk management practices.* The Commission has not identified any effects that this rule will have on sound risk management practices.

5. *Other public interest considerations.* The Commission has not identified any effects that this rule will have on other public interest considerations.

Sec. 38.8 (Listing of Swaps on a Designated Contract Market)

Section 38.8(a) provides that a DCM that lists a swap contract for trading on its contract market for the first time must file with the Commission a written demonstration detailing how the DCM is addressing its self-regulatory obligations with respect to swap transactions.

Section 38.8(b) provides that prior to listing swaps for trading on or through the DCM, each DCM must request an alphanumeric code from the Commission for purposes of identifying the DCM pursuant to part 45.

Summary of Comments and Discussion

ELX argued that the DCM NPRM did not make clear what criteria will be used to distinguish between a swap contract and a futures contract and argued that this ambiguity will cause uncertainty and redundant costs for boards of trade that would prefer to follow a DCM model without having to adopt a parallel set of rules and procedures.[558]

As noted in the Final Exemptive Order issued July 14, 2011,[559] a DCM may list and trade swaps after July 16, 2011 under the DCM's rules related to futures contracts, without further exemptive relief. In the Order, the Commission noted that if a DCM intends to trade swaps pursuant to the rules, processes, and procedures currently regulating trading on its DCM, the DCM may need to amend or otherwise update its rules, processes, and procedures in order to address the trading of swaps.[560]

Costs and Benefits

In order to comply with new § 38.8(a), DCMs listing swaps for the first time will incur costs associated with filing the required demonstration detailing how the DCM is addressing its self-regulatory obligations and fulfilling its statutory and regulatory obligations with respect to swap transactions. The Commission estimates that this filing will take two hours to complete at a cost of about $104.

With respect to § 38.8(b), the comments, costs, and benefits of this provision will be discussed in the rulemaking that implement swap data recordkeeping and reporting requirements under part 45 of the Commission's regulations.[561]

Sec. 38.9 (Boards of Trade Operating Both a Designated Contract Market and Swap Execution Facility)

Section 38.9 provides that a board of trade that operates a DCM also may operate a SEF, provided that the board of trade separately register as a SEF pursuant to the requirements set forth in part 37. The rule also requires such boards of trade to comply with the core principles under section 5h of the Act and the SEF rules under part 37, on an ongoing basis.

Additionally, the rule codifies the requirement contained in section 5h(c) of the CEA, which provides that a board of trade that operates both a DCM and a SEF, and that uses the same electronic trade execution system for executing and trading swaps that it uses in its capacity as a DCM, must clearly identify to market participants for each swap whether the execution or trading is taking place on the DCM or the SEF. The Commission did not receive any comments on the costs or benefits of this provision and is adopting the rule as proposed.

Costs and Benefits

The obligations imposed by § 38.9 are codifications of the new statutory requirement placed on DCMs. The obligations imposed by the CEA are not within the Commission's discretion to change. However, the Commission believes there are several benefits to restating the statutory requirements in the regulations. Codification of statutory requirements in the regulations will improve the Commission's ability to enforce the statutory language and will provide market participants with a more unified regulatory picture and with greater context and specificity regarding the congressional intent underlying the regulations.

Sec. 38.10 (Reporting of Swaps Traded on a Designated Contract Market)

Section 38.10 provides that each DCM that trades swaps must report specified swap data as provided under parts 43 and 45.[562] This provision is consistent with the statute's reporting requirements as reflected in sections 2(a)(13)–(14) and 21(b) of the CEA. The costs and benefits of these rules are discussed in connection with those rulemakings.

(3) Core Principle 2: Compliance With Rules

For the most part, the regulations adopted under Core Principle 2 codify: (1) Language found in the guidance and acceptable practices issued under former Core Principle 2 and former Designation Criterion 8; (2) existing DCM compliance practices that the Commission believes constitute best practices; and (3) recommendations made over the past several years by the Commission in RERs, and which are currently largely followed. The Commission also incorporated into the rules for Core Principle 2 certain concepts contained in part 8 of its regulations—Exchange Procedures for Disciplinary, Summary, and Membership Denial Actions. Most DCMs' compliance and enforcement practices relating to Core Principle 2 obligations historically have been consistent with the rules contained in part 8. The Commission is also adopting some requirements that are new for DCMs. The costs and benefits of each of these requirements are discussed below.

[558] ELX Comment Letter at 4 (Feb. 22, 2011).

[559] 76 FR 42508, Jul. 14, 2011.

[560] *Id.* at 42518, n. 131.

[561] *See* 77 FR 2136, Jan. 13, 2012.

[562] ''Real-Time Public Reporting of Swap Transaction Data,'' 77 FR 1182, Jan. 9, 2012; ''Swap Data Recordkeeping and Reporting Requirements,'' 77 FR 2136, Jan. 13, 2012.

Sec. 38.151(a) (Jurisdiction), § 38.151(b) (Impartial access by members, persons with trading privileges, and independent software vendors) and § 38.151(c) (Limitations on access)

Section 38.151(a) requires that prior to granting a member or market participant access to its markets, the DCM must require the member or market participant to consent to its jurisdiction. Section 38.151(b)(1) requires a DCM to provide its members, persons with trading privileges, and independent software vendors (''ISVs'') with impartial access to its markets and services, including access criteria that are impartial, transparent, and applied in a non-discriminatory manner. Section 38.151(b)(2) requires that the DCM provide comparable fee structures for members, persons with trading privileges, and ISVs receiving equal access to, or services from, the DCM.

Section 38.151(c) (Limitations on Access) requires a DCM to establish and impartially enforce rules governing any decision by the DCM to deny, suspend, or permanently bar a member's or a person with trading privileges access to the contract market. Accordingly, any decision by a DCM to deny, suspend, or permanently bar a member's or person with trading privileges access to the DCM must be impartial and applied in a non-discriminatory manner. Section 38.151(a) derives from the statutory language of Core Principle 2. While §§ 38.151(b) and (c) are new rules, they codify existing industry practice and current Commission requirements.

Summary of Comments

CME stated that it would be costly to comply with the proposed § 38.151(a) requirement that clearing firms obtain every customer's consent to the regulatory jurisdiction of each DCM.[563] KCBT questioned the benefit of implementing the proposed rule.[564]

With respect to 38.151(b)(1), MGEX stated that it is generally in the best interest of the DCM to have open and available markets and services. Therefore, MGEX argued that the proposed rule was unnecessary and infringed on the business judgment of the DCM.[565]

With respect to 38.151(b)(2), CME argued that the Commission does not have the authority to set or limit fees charged by DCMs, likening the requirement for comparable fee structures to an industry-wide fee cap that has the effect of a tax.[566]

Discussion

The Commission believes that § 38.151(a) codifies jurisdictional requirements necessary to effectuate Core Principle 2's statutory mandate that a board of trade ''shall have the capacity to detect, investigate, and apply appropriate sanctions to any person that violates any rules of the contract market.'' In the Commission's view, a DCM must establish jurisdiction prior to granting members and market participants access to its markets in order to effectively investigate and sanction persons that violate DCM rules. A DCM should not be in the position of asking market participants to voluntarily submit to jurisdiction after a potential rule violation has been found. In response to CME's comment, the Commission clarifies that each DCM may determine for itself how it will secure such agreements. For example, a DCM could utilize its clearing firms to secure the agreement. The Commission recognizes that DCMs may need additional time to secure market participants' agreements to jurisdiction. Accordingly, in order to reduce the burden associated with this rule, the Commission is granting DCMs up to 180 additional days following the applicable effective date for existing members and market participants to comply with the requirements of § 38.151(a).

With respect to § 38.151(b), and as discussed in further detail in the preamble, the Commission has considered the arguments asserted by commenters and determined that the rule is necessary in order to prevent the use of discriminatory access requirements as a competitive tool against certain participants. The Commission has, however, listened to commenters' concerns about the costs associated with the regulation and believes the rules strike an appropriate balance.

Any comment implying that the Commission is attempting to set or limit fees charged by DCMs is misplaced. The requirement in § 38.151(b)(2) neither sets nor limits fees charged by DCMs. Rather, the rule states only that the DCM set non-discriminatory fee classes for those receiving access to the DCM as a way to implement the requirement of impartial access to DCMs. Accordingly, DCMs may establish different categories of market participants, but may not discriminate within a particular category. As the Commission noted in the preamble, when a DCM determines its fee structure, it may consider other factors in addition to the cost of providing access. The fee structure was not designed to be a rigid requirement that fails to take account of legitimate business justifications for offering different fees to different categories of entities seeking access. The Commission recognizes that DCMs may also consider services they receive (in addition to costs) when determining their fee structure. Accordingly, the comment suggesting that the Commission does not have authority to set fees is misplaced as the rule neither sets nor limits fees charged by DCMs.

Costs

The costs associated with § 38.151(a) derive from the statute and are likely to be limited to the cost of obtaining customers' consent to the DCM's jurisdiction. In response to comments received, the Commission is not mandating the method for obtaining consent; this may afford cost savings to DCMs. The Commission believes that most DCMs are generally already in compliance with the requirements of § 38.151(b), which require that DCMs provide comparable fee structures for members, persons with trading privileges, and ISVs receiving equal access to, or services from, the DCM. In addition, the Commission believes that most DCMs currently have rules that comply with the requirements of § 38.151(c), which states that DCMs must establish and enforce rules governing any decisions to deny, suspend, or permanently bar a member's or market participant's access to the contract market. Accordingly, the Commission believes that the final rule is unlikely to impose additional costs on DCMs.

Benefits

The requirements of § 38.151(a) ensure that DCMs can effectively investigate and sanction persons that violate DCM rules, as required by Core Principle 2. A DCM should not be in the position of asking market participants to voluntarily submit to jurisdiction after a potential rule violation has been found. This requirement also ensures that market participants are clear that their trading practices are subject to the rules of a DCM.

As noted above, the impartial access requirements of § 38.151(b) prevent DCMs from using discriminatory access fee requirements as a competitive tool against certain participants. Access (and decisions to limit access) to a DCM should be based on the financial and operational soundness of a participant, rather than discriminatory or other improper motives. Impartial access benefits the market by ensuring that all participants that meet the requirements are able to trade on the DCM, thus

[563] CME Comment Letter at 16 (Feb. 22, 2011).

[564] KCBT Comment Letter at 2 (Feb. 22, 2011).

[565] MGEX Comment Letter at 3 (Feb. 22, 2011).

[566] CME Comment Letter at 8–9 (Feb. 22, 2011).

potentially increasing liquidity in the marketplace. The preamble's discussion that any participant should be able to demonstrate financial soundness either by showing that it is a clearing member of a DCO that clears products traded on that DCM or by showing that it has clearing arrangements in place with such a clearing member specifies that access will be neutral and non-discriminatory. Granting such impartial access to participants will likely improve competition within the market by ensuring access criteria do not inappropriately deter market participants from participating in the market.

The benefits described above also apply to the requirement that DCM decisions to deny, suspend, or permanently bar a member or person with trading privileges' access to the DCM should be impartial and applied in a non-discriminatory manner.

Section 15(a) Factors

1. *Protection of market participants and the public.* The final rules protect market participants by ensuring that DCMs can effectively investigate and sanction persons that violate DCM rules, and by ensuring that similarly situated market participants receive similar access criteria and comparable fee structures, consistent with the statute. Accordingly, the rules protect market participants from the potential that DCMs may employ unfair or discriminatory practices in rendering access determinations. In addition, the rules will provide market participants with greater specificity regarding DCMs procedures for denials and suspensions. This will benefit the market by ensuring that market participants know what behavior will lead to denials and suspensions and that denials and suspensions are being imposed in a fair and non-discriminatory manner.

2. *Efficiency, competitiveness, and financial integrity.* The rules prevent DCMs from employing discriminatory or preferential criteria in granting members, persons with trading privileges, and ISVs access to their market. Accordingly, the rules will likely promote participation and competition within the marketplace by ensuring access criteria do not inappropriately deter market participants from participating in the market. Efficiency is promoted by defining clear rules governing the denial or suspension of a member's or person with trading privileges access to the contract market. The final rules may also promote financial integrity in the derivatives markets because sound, non-discriminatory access criteria and fee structures are less likely to deter the financial integrity of members and market participants.

3. *Price discovery.* As noted above, the rules are likely to increase competition within the market by optimizing market participation. Increased participation is likely to enhance the DCM's liquidity, leading to enhanced price discovery.

4. *Sound risk management practices.* The Commission has not identified any effects that this rule will have on sound risk management practices other than the effects related to the factors above, especially with respect to financial integrity.

5. *Other public interest considerations.* The Commission has not identified any effects that this rule will have on other public interest considerations.

Sec. 38.152 (Abusive Trading Practices Prohibited)

Section 38.152 requires a DCM to prohibit abusive trading practices, including front-running, wash trading, fraudulent trading, and money passes, as well as any other trading practices that the DCM deems to be abusive. The Commission did not receive any comments discussing the costs or benefits of this provision.[567]

Costs

DCMs generally already have rules in place that prohibit the conduct enumerated in the CEA and the final rule. They also have the systems and staff necessary to detect, investigate, and prosecute possible rule violations. Accordingly, the Commission believes that the final rule is unlikely to impose additional costs on most DCMs.

Benefits

The rule ensures that DCMs prohibit the specific trading practices identified in the rule, as well as any manipulative or disruptive trading practices prohibited by the CEA or by Commission regulation. Market participants and the public are likely to have greater confidence in markets that are protected from abusive trade practices, and therefore will be more willing to participate in the market, which may enhance liquidity, competition, and price discovery.

Section 15(a) Factors

1. *Protection of market participants and the public.* Congress determined in Core Principle 2 that market participants must be protected from abusive trade practices. Market participants rely on properly functioning futures markets in order to hedge risk and must have confidence in the integrity of the markets in order to actively participate. Rule 38.152 requires DCMs to prohibit conduct that could result in harm to market participants, as well as members of the public who rely on the prices derived from the market. The rule protects market participants and the public from possible wrongdoing on the part of firms and commodity professionals with whom they deal.

2. *Efficiency, competitiveness and financial integrity of futures markets.* The rule promotes efficiency, competitiveness, and financial integrity in the DCM market because markets that are protected from abusive trade practices will likely attract greater market participation, and increase public confidence in the market, and thereby will likely increase competition and liquidity.

3. *Price discovery.* The rule similarly promotes price discovery because markets protected from the trading abuses prohibited by the rule are likely to operate more efficiently and more accurately and to attract greater market participation and competition; such markets better reflect the forces of supply and demand, leading to greater price discovery.

4. *Sound risk management practices.* The Commission has not identified any effects that this rule will have on sound risk management practices, other than the effects related to the factors above.

5. *Other public interest considerations.* The Commission has not identified any effects that this rule will have on other public interest considerations.

Sec. 38.153 (Capacity To Detect and Investigate Rule Violations), § 38.155 (Compliance Staff and Resources), § 38.156 (Automated Trade Surveillance System), and § 38.157 (Real Time Market Monitoring)

Sec. 38.153 (Capacity To Detect and Investigate Rule Violations)

Section 38.153 requires that a DCM have arrangements and appropriate resources for the effective enforcement of all of its rules, including the authority to collect information and examine books and records of members and persons under investigation, and adequate resources for trade and surveillance programs. While the proposed rule required DCMs to have the authority to collect information and

[567] CME commented that the rule is overly prescriptive. CME Comment Letter at 17–18 (Feb. 22, 2011). The Commission considered this comment in preparing this release and discusses the costs and benefits of the codification of rules in lieu of guidance and acceptable practices in further detail in section C(1) above.

examine books and records for ''members'' and ''market participants,'' the final rule imposes a lesser burden on DCMs by replacing the term ''market participants'' with ''persons under investigation.''

Summary of Comments and Discussion

CFE requested that the Commission clarify the term ''market participant,'' arguing that if the term ''market participant'' were to be interpreted to apply to all customers—and not just those customers with direct electronic access to the DCM—a DCM's regulatory responsibilities would greatly expand over participants with whom it has no direct relationship or connection, greatly increasing costs for the DCM.[568]

Similarly, CME stated that the proposed rule implied that the entire class of non-member, non-registered market participants would be subject to the panoply of recordkeeping requirements currently applicable only to members, registrants, and direct access clients of CME.[569] CME stated that there has been no showing that such a requirement will further the DCM's ability to effectively carry out its self-regulatory responsibilities and that it would be imprudent to impose these costs and burdens on market participants.[570]

The Commission notes that Core Principle 2 requires a DCM to have, in addition to appropriate resources for trade practice surveillance programs, appropriate resources to enforce all of its rules. Further, the Commission is cognizant that a broad interpretation of the term ''market participant'' could significantly increase the regulatory responsibilities for DCMs. In response to the commenters' concerns, the Commission is replacing the term ''market participant'' in the proposed rule with ''persons under investigation'' in the final rule, which will reduce the costs of compliance.

Costs

The requirements of this rule are not new for DCMs. Prior to the Dodd-Frank Act, the Commission expected a DCM to have adequate capacity and resources for effective rule enforcement.[571] The existing costs associated with § 38.153 include the initial and recurring costs associated with a DCM investing in the resources and staff necessary to provide effective rule enforcement. A DCM must have sufficient staff and resources, including the resources to collect information and examine books and records of members and persons under investigation and to analyze data to determine whether a rule violation occurred. Other costs include automated systems to assist the compliance staff in carrying out self-regulatory responsibilities for the DCM. The Commission believes that existing DCMs generally already have the systems necessary for effective rule enforcement. Further, replacing the term ''market participant'' with ''persons under investigation'' in the final rule will reduce the costs by narrowing the scope of the requirement.

Benefits

The rule ensures that a DCM has arrangements and resources for effective rule enforcement. A DCM can best administer its compliance and rule enforcement obligations when it has the ability to access and examine the books and records of its members and persons under investigation.

Sec. 38.155 (Compliance staff and resources)

Section 38.155 requires that a DCM establish and maintain sufficient compliance staff and resources to conduct a number of enumerated tasks, such as audit trail reviews, trade practice surveillance, market surveillance, real-time market monitoring, and the ability to address unusual market or trading events and to complete any investigations in a timely manner. The Commission did not receive any comments discussing the costs or benefits of this provision.

Costs

The Commission notes that it currently requires DCMs to have sufficient compliance staff and resources to perform the noted regulatory functions and that most DCMs have already expended the costs necessary to comply with the requirements under § 38.155. Any DCM not currently in compliance with the rule will incur the cost of hiring and maintaining sufficient staff and resources (e.g. electronic systems) to conduct effective audit trail reviews, trade practice surveillance, market surveillance, and real-time market monitoring, to address unusual market or trading events, and to complete any investigations in a timely manner. However, this requirement is consistent with existing practice at many DCMs and reflects staff recommendations made in RERs from time to time. DCMs will also incur the cost of the annual monitoring of the size and workload of compliance staff and resources, which will require oversight time for compliance staff, management and the regulatory oversight committee. Any costs associated with § 38.155 will vary depending upon a DCM's trading volumes, the number of products offered for trading, and the complexity of conducting surveillance on the particular products offered by the DCM. In addition, changes in market characteristics such as volatility, the presence or absence of intermediaries, and the nature and sophistication of market participants may also impact the costs associated with § 38.155.

Benefits

This rule ensures that DCMs have adequate compliance staff and resources to conduct effective audit trail reviews, trade practice surveillance, market surveillance, and real-time market monitoring in order to help detect rule violations and abusive trading practices. DCMs must also have adequate resources necessary to address unusual market or trading events in order to help stabilize market conditions if necessary and to complete any investigations in a timely manner. To this end, the rule promotes market integrity, customer protection, and the effectiveness of DCMs as self-regulatory organizations.

Sec. 38.156 (Automated trade surveillance system)

Section 38.156 requires a DCM to maintain an automated trade surveillance system capable of detecting and investigating potential trade practice violations and able to process this data on a trade date plus one (''T+1 basis''). The Commission did not receive any comments discussing the costs or benefits of this provision.[572]

Costs

Costs associated with § 38.156 include the costs of developing and maintaining an automated system capable of conducting trade practice surveillance, as well as requiring a DCM to have adequate compliance staff to administer the trade surveillance system. Adequate staff resources are necessary to administer, maintain, and periodically upgrade the system. For existing DCMs, the costs associated with § 38.156 should not be new, as the regulation generally reflects current industry practices and Commission

[568] CFE Comment Letter at 2 (Feb. 22, 2011).

[569] CME Comment Letter at 18 (Feb. 22, 2011).

[570] *Id.*

[571] Commission staff has recommended these practices through RERs.

[572] In its comment letter, CME stated this rule is overly prescriptive. *See* CME Comment Letter at 20 (Feb. 22, 2011). The Commission considered this comment in preparing this release and discusses the costs and benefits of the codification of rules in lieu of guidance and acceptable practices in further detail in section C(1) above.

requirements. Further, any costs will vary according to the complexity and analytical power of the trade surveillance system it builds, as well as the amount of compliance staff necessary to administer, maintain, and upgrade the system given the DCM's product and participant profiles. Moreover, the Commission has found, through RERs, that a DCM's automated surveillance system typically satisfies the requirements set forth in the final rule (e.g., the ability to compute, retain, and compare trading statistics). Therefore, the Commission believes that it will be unnecessary for most DCMs to incur costs to significantly upgrade their automated surveillance systems to comply with the final rule.

Benefits

The rule ensures that a DCM has an adequate automated trade practice surveillance system. These systems play a critical role in ensuring that a DCM can effectively conduct investigations and detect and prosecute possible trading abuses, including the abusive trading practices enumerated in § 38.152. Such systems improve DCM compliance staff's ability to sort and query voluminous amounts of data in order to better detect potential rule violations and abusive trading practices that could harm market participants.

Sec. 38.157 (Real-Time Market Monitoring)

Section 38.157 requires a DCM to conduct real-time market monitoring of all trading activity on its electronic trading platform(s) to identify disorderly trading and any market or system anomalies and to have the authority to cancel trades and adjust trade prices when necessary.[573]

Costs

Costs associated with § 38.157 include the costs of developing and maintaining electronic systems to facilitate real-time monitoring of all trading activity on a DCM's electronic trading platform(s). DCMs will also bear the cost of maintaining sufficient staff to conduct real-time market monitoring and to administer any interventions in the market that may be required, including the cancellation of trades, suspension and resumption of trading, and responses to any disorderly market conditions requiring human intervention.

The Commission notes, however, that existing DCMs already have market monitoring capabilities, either directly or through a regulatory service provider. In addition, existing DCMs also have rules and procedures in place regarding items such as the cancellation of trades. As such, many of the costs associated with § 38.157 are likely to have been previously expended by existing DCMs. The Commission also notes that the change in the final rule that replaces the requirement to ''ensure orderly trading'' with a requirement to ''identify disorderly trading'' will likely reduce the overall burden of the rule. Moreover, any costs associated with § 38.157 will vary widely according to a DCM's trading volumes, the number of products offered for trading, and the complexity of conducting real-time market monitoring on the particular products offered by the DCM. In addition, changes in market characteristics such as volatility, the presence or absence of intermediaries, and the nature and sophistication of market participants may also impact the costs associated with § 38.157 due to their correlation to system and staff requirements.

Benefits

The real-time monitoring requirements imposed by the rule will promote orderly trading and will ensure that DCMs have the capability to promptly identify and correct market or system anomalies. Prompt responses to these anomalies will likely mitigate the effects of these anomalies and may help prevent them from generating systemic risk or other severe problems. The requirement that any price adjustments or trade cancellations be transparent to the market and subject to clear, fair, and publicly-available standards ensures that market participants are not subject to arbitrary or opaque processes in the event that their trades are involuntarily cancelled.

Section 15(a) Factors (§ 38.153 and §§ 38.155–38.157)

1. *Protection of market participants and the public.* The rules protect market participants and the public by requiring that a DCM has the capacity to detect and investigate rule violations, including adequate compliance staff and resources, automated trade surveillance and real time monitoring capability. These rules will help ensure fair and equitable markets that are protected from abusive trading practices or manipulative market conditions. Under the rules, market users are protected from possible wrongdoing on the parts of firms and commodity professionals with whom they deal to access the marketplace. In addition, the rules are likely to protect the public from the potential of price distortion.

Additionally, the requirement in § 38.157 that any price adjustments or trade cancellations are transparent to the market and subject to clear, fair and publicly-available standards protects market participants from opaque rules related to price adjustments and trade cancellations.

2. *Efficiency, competitiveness and financial integrity of futures markets.* The requirement that DCMs have the capability to monitor and detect rule and trade practice violations and market anomalies improves market efficiency, promotes financial integrity, and helps to ensure fair and equitable markets by ensuring that violations and market anomalies are promptly addressed and do not generate systemic risk or other severe problems. It also helps to ensure that market prices are not distorted by prohibited activities. The rules also enhance the competitiveness of the market by increasing participant confidence in the integrity of the market and by requiring DCMs to maintain and establish resources for effective rule enforcement through the collection of relevant information and examination of relevant books and records.

3. *Price discovery.* Requiring DCMs to conduct effective monitoring and surveillance of their markets and to have the capacity to detect rule violations will help ensure that legitimate trades with fundamental supply and demand information are accurately portrayed in market prices. Mitigating rule violations, which deter from the price discovery process in DCM markets, helps provide confidence in the prices market participants use to hedge risk and to provide confidence in the price discovery process.

4. *Sound risk management practices.* The rules promote sound risk management practices as they would allow DCMs to better evaluate and be aware of risks posed by trading practices or member activities.

5. *Other public interest considerations.* The Commission has not identified any effects that this rule will have on other public interest considerations.

Sec. 38.154 (Regulatory Services Provided by a Third Party)

Section 38.154(a) requires that a DCM that contracts with a registered futures association or another registered entity (collectively, a ''regulatory service provider'') ensures that its regulatory

[573] In its comment letter, CME stated that this rule is overly prescriptive. CME Comment Letter at 20–21 (Feb. 22, 2011). The Commission considered this comment in preparing this release and discusses the costs and benefits of the codification of rules in lieu of guidance and acceptable practices in further detail in section C(1) above. The Commission did not receive any other comments discussing the costs or benefits of this provision.

service provider has sufficient capacity and resources to provide timely and effective regulatory services.

Section 38.154(b) requires that a DCM maintain adequate compliance staff to supervise and periodically review any services performed by a regulatory service provider.

Section 38.154(c) requires a DCM that utilizes a regulatory service provider to retain exclusive authority over certain decisions. While the proposed rule permitted a DCM to retain exclusive authority in other areas of its choosing, it required the decision to open an investigation into a possible rule violation to reside exclusively with the regulatory service provider. As discussed in the preamble, this requirement has been removed from the final rule. These regulations update and clarify the last general public guidance issued approximately 10 years ago by the Commission in this area.[574]

Summary of Comments

MGEX, KCBT, and CME stated that the proposed rule is either overly burdensome or unnecessary.[575] MGEX expressed its general opposition to proposed § 38.154 by stating that if a service has been delegated to another registered entity pursuant to a Commission-approved agreement, then this ''should be sufficient and no other formal agreement is necessary.'' [576] KCBT contended that proposed § 38.154 is overly burdensome and duplicative, particularly when a DCM contracts with a regulatory service provider that is also a DCM required to comply with the same core principles.[577] KCBT noted that it is currently party to a services agreement with another DCM and argued that it will be costly and unnecessary to perform periodic reviews and hold regular meetings with this regulatory service provider.[578] CME contended that the proposed rule is overly prescriptive and suggested that the rule would be better served as guidance and acceptable practices.[579]

Discussion

The Commission has determined that, on the whole, § 38.154 strikes the appropriate balance between flexibility and ensuring that a DCM properly oversees the actions of its regulatory service provider to ensure accountability and effective performance. The Commission believes that it is necessary to require a DCM to conduct periodic reviews and to hold regular meetings with its regulatory service provider. A DCM that elects to use a regulatory service provider must properly supervise the quality and effectiveness of the services provided on its behalf, and can only do so by acquiring detailed knowledge during periodic reviews and regular meetings required under § 38.154.

Costs

The costs associated with § 38.154 will include the cost of initially determining whether a regulatory service provider has the capacity and resources necessary to provide timely and effective regulatory services. An existing DCM replacing a current regulatory service provider with a new one will have a similar cost. For existing DCMs with a regulatory service provider, this should not be a new cost as DCMs are currently required to conduct such due diligence when entering into an agreement for regulatory services from a third-party provider, in line with existing industry practices.

The costs associated with § 38.154 will also include the cost of hiring and maintaining sufficient compliance staff at the exchange to effectively supervise the quality and effectiveness of the services provided by a regulatory service provider, including the cost of holding regular meetings with their regulatory service provider and the cost of periodic reviews of the adequacy and effectiveness of services provided. These costs will vary widely depending upon a DCM's trading volumes, the number of products offered for trading, and the complexity of conducting surveillance on the particular products offered by the DCM. Changes in market characteristics such as volatility, the presence or absence of intermediaries, and the nature and sophistication of market participants may also impact the costs associated with § 38.154. DCMs will also bear the cost of documenting any instances where their actions differed from those recommended by their regulatory service provider. Commenters did not, however, provide any specific costs to the Commission.

The Commission notes that prior to the Dodd-Frank Act, many of the requirements under § 38.154 (and many of the associated costs summarized above), were already required under Commission policy with respect to compliance with Core Principle 2. Section 38.154 communicates the Commission's expectations with respect to supervision of third-party regulatory service providers in a more consistent and explicit manner.

Benefits

The rule ensures that all regulatory service providers have the capacity to provide the services they contract to perform, and that DCMs are aware of the quality and outputs of the services provided on their behalf. Additionally, the rule ensures that all DCMs have the staff to adequately supervise their regulatory service providers and that these regulatory service providers effectively perform the services they are engaged to perform. By requiring that DCMs oversee the services provided by the regulatory service provider, and thereby ensuring that the service provider is meeting the expected standards for compliance, the rule will likely result in cost savings to the DCM, as the failure of a service provider to adequately fulfill its duties may result in costs to DCMs for not meeting compliance obligations.

Section 15(a) Factors

1. *Protection of market participants and the public.* The final rule promotes the protection of market participants and the public because it ensures that regulatory service providers that are utilized by DCMs are properly supervised and have the capacity to perform the services they are engaged to provide, including conducting market surveillance for rule violations and performing other market regulatory activities that protect market participants and the public.

2. *Efficiency, competitiveness and financial integrity of futures markets.* Markets that have effective oversight, surveillance, and monitoring are likely to function more efficiently as rule violations and market abuses would be detected more quickly. Proper supervision of a regulatory service provider that provides these functions will ensure the provider has the ability to perform these activities and will in turn promote confidence in the market and likely increase competition.

3. *Price discovery.* The Commission has not identified any effects that this rule will have on price discovery.

4. *Sound risk management practices.* The Commission has not identified any effects that this rule will have on sound risk management practices, other than those enumerated with regard to the factors above.

5. *Other public interest considerations.* Section 38.154 is particularly important in promoting the public interest as regulatory service providers that help DCMs comply with their obligations are effectively standing

[574] *See* 66 FR 42256, 42266, Aug. 10, 2001.

[575] MGEX Comment Letter at 3 (Feb. 22, 2011); KCBT Comment Letter at 3 (Feb. 22, 2011); CME Comment Letter at 18–19 (Feb. 22, 2011).

[576] MGEX Comment Letter at 3 (Feb. 22, 2011).

[577] KCBT Comment Letter at 3 (Feb. 22, 2011).

[578] *Id.*

[579] CME Comment Letter at 18–19 (Feb. 22, 2011).

in place of their DCM clients in providing elements of front-line self-regulation.

Sec. 38.158 (Investigations and Investigation Reports)

Section 38.158(a) requires that a DCM have procedures in place to conduct investigations of possible rule violations, and requires an investigation to be commenced upon the request of Commission staff, or upon the discovery by a DCM of information indicating a reasonable basis for a finding that a violation may have occurred or will occur. The final rule reduces the burden imposed by the proposed rule by now requiring that an investigation must be commenced upon receipt of a request from Commission staff or upon the discovery or receipt of information by the DCM that indicates a ''reasonable basis'' for finding that a violation ''may have'' occurred or will occur. Section 38.158(b) requires that an investigation be completed within 12 months after an investigation is opened, absent mitigating factors as specified in the rule. Sections 38.158(c) and (d) set forth the elements and information that must be included in an investigation report when there is or is not a reasonable basis for finding a rule violation. Section 38.158(e) provides that no more than one warning letter for the same violation may be issued to the same person or entity during a rolling 12-month period.[580]

Costs

Section 38.158(a) codifies the current practice at DCMs because every DCM already has investigation procedures, guidelines, and compliance staff. Therefore, the Commission does not believe the final rule creates any new resource requirements. Unlike the proposed rule, which may have imposed certain costs not currently incurred by DCMs, the final rule limits the situations under which a DCM must conduct an investigation and keeps the final rule in line with current practices.

Under section 38.158(b), a DCM may have to periodically adjust its compliance staff resources to ensure that investigations are completed within the time period specified in the final rule. However, the Commission notes that this is not a new cost for DCMs. The Commission, through RERs, has already communicated to DCMs that it expects a DCM to complete investigations in a timely manner.

Sections 38.158 (c) and (d) require a DCM to have sufficient compliance staff to conduct investigations and to prepare investigation reports. The Commission notes that this is not a new cost for DCMs. The Commission, through RERs, has already communicated to DCMs that it expects a DCM to have adequate staff to perform these responsibilities. The Commission has also reduced the cost associated with proposed § 38.158(c) by eliminating the requirement that an investigation report include the member or market participant's disciplinary history at the DCM.

Under § 38.158(e), a DCM will be required to maintain sufficient compliance staff to conduct investigations and to determine whether a warning letter should be issued for exchange rule violations. The Commission notes that this is not a new cost for DCMs. The Commission, through RERs, has already communicated to DCMs that it expects a DCM to have adequate staff to perform its self-regulatory responsibilities and to issue warning letters when appropriate.

Benefits

Section 38.158(a) provides that a DCM must establish and maintain procedures that require its compliance staff to conduct investigations of possible rule violations. Investigations that examine potential rule violations help to ensure that rule violations are appropriately examined and prosecuted.

The Commission has determined that the completion of investigations in a timely manner, as required by § 38.158(b), increases the effectiveness of a DCM's rule enforcement program because prompt resolution of investigations is essential to discouraging further violations of a DCM's rules and addressing violations before they escalate. Timely investigations also assist the Commission in appropriately and quickly removing bad actors from markets. By ensuring that DCMs are effectively overseeing potential rule violations on a regular and timely basis, the rule helps DCMs to determine and address violations before they escalate, and serves as a beneficial deterrent against misconduct.

The required elements and information that must be included in an investigation report under §§ 38.158 (c) and (d) will assist disciplinary panels in determining whether there is a reasonable basis for finding that a violation of exchange rules warrants the issuance of charges. The investigation reports that must be provided to the Commission will also assist in reviewing the adequacy of a DCM's trade practice and disciplinary programs.

Section 38.158(e) will ensure that warning letters serve as effective deterrents and will protect the public and market participants against individuals engaging in recidivist activity. A policy of issuing repeated warning letters rather than issuing meaningful sanctions to members and market participants who repeatedly violate the same or similar rules denigrates the effectiveness of a DCM's rule enforcement program.

Section 15(a) Factors

1. *Protection of market participants and the public.* The final rule protects market participants and the public by requiring DCMs to flag potential rule violations, providing a framework for which an investigation is conducted, and protecting against individuals who attempt to engage in violative recidivist activity. By ensuring that investigations are adequately performed, the rule protects market participants and the public by ensuring that remedial action is taken as appropriate. Moreover, timely investigation of rule violations will help to promote fair and equitable markets free of abusive trading practices or manipulative market conditions, and will provide market users assurance that the overseers of the markets in which they trade have the capacity to effectively investigate wrongdoing.

2. *Efficiency, competitiveness and financial integrity of futures markets.* For the reasons noted above, the final rule also promotes efficiency, competitiveness, and financial integrity in the derivatives markets by requiring that a DCM have adequate resources to commence an investigation upon the discovery or receipt of information indicating that there is a reasonable basis for finding that a violation may have occurred or will occur, and to conduct this investigation in a timely manner.

3. *Price discovery.* The requirement that DCMs conduct investigations in a timely manner helps to ensure that the market is protected from disruptive and manipulative practices. This rule will help protect the price discovery process of markets from these violations, and thus help provide confidence in the prices market participants use to hedge risk.

4. *Sound risk management practices.* The Commission has not identified any effects that this rule will have on sound risk management practices other than

[580] In its comment letter, CME stated that this rule is overly prescriptive. CME Comment Letter at 21–22 (Feb. 22, 2011). The Commission considered this comment in preparing this release and discusses the costs and benefits of the codification of rules in lieu of guidance and acceptable practices in further detail in section C(1) above. The Commission did not receive any other comments discussing the costs or benefits of these provisions.

those enumerated with regard to the factors above.

5. *Other public interest considerations.* The Commission has not identified any effects that this rule will have on other public interest considerations.

Sec. 38.159 (Ability To Obtain Information)

Section 38.159 implements the Core Principle 2 requirement that a DCM have the ability and authority to obtain necessary information to perform its rule enforcement obligations, including information sharing agreements. The Commission did not receive any comments discussing the costs or benefits of this provision.

Costs and Benefits

This rule codifies and implements the requirements of Core Principle 2 that DCM must have the ability and authority to obtain any necessary information to perform any required function, including the capacity to carry out such international information-sharing agreements, as the Commission may require. To the extent that a DCM determines it is necessary for it to enter into an information sharing agreement with other DCMs or SEFs, the rule makes it clear that this is permitted. In so doing, DCMs may face additional costs. However, these costs are unlikely to be significant and will only be incurred should a DCM determine that it is necessary to enter into an information sharing agreement with another DCM or with a SEF. Additionally, some DCMs are already parties to such agreements. The Commission is unable to quantify the cost of entering into such agreements as the costs will vary depending on several factors, including the nature of the agreement, the size of the DCM, and whether the DCM is negotiating a new agreement or signing-on to an existing agreement.

Section 15(a) Factors

1. *Protection of market participants and the public.* The final rule protects market participants and the public by providing a mechanism for which DCMs can obtain necessary information to carry out their duties. A DCM's ability and authority to obtain information in order to perform its rule enforcement obligations is imperative in order to identify rule violations and ensure that remedial action is taken as appropriate. Moreover, this requirement will help to promote fair and equitable markets free of abusive trading practices or manipulative market conditions, and will provide market users assurance that the overseers of the markets in which they trade have the capacity to effectively investigate wrongdoing.

2. *Efficiency, competitiveness and financial integrity of futures markets.* For the reasons noted above, the final rule also promotes efficiency, competitiveness, and financial integrity in the derivatives markets by requiring that a DCM have an adequate means to obtain information to enforce its rules.

3. *Price discovery.* The requirement that DCMs have a mechanism to obtain appropriate information about traders in its markets helps to ensure that the market is protected from disruptive and manipulative practices. This rule will help protect the price discovery process of markets from these violations, and thus help provide confidence in the prices market participants use to hedge risk.

4. *Sound risk management practices.* The Commission has not identified any effects that this rule will have on sound risk management practices other than those enumerated with regard to the factors above.

5. *Other public interest considerations.* The Commission has not identified any effects that this rule will have on other public interest considerations.

(4) *Core Principle 3: Contracts Not Readily Susceptible to Manipulation*

Sec. 38.201 (Additional Sources for Compliance and Appendix C)

Section 38.201 refers applicants and DCMs to the guidance in appendix C to part 38 (Demonstration of Compliance That a Contract is Not Readily Susceptible to Manipulation), for purposes of demonstrating their compliance with the requirements of § 38.200, which codifies Core Principle 3. The guidance under appendix C to part 38 amends and replaces Guideline No. 1 under appendix A to part 40.

Summary of Comments and Discussion

CME commented that the proposed rulemaking did not identify any problems with continuing to use the current methodology to estimate deliverable supply, and claimed that if the proposed standard is adopted, it will impose additional costs on exchanges and market participants with no defined benefit, including requiring exchanges to survey market participants annually.[581] CME also commented on the provision that DCMs submit monthly deliverable supply estimates, stating that this requirement is onerous for DCMs and suggesting that the Commission should only require monthly estimates of deliverable supply for the most recent three years.[582]

The Commission notes that the proposed guidance regarding estimating deliverable supply is not a departure from existing and longstanding practice. Estimating deliverable supply has historically required that a DCM consult with market participants on a regular, if not monthly, basis. In that regard, the burden of maintaining contacts with market participants should not be any more or less than it has been. In response to CME's second comment, the Commission has made amendments to its proposed appendix C by requiring DCMs to submit monthly estimates of deliverable supply for the most recent three years rather than for five years.

Costs

In order to comply with this regulation, DCMs would have to incur the cost of supplying supporting information and documentation to justify the contract specifications of a new product or substantial rule amendment. However, the Commission believes there will likely be no additional costs attributed to the rule because under existing practices, DCMs conduct market analysis for new products before deciding whether or not it makes business sense to list a new product for trading, including interviewing market participants. Additionally, DCMs also conduct market analysis before adopting amendments to existing contract terms and conditions.

Benefits

The guidance outlined in appendix C to part 38 provides a reference for existing and new regulated markets for information that should be provided to the Commission for new products and rule amendments based on best practices developed over the past three decades by the Commission and other regulators. This guidance will likely reduce the time and costs that regulated markets will incur in providing the appropriate information. The guidance also reduces the amount of time it takes Commission staff to analyze whether a new product or rule amendment is in compliance with the CEA. Some DCMs regularly provide the information outlined in appendix C, but others do not include enough information for Commission staff to determine whether the contract is in compliance with the CEA. Having all of the supporting information included in a new product submission or rule amendment reduces the resources Commission staff must

[581] CME Comment Letter at 38 (Feb. 22, 2011).

[582] CME Comment Letter at 9 (Mar. 28, 2011).

expend to request such information from the exchange or to find independently.

Section 15(a) Factors

1. *Protection of market participants and the public.* The information recommended in appendix C for inclusion in the new product or rule amendment submission provides insight and evidence of the DCM's research into the underlying cash market of the DCM's product. This should allow for a timely review by Commission staff of the DCM's supporting analysis and data to determine whether the contract is not readily susceptible to manipulation.

2. *Efficiency, competitiveness and financial integrity of futures markets.* By providing guidance based on best practices regarding what a DCM should consider when developing a futures contract or amending the rules of an existing contract, the contracts listed by DCMs, as a whole, should be more reflective of the underlying cash market by promoting efficient pricing through convergence.

3. *Price discovery.* The guidance provides the information a DCM should analyze to determine if its contract is designed in such a way to promote convergence at expiration, and thus promote the price discovery mechanism of the centralized market.

4. *Sound risk management practices.* By following the best practices outlined in the guidance in appendix C, a DCM can minimize the susceptibility of a contract to manipulation or price distortion while it is developing the contract terms and conditions for its futures contract. As a result, the risks to the DCM's clearing house and market participants would also be minimized.

5. *Other public interest considerations.* The Commission has not identified any effects that this rule will have on other public interest considerations.

(5) *Core Principle 4: Prevention of Market Disruption*

Sec. 38.251 (General Requirements)

Section 38.251 requires that DCMs collect and evaluate data on individual traders' market activity on an ongoing basis, monitor and evaluate general market data, have the ability to conduct real-time monitoring of trading and comprehensive and accurate trade reconstructions, and monitor for violations of exchange-set position limits. Based upon comments, the Commission removed what were perceived as prescriptive elements from the proposed rule (including a requirement that DCMs have manual processes or automated alerts effective in detecting and preventing trading abuses) and included them in the guidance and acceptable practices in appendix B.

Summary of Comments and Discussion

Several commenters asserted that their current regulatory systems do not allow for effective real-time monitoring of position limits and that this regulation would impose additional costs.[583] Additionally, MGEX stated that the automated trading alert requirement of proposed § 38.251 did not provide any real value and only imposed more burden and cost.[584]

The Commission notes that while § 38.251 requires that DCMs monitor for intraday position-limit violations it does not require that position limits necessarily be monitored in real-time. Instead, the rule requires that DCMs demonstrate the ability to comprehensively and accurately reconstruct daily trading activity for the purposes of detecting trading abuses and violations of exchange-set position limits, including those that may have occurred intraday. The acceptable practices under appendix B explains that while real-time monitoring is the most effective method, an acceptable program may monitor for intraday violations on a T + 1 basis. The flexibility afforded by the guidance should limit the cost of compliance given that T+1 monitoring is likely less costly than real-time monitoring.

In order to provide greater specificity to market participants, reduce costs, and maximize flexibility, the Commission is also converting the requirement that a DCM have an effective automated alerts regime to detect trading abuses from a rule to an acceptable practice so that a DCM will have added flexibility in meeting this requirement, as the Commission believes that automated trading alerts, though not necessarily in real time, are the most effective means of detecting market anomalies. The Commission is also removing provisions from the proposal dealing with the real-time monitoring of impairments to market liquidity and clarifying in the guidance and acceptable practices what must be included in real-time monitoring as compared to what may not need to be monitored in real-time.

Costs

While some DCMs already have the ability to monitor for intraday trading abuses and market activity, including position-limit violations as required in § 38.251, other DCMs may need to hire additional staff (even if the monitoring is done on a T+1 basis) and may need to install and maintain new or advanced systems with improved capabilities. Additional costs will vary based on the number of products a DCM offers and its trading volumes. However, the Commission notes that a DCM may be able to reduce the costs associated with this rule by using a unified monitoring system to jointly satisfy the requirements of § 38.251 and § 38.157 (Real-time market monitoring). Notwithstanding any related costs, § 38.251 brings DCMs into compliance with the statutory language of the Dodd-Frank Act, which requires that DCMs conduct real-time monitoring of trading activities and be able to reconstruct trading. The regulation does so by minimizing costs while abiding by the Dodd-Frank Act.

Benefits

The Dodd-Frank Act amended Core Principle 4 to emphasize that DCMs must take an active role not only in monitoring trading activities within their markets, but in preventing market disruptions. Rule 38.251 requires that DCMs have the proper tools to prevent manipulation or other disruptions. By requiring DCMs to prevent manipulation or other disruptions, the Commission is able to help ensure that market participants are able to execute trades at prices that are not subject to preventable market disruptions. Moreover, to help reduce the cost of compliance, the Commission is providing DCMs with flexibility in meeting the rule's requirements as set forth in guidance and acceptable practices.

Sec. 38.252 (Additional Requirements for Physical-Delivery Contracts)

Section 38.252 requires that DCMs monitor physical-delivery contracts' terms and conditions as they relate to the underlying commodity market and to the convergence between the contract price and the price of the underlying commodity, address conditions that interfere with convergence, and monitor the supply of the commodity used to satisfy the delivery requirements.[585]

[583] CME Comment Letter at 24–25 (Feb. 22, 2011), MGEX Comment Letter at 4 (Feb. 22, 2011), KCBT Comment Letter at 4 (Feb. 22, 2011), and ICE Comment Letter at 4 (Feb. 22, 2011).

[584] MGEX Comment Letter at 4 (Feb. 22, 2011).

[585] The Commission received comments from CME, MGEX, and KCBT stating that this rule is overly prescriptive. CME Comment Letter at 25 (Feb. 22, 2011), MGEX Comment Letter at 4–5 (Feb. 22, 2011), KCBT Comment Letter at 4 (Feb. 22, 2011). The Commission considered these comments in preparing this release and discusses the costs and benefits of the codification of rules in lieu of guidance and acceptable practices in further detail in section C(1) above.

Costs and Benefits

The Commission has a long history of monitoring for convergence and addressing issues of non-convergence.[586] The Commission notes that this surveillance requirement is currently in place and that DCMs are unlikely to incur any additional costs as a result of this codification of an existing practice. The rules adopted in this release ensure that market participants are better able to hedge their risk and that price discovery is enhanced by helping to detect disconnects between futures and underlying physical market prices. Close monitoring of physical-delivery contracts helps prevent the manipulation of prices, and the public benefits from futures prices that reflect actual market conditions because those prices often form the basis for transactions taking place in the physical market.

Sec. 38.253 (Additional Requirements for Cash-Settled Contracts)

Section 38.253 requires that for cash-settled contracts, a DCM must monitor the pricing of the index to which the contract will be settled and also monitor the continued appropriateness of the methodology for deriving the index. If a DCM's contract is settled by reference to the price of a contract or commodity traded in another venue, the DCM must have access to information on the activities of its traders in the reference market.

Summary of Comments and Discussion

CME commented that the Commission is uniquely situated to add regulatory value to the industry by reviewing for potential cross-venue rule violations, noting that the Commission is the central repository for position information delivered to it on a daily basis in a common format across all venues.[587] CME asserted that the Commission would be imposing an onerous burden on DCMs and their customers by requiring the reporting of information that the Commission already receives or will be receiving.[588] CME also stated that the alternative proposal, that the DCM enter into an information-sharing agreement with the other venue, also will result in additional costs to both entities, and that it may not be practical or prudent for a DCM to enter into such an agreement with the other venue.[589] CME noted that its rules already allow it to request such information from market participants on an as-needed basis.[590] Argus stated that the cost of monitoring the ''availability and pricing'' of the commodity making up a third-party index to which a contract is settled would be prohibitive.[591]

The Commission believes that a DCM must have the ability to determine whether a trader in its market is manipulating the instrument or index to which the DCM contract cash-settles. A DCM must be able to obtain information on its traders' activities in the underlying instrument or index. Nonetheless, the Commission believes the rule need not prescribe the specific methods to accomplish this, for example, by information-sharing agreements or by placing a reporting burden on traders who carry a position near contract settlement. Accordingly, the description of the methods for obtaining these data on traders' activity in an underlying index or instrument are set forth in the acceptable practices, rather than included in the rule. Also, the specific requirement that DCMs monitor the availability and pricing of the commodity making up the index has been removed from the rule.

Costs

DCMs have, as a part of the contract market designation process, long been required to perform this type of surveillance on cash-settled contracts, and thus are unlikely to incur substantial additional costs on these contracts. DCMs may, however, incur significant additional costs for collecting information on traders' activities in the underlying instrument or index. These costs cannot be quantified because they will vary according to the particular instrument or index. Moreover, no DCM provided the Commission with any quantification of the costs of compliance. In consideration of the comment received from CME, the Commission has attempted to minimize the costs that will be incurred by giving DCMs some flexibility in determining the size of positions and the dates for which position data is collected. This will sharply reduce the costs for DCMs that routinely have few traders that hold substantial positions near contract expirations.

Benefits

In certain markets, the settlement price is linked to prices established in another market. Linked markets are becoming more and more prevalent, and the interconnected nature of these markets may create incentives for traders to disrupt or manipulate prices in the reference market in order to influence the prices in the linked market. Detecting and preventing this sort of manipulation requires information on traders' activities in the cash-settled contract and in, or related to, the index to which it is settled. This rule ensures that DCMs have the information and tools they need to accomplish their statutory duty to prevent manipulation and disruptions to the cash-settlement process and enhances the confidence of market participants and the public that these contracts are free of manipulation.

Sec. 38.254 (Ability To Obtain Information)

Section 38.254 requires DCMs to require that traders in their markets keep records, including records of their activity in the underlying commodity and related derivative markets and contracts. If its market has intermediaries, the DCM must either use a comprehensive large-trader reporting system or obtain position data from other sources in order to conduct an effective surveillance program.

Summary of Comments and Discussion

KCBT contended that it is unnecessary and burdensome for a DCM to require traders to keep such records.[592] Similarly, MGEX discussed the burden that the proposed rule would place on its traders as a result of the proposed record-keeping obligation, and noted that, for contracts not traded on the DCM, it is unclear what records a DCM must tell its traders to keep.[593]

The Commission notes that a trader's burden to keep such records is sound commercial practice, and that a trader of a reportable size is already required, under § 18.05 of the Commission's regulations, to keep records of such trades and to make them available to the Commission upon request. In addition, the Commission has found trader records to be an invaluable tool in its market surveillance effort, and believes that the DCM, as an SRO, should have direct access to such information in order to fulfill its obligations under the DCM core principles, and in particular, Core Principle 4. The Commission is, however, providing in appendix B an

[586] *See, e.g.,* ''Statement of the Agricultural Advisory Committee,'' October 29, 2009, available at: *http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/aac102909_bruns.pdf.*

[587] CME Comment Letter at 25–26 (Feb. 22, 2011).

[588] *Id.* at 26.

[589] *Id.*

[590] *Id.*

[591] Argus Comment Letter at 6–7 (Feb. 22, 2011).

[592] KCBT Comment Letter at 5 (Feb. 22, 2011).

[593] MGEX Comment Letter at 5 (Feb. 22, 2011).

acceptable practice for meeting the requirements of § 38.254(b) that allows the DCM to limit the duration and scope of the trader's obligations. For instance, in the acceptable practices, the Commission permits a DCM to restrict the record-keeping requirement to traders who are reportable to the DCM in its large-trader reporting system or who otherwise hold a substantial position. As an acceptable practice, the reportable level of a trader is at the discretion of the DCM, as long as the reportable level is consistent with an effective oversight program.

Costs

A trader's cost to keep such records should be minimal if, as expected, it is part of their normal business practice. Moreover, the Commission already imposes a similar requirement on large traders under its rule 18.05 (Maintenance of books and records). As a result, a trader's additional cost to provide records to the DCM, and the DCM's cost to request and process the records, will be low if, based upon the Commission's experience, such requests are infrequent and targeted to specific and significant market situations.[594]

Benefits

This rule ensures that DCMs have sufficient information in order to assess the potential for price manipulation, price distortions, and the disruption of the delivery or cash-settlement process as required by Core Principle 4. Detecting and preventing manipulation requires information on large traders' positions in the relevant contracts and their activities in the underlying markets. Access to this information is vital to an effective surveillance program. Absent this information, the DCM may fail in its statutory duty to prevent manipulation and disruptions to the cash-settlement process.

Sec. 38.255 (Risk controls for trading)

Section 38.255 requires that DCMs establish and maintain risk control mechanisms to prevent or reduce the potential risk of price distortions and market disruptions, including, but not limited to, market restrictions that automatically pause or halt trading in market conditions prescribed by the DCM.[595] While the rule requires pauses and halts, the acceptable practices enumerate other additional types of risk controls that would also be permitted, giving wide discretion to the DCM to select among the listed controls, to create new ones that are most appropriate for their markets, and to choose the parameters for those selected. If equity products are traded on the DCM, then the acceptable practices for this rule include, to the extent practicable, coordination of such controls with those placed by national security exchanges.[596]

Summary of Comments and Discussion

ICE stated that a temporary price floor or ceiling can work better than a pause or halt since trading can continue uninterrupted, thereby offering the earliest opportunity for price reversal should the market deem a sudden large move to be an overreaction or error.[597] ICE also stated that pauses and halts are not the only effective way to prevent market disruption, and that by being prescriptive, the Commission is freezing innovation in preventing market disruptions.[598]

In response to ICE and other commenters that question the necessity of pauses and halts over other forms of risk controls, the Commission notes that pauses and halts to trading have been effective in the past. The ability of DCMs to pause or halt trading in extraordinary circumstances and, importantly, to re-start trading through the appropriate re-opening procedures, will allow DCMs to mitigate the propagation of shocks that are of a systemic nature and to facilitate orderly markets. Furthermore, DCMs must ensure that such pauses and halts are effective for their specific order-routing and trading environment and are adapted to the specific types of products traded.

With respect to ICE's comment regarding innovation, the Commission notes that DCMs are not prohibited from implementing additional risk controls, such as temporary price floors or ceilings as ICE suggests, or any other appropriate risk control, including those not enumerated in the acceptable practices.

Costs

Although pauses and halts are not currently required by Commission regulation, many DCMs already have the types of risk controls that are required by § 38.255, as well as others that have been moved to acceptable practices.[599] There may be certain one-time costs of programming such controls where they are not already present as well as on-going costs to maintain and adjust such controls across time. Some DCMs have pauses and halts only for stock index futures, while utilizing other risk controls for other contracts. For those DCMs, the costs of adding pause and halt functionality to the other contracts should be minimal since much of that technology would already exist. DCMs that do not currently utilize pauses and halts should be able to implement them with existing software, so that the cost should be relatively modest. As noted in the Pre-Trade Functionality Subcommittee of the CFTC Technology Advisory Committee report, the costs would largely be borne by the exchanges and would center around intellectual property, as many exchanges develop, own, and manage their own technology.[600] However, the exact costs associated with implementing risk controls were not described in verifiable detail in the Pre-Trade Functionality Subcommittee report and can vary greatly from one DCM to another. Additionally, the costs will depend on which specific risk controls will be implemented and the trading platform being used by the DCM. The Commission received no comments indicating that risk controls cannot be implemented in a cost-effective manner using commercially available technology.

As further noted in the Pre-Trade Functionality Subcommittee of the CFTC Technology Advisory Committee report, ''[s]ome measure of standardization of pre-trade risk controls at the exchange level is the

[594] CME opposed the rule as proposed and recommended that the types of records the DCM should require traders to keep should be covered in acceptable practices. CME Comment Letter at 26 (Feb. 22, 2011).

[595] The Commission received several comments stating that rule § 38.255 should not be prescriptive. *See, e.g.,* CME Comment Letter at 26–27 (Feb. 22, 2011), KCBT Comment Letter at 5 (Feb. 22, 2011), ICE Comment Letter at 12 (Feb. 22, 2011), CFE Comment Letter at 3–4 (Feb. 22, 2011), NYSE Liffe Comment Letter at 11 (Feb. 22, 2011), ELX Comment Letter at 4 (Feb. 22, 2011), and MGEX Comment Letter at 5–6 (Feb. 22, 2011). The Commission considered these comments in preparing this release and discusses the costs and benefits of the codification of rules in lieu of guidance and acceptable practices in further detail in section C(1) above.

[597] ICE Comment Letter at 12 (Feb. 22, 2011).

[598] *Id.*

[599] An FIA working group survey revealed that 66 percent of exchanges surveyed currently offer pre-trade risk controls at the exchange levels and that an additional 27 percent of respondents are planning to add such controls in the future. *See http://www.futuresindustry.org/downloads/RC-survey.pdf* at 27.

[600] *See* ''Recommendations on Pre-Trade Practices for Trading Firms, Clearing Firms and Exchanges involved in Direct Market Access,'' Pre-Trade Functionality Subcommittee of the CFTC Technology Advisory Committee (''TAC Subcommittee Recommendations''), (March 1, 2011) at 4, available at *http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/tacpresentation030111_ptfs2.pdf.* The Commission notes that the subcommittee report was submitted to the Technology Advisory Committee and made available for public comment, but no final action has been taken by the full committee.

cheapest, most effective and most robust path to addressing the Commission's concern [for preserving market integrity].'' [601] Congress specifically modified DCM Core Principle 4 to substitute the title ''prevention of market disruptions'' for the previous title of ''monitoring of trading.'' The new rules on risk controls, which are designed to prevent market disruptions before they occur, bring the rules in line with the amended statute.

Benefits

The Commission anticipates that the benefits of this rule will be substantial. As noted in the DCM NPRM, risk controls such as automated trading pauses and halts can, among other things, allow time for participants to analyze the market impact of new information that may have caused a sudden market move, allow new orders to come into a market that has moved dramatically, and allow traders to assess and secure their capital needs in the face of potential margin calls.[602] Moreover, the Commission notes that pauses and halts are particularly intended to apply in the event of extraordinary price movements that may trigger or propagate systemic disruptions. Accordingly, the Commission notes that a DCM's ability to pause or halt trading in certain circumstances and, importantly, to re-start trading through the appropriate re-opening procedures will allow DCMs to mitigate the propagation of shocks that are of a systemic nature and to facilitate orderly markets. For these reasons, the Commission believes that pauses and halts are the most effective risk management tools to carry out this purpose and will facilitate orderly markets and prevent systemic disruptions. While the Commission is requiring pauses and halts in the rule, the Commission is enumerating other types of automated risk controls that may be implemented by DCMs in the acceptable practices in order to give DCMs greater discretion to select among the enumerated risk controls or to create new risk controls. The Commission believes that this combination of rules and acceptable practices will facilitate orderly markets and mitigate systemic disruptions while maintaining a flexible environment that facilitates innovation.

Sec. 38.256 (Trade Reconstruction), § 38.257 (Regulatory Service Provider), and Sec. 38.258 (Additional Sources for Compliance)

Section 38.256 requires a DCM to have the ability to comprehensively and accurately reconstruct all trading on its trading facility. The requirement to have the ability to comprehensively and accurately reconstruct trading appears in the statute itself and has long been a part of the DCM requirements under former Core Principle 10.

Section 38.257 requires a DCM to comply with the regulations in this subpart through a dedicated regulatory department, or by delegation of that function to a regulatory service provider.

The Commission eliminated proposed rule 38.258 (which required a DCM to adopt and enforce additional rules that are necessary to comply with this core principle), and replaced it with new § 38.258, which allows a DCM to refer to the guidance and acceptable practices in appendix B in order to demonstrate compliance with Core Principle 4.

The Commission received no comments discussing the costs or benefits of §§ 38.256, 35.257, and 38.258 and is adopting § 38.256 with a minor modification, § 35.257 as proposed, and § 38.258 as noted above. In addition, these rules do not contain any significant changes from existing DCM requirements, and thus it is unlikely that additional costs will be incurred.

Section 15(a) Factors (§§ 38.251–38.258)

1. *Protection of market participants and the public.* These rules implementing Core Principle 4 reduce the likelihood that markets will be subject to manipulation or other disruptions and ensure that market participants are better able to hedge their risk by requiring that: DCMs properly monitor their markets; market participants keep adequate records; DCMs are able to adequately collect information on market activity, including special considerations for physical-delivery contracts and cash-settled contracts; and reasonable pre-trade risk controls are in place that facilitate orderly markets and prevent systemic disruptions that could harm market participants and the public. Close monitoring of physical-delivery contracts helps prevent the manipulation of prices, and the public benefits from futures prices that reflect actual market conditions because those prices often form the basis for transactions taking place in the physical market.

2. *Efficiency, competitiveness and financial integrity of futures markets.* The rules for market monitoring and implementation of risk controls, including pauses and halts, help to facilitate orderly, efficient markets by requiring DCMs to establish and maintain risk control mechanisms that would be able to prevent or reduce the risks associated with a variety of market disruptions. By protecting against disruptions and market manipulation, the rules enhance competitiveness and promote the efficiency and financial integrity of DCM markets. Market mispricing that is due to disruptions or manipulation interferes with a market's efficiency by limiting its ability to reflect the value of the underlying commodity. Markets that are prone to disruption or manipulation have a severe competitive disadvantage to those without such problems. These rules are designed to address and mitigate such problems. Further, the rules are designed to prevent or mitigate extreme volatility or other market disruptions that can lead to unwarranted margin calls and losses of capital, which could otherwise impair the financial integrity of the market and its participants.

3. *Price discovery.* Manipulation or other market disruptions interfere with the discovery of a commodity's value in normal market circumstances. These rules are designed to detect and, where possible, prevent such market mispricing and to detect disconnects between futures and underlying physical market prices. In physical-delivery markets, such disconnects usually relate to market convergence. In cash-settled markets, such disconnects usually relate to the integrity of the index used to settle the futures contract. Under the new rules, DCMs will need to monitor contract terms and resolve conditions that are interfering with the price discovery process.

4. *Sound risk management practices.* Sound risk management relies upon execution of hedge strategies at market prices that are free of manipulation or other preventable disruptions. These rules are designed to facilitate hedging at prices free of distortions that may be preventable by adequate controls.

5. *Other public interest considerations.* The Commission has not identified any effects that this rule will have on other public interest considerations.

(6) Core Principle 5: Position Limitations or Accountability

Core Principle 5 requires that DCMs, for each contract and as necessary and appropriate, adopt position limitation or position accountability, and that, for any contract that is subject to a position

[601] *See* TAC Recommendations at 4, available at *http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/tacpresentation030111_ptfs2.pd.*

[602] 75 FR 80572, 80584, Dec. 22, 2010.

limitation established by the Commission in part 151 of the Commission's regulations,[603] DCMs must set the position limit at a level not higher than the position limitation established by the Commission.

Summary of Comments and Discussion

The Commission received several comments pertaining to the Commission's codification of part 151 of its regulations. These comments were appropriately addressed in the relevant rulemaking for Position Limits for Futures and Swaps.[604]

(7) Core Principle 6: Emergency Authority

Sec. 38.351 (Additional Sources for Compliance and Appendix B)

Rule 38.351 refers applicants and DCMs to appendix B to part 38—''Guidance on, and Acceptable Practices in, Compliance With Core Principles'' for purposes of demonstrating compliance with the requirements of Core Principle 6. The guidance for Core Principle 6 tracks the former guidance to previous Core Principle 6. As such, the costs and benefits of administering emergency procedures pursuant to current Core Principle 6 should be no different than the costs and benefits of administering emergency procedures prior to the Dodd-Frank Act. The Commission did not receive any comments discussing the costs or benefits of these provisions.

(8) Core Principle 7: Availability of General Information

Sec. 38.401 (General Requirements)

Section 38.401(a) requires DCMs to have in place procedures for disclosing to market authorities, market participants, and the public accurate and relevant information pertaining to rules and regulations, contract terms and conditions, and operations. Section 38.401(b) requires that each DCM have procedures in place to ensure that, to the best of its knowledge, any information or communication with the Commission is accurate and complete. Section 38.401(c) requires DCMs to post such information on their Web sites concurrent with the filing of such information with the Commission. Section 38.401(d) requires DCMs to update their rulebooks upon the effectiveness of a rule submission or certification.

Costs

The few requirements in § 38.401 that do not simply replicate the statutory language were derived from previous guidance and acceptable practices that reflect existing industry practices, and thus should impose no new costs on DCMs or market participants. For example, the accuracy requirement is unlikely to impose additional costs on market participants because the statute already contains an accuracy requirement; the rule simply adds additional context to the requirement. The requirements for a DCM to place information on its web site on the same business day as the filing of such information with the Commission and to post new or amended rules on the date of implementation are unlikely to result in additional costs to DCMs because similar requirements existed in the guidance and acceptable practices under the original Core Principle 7. No DCM commented on the costs imposed by this rule.

Benefits

Market authorities, market participants, and the public all benefit from access to accurate, relevant, and timely information pertaining to contract terms and conditions, new product listings, new or amended governance, trading and product rules, and other changes to information previously disclosed by the DCM. The disclosure of accurate information to the Commission will assist the Commission's oversight of the markets by enabling the Commission to evaluate a DCM's compliance with the core principles and to take prompt action to ensure transparent, fair, and orderly markets.

Prompt posting of information pertaining to new product listings, new rules, and rule amendments on the DCM's Web site will ensure that market participants and the public have sufficient notice and time to analyze proposed rule amendments, product listings/de-listings, and rule certifications in advance of their taking effect and to be able to plan their actions accordingly. Advance notice of rule amendments and certifications is consistent with the goal of Core Principle 7 to make pertinent information available to market participants and the public.

Section 15(a) Factors

1. *Protection of market participants and the public.* To protect market participants and the public, the Commission has comprehensive regulatory, surveillance, investigative, and enforcement programs. To support these programs, the Commission must have access to accurate, relevant, and timely information regarding contract terms and conditions, new product listings, new or amended governance, trading and product rules, and other changes to information previously disclosed by the DCM. Additionally, prompt posting of information pertaining to new product listings, new rules, and rule amendments on the DCM's Web site will ensure that market participants and the public have sufficient notice and time to analyze these changes and report any problems to the Commission in advance of the changes taking effect.

2. *Efficiency, competitiveness and financial integrity of futures markets.* In order to promote efficient, competitive, and financially stable markets, the Commission must have access to accurate, relevant, and timely information regarding contract terms and conditions, new product listings, new or amended governance, trading and product rules, and other changes to information previously disclosed by the DCM. The Commission must have notice of these changes in order to analyze their likely impact on the efficiency, competitiveness, and financial integrity of the futures markets and to take action as necessary.

3. *Price discovery.* The disclosure of accurate information to the Commission will assist the Commission's oversight of the markets and protect market participants by enabling the Commission to evaluate a DCM's compliance with the core principles.

4. *Sound risk management practices.* The disclosure of accurate information to the Commission will assist the Commission's oversight of the markets and protect market participants by enabling the Commission to evaluate a DCM's compliance with the core principles, including Core Principle 11 (Financial Integrity of Transactions). A detailed discussion of Core Principle 11 in light of the section 15(a) factors appears later in this release.

5. *Other public interest considerations.* The Commission has not identified any effects that this rule will have on other public interest considerations.

(9) Core Principle 8: Daily Publication of Trading Information

Sec. 38.451 (Reporting of Trade Information)

Core Principle 8 requires that a board of trade make public daily information on settlement prices, volume, open interest, and opening and closing ranges

[603] *See* ''Position Limits for Futures and Swaps,'' 76 FR 71626, Nov. 18, 2011.

[604] *Id.*

for actively traded contracts on the contract market. Section 38.451 refers a DCM to part 16 of the Commission's regulations in order to meet the compliance requirements of Core Principle 8. This rulemaking also revises § 16.01 with regards to the information a reporting market must record and publish by adding swaps and options on swaps. Also, § 16.01 is revised to add the requirement that reporting markets also report to the Commission information pertaining to ''the total volume of block trades that are included in the total volume of trading.''

Summary of Comments and Discussion

CME did not object to reporting block trades that are included in the daily volume of trading, but noted that this new requirement will require it to ascertain what systems changes will be necessary and how long such changes will take to implement.[605] CME did not provide any cost or time estimates.

The Commission believes that it is necessary for DCMs to report trade information; the regulation provides the reporting markets flexibility to make the necessary and appropriate changes to their systems in a cost-effective manner while providing transparency to the markets by means of basic summary trading information of that day's trading session.

Costs

The cost of reporting volume for swaps should be similar to the cost of reporting volume for futures and options. The Commission did not receive any comments that provide otherwise. Further, the Commission does not anticipate that DCMs that choose to list swaps will need to make any changes to systems beyond those needed to report prices and volume for any new contract. The requirement to publish the total volume of block trading at the end of the day will be an added cost for the DCM. This provision may require some changes to DCMs' current systems. However, because DCMs already have or will have to have systems in place to provide daily trading volumes under § 16.01, any costs to now include the reporting of blocks should be minimal. It is not feasible to quantify the costs of necessary system changes, largely because it is unclear what system changes will be adopted by DCMs. The Commission did not receive any comments stating that the regulation imposes an unnecessary burden.

Benefits

The Commission allows DCMs significant flexibility in complying with this rule. As such, DCMs are free to design a system that provides the transparency required by part 16 in the most cost effective manner. This rule complies with the statute and provides transparency to the markets by requiring DCMs to publish end of day price and volume summary information to the public and to the Commission.

Section 15(a) Factors

1. *Protection of market participants and the public.* The rule complies with Core Principle 8 by ensuring that volume and price information is publicly available on a daily basis. Market participants and the public will be able to make economic decisions based on accurate futures and swaps prices that are reported on a timely basis.

2. *Efficiency, competitiveness, and financial integrity of futures markets.* The rule will promote the efficiency and competitiveness of futures markets by ensuring that volume and price data for futures, options, and swaps traded at all DCMs are publicly available. Competitiveness may be enhanced to the extent that market participants are able to compare prices of similar contracts at different DCMs.

3. *Price discovery.* The rule promotes price discovery by ensuring that end of day trading data, including volume and prices, are disseminated to the public. An important benefit of price discovery is the availability of prices to market participants and the public who may use this information to inform their economic decisions.

4. *Sound risk management practices.* The Commission has not identified any effects that this rule will have on sound risk management practices.

5. *Other public interest considerations.* The rule provides post-trade transparency to the markets by requiring DCMs and SEFs to publish end of day trading data including volume and prices to show the activity that occurred during that day's trading session.

(10) Core Principle 9: Execution of Transactions

Sec. 38.501–38.506

The Commission received a number of comments pertaining to the costs and/or benefits of proposed §§ 38.501–38.506. As noted above, the Commission is not finalizing these provisions at this time, and expects and plans to take up the proposed rules under Core Principle 9 when it considers the final SEF rulemaking. Comments pertaining to these proposed rules, including those relative to costs and/or benefits, will be considered in such future rulemaking.

(11) Core Principle 10: Trade Information

Sec. 38.551 (Audit Trail Required), Sec. 38.552 (Elements of an Acceptable Audit Trail Program), and Sec. 38.553 (Enforcement of Audit Trail Requirements)

Section 38.551 establishes the requirements of an acceptable audit trail program to help ensure that DCMs can monitor and investigate any customer or market abuses.

Section 38.552 sets forth the four program areas that a DCM must address as part of an acceptable audit trail program, including original source documents, transaction history database, electronic analysis capability, and safe storage of all audit trail data.

Section 38.553(a) establishes the elements of an effective audit trail enforcement program. Additionally, § 38.553(b) requires that an effective audit trail enforcement program must enable the DCM to identify entities that are routinely non-compliant with the regulations under Core Principle 10 and to levy meaningful sanctions when such deficiencies are identified. The regulation prohibits DCMs from issuing more than one warning letter for the same violation within a rolling 12-month time period.

Summary of Comments

CME and MGEX argued that the requirement for enforcement of an audit trail program to annually audit all market participants would essentially require the exchange to review every participant who enters an order into the trading system, which would be onerous, costly, and unproductive.[606] MGEX suggested that DCMs should only be required to review a sample of market participants.[607]

Discussion

In response to comments that requiring exchanges to conduct annual audits of all members and market participants would be onerous and costly, the Commission is revising proposed § 38.553 to apply only to ''members and persons and firms subject to designated contract market recordkeeping rules.'' With this change, the Commission limits the universe of entities that a DCM must audit for compliance with Core Principle 10. This

[605] CME Comment Letter at 29 (Feb. 22, 2011).

[606] CME Comment Letter at 33–34 (Feb. 22, 2011), MGEX Comment Letter at 7 (Feb. 22, 2011).

[607] MGEX Comment Letter at 7 (Feb. 22, 2011).

revision addresses commenters' concerns by making the annual audit requirement less burdensome.

Additionally, this revision also responds to MGEX's comments that the Commission should allow DCMs to test for audit trail compliance by auditing only a sample of market participants. While the number of persons and entities subject to audit has been reduced in the final rule, the remaining population must still be audited annually to ensure compliance. As explained above, this revision will decrease the burden on DCMs.

The Commission believes it is essential for DCMs to have complete and accurate access to trade information to facilitate trade reconstructions and thereby detect customer and market abuses. The Commission believes it is essential for DCMs to have complete and accurate access to trade information to facilitate trade reconstructions and thereby detect customer and market abuses. The Commission has determined that the audit trail requirements and the annual audits of members and entities subject to Commission or DCM recordkeeping rules are the best way to achieve its policy objectives, while providing DCMs with flexibility to achieve these objectives. The Commission has considered the comments raised related to the cost of ensuring that customer and market abuses can be detected, prosecuted, and ultimately discouraged, and believes that the benefits of the rule as finalized are substantial.

Costs

The costs associated with Core Principle 10 include the cost of developing and maintaining an electronic history transaction database to maintain a history of all orders and transactions entered into the trading system and electronic analysis capability to permit the exchange to reconstruct orders and trades. DCMs will also bear the cost of developing and implementing a program to collect and maintain original source documents for trades entered both manually and electronically into the trading system. Core Principle 10 compliance also imposes costs for developing and maintaining a safe storage system for all the trade data collected and ensuring that such data is readily accessible to exchange compliance staff. The Commission notes, however, that almost all exchanges currently operating are in compliance with these regulations. Therefore, existing DCMs should have already established these programs and, as such, should have already borne the costs necessary to comply with these requirements.

These requirements were previously explained in the guidance and acceptable practices for Core Principle 10—Trade Information. The Commission's RERs have frequently highlighted compliance with the guidance and acceptable practices in the discussion of an exchange's audit trail program. Specifically, past RERs have discussed exchanges' practices regarding use of an electronic history transaction database, electronic analysis capability, and safe storage systems. As such, the Commission is simply codifying these existing practices and regulations as rules.

DCMs will incur costs to ensure they employ appropriate resources to enforce Core Principle 10's requirements, including the ability to conduct annual compliance audits by hiring sufficient staff to review the information and having in place adequate technology to retrieve and store the information. It is not feasible to quantify the costs for appropriate resources for audit trail and Core Principle 10 enforcement because the factors necessary to determine what resources are ''appropriate'' vary widely from exchange to exchange, and the costs for each variable depend upon the particular circumstances of each exchange. For example, the number of participants who trade on a particular exchange varies widely and the number of participants who are members and persons and firms subject to Commission or DCM recordkeeping rules directly corresponds to the number of annual compliance audits a particular DCM will conduct to determine compliance with all audit trail requirements.

While the Commission is imposing new requirements that specify certain components that must be incorporated in audit trail reviews, the Commission notes that most exchanges already have such resources in place and conduct audit trail reviews in such a manner to comply with these new regulations due to the RER process and recent recommendations. What constitutes ''appropriate resources'' to oversee and enforce the audit trail requirements is addressed on an individualized basis in the specific RERs for each exchange. Importantly, no DCM provided the Commission with information related to the current cost of compliance and the estimated increase related to codification of existing practices.

Benefits

Core Principle 10 and the associated regulations promote the reliability, completeness, accuracy, and security of exchange order and trade data. The ability of DCMs to recover, review, and reconstruct trading transactions is imperative to monitor for potential customer and market abuses. The requirements of Core Principle 10 ensure the ability of DCMs to prosecute rule violations supported by evidence from audit trail data and order and trade information. This furthers the protection of market participants by requiring exchanges to have the ability to adequately conduct market surveillance and prosecute rule violations.

The requirement that exchanges issue no more than one warning letter for the same violation within a rolling twelve-month time period will ensure that instead of simply sending multiple warning letters, exchanges levy meaningful fines and sanctions to deter recidivist behavior and prevent future rule violations.

Section 15(a) Factors (§§ 38.551–38.553)

1. *Protection of market participants and the public.* Sections 38.551–38.553 benefit the protection of market participants and the public by requiring that DCMs maintain all order and trade information so that rule violations that could harm market participants and the public may be detected, reconstructed, investigated, and prosecuted. A DCM cannot complete its surveillance and enforcement practices without such audit trail data collection and requirements. The absence of these regulations would result in an increased potential for violations to go undetected. Such requirements strengthen DCMs' market oversight capabilities and result in stronger protection of market participants and the general public from rule violations and market abuses.

2. *Efficiency, competitiveness, and financial integrity of futures markets.* The regulations under Core Principle 10 implemented in §§ 38.551–38.553 promote efficiency and competitiveness by ensuring that DCMs can adequately monitor their markets for rule violations and effectively prosecute and deter such rule violations. These regulations strengthen market confidence by deterring such rule violations, thereby promoting efficient pricing and a competitive trading atmosphere.

3. *Price discovery.* Sections 38.551–38.553 benefit the price discovery process of markets by allowing DCMs to detect and prosecute rule violations that impede market prices from accurately reflecting information pertaining to underlying fundamentals. Having a process by which to detect, reconstruct, investigate, and prosecute rule violations deters market participants

from engaging in activities which harm the market's price discovery process.

4. *Sound risk management practices.* The Commission has not identified any effects that this rule will have on sound risk management practices.

5. *Other public interest considerations.* The Commission has not identified any effects that this rule will have on other public interest considerations.

(12) Core Principle 11: Financial Integrity of Transactions

Sec. 38.601–38.606

Section 38.601 provides that all transactions executed on or through a DCM, other than transactions in security futures products, must be cleared through a Commission-registered DCO. Section 38.602 provides that DCMs must adopt rules establishing minimum financial standards for both member FCMs and IBs and non-intermediated market participants. Section 38.603 provides that DCMs must adopt rules for the protection of customer funds.

Section 38.604 requires that a DCM must routinely receive and promptly review financial and related information from its members, and conduct ongoing financial surveillance of the risk created by the positions taken by an FCM's customers. Section 38.605 requires DCMs, as self-regulatory organizations, to comply with the standards of amended § 1.52 to ensure the financial integrity of intermediaries by establishing and carrying out an SRO program for the examination and financial supervision of intermediaries. Section 38.606 provides that DCMs may satisfy their financial surveillance responsibilities under §§ 38.604 and 38.605 by outsourcing such responsibilities to a regulatory service provider if certain requirements are met.

Summary of Comments and Discussion

KCBT commented that because its rules incorporate by reference the requirements of the CEA, the requirement to implement exchange rules that mirror Commission regulations is duplicative, unnecessary and burdensome.[608]

The Commission believes the establishment of independent financial integrity rules is important because it will provide evidence that: (i) Each DCM has focused attention on the specific regulations promulgated under the CEA; and (ii) such regulations are appropriately implemented. Section 38.603 does not specify the exact rules to be implemented by each DCM, but sets forth the substance of what the rules of each DCM must address; therefore, a DCM would be unable to meet the requirements of the rule by incorporating the CEA requirements by reference.

Costs

Section 38.601 imposes no new costs on DCMs, as all transactions on a DCM are currently subject to mandatory clearing; this was required by the former core principle, before it was amended by the Dodd-Frank Act.

Section 38.602 imposes no new costs as all DCMs are currently required to have rules establishing minimum financial standards for member FCMs and IBs pursuant to Core Principle 11. The Commission will continue to review the financial standards that each DCM has established to be certain that the DCM is in compliance with the rule. The requirements of § 38.603 relating to the protection of customer funds are all existing requirements pursuant to former Designation Criterion 5(b) and have been found to be effective in monitoring and mitigating financial risk. By incorporating the substantive standards from former designation criteria that have already been implemented by registered DCMs, the Commission aims to minimize implementation costs. However, the explicit requirement that DCMs adopt rules, as opposed to solely incorporating the requirements of the CEA by reference, will involve administrative costs on the part of DCMs, such as enacting the appropriate rules and building the understanding within its staff of those rules.

The requirements of § 38.604 also reflect requirements pursuant to former Designation Criterion 5(a). However, the rule does build on the foundation of historical compliance by DCMs by explicitly requiring intraday financial surveillance. The Commission believes that intraday surveillance is necessary to account for possible intraday risk build-up and to meet the requirements of the financial integrity core principle. Because DCOs currently conduct intraday monitoring, DCMs should already meet this requirement through the DCO(s) that provides their clearing services. As the Commission notes in the preamble, an arrangement between a DCO and a DCM, whereby the DCO is responsible to a DCM for the performance of certain functions, including this monitoring, will continue to be permitted by the Commission. Therefore, intraday financial surveillance should not impose new costs on DCMs.

DCMs will not need to expend significant additional resources to comply with § 38.605 as all DCMs have existing SRO programs in place and currently are in compliance with section 1.52, as well as the guidance that has now been incorporated into section 1.52 from Division of Trading and Markets Financial and Segregation Interpretations 4–1 and 4–2. Further, the JAC Agreement, as discussed above, is already in place and operating effectively.

Section 38.606 provides DCMs with the option of outsourcing their financial surveillance responsibilities if they would prefer not to do such surveillance in house. Although §§ 38.604 and 38.605 impose the actual surveillance requirements, those DCMs electing to outsource such surveillance responsibilities will incur costs related to conducting due diligence of the regulatory service provider and making sure the DCM has adequate staff to monitor the provider. The Commission is unable to quantify such costs because the rule does not require a certain method of due diligence, and therefore the costs would vary based on the practices and choices of each DCM.

Benefits

Section 38.601 is a codification of the statutory requirement in Core Principle 11. Section 38.602 requires a DCM to establish and maintain minimum financial standards for market participants, which is essential to mitigating systemic risk. Implementing the requirements of the core principle, which requires that each DCM has rules to ensure the financial integrity of FCMs and IBs, achieves the Commission's regulatory objectives by ensuring the financial integrity of the transactions entered into by or through the facilities of the contract market, while also providing flexibility as to how to meet the requirements of the core principle.

Rule 38.603 implements the requirement of the core principle that DCMs establish and enforce rules to ensure the protection of customer funds. DCMs, as SROs, are well-positioned to undertake the responsibility of establishing such rules and ensuring the compliance of intermediaries with those rules. As a result, the requirements of § 38.603 enhance the protection of customers (who are both market participants and members of the public) from the losses incurred by fellow customers. This directly enhances the protection of market participants and the public, and promotes sound risk management. Moreover, by mitigating the loss of customer funds, which loss in turn would damage all customers' confidence in the safety of the funds they post as collateral for cleared

[608] KCBT Comment Letter at 7 (Feb. 22, 2011).

positions, these requirements mitigate systemic risk.

The intraday surveillance requirement in § 38.604 requires that a DCM continually survey each FCM's obligations created by its customers. Satisfaction of this requirement is necessary for a DCM to meet the requirements of the core principle to have rules ensuring the financial integrity of market participants, as well as the protection of customer funds. By conducting intraday surveillance and acting on the results of the surveillance, DCMs will be able to address intraday risks before they grow larger and therefore avoid losses to DCOs carrying FCMs or customers.

For section 38.605, existing benefits include avoiding duplicative review of members, as well as ensuring the financial integrity of FCMs and IBs, protecting customer funds and contributing to market confidence. In addition, because § 38.606 provides a DCM with options, it is more efficient and cost-effective as DCMs can choose whether to allocate their own resources to this surveillance or to use a regulatory service provider.

Section 15(a) Factors (§§ 38.601–38.606)

1. *Protection of market participants and the public.* The rules protect market participants and the public by ensuring the financial integrity of DCM transactions via clearing of all transactions on a DCM, financial surveillance of members and minimum standards for members. The protection of customer funds rules protect customers from the losses incurred by either other market participants or fellow customers, thereby strengthening the financial integrity of the markets and decreasing potential systemic risks.

2. *Efficiency, competitiveness and financial integrity of futures markets.* Since most of these rules codify pre-existing requirements, DCMs are already in compliance. As a result, the rules do not require significant changes (i.e., costs), and therefore have minimal effect on the competitiveness of futures markets. The addition of rules requiring intraday financial surveillance will benefit the financial integrity of the markets by requiring DCMs to have procedures that will foster DCMs addressing intraday risks before they grow larger, thereby avoiding losses to DCOs carrying FCMs or customers.

3. *Price discovery.* The Commission has not identified any effects that this rule will have on price discovery.

4. *Sound risk management practices.* The rules requiring the establishment of minimum financial standards for DCM market participants promote sound risk management practices by ensuring that market participants have a certain level of sophistication and resources, which in turn, mitigates systemic risk.

5. *Other public interest considerations.* The Commission has not identified any effects that this rule will have on other public interest considerations.

Sec. 38.607 (Direct Access)

Section 38.607 requires a DCM that allows customers direct access to its contract market to implement certain direct access controls and procedures (such as automated pre-trade controls) in order to provide member FCMs with tools to manage their financial risk.

Costs

As discussed in the preamble, a recent Futures Industry Association (''FIA'') report stated that the majority of exchanges have policies and tools in place that comply with the recommendation that mandatory pre-trade controls be set at the exchange level.[609] As a result, these requirements will not impose significant costs on a majority of DCMs. Those DCMs that do not have controls and procedures in place, but do allow customers direct access to the contract market, will incur costs in implementing these controls and procedures, and FCMs will incur costs in utilizing the controls and procedures. The Commission is unable to quantify such costs because the rule does not require a certain set of controls and procedures, and therefore the costs would vary based on the controls adopted by the individual DCM. In addition, such costs would also vary depending on the DCM's existing infrastructure, which varies markedly across exchanges. Moreover, commenters did not discuss the costs of this provision.

Benefits

The requirements of this rule will enable an FCM to protect itself when a customer has direct access to a DCM and completes a trade before an FCM's systems have an opportunity to prevent the execution of such trade, thereby avoiding losses that could extend to customers or the DCO from trades that would exceed the parameters set by the FCM on the DCM. Further, as discussed in the preamble, the benefits of risk controls at the FCM, DCO and DCM level, discussed above, have been recognized both domestically and internationally.

[609] *See* FIA report on ''Market Access Risk Management Recommendations'' (April 2010), available at: *http://www.futuresindustry.org/downloads/Market_Access-6.pdf.*

Section 15(a) Factors

1. *Protection of market participants and the public.* The final rule promotes the protection of market participants and the public because it enables an FCM to protect itself from its customers with direct access to the DCM, thereby preventing customers from undertaking risks that could bankrupt an FCM.

2. *Efficiency, competitiveness and financial integrity of futures markets.* Automated controls will permit an FCM to enforce limitations on its customers' trading via direct access, which will serve to protect all market participants, which will also promote the efficient, competitive, and financial integrity of futures markets.

3. *Price discovery.* The Commission has not identified any effects that this rule will have on price discovery.

4. *Sound risk management practices.* Without the aid of controls at the DCM-level, an FCM will be unable to protect itself from its customers with direct access to the DCM. Therefore, the final rule serves sound risk management practices by enabling FCMs to manage risk.

5. *Other public interest considerations.* The Commission has not identified any effects that this rule will have on other public interest considerations.

(13) Core Principle 12: Protection of Markets and Market Participants

Section 38.651 provides that a DCM must have and enforce rules that are designed to promote fair and equitable trading and to protect the market and market participants from abusive practices including fraudulent, noncompetitive or unfair actions, committed by any party.

Costs and Benefits

Section § 38.651 specifies DCMs' obligations under Core Principle 12 relating to their compliance with Core Principles 2, 4 and 9, and the associated regulations. Accordingly, § 38.651 does not impose any additional costs beyond those discussed under each of the respective Core Principles 2, 4 and 9.

(14) Core Principle 13: Disciplinary Procedures

Core Principle 13 consists of a series of rules that, among other things, seek to ensure a fair, prompt, and effective disciplinary program.[610] A more

[610] CME and MGEX stated that a number of the rules implementing Core Principle 13 are overly prescriptive. *See* CME Comment Letter at 35–36 (Feb. 22, 2011) and MGEX Comment Letter at 9 (Feb. 22, 2011). The Commission considered these comments in preparing this release and discusses

Continued

detailed description of the Core Principle 13 rules themselves is contained in the preamble.

Sec. 38.701 (Enforcement Staff)

Rule 38.701 requires that a DCM must establish and maintain sufficient enforcement staff and resources to effectively and promptly prosecute possible rule violations.

Costs

The obligations imposed by § 38.701 are not new; rather, the requirements for DCMs to ensure adequate staff and resources stem from recent RERs, in which Commission staff recommended that DCMs increase their compliance staff levels and monitor the size of their staff and increase the number of staff as appropriate.[611] Accordingly, the Commission does not anticipate that this provision will impose additional costs on DCMs.

Benefits

The Commission believes that adequate enforcement staff and resources are essential to the effective performance of a DCM's disciplinary program. Without an effective disciplinary program, a DCM will be unable to effectively and promptly investigate and adjudicate potential rule violations and deter future violations. Rule 38.701 ensures that DCMs monitor the size of their staff and increase the number of staff appropriately as trading volume increases, new responsibilities are assigned to compliance staff, or internal reviews demonstrate that work is not completed in an effective or timely manner. Rule 38.701 also ensures the independence of enforcement staff and promotes disciplinary procedures that are free of potential conflicts of interest by providing that a DCM's enforcement staff may not include members of the exchange or persons whose interests conflict with their enforcement duties.

Sec. 38.702 (Disciplinary Panels)

Rule 38.702 requires DCMs to have one or more ''review panels, without imposing a specific requirement for DCMs to maintain a ''review panel'' and a ''hearing panel.''

Costs

The requirement in the rule to establish disciplinary panels reflects industry practices that have already been adopted by most DCMs. Accordingly, the Commission anticipates that § 38.702 will not impose additional cost burdens on most DCMs. To the extent that the rule does impose costs on DCMs, the Commission notes that since disciplinary panel members are typically unpaid, any potential costs associated with § 38.702 would be limited to administrative costs associated with establishing the disciplinary panel, which are likely to vary by DCM. Finally, as described above, in response to concerns raised by commenters, the Commission has removed the proposed requirement to maintain distinct hearing panels and review panels, thereby reducing the burden associated with the proposed rule.

Benefits

Rule 38.702 requires DCMs to establish one or more disciplinary panels authorized to fulfill their obligations under the part 38 rules, including, among other things, to issue notices of charges, conduct hearings, render written decisions, and impose disciplinary sanctions. These functions are critical components of a DCM's disciplinary program and will deter violations of DCM rules, prevent recidivist behavior, protect respondents by requiring procedural safeguards to ensure fairness for all respondents in disciplinary actions, and protect customers by requiring full customer restitution in any disciplinary matter where customer harm is demonstrated.

In addition to providing these numerous benefits, § 38.702 permits flexibility in the structure of DCMs' disciplinary bodies but protects against conflicts of interest by ensuring that the same individual is not invested with the authority to both issue and adjudicate charges in the same manner.

Sec. 38.703–38.711 and Guidance

Rules 38.703–38.711, and the accompanying guidance, seek to ensure a fair, prompt, and effective disciplinary program by, among other things, requiring a notice of charges and providing respondents with a right to representation, a reasonable period of time to file an answer to charges, and the right to a fair hearing. The rules also outline procedures for rendering disciplinary decisions and issuing disciplinary sanctions and warning letters. In response to comments requesting greater flexibility, the Commission is also converting several proposed rules into guidance in order to reduce potential incremental costs resulting from the final rules. This guidance will cover notices of charges, the admission or failure to deny charges, settlement offers, hearings, rights to appeal, summary fines, and emergency disciplinary sanctions.

Summary of Comments and Discussion

The Commission did not receive any specific comments discussing costs or benefits of proposed §§ 38.703–38.716. However, several commenters made general requests for greater flexibility across all core principles. Accordingly, the Commission has modified certain aspects of the proposed rules under Core Principle 13 where it believes that flexibility can reasonably be afforded. To that end, the Commission is converting the following proposed rules, in their entirety, to guidance: proposed § 38.707 (Admission or failure to deny charges); proposed § 38.709 (Settlement offers); proposed § 38.712 (Right to appeal); and proposed § 38.716 (Emergency disciplinary actions). In addition, the Commission is moving the following specific requirements to guidance: the requirements under paragraphs (a) and (b) of proposed § 38.704, which allowed, but did not require, a DCM to issue rules regarding failures to request a hearing and expressly answer or deny a charge; the provision under paragraph (b) of proposed § 38.710, which provided that the DCM's rules may provide that a sanction may be summarily imposed upon any person whose actions impede the progress of a hearing; and the provisions under proposed § 38.715 that permitted, but did not require, a DCM to adopt a summary fine schedule.

The Commission is also removing the following proposed provisions from the final rules: paragraphs (a) and (b) under proposed § 38.703 regarding the review of investigation reports when additional evidence is needed or no reasonable basis exists for finding a violation; the section of proposed § 38.708 which was optional, allowing a DCM's rule to provide that, except for good cause, a hearing must be concerned only with those charges denied or sanctions set by the panel for which a hearing has been requested; and the optional rule under proposed § 38.710(a)(7) which, in certain cases, allowed for the cost of transcribing the record of the hearing to be borne by the respondent.

Costs (§ 38.703–38.712 and Guidance)

While § 38.701 and § 38.702 impose specific requirements on DCMs to have sufficient enforcement staff and

the costs and benefits of the codification of rules in lieu of guidance and acceptable practices in further detail in section C(1) above.

[611] *See* Rule Enforcement Review of the Minneapolis Grain Exchange (Aug. 27, 2009), Rule Enforcement Review of ICE Futures U.S. (Feb. 2, 2010), and Rule Enforcement Review of the Chicago Board of Trade and the Chicago Mercantile Exchange (Sept. 13, 2010) for findings and recommendations pertaining to the adequate staff size of DCM compliance departments.

resources and to establish disciplinary panels, the remainder of the Core Principle 13 regulations simply outline the policies and procedures that a DCM's disciplinary program must follow. The Commission notes that these Core Principle 13 regulations merely reflect disciplinary concepts formerly found in Designation Criterion 6, part 8 of the Commission's regulations,[612] and the guidance and acceptable practices for former Core Principle 2. Accordingly, existing exchanges generally have already established disciplinary programs and, as such, have already expended the fees and costs necessary to comply with the requirements under §§ 38.703–38.712.

As discussed in the preamble, many of the new requirements applicable to DCMs with respect to their disciplinary procedures were derived from findings and recommendations made by Commission staff through RERs.[613] These recommendations represent what the Commission staff believes are best practices and are typically adopted by DCMs as the standard form of compliance. Therefore, while the codification of certain disciplinary requirements may be new, Commission staff has already expressed these expectations to the industry through RERs.

The exact incremental costs incurred by DCMs to comply with the specific requirements of final rules under Core Principle 13 cannot be ascertained since they will vary depending on the DCM's current disciplinary program. To ensure the effectiveness of their disciplinary programs and provide procedural safeguards to potential respondents, most DCMs already have disciplinary rules and procedures that are similar to those required by the rules, even though they were not previously required to do so by Commission regulation. Therefore, as a practical matter, the rules may likely require DCMs to amend existing disciplinary rules and procedures rather than creating them anew. Accordingly, costs would likely be limited to the resources allocated to amending existing rules and procedures to ensure compliance with the final rules.

As described above, in response to commenters' request for greater flexibility, the Commission has sought to reduce any incremental costs imposed by the final rules by modifying certain rules where it believes that flexibility can reasonably be afforded and the overall burden on DCMs can be reduced. As described above, the Commission is moving numerous proposed regulations from rules to guidance, as well as removing certain provisions in their entirety. Finally, the Commission expects the following additional modifications to the proposed rules to also reduce the costs imposed by the rules on market participants: (1) The rules regarding a respondent's answer to a notice of charges, outlined in paragraphs (a), (b), and (c) of proposed § 38.706, are being replaced with a requirement that any rules adopted pursuant to this rule be ''fair, equitable, and publically available;'' (2) Proposed § 38.714 is being modified so that it does not require customer restitution if the amount of restitution, or the recipient, cannot be reasonably determined.

Benefits

The regulations under Core Principle 13 protect market participants and the public by ensuring that exchanges will discipline, suspend or terminate the activities of members or market participants found to have committed rule violations. To that end, the rules will ensure that DCMs maintain fair, prompt, and effective disciplinary programs. The rules will deter violations of DCM rules by requiring disciplinary sanctions sufficient to deter recidivism under§ 38.710 and by restricting repeat warning letters in § 38.711. The rules protect respondents by requiring procedural safeguards to ensure fairness for respondents. These include an adequate notice of charges under § 38.703, the right to representation in § 38.704, a reasonable period of time to file an answer to charges under § 38.705, right to a hearing under § 38.707, and a prompt written decision under § 38.708, among others. Finally, the rules protect customers by requiring restitution where customer harm is demonstrated in § 38.710.

The guidance provisions regarding settlement offers and § 38.708 (Decisions) were based on the Commission's recommendation that DCM disciplinary committees improve the documentation of their disciplinary decisions. As discussed in the DCM NPRM, the Commission believes that improved written documentation yields the following benefits: (1) Disciplinary panels will be required to focus their analysis more carefully in order to articulate the rationale for their decisions; (2) DCM enforcement staff will gain a better understanding of the evidentiary expectations to which different disciplinary panels adhere; (3) DCM enforcement staff and respondents will both have an improved record to base any appeals they may wish to file; and (4) Improved review of the DCMs' disciplinary program by the Commission.

Section § 38.710 (Disciplinary Sanctions), which provides that all disciplinary penalties imposed by a DCM or its disciplinary panels must be commensurate with the violations committed, and be sufficient to deter recidivist activity, and § 38.711 (Warning Letters), which prohibits a DCM from issuing more than one warning letter in a rolling 12 month period, are also examples of recommendations made by the Commission in RERs. As discussed in the DCM NPRM, these reflected DMO staff's concern regarding the adequacy of sanctions.

Section 15(a) Factors (§ 38.701–38.712 and Guidance)

1. *Protection of market participants and the public.* The regulations and guidance under Core Principle 13 benefit the protection of market participants and the public by ensuring that exchanges maintain sufficient enforcement staff and resources through § 38.701 and will discipline, suspend or terminate the activities of members or market participants found to have committed rule violations. The regulations require that DCMs maintain fair, prompt, and effective disciplinary programs to ensure fairness for all respondents in disciplinary actions. Additionally, by requiring that DCMs levy meaningful sanctions against persons and entities that violate DCM rules under §§ 38.710 and 38.711, the regulations seek to promote the effectiveness of disciplinary sanctions and deter recidivist behavior. Finally, to compensate customers who suffer harm, the rules require full customer restitution in any disciplinary matter where customer harm was demonstrated and where the amount of restitution and the recipient can be reasonably determined under § 38.710.

2. *Efficiency, competitiveness and financial integrity of futures markets.* The regulations under Core Principle 13 promote the financial integrity of the futures markets by ensuring that individuals and entities that violate the rules of a DCM are appropriately sanctioned, such sanctions are effective and discourage recidivist activity, and customers who are harmed received full restitution under §§ 38.710 and 38.711.

3. *Price discovery.* The Commission has not identified any effects that these rules will have on price discovery other than those identified above.

[612] Exchange Procedures for Disciplinary, Summary, and Membership Denial Actions.

[613] For example, the requirements in regulation 38.708 (Decisions) and regulation 38.710 (Disciplinary Sanctions) are based on findings and recommendations in recent RERs.

4. *Sound risk management practices.* The Commission has not identified any effects that these rules will have on sound risk management practices, other than those identified above.

5. *Other public interest considerations.* The regulations under Core Principle 13 promote public interest considerations, such as market integrity and customer protection, by establishing an enforcement program through which DCMs can effectively prosecute members and market participants who engage in abusive trading practices or violate other DCM rules.

(15) Core Principle 14: Dispute Resolution

The new guidance for Core Principle 14 is essentially identical to the prior guidance to former Core Principle 13. No comments were provided related to the costs of Core Principle 14. Therefore, the costs and benefits should be no different than the costs and benefits of administering a dispute resolution program under former Core Principle 13 prior to enactment of the Dodd-Frank Act.

(16) Core Principle 18: Recordkeeping

Sec. 38.951 (Additional Sources for Compliance)

Section 38.951 requires DCMs to maintain records, including trade records and investigatory and disciplinary files, in accordance with Commission regulations, § 1.31, and in accordance with part 45 of the Commission's regulations with respect to swap transactions.

Costs

The Commission did not receive any comments related to the costs of this core principle. Although § 38.951 incorporates by reference the requirements of existing § 1.31 and part 45, it does not impose any additional burden or costs to which DCMs are not already subject under current regulations. Regulation 38.951 merely references recordkeeping obligations to which DCMs have always been subject under § 1.31 and to which DCMs are required to comply with respect to swap transactions under part 45. Accordingly, DCMs will not bear any new costs solely due to § 38.951.

Benefits

Section § 38.951 enables the Commission to obtain the books and records of DCMs, which is essential to carrying out the Commission's regulatory functions, including trade practice and market surveillance, regulatory examinations, and enforcement examinations. Furthermore, such books and records assist the Commission in prosecuting violations of the CEA and Commission regulations.

(17) Core Principle 19: Antitrust Considerations

The guidance for Core Principle 19 is nearly identical to the guidance for former Core Principle 18 and therefore the costs and benefits of requiring DCMs to operate according to accepted antitrust law should be no different than the costs and benefits associated with the pre-existing guidance, prior to the enactment of the Dodd-Frank Act.

(18) Core Principle 20: System Safeguards

Sec. 38.1051 (General Requirements)

Section 38.1051 establishes system safeguards requirements for all DCMs, pursuant to new Core Principle 20 added under the Dodd-Frank Act. The rules under § 38.1051(a) and (b) require a DCM's program of risk analysis and oversight to address six categories of risk analysis and oversight and to follow generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems. Section 38.1051(c) specifically requires each DCM to maintain a business continuity-disaster recovery (''BC–DR'') plan and BC–DR resources sufficient to enable resumption of trading and of all of the responsibilities and obligations of the DCM during the next business day following any disruption of its operations. Section 38.1051(d) specifies the requirement to be able to resume trading and clearing during the next business day following a disruption for DCMs that are not determined to be a critical financial market. The rules also require each DCM to notify Commission staff of various system security-related events under § 38.1051(e) and (f), to provide relevant documents to the Commission in § 38.1051(g), and to conduct regular, periodic, objective testing and review of automated systems under § 38.1051(h). Finally, the rules under § 38.1051(i) require each DCM to coordinate its BC–DR plan with its members and market participants.

Summary of Comments

CME stated that the requirement for notice of all systems malfunctions is overly broad and would require onerous reporting of mundane and trivial incidents, and that the Commission should limit required reporting only to material system failures.[614] CME also stated that the requirement that DCMs provide the Commission with timely advance notice of all planned changes to automated systems that may impact the reliability, security, or adequate scalable capacity of such systems is an ''extremely onerous burden for DCMs'' and that the requirement adds ''significant costs that are not at all commensurate with any value created.''[615] CME claimed that any change to a system could conceivably impact the operation of the system, and that it would be inefficient and unproductive to report every planned change to their automated systems.[616] Finally, CME stated that the requirement that DCMs provide timely advance notice of all planned changes to the DCM's program of risk analysis and oversight is overly broad and is neither necessary nor productive.[617]

Discussion

In response to CME's concerns that the rule would require reporting of insignificant system events, the Commission is adopting final rules that require reporting only of significant system malfunctions and advance notification only of material system changes.

Costs

Sec. 38.1051(a) and (b)

The Commission believes that DCMs generally will not incur significant additional costs to achieve compliance with the requirements described in § 38.1051(a) and (b) because from the time Core Principle 20 went into effect, all DCMs would need to have a program addressing all six categories of risk analysis and oversight. Former Core Principle 9 and Designation Criteria 4 provided for essentially the same requirements which reflect activities that would normally be conducted by the DCM in the course of following industry standards, guidelines, and best practices for the management and operation of automated systems. Additionally, the requirement to maintain a program of risk analysis and oversight appears in Core Principle 20 itself and was not the product of Commission discretion.

Sec. 38.1051(c)

The Commission believes that DCMs generally will not incur significant additional costs to achieve compliance with the requirements described in

[614] CME Comment Letter at 36–37 (Feb. 22, 2011).

[615] *Id.*

[616] *Id.*

[617] *Id.*

§ 38.1051(c). The requirement to maintain a business continuity-disaster recovery plan, business continuity disaster recovery resources, emergency procedures, and backup facilities appears in the core principle itself and was not the product of Commission discretion. Additionally, the requirements in § 38.1051(c) reflect industry best practices; an exchange without the ability to resume operations shortly after a disastrous event, which by definition implies that they will not in that timeframe be able to operate out of their production environment, cannot expect to retain its customer base. In the event that an existing DCM is determined by the Commission to be a ''critical financial market,'' substantial additional initial and ongoing costs could be incurred due to the more stringent requirements in this regard, set forth in § 40.9. The Commission expects to notify a DCM of its consideration of the DCM's status as a critical financial market sufficiently in advance of any formal designation as such; further, the Commission believes that any DCM subject to this designation would be generating sufficient volume to reasonably support additional costs incurred.

Sec. 38.1051(d)

The Commission does not believe that any additional material costs will be incurred by DCMs in complying with the requirements listed in § 38.1051(d), as DCMs covered by this provision are already in compliance with its requirements.

Sec. 38.1051(e)

The Commission does not believe that any material costs will be incurred by DCMs in complying with the notification requirements listed in § 38.1051(e). Given the general operating stability of the automated systems at existing DCMs, notification to Commission staff, either via email or telephone, would be fairly infrequent and could easily be combined with notifications distributed to market participants. Several DCMs have automated notification systems; adding an email address to these systems would not impose additional costs on DCMs. Minimal additional cost due to DCM staff time could be incurred in follow-up activities, including completing a systems outage notification template developed by Commission staff. However, this template closely follows standard technical post-mortem reporting procedures, and is not expected to require more than one hour to complete, at a cost of about $52. Additionally, the Commission notes that it is reducing the burden of this provision by revising the proposed rule to provide that DCMs must only promptly advise the Commission of all significant system malfunctions, rather than all system malfunctions.

Sec. 39.1051(f)

The Commission does not believe that any significant material costs will be incurred by existing DCMs or applicants in complying with the notification requirements listed in § 38.1051(f). Commission staff has developed notification templates for the notice requirements contained in both (f)(1) and (2); these templates have been designed to minimize additional work for DCM staff. As the templates largely follow guidelines for best practices in automated systems management and capacity planning, Commission staff believes that each notification will require no more than two hours of DCM staff time (at a cost of about $104). Commission notification of planned changes to a DCM's program of risk analysis and oversight should also not impose additional costs on DCMs, as copies of documents developed by DCM staff for change planning purposes are expected to be sufficient in meeting this requirement. Additionally, the Commission notes that it is reducing the burden of this provision on DCMs by revising the proposed rule to provide that, with respect to planned changes to automated systems or risk analysis and oversight programs, a DCM must only provide timely advance notification of material changes, rather than of all changes.

Sec. 38.1051(g)

The Commission does not believe that any significant costs will be incurred by existing DCMs or applicants in complying with the requirements listed in § 38.1051(g), as these documents and procedures can be provided electronically with minimal additional DCM staff effort, and would be produced by the DCM in the course of following industry standards, guidelines and best practices for the management and operation of automated systems. If the documents are available electronically, the request can likely be met in under 15 minutes. Hardcopy responses would likely require no more than 30 minutes of DCM staff time.

Sec. 38.1051(h)

The Commission does not believe that any significant costs will be incurred by existing DCMs in complying with the requirements listed in § 38.1051(h), as all DCMs should currently be performing this testing and review in the course of following industry standards, guidelines and best practices for the management and operation of automated systems.

Sec. 38.1051(i)

The Commission does not believe that any significant costs will be incurred by existing DCMs in complying with the requirements listed in § 38.1051(i), as all DCMs should meet the requirements of this provision in the course of following industry standards (including industry-wide tests conducted at least annually and sponsored by the Futures Industry Association (''FIA'')), guidelines and best practices for the management and operation of automated systems. Further, compliance with sections (1) and (3) would generally result from the development of contingency and disaster recovery plans following generally accepted best practices and standards. Finally, industry-wide testing currently conducted on an annual basis would result in substantial compliance with part (2) of this section.

Benefits

Sophisticated computer systems are crucial to a DCM's ability to meet its obligations and responsibilities. Safeguarding the reliability, security, and capacity of such systems is essential to mitigate systemic risk for the nation's financial sector as a whole. The ability of DCMs to recover and resume trading promptly in the event of a disruption of their operations is highly important to the U.S. economy. Ensuring the resilience of the automated systems of DCMs is a vitally important part of the Commission's mission and will be crucial to the robust and transparent systemic risk management framework established by the Dodd- Frank Act. DCM compliance with generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems can reduce the frequency and severity of automated system security breaches or functional failures, thereby augmenting efforts to mitigate systemic risk. Notice to the Commission concerning systems malfunctions, systems security incidents, or any events leading to the activation of a DCM's business continuity-disaster recovery (''BC–DR'') plan will assist the Commission's oversight and its ability to assess systemic risk levels. It would present unacceptable risks to the U.S. financial system if futures and swaps markets that comprise critical components of the world financial system were to become unavailable for an extended period of time for any reason. Adequate system

safeguards are crucial to mitigate such risks and this regulation will ensure such safeguards are in place.

Section 15(a) Factors

1. *Protection of market participants and the public.* Because automated systems play a central and critical role in today's electronic financial market environment, oversight of core principle compliance by DCMs with respect to automated systems is an essential part of effective oversight of both futures and swaps markets. Timely reporting to the Commission of material system malfunctions, planned changes to automated systems, and planned changes to programs of risk analysis and oversight will facilitate the Commission's oversight of futures and swaps markets, augment the Commission's efforts to monitor systemic risk, and will further the protection of market participants and the public by helping to ensure that automated systems are available, reliable, secure, have adequate scalable capacity, and are effectively overseen.

2. *Efficiency, competitiveness, and financial integrity of futures markets.* Sophisticated computer systems are crucial to a DCM's ability to meet its obligations and responsibilities. Safeguarding the reliability, security, and capacity of such systems is also essential to mitigation of system risk for the nation's financial sector as a whole. This is particularly true in light of the fact that the over-the-counter swaps market is estimated to have in excess of $600 trillion in outstanding contracts. The ability of DCMs to recover and resume trading promptly in the event of a disruption of their operations is highly important to the U.S. economy. Ensuring the resilience of the automated systems of DCMs is a critical part of the Commission's mission, and will be crucial to the robust and transparent systemic risk management framework established by the Dodd-Frank Act. Notice to the Commission concerning systems malfunctions, systems security incidents, or any events leading to the activation of a DCM's business continuity-disaster recovery plan will assist the Commission's oversight and its ability to assess systemic risk levels. It would present unacceptable risks to the U.S. financial system if futures and swaps markets that comprise critical components of the world financial system were to become unavailable for an extended period of time for any reason, and adequate system safeguards and timely notice to the Commission regarding the status of those safeguards are crucial to mitigation of such risks.

3. *Price discovery.* The reliable function of sophisticated computer systems and networks is vital to the fulfillment of a DCM's duties and obligations, a crucial ingredient of adequate regulatory oversight, and central to the robust, conservative, and transparent risk management framework promulgated by the Dodd-Frank Act. Following generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems will reduce the incidence and severity of automated system security breaches and functional failures, thereby providing reliable and available venues for price discovery.

4. *Sound risk management practices.* Reliably functioning computer systems and networks are crucial to comprehensive risk management, and prompt notice to the Commission concerning systems malfunctions, systems security incidents, or any events leading to the activation of a DCM's business continuity-disaster recovery plan will assist the Commission in its oversight role, and will bolster its ability to assess systemic risk levels. Adequate system safeguards and timely notice to the Commission regarding the status of those safeguards are crucial to mitigation of potential systemic risks.

5. *Other public interest considerations.* The American economy and the American public depend upon the availability of reliable and secure markets for price discovery, hedging, and speculation. Ensuring the adequate safeguarding and the reliability, security, and capacity of the systems supporting these market functions is a core focus in the Commission's role in monitoring and assessing the level of systemic risk, and is central to its fulfillment of responsibilities given to it by the Dodd-Frank Act.

(19) Core Principle 21: Financial Resources

Sec. 38.1101 (Financial Resources)

Section 38.1101(a) requires DCMs to maintain and calculate sufficient financial resources to cover operating costs for at least one year, calculated on a rolling basis, at all times, and requires any entity operating as both a DCM and a DCO to comply with both the DCM and DCO financial resources requirements.

Under section 38.1101(b), financial resources available to DCMs to satisfy the applicable financial resources requirements would include the DCM's own capital (assets in excess of liabilities) and any other financial resource deemed acceptable by the Commission.

Sections 38.1101(c), (d), and (f) require each DCM, no less frequently than at the end of each fiscal quarter, to calculate the financial resources it needs to meet the requirements of § 38.1101(a) and the current market value of each financial resource and report this information to the Commission within a specified timeframe. Section 38.1101(e) requires DCMs to maintain unencumbered liquid financial assets, such as cash or highly liquid securities, equal to at least six months' operating costs, or a committed line of credit or similar facility.

Summary of Comments

GreenX stated that the proposed rules implementing Core Principle 21 could effectively require DCMs to maintain financial resources in excess of one year's operating costs.[618] GreenX suggested modifying the rule so that the proposed six month liquidity requirement be explicitly included in the financial resources required to cover a DCM's operating costs for at least one year, or alternatively, requested that the Commission perform a cost benefit analysis of the proposed rule as written.[619]

GreenX also stated that revising the proposed rule to permit DCMs to include committed lines of credit as an acceptable financial resource would permit a DCM to reduce its operating costs by avoiding the need to incur unnecessary interest charges, while still ensuring that it has adequate funds available to pay its operating expenses.[620]

Several commenters requested an extended deadline for filing the financial reports required as a result of § 38.1101(f). CME stated that the proposed 17 day filing deadline is not feasible and that instead, the requirement should be consistent with the SEC's reporting requirements.[621] Similarly, GreenX stated that it has procedures in place to comply with the SEC's requirements and that the proposed requirements in this rule would require new programming and resources.[622] GreenX recommended extending the reporting deadline to 30 calendar days, noting that this is still more burdensome than the requirements imposed by the SEC on national securities exchanges.[623] The

[618] GreenX Comment Letter at 14–15 (Feb. 22, 2011).

[619] *Id.* at 17–18.

[620] *Id.* at 16.

[621] CME Comment Letter at 38 (Feb. 22, 2011).

[622] GreenX Comment Letter at 20 (Feb. 22, 2011).

[623] *Id.*

Commission received no comments discussing the costs and benefits of §§ 38.1101(b) and 38.1101(d).

Discussion

As discussed in the preamble, the rule does not require each DCM to maintain eighteen months of financial resources, but, rather, requires each DCM to have at least twelve months of financial resources, including six months of liquid financial resources. Each DCM has the discretion to determine how to meet this requirement (*e.g.,* six months of illiquid financial resources combined with six months of liquid ones, twelve months of illiquid financial resources with a line of credit covering six months' worth of financial resources, or twelve months of illiquid financial resources and six months of liquid ones). There are similar proposed financial resources rules in the rulemakings for each type of registered entity (*i.e.,* SEFs, SDRs, and DCOs).

The provision in the rule text stating that acceptable financial resources include a DCM's own capital and ''any other financial resource deemed acceptable by the Commission'' was meant to capture other types of resources on a case-by-case basis and provide flexibility to both DCMs and the Commission. Accordingly, the Commission has revised the rule text to state that a DCM's own capital means its assets minus its liabilities calculated in accordance with GAAP. The Commission believes that if a certain financial resource is deemed to be an asset under GAAP, it is appropriate for inclusion in the calculation for this rule. To the extent a certain financial resource is not considered an asset under GAAP, but based upon the facts and circumstances a DCM believes that the particular asset should be so considered, Commission staff will work with the DCM to determine whether such resource is acceptable.

The Commission is persuaded that the proposed 17 business day filing deadline may be overly burdensome. The SEC requires its quarterly reports on Form 10–Q to be filed with the SEC 40 calendar days after the end of the fiscal quarter for accelerated filers and 45 calendar days after the end of the fiscal quarter for all other SEC-registered entities. The SEC requires annual reports on Form 10–K to be filed with the SEC 60 calendar days after the end of the fiscal year for large accelerated filers, 75 calendar days for other accelerated filers and 90 calendar days for non-accelerated filers. Accordingly, the Commission is extending the 17 business day proposed filing deadline to 40 calendar days for the required reports for the first three quarters. This will harmonize the Commission's regulations with the SEC's requirements for its Form 10–Q. Similarly, the Commission has extended the filing deadline to 60 days for the fourth quarter report to harmonize with the SEC deadlines for the Form 10–K. The Commission does not believe that annual submissions are sufficient. The Commission believes that prudent financial management requires DCMs to prepare and review financial reports more frequently than annually, and expects that DCMs currently are reviewing their finances on at least a quarterly basis.

Costs

This is a new core principle for DCMs, so the requirement to maintain and calculate the financial resources necessary to meet the requirements of this rule may require an outlay of resources to achieve compliance. However, the Commission has required recent DCM registrants pursuant to their designation order to calculate and maintain a certain level of financial resources and therefore some DCMs are already generally in compliance with this requirement.

The Commission expects that most, if not all, DCMs already calculate and prepare financial statements quarterly. Accordingly, the Commission does not believe that the calculation of the financial resources required to meet the requirements of this core principle imposes a significant burden on DCMs. Extrapolation from the prepared financial statements should be relatively straightforward, but will require some resources on the part of DCMs, potentially including staff and technology resources to calculate, monitor, and report financial resources. Given the staffing and operational differences among DCMs, the Commission is unable to accurately estimate or quantify the additional costs DCMs may incur to comply with the new financial resource rules, and no information was provided in the comments in response to the NPRM. The proposed regulation imposes additional costs on the Commission as staff will be required to review the filings received from DCMs. However, once the first couple of filings have been received and reviewed, Commission staff will be familiarized with the financial resources of each DCM and the Commission expects that the review will become increasingly more efficient.

Benefits

A DCM is obligated to ensure that trading occurs in a liquid, fair, and financially secure trading facility. In order to fulfill its responsibilities, a DCM must have appropriate minimum financial resources on hand and on an ongoing basis to sustain operations for a reasonable period of time. This includes a DCM having sufficient resources to allow it to close out trading in a manner not disruptive to the market, if necessary. The Commission believes that the benefits of the rule requiring six months' worth of unencumbered liquid financial assets are substantial. Specifically, this provision would give a DCM time to liquidate the remaining financial assets it would need to continue operating for the last six months of the required one year period. If a DCM does not have six months' worth of unencumbered liquid financial assets, it would be allowed to use a committed line of credit or similar facility to satisfy the requirement. If a DCM does not have the liquidity required under § 38.1101(e), it is not achieving the goal of the core principle, as it will be unable to pay its creditors. Liquidity is implicit in the core principle requirement that the financial resources be adequate. Additionally, the rules ensure that the Commission can be certain that DCMs are in compliance with the core principle as required by the Dodd-Frank Act. In addition, the reporting requirements will facilitate the Commission's oversight role of ensuring DCMs maintain sufficient financial resources, as required by the core principle.

Section 15(a) Factors

1. *Protection of market participants and the public.* As discussed herein, these rules implement the requirements of new Core Principle 21 pursuant to the Dodd-Frank Act. These requirements will enable a DCM to fulfill its responsibilities of ensuring that trading occurs in a liquid, fair, and financially secure trading facility by maintaining appropriate minimum financial resources on hand and on an ongoing basis to sustain operations for a reasonable period of time. As discussed, as a result of these requirements, DCMs will also have the financial resources necessary to close out trading in a manner not disruptive to the market. By establishing uniform standards that further the goals of avoiding market disruptions, financial losses, and systemic problems that could arise from a DCM's failure to maintain adequate financial resources, these rules will protect market participants and the public.

2. *Efficiency, competitiveness and financial integrity of futures markets.* The rules also promote the financial

integrity of the futures markets by requiring DCMs to have adequate operating resources (i.e., operating resources sufficient to fund both current operations and ensure operations of sufficient length in the future), and preventing those DCMs that lack these resources from expanding in ways that may ultimately harm the broader financial market (i.e., confining the operations of DCMs to levels their financial resources can support).

3. *Price discovery.* The Commission has not identified any effects that this rule will have on price discovery.

4. *Sound risk management practices.* By setting specific standards with respect to how DCMs should assess and monitor the adequacy of their financial resources, the rules promote sound risk management practices and further the goal of minimizing systemic risk.

5. *Other public interest considerations.* The Commission has not identified any effects that this rule will have on other public interest considerations.

(20) Core Principle 23: Securities and Exchange Commission

The Dodd-Frank Act added new Core Principle 23, requiring that DCMs keep any records relating to swaps defined in CEA section 1a(47)(A)(v), as amended by the Dodd-Frank Act, open to inspection and examination by the SEC. Consistent with the text of the core principle, the Commission is adopting guidance that provides that each DCM should have arrangements and resources for collecting and maintaining accurate records pertaining to any swap agreements defined in section 1a(47)(A)(v) of the amended CEA, and should leave them open to inspection and examination for a period of five years. The Commission did not receive any comments discussing the costs or benefits of this provision.

Costs

Core Principle 23 requires DCMs to keep records relating only to security-based swaps open to inspection and examination by the SEC. The accompanying guidance simply tracks the language of the Core Principle and does not impose any additional substantive requirements on DCMs. The five-year period is unlikely to impose significant costs on market participants because the core principle already requires DCMs to keep records relating to certain swaps open to inspection and examination by the SEC; the guidance simply provides additional information with respect to the duration of the obligation imposed by the core principle. The Commission believes the five-year retention period is reasonable and reflects industry standards; the recordkeeping requirement under Core Principle 18 extends for a period of five years and the SEC's relevant recordkeeping requirements typically extend for a period of five years as well. Additionally, the requirement only applies to security-based swaps.

Benefits

The Dodd-Frank Act was intended to establish a comprehensive, new regulatory framework for swaps and security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system. In order to perform effective oversight and ensure the goals of Dodd-Frank are realized, the regulatory agencies charged with overseeing the swaps market must have access to accurate information regarding swap transactions. The SEC shares jurisdiction over the regulation of the swaps markets with the Commission and must have access to accurate records relating to swaps in order to effectively oversee those markets.

Section 15(a) Factors

1. *Protection of market participants and the public.* To protect market participants and the public, the SEC has comprehensive regulatory, surveillance, investigative, and enforcement programs. To support these programs, the SEC must have access to accurate information regarding swap agreements. Section 38.1201 and the accompanying guidance ensure that DCMs keep accurate records relating to certain swaps open to inspection and examination by the SEC for a sufficient period of time of five years.

2. *Efficiency, competitiveness and financial integrity of futures markets.* The SEC has comprehensive regulatory programs designed to promote efficient, competitive, and financially stable markets. In order to support these programs, the SEC must have access to accurate information regarding swap agreements. Section 38.1201 and the accompanying guidance ensure that DCMs keep accurate records relating to certain swaps open to inspection and examination by the SEC for a sufficient period of time of five years.

3. *Price discovery.* The Commission has not identified any effects that this rule will have on price discovery.

4. *Sound risk management practices.* The Commission has not identified any effects that this rule will have on sound risk management practices.

5. *Other public interest considerations.* The Commission has not identified any effects that this rule will have on other public interest considerations.

IV. Text of Final Rules

List of Subjects

17 CFR Part 1

Commodity futures, Designated contract markets, Minimum financial requirements for intermediaries, Reporting and recordkeeping requirements.

17 CFR Part 16

Commodity futures, Reporting and recordkeeping requirements

17 CFR Part 38

Block transaction, Commodity futures, Designated contract markets, Reporting and recordkeeping requirements, Transactions off the centralized market.

For the reasons stated in the preamble, and under the authority of 7 U.S.C. 1, *et seq.,* the Commodity Futures Trading Commission amends 17 CFR parts 1, 16, and 38 as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

■ 1. Revise the authority citation for part 1 to read as follows:

Authority: 7 U.S.C. 1a, 2, 2a, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6l, 6m, 6n, 6o, 6p, 6r, 6s, 7, 7a–1, 7a–2, 7b, 7b–3, 8, 9, 10a, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23, and 24, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 2. Revise § 1.52 to read as follows:

§ 1.52 Self-regulatory organization adoption and surveillance of minimum financial requirements.

(a) Each self-regulatory organization must adopt rules prescribing minimum financial and related reporting requirements for members who are registered futures commission merchants, registered retail foreign exchange dealers, or registered introducing brokers. The self-regulatory minimum financial and related reporting requirements must be the same as, or more stringent than, the requirements contained in §§ 1.10 and 1.17 of this chapter, for futures commission merchants and introducing brokers, and §§ 5.7 and 5.12 of this chapter for retail foreign exchange dealers; provided, however, a self-regulatory organization may permit its member registrants that are registered with the Securities and Exchange Commission as securities brokers or

dealers to file (in accordance with § 1.10(h) of this chapter) a copy of their Financial and Operational Combined Uniform Single Report under the Securities Exchange Act of 1934, Part II, Part IIA, or Part II CSE, in lieu of Form 1–FR. The definition of adjusted net capital must be the same as that prescribed in § 1.17(c) of this chapter for futures commission merchants and introducing brokers, and § 5.7(b)(2) of this chapter for futures commission merchants offering or engaging in retail forex transactions and for retail foreign exchange dealers. (b) Each self-regulatory organization must establish and operate a supervisory program for the purpose of assessing whether each member registrant is in compliance with the applicable self-regulatory organization and Commission rules and regulations governing minimum net capital and related financial requirements, the obligation to segregate customer funds, financial reporting requirements, recordkeeping requirements, and sales practice and other compliance requirements. The supervisory program also must address the following elements:

(1) *Adequate levels and independence of audit staff.* A self-regulatory organization must maintain staff of an adequate size, training, and experience to effectively implement a supervisory program. Staff of the self-regulatory organization, including officers, directors and supervising committee members, must maintain independent judgment and its actions must not impair its independence nor appear to impair its independence in matters related to the supervisory program. The self-regulatory organization must provide annual ethics training to all staff with responsibilities for the supervisory program.

(2) *Ongoing surveillance.* A self-regulatory organization's ongoing surveillance of member registrants must include the review and analysis of financial reports and regulatory notices filed by member registrants with the designated self-regulatory organization.

(3) *High-risk firms.* A self-regulatory organization's supervisory program must include procedures for identifying member registrants that are determined to pose a high degree of potential financial risk, including the potential risk of loss of customer funds. High-risk member registrants must include firms experiencing financial or operational difficulties, failing to meet segregation or net capital requirements, failing to maintain current books and records, or experiencing material inadequacies in internal controls. Enhanced monitoring for high risk firms should include, as appropriate, daily review of net capital, segregation, and secured calculations, to assess compliance with self-regulatory and Commission requirements.

(4*) On-site examinations.* (i) A self-regulatory organization must conduct routine periodic on-site examinations of member registrants. Member futures commission merchants and retail foreign exchange dealers must be subject to on-site examinations no less frequently than once every eighteen months. A self-regulatory organization may establish a risk-based method of establishing the scope of each on-site examination, provided however, that the scope of each on-site examination of a futures commission merchant or retail foreign exchange dealer must include an assessment of whether the registrant is in compliance with applicable Commission and self-regulatory organization minimum capital and customer fund protection requirements, recordkeeping, and reporting requirements.

(ii) A self-regulatory organization must establish the frequency of on-site examinations of member introducing brokers that do not operate pursuant to guarantee agreements with futures commission merchants or retail foreign exchange dealers using a risk-based approach, provided however, that each introducing broker is subject to an on-site examination no less frequently than once every three years.

(iii) A self-regulatory organization must conduct on-site examinations of member registrants in accordance with uniform audit programs and procedures that have been submitted to the Commission.

(5) *Adequate documentation.* A self-regulatory organization must adequately document all aspects of the operation of the supervisory program, including the conduct of risk-based scope setting and the risk-based surveillance of high-risk member registrants, and the imposition of remedial and punitive action(s) for material violations.

(c) Any two or more self-regulatory organizations may file with the Commission a plan for delegating to a designated self-regulatory organization, for any registered futures commission merchant, retail foreign exchange dealer, or introducing broker that is a member of more than one such self-regulatory organization, the responsibility of:

(1) Monitoring and auditing for compliance with the minimum financial and related reporting requirements adopted by such self-regulatory organizations and the Commission in accordance with paragraphs (a) and (b) of this section; and

(2) Receiving the financial reports necessitated by such minimum financial and related reporting requirements.

(d) Any plan filed under this section may contain provisions for the allocation of expenses reasonably incurred by the designated self-regulatory organization among the self-regulatory organizations participating in such a plan.

(e) A plan's designated self-regulatory organization must report to:

(1) That plan's other self-regulatory organizations any violation of such other self-regulatory organizations' rules and regulations for which the responsibility to monitor, audit or examine has been delegated to such designated self-regulatory organization under this section; and

(2) The Commission any violation of a self-regulatory organization's rules and regulations or any violation of the Commission's regulations for which the responsibility to monitor, audit or examine has been delegated to such designated self-regulatory organization under this section.

(f) The self-regulatory organizations may, among themselves, establish programs to provide access to any necessary financial or related information.

(g) After appropriate notice and opportunity for comment, the Commission may, by written notice, approve such a plan, or any part of the plan, if it finds that the plan, or any part of it:

(1) Is necessary or appropriate to serve the public interest;

(2) Is for the protection and in the interest of customers;

(3) Reduces multiple monitoring and multiple auditing for compliance with the minimum financial rules of the self-regulatory organizations submitting the plan of any futures commission merchant, retail foreign exchange dealer, or introducing broker that is a member of more than one self-regulatory organization;

(4) Reduces multiple reporting of the financial information necessitated by such minimum financial and related reporting requirements by any futures commission merchant, retail foreign exchange dealer, or introducing broker that is a member of more than one self-regulatory organization;

(5) Fosters cooperation and coordination among the self-regulatory organizations; and

(6) Does not hinder the development of a registered futures association under section 17 of the Act.

(h) After the Commission has approved a plan, or part thereof, under § 1.52(g), a self-regulatory organization

relieved of responsibility must notify each of its members that are subject to such a plan:

(1) Of the limited nature of its responsibility for such a member's compliance with its minimum financial and related reporting requirements; and

(2) Of the identity of the designated self-regulatory organization that has been delegated responsibility for such a member.

(i) The Commission may at any time, after appropriate notice and opportunity for hearing, withdraw its approval of any plan, or part thereof, established under this section, if such plan, or part thereof, ceases to adequately effectuate the purposes of section 4f(b) of the Act or of this section.

(j) Whenever a registered futures commission merchant, a registered retail foreign exchange dealer, or a registered introducing broker holding membership in a self-regulatory organization ceases to be a member in good standing of that self-regulatory organization, such self-regulatory organization must, on the same day that event takes place, give electronic notice of that event to the Commission at its Washington, DC, headquarters and send a copy of that notification to such futures commission merchant, retail foreign exchange dealer, or introducing broker.

(k) Nothing in this section shall preclude the Commission from examining any futures commission merchant, retail foreign exchange dealer, or introducing broker for compliance with the minimum financial and related reporting requirements to which such futures commission merchant, retail foreign exchange dealer, or introducing broker is subject.

(l) In the event a plan is not filed and/or approved for each registered futures commission merchant, retail foreign exchange dealer, or introducing broker that is a member of more than one self-regulatory organization, the Commission may design and, after notice and opportunity for comment, approve a plan for those futures commission merchants, retail foreign exchange dealers, or introducing brokers that are not the subject of an approved plan (under paragraph (g) of this section), delegating to a designated self-regulatory organization the responsibilities described in paragraph (c) of this section.

PART 16—REPORTS BY CONTRACT MARKETS AND SWAP EXECUTION FACILITIES

■ 3. The authority citation for part 16 is revised to read as follows:

Authority: 7 U.S.C. 2, 6a, 6c, 6g, 6i, and 7, and 7b–3, as amended by Pub. L. 111–203, 124 Stat. 1376.

■ 4. The heading for part 16 is revised to read as set forth above.

■ 5. Revise § 16.01 to read as follows:

§ 16.01 Publication of market data on futures, swaps and options thereon: trading volume, open contracts, prices, and critical dates.

(a) *Trading volume and open contracts.* (1) Each reporting market, as defined in part 15 of this chapter, must separately record for each business day the information prescribed in paragraphs (a)(2)(i) through (vi) of this section for each of the following contract categories:

(i) For futures, by commodity and by futures expiration date;

(ii) For options, by underlying futures contracts for options on futures contracts or by underlying physical for options on physicals, and by put, by call, by expiration date and by strike price;

(iii) For swaps or class of swaps, by product type and by term life of the swap; and

(iv) For options on swaps or classes of options on swaps, by underlying swap contracts for options on swap contracts or by underlying physical for options on swaps on physicals, and by put, by call, by expiration date and by strike price.

(2) Each reporting market must record for each trading session the following trading volume and open interest summary data:

(i) The option delta, where a delta system is used;

(ii) The total gross open contracts for futures, excluding those contracts against which delivery notices have been stopped;

(iii) For futures products that specify delivery, open contracts against which delivery notices have been issued on that business day;

(iv) The total volume of trading, excluding transfer trades or office trades:

(A) For swaps and options on swaps, trading volume shall be reported in terms of the number of contracts traded for standard-sized contracts (i.e., contracts with a set contract size for all transactions) or in terms of notional value for non-standard-sized contracts (i.e., contracts whose contract size is not set and can vary for each transaction).

(v) The total volume of futures/options/swaps/swaptions exchanged for commodities or for derivatives positions that are included in the total volume of trading; and

(vi) The total volume of block trades included in the total volume of trading.

(b) *Prices.* (1) Each reporting market must record the following contract types separately

(i) For futures, by commodity and by futures expiration;

(ii) For options, by underlying futures contracts for options on futures contracts or by underlying physical for options on physicals, and by put, by call, by expiration date and by strike price;

(iii) For swaps, by product type and contract month or term life of the swap; and

(iv) For options on swaps or classes of options on swaps, by underlying swap contracts for options on swap contracts or by underlying physical for options on swaps on physicals, and by put, by call, by expiration date and by strike price.

(2) Each reporting market must record for the trading session and for the opening and closing periods of trading as determined by each reporting market:

(i) The opening and closing prices of each futures, option, swap or swaption;

(ii) The price that is used for settlement purposes, if different from the closing price; and

(iii) The lowest price of a sale or offer, whichever is lower, and the highest price of a sale or bid, whichever is higher, that the reporting market reasonably determines accurately reflects market conditions. Bids and offers vacated or withdrawn shall not be used in making this determination. A bid is vacated if followed by a higher bid or price and an offer is vacated if followed by a lower offer or price.

(3) If there are no transactions, bids, or offers during the opening or closing periods, the reporting market may record as appropriate:

(i) The first price (in lieu of opening price data) or the last price (in lieu of closing price data) occurring during the trading session, clearly indicating that such prices are the first and last prices; or

(ii) Nominal opening or nominal closing prices that the reporting market reasonably determines to accurately reflect market conditions, clearly indicating that such prices are nominal.

(4) Additional information. Each reporting market must record the following information with respect to transactions in commodity futures, commodity options, swaps or options on swaps on that reporting market:

(i) The method used by the reporting market in determining nominal prices and settlement prices; and

(ii) If discretion is used by the reporting market in determining the opening and/or closing ranges or the settlement prices, an explanation that certain discretion may be employed by

the reporting market and a description of the manner in which that discretion may be employed. Discretionary authority must be noted explicitly in each case in which it is applied (for example, by use of an asterisk or footnote).

(c) *Critical dates.* Each reporting market must report to the Commission, for each futures contract, the first notice date and the last trading date, and for each option contract, the expiration date in accordance with paragraph (d) of this section.

(d) *Form, manner and time of filing reports.* Unless otherwise approved by the Commission or its designee, reporting markets must submit to the Commission the information specified in paragraphs (a), (b), and (c) of this section as follows:

(1) Using the format, coding structure and electronic data transmission procedures approved in writing by the Commission or its designee; provided however, that the information must be made available to the Commission or its designee in hard copy upon request;

(2) When each such form of the data is first available, but not later than 7:00 a.m. on the business day following the day to which the information pertains for the delta factor and settlement price and not later than 12:00 p.m. for the remainder of the information. Unless otherwise specified by the Commission or its designee, the stated time is U.S. eastern standard time for information concerning markets located in that time zone, and U.S. central time for information concerning all other markets; and

(3) For information on reports to the Commission for swap or options on swap contracts, refer to part 20 of this chapter.

(e) *Publication of recorded information.* (1) Reporting markets must make the information in paragraph (a) of this section readily available to the news media and the general public without charge, in a format that readily enables the consideration of such data, no later than the business day following the day to which the information pertains. The information in paragraphs (a)(2)(iv) through (vi) of this section shall be made readily available in a format that presents the information together.

(2) Reporting markets must make the information in paragraphs (b)(2) and (3) of this section readily available to the news media and the general public, and the information in paragraph (b)(4)(ii) of this section readily available to the general public, in a format that readily enables the consideration of such data, no later than the business day following the day to which the information pertains. Information in paragraph (b)(4)(i) of this section must be made available in the registered entity's rulebook, which is publicly accessible on its Web site.

PART 38—DESIGNATED CONTRACT MARKETS

■ 6. The authority citation for part 38 is revised to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6c, 6d, 6e, 6f, 6g, 6i, 6j, 6k, 6l, 6m, 6n, 7, 7a–2, 7b, 7b–1, 7b–3, 8, 9, 15, and 21, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 7. Designate existing §§ 38.1 through 38.6 as subpart A under the following subpart heading:

Subpart A—General Provisions

* * * * *

§ 38.1 [Amended]

■ 8. Amend § 38.1 by removing the reference ''Parts 36 or 37 of this chapter'' and adding in its place the reference ''parts 37 or 49 of this chapter''.

■ 9. Revise § 38.2 to read as follows:

§ 38.2 Exempt provisions.

A designated contract market, the designated contract market's operator and transactions traded on or through a designated contract market under section 5 of the Act shall comply with all applicable regulations under Title 17 of the Code of Federal Regulations, except for the requirements of § 1.35(e) through (j), § 1.39(b), § 1.44, § 1.53, § 1.54, § 1.59(b) and (c), § 1.62, § 1.63(a) and (b) and (d) through (f), § 1.64, § 1.69, part 8, § 100.1, § 155.2, and part 156.

■ 10. Revise § 38.3 to read as follows:

§ 38.3 Procedures for designation.

(a) *Application procedures.* (1) A board of trade seeking designation as a contract market must file electronically, in a format and manner specified by the Secretary of the Commission, the Form DCM provided in appendix A of this part, with the Secretary of the Commission at its Washington, DC headquarters at *submissions@cftc.gov* and the Division of Market Oversight at *DMOSubmissions@cftc.gov.* The Commission will review the application for designation as a contract market pursuant to the 180-day timeframe and procedures specified in section 6(a) of the Act. The Commission shall approve or deny the application or, if deemed appropriate, designate the applicant as a contract market subject to conditions.

(2) The application must include information sufficient to demonstrate compliance with the core principles specified in section 5(d) of the Act. Form DCM consists of instructions, general questions and a list of exhibits (documents, information and evidence) required by the Commission in order to determine whether an applicant is able to comply with the core principles. An application will not be considered to be materially complete unless the applicant has submitted, at a minimum, the exhibits required in Form DCM. If the application is not materially complete, the Commission shall notify the applicant that the application will not be deemed to have been submitted for purposes of starting the 180-day review period set forth in paragraph (a)(1) of this section.

(3) The applicant must identify with particularity any information in the application that will be subject to a request for confidential treatment pursuant to § 145.9 of this chapter.

(4) Section 40.8 of this chapter sets forth those sections of the application that will be made publicly available, notwithstanding a request for confidential treatment pursuant to § 145.9 of this chapter.

(5) If any information contained in the application or in any exhibit is or becomes inaccurate for any reason, an amendment to the application or a submission filed under part 40 of this chapter must be filed promptly correcting such information.

(b) *Reinstatement of dormant designation.* Before listing or relisting products for trading, a dormant designated contract market as defined in § 40.1 of this chapter must reinstate its designation under the procedures of paragraphs (a)(1) and (2) of this section; provided, however, that an application for reinstatement may rely upon previously submitted materials that still pertain to, and accurately describe, current conditions.

(c) *Delegation of authority.* (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, upon consultation with the General Counsel or the General Counsel's designee, authority to notify the applicant seeking designation under section 6(a) of the Act that the application is materially incomplete and the running of the 180-day period is stayed.

(2) The Director may submit to the Commission for its consideration any matter that has been delegated in this paragraph.

(3) Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in paragraph (c)(1) of this section.

(d) *Request for transfer of designation.* (1) *Request for transfer of designation, listed contracts and open interest.* A designated contract market that wants to request the transfer of its designation from its current legal entity to a new legal entity, as a result of a corporate reorganization or otherwise, must file a request with the Commission for approval to transfer the designation, listed contracts and positions comprising all associated open interest. Such request must be filed electronically, in a format and manner specified by the Secretary of the Commission, with the Secretary of the Commission at its Washington, DC headquarters at *submissions@cftc.gov* and the Division of Market Oversight at *DMOSubmissions@cftc.gov.*

(2) *Timing of submission.* The request must be filed no later than three months prior to the anticipated corporate change; provided that the designated contract market may file a request with the Commission later than three months prior to the anticipated corporate change if the designated contract market does not know and reasonably could not have known of the anticipated change three months prior to the anticipated corporate change. In such event, the designated contract market shall be required to immediately file the request with the Commission as soon as it knows of such change, with an explanation as to the timing of the request.

(3) *Required information.* The request shall include the following:

(i) The underlying agreement that governs the corporate change;

(ii) A narrative description of the corporate change, including the reason for the change and its impact on the designated contract market, including its governance and operations, and its impact on the rights and obligations of market participants holding the open interest positions;

(iii) A discussion of the transferee's ability to comply with the Act, including the core principles applicable to designated contract markets, and the Commission's regulations thereunder;

(iv) The governing documents of the transferee including, but not limited to, articles of incorporation and bylaws;

(v) The transferee's rules marked to show changes from the current rules of the designated contract market;

(vi) A list of contracts, agreements, transactions or swaps for which the designated contract market requests transfer of open interest;

(vii) A representation by the transferee that it:

(A) Will be the surviving legal entity and successor-in-interest to the transferor designated contract market and will retain and assume, without limitation, all the assets and liabilities of the transferor;

(B) Will assume responsibility for complying with all applicable provisions of the Act and the Commission's regulations thereunder, including part 38 and Appendices thereto;

(C) Will assume, maintain and enforce all rules implementing and complying with these core principles, including the adoption of the transferor's rulebook, as amended in the request, and that any such amendments will be submitted to the Commission pursuant to section 5c(c) of the Act and part 40 of the Commission's regulations; and

(D) Will comply with all self-regulatory responsibilities except if otherwise indicated in the request, and will maintain and enforce all self-regulatory programs.

(viii) A representation by the transferee that upon the transfer:

(A) All open interest in all contracts listed on the transferor will be transferred to and represent equivalent open interest in all such contracts listed on the transferee;

(B) It will assume responsibility for and maintain compliance with the core principles for all contracts previously listed for trading through the transferor, whether by certification or approval; and

(C) That none of the proposed rule changes will affect the rights and obligations of any market participant with open positions transferred to it and that the proposed rule changes do not modify the manner in which such contracts are settled or cleared.

(ix) A representation by the transferee that market participants will be notified of all changes to the transferor's rulebook prior to the transfer and will be further notified of the concurrent transfer of the contract market designation, and the related transfer of all listed contracts and all associated open interest, to the transferee upon Commission approval and issuance of an order permitting this transfer.

(4) *Commission determination.* The Commission will review a request as soon as practicable and such request will be approved or denied pursuant to a Commission order and based on the Commission's determination as to the transferee's ability to continue to operate the designated contract market in compliance with the Act and the Commission's regulations thereunder.

(e) *Request for withdrawal of application for designation.* An applicant for designation may withdraw its application submitted pursuant to paragraphs (a)(1) and (2) of this section by filing such a request with the Commission. Such request must be filed electronically, in a format and manner specified by the Secretary of the Commission, with the Secretary of the Commission at its Washington, DC headquarters, at *submissions@cftc.gov,* and the Division of Market Oversight, at *DMOSubmissions@cftc.gov.* Withdrawal of an application for designation shall not affect any action taken or to be taken by the Commission based upon actions, activities or events occurring during the time that the application for designation was pending with the Commission.

(f) *Request for vacation of designation.* A designated contract market may vacate its designation under section 7 of the Act by filing a request electronically, in a format and manner specified by the Secretary of the Commission, with the Secretary of the Commission at its Washington, DC headquarters at *submissions@cftc.gov* and the Division of Market Oversight at *DMOSubmissions@cftc.gov.* Vacation of designation shall not affect any action taken or to be taken by the Commission based upon actions, activities or events occurring during the time that the facility was designated by the Commission.

■ 11. In § 38.4, revise paragraphs (a) and (b) to read as follows:

§ 38.4 Procedures for listing products and implementing designated contract market rules.

(a) *Request for Commission approval of rules and products.* (1) An applicant for designation, or a designated contract market, may request that the Commission approve under section 5c(c) of the Act, any or all of its rules and contract terms and conditions, and subsequent amendments thereto, prior to their implementation or, notwithstanding the provisions of section 5c(c)(4) of the Act, at any time thereafter, under the procedures of § 40.3 or § 40.5 of this chapter, as applicable. A designated contract market may label a future, swap or options product in its rules as ''Listed for trading pursuant to Commission approval,'' if the future, swap or options product and its terms or conditions have been approved by the Commission, and it may label as ''Approved by the Commission'' only those rules that have been so approved.

(2) Notwithstanding the timeline under §§ 40.3(c) and 40.5(c) of this chapter, the operating rules, and terms and conditions of futures, swaps and option products that have been submitted for Commission approval at the same time as an application for contract market designation or an application under § 38.3(b) of this part to reinstate the designation of a dormant designated contract market, as defined in § 40.1 of this chapter, or while one of the foregoing is pending, will be deemed approved by the Commission no earlier than when the facility is deemed to be designated or reinstated.

(b) *Self-certification of rules and products.* Rules of a designated contract market and subsequent amendments thereto, including both operational rules and the terms or conditions of futures, swaps and option products listed for trading on the facility, not voluntarily submitted for prior Commission approval pursuant to paragraph (a) of this section, must be submitted to the Commission with a certification that the rule, rule amendment or futures, swap or options product complies with the Act or rules thereunder pursuant to the procedures of § 40.6 of this chapter, as applicable. Provided, however, any rule or rule amendment that would, for a delivery month having open interest, materially change a term or condition of a swap or a contract for future delivery in an agricultural commodity enumerated in section 1a(9) of the Act, or of an option on such contract or commodity, must be submitted to the Commission prior to its implementation for review and approval under § 40.4 of this chapter.

* * * * *

■ 12. Revise § 38.5 to read as follows:

§ 38.5 Information relating to contract market compliance.

(a) *Requests for information.* Upon request by the Commission, a designated contract market must file with the Commission information related to its business as a designated contract market, including information relating to data entry and trade details, in the form and manner and within the time specified by the Commission in its request.

(b) *Demonstration of compliance.* Upon request by the Commission, a designated contract market must file with the Commission a written demonstration, containing supporting data, information and documents, in the form and manner and within the time specified by the Commission, that the designated contract market is in compliance with one or more core principles as specified in the request, or that is requested by the Commission to show that the designated contract market satisfies its obligations under the Act.

(c) *Equity interest transfers.* (1) *Equity interest transfer notification.* A designated contract market shall file with the Commission a notification of each transaction that the designated contract market enters into involving the transfer of ten percent or more of the equity interest in the designated contract market.

(2) *Timing of Notification.* The equity transfer notice described in paragraph (1) shall be filed electronically with the Secretary of the Commission at its Washington, DC headquarters at *submissions@cftc.gov* and the Division of Market Oversight at *DMOSubmissions@cftc.gov,* at the earliest possible time but in no event later than the open of business ten business days following the date upon which the designated contract market enters into a firm obligation to transfer the equity interest.

(3) *Rule filing.* Notwithstanding the foregoing, any aspect of an equity interest transfer described in paragraph (c)(1) of this section that necessitates the filing of a rule as defined in part 40 of this chapter shall comply with the requirements of 5c(c) of the Act and part 40 of this chapter, and all other applicable Commission regulations.

(d) *Delegation of authority.* The Commission hereby delegates, until it orders otherwise, the authority set forth in paragraph (b) of this section to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time. The Director may submit to the Commission for its consideration any matter that has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

■ 13. Add § 38.7 to subpart A to read as follows:

§ 38.7 Prohibited use of data collected for regulatory purposes.

A designated contract market may not use for business or marketing purposes any proprietary data or personal information it collects or receives, from or on behalf of any person, for the purpose of fulfilling its regulatory obligations; provided however, that a designated contract market may use such data or information for business or marketing purposes if the person from whom it collects or receives such data or information clearly consents to the designated contract market's use of such data or information in such manner. A designated contract market, where necessary, for regulatory purposes, may share such data or information with one or more designated contract markets or swap execution facilities registered with the Commission. A designated contract market may not condition access to its trading facility on a market participant's consent to the use of proprietary data or personal information for business or marketing purposes.

■ 14. Add § 38.8 to subpart A to read as follows:

§ 38.8 Listing of swaps on a designated contract market.

(a) A designated contract market that lists for the first time a swap contract for trading on its contract market must, either prior to or at the time of such listing, file with the Commission a written demonstration detailing how the designated contract market is addressing its self-regulatory obligations and is fulfilling its statutory and regulatory obligations with respect to swap transactions.

(b)(1) Prior to listing swaps for trading on or through a designated contract market, each designated contract market must obtain from the Commission a unique, alphanumeric code assigned to the designated contract market by the Commission for the purpose of identifying the designated contract market with respect to unique swap identifier creation. (2) Each designated contract market must generate and assign a unique swap identifier at, or as soon as technologically practicable following, the time of execution of the swap, in a manner consistent with the requirements of part 45.

■ 15. Add § 38.9 to subpart A to read as follows:

§ 38.9 Boards of trade operating both a designated contract market and a swap execution facility.

(a) A board of trade that operates a designated contract market and that intends to also operate a swap execution facility must separately register, pursuant to the swap execution facility registration requirements set forth in part 37 of this chapter, and on an ongoing basis, comply with the core principles under section 5h of the Act, and the swap execution facility rules under part 37 of this chapter.

(b) A board of trade that operates both a designated contract market and a swap execution facility, and that uses the same electronic trade execution system for executing and trading swaps that it uses in its capacity as a designated contract market, must clearly identify to market participants for each swap

whether the execution or trading of such swap is taking place on the designated contract market or on the swap execution facility.

■ 16. Add § 38.10 to subpart A to read as follows:

§ 38.10 Reporting of swaps traded on a designated contract market.

With respect to swaps traded on and/or pursuant to the rules of a designated contract market, each designated contract market must maintain and report specified swap data as provided under parts 43 and 45 of this chapter.

■ 17. Add subparts B through X to read as follows:

Subpart B—Designation as Contract Market

Sec.
38.100 Core Principle 1.

Subpart C—Compliance With Rules

38.150 Core Principle 2.
38.151 Access requirements.
38.152 Abusive trading practices prohibited.
38.153 Capacity to detect and investigate rule violations.
38.154 Regulatory services provided by a third party.
38.155 Compliance staff and resources.
38.156 Automated trade surveillance system.
38.157 Real-time market monitoring.
38.158 Investigations and investigation reports.
38.159 Ability to obtain information.
38.160 Additional sources for compliance.

Subpart D—Contracts Not Readily Subject to Manipulation

38.200 Core Principle 3.
38.201 Additional sources for compliance.

Subpart E—Prevention of Market Disruption

38.250 Core Principle 4.
38.251 General requirements.
38.252 Additional requirements for physical-delivery contracts.
38.253 Additional requirements for cash-settled contracts.
38.254 Ability to obtain information.
38.255 Risk controls for trading.
38.256 Trade reconstruction.
38.257 Regulatory service provider.
38.258 Additional sources for compliance.

Subpart F—Position Limitations or Accountability

38.300 Core Principle 5.
38.301 Position limitations and accountability.

Subpart G—Emergency Authority

38.350 Core Principle 6.
38. 351 Additional sources for compliance.

Subpart H—Availability of General Information

38.400 Core Principle 7.
38.401 General requirements.

Subpart I—Daily Publication of Trading Information

38.450 Core Principle 8.
38.451 Reporting of trade information.

Subpart J—Execution of Transactions

38.500 Core Principle 9.

Subpart K—Trade Information

38.550 Core Principle 10.
38.551 Audit trail required.
38.552 Elements of an acceptable audit trail program.
38.553 Enforcement of audit trail requirements.

Subpart L—Financial Integrity of Transactions

38.600 Core Principle 11.
38.601 Mandatory clearing.
38.602 General financial integrity.
38.603 Protection of customer funds.
38.604 Financial surveillance.
38.605 Requirements for financial surveillance program.
38.606 Financial regulatory services provided by a third party.
38.607 Direct access.

Subpart M—Protection of Markets and Market Participants

38.650 Core Principle 12.
38.651 Protection of Markets and Market Participants.

Subpart N—Disciplinary Procedures

38.700 Core Principle 13.
38.701 Enforcement staff.
38.702 Disciplinary panels.
38.703 Notice of charges.
38.704 Right to representation.
38.705 Answer to charges.
38.706 Denial of charges and right to hearing.
38.707 Hearings.
38.708 Decisions.
38.709 Final decisions.
38.710 Disciplinary sanctions.
38.711 Warning letters.
38.712 Additional sources for compliance.

Subpart O—Dispute Resolution

38.750 Core Principle 14.
38.751 Additional sources for compliance.

Subpart P—Governance Fitness Standards

38.800 Core Principle 15.
38.801 Additional sources for compliance.

Subpart Q—Conflicts of Interest

38.850 Core Principle 16.
38.851 Additional sources for compliance.

Subpart R—Composition of Governing Boards of Contract Markets

38.900 Core Principle 17.

Subpart S—Recordkeeping

38.950 Core Principle 18.
38.951 Additional sources for compliance.

Subpart T—Antitrust Considerations

38.1000 Core Principle 19.
38.1001 Additional sources for compliance.

Subpart U—System Safeguards

38.1050 Core Principle 20.
38.1051 General requirements.

Subpart V—Financial Resources

38.1100 Core Principle 21.
38.1101 General requirements.

Subpart W—Diversity of Boards of Directors

38.1150 Core Principle 22.

Subpart X—Securities and Exchange Commission

38.1200 Core Principle 23.
38.1201 Additional sources for compliance.

Subpart B—Designation as Contract Market

§ 38.100 Core Principle 1.

(a) *In general.* To be designated, and maintain a designation, as a contract market, a board of trade shall comply with:

(1) Any core principle described in section 5(d) of the Act, and

(2) Any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5) of the Act.

(b) *Reasonable discretion of the contract market.* Unless otherwise determined by the Commission by rule or regulation, a board of trade described in paragraph (a) of this section shall have reasonable discretion in establishing the manner in which the board of trade complies with the core principles described in this subsection.

Subpart C—Compliance With Rules

§ 38.150 Core Principle 2.

(a) *In general.* The board of trade shall establish, monitor, and enforce compliance with the rules of the contract market, including:

(1) Access requirements;

(2) The terms and conditions of any contracts to be traded on the contract market; and

(3) Rules prohibiting abusive trade practices on the contract market.

(b) *Capacity of contract market.* The board of trade shall have the capacity to detect, investigate, and apply appropriate sanctions to any person that violates any rule of the contract market.

(c) *Requirement of rules.* The rules of the contract market shall provide the board of trade with the ability and authority to obtain any necessary information to perform any function described in this section, including the capacity to carry out such international information-sharing agreements, as the Commission may require.

§ 38.151 Access requirements.

(a) *Jurisdiction.* Prior to granting any member or market participant access to its markets, a designated contract market must require that the member or market participant consent to its jurisdiction.

(b) *Impartial access by members, persons with trading privileges and independent software vendors.* A designated contract market must provide its members, persons with trading privileges, and independent software vendors with impartial access to its markets and services, including:

(1) Access criteria that are impartial, transparent, and applied in a non-discriminatory manner; and

(2) Comparable fee structures for members, persons with trading privileges and independent software vendors receiving equal access to, or services from, the designated contract market.

(c) *Limitations on access.* A designated contract market must establish and impartially enforce rules governing denials, suspensions, and revocations of a member's and a person with trading privileges' access privileges to the designated contract market, including when such actions are part of a disciplinary or emergency action by the designated contract market.

§ 38.152 Abusive trading practices prohibited.

A designated contract market must prohibit abusive trading practices on its markets by members and market participants. Designated contract markets that permit intermediation must prohibit customer-related abuses including, but not limited to, trading ahead of customer orders, trading against customer orders, accommodation trading, and improper cross trading. Specific trading practices that must be prohibited by all designated contract markets include front-running, wash trading, pre-arranged trading (except for certain transactions specifically permitted under part 38 of this chapter), fraudulent trading, money passes, and any other trading practices that a designated contract market deems to be abusive. In addition, a designated contract market also must prohibit any other manipulative or disruptive trading practices prohibited by the Act or by the Commission pursuant to Commission regulation.

§ 38.153 Capacity to detect and investigate rule violations.

A designated contract market must have arrangements and resources for effective enforcement of its rules. Such arrangements must include the authority to collect information and documents on both a routine and non-routine basis, including the authority to examine books and records kept by the designated contract market's members and by persons under investigation. A designated contract market's arrangements and resources must also facilitate the direct supervision of the market and the analysis of data collected to determine whether a rule violation occurred.

§ 38.154 Regulatory services provided by a third party.

(a) *Use of third-party provider permitted.* A designated contract market may choose to utilize a registered futures association or another registered entity, as such terms are defined under the Act, (collectively, ''regulatory service provider''), for the provision of services to assist in complying with the core principles, as approved by the Commission. Any designated contract market that chooses to utilize a regulatory service provider must ensure that its regulatory service provider has the capacity and resources necessary to provide timely and effective regulatory services, including adequate staff and automated surveillance systems. A designated contract market will at all times remain responsible for the performance of any regulatory services received, for compliance with the designated contract market's obligations under the Act and Commission regulations, and for the regulatory service provider's performance on its behalf.

(b) *Duty to supervise third party.* A designated contract market that elects to utilize a regulatory service provider must retain sufficient compliance staff to supervise the quality and effectiveness of the services provided on its behalf. Compliance staff of the designated contract market must hold regular meetings with the regulatory service provider to discuss ongoing investigations, trading patterns, market participants, and any other matters of regulatory concern. A designated contract market also must conduct periodic reviews of the adequacy and effectiveness of services provided on its behalf. Such reviews must be documented carefully and made available to the Commission upon request.

(c) *Regulatory decisions required from the designated contract market.* A designated contract market that elects to utilize a regulatory service provider must retain exclusive authority in decisions involving the cancellation of trades, the issuance of disciplinary charges against members or market participants, and the denials of access to the trading platform for disciplinary reasons. A designated contract market may also retain exclusive authority in other areas of its choosing. A designated contract market must document any instances where its actions differ from those recommended by its regulatory service provider, including the reasons for the course of action recommended by the regulatory service provider and the reasons why the designated contract market chose a different course of action.

§ 38.155 Compliance staff and resources.

(a) *Sufficient compliance staff.* A designated contract market must establish and maintain sufficient compliance department resources and staff to ensure that it can conduct effective audit trail reviews, trade practice surveillance, market surveillance, and real-time market monitoring. The designated contract market's compliance staff also must be sufficient to address unusual market or trading events as they arise, and to conduct and complete investigations in a timely manner, as set forth in § 38.158(b) of this part.

(b) *Ongoing monitoring of compliance staff resources.* A designated contract market must monitor the size and workload of its compliance staff annually, and ensure that its compliance resources and staff are at appropriate levels. In determining the appropriate level of compliance resources and staff, the designated contract market should consider trading volume increases, the number of new products or contracts to be listed for trading, any new responsibilities to be assigned to compliance staff, the results of any internal review demonstrating that work is not completed in an effective or timely manner, and any other factors suggesting the need for increased resources and staff.

§ 38.156 Automated trade surveillance system.

A designated contract market must maintain an automated trade surveillance system capable of detecting and investigating potential trade practice violations. The automated system must load and process daily orders and trades no later than 24 hours after the completion of the trading day. In addition, the automated trade surveillance system must have the capability to detect and flag specific trade execution patterns and trade anomalies; compute, retain, and compare trading statistics; compute trade gains, losses, and futures-equivalent positions; reconstruct the sequence of market activity; perform market analyses; and support system users to perform in-depth analyses and ad hoc queries of trade-related data.

§ 38.157 Real-time market monitoring.

A designated contract market must conduct real-time market monitoring of all trading activity on its electronic trading platform(s) to identify disorderly trading and any market or system anomalies. A designated contract market must have the authority to adjust trade prices or cancel trades when necessary to mitigate market disrupting events caused by malfunctions in its electronic trading platform(s) or errors in orders submitted by members and market participants. Any trade price adjustments or trade cancellations must be transparent to the market and subject to standards that are clear, fair, and publicly available.

§ 38.158 Investigations and investigation reports.

(a) *Procedures.* A designated contract market must establish and maintain procedures that require its compliance staff to conduct investigations of possible rule violations. An investigation must be commenced upon the receipt of a request from Commission staff or upon the discovery or receipt of information by the designated contract market that indicates a reasonable basis for finding that a violation may have occurred or will occur.

(b) *Timeliness.* Each compliance staff investigation must be completed in a timely manner. Absent mitigating factors, a timely manner is no later than 12 months after the date that an investigation is opened. Mitigating factors that may reasonably justify an investigation taking longer than 12 months to complete include the complexity of the investigation, the number of firms or individuals involved as potential wrongdoers, the number of potential violations to be investigated, and the volume of documents and data to be examined and analyzed by compliance staff.

(c) *Investigation reports when a reasonable basis exists for finding a violation.* Compliance staff must submit a written investigation report for disciplinary action in every instance in which compliance staff determines from surveillance or from an investigation that a reasonable basis exists for finding a rule violation. The investigation report must include the reason the investigation was initiated; a summary of the complaint, if any; the relevant facts; compliance staff's analysis and conclusions; and a recommendation as to whether disciplinary action should be pursued.

(d) *Investigation reports when no reasonable basis exists for finding a violation.* If after conducting an investigation, compliance staff determines that no reasonable basis exists for finding a violation, it must prepare a written report including the reason(s) the investigation was initiated; a summary of the complaint, if any; the relevant facts; and compliance staff's analysis and conclusions.

(e) *Warning letters.* No more than one warning letter may be issued to the same person or entity found to have committed the same rule violation within a rolling twelve month period.

§ 38.159 Ability to obtain information.

A designated contract market must have the ability and authority to obtain any necessary information to perform any function required under this subpart C of the Commission's regulations, including the capacity to carry out international information-sharing agreements as the Commission may require. Appropriate information-sharing agreements can be established with other designated contract markets and swap execution facilities, or the Commission can act in conjunction with the designated contract market to carry out such information sharing.

§ 38.160 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 38.150 of this part.

Subpart D—Contracts Not Readily Subject to Manipulation

§ 38.200 Core Principle 3.

The board of trade shall list on the contract market only contracts that are not readily susceptible to manipulation.

§ 38.201 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance in appendix C of this part to demonstrate to the Commission compliance with the requirements of § 38.200 of this part.

Subpart E—Prevention of Market Disruption

§ 38.250 Core Principle 4.

The board of trade shall have the capacity and responsibility to prevent manipulation, price distortion, and disruptions of the delivery or cash-settlement process through market surveillance, compliance, and enforcement practices and procedures, including:

(a) Methods for conducting real-time monitoring of trading; and

(b) Comprehensive and accurate trade reconstructions.

§ 38.251 General requirements.

A designated contract market must:

(a) Collect and evaluate data on individual traders' market activity on an ongoing basis in order to detect and prevent manipulation, price distortions and, where possible, disruptions of the physical-delivery or cash-settlement process;

(b) Monitor and evaluate general market data in order to detect and prevent manipulative activity that would result in the failure of the market price to reflect the normal forces of supply and demand;

(c) Demonstrate an effective program for conducting real-time monitoring of market conditions, price movements and volumes, in order to detect abnormalities and, when necessary, make a good-faith effort to resolve conditions that are, or threaten to be, disruptive to the market; and

(d) Demonstrate the ability to comprehensively and accurately reconstruct daily trading activity for the purposes of detecting trading abuses and violations of exchange-set position limits, including those that may have occurred intraday.

§ 38.252 Additional requirements for physical-delivery contracts.

For physical-delivery contracts, the designated contract market must demonstrate that it:

(a) Monitors a contract's terms and conditions as they relate to the underlying commodity market and to the convergence between the contract price and the price of the underlying commodity and show a good-faith effort to resolve conditions that are interfering with convergence; and

(b) Monitors the supply of the commodity and its adequacy to satisfy the delivery requirements and make a good-faith effort to resolve conditions that threaten the adequacy of supplies or the delivery process.

§ 38.253 Additional requirements for cash-settled contracts.

(a) For cash-settled contracts, the designated contract market must demonstrate that it:

(1) Monitors the pricing of the index to which the contract will be settled; and

(2) Monitors the continued appropriateness of the methodology for deriving the index and makes a good-faith effort to resolve conditions, including amending contract terms where necessary, where there is a threat of market manipulation, disruptions, or distortions.

(b) If a contract listed on a designated contract market is settled by reference to

the price of a contract or commodity traded in another venue, including a price or index derived from prices on another designated contract market, the designated contract market must have rules or agreements that allow the designated contract market access to information on the activities of its traders in the reference market.

§ 38.254 Ability to obtain information.

(a) The designated contract market must have rules that require traders in its contracts to keep records of their trading, including records of their activity in the underlying commodity and related derivatives markets, and make such records available, upon request, to the designated contract market.

(b) A designated contract market with participants trading through intermediaries must either use a comprehensive large-trader reporting system (LTRS) or be able to demonstrate that it can obtain position data from other sources in order to conduct an effective surveillance program.

§ 38.255 Risk controls for trading.

The designated contract market must establish and maintain risk control mechanisms to prevent and reduce the potential risk of price distortions and market disruptions, including, but not limited to, market restrictions that pause or halt trading in market conditions prescribed by the designated contract market.

§ 38.256 Trade reconstruction.

The designated contract market must have the ability to comprehensively and accurately reconstruct all trading on its trading facility. All audit-trail data and reconstructions must be made available to the Commission in a form, manner, and time that is acceptable to the Commission.

§ 38.257 Regulatory service provider.

A designated contract market must comply with the regulations in this subpart through a dedicated regulatory department, or by delegation of that function to a registered futures association or a registered entity (collectively, ''regulatory service provider''), as such terms are defined in the Act and over which the designated contract market has supervisory authority.

§ 38.258 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance and acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 38.250 of this part.

Subpart F—Position Limitations or Accountability

§ 38.300 Core Principle 5.

To reduce the potential threat of market manipulation or congestion (especially during trading in the delivery month), the board of trade shall adopt for each contract of the board of trade, as is necessary and appropriate, position limitations or position accountability for speculators. For any contract that is subject to a position limitation established by the Commission, pursuant to section 4a(a), the board of trade shall set the position limitation of the board of trade at a level not higher than the position limitation established by the Commission.

§ 38.301 Position limitations and accountability.

A designated contract market must meet the requirements of parts 150 and 151 of this chapter, as applicable.

Subpart G—Emergency Authority

§ 38.350 Core Principle 6.

The board of trade, in consultation or cooperation with the Commission, shall adopt rules to provide for the exercise of emergency authority, as is necessary and appropriate, including the authority:

(a) To liquidate or transfer open positions in any contract;

(b) To suspend or curtail trading in any contract; and

(c) To require market participants in any contract to meet special margin requirements.

§ 38.351 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance and/or acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 38.350.

Subpart H—Availability of General Information

§ 38.400 Core Principle 7.

The board of trade shall make available to market authorities, market participants, and the public accurate information concerning:

(a) The terms and conditions of the contracts of the contract market; and

(b)(1) The rules, regulations and mechanisms for executing transactions on or through the facilities of the contract market, and

(2) The rules and specifications describing the operation of the contract market's:

(i) Electronic matching platform, or

(ii) Trade execution facility.

§ 38.401 General requirements.

(a) *General.* (1) A designated contract market must have procedures, arrangements and resources for disclosing to the Commission, market participants and the public accurate information pertaining to:

(i) Contract terms and conditions;

(ii) Rules and regulations pertaining to the trading mechanisms; and

(iii) Rules and specifications pertaining to operation of the electronic matching platform or trade execution facility.

(2) Through the procedures, arrangements and resources required in paragraph (a) of this section, the designated contract market must ensure public dissemination of information pertaining to new product listings, new rules, rule amendments or other changes to previously-disclosed information, in accordance with the timeline provided in paragraph (c) of this section.

(3) A designated contract market shall meet the requirements of this paragraph (a), by placing the information described in this paragraph (a) on the designated contract market's Web site within the time prescribed in paragraph (c) of this section.

(b) *Accuracy requirement.* With respect to any communication with the Commission, and any information required to be transmitted or made available to market participants and the public, including on its Web site or otherwise, a designated contract market must provide information that it believes, to the best of its knowledge, is accurate and complete, and must not omit material information.

(c) *Notice of regulatory submissions.* (1) A designated contract market, in making available on its Web site information pertaining to new product listings, new rules, rule amendments or other changes to previously-disclosed information, must place such information and submissions on its Web site concurrent with the filing of such information or submissions with the Secretary of the Commission.

(2) To the extent that a designated contract market requests confidential treatment of any information filed with the Secretary of the Commission, the designated contract market must post on its Web site the public version of such filing or submission.

(d) *Rulebook.* A designated contract market must ensure that the rulebook posted on its Web site is accurate,

complete, current and readily accessible to the public. A designated contract market must publish or post in its rulebook all new or amended rules, both substantive and non-substantive, on the date of implementation of such new or amended rule, on the date a new product is listed, or on the date any changes to previously-disclosed information take effect.

Subpart I—Daily Publication of Trading Information

§ 38.450 Core Principle 8.

The board of trade shall make public daily information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts on the contract market.

§ 38.451 Reporting of trade information.

A designated contract market must meet the reporting requirements set forth in part 16 of this chapter.

Subpart J—Execution of Transactions

§ 38.500 Core Principle 9.

The board of trade shall provide a competitive, open, and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade. The rules of the board of trade may authorize, for bona fide business purposes:

(a) Transfer trades or office trades;

(b) An exchange of:

(1) Futures in connection with a cash commodity transaction;

(2) Futures for cash commodities; or

(3) Futures for swaps; or

(c) A futures commission merchant, acting as principal or agent, to enter into or confirm the execution of a contract for the purchase or sale of a commodity for future delivery if the contract is reported, recorded, or cleared in accordance with the rules of the contract market or a derivatives clearing organization.

Subpart K—Trade Information

§ 38.550 Core Principle 10.

The board of trade shall maintain rules and procedures to provide for the recording and safe storage of all identifying trade information in a manner that enables the contract market to use the information:

(a) To assist in the prevention of customer and market abuses; and

(b) To provide evidence of any violations of the rules of the contract market.

§ 38.551 Audit trail required.

A designated contract market must capture and retain all audit trail data necessary to detect, investigate, and prevent customer and market abuses. Such data must be sufficient to reconstruct all transactions within a reasonable period of time and to provide evidence of any violations of the rules of the designated contract market. An acceptable audit trail must also permit the designated contract market to track a customer order from the time of receipt through fill, allocation, or other disposition, and must include both order and trade data.

§ 38.552 Elements of an acceptable audit trail program.

(a) *Original source documents.* A designated contract market's audit trail must include original source documents. Original source documents include unalterable, sequentially identified records on which trade execution information is originally recorded, whether recorded manually or electronically. Records for customer orders (whether filled, unfilled, or cancelled, each of which shall be retained or electronically captured) must reflect the terms of the order, an account identifier that relates back to the account(s) owner(s), and the time of order entry. For open-outcry trades, the time of report of execution of the order shall also be captured.

(b) *Transaction history database.* A designated contract market's audit trail program must include an electronic transaction history database. An adequate transaction history database includes a history of all trades executed via open outcry or via entry into an electronic trading system, and all orders entered into an electronic trading system, including all order modifications and cancellations. An adequate transaction history database also includes:

(1) All data that are input into the trade entry or matching system for the transaction to match and clear;

(2) The customer type indicator code;

(3) Timing and sequencing data adequate to reconstruct trading; and

(4) Identification of each account to which fills are allocated.

(c) *Electronic analysis capability.* A designated contract market's audit trail program must include electronic analysis capability with respect to all audit trail data in the transaction history database. Such electronic analysis capability must ensure that the designated contract market has the ability to reconstruct trading and identify possible trading violations with respect to both customer and market abuse.

(d) *Safe storage capability.* A designated contract market's audit trail program must include the capability to safely store all audit trail data retained in its transaction history database. Such safe storage capability must include the capability to store all data in the database in a manner that protects it from unauthorized alteration, as well as from accidental erasure or other loss. Data must be retained in accordance with the recordkeeping requirements of Core Principle 18 and the associated regulations in subpart S of this part.

§ 38.553 Enforcement of audit trail requirements.

(a) *Annual audit trail and recordkeeping reviews.* A designated contract market must enforce its audit trail and recordkeeping requirements through at least annual reviews of all members and persons and firms subject to designated contract market recordkeeping rules to verify their compliance with the contract market's audit trail and recordkeeping requirements. Such reviews must include, but are not limited to, the following:

(1) For electronic trading, audit trail and recordkeeping reviews must include reviews of randomly selected samples of front-end audit trail data for order routing systems; a review of the process by which user identifications are assigned and user identification records are maintained; a review of usage patterns associated with user identifications to monitor for violations of user identification rules; and reviews of account numbers and customer type indicator codes in trade records to test for accuracy and improper use.

(2) For open outcry trading, audit trail and recordkeeping reviews must include reviews of members' and market participants' compliance with the designated contract market's trade timing, order ticket, and trading card requirements.

(b) *Enforcement program required.* A designated contract market must establish a program for effective enforcement of its audit trail and recordkeeping requirements for both electronic and open-outcry trading, as applicable. An effective program must identify members and persons and firms subject to designated contract market recordkeeping rules that have failed to maintain high levels of compliance with such requirements, and levy meaningful sanctions when deficiencies are found. Sanctions must be sufficient to deter recidivist behavior. No more than one warning letter may be issued to the

same person or entity found to have committed the same rule violation within a rolling twelve month period.

Subpart L—Financial Integrity of Transactions

§ 38.600 Core Principle 11.

The board of trade shall establish and enforce:

(a) Rules and procedures for ensuring the financial integrity of transactions entered into on or through the facilities of the contract market (including the clearance and settlement of the transactions with a derivatives clearing organization); and

(b) Rules to ensure:

(1) The financial integrity of any:

(i) Futures commission merchant, and

(ii) Introducing broker; and

(2) The protection of customer funds.

§ 38.601 Mandatory clearing.

(a) Transactions executed on or through the designated contract market must be cleared through a Commission-registered derivatives clearing organization, in accordance with the provisions of part 39 of this chapter. Notwithstanding the foregoing, transactions in security futures products executed on or through the designated contract market may alternatively be cleared through a clearing agency, registered pursuant to section 17A of the Securities Exchange Act of 1934.

(b) [Reserved]

§ 38.602 General financial integrity.

A designated contract market must provide for the financial integrity of its transactions by establishing and maintaining appropriate minimum financial standards for its members and non-intermediated market participants.

§ 38.603 Protection of customer funds.

A designated contract market must have rules concerning the protection of customer funds. These rules shall address appropriate minimum financial standards for intermediaries, the segregation of customer and proprietary funds, the custody of customer funds, the investment standards for customer funds, intermediary default procedures and related recordkeeping. A designated contract market must review the default rules and procedures of the derivatives clearing organization that clears for such designated contract market to wind down operations, transfer customers, or otherwise protect customers in the event of a default of a clearing member or the derivatives clearing organization.

§ 38.604 Financial surveillance.

A designated contract market must monitor members' compliance with the designated contract market's minimum financial standards and, therefore, must routinely receive and promptly review financial and related information from its members, as well as continuously monitor the positions of members and their customers. A designated contract market must have rules that prescribe minimum capital requirements for member futures commission merchants and introducing brokers. A designated contract market must:

(a) Continually survey the obligations of each futures commission merchant created by the positions of its customers;

(b) As appropriate, compare those obligations to the financial resources of the futures commission merchant; and

(c) Take appropriate steps to use this information to protect customer funds.

§ 38.605 Requirements for financial surveillance program.

A designated contract market's financial surveillance program for futures commission merchants, retail foreign exchange dealers, and introducing brokers must comply with the requirements of § 1.52 of this chapter to assess the compliance of such entities with applicable contract market rules and Commission regulations.

§ 38.606 Financial regulatory services provided by a third party.

A designated contract market may comply with the requirements of § 38.604 (Financial Surveillance) and § 38.605 (Requirements for Financial Surveillance Program) of this part through the regulatory services of a registered futures association or a registered entity (collectively, ''regulatory service provider''), as such terms are defined under the Act. A designated contract market must ensure that its regulatory service provider has the capacity and resources necessary to provide timely and effective regulatory services, including adequate staff and appropriate surveillance systems. A designated contract market will at all times remain responsible for compliance with its obligations under the Act and Commission regulations, and for the regulatory service provider's performance on its behalf. Regulatory services must be provided under a written agreement with a regulatory services provider that shall specifically document the services to be performed as well as the capacity and resources of the regulatory service provider with respect to the services to be performed.

§ 38.607 Direct access.

A designated contract market that permits direct electronic access by customers (i.e., allowing customers of futures commission merchants to enter orders directly into a designated contract market's trade matching system for execution) must have in place effective systems and controls reasonably designed to facilitate the FCM's management of financial risk, such as automated pre-trade controls that enable member futures commission merchants to implement appropriate financial risk limits. A designated contract market must implement and enforce rules requiring the member futures commission merchants to use the provided systems and controls.

Subpart M—Protection of Markets and Market Participants

§ 38.650 Core Principle 12.

The board of trade shall establish and enforce rules:

(a) To protect markets and market participants from abusive practices committed by any party, including abusive practices committed by a party acting as an agent for a participant; and

(b) To promote fair and equitable trading on the contract market.

§ 38.651 Protection of markets and market participants.

A designated contract market must have and enforce rules that are designed to promote fair and equitable trading and to protect the market and market participants from abusive practices including fraudulent, noncompetitive or unfair actions, committed by any party. The designated contract market must have methods and resources appropriate to the nature of the trading system and the structure of the market to detect trade practice and market abuses and to discipline such behavior, in accordance with Core Principles 2 and 4, and the associated regulations in subparts C and E of this part, respectively. The designated contract market also must provide a competitive, open and efficient market and mechanism for executing transactions in accordance with Core Principle 9 and the associated regulations under subpart J of this part.

Subpart N—Disciplinary Procedures

§ 38.700 Core Principle 13.

The board of trade shall establish and enforce disciplinary procedures that authorize the board of trade to discipline, suspend, or expel members or market participants that violate the rules of the board of trade, or similar methods for performing the same functions, including delegation of the functions to third parties.

§ 38.701 Enforcement staff.

A designated contract market must establish and maintain sufficient enforcement staff and resources to effectively and promptly prosecute possible rule violations within the disciplinary jurisdiction of the contract market. A designated contract market must also monitor the size and workload of its enforcement staff annually, and ensure that its enforcement resources and staff are at appropriate levels. The enforcement staff may not include either members of the designated contract market or persons whose interests conflict with their enforcement duties. A member of the enforcement staff may not operate under the direction or control of any person or persons with trading privileges at the contract market. A designated contract market's enforcement staff may operate as part of the designated contract market's compliance department.

§ 38.702 Disciplinary panels.

A designated contract market must establish one or more disciplinary panels that are authorized to fulfill their obligations under the rules of this subpart. Disciplinary panels must meet the composition requirements of part 40 of this chapter, and must not include any members of the designated contract market's compliance staff or any person involved in adjudicating any other stage of the same proceeding.

§ 38.703 Notice of charges.

If compliance staff authorized by a designated contract market or a designated contract market disciplinary panel determines that a reasonable basis exists for finding a violation and that adjudication is warranted, it must direct that the person or entity alleged to have committed the violation be served with a notice of charges and must proceed in accordance with the rules of this section. A notice of charges must adequately state the acts, conduct, or practices in which the respondent is alleged to have engaged; state the rule, or rules, alleged to have been violated (or about to be violated); and prescribe the period within which a hearing on the charges may be requested. The notice must also advise that the charged respondent is entitled, upon request, to a hearing on the charges.

§ 38.704 Right to representation.

Upon being served with a notice of charges, a respondent must have the right to be represented by legal counsel or any other representative of its choosing in all succeeding stages of the disciplinary process, except any member of the designated contract market's board of directors or disciplinary panel, any employee of the designated contract market, or any person substantially related to the underlying investigations, such as material witness or respondent.

§ 38.705 Answer to charges.

A respondent must be given a reasonable period of time to file an answer to a notice of charges. The rules of a designated contract market governing the requirements and timeliness of a respondent's answer to charges must be fair, equitable, and publicly available.

§ 38.706 Denial of charges and right to hearing.

In every instance where a respondent has requested a hearing on a charge that is denied, or on a sanction set by the disciplinary panel, the respondent must be given an opportunity for a hearing in accordance with the requirements of § 38.707 of this part.

§ 38.707 Hearings.

(a) A designated contract market must adopt rules that provide for the following minimum requirements for any hearing conducted pursuant to a notice of charges:

(1) The hearing must be fair, must be conducted before members of the disciplinary panel, and must be promptly convened after reasonable notice to the respondent. The formal rules of evidence need not apply; nevertheless, the procedures for the hearing may not be so informal as to deny a fair hearing. No member of the disciplinary panel for the matter may have a financial, personal, or other direct interest in the matter under consideration.

(2) In advance of the hearing, the respondent must be entitled to examine all books, documents, or other evidence in the possession or under the control of the designated contract market. The designated contract market may withhold documents that are privileged or constitute attorney work product, documents that were prepared by an employee of the designated contract market but will not be offered in evidence in the disciplinary proceedings, documents that may disclose a technique or guideline used in examinations, investigations, or enforcements proceedings, and documents that disclose the identity of a confidential source.

(3) The designated contract market's enforcement and compliance staffs must be parties to the hearing, and the enforcement staff must present their case on those charges and sanctions that are the subject of the hearing.

(4) The respondent must be entitled to appear personally at the hearing, must be entitled to cross-examine any persons appearing as witnesses at the hearing, and must be entitled to call witnesses and to present such evidence as may be relevant to the charges.

(5) The designated contract market must require persons within its jurisdiction who are called as witnesses to participate in the hearing and to produce evidence. It must make reasonable efforts to secure the presence of all other persons called as witnesses whose testimony would be relevant.

(6) If the respondent has requested a hearing, a copy of the hearing must be made and must become a part of the record of the proceeding. The record must be one that is capable of being accurately transcribed; however, it need not be transcribed unless the transcript is requested by Commission staff or the respondent, the decision is appealed pursuant to the rules of the designated contract market, or is reviewed by the Commission pursuant to section 8c of the Act or part 9 of this chapter. In all other instances a summary record of a hearing is permitted.

(b) [Reserved]

§ 38.708 Decisions.

Promptly following a hearing conducted in accordance with § 38.707 of this part, the disciplinary panel must render a written decision based upon the weight of the evidence contained in the record of the proceeding and must provide a copy to the respondent. The decision must include:

(a) The notice of charges or a summary of the charges;

(b) The answer, if any, or a summary of the answer;

(c) A summary of the evidence produced at the hearing or, where appropriate, incorporation by reference of the investigation report;

(d) A statement of findings and conclusions with respect to each charge, and a complete explanation of the evidentiary and other basis for such findings and conclusions with respect to each charge;

(e) An indication of each specific rule that the respondent was found to have violated; and

(f) A declaration of all sanctions imposed against the respondent, including the basis for such sanctions and the effective date of such sanctions.

§ 38.709 Final decisions.

Each designated contract market must establish rules setting forth when a decision rendered pursuant to this

section will become the final decision of such designated contract market.

§ 38.710 Disciplinary sanctions.

All disciplinary sanctions imposed by a designated contract market or its disciplinary panels must be commensurate with the violations committed and must be clearly sufficient to deter recidivism or similar violations by other market participants. All disciplinary sanctions, including sanctions imposed pursuant to an accepted settlement offer, must take into account the respondent's disciplinary history. In the event of demonstrated customer harm, any disciplinary sanction must also include full customer restitution, except where the amount of restitution, or to whom it should be provided, cannot be reasonably determined.

§ 38.711 Warning letters.

Where a rule violation is found to have occurred, no more than one warning letter may be issued per rolling 12-month period for the same violation.

§ 38.712 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 38.700 of this part.

Subpart O—Dispute Resolution

§ 38.750 Core Principle 14.

The board of trade shall establish and enforce rules regarding, and provide facilities for alternative dispute resolution as appropriate for, market participants and any market intermediaries.

§ 38.751 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance and acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 38.750 of this part.

Subpart P—Governance Fitness Standards

§ 38.800 Core Principle 15.

The board of trade shall establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, members of the contract market, and any other person with direct access to the facility (including any party affiliated with any person described in this paragraph).

§ 38.801 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 38.800 of this part.

Subpart Q—Conflicts of Interest

§ 38.850 Core Principle 16.

The board of trade shall establish and enforce rules:

(a) To minimize conflicts of interest in the decision-making process of the contract market; and

(b) To establish a process for resolving conflicts of interest described in paragraph (a) of this section.

§ 38.851 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance and/or acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 38.850 of this part.

Subpart R—Composition of Governing Boards of Contract Markets

§ 38.900 Core Principle 17.

The governance arrangements of the board of trade shall be designed to permit consideration of the views of market participants.

Subpart S—Recordkeeping

§ 38.950 Core Principle 18.

The board of trade shall maintain records of all activities relating to the business of the contract market:

(a) In a form and manner that is acceptable to the Commission; and

(b) For a period of at least 5 years.

§ 38.951 Additional sources for compliance.

A designated contract market must maintain such records, including trade records and investigatory and disciplinary files, in accordance with the requirements of § 1.31 of this chapter, and in accordance with part 45 of this chapter, if applicable.

Subpart T—Antitrust Considerations

§ 38.1000 Core Principle 19.

Unless necessary or appropriate to achieve the purposes of this Act, the board of trade shall not:

(a) Adopt any rule or taking any action that results in any unreasonable restraint of trade; or

(b) Impose any material anticompetitive burden on trading on the contract market.

§ 38.1001 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance and acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 38.1000 of this part.

Subpart U—System Safeguards

§ 38.1050 Core Principle 20.

Each designated contract market shall:

(a) Establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and the development of automated systems, that are reliable, secure, and have adequate scalable capacity;

(b) Establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for the timely recovery and resumption of operations and the fulfillment of the responsibilities and obligations of the board of trade; and

(c) Periodically conduct tests to verify that backup resources are sufficient to ensure continued order processing and trade matching, transmission of matched orders to a designated clearing organization for clearing, price reporting, market surveillance, and maintenance of a comprehensive and accurate audit trail.

§ 38.1051 General requirements.

(a) A designated contract market's program of risk analysis and oversight with respect to its operations and automated systems must address each of the following categories of risk analysis and oversight:

(1) Information security;

(2) Business continuity-disaster recovery planning and resources;

(3) Capacity and performance planning;

(4) Systems operations;

(5) Systems development and quality assurance; and

(6) Physical security and environmental controls.

(b) In addressing the categories of risk analysis and oversight required under paragraph (a) of this section, a designated contract market should follow generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems.

(c) A designated contract market must maintain a business continuity-disaster recovery plan and business continuity-disaster recovery resources, emergency procedures, and backup facilities

sufficient to enable timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its responsibilities and obligations as a designated contract market following any disruption of its operations. Such responsibilities and obligations include, without limitation, order processing and trade matching; transmission of matched orders to a designated clearing organization for clearing; price reporting; market surveillance; and maintenance of a comprehensive audit trail. The designated contract market's business continuity-disaster recovery plan and resources generally should enable resumption of trading and clearing of the designated contract market's products during the next business day following the disruption. Designated contract markets determined by the Commission to be critical financial markets are subject to more stringent requirements in this regard, set forth in § 40.9 of this chapter. Electronic trading is an acceptable backup for open outcry trading in the event of a disruption.

(d) A designated contract market that is not determined by the Commission to be a critical financial market satisfies the requirement to be able to resume trading and clearing during the next business day following a disruption by maintaining either:

(1) Infrastructure and personnel resources of its own that are sufficient to ensure timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its responsibilities and obligations as a designated contract market following any disruption of its operations; or

(2) Contractual arrangements with other designated contract markets or disaster recovery service providers, as appropriate, that are sufficient to ensure continued trading and clearing of the designated contract market's products, and ongoing fulfillment of all of the designated contract market's responsibilities and obligations with respect to those products, in the event that a disruption renders the designated contract market temporarily or permanently unable to satisfy this requirement on its own behalf.

(e) A designated contract market must notify Commission staff promptly of all:

(1) Electronic trading halts and significant systems malfunctions;

(2) Cyber security incidents or targeted threats that actually or potentially jeopardize automated system operation, reliability, security, or capacity; and

(3) Activation of the designated contract market's business continuity-disaster recovery plan.

(f) A designated contract market must give Commission staff timely advance notice of all material:

(1) Planned changes to automated systems that may impact the reliability, security, or adequate scalable capacity of such systems; and

(2) Planned changes to the designated contract market's program of risk analysis and oversight.

(g) A designated contract market must provide to the Commission upon request current copies of its business continuity-disaster recovery plan and other emergency procedures, its assessments of its operational risks, and other documents requested by Commission staff for the purpose of maintaining a current profile of the designated contract market's automated systems.

(h) A designated contract market must conduct regular, periodic, objective testing and review of its automated systems to ensure that they are reliable, secure, and have adequate scalable capacity. It must also conduct regular, periodic testing and review of its business continuity-disaster recovery capabilities. Both types of testing should be conducted by qualified, independent professionals. Such qualified independent professionals may be independent contractors or employees of the designated contract market, but should not be persons responsible for development or operation of the systems or capabilities being tested. Pursuant to Core Principle 18 (Recordkeeping) and §§ 38.950 and 38.951 of this part, the designated contract market must keep records of all such tests, and make all test results available to the Commission upon request.

(i) To the extent practicable, a designated contract market should:

(1) Coordinate its business continuity-disaster recovery plan with those of the members and other market participants upon whom it depends to provide liquidity, in a manner adequate to enable effective resumption of activity in its markets following a disruption causing activation of the designated contract market's business continuity-disaster recovery plan;

(2) Initiate and coordinate periodic, synchronized testing of its business continuity-disaster recovery plan and the business continuity-disaster recovery plans of the members and other market participants upon whom it depends to provide liquidity; and

(3) Ensure that its business continuity-disaster recovery plan takes into account the business continuity-disaster recovery plans of its telecommunications, power, water, and other essential service providers.

(j) Part 46 of this chapter governs the obligations of those registered entities that the Commission has determined to be critical financial markets, with respect to maintenance and geographic dispersal of disaster recovery resources sufficient to meet a same-day recovery time objective in the event of a wide-scale disruption. Section 40.9 of this chapter establishes the requirements for core principle compliance in that respect.

Subpart V—Financial Resources

§ 38.1100 Core Principle 21.

(a) *In General.* The board of trade shall have adequate financial, operational, and managerial resources to discharge each responsibility of the board of trade.

(b) *Determination of adequacy.* The financial resources of the board of trade shall be considered to be adequate if the value of the financial resources exceeds the total amount that would enable the contract market to cover the operating costs of the contract market for a 1-year period, as calculated on a rolling basis.

§ 38.1101 General requirements.

(a) *General rule.* (1) A designated contract market must maintain financial resources sufficient to enable it to perform its functions in compliance with the core principles set forth in section 5 of the Act and regulations thereunder.

(2) Financial resources shall be considered sufficient if their value is at least equal to a total amount that would enable the designated contract market, or applicant for designation as such, to cover its operating costs for a period of at least one year, calculated on a rolling basis.

(3) An entity that is registered with the Commission as both a designated contract market and a derivatives clearing organization also shall comply with the financial resource requirements of § 39.11 of this chapter, demonstrating that it has sufficient financial resources to operate the single, combined entity as both a designated contract market and a derivatives clearing organization. In lieu of filing separate quarterly reports under paragraph (a)(2) of this section and § 39.11(f) of this chapter, such entity shall file single quarterly reports in accordance with § 39.11.

(b) *Types of financial resources.* Financial resources available to satisfy the requirements of paragraph (a) of this section may include:

(1) The designated contract market's own capital, calculated in accordance with U.S. generally accepted accounting principles; and

(2) Any other financial resource deemed acceptable by the Commission.

(c) *Computation of financial resource requirement.* A designated contract market must, on a quarterly basis, based upon its fiscal year, make a reasonable calculation of its projected operating costs over a 12-month period in order to determine the amount needed to meet the requirements of paragraph (a) of this section. The designated contract market shall have reasonable discretion in determining the methodology used to compute such projected operating costs. The Commission may review the methodology and require changes as appropriate.

(d) *Valuation of financial resources.* At appropriate intervals, but not less than quarterly, a designated contract market must compute the current market value of each financial resource used to meet its obligations under paragraph (a) of this section. Reductions in value to reflect market and credit risk (''haircuts'') must be applied as appropriate.

(e) *Liquidity of financial resources.* The financial resources allocated by the designated contract market to meet the requirements of paragraph (a) of this section must include unencumbered, liquid financial assets (*i.e.,* cash and/or highly liquid securities) equal to at least six months' operating costs. If any portion of such financial resources is not sufficiently liquid, the designated contract market may take into account a committed line of credit or similar facility for the purpose of meeting this requirement.

(f) *Reporting requirements.* (1) Each fiscal quarter, or at any time upon Commission request, a designated contract market must:

(i) Report to the Commission:

(A) The amount of financial resources necessary to meet the requirements of paragraph (a) of this section; and

(B) The value of each financial resource available, computed in accordance with the requirements of paragraph (d) of this section; and

(ii) Provide the Commission with a financial statement, including the balance sheet, income statement, and statement of cash flows of the designated contract market or of its parent company.

(2) The calculations required by this paragraph shall be made as of the last business day of the designated contract market's fiscal quarter.

(3) The designated contract market must provide the Commission with:

(i) Sufficient documentation explaining the methodology used to compute its financial requirements under paragraph (a) of this section;

(ii) Sufficient documentation explaining the basis for its determinations regarding the valuation and liquidity requirements set forth in paragraphs (d) and (e) of this section; and

(iii) Copies of any agreements establishing or amending a credit facility, insurance coverage, or other arrangement evidencing or otherwise supporting the designated contract market's conclusions.

(4) The reports shall be filed not later than 40 calendar days after the end of the designated contract market's first three fiscal quarters, and not later than 60 calendar days after the end of the designated contract market's fourth fiscal quarter, or at such later time as the Commission may permit, in its discretion, upon request by the designated contract market.

(g) *Delegation of authority.* (1) The Commission hereby delegates, until it orders otherwise, the authority to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, to:

(i) Determine whether a particular financial resource under paragraph (b)(2) may be used to satisfy the requirements of paragraph (a)(1) and (2) of this section;

(ii) Review and make changes to the methodology used to compute the requirements of paragraph (c) of this section;

(iii) Request financial reporting from a designated contract market (in addition to quarterly reports) under paragraph (f)(1) of this section; and

(iv) Grant an extension of time for a designated contract market to file its quarterly financial report under paragraph (f)(4) of this section.

(2) The Director may submit to the Commission for its consideration any matter that has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

Subpart W—Diversity of Board of Directors

§ 38.1150 Core Principle 22.

The board of trade, if a publicly traded company, shall endeavor to recruit individuals to serve on the board of directors and the other decision-making bodies (as determined by the Commission) of the board of trade from among, and to have the composition of the bodies reflect, a broad and culturally diverse pool of qualified candidates.

Subpart X—Securities and Exchange Commission

§ 38.1200 Core Principle 23.

The board of trade shall keep any such records relating to swaps defined in section 1a(47)(A)(v) of the Act open to inspection and examination by the Securities and Exchange Commission.

§ 38.1201 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance and/or acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 38.1200 of this part.

■ 18. Revise appendix A to part 38 to read as follows:

BILLING CODE 6351–01–P

Appendix A to Part 38 – Form DCM

COMMODITY FUTURES TRADING COMMISSION

FORM DCM

CONTRACT MARKET
APPLICATION OR AMENDMENT TO APPLICATION FOR DESIGNATION

DESIGNATION INSTRUCTIONS

Intentional misstatements or omissions of material fact may constitute federal criminal violations (7 U.S.C. § 13 and 18 U.S.C. § 1001) or grounds for disqualification from designation.

DEFINITIONS

Unless the context requires otherwise, all terms used in this Form DCM have the same meaning as in the Commodity Exchange Act, as amended ("CEA" or "Act"), and in the General Rules and Regulations of the Commodity Futures Trading Commission ("Commission") thereunder.

For the purposes of this Form DCM, the term "Applicant" shall include any board of trade applying for designation as a contract market, any board of trade amending a pending application, or any designated contract market that is applying for an amendment to its order of designation.

GENERAL INSTRUCTIONS

1. This Form DCM, which includes instructions, a Cover Sheet, and required Exhibits (together, "Form DCM") is to be filed with the Commission by all Applicants, pursuant to Section 5 of the CEA and the Commission's regulations thereunder. Applicants may prepare their own Form DCM but must follow the format prescribed herein. Upon the filing of an application for designation or a designation amendment in accordance with the instructions provided herein, the Commission will publish notice of the filing and afford interested persons an opportunity to submit written data, views and arguments concerning such application. No application for designation or designation amendment shall be effective unless the Commission, by order, grants such designation or amended designation.

2. Individuals' names, except the executing signature, shall be given in full (Last Name, First Name, Middle Name).

3. Signatures on all copies of the Form DCM filed with the Commission can be executed electronically. If this Form DCM is filed by a corporation, it shall be signed in the name of the corporation by a principal officer duly authorized; if filed by a limited liability company, it shall be signed in the name of the limited liability company by a manager or member duly authorized to sign on the limited liability company's behalf; if filed by a partnership, it shall be signed in the name of the partnership by a general partner duly authorized; if filed by an unincorporated organization or association which is not a partnership, it shall be signed in the name of such organization or association by the managing agent, i.e., a duly authorized person who directs or manages or who participates in the directing or managing of its affairs.

4. If this Form DCM is being filed as an application for designation, all applicable items must be answered in full. If any item is inapplicable, indicate by "none," "not applicable," or "N/A," as appropriate.

5. Under Section 5 of the CEA and the Commission's regulations thereunder, the Commission is authorized to solicit the information required to be supplied by this Form DCM from any Applicant seeking designation as a contract market and from any designated contract market. Disclosure by the Applicant of the information specified on this Form DCM is mandatory prior to the start of the processing of an

application for, or an amendment to, designation as a contract market. The information provided in this Form DCM will be used for the principal purpose of determining whether the Commission should grant or deny designation to an Applicant. The Commission may determine that additional information is required from the Applicant in order to process its application. **A Form DCM which is not prepared and executed in compliance with applicable requirements and instructions may be returned as not acceptable for filing. Acceptance of this Form DCM, however, shall not constitute a finding that the Form DCM has been filed as required or that the information submitted is true, current, or complete.**

6. Except in cases where confidential treatment is requested by the Applicant and granted by the Commission pursuant to the Freedom of Information Act and the rules of the Commission thereunder, information supplied on this Form DCM will be included routinely in the public files of the Commission and will be available for inspection by any interested person.

APPLICATION AMENDMENTS

1. Part 38 of the Commission's regulations requires that if any information contained in this application, or any supplement or amendment thereto, is or becomes inaccurate for any reason, an amendment to Form DCM, or a submission under Part 40 of the Commission's regulations, in either case correcting such information must be filed promptly with the Commission.

2. Applicants, when filing this Form DCM for purposes of amending an application, must re-file the Cover Sheet, amended if necessary and including an executing signature, and attach thereto revised Exhibits or other materials marked to show changes, as applicable. The submission of an amendment represents that the remaining items and Exhibits that are not amended remain true, current, and complete as previously filed.

WHERE TO FILE

This Form DCM must be filed electronically with the Secretary of the Commission in a format specified by the Secretary of the Commission.

COMMODITY FUTURES TRADING COMMISSION

FORM DCM

CONTRACT MARKET
APPLICATION OR AMENDMENT TO APPLICATION FOR DESIGNATION

COVER SHEET

_____

Exact name of Applicant as specified in charter

_____

Address of principal executive offices

☐ If this is an **APPLICATION** for designation, complete in full and check here.

☐ If this is an **AMENDMENT** to an application, or to an existing designation, list all items that are amended and check here.

_____ _____

_____ _____

_____ _____

_____ _____

GENERAL INFORMATION

1. Name under which the business of the designated contract market is or will be conducted, if different than name specified above (include acronyms, if any):

_____

2. If name of designated contract market is being amended, state previous designated contract market name:

_____

3. Contact information, including mailing address if different than address specified above:

_____
Number and Street

_____
City State Country Zip Code

_____
Main Phone number Fax

_____
Website URL E-mail Address

4. List of principal office(s) and address(es) where designated contract market activities are/will be conducted:

Office	**Address**

5. If Applicant is a successor to a previously designated contract market, please complete the following:

a. Date of succession

_____

b. Full name and address of predecessor designee

_____
Name

_____

Number and Street

City State Country Zip Code

Main Phone Number Website URL

BUSINESS ORGANIZATION

6. Applicant is a:

☐ Corporation
☐ Partnership
☐ Limited Liability Company
☐ Other form of organization (specify)_____

7. Date of incorporation or formation: _____

8. State of incorporation or jurisdiction of organization:_____

9. Applicant agrees and consents that the notice of any proceeding before the Commission in connection with this application may be given by sending such notice by certified mail to the person named below at the address given.

Print Name and Title

Name of Applicant

Number and Street

City State Zip Code

SIGNATURES

10. The Applicant has duly caused this application or amendment to be signed on its behalf by the undersigned, hereunto duly authorized, this _____ day of _____, 20_____. The Applicant and the undersigned represent hereby that all information contained herein is true, current, and complete. It is understood that all required items and Exhibits are considered integral parts of this Form DCM and that the submission of any amendment represents that all un-amended items and Exhibits remain true, current, and complete as previously filed.

Name of Applicant

Signature of Duly Authorized Person

Print Name and Title of Signatory

COMMODITY FUTURES TRADING COMMISSION

FORM DCM

CONTRACT MARKET
APPLICATION OR AMENDMENT TO APPLICATION FOR DESIGNATION

EXHIBITS INSTRUCTIONS

The following Exhibits must be filed with the Commission by each Applicant applying for designation as a contract market, or by a designated contract market amending its designation, pursuant to Section 5 of the CEA and the Commission's regulations thereunder. The Exhibits must be labeled according to the items specified in this Form DCM.

The application must include a Table of Contents listing each Exhibit required by this Form DCM and indicating which, if any, Exhibits are inapplicable. For any Exhibit that is inapplicable, next to the Exhibit letter specify "none," "not applicable," or "N/A," as appropriate.

LIST OF EXHIBITS

EXHIBITS – BUSINESS ORGANIZATION

1. Attach as **Exhibit A,** the name of any person(s) who own(s) ten percent (10%) or more of the Applicant's stock or who, either directly or indirectly, through agreement or otherwise, in any other manner, may control or direct the management or policies of Applicant.

   Provide as part of Exhibit A the full name and address of each such person and attach a copy of the agreement or, if there is none written, describe the agreement or basis upon which such person exercises or may exercise such control or direction.

2. Attach as **Exhibit B**, a list of the present officers, directors, governors (and, in the case of an Applicant that is not a corporation, the members of all standing committees grouped by committee), or persons performing functions similar to any of the foregoing, of the designated contract market or of any entity that performs the regulatory activities of the Applicant, indicating for each:
   1. Name
   2. Title
   3. Dates of commencement and termination of present term of office or position
   4. Length of time each present officer, director, or governor has held the same office or position
   5. Brief account of the business experience of each officer and director over the last five (5) years
   6. Any other business affiliations in the derivatives and securities industry
   7. For directors, list any committees on which they serve and any compensation received by virtue of their directorship
   8. A description of:
      (1) Any order of the Commission with respect to such person pursuant to Section 5e of the CEA;
      (2) Any conviction or injunction against such person within the past ten (10) years;
      (3) Any disciplinary action with respect to such person within the last five (5) years;
      (4) Any disqualification under Sections 8b and 8d of the CEA;
      (5) Any disciplinary action under Section 8c of the CEA; and
      (6) Any violation pursuant to Section 9 of the CEA.

3. Attach as **Exhibit C**, a narrative that sets forth the fitness standards for the Board of Directors and its composition including the number and percentage of public directors.

4. Attach as **Exhibit D,** a narrative or graphic description of the organizational structure of the Applicant. Include a list of all affiliates of the Applicant and indicate the general nature of the affiliation. Note: If the designated contract market activities of the Applicant are or will be conducted primarily by a division, subdivision, or other separate entity, corporation or organization, describe the relationship of such entity within the overall organizational structure and attach as Exhibit D a description only as it applies to the division, subdivision or separate entity, as applicable. Additionally, provide any relevant jurisdictional information, including any and all jurisdictions in which you or any affiliated entity are doing business, and registration status, including pending applications (e.g., country, regulator, registration category, date of registration). Provide the address for legal service of process for each jurisdiction, which cannot be a post office box.

5. Attach as **Exhibit E**, a description of the personnel qualifications for each category of professional employees employed by the Applicant or the division, subdivision, or other separate entity within the Applicant as described in Item 4.

6. Attach as **Exhibit F**, an analysis of staffing requirements necessary to carry out operations of the Applicant as a designated contract market and the name and qualifications of each key staff person.

7. Attach as **Exhibit G**, a copy of the constitution, articles of incorporation, formation or association with all amendments thereto, partnership or limited liability agreements, and existing by-laws, operating agreement, rules or instruments corresponding thereto, of the Applicant. Include any additional governance fitness information not included in Exhibit C. Provide a certificate of good standing dated within one week of the date of this Form DCM.

8. Attach as **Exhibit H,** a brief description of any material pending legal proceeding(s), other than ordinary and routine litigation incidental to the business, to which the Applicant or any of its affiliates is a party or to which any of its or their property is the subject. Include the name of the court or agency where the proceeding(s) are pending, the date(s) instituted, the principal parties involved, a description of the factual basis alleged to underlie the proceeding(s), and the relief sought. Include similar information as to any proceeding(s) known to be contemplated by the governmental agencies.

EXHIBITS — FINANCIAL INFORMATION

9. Attach as **Exhibit I:**
   1. (i) Balance sheet, (ii) Statement of income and expenses, (iii) Statement of cash flows, and (iv) Statement of sources and application of revenues and all notes or schedules thereto, as of the most recent fiscal year of the Applicant, or of its parent company, if applicable. If a balance sheet and any statement(s) certified by an independent public accountant are available, that balance sheet and statement(s) should be submitted as Exhibit I.

   2. Provide a narrative of how the value of the financial resources of the Applicant is at least equal to a total amount that would enable the Applicant to cover its operating costs for a period of at least one year, calculated on a rolling basis, and whether such financial resources include unencumbered, liquid financial assets (i.e. cash and/or highly liquid securities) equal to at least six months' operating costs.

   3. Attach copies of any agreements establishing or amending a credit facility, insurance coverage, or other arrangement evidencing or otherwise supporting the Applicant's conclusions regarding the liquidity of its financial assets.

   4. Representations regarding sources and estimates for future ongoing operational resources.

10. Attach as **Exhibit J,** a balance sheet and an income and expense statement for each affiliate of the designated contract market that also engages in designated contract market activities as of the end of the most recent fiscal year of each such affiliate, and each affiliate of the designated contract market that engages in swap execution facility activities.

11. Attach as **Exhibit K,** the following:

1. A complete list of all dues, fees and other charges imposed, or to be imposed, by or on behalf of Applicant for its designated contract market services that are provided on an exclusive basis and identify the service or services provided for each such due, fee, or other charge.

2. A description of the basis and methods used in determining the level and structure of the dues, fees and other charges listed in paragraph (a) of this item.

3. If the Applicant differentiates, or proposes to differentiate, among its customers, or classes of customers in the amount of any dues, fees, or other charges imposed for the same or similar exclusive services, so state and indicate the amount of each differential. In addition, identify and describe any differences in the cost of providing such services, and any other factors, that account for such differentiations.

EXHIBITS — COMPLIANCE

12. Attach as **Exhibit L**, a narrative and any other form of documentation that may be provided under other Exhibits herein that describe the manner in which the Applicant is able to comply with each core principle. Such documentation must include a regulatory compliance chart setting forth each core principle and providing citations to the Applicant's relevant rules, policies, and procedures that address each core principle. To the extent that the application raises issues that are novel, or for which compliance with a core principle is not self-evident, include an explanation of how that item and the application satisfy the core principles. Applicant must include a description of how it meets the definition of "Board of Trade" as defined in §1a(2) of the CEA.

13. Attach as **Exhibit M,** a copy of the Applicant's rules (as defined in § 40.1 of the Commission's regulations) and any technical manuals, other guides or instructions for users of, or participants in, the market, including minimum financial standards for members or market participants. Include rules citing applicable federal position limits and aggregation standards in Part 150 or 151, as applicab le, of the Commission's regulations and any exchange set position limit rules. Include rules on publication of daily trading information with regards to the requirements of Part 16 of the Commission's regulations. The Applicant should include an explanation, and any other forms of documentation the Applicant thinks will be helpful to its explanation, demonstrating how its rules, technical manuals, other guides or instructions for users of, or participants in, the market, or minimum financial standards for members or market participants as provided in this Exhibit M help support the designated contract market's compliance with the core principles.

14. Attach as **Exhibit N**, executed or executable copies of any agreements or contracts entered into or to be entered into by the Applicant, including third party regulatory service provider or member or user agreements that enable or empower the Applicant to comply with applicable core principles. Identify: (1) the services that will be provided; and (2) the core principles addressed by such agreement.

15. Attach as **Exhibit O,** a copy of any compliance manual, and any other documents, that describe with specificity the manner in which the Applicant will conduct trade practice, market and financial surveillance.

16. Attach as **Exhibit P**, a description of the Applicant's disciplinary and enforcement protocols, tools, and procedures and the arrangements for alternative dispute resolution.

17. Attach as **Exhibit Q**, a description of the Applicant's trading system and trade matching algorithm, and examples of how that algorithm works in various trading scenarios involving various types of orders.

18. Attach as **Exhibit R**, a list of rules prohibiting specific trade practice violations.

19. Attach as **Exhibit S**, a discussion of how trading data will be maintained by the designated contract market.

20. Attach as **Exhibit T**, a list of the name of the clearing organization(s) that will be clearing the Applicant's trades, and a representation that clearing members of that organization will be guaranteeing such trades.

21. Attach as **Exhibit U**, any information (described with particularity) included in the application that will be subject to a request for confidential treatment pursuant to § 145.9 of the Commission's regulations.

EXHIBITS –OPERATIONAL CAPABILITY

22. Attach as **Exhibit V**, information responsive to the Technology Questionnaire (link). This questionnaire focuses on information pertaining to the Applicant's program of risk analysis and oversight. Main topic areas include: information security; business continuity-disaster recovery planning and resources; capacity and performance planning; systems operations; systems development and quality assurance; and physical security and environmental controls.

BILLING CODE 6351–01–C

■ 19. Revise appendix B to part 38 to read as follows:

Appendix B to Part 38—Guidance on, and Acceptable Practices in, Compliance With Core Principles

1. This appendix provides guidance on complying with core principles, both initially and on an ongoing basis, to obtain and maintain designation under section 5(d) of the Act and this part 38. Where provided, guidance is set forth in paragraph (a) following the relevant heading and can be used to demonstrate to the Commission compliance with the selected requirements of a core principle, under §§ 38.3 and 38.5 of this part. The guidance for the core principle is illustrative only of the types of matters a designated contract market may address, as applicable, and is not intended to be used as a mandatory checklist. Addressing the issues set forth in this appendix would help the Commission in its consideration of whether the designated contract market is in compliance with the selected requirements of a core principle; provided however, that the guidance is not intended to diminish or replace, in any event, the obligations and requirements of applicants and designated contract markets to comply with the regulations provided under this part.

2. Where provided, acceptable practices meeting selected requirements of core principles are set forth in paragraph (b) following guidance. Designated contract markets that follow specific practices outlined in the acceptable practices for a core principle in this appendix will meet the selected requirements of the applicable core principle; provided however, that the acceptable practice is not intended to diminish or replace, in any event, the obligations and requirements of applicants and designated contract markets to comply with the regulations provided under this part 38. The acceptable practices are for illustrative purposes only and do not state the exclusive means for satisfying a core principle.

Core Principle 1 of section 5(d) of the Act: DESIGNATION AS CONTRACT MARKET.—(A) IN GENERAL.—To be designated, and maintain a designation, as a contract market, a board of trade shall comply with—

(i) Any core principle described in this subsection; and

(ii) Any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5).

(B) REASONABLE DISCRETION OF CONTRACT MARKET.—Unless otherwise determined by the Commission by rule or regulation, a board of trade described in subparagraph (A) shall have reasonable discretion in establishing the manner in which the board of trade complies with the core principles described in this subsection.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 2 of section 5(d) of the Act: COMPLIANCE WITH RULES—(A) IN GENERAL.—The board of trade shall establish, monitor, and enforce compliance with the rules of the contract market, including—

(i) Access requirements;

(ii) The terms and conditions of any contracts to be traded on the contract market; and

(iii) Rules prohibiting abusive trade practices on the contract market.

(B) CAPACITY OF CONTRACT MARKET.—The board of trade shall have the capacity to detect, investigate, and apply appropriate sanctions to any person that violates any rule of the contract market.

(C) REQUIREMENT OF RULES.—The rules of the contract market shall provide the board of trade with the ability and authority to obtain any necessary information to perform any function described in this subsection, including the capacity to carry out such international information-sharing agreements as the Commission may require.

(a) *Guidance.* (1) *Investigations and investigation reports—Warning letters.* The rules of a designated contract market may authorize compliance staff to issue a warning letter to a person or entity under investigation or to recommend that a disciplinary panel take such an action.

(2) *Additional rules required.* A designated contract market should adopt and enforce any additional rules that it believes are necessary to comply with the requirements of subpart C of this chapter

(b) *Acceptable Practices.* [Reserved.]

Core Principle 3 of section 5(d) of the Act: CONTRACTS NOT READILY SUBJECT TO MANIPULATION.—The board of trade shall list on the contract market only contracts that are not readily susceptible to manipulation.

(a) *Guidance.* (1) Designated contract markets may list new products for trading by self-certification under § 40.2 of this chapter or may submit products for Commission approval under § 40.3 of this chapter.

(2) Guidance in appendix C to this part may be used as guidance in meeting this core principle for both new products listings and existing listed contracts.

(b) *Acceptable Practices.* [Reserved.]

Core Principle 4 of section 5(d) of the Act: PREVENTION OF MARKET DISRUPTION.—The board of trade shall have the capacity and responsibility to prevent manipulation, price distortion, and disruptions of the delivery or cash-settlement process through market surveillance, compliance, and enforcement practices and procedures, including—

(A) Methods for conducting real-time monitoring of trading; and

(B) Comprehensive and accurate trade reconstructions.

(a) *Guidance.* The detection and prevention of market manipulation, disruptions, and distortions should be incorporated into the design of programs for monitoring trading activity. Monitoring of intraday trading should include the capacity to detect developing market anomalies, including abnormal price movements and unusual trading volumes, and position-limit violations. The designated contract market should have rules in place that allow it broad powers to intervene to prevent or reduce market disruptions. Once a threatened or actual disruption is detected, the designated contract market should take steps to prevent the disruption or reduce its severity.

(2) *Additional rules required.* A designated contract market should adopt and enforce any additional rules that it believes are necessary to comply with the requirements of subpart E of this part.

(b) *Acceptable Practices.* (1) *General Requirements.* Real-time monitoring for market anomalies and position-limit violations are the most effective, but the designated contract market may also demonstrate that it has an acceptable program if some of the monitoring is accomplished on a T+1 basis. An acceptable

program must include automated trading alerts to detect market anomalies and position-limit violations as they develop and before market disruptions occur or become more serious. In some cases, a designated contract market may demonstrate that its manual processes are effective.

(2) *Physical-delivery contracts.* For physical-delivery contracts, the designated contract market must demonstrate that it is monitoring the adequacy and availability of the deliverable supply, which, if such information is available, includes the size and ownership of those supplies and whether such supplies are likely to be available to short traders and saleable by long traders at the market value of those supplies under normal cash marketing conditions. Further, for physical-delivery contracts, the designated contract market must continually monitor the appropriateness of a contract's terms and conditions, including the delivery instrument, the delivery locations and location differentials, and the commodity characteristics and related differentials. The designated contract market must demonstrate that it is making a good-faith effort to resolve conditions that are interfering with convergence of its physical-delivery contract to the price of the underlying commodity or causing price distortions or market disruptions, including, when appropriate, changes to contract terms.

(3) *Cash-settled contracts.* At a minimum, an acceptable program for monitoring cash-settled contracts must include access, either directly or through an information-sharing agreement, to traders' positions and transactions in the reference market for traders of a significant size in the designated contract market near the settlement of the contract.

(4) *Ability to obtain information.* With respect to the designated contract market's ability to obtain information, a designated contract market may limit the application of the requirement to keep and provide such records only to those that are reportable under its large-trader reporting system or otherwise hold substantial positions.

(5) *Risk controls for trading.* An acceptable program for preventing market disruptions must demonstrate appropriate trade risk controls, in addition to pauses and halts. Such controls must be adapted to the unique characteristics of the markets to which they apply and must be designed to avoid market disruptions without unduly interfering with that market's price discovery function. The designated contract market may choose from among controls that include: pre-trade limits on order size, price collars or bands around the current price, message throttles, and daily price limits, or design other types of controls. Within the specific array of controls that are selected, the designated contract market also must set the parameters for those controls, so long as the types of controls and their specific parameters are reasonably likely to serve the purpose of preventing market disruptions and price distortions. If a contract is linked to, or is a substitute for, other contracts, either listed on its market or on other trading venues, the designated contract market must, to the extent practicable, coordinate its risk controls with any similar controls placed on those other contracts. If a contract is based on the price of an equity security or the level of an equity index, such risk controls must, to the extent practicable, be coordinated with any similar controls placed on national security exchanges.

Core Principle 5 of section 5(d) of the Act: POSITION LIMITATIONS OR ACCOUNTABILITY—(A) IN GENERAL.—To reduce the potential threat of market manipulation or congestion (especially during trading in the delivery month), the board of trade shall adopt for each contract of the board of trade, as is necessary and appropriate, position limitations or position accountability for speculators.

(B) MAXIMUM ALLOWABLE POSITION LIMITATION.—For any contract that is subject to a position limitation established by the Commission pursuant to section 4a(a), the board of trade shall set the position limitation of the board of trade at a level not higher than the position limitation established by the Commission.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 6 of section 5(d) of the Act: EMERGENCY AUTHORITY—The board of trade, in consultation or cooperation with the Commission, shall adopt rules to provide for the exercise of emergency authority, as is necessary and appropriate, including the authority—

(A) To liquidate or transfer open positions in any contract;

(B) To suspend or curtail trading in any contract; and

(C) To require market participants in any contract to meet special margin requirements.

(a) *Guidance.* In consultation and cooperation with the Commission, a designated contract market should have the authority to intervene as necessary to maintain markets with fair and orderly trading and to prevent or address manipulation or disruptive trading practices, whether the need for intervention arises exclusively from the DCM's market or as part of a coordinated, cross-market intervention. DCM rules should include procedures and guidelines to avoid conflicts of interest in accordance with the provisions of § 40.9 of this chapter, and include alternate lines of communication and approval procedures to address emergencies associated with real-time events. To address perceived market threats, the designated contract market should have rules that allow it to take certain actions in the event of an emergency, as defined in § 40.1(h) of this chapter, including: imposing or modifying position limits, price limits, and intraday market restrictions; imposing special margin requirements; ordering the liquidation or transfer of open positions in any contract; ordering the fixing of a settlement price; extending or shortening the expiration date or the trading hours; suspending or curtailing trading in any contract; transferring customer contracts and the margin or altering any contract's settlement terms or conditions; and, where applicable, providing for the carrying out of such actions through its agreements with its third-party provider of clearing or regulatory services. In situations where a contract is fungible with a contract on another platform, emergency action to liquidate or transfer open interest must be as directed, or agreed to, by the Commission or the Commission's staff. The DCM has the authority to independently respond to emergencies in an effective and timely manner consistent with the nature of the emergency, as long as all such actions taken by the DCM are made in good faith to protect the integrity of the markets. The Commission should be notified promptly of the DCM's exercise of emergency action, explaining how conflicts of interest were minimized, including the extent to which the DCM considered the effect of its emergency action on the underlying markets and on markets that are linked or referenced to the contract market and similar markets on other trading venues. Information on all regulatory actions carried out pursuant to a DCM's emergency authority should be included in a timely submission of a certified rule pursuant to part 40 of this chapter.

(b) *Acceptable Practices.* A designated contract market must have procedures and guidelines for decision-making and implementation of emergency intervention in the market. At a minimum, the DCM must have the authority to liquidate or transfer open positions in the market, suspend or curtail trading in any contract, and require market participants in any contract to meet special margin requirements. In situations where a contract is fungible with a contract on another platform, emergency action to liquidate or transfer open interest must be directed, or agreed to, by the Commission or the Commission's staff. The DCM must promptly notify the Commission of the exercise of its emergency authority, documenting its decision-making process, including how conflicts of interest were minimized, and the reasons for using its emergency authority. The DCM must also have rules that allow it to take such market actions as may be directed by the Commission.

Core Principle 7 of section 5(d) of the Act: AVAILABILITY OF GENERAL INFORMATION.—The board of trade shall make available to market authorities, market participants, and the public accurate information concerning—

(A) The terms and conditions of the contracts of the contract market; and

(B)(i) The rules, regulations, and mechanisms for executing transactions on or through the facilities of the contract market; and

(ii) The rules and specifications describing the operation of the contract market's—

(I) Electronic matching platform; or

(II) Trade execution facility.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 8 of section 5(d) of the Act: DAILY PUBLICATION OF TRADING INFORMATION.—The board of trade shall make public daily information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts on the contract market.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 9 of section 5(d) of the Act: EXECUTION OF TRANSACTIONS.—''(A) IN

GENERAL.—The board of trade shall provide a competitive, open, and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade.

(B) RULES.—The rules of the board of trade may authorize, for bona fide business purposes—

(i) Transfer trades or office trades;

(ii) An exchange of—

(I) Futures in connection with a cash commodity transaction;

(II) Futures for cash commodities; or

(III) Futures for swaps; or

(iii) A futures commission merchant, acting as principal or agent, to enter into or confirm the execution of a contract for the purchase or sale of a commodity for future delivery if the contract is reported, recorded, or cleared in accordance with the rules of the contract market or a derivatives clearing organization.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

Core Principle 10 of section 5(d) of the Act: TRADE INFORMATION.—The board of trade shall maintain rules and procedures to provide for the recording and safe storage of all identifying trade information in a manner that enables the contract market to use the information—

(A) To assist in the prevention of customer and market abuses; and

(B) To provide evidence of any violations of the rules of the contract market.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 11 of section 5(d) of the Act: FINANCIAL INTEGRITY OF TRANSACTIONS.—The board of trade shall establish and enforce—

(A) Rules and procedures for ensuring the financial integrity of transactions entered into on or through the facilities of the contract market (including the clearance and settlement of the transactions with a derivatives clearing organization); and

(B) Rules to ensure—

(i) The financial integrity of any—

(I) Futures commission merchant; and

(II) Introducing broker; and

(ii) The protection of customer funds.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 12 of section 5(d) of the Act: PROTECTION OF MARKETS AND MARKET PARTICIPANTS—The board of trade shall establish and enforce rules—

(A) To protect markets and market participants from abusive practices committed by any party, including abusive practices committed by a party acting as an agent for a participant; and

(B) To promote fair and equitable trading on the contract market.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 13 of section 5(d) of the Act: DISCIPLINARY PROCEDURES.—The board of trade shall establish and enforce disciplinary procedures that authorize the board of trade to discipline, suspend, or expel members or market participants that violate the rules of the board of trade, or similar methods for performing the same functions, including delegation of the functions to third parties.

(a) *Guidance.* (1) *Notice of charges.* If the rules of the designated contract market so provide, a notice may also advise: (i) That failure to request a hearing within the period prescribed in the notice, except for good cause, may be deemed a waiver of the right to a hearing; and (ii) That failure to answer or to deny expressly a charge may be deemed to be an admission of such charge.

(2) *Admission or failure to deny charges.* The rules of a designated contract market may provide that if a respondent admits or fails to deny any of the charges, a disciplinary panel may find that the violations alleged in the notice of charges for which the respondent admitted or failed to deny any of the charges have been committed. If the designated contract market's rules so provide, then:

(i) The disciplinary panel should impose a sanction for each violation found to have been committed;

(ii) The disciplinary panel should promptly notify the respondent in writing of any sanction to be imposed pursuant to paragraph (2)(i) of this section and shall advise the respondent that it may request a hearing on such sanction within the period of time, which shall be stated in the notice;

(iii) The rules of a designated contract market may provide that if a respondent fails to request a hearing within the period of time stated in the notice, the respondent will be deemed to have accepted the sanction.

(3) *Settlement offers.* (i) The rules of a designated contract market may permit a respondent to submit a written offer of settlement at any time after an investigation report is completed. The disciplinary panel presiding over the matter may accept the offer of settlement, but may not alter the terms of a settlement offer unless the respondent agrees.

(ii) The rules of a designated contract market may provide that, in its discretion, a disciplinary panel may permit the respondent to accept a sanction without either admitting or denying the rule violations upon which the sanction is based.

(iii) If an offer of settlement is accepted, the panel accepting the offer should issue a written decision specifying the rule violations it has reason to believe were committed, including the basis or reasons for the panel's conclusions, and any sanction to be imposed, which should include full customer restitution where customer harm is demonstrated, except where the amount of restitution and to whom it should be provided cannot be reasonably determined. If an offer of settlement is accepted without the agreement of the enforcement staff, the decision should adequately support the disciplinary panel's acceptance of the settlement. Where applicable, the decision should also include a statement that the respondent has accepted the sanctions imposed without either admitting or denying the rule violations.

(iv) The respondent may withdraw his or her offer of settlement at any time before final acceptance by a disciplinary panel. If an offer is withdrawn after submission, or is rejected by a disciplinary panel, the respondent should not be deemed to have made any admissions by reason of the offer of settlement and should not be otherwise prejudiced by having submitted the offer of settlement.

(4) *Hearings.* The rules of a designated contract market may provide that a sanction may be summarily imposed upon any person within its jurisdiction whose actions impede the progress of a hearing.

(5) *Right to appeal.* The rules of a designated contract market may permit the parties to a proceeding to appeal promptly an adverse decision of a disciplinary panel in all or in certain classes of cases. Such rules may require a party's notice of appeal to be in writing and to specify the findings, conclusions, or sanctions to which objection are taken. If the rules of a designated contract market permit appeals, then both the respondent and the enforcement staff should have the opportunity to appeal and the designated contract market should provide for the following:

(i) The designated contract market should establish an appellate panel that should be authorized to hear appeals of respondents. In addition, the rules of a designated contract market may provide that the appellate panel may, on its own initiative, order review of a decision by a disciplinary panel within a reasonable period of time after the decision has been rendered.

(ii) The composition of the appellate panel should be consistent with the requirements set forth in part 40 of this chapter and paragraph (4) of the acceptable practices for Core Principle 16, and should not include any members of the designated contract market's compliance staff, or any person involved in adjudicating any other stage of the same proceeding. The rules of a designated contract market should provide for the appeal proceeding to be conducted before all of the members of the appellate panel or a panel thereof.

(iii) Except for good cause shown, the appeal or review should be conducted solely on the record before the disciplinary panel, the written exceptions filed by the parties, and the oral or written arguments of the parties.

(iv) Promptly following the appeal or review proceeding, the appellate panel should issue a written decision and should provide a copy to the respondent. The decision issued by the appellate panel should adhere to all the requirements of § 38.708 of this part, to the extent that a different conclusion is reached from that issued by the disciplinary panel.

(6) *Summary fines for violations of rules regarding timely submission of records, decorum, or other similar activities.* A designated contract market may adopt a summary fine schedule for violations of rules relating to the timely submission of accurate records required for clearing or verifying each day's transactions, decorum, attire, or other similar activities. A designated contract market may permit its compliance staff, or a designated panel of contract market officials, to summarily impose minor sanctions against persons within the designated contract market's jurisdiction for violating such rules. A designated contract market's summary fine schedule may allow for warning letters to be issued for first-time violations or violators. If

adopted, a summary fine schedule should provide for progressively larger fines for recurring violations.

(7) *Emergency disciplinary actions.* (i) A designated contract market may impose a sanction, including suspension, or take other summary action against a person or entity subject to its jurisdiction upon a reasonable belief that such immediate action is necessary to protect the best interest of the marketplace.

(ii) Any emergency disciplinary action should be taken in accordance with a designated contract market's procedures that provide for the following:

(A) If practicable, a respondent should be served with a notice before the action is taken, or otherwise at the earliest possible opportunity. The notice should state the action, briefly state the reasons for the action, and state the effective time and date, and the duration of the action.

(B) The respondent should have the right to be represented by legal counsel or any other representative of its choosing in all proceedings subsequent to the emergency action taken. The respondent should be given the opportunity for a hearing as soon as reasonably practicable and the hearing should be conducted before the disciplinary panel pursuant to the requirements of § 38.707 of this part.

(C) Promptly following the hearing provided for in this rule, the designated contract market should render a written decision based upon the weight of the evidence contained in the record of the proceeding and should provide a copy to the respondent. The decision should include a description of the summary action taken; the reasons for the summary action; a summary of the evidence produced at the hearing; a statement of findings and conclusions; a determination that the summary action should be affirmed, modified, or reversed; and a declaration of any action to be taken pursuant to the determination, and the effective date and duration of such action.

(b) *Acceptable Practices.* [Reserved.]

Core Principle 14 of section 5(d) of the Act: DISPUTE RESOLUTION.—The board of trade shall establish and enforce rules regarding, and provide facilities for alternative dispute resolution as appropriate for, market participants and any market intermediaries.

(a) *Guidance.* A designated contract market should provide customer dispute resolution procedures that are: appropriate to the nature of the market; fair and equitable; and available on a voluntary basis, either directly or through another self-regulatory organization, to customers that are non-eligible contract participants.

(b) *Acceptable Practices.*

(1) *Fair and equitable procedure.* Every contract market shall provide customer dispute resolution procedures that are fair and equitable. An acceptable customer dispute resolution mechanism would:

(i) Provide the customer with an opportunity to have his or her claim decided by an objective and impartial decisionmaker;

(ii) Provide each party with the right to be represented by counsel at the commencement of the procedure, at the party's own expense;

(iii) Provide each party with adequate notice of the claims presented against such party, an opportunity to be heard on all claims, defenses and permitted counterclaims, and an opportunity for a prompt hearing;

(iv) Authorize prompt, written, final settlement awards that are not subject to appeal within the designated contract market; and

(v) Notify the parties of the fees and costs that may be assessed.

(2) *Voluntary Procedures.* The use of dispute settlement procedures shall be voluntary for customers other than eligible contract participants as defined in section 1a(18) of the Dodd-Frank Act, and may permit counterclaims as provided in § 166.5 of this chapter.

(3) *Member-to-Member Procedures.* If the designated contract market also provides procedures for the resolution of disputes that do not involve customers (i.e., member-to-member disputes), the procedures for resolving such disputes must be independent of and shall not interfere with or delay the resolution of customers' claims or grievances.

(4) *Delegation.* A designated contract market may delegate to another self-regulatory organization or to a registered futures association its responsibility to provide for customer dispute resolution mechanisms, provided, however, that in the event of such delegation, the designated contract market shall in all respects treat any decision issued by such other organization or association with respect to such dispute as if the decision were its own, including providing for the appropriate enforcement of any award issued against a delinquent member.

Core Principle 15 of section 5(d) of the Act: GOVERNANCE FITNESS STANDARDS.—The board of trade shall establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, members of the contract market, and any other person with direct access to the facility (including any party affiliated with any person described in this paragraph).

(a) *Guidance.* (1) A designated contract market should have appropriate eligibility criteria for the categories of persons set forth in the Core Principle that should include standards for fitness and for the collection and verification of information supporting compliance with such standards. Minimum standards of fitness for persons who have member voting privileges, governing obligations or responsibilities, or who exercise disciplinary authority are those bases for refusal to register a person under section 8a(2) of the Act. In addition, persons who have governing obligations or responsibilities, or who exercise disciplinary authority, should not have a significant history of serious disciplinary offenses, such as those that would be disqualifying under § 1.63 of this chapter. Members with trading privileges but having no, or only nominal, equity, in the facility and non-member market participants who are not intermediated and do not have these privileges, obligations, responsibilities or disciplinary authority could satisfy minimum fitness standards by meeting the standards that they must meet to qualify as a ''market participant.'' Natural persons who directly or indirectly have greater than a ten percent ownership interest in a designated contract market should meet the fitness standards applicable to members with voting rights.

(2) The Commission believes that such standards should include providing the Commission with fitness information for such persons, whether registration information, certification to the fitness of such persons, an affidavit of such persons' fitness by the contract market's counsel or other information substantiating the fitness of such persons. If a contract market provides certification of the fitness of such a person, the Commission believes that such certification should be based on verified information that the person is fit to be in his or her position.

(b) *Applicable Practices.* [Reserved.]

Core Principle 16 of section 5(d) of the Act: CONFLICTS OF INTEREST.—The board of trade shall establish and enforce rules—

(A) to minimize conflicts of interest in the decisionmaking process of the contract market; and

(B) to establish a process for resolving conflicts of interest described in subparagraph (A).

(a) *Guidance.* The means to address conflicts of interest in decisionmaking of a contract market should include methods to ascertain the presence of conflicts of interest and to make decisions in the event of such a conflict. In addition, the Commission believes that the contract market should provide for appropriate limitations on the use or disclosure of material non-public information gained through the performance of official duties by board members, committee members and contract market employees or gained through an ownership interest in the contract market.

(b) *Acceptable Practices.* All designated contract markets (''DCMs'' or ''contract markets'') bear special responsibility to regulate effectively, impartially, and with due consideration of the public interest, as provided for in section 3 of the Act. Under Core Principle 15, they are also required to minimize conflicts of interest in their decisionmaking processes. To comply with this Core Principle, contract markets should be particularly vigilant for such conflicts between and among any of their self-regulatory responsibilities, their commercial interests, and the several interests of their management, members, owners, customers and market participants, other industry participants, and other constituencies. Acceptable practices for minimizing conflicts of interest shall include the following elements:

(1) Board composition for contract markets

(i) At least thirty-five percent of the directors on a contract market's board of directors shall be public directors; and

(ii) The executive committees (or similarly empowered bodies) shall be at least thirty-five percent public.

(2) Public director

(i) To qualify as a public director of a contract market, an individual must first be found, by the board of directors, on the record, to have no material relationship with the contract market. A ''material relationship'' is one that reasonably could

affect the independent judgment or decisionmaking of the director.

(ii) In addition, a director shall be considered to have a ''material relationship'' with the contract market if any of the following circumstances exist:

(A) The director is an officer or employee of the contract market or an officer or employee of its affiliate. In this context, ''affiliate'' includes parents or subsidiaries of the contract market or entities that share a common parent with the contract market;

(B) The director is a member of the contract market, or an officer or director of a member. ''Member'' is defined according to section 1a(34) of the Commodity Exchange Act and Commission Regulation 1.3(q);

(C) The director, or a firm with which the director is an officer, director, or partner, receives more than $100,000 in combined annual payments from the contract market, or any affiliate of the contract market (as defined in subsection (2)(ii)(A)), for legal, accounting, or consulting services. Compensation for services as a director of the contract market or as a director of an affiliate of the contract market does not count toward the $100,000 payment limit, nor does deferred compensation for services prior to becoming a director, so long as such compensation is in no way contingent, conditioned, or revocable;

(D) Any of the relationships above apply to a member of the director's ''immediate family,'' i.e., spouse, parents, children and siblings.

(iii) All of the disqualifying circumstances described in subsection (2)(ii) shall be subject to a one-year look back.

(iv) A contract market's public directors may also serve as directors of the contract market's affiliate (as defined in subsection (2)(ii)(A)) if they otherwise meet the definition of public director in this section (2).

(v) A contract market shall disclose to the Commission which members of its board are public directors, and the basis for those determinations.

(3) Regulatory oversight committee

(i) A board of directors of any contract market shall establish a Regulatory Oversight Committee (''ROC'') as a standing committee, consisting of only public directors as defined in section (2), to assist it in minimizing actual and potential conflicts of interest. The ROC shall oversee the contract market's regulatory program on behalf of the board. The board shall delegate sufficient authority, dedicate sufficient resources, and allow sufficient time for the ROC to fulfill its mandate.

(ii) The ROC shall:

(A) Monitor the contract market's regulatory program for sufficiency, effectiveness, and independence;

(B) Oversee all facets of the program, including trade practice and market surveillance; audits, examinations, and other regulatory responsibilities with respect to member firms (including ensuring compliance with financial integrity, financial reporting, sales practice, recordkeeping, and other requirements); and the conduct of investigations;

(C) Review the size and allocation of the regulatory budget and resources; and the number, hiring and termination, and compensation of regulatory personnel;

(D) Supervise the contract market's chief regulatory officer, who will report directly to the ROC;

(E) Prepare an annual report assessing the contract market's self-regulatory program for the board of directors and the Commission, which sets forth the regulatory program's expenses, describes its staffing and structure, catalogues disciplinary actions taken during the year, and reviews the performance of disciplinary committees and panels;

(F) Recommend changes that would ensure fair, vigorous, and effective regulation; and

(G) Review regulatory proposals and advise the board as to whether and how such changes may impact regulation.

(4) Disciplinary panels

All contract markets shall minimize conflicts of interest in their disciplinary processes through disciplinary panel composition rules that preclude any group or class of industry participants from dominating or exercising disproportionate influence on such panels. Contract markets can further minimize conflicts of interest by including in all disciplinary panels at least one person who would qualify as a public director, as defined in subsections (2)(ii) and (2)(iii) above, except in cases limited to decorum, attire, or the timely submission of accurate records required for clearing or verifying each day's transactions. If contract market rules provide for appeal to the board of directors, or to a committee of the board, then that appellate body shall also include at least one person who would qualify as a public director as defined in subsections (2)(ii) and (2)(iii) above.

Core Principle 17 of section 5(d) of the Act: COMPOSITION OF GOVERNING BOARDS OF CONTRACT MARKETS.—The governance arrangements of the board of trade shall be designed to permit consideration of the views of market participants.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 18 of section 5(d) of the Act: RECORDKEEPING.—The board of trade shall maintain records of all activities relating to the business of the contract market—

(A) In a form and manner that is acceptable to the Commission; and

(B) For a period of at least 5 years.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 19 of section 5(d) of the Act: ANTITRUST CONSIDERATIONS.—Unless necessary or appropriate to achieve the purposes of this Act, the board of trade shall not—

(A) Adopt any rule or taking any action that results in any unreasonable restraint of trade; or

(B) Impose any material anticompetitive burden on trading on the contract market.

(a) *Guidance.* An entity seeking designation as a contract market may request that the Commission consider under the provisions of section 15(b) of the Act, any of the entity's rules, including trading protocols or policies, and including both operational rules and the terms or conditions of products listed for trading, at the time of designation or thereafter. The Commission intends to apply section 15(b) of the Act to its consideration of issues under this core principle in a manner consistent with that previously applied to contract markets.

(b) *Acceptable Practices.* [Reserved.]

Core Principle 20 of section 5(d) of the Act: SYSTEM SAFEGUARDS.—The board of trade shall—

(A) Establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and the development of automated systems, that are reliable, secure, and have adequate scalable capacity;

(B) Establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for the timely recovery and resumption of operations and the fulfillment of the responsibilities and obligations of the board of trade; and

(C) Periodically conduct tests to verify that backup resources are sufficient to ensure continued order processing and trade matching, price reporting, market surveillance, and maintenance of a comprehensive and accurate audit trail.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 21 of section 5(d) of the Act: FINANCIAL RESOURCES.—

(A) IN GENERAL.—The board of trade shall have adequate financial, operational, and managerial resources to discharge each responsibility of the board of trade.

(B) DETERMINATION OF ADEQUACY.—The financial resources of the board of trade shall be considered to be adequate if the value of the financial resources exceeds the total amount that would enable the contract market to cover the operating costs of the contract market for a 1-year period, as calculated on a rolling basis.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 22 of section 5(d) of the Act: DIVERSITY OF BOARD OF DIRECTORS.—The board of trade, if a publicly traded company, shall endeavor to recruit individuals to serve on the board of directors and the other decision-making bodies (as determined by the Commission) of the board of trade from among, and to have the composition of the bodies reflect, a broad and culturally diverse pool of qualified candidates.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 23 of section 5(d) of the Act: SECURITIES AND EXCHANGE COMMISSION.—The board of trade shall keep any such records relating to swaps defined in section 1a(47)(A)(v) open to inspection and examination by the Securities and Exchange Commission.

(a) *Guidance.* A designated contract market should have arrangements and resources for collecting and maintaining accurate records pertaining to any swaps agreements defined in section 1a(47)(A)(v) of the Act, and should leave them open to inspection and examination for a period of five years.

(b) *Acceptable Practices.* [Reserved.]

Appendix C—Demonstration of Compliance That a Contract Is Not Readily Susceptible to Manipulation

(a) *Futures Contracts—General Information.* When a designated contract market certifies or submits for approval contract terms and conditions for a new futures contract, that submission should include the following information:

(1) A narrative describing the contract, including data and information to support the contract's terms and conditions, as set by the designated contract market. When designing a futures contract, the designated contract market should conduct market research so that the contract design meets the risk management needs of prospective users and promotes price discovery of the underlying commodity. The designated contract market should consult with market users to obtain their views and opinions during the contract design process to ensure the contract's term and conditions reflect the underlying cash market and that the futures contract will perform the intended risk management and/or price discovery functions. A designated contract market should provide a statement indicating that it took such steps to ensure the usefulness of the submitted contract.

(2) A detailed cash market description for physical and cash-settled contracts. Such descriptions should be based on government and/or other publicly-available data whenever possible and be formulated for both the national and regional/local market relevant to the underlying commodity. For tangible commodities, the cash market descriptions for the relevant market (i.e., national and regional/local) should incorporate at least three full years of data that may include, among other factors, production, consumption, stocks, imports, exports, and prices. Each of those cash market variables should be fully defined and the data sources should be fully specified and documented to permit Commission staff to replicate the estimates of deliverable supply (defined in paragraph (b)(1)(A) of this appendix C). Whenever possible, the Commission requests that monthly or daily prices (depending on the contract) underlying the cash settlement index be submitted for the most recent three full calendar years and for as many of the current year's months for which data are available. For contracts that are cash settled to an index, the index's methodology should be provided along with supporting information showing how the index is reflective of the underlying cash market, is not readily subject to manipulation or distortion, and is based on a cash price series that is reliable, acceptable, publicly available and timely (defined in paragraphs (c)(2) and (c)(3) of this appendix C). The Commission recognizes that the data necessary for accurate and cogent cash market analyses for an underlying commodity vary with the nature of the underlying commodity. The Commission may require that the designated contract market submit a detailed report on commodity definitions and uses.

(b) *Futures Contracts Settled by Physical Delivery.* (1) For listed contracts that are settled by physical delivery, the terms and conditions of the contract should conform to the most common commercial practices and conditions in the cash market for the commodity underlying the futures contract. The terms and conditions should be designed to avoid any impediments to the delivery of the commodity so as to promote convergence between the price of the futures contract and the cash market value of the commodity at the expiration of a futures contract.

(i) Estimating Deliverable Supplies.

(A) *General definition.* The specified terms and conditions, considered as a whole, should result in a ''deliverable supply'' that is sufficient to ensure that the contract is not susceptible to price manipulation or distortion. In general, the term ''deliverable supply'' means the quantity of the commodity meeting the contract's delivery specifications that reasonably can be expected to be readily available to short traders and salable by long traders at its market value in normal cash marketing channels at the contract's delivery points during the specified delivery period, barring abnormal movement in interstate commerce. Typically, deliverable supply reflects the quantity of the commodity that potentially could be made available for sale on a spot basis at current prices at the contract's delivery points. For a non-financial physical-delivery commodity contract, this estimate might represent product which is in storage at the delivery point(s) specified in the futures contract or can be moved economically into or through such points consistent with the delivery procedures set forth in the contract and which is available for sale on a spot basis within the marketing channels that normally are tributary to the delivery point(s). Furthermore, an estimate of deliverable supply would not include supply that is committed for long-term agreements (i.e., the amount of deliverable supply that would not be available to fulfill the delivery obligations arising from current trading). The size of commodity supplies that are committed to long-term agreements may be estimated by consulting with market participants. However, if the estimated deliverable supply that is committed for long-term agreements, or significant portion thereof, can be demonstrated by the designated contract market to be consistently and regularly made available to the spot market for shorts to acquire at prevailing economic values, then those ''available'' supplies committed for long-term contracts may be included in the designated contract market's estimate of deliverable supply for that commodity. An adequate measure of deliverable supply would be an amount of the commodity that would meet the normal or expected range of delivery demand without causing futures prices to become distorted relative to cash market prices. Given the availability of acceptable data, deliverable supply should be estimated on a monthly basis for at least the most recent three years for which data are available. To the extent possible and that data resources permit, deliverable supply estimates should be constructed such that the data reflect, as close as possible, the market defined by the contract's terms and conditions, and should be formulated, whenever possible, with government or publicly available data. All deliverable supply estimates should be fully defined, have all underlying assumptions explicitly stated, and have documentation of all data/information sources in order to permit estimate replication by Commission staff.

(B) *Accounting for variations in deliverable supplies.* To assure the availability of adequate deliverable supplies and acceptable levels of commercial risk management utility, contract terms and conditions should account for variations in the patterns of production, consumption and supply over a period of years of sufficient length to assess adequately the potential range of deliverable supplies. This assessment also should consider seasonality, growth, and market concentration in the production/consumption of the underlying cash commodity. Deliverable supply implications of seasonal effects are more straightforwardly delineated when deliverable supply estimates are calculated on a monthly basis and when such monthly estimates are provided for at least the most recent three years for which data resources permit. In addition, consideration should be given to the relative roles of producers, merchants, and consumers in the production, distribution, and consumption of the cash commodity and whether the underlying commodity exhibits a domestic or international export focus. Careful consideration also should be given to the quality of the cash commodity and to the movement or flow of the cash commodity in normal commercial channels and whether there exist external factors or regulatory controls that could affect the price or supply of the cash commodity.

(C) *Calculation of deliverable supplies.* Designated contract markets should derive a quantitative estimate of the deliverable supplies for the delivery period specified in the proposed contract. For commodities with seasonal supply or demand characteristics, the deliverable supply analysis should include that period when potential supplies typically are at their lowest levels. The estimate should be based on statistical data, when reasonably available, covering a period of time that is representative of the underlying commodity's actual patterns of production, patterns of consumption, and patterns of seasonal effects (if relevant). Often, such a relevant time period should include at least three years of monthly deliverable supply estimates permitted by available data resources. Deliverable supply estimates should also exclude the amount of the commodity that would not be otherwise deliverable on the futures contract. For example, deliverable supplies should exclude quantities that at current price levels are not economically obtainable or deliverable or were previously committed for long-term agreements.

(2) Contract terms and conditions requirements for futures contracts settled by physical delivery.

(i) For physical delivery contracts, an acceptable specification of terms and conditions would include, but may not be limited to, rules that address, as appropriate,

the following criteria and comply with the associated standards:

(A) *Quality Standards.* The terms and conditions of a commodity contract should describe or define all of the economically significant characteristics or attributes of the commodity underlying the contract. In particular, the quality standards should be described or defined so that such standards reflect those used in transactions in the commodity in normal cash marketing channels. Documentation establishing that the quality standards of the contract's underlying commodity comply with those accepted/established by the industry, by government regulations, and/or by relevant laws should also be submitted. For any particular commodity contract, the specific attributes that should be enumerated depend upon the individual characteristics of the underlying commodity. These may include, for example, the following items: grade, quality, purity, weight, class, origin, growth, issuer, originator, maturity window, coupon rate, source, hours of trading, etc. If the terms of the contract provide for the delivery of multiple qualities of a specific attribute of the commodity having different cash market values, then a ''par'' quality should be specified with price differentials applicable to the ''non-par'' qualities that reflect discounts or premiums commonly observed or expected to occur in the cash market for that commodity.

(B) *Delivery Points and Facilities.* Delivery point/area specifications should provide for futures delivery at a single location or at multiple locations where the underlying cash commodity is normally transacted or stored and where there exists a viable cash market(s). If multiple delivery points are specified and the value of the commodity differs between these locations, contract terms should include price differentials that reflect usual differences in value between the different delivery locations. If the price relationships among the delivery points are unstable and a designated contract market chooses to adopt fixed locational price differentials, such differentials should fall within the range of commonly observed or expected commercial price differences. In this regard, any price differentials should be supported with cash price data for the delivery location(s). The terms and conditions of the contracts also should specify, as appropriate, any conditions the delivery facilities and/or delivery facility operators should meet in order to be eligible for delivery. Specification of any requirements for delivery facilities also should consider the extent to which ownership of such facilities is concentrated and whether the level of concentration would be susceptible to manipulation of the futures contract's prices. Commodity contracts also should specify appropriately detailed delivery procedures that describe the responsibilities of deliverers, receivers and any required third parties in carrying out the delivery process. Such responsibilities could include allocation between buyer and seller of all associated costs such as load-out, document preparation, sampling, grading, weighing, storage, taxes, duties, fees, drayage, stevedoring, demurrage, dispatch, etc. Required accreditation for third-parties also should be detailed. These procedures should seek to minimize or eliminate any impediments to making or taking delivery by both deliverers and takers of delivery to help ensure convergence of cash and futures at the expiration of a futures delivery month.

(C) *Delivery Period and Last Trading Day.* An acceptable specification of the delivery period would allow for sufficient time for deliverers to acquire the deliverable commodity and make it available for delivery, considering any restrictions or requirements imposed by the designated contract market. Specification of the last trading day for expiring contracts should consider whether adequate time remains after the last trading day to allow for delivery on the contract.

(D) *Contract Size and Trading Unit.* An acceptable specification of the delivery unit and/or trading unit would be a contract size that is consistent with customary transactions, transportation or storage amounts in the cash market (e.g., the contract size may be reflective of the amount of the commodity that represents a pipeline, truckload or railcar shipment). For purposes of increasing market liquidity, a designated contract market may elect to specify a contract size that is smaller than the typical commercial transaction size, storage unit or transportation size. In such cases, the commodity contract should include procedures that allow futures traders to easily take or make delivery on such a contract with a smaller size, or, alternatively, the designated contract market may adopt special provisions requiring that delivery be made only in multiple contracts to accommodate reselling the commodity in the cash market. If the latter provision is adopted, contract terms should be adopted to minimize the potential for default in the delivery process by ensuring that all contracts remaining open at the close of trading in expiring delivery months can be combined to meet the required delivery unit size. Generally, contract sizes and trading units should be determined after a careful analysis of relevant cash market trading practices, conditions and deliverable supply estimates, so as to ensure that the underlying market commodity market and available supply sources are able to support the contract sizes and trading units at all times.

(E) *Delivery Pack.* The term ''delivery pack'' refers to the packaging standards (e.g., product may be delivered in burlap or polyethylene bags stacked on wooden pallets) or non-quality related standards regarding the composition of commodity within a delivery unit (e.g., product must all be imported from the same country or origin). An acceptable specification of the delivery pack or composition of a contract's delivery unit should reflect, to the extent possible, specifications commonly applied to the commodity traded or transacted in the cash market.

(F) *Delivery Instrument.* An acceptable specification of the delivery instrument (*e.g.,* warehouse receipt, depository certificate or receipt, shipping certificate, bill of lading, in-line transfer, book transfer of securities, etc.) would provide for its conversion into the cash commodity at a commercially-reasonable cost. Transportation terms (*e.g.,* FOB, CIF, freight prepaid to destination) as well as any limits on storage or certificate daily premium fees should be specified. These terms should reflect cash market practices and the customary provision for allocating delivery costs between buyer and seller.

(G) *Inspection Provisions.* Any inspection/certification procedures for verifying compliance with quality requirements or any other related delivery requirements (*e.g.,* discounts relating to the age of the commodity, etc.) should be specified in the contract rules. An acceptable specification of inspection procedures would include the establishment of formal procedures that are consistent with procedures used in the cash market. To the extent that formal inspection procedures are not used in the cash market, an acceptable specification would contain provisions that assure accuracy in assessing the commodity, that are available at a low cost, that do not pose an obstacle to delivery on the contract and that are performed by a reputable, disinterested third party or by qualified designated contract market employees. Inspection terms also should detail which party pays for the service, particularly in light of the possibility of varying inspection results.

(H) *Delivery (Trading) Months.* Delivery months should be established based on the risk management needs of commercial entities as well as the availability of deliverable supplies in the specified months.

(I) *Minimum Price Fluctuation (Minimum Tick).* The minimum price increment (tick) should be set at a level that is equal to, or less than, the minimum price increment commonly observed in cash market transactions for the underlying commodity. Specifying a futures' minimum tick that is greater than the minimum price increment in the cash market can undermine the risk management utility of the futures contract by preventing hedgers from efficiently establishing and liquidating futures positions that are used to hedge anticipated cash market transactions or cash market positions.

(J) *Maximum Price Fluctuation Limits.* Designated contract markets may adopt price limits to: (*1*) Reduce or constrain price movements in a trading day that may not be reflective of true market conditions but might be caused by traders overreacting to news; (*2*) Allow additional time for the collection of margins in times of large price movements; and (*3*) Provide a ''cooling-off'' period for futures market participants to respond to bona fide changes in market supply and demand fundamentals that would lead to large cash and futures price changes. If price limit provisions are adopted, the limits should be set at levels that are not overly restrictive in relation to price movements in the cash market for the commodity underlying the futures contract.

(K) *Speculative Limits.* Specific information regarding the establishment of speculative position limits are set forth in part 150, and/or part 151, as applicable, of the Commission's regulations.

(L) *Reportable Levels.* Refer to § 15.03 of the Commission's regulations.

(M) *Trading Hours.* Should be set by the designated contract market to delineate each trading day.

(c) *Futures Contracts Settled by Cash Settlement.* (1) Cash settlement is a method of settling certain futures or option contracts whereby, at contract expiration, the contract is settled by cash payment in lieu of physical delivery of the commodity or instrument underlying the contract. An acceptable specification of the cash settlement price for commodity futures and option contracts would include rules that fully describe the essential economic characteristics of the underlying commodity (e.g., grade, quality, weight, class, growth, issuer, maturity, source, rating, description of the underlying index and index's calculation methodology, etc.), as well as how the final settlement price is calculated. In addition, the rules should clearly specify the trading months and hours of trading, the last trading day, contract size, minimum price change (tick size) and any limitations on price movements (e.g., price limits or trading halts).

(2) Cash settled contracts may be susceptible to manipulation or price distortion. In evaluating the susceptibility of a cash-settled contract to manipulation, a designated contract market should consider the size and liquidity of the cash market that underlies the listed contract in a manner that follows the determination of deliverable supply as noted above in (b)(1). In particular, situations susceptible to manipulation include those in which the volume of cash market transactions and/or the number of participants contacted in determining the cash-settlement price are very low. Cash-settled contracts may create an incentive to manipulate or artificially influence the data from which the cash-settlement price is derived or to exert undue influence on the cash-settlement price's computation in order to profit on a futures position in that commodity. The utility of a cash-settled contract for risk management and price discovery would be significantly impaired if the cash settlement price is not a reliable or robust indicator of the value of the underlying commodity or instrument. Accordingly, careful consideration should be given to the potential for manipulation or distortion of the cash settlement price, as well as the reliability of that price as an indicator of cash market values. Appropriate consideration also should be given to the commercial acceptability, public availability, and timeliness of the price series that is used to calculate the cash settlement price. Documentation demonstrating that the settlement price index is a reliable indicator of market values and conditions and is commonly used as a reference index by industry/market agents should be provided. Such documentation may take on various forms, including carefully documented interview results with knowledgeable agents.

(3) Where an independent, private-sector third party calculates the cash settlement price series, a designated contract market should consider the need for a licensing agreement that will ensure the designated contract market's rights to the use of the price series to settle the listed contract.

(i) Where an independent, private-sector third party calculates the cash settlement price series, the designated contract market should verify that the third party utilizes business practices that minimize the opportunity or incentive to manipulate the cash-settlement price series. Such safeguards may include lock-downs, prohibitions against derivatives trading by employees, or public dissemination of the names of sources and the price quotes they provide. Because a cash-settled contract may create an incentive to manipulate or artificially influence the underlying market from which the cash-settlement price is derived or to exert undue influence on the cash-settlement computation in order to profit on a futures position in that commodity, a designated contract market should, whenever practicable, enter into an information-sharing agreement with the third-party provider which would enable the designated contract market to better detect and prevent manipulative behavior.

(ii) Where a designated contract market itself generates the cash settlement price series, the designated contract market should establish calculation procedures that safeguard against potential attempts to artificially influence the price. For example, if the cash settlement price is derived by the designated contract market based on a survey of cash market sources, the designated contract market should maintain a list of such entities which all should be reputable sources with knowledge of the cash market. In addition, the sample of sources polled should be representative of the cash market, and the poll should be conducted at a time when trading in the cash market is active.

(iii) The cash-settlement calculation should involve computational procedures that eliminate or reduce the impact of potentially unrepresentative data.

(iv) The cash settlement price should be an accurate and reliable indicator of prices in the underlying cash market. The cash settlement price also should be acceptable to commercial users of the commodity contract. The registered entity should fully document that the settlement price is accurate, reliable, highly regarded by industry/market agents, and fully reflects the economic and commercial conditions of the relevant designated contract market.

(v) To the extent possible, the cash settlement price should be based on cash price series that are publicly available and available on a timely basis for purposes of calculating the cash settlement price at the expiration of a commodity contract. A designated contract market should make the final cash settlement price and any other supporting information that is appropriate for release to the public, available to the public when cash settlement is accomplished by the derivatives clearing organization. If the cash settlement price is based on cash prices that are obtained from non-public sources (e.g., cash market surveys conducted by the designated contract market or by third parties on behalf of the designated contract market), a designated contract market should make available to the public as soon as possible after a contract month's expiration the final cash settlement price as well as any other supporting information that is appropriate or feasible to make available to the public.

(4) Contract terms and conditions requirements for futures contracts settled by cash settlement.

(i) An acceptable specification of the terms and conditions of a cash-settled commodity contract will also set forth the trading months, last trading day, contract size, minimum price change (tick size) and daily price limits, if any.

(A) *Commodity Characteristics:* The terms and conditions of a commodity contract should describe the commodity underlying the contract.

(B) *Contract Size and Trading Unit:* An acceptable specification of the trading unit would be a contract size that is consistent with customary transactions in the cash market. A designated contract market may opt to set the contract size smaller than that of standard cash market transactions.

(C) *Cash Settlement Procedure:* The cash settlement price should be reliable, acceptable, publicly available, and reported in a timely manner as described in paragraphs (c)(3)(iv) and (c)(3)(v) of this appendix C.

(D) *Pricing Basis and Minimum Price Fluctuation (Minimum Tick):* The minimum price increment (tick) should be set a level that is equal to, or less than, the minimum price increment commonly observed in cash market transactions for the underlying commodity. Specifying a futures' minimum tick that is greater than the minimum price increment in the cash market can undermine the risk management utility of the futures contract by preventing hedgers from efficiently establishing and liquidating futures positions that are used to hedge anticipated cash market transactions or cash market positions.

(E) *Maximum Price Fluctuation Limits:* Designated contract markets may adopt price limits to: (1) Reduce or constrain price movements in a trading day that may not be reflective of true market conditions but might be caused by traders overreacting to news; (2) Allow additional time for the collection of margins in times of large price movements; and (3) Provide a ''cooling-off'' period for futures market participants to respond to bona fide changes in market supply and demand fundamentals that would lead to large cash and futures price changes. If price-limit provisions are adopted, the limits should be set at levels that are not overly restrictive in relation to price movements in the cash market for the commodity underlying the futures contract. For broad-based stock index futures contracts, rules should be adopted that coordinate with New York Stock Exchange (''NYSE'') declared Circuit Breaker Trading Halts (or other market coordinated Circuit Breaker mechanism) and would recommence trading in the futures contract only after trading in the majority of the stocks underlying the index has recommenced.

(F) *Last Trading Day:* Specification of the last trading day for expiring contracts should be established such that it occurs before publication of the underlying third-party price index or determination of the final settlement price. If the designated contract market chooses to allow trading to occur through the determination of the final

settlement price, then the designated contract market should show that futures trading would not distort the final settlement price calculation.

(G) *Trading Months:* Trading months should be established based on the risk management needs of commercial entities as well as the availability of price and other data needed to calculate the cash settlement price in the specified months. Specification of the last trading day should take into consideration whether the volume of transactions underlying the cash settlement price would be unduly limited by occurrence of holidays or traditional holiday periods in the cash market. Moreover, a contract should not be listed past the date for which the designated contract market has access to use a proprietary price index for cash settlement.

(H) *Speculative Limits:* Specific rules and policies for speculative position limits are set forth in part 150 and/or part 151, as applicable, of the Commission's regulations.

(I) *Reportable Levels:* Refer to § 15.03 of the Commission's regulations.

(J) *Trading Hours:* Should be set by the designated contract market to delineate each trading day.

(d) *Options on a Futures Contract.* (1) The Commission's experience with the oversight of trading in futures option contracts indicates that most of the terms and conditions associated with such trading do not raise any regulatory concerns or issues. The Commission has found that the following terms do not affect an option contract's susceptible to manipulation or its utility for risk management. Thus, the Commission believes that, in most cases, any specification of the following terms would be acceptable; the only requirement is that such terms be specified in an automatic and objective manner in the option contract's rules:

○ Exercise method;

○ Exercise procedure (if positions in the underlying futures contract are established via book entry);

○ Strike price listing provisions, including provisions for listing strike prices on a discretionary basis;

○ Strike price intervals;

○ Automatic exercise provisions;

○ Contract size (unless not set equal to the size of the underlying futures contract); and

○ Option minimum tick should be equal to or smaller than that of the underlying futures contract.

(2) Option Expiration & Last Trading Day. For options on futures contracts, specification of expiration dates should consider the relationship of the option expiration date to the delivery period for the underlying futures contract. In particular, an assessment should be made of liquidity in the underlying futures market to assure that any futures contracts acquired through exercise can be liquidated without adversely affecting the orderly liquidation of futures positions or increasing the underlying futures contract's susceptibility to manipulation. When the underlying futures contract exhibits a very low trading activity during an expiring delivery month's final trading days or has a greater risk of price manipulation than other contracts, the last trading day and expiration day of the option should occur prior to the delivery period or the settlement date of the underlying future. For example, the last trading day and option expiration day might appropriately be established prior to first delivery notice day for option contracts with underlying futures contracts that have very limited deliverable supplies. Similarly, if the futures contract underlying an option contract is cash settled using cash prices from a very limited number of underlying cash market transactions, the last trading and option expiration days for the option contract might appropriately be established prior to the last trading day for the futures contract.

(3) Speculative Limits. In cases where the terms of an underlying futures contract specify a spot-month speculative position limit and the option contract expires during, or at the close of, the futures contract's delivery period, the option contract should include a spot-month speculative position limit provision that requires traders to combine their futures and option position and be subject to the limit established for the futures contract. Specific rules and policies for speculative position limits are set forth in part 150 and/or part 151, as applicable, of the Commission's regulations.

(4) Options on Physicals Contracts.

(i) Under the Commission's regulations, the term ''option on physicals'' refers to option contracts that do not provide for exercise into an underlying futures contract. Upon exercise, options on physicals can be settled via physical delivery of the underlying commodity or by a cash payment. Thus, options on physicals raise many of the same issues associated with trading in futures contracts regarding adequacy of deliverable supplies or acceptability of the cash settlement price series. In this regard, an option that is cash settled based on the settlement price of a futures contract would be considered an ''option on physicals'' and the futures settlement price would be considered the cash price series.

(ii) In view of the above, acceptable practices for the terms and conditions of options on physicals contracts include, as appropriate, those practices set forth above for physical-delivery or cash-settled futures contracts plus the practices set forth for options on futures contracts.

(e) *Security Futures Products.* The listing of security futures products are governed by the special requirements of part 41 of the Commission's regulations.

(f) *Non-Price Based Futures Contracts.* (1) Non-price based contracts are typically construed as binary options, but also may be designed to function similar to traditional futures or option contracts.

(2) Where the contract is settled to a third party cash-settlement series, the designated contract market should consider the nature and sources of the data comprising the cash-settlement calculation, the computational procedures, and the mechanisms in place to ensure the accuracy and reliability of the index value. The evaluation also considers the extent to which the third party has, or will adopt, safeguards against unauthorized or premature release of the index value itself or any key data used in deriving the index value.

(3) The designated contract market should follow the guidance in paragraph (c)(4) (Contract Terms and Conditions Requirements for Futures Contracts Settled by Cash Settlement) of this appendix C to meet compliance.

(g) *Swap Contracts.* (1) In general, swap contracts are an agreement to exchange a series of cash flows over a period of time based on reference price indices. When listing a swap for trading, a swap execution facility or designated contract market should determine that the reference price indices used for its contracts are not readily susceptible to manipulation. Accordingly, careful consideration should be given to the potential for manipulation or distortion of the cash settlement price, as well as the reliability of that price as an indicator of cash market values. Appropriate consideration also should be given to the commercial acceptability, public availability, and timeliness of the price series that is used to calculate the cash settlement price. Documentation demonstrating that the settlement price index is a reliable indicator of market values and conditions and is highly regarded by industry/market agents should be provided. Such documentation may take on various forms, including carefully documented interviews with principal market trading agents, pricing experts, marketing agents, etc. Appropriate consideration also should be given to the commercial acceptability, public availability, and timeliness of the price series that is used to calculate the cash flows of the swap.

(i) Where an independent, private-sector third party calculates the referenced price index, the designated contract market should verify that the third party utilizes business practices that minimize the opportunity or incentive to manipulate the cash-settlement price series. Such safeguards may include lock-downs, prohibitions against derivatives trading by employees, or public dissemination of the names of sources and the price quotes they provide. Because a cash-settled contract may create an incentive to manipulate or artificially influence the underlying market from which the cash-settlement price is derived or to exert undue influence on the cash-settlement computation in order to profit on a futures position in that commodity, a designated contract market should, whenever practicable, enter into an information-sharing agreement with the third-party provider which would enable the designated contract market to better detect and prevent manipulative behavior.

(ii) Where a designated contract market itself generates the cash settlement price series, the designated contract market should establish calculation procedures that safeguard against potential attempts to artificially influence the price. For example, if the cash settlement price is derived by the designated contract market based on a survey of cash market sources, the designated contract market should maintain a list of such entities which all should be reputable sources with knowledge of the cash market. In addition, the sample of sources polled should be representative of the cash market, and the poll should be conducted at a time when trading in the cash market is active.

(iii) The cash-settlement calculation should involve appropriate computational procedures that eliminate or reduce the impact of potentially unrepresentative data.

(2) Speculative Limits: Specific rules and policies for speculative position limits are set forth in part 151 and/or part 151, as applicable, of the Commission's regulations.

(3) Intraday Market Restrictions: Designated contract markets or swap execution facilities should have in place intraday market restrictions that pause or halt trading in the event of extraordinary price moves that may result in distorted prices. Such restrictions need to be coordinated with other markets that may be a proxy or a substitute for the contracts traded on their facility. For example, coordination with NYSE rule 80.B Circuit Breaker Trading Halts. The designated contract market or swap execution facility should adopt rules to specifically address who is authorized to declare an emergency; how the designated contract market or swap execution facility will notify the Commission of its decision that an emergency exists; how it will address conflicts of interest in the exercise of emergency authority; and how it will coordinate trading halts with markets that trade the underlying price reference index or product.

(4) *Settlement Method.* The designated contract market or swap execution facility should follow the guidance in paragraph (c)(4) (Contract Terms and Conditions Requirements for Futures Contracts Settled by Cash Settlement) of this appendix C to meet compliance, or paragraph (b)(2) (Contract Terms and Conditions Requirements for Futures Contracts Settled by Physical Delivery) of this appendix C, as appropriate.

Issued in Washington, DC, on May 10, 2012, by the Commission.

David A. Stawick,

Secretary of the Commission.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendices to Core Principles and Other Requirements for Designated Contract Markets—Commission Voting Summary and Statements of Commissioners

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Sommers, Chilton, O'Malia and Wetjen voted in the affirmative; no Commissioner voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the final rulemaking on designated contract markets DCMs, which includes rules, guidance and acceptable practices. It advances important Dodd-Frank transparency reforms. The Dodd-Frank Act squarely addresses the historically opaque swaps market though its strong transparency provisions. A critical element is pre-trade transparency—requiring standardized swaps between financial firms—those that are cleared, made available for trading and not blocks—to be traded on exchanges, such as DCMs, swap execution facilities (SEFs) or foreign boards of trade (FBOTs). When markets are open and transparent, prices are more competitive, markets are more efficient and liquid, and costs are lowered for companies and their customers.

DCMs have long demonstrated the value of open and competitive trading. DCMs, for the first time, will be able to list and trade swaps, helping to bring the benefit of pre-trade transparency to the swaps marketplace.

In addition, the Dodd-Frank Act incorporated the previously existing eight statutory designation criteria for DCMs into the DCM core principles and expanded the principles from 18 to 23. The final rulemaking the Commission will consider today conforms to the Dodd-Frank transparency reforms.

The final rulemaking benefits from extensive public comment and provides exchanges rules, guidance and acceptable practices on complying with Dodd-Frank's 23 core principles. In many instances, we're codifying industry practices that the Commission has observed and found appropriate to comply with these core principles. While preserving a principles-based regime, these regulations will provide greater legal certainty and transparency to DCMs in determining their compliance obligations, and to market participants in determining their obligations as DCM members, and will facilitate the enforcement of such provisions.

The final rulemaking is consistent with the core principles-based regime of the Commodity Exchange Act. It provides each DCM with the flexibility to employ additional measures to address core principle requirements.

As an example, the final rulemaking requires DCMs to put in place effective pre-trade risk filters, including pauses and/or trading halts to address extraordinary price movements that may result in distorted prices or trigger market disruptions. The rulemaking, though, also recognizes that pauses and halts comprise only one category of risk controls, and that additional controls may be necessary to be put in place by exchanges to reduce the potential for market disruptions. The final guidance included in today's rulemaking lists that exchanges may possibly implement price collars or bands, maximum order size limits, and message throttles.

This rulemaking does not yet finalize the Commission's proposal relating to core principle 9—which requires DCMs to provide an open, competitive and efficient market and mechanism for transactions that protects the price discovery process of the DCM's central marketplace. I expect the Commission to consider a final rule on this matter when it takes up the SEF rule this summer. The additional time will allow the Commission to more fully analyze the many public comments on these provisions, including comments on the implications of exchange of futures for swap transactions, or so-called ''EFS transactions,'' in relation to the transparency reforms of Dodd-Frank, as well as the requirement for non-discriminatory open access to clearing.

[FR Doc. 2012–12746 Filed 6–18–12; 8:45 am]

BILLING CODE 6351–01–P

FEDERAL REGISTER

Vol. 77 Tuesday,

No. 118 June 19, 2012

Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Pacific Coast Population of the Western Snowy Plover; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2010–0070; 4500030114]

RIN 1018–AX10

Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Pacific Coast Population of the Western Snowy Plover

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate revised critical habitat for the Pacific Coast distinct population segment (DPS) (Pacific Coast WSP) of the western snowy plover (*Charadrius nivosus nivosus,* formerly *C. alexandrinus nivosus*) under the Endangered Species Act of 1973, as amended (Act). In total, approximately 24,527 acres (9,926 hectares) of critical habitat for the Pacific Coast WSP in Washington, Oregon, and California, fall within the boundaries of the critical habitat designation. This revised final designation constitutes an increase of approximately 12,377 ac (5,009 ha) from the 2005 designation of critical habitat for the Pacific Coast WSP. A taxonomic name change has occurred and been accepted for the snowy plover. Throughout the remainder of this document, we will use the currently recognized name for the subspecies, *Charadrius nivosus nivosus,* to which the listed entity (Pacific Coast WSP) belongs for references to the Pacific Coast WSP.

DATES: This rule becomes effective on July 19, 2012.

ADDRESSES: This final rule, final economic analysis, and maps of critical habitat will be available on the Internet at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2010–0070, and at *http://www.fws.gov/arcata/.* Comments and materials received, as well as supporting documentation used in preparing this final rule, are available for public inspection, by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Arcata Fish and Wildlife Office, 1655 Heindon Road, Arcata, CA 95521; telephone 707–822–7201; facsimile 707–822–8411.

FOR FURTHER INFORMATION CONTACT: Nancy Finley, Field Supervisor, or Jim Watkins, Fish and Wildlife Biologist, U.S. Fish and Wildlife Service, Arcata Fish and Wildlife Office, 1655 Heindon Road, Arcata, CA 95521; telephone 707–822–7201; facsimile 707–822–8411. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. This is a final rule to revise the designation of critical habitat for the threatened Pacific Coast population of the western snowy plover under the Act. Under the Act, any species that is determined to be endangered or threatened requires designated critical habitat. We must issue a rule to designate critical habitat. In total, approximately 24,527 acres (9,926 hectares) of critical habitat for the Pacific Coast WSP in Washington, Oregon, and California, fall within the boundaries of the critical habitat designation.

We designated critical habitat for this species in 1999 and again in 2005. As part of a settlement agreement, we agreed to reconsider the designations. A proposed revised critical habitat was published in the **Federal Register** on March 22, 2011 (76 FR 16046). This constitutes our final revised designation for the Pacific Coast WSP.

We are making the following changes to the critical habitat designation. See Table 2 for details.

State	Current critical habitat designation	Revised designation	Factors affecting revised designation
Washington	2,526 acres (1,023 hectares) of Federal, State, and Private lands.	Four units in Washington, totaling 6,077 acres (2,460 hectares).	We are excluding 425 acres (172 hectares) of Tribal lands from designation based on partnerships.
Oregon	2,147 acres (869 hectares) of Federal, State, and Private lands.	9 units in Oregon, totaling 2,112 acres (856 hectares).	We are excluding 3,106 acres (1,257 hectares) of lands from designation based on partnerships with landowners.
California	7,477 acres (3,030 hectares) of Federal, State, and Private lands.	47 units in California, totaling 16,337 acres (6,612 hectares).	We are excluding 266 acres (108 hectares) of lands from designation based on partnerships with landowners.

The basis for our action. Under the Endangered Species Act, any endangered or threatened species must have a designated critical habitat. We are required to base the designation on the best available scientific data after taking into consideration economic and other impacts. The Secretary can exclude an area from critical habitat if the benefits of exclusion outweigh the benefits of designation, unless the exclusion will result in the extinction of the species.

We prepared an economic analysis. To ensure that we consider the economic impacts, we prepared a new economic analysis of the proposed revised designation. On January 17, 2012, we made available our revised draft economic analysis (77 FR 2243). We received public comments on the draft economic analysis and revised it based on input from the public. The economic analysis did not identify any areas with disproportionate costs associated with the designation, and no areas were excluded from the final designation based on economic reasons.

We incorporated peer review. We sought comments and information from independent specialists to ensure that our critical habitat designation was based on scientifically sound data, assumptions, and analyses. We had invited these peer reviewers to comment on our specific assumptions and conclusions in the proposed revision of the critical habitat designation. Information we received from peer review is incorporated in this final revised designation.

Background

It is our intent to discuss in this final rule only those topics directly relevant to the development and designation of revised critical habitat for the Pacific Coast WSP under the Act (16 U.S.C. 1531 *et seq.*). For more information on the taxonomy, biology, and ecology of the Pacific Coast WSP, refer to the final listing rule published in the **Federal Register** on March 5, 1993 (58 FR 12864); the 12-month finding on a petition to delist the Pacific Coast WSP (71 FR 20607, April 21, 2006); and the revised proposed critical habitat rule

published in the **Federal Register** on March 22, 2011 (76 FR 16046). Additional information on this species can also be found in the Recovery Plan for the Pacific Coast Population of the Western Snowy Plover (*Charadrius alexandrinus nivosus*) finalized on August 13, 2007, which is available from the Arcata Fish and Wildlife Office (see **ADDRESSES** section) (Service 2007). Information on the associated draft economic analysis for the revised proposed critical habitat was published in the **Federal Register** on January 17, 2012 (77 FR 2243). The nomenclature for the listed entity has changed to the ''Pacific Coast population of the western snowy plover (*Charadrius nivosus nivosus*),'' but this change does not alter the description or distribution of the species.

Change in Taxonomic Nomenclature

In our January 17, 2012, **Federal Register** publication (77 FR 2243), which made available the draft economic analysis on the March 22, 2011, revised proposed critical habitat for the Pacific Coast WSP, we proposed a taxonomic and nomenclatural change for the Pacific Coast WSP from *Charadrius alexandrinus nivosus* to *C. nivosus nivosus* and for that change to be published in the Code of Federal Regulations (CFR). Based on information presented in that notice (see the notice's section entitled *Taxonomic and Nomenclatural Changes Affecting Charadrius alexandrinus nivosus*) and acceptance of the change by the scientific community, we are amending the List of Endangered and Threatened Wildlife at 50 CFR 17.11(h) to identify the listed entity as the western snowy plover (Pacific Coast population DPS) (*Charadrius nivosus nivosus*), to update the ''Historic Range'' column to clarify that the historical range of the Pacific Coast population DPS is California, Oregon, Washington, and Mexico, and to update the ''Vertebrate population where endangered or threatened'' column to indicate that the DPS is threatened in California, Oregon, Washington, and Mexico (within 50 miles of Pacific coast).

New Information on Species' Description, Life History, Ecology, Habitat, and Range

We did not receive any new information pertaining to the description, ecology, or habitat of the Pacific Coast WSP following the 2011 revised proposed critical habitat rule (76 FR 16046; March 22, 2011).

Climate Change

Our analyses under the Act include consideration of ongoing and projected changes in climate. The terms ''climate'' and ''climate change'' are defined by the Intergovernmental Panel on Climate Change (IPCC). ''Climate'' refers to the mean and variability of different types of weather conditions over time, with 30 years being a typical period for such measurements, although shorter or longer periods also may be used (IPCC 2007, p. 78). The term ''climate change'' thus refers to a change in the mean or variability of one or more measures of climate (*e.g.,* temperature or precipitation) that persists for an extended period, typically decades or longer, whether the change is due to natural variability, human activity, or both (IPCC 2007, p. 78). Various types of changes in climate can have direct or indirect effects on species. These effects may be positive, neutral, or negative, and they may change over time, depending on the species and other relevant considerations, such as the effects of interactions of climate with other variables (*e.g.,* habitat fragmentation) (IPCC 2007, pp. 8–14, 18–19). In our analyses, we use our expert judgment to weigh relevant information, including uncertainty, in our consideration of various aspects of climate change.

Sea level rise and hydrological changes associated with climate change are having and will continue to have significant effects on Pacific Coast WSP and its habitat over the next several decades. Sea level rise is a result of two phenomena: Thermal expansion (increased sea water temperatures) and global ice melt (Cayan *et al.* 2006, p. 5). Between 1897 and 2006, the observed sea level rise has been approximately 0.08 inches (in) (2 millimeters (mm)) per year, or a total of 8 in (20 centimeters (cm)) over that period (Heberger *et al.* 2009, p. 6). Older estimates projected that sea level rise along the California coast would follow a similar rate and reach 0.7–2 feet (ft) (0.2–0.6 meters (m)) by 2100 (IPCC 2007). Recent observations and models (including the models we used to evaluate Pacific Coast WSP habitat) indicate that those projections were conservative and ignored some critical factors, such as melting of the Greenland and Antarctica ice sheets (Heberger *et al.* 2009, p. 6). Heberger *et al.* (2009, p. 8) have updated the sea level rise projections for California to 3.3–4.6 ft (1.0–1.4 m) by 2100, while Vermeer and Rahmstorf (2009, p. 21530) calculate the sea level rise globally at 2.4–6.2 ft (0.57–1.9 m); in both cases, recent estimates were more than twice earlier projections. Combined with California's normal dramatic tidal fluctuations and coincidental storms, the severity of the latter increasing with more frequent El Niño Southern Oscillations due to increasing surface water temperature (Cayan *et al.* 2006, p. 17), the effects of sea level rise are expected to reach farther inland than previously anticipated (Cayan *et al.* 2006, pp. 48–49; Cayan *et al.* 2009, p. 40). Similar effects are expected to occur along the Oregon and Washington coastlines (Galbraith *et al.* 2002, pp. 173–183; Huppert *et al.* 2009, pp. 285–309; Ruggiero *et al.* 2010, 211–262).

For the Pacific Coast WSP and other shorebird habitat, Galbraith *et al.* (2002, pp. 173–183) in a study of sites in Washington (Willapa Bay) and California (Humboldt Bay and San Francisco Bay) projected losses of intertidal habitat could range between 20 and 70 percent of the existing habitat. In addition, sea-level rise may result in coastal areas to lose their ability to continue to support the current number of shorebirds. Areas with steep topography (Northern California to Washington State) or seawalls (Southern California) with limited beach habitat are expected to have the most severe losses (Galbraith *et al.* 2002, pp. 173–183). Additionally sea-level rise would cause: (1) Inundation of low-lying areas by high tides; (2) flooding of coastal areas during major storm events, especially near river mouths; (3) acceleration of erosion of coastal bluffs; and (4) a shift in beach profiles, move the position of the mean high water line landward (Huppert *et al.* 2009, p. 285).

In our development of this critical habitat designation, we evaluated numerous climate change models of varying scope and scale. Due to the wide range of the Pacific Coast WSP (Washington to Mexico) we selected models which reflected conditions across the range for the Pacific Coast WSP and those developed or accepted by the Department of the Interior as a basis for determining the extent of the effects of climate change on coastal habitat used by the Pacific Coast WSP.

Previous Federal Actions

The Pacific Coast WSP was listed as a threatened species on March 5, 1993 (58 FR 12864). Critical habitat was designated in 1999 (64 FR 68508; December 7, 1999). That rule was remanded and partially vacated by the U. S. District Court for the District of Oregon on July 2, 2003, in order to conduct a new analysis of economic impacts (*Coos County Board of County*

Commissioners et al. v. *Department of the Interior et al.,* CV 02–6128, M. Hogan). We published a revised rule designating critical habitat on September 29, 2005 (70 FR 56970).

A 5-year status review of the population under section 4(c)(2) of the Act was completed June 8, 2006, based on the analysis conducted for the section 4(b)(3)(B) status review for a 12-month finding on a petition to delist the Pacific Coast WSP (71 FR 20607; April 21, 2006). Because the Pacific Coast WSP was listed prior to our 1996 policy published in the **Federal Register** on February 7, 1996 (61 FR 4721) regarding recognition of distinct population segments, in our 12-month finding, we reviewed and confirmed our determination that the Pacific Coast WSP constituted a valid distinct population segment.

On October 2, 2008, the Center for Biological Diversity challenged our 2005 critical habitat designation (70 FR 56970; September 29, 2005) (*Center for Biological Diversity* v. *Kempthorne, et al.,* No. C–08–4594 PJH (N.D. California)). This litigation was resolved through settlement, in which the Service agreed to conduct a rulemaking to consider potential revisions to the designated critical habitat for the Pacific Coast WSP. On May 11, 2009, the U. S. District Court for the Northern District of California adopted the terms of the settlement agreement and issued an order requiring the Service to submit a final revised critical habitat designation to the **Federal Register** by June 5, 2012. This rule complies with that court order.

Summary of Comments and Recommendations

We requested written comments from the public on the 2011 proposed rule to revise critical habitat for the Pacific Coast WSP during two comment periods. The first comment period requesting comments in association with the publication of the proposed revised rule (76 FR 16046) opened on March 22, 2011, and closed May 23, 2011. Upon the availability of the draft economic analysis (DEA) associated with the revised proposed critical habitat, a second comment period covering both the revised proposed rule and the DEA opened on January 17, 2012 (77 FR 2243) and closed on February 16, 2012. During both public comment periods, we contacted appropriate Federal, State, and local agencies, scientific organizations, and other interested parties and invited them to comment on the proposal to revise critical habitat for this species and the associated DEA. During the comment periods, we requested that all interested parties submit comments or information related to the proposed revisions to critical habitat, including (but not limited to) the following: Unit boundaries; species occurrence information and distribution; land use designations that may affect critical habitat; potential economic effects of the revised proposed designation; benefits associated with critical habitat designation; areas proposed for designation and associated rationale for the non-inclusion or considered exclusion of these areas; and methods used to designate critical habitat.

During the first comment period, we received 149 comment letters directly addressing the proposed revision of critical habitat, as follows: 1 from a peer reviewer, 5 from Federal agencies, 1 from a Native American Tribe, and 142 from public organizations or individuals. During the second comment period, we received nine additional comments addressing the revised proposed critical habitat designation and the DEA. Of these latter comments, none were from Federal agencies, one was from a State agency, and the remaining eight were from public organizations or individuals. We did not receive any additional comments from Native American Tribes during the second public comment period. We reviewed all comments received for substantive issues and new information regarding the revised designation of critical habitat for the Pacific Coast WSP. All substantive comments are addressed in the following summary and any changes have been incorporated into this revised final rule as appropriate.

The open period for requesting public hearings on the revised proposed rule ran from March 22, 2011, through May 6, 2011 (76 FR 16046). The second open period for requesting public hearings associated with the January 17, 2012 (77 FR 2243), **Federal Register** publication ran from January 17, 2012, through February 16, 2012. We did not receive any requests for a public hearing during the two open periods.

Peer Review

In accordance with our Policy for Peer Review in Endangered Species Act Activities, published on July 1, 1994 (59 FR 34270), we solicited expert opinions from three knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which it occurs, and conservation biology principles. One peer reviewer responded and generally supported the revised proposed designation, and provided additional information, clarifications, and suggestions that we have incorporated, as appropriate, to improve this revised final critical habitat rule. Other potential reviewers that were contacted could not respond due to prior commitments and timing of the requested review relative to the Pacific Coast WSP field season. Peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Review Comments

(1) *Comment:* The peer reviewer affirmed that the background information, essentially the biology of the Pacific Coast WSP, was well represented. Additional information was provided for the distribution of Pacific Coast WSP in Oregon. The reviewer suggested including sites in northern Oregon not covered under the State's habitat conservation plan (HCP), and that the sites should be considered collectively, as plovers move between them.

Our Response: We appreciate the assessment of the revised proposed rule by the peer reviewer. We have identified all the areas we consider to have the physical or biological features essential to the conservation of the species or other areas we have determined to be essential for the conservation of the species as based on our criteria for designating critical habitat. Not all occupied sites were proposed as critical habitat. Some areas meeting the definition of critical habitat have been excluded from this revised final critical habitat designation under section 4(b)(2) of the Act (see Exclusions section for a detailed discussion). Those sites that we consider to have spatial significance to one another were grouped as subunits of a larger unit. The northern Oregon sites referenced by the reviewer were not included because of their relatively limited use by Pacific Coast WSP at this time and they were determined not to be essential.

The HCP with the Oregon Parks and Recreation Department (OPRD) is a landscape-level conservation planning effort. It was developed with the assistance of a multi-partner steering committee that reviewed the recovery plan and objectives, historical plover use, and existing habitat conditions, and selected the most appropriate locations for reestablishment of plover nesting habitat. In addition, the HCP went through extensive public review at both the State and Federal levels, and incorporated appropriate input from those processes.

(2) *Comment:* The peer reviewer agreed with the conservation benefit of

designating additional habitat for the Pacific Coast WSP. Specifically, the reviewer acknowledged that additional habitat is needed for connectivity between sites, and noted that the revised proposed rule leaves a 75-mile (mi) (121-kilometer (km)) gap between units on the north and south coasts of Oregon.

Our Response: We appreciate the peer reviewer's critical review. Connectivity is not the only criterion used to select sites. We refer readers to our Criteria Used To Identify Critical Habitat section in the revised proposed rule (76 FR 16046; March 22, 2011). Selected sites must have regional importance, either for breeding or wintering Pacific Coast WSPs.

There are few additional suitable locations between Oregon's north and south coasts to designate as critical habitat. Sites were considered, but not proposed, due to habitat and development conditions that would adversely impact plovers were they to use the sites. Seventy-five miles is a relatively small gap in the range given that current gap between occupied habitat in Oregon and Washington is greater than 150 miles (241 km).

(3) *Comment:* The peer reviewer acknowledged the importance of addressing sea-level rise, but noted uncertainty regarding our ability to predict how Pacific Coast WSP will respond. In addition, the reviewer noted that we cannot adequately predict the response of Pacific Coast WSP prey sources to a rapidly changing beach environment that is compromised by years of beach stabilization and invasive, nonnative plants.

Our Response: We agree that the response of Pacific Coast WSPs and their prey is difficult to predict (refer to *Climate Change* section above). Our models for sea-level rise are general in nature as they must represent the entire range of the Pacific Coast WSP in the United States. Consequently, site- and regionally-specific models are relevant when assessing specific effects on species and locations, but for the purposes of this evaluation, landscape-scale models were used to assist us in establishing unit boundaries.

There is inherent uncertainty associated with the parameters in the model; however, assumptions were selected that were generally conservative to best protect the species. Our assessment of sea-level rise in the revised proposed rule only addresses habitat, and does not attempt to address prey response, plover use, and site-specific shoreline armoring, as these are conditions or parameters that cannot be adequately represented across the range of the species.

Federal Agency Comments

Bureau of Land Management

(4) *Comment:* The Bureau of Land Management (BLM) in Arcata, California, noted that, as proposed, Unit 5 (Subunits A, B, and C) has expanded to the west, encompassing the intertidal zone. Yet the eastern boundary remains the same as in prior critical habitat designations. BLM commented that they understand the rationale for the westward expansion based on year-to-year changes to the beach environment and improved mapping, because of expected inundation resulting from sea-level rise. BLM noted that critical habitat would be better served with an expansion to the east.

Our Response: Unit 5 primarily depicts mapping changes with improved information from the 2005 designation. We did not extend the unit to the east, as there is a dune crest that would separate such an eastern expansion from the ocean beach. Such a barrier would likely discourage Pacific Coast WSP use of the area, combined with the paved road that reaches the length of Humboldt Bay's South Spit. Similarly, there is a dirt road to the east side of the dune crest in subunit CA 5B that may also discourage Pacific Coast WSP use of any eastern expansion area there.

Department of the Army (U.S. Army Corps of Engineers)

(5) *Comment:* The U.S. Army Corps of Engineers (USACE) challenged the need for critical habitat designation of the intertidal zone, stating that Pacific Coast WSPs generally forage on wrack deposited at the maximum high water mark, and roost well above this line and are not found along the water's edge.

Our Response: We agree that most foraging by Pacific Coast WSP on southern California beaches is associated with wrack; however, Pacific Coast WSP will use the intertidal areas. Use of intertidal areas may be greater where there is no offshore kelp beds to form well-developed wrack, such as in northern California, Oregon, and Washington. However, Pacific Coast WSPs have been documented foraging within the beach intertidal zone, and gathering food from both above and below the sand surface (Page *et al.* 2009; *http://bna.birds.cornell.edu/bna/species/154/articles/foodhabits*).

In areas that do not have well-developed wrack, the intertidal zone may play a greater importance in plover foraging. Consequently, the intertidal zone is essential to Pacific Coast WSP's conservation, thereby meeting the standard for designation as critical habitat when there is an association with other features and primary constituent elements.

(6) *Comment:* The USACE commented that our approach to sea-level rise should be modified. The highest, high water boundary is recommended as a starting reference point. In addition, the USACE stated that the eastern boundary should not be established in areas that do not currently contain suitable habitat as a means to address sea-level rise.

Our Response: The purpose of this revised critical habitat designation is to conserve the Pacific Coast WSP. Establishing a western boundary is difficult, but the ''water's edge'' is a boundary that is easily determined on the ground. We agree with the USACE that the water's edge is difficult to map, and will change with seasonal and daily tides, storm events, beach configuration, etc. Our maps and the inclusion of the intertidal zone are an attempt to address the water's edge issue and include the full range of habitat available to the Pacific Coast WSP.

We expanded critical habitat to the east from past designations to help ensure there will be adequate potential for habitat in the future as sea-level rise occurs. Not all habitat to the east is currently suitable, however, and we include in this critical habitat designation only those areas that we consider likely to be suitable with restoration. Not addressing the eastern expansion and only considering currently available habitat would limit the conservation value of a critical habitat designation as ''coastal squeeze'' occurs with a rise in sea level. Using elevations on the beach and adjusting them as sea-level rise occurs, as suggested by the USACE, makes it difficult for land and project managers to determine critical habitat boundaries.

(7) *Comment:* The USACE questioned the validity of the Pacific Coast WSP listing as threatened. Specifically, the agency provided an example of a snowy plover banded in Utah appearing at a coastal Orange County, California, site.

Our Response: First, we note that the Service action at issue here does not concern whether or not the Pacific Coast WSP should be listed under the Act, but whether the Service should revise critical habitat for the species. Separate from this action, the Service is currently reviewing the listing status of the Pacific Coast WSP (see 76 FR 30377; May 25, 2011). For further discussion of listing issues, we direct the USACE to our 12-month finding on a petition to delist the Pacific Coast WSP (71 FR 20607; April

21, 2006), where detailed information on the Pacific Coast WSP distinct population segment listing is available.

The report cited by the USACE documents a Utah-banded snowy plover at an Orange County beach during the nonbreeding season (project-related observation period was from September 27, 2009, to October 29, 2009) (Ryan and Hamilton 2009, unpublished report). Our understanding is that the snowy plover banding in Utah was done during the end of the breeding season, on July 22, 2009 (F. Bidstrup, pers. comm. 2012). Few, if any, snowy plovers are present in Utah during the nonbreeding season (Paton 1995, p. 277). Interior-nesting snowy plovers are migratory, and are well documented overwintering along the Pacific Coast (71 FR 20607; April 21, 2006). Generally, interior-nesting snowy plovers begin to appear along the Pacific Coast in mid- to late-July. In the 12-month finding, we cite instances of coastal-breeding snowy plovers nesting at interior sites, but acknowledge that this type of occurrence is rare based on banding records (71 FR 20607; April 21, 2006). This interchange in breeders accounts for the fact that there is little genetic difference between interior and coastal-breeding snowy plovers (71 FR 20607; April 21, 2006). Regardless, because the Pacific Coast WSP is generally a non-migratory population, and because it is ecologically separated from interior-nesting snowy plovers, it meets criteria for listing under our distinct population segment policy (71 FR 20607, April 21, 2006; 61 FR 4721, February 7, 1996) and the Act.

(8) *Comment:* The USACE stated that some of the areas proposed for designation as critical habitat do not meet the definition of critical habitat. Either the units are heavily used by recreational users, or are adjacent to disturbed areas. The commenter provided site-specific information where they believe designation is inappropriate due to beach nourishment projects at some units.

Our Response: We have determined based on our criteria for designating critical habitat that all the areas designated in this rule are essential either to or for the conservation of the Pacific Coast WSP and meet the definition of critical habitat. However, within each critical habitat unit there may be some areas that do not contain the physical or biological features and therefore would not be considered critical habitat. Due to mapping constraints (*e.g.,* the scale of the unsuitable areas are too small to be reflected on our maps), we did not remove these areas from this final revised designation. The analysis of effects of dredging and beach nourishment on Pacific Coast WSPs and their habitat is part of the section 7 consultation process under the Act. Effects to designated critical habitat and non-designated areas that are affected by the Federal action will be assessed under that process, as well as other effects to Pacific Coast WSPs.

Disturbance by recreational users and other sources will also be evaluated through the section 7 process where there is a Federal nexus. For areas lacking a Federal nexus, the Service will work with beach and land managers to implement recovery actions that will avoid or offset adverse effects of disturbance. We consider disturbance to be relative, as Pacific Coast WSPs respond differently to disturbance between sites.

(9) *Comment:* The USACE commented that the maps were easier to follow in the 2005 designation than those in the 2011 revised proposed rule because the 2005 maps provided more detail relative to land marks, such as roads.

Our Response: We appreciate this comment, and have made changes to the maps in this final rule. Specifically, the maps in this revised final rule have more location detail, such as roads, than we provided in the 2011 revised proposed rule. In remote areas where roads are scarce, we added watercourses. We acknowledge that watercourses are dynamic, and they can change with time, but they do provide some ability to locate unit boundaries on the ground.

Department of the Navy

(10) *Comment:* The Department of the Navy (Navy) commented that portions of two of their installations, Naval Support Area Monterey and Navy at Naval Base Ventura County, Port Hueneme, were included in the revised proposed rule, and requested they be exempted from critical habitat because both installations have an integrated natural resources management plan (INRMP).

Our Response: An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. A Service-approved INRMP is required to exempt a facility from critical habitat designation (refer to section of this rule concerning military exemptions under section 4(a)(3)). In 2001, the Navy completed the INRMP for Naval Support Area Monterey, which includes approximately 8 ac (3 ha) in Unit CA 22, Monterey to Moss Landing. Although the 2001 INRMP was approved by the Service, we determined that it did not address management actions for western snowy plovers and therefore does not meet the requirements for exemption from critical habitat. On March 30, 2012, we received an addendum to the 2001 INRMP; this addendum detailed additional conservation measures the Navy will implement for the Pacific Coast WSP at Naval Support Area Monterey. We have reviewed the addendum and have concluded that the conservation measures identified in the addendum would provide a benefit to the Pacific Coast WSP and its habitat. We approved and signed this addendum on May 24, 2012. As a result we have exempted the approximately 8 ac (3 ha) from Unit CA 22 from the designation under section 4(a)(3) of the Act (see Exemptions section).

The Navy also identified that approximately 0.08 ac (0.03 ha) at Naval Base Ventura County, Port Hueneme, was included in the revised proposed rule. These lands were inadvertently included as part of Unit CA 39 in the revised proposed designation due to a mapping error. The identified 0.08 ac (0.03 ha) of Navy lands within Unit CA 39, Ormond Beach, have been removed in this revised final designation because they are unsuitable habitat and not essential to the conservation of the species.

National Park Service

(11) *Comment:* The National Park Service noted that critical habitat units for the Pacific Coast WSP were proposed within several units of the National Park system, including: Channel Islands National Park; Golden Gate National Recreation Area; Point Reyes National Seashore; Redwood National and State Parks; and Lewis and Clark National Historic Park. The National Park Service supports the proposed revised designation, and provided general information regarding its management for Pacific Coast WSP at its facilities.

Our Response: We appreciate the National Park Service's comments. No response necessary.

U.S. Forest Service

(12) *Comment:* The U.S. Forest Service (USFS), Siuslaw National Forest, Oregon, provided information regarding use and boundary descriptions for Units OR 7, OR 8, and OR 9.

Our Response: Lands covered under the OPRD HCP are excluded in this revised final rule. We note the USFS's comments; however, all units have changed with the exception of OR 8A, as a result of the exclusions. Federal lands remain unaffected by the OPRD

HCP exclusions, and remain in this final designation.

State Agency Comments

(13) *Comment:* The OPRD requested that all lands under its HCP be ''exempted'' (meaning ''excluded'') under section 4(b)(2) of the Act, because the OPRD HCP provides adequate management protections, making designation of critical habitat on those lands covered by the HCP redundant.

Our Response: Comment noted. In developing this final revised designation, we have considered OPRD's comments regarding exclusion of the HCP areas, and have conducted the analysis required under section 4(b)(2) of the Act to consider such exclusions (refer to the Exclusions section). As a result of our analysis, we have concluded that the benefits of excluding the lands covered under the OPRD HCP outweigh the benefits of including those areas as critical habitat and as a result the Secretary has used his discretion to exclude these areas under section 4(b)(2) of the Act.

(14) *Comment:* The California Department of Parks and Recreation (CDPR) provided site information throughout California and pointed out errors in the unit descriptions. CDPR believes some sites proposed for designation are inappropriate, due to disturbance, proximity to campgrounds, recreational off-road vehicle use, and presence of lifeguard facilities.

Regarding Oceano Dunes State Vehicular Recreation Area (SVRA), CDPR acknowledged that the critical habitat designation would have little effect on day-to-day operations of Oceano Dunes SVRA and would not affect management activities for the Pacific Coast WSP. However, CDPR also stated that a critical habitat designation would increase administrative costs and implied that a critical habitat designation would require restoration of degraded habitat in Oceano Dunes SVRA.

CDPR stated that designation of the ''riding area'' of Oceano Dunes SVRA as critical habitat would be inappropriate because the riding area is degraded, used for recreation, and unoccupied by the western snowy plover. CDPR requested that the riding and camping areas be excluded from the critical habitat designation under section 4(b)(2) of the Act, because those areas (1) do not contain the physical or biological features essential for the western snowy plover, and (2) are covered by a management plan that provides conservation value greater than what would be provided by a critical habitat designation.

Our Response: The general comments from CDPR on the unit description errors were noted and incorporated into this revised final rule.

We agree with CDPR that a critical habitat designation should have little, if any, effect on day-to-day operations at Oceano Dunes SVRA and should not affect management activities for the Pacific Coast WSP unless a future project in Oceano Dunes SVRA would be authorized, funded, permitted, or carried out by a Federal agency.

We agree that portions of Oceano Dunes SVRA are degraded by recreation activities; however, habitat degradation does not preclude us from designating an area as critical habitat if the area contains physical or biological features essential to the conservation of the species and otherwise meets the definition of critical habitat. Also, annual surveys by CDPR and other groups have documented the species (in relatively large numbers) using Oceano Dunes SVRA in both breeding and wintering seasons. The use of areas for recreational activities does not preclude the use of the area by the Pacific Coast WSP. For example, the Silver Strand State Beach area identified as critical habitat (Unit CA 55B), as well as other high recreational use areas, plays an important role in Pacific Coast WSP conservation. We have determined that these areas are essential because they provide adequate space for high-tide roosting and foraging opportunities, especially during low human-use periods and during the winter. These areas may provide an even greater conservation value as habitat conditions shift and adaptive management strategies are implemented.

The DEA accompanying the proposed critical habitat rule determined that Oceano Dunes SVRA would incur some increase in administrative cost as a result of being included in critical habitat. These costs would be associated with coordination with a Federal agency during consultation under section 7 of the Act, additional analysis under California Environmental Quality Act (CEQA), or critical habitat analysis in the Oceano Dunes SVRA HCP. However, the DEA did not identify any disproportionate costs to the Oceano Dunes SVRA likely to result from a critical habitat designation.

The recovery plan for the Pacific Coast WSP (Service 2007) states that, because of the dynamic nature of western snowy plover habitat, the physical or biological features and specific primary constituent elements (PCEs) for the species may be seasonally variable or lacking. Accordingly, one or more PCEs may be absent during certain seasons. That said, a critical habitat unit is not required to contain all PCEs to qualify for designation. The implementing regulations for section 4 of the Act (50 CFR 424.12(d)) state that when several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, an inclusive area may be designated as critical habitat. Portions of that inclusive area may not contain any or all PCEs. The Oceano Dunes SVRA is located within unit CA–31, and contains at least one PCE (open landscapes) year round, and may seasonally contain two other PCEs (frequency of inundation and organic debris). We have determined that Oceano Dunes SVRA plays an important role in conservation of the western snowy plover. That role may increase due to climate-related changes, including sea-level rise. We maintain that Oceano Dunes SVRA is essential to the conservation of the Pacific Coast WSP.

Lastly, we recognize that the CDPR intensively manages habitat for the Pacific Coast WSP at Oceano Dunes SVRA. We also recognize the difficult balance between the Oceano Dunes SVRA use-mandate and conservation of sensitive species. However, justification of exclusion from critical habitat is not solely based on conservation measures provided by a management plan but on how the benefits of exclusion from critical habitat compare to the benefits of inclusion. We recognize that the CDPR at Oceano Dunes SVRA have been implementing measures to conserve the Pacific Coast WSP and conditions have improved somewhat for the Pacific Coast WSP in critical habitat unit CA–31. We value our current partnership with the CDPR in conserving sensitive species and their habitats; however, after considering the relevant impacts being incurred by the Pacific Coast WSP, we did not conclude that the benefits of excluding Oceano Dunes SVRA lands in unit CA–31 outweigh the benefits of including those lands as critical habitat. In addition, as mentioned in the CDPR comment letter, the CDPR is experiencing severe funding limitations. Consequently, the CDPR may not be able to guarantee that the Oceano Dunes SVRA management plan will be implemented in the future. For these reasons, the Secretary is declining to exercise his discretion to exclude Oceano Dunes SVRA lands from unit CA–31.

Public Comments

The majority of the public comments we received were form letters regarding Oceano Dunes SVRA. The 104 form letters did not provide substantial

information, and were analogous to a ''vote'' not to designate critical habitat at Oceano Dunes SVRA. For information on our determination on critical habitat for the Oceano Dunes SVRA, please see *Comment* 14 above.

(15) *Comment:* Several commenters proposed models other than the ones we used relative to sea-level rise. We also received comments challenging the likelihood of sea-level rise. Some commenters stated that sea-level rise could not be attributed to human-caused actions and that we should not be managing for an impact (*i.e.,* sea-level rise) that might not occur. Others commenters stated that there is no ''global warming'' occurring, and that the Service is not considering the best science available.

Our Response: The Service considers climate change the single greatest conservation challenge of the 21st century, and as a result we have developed a draft strategic plan to address climate change (Service 2009, pp. 1–32). We acknowledge climate change is a complex issue, and there may be some uncertainty over all the causes and precise manifestations of climate change (see *Climate Change* section above). Given these uncertainties, one objective of this revised final rule is to identify and protect those habitats that we determine will provide resiliency for Pacific Coast WSP in the face of the effects of climate change on habitat. We will undoubtedly have to adapt management approaches as we learn more. We agree that Pacific Coast WPS management actions should stem the impacts of climate change where opportunities to do so exist.

We evaluated the models proposed by the commenters, and in some instances, we acknowledge that these models have more detail, often resulting from site-specific information. However, that site specificity could not be incorporated into a model that would assess the species' habitat rangewide because there is insufficient corresponding data from all sites across the entire range of the Pacific Coast WSP (*i.e.,* from Washington to the Mexican border in California). Other models proposed by commenters used different parameters than the models we employed, and thus, could not be used consistently. The models we selected reflected conditions across the range for the Pacific Coast WSP. Because we anticipated that use of models would be controversial, we chose to use those developed or accepted by the Department of the Interior.

We intentionally did not address the cause(s) for sea-level rise in our revised proposed rule (76 FR 16046; March 22, 2011), as it is subject to debate in many forums outside this critical habitat designation process. However, there are ample data to support that sea-level rise is occurring, and it will continue into the future. The models we used provide perspective on the extent and time at which we can expect sea-level rise to occur (refer to *Climate Change* section above).

(16) *Comment:* Two commenters questioned the need to list the Pacific Coast WSP as threatened.

Our Response: As noted above in response to Comment 7, this finding does not address whether the Pacific Coast WSP should be listed, but rather concerns whether revisions should be made to critical habitat for the Pacific Coast WSP. See 71 FR 20607 (April 21, 2006) for information on the listing of the Pacific Coast WSP.

(17) *Comment:* Three commenters believe that we underestimate the impacts of predation, and overstate the effects of human-caused disturbance.

Our Response: Predation is a leading cause of Pacific Coast WSP adult, chick, and egg mortality; however, the significance of predation varies by site. With the influx of common ravens to Santa Barbara, San Luis Obispo, Monterey, and Santa Cruz Counties to coastal habitat since the late 1990s, predation pressure has increased in some areas. Predator management, both nonlethal and lethal, has been effective at many sites. Predator management is generally considered a recovery action, outside the process for designating critical habitat (Page *et al.* 2008, pp. 1–11).

Regarding human disturbance and effects to Pacific Coast WSP, there is a relationship between human beach use and predation. Disturbance associated with human beach use can result in Pacific Coast WSPs flushing from their nest. When this occurs, the birds leave tracks in the sand, and those foot tracks can lead predators to the nest and result in egg loss. Also, unmanaged or poorly managed trash associated with a variety of uses, including recreational use, can also attract potential predators to beach habitats. Gulls, ravens, and crows are known Pacific Coast WSP predators and are good examples of species that are attracted to areas with improper trash management practices. Outreach and education focusing on these human-associated concerns will assist in reducing predator interaction with the Pacific Coast WSP.

Pacific Coast WSPs can withstand some disturbance. Their tolerance to disturbance will vary by site (see our response to Comment 18 below), and may vary by the individual experience of a single bird. Disturbance can come from both predators and human-caused sources.

(18) *Comment:* Comments regarding the primary constituent elements (PCEs) were wide-ranging. Some commenters stated that the ''minimal disturbance'' element limited the Service's selection of potential units, while other commenters asserted that several units should not be designated due to too much disturbance. One commenter suggested that ''minimal disturbance'' is better considered under Special Management Considerations.

Our Response: We generally consider that there are three generalized threats, or limiting factors, to conservation and recovery of the Pacific Coast WSP. Specifically, we consider limiting factors to conservation to be: (1) Predation; (2) habitat loss and degradation; and (3) disturbance. These three factors may vary in importance by site, and their sequence here should not indicate a priority or level of importance.

For the Pacific Coast WSP, there are natural and human-caused disturbances that affect the species and its habitat. Pacific Coast WSPs respond differently to disturbance depending on the type of disturbance, its frequency, and the timing of the disturbance. By way of example, breeding Pacific Coast WSPs appear to be more sensitive to disturbance than wintering plovers. Pacific Coast WSPs are more likely to flush from, or abandon, a nest during the early incubation stages. They are less likely to abandon a nest as eggs approach hatching, presumably because a significant time has been spent incubating and defending the nest. Human presence at isolated beaches on Vandenberg Air Force Base, for example, can result in Pacific Coast WSPs flushing at a greater distance than plovers at Oceano Dunes SVRA, where they are subject to greater disturbance and have the ability to ''habituate.'' Vandenberg and Oceano Dunes SVRA are only approximately 30 mi (48 km) apart. Consequently, disturbance is ''relative'' to site conditions. Minimal disturbance is a PCE because it is a component of a unit's suitability and should be considered in Pacific Coast WSP conservation, and therefore, in critical habitat designation. The amount, timing, and extent of disturbance may be best addressed as a special management consideration. We considered sites with a range of disturbance, and each site designated is regionally important.

(19) *Comment:* One commenter stated that the Service is constraining critical habitat protection by using criteria not

consistent with the Act. Specifically, use of criteria other than the PCEs limits the Service's ability to designate habitat.

Our Response: Stating our selection criteria and methods is necessary for public disclosure (refer to *Methods Used to Designate Critical Habitat* and *Physical and Biological Features* sections). The selection criteria relate to how we determine where the PCEs, or elements of physical and biological features that are essential to the conservation of the Pacific coast WSP, are on the landscape. Therefore, our selection criteria define how we determined ''essential areas'' for designation of critical habitat.

(20) *Comment:* One commenter suggested that we include habitat buffers in our designation.

Our Response: The Act does not provide for us to designate buffer habitat. We are directed by section 4 of the Act to designate only those specific areas determined to be either essential to or for the conservation of the species. The areas identified as critical habitat within units that are not occupied, and may be unsuitable at the present, still meet the definition of critical habitat as they will play a role in Pacific Coast WSP conservation as sea-level rise occurs. These areas are not considered buffers.

(21) *Comment:* One commenter raised issues with the increase in unit size on their lands from the 2005 designation. Other landowners that are within proposed critical habitat units, but have property at some distance from the water's edge, questioned the need to designate their properties as critical habitat for the Pacific Coast WSP.

Our Response: In many instances, the units are wider in this rule than designated in 2005, because we anticipate sea-level rise and want to ensure there remains adequate critical habitat following inundation. It is difficult to determine where the effects of sea-level rise will be the most significant, because we expect beach morphology or habitat characteristics to change. Inland expansion of unit boundaries (generally eastward) beyond those in the 2005 designation are expected to offset potential adverse effects of sea-level rise.

Our maps and unit descriptions indicate a westward increase in unit boundaries for this rule in many cases. The inclusion of the intertidal zone is a function of better mapping and the updated National Agriculture Imagery (NAIP) used for this rule, as well as our desire to use the ''water's edge'' as a boundary. The intertidal zone plays an important role in providing the physical and biological features of most of the designated units. As a consequence, the intertidal zone is included in our designation where appropriate. Having the water's edge as the westward, or ocean-side boundary, gives a clear demarcation of the unit boundary when actually visiting the site.

Other expansions of unit boundaries beyond those in the 2005 designation occurred as a result of using new information that better identifies the physical or biological features essential to Pacific Coast WSP. Thus, the new unit boundaries were drawn using the best scientific information available to the Service.

(22) *Comment:* Two commenters believe the Service violated both the Act and Administrative Procedure Act by failing to adequately detail the difference in the revised proposed rule over the 2005 designation.

Our Response: In the revised proposed rule, we outlined our methods and explained differences between the prior September 2005 final rule and the March 2011 revised proposed rule in the Summary of Changes From Previously Designated Critical Habitat section (76 FR 16054; March 22, 2011). We changed the methods used to designate critical habitat because of the need to address sea-level rise and provide conservation of the species and its habitat based on the 2007 Recovery Plan for the species. These changes resulted in the proposed revision to designated critical habitat and the proposed designation of additional areas as critical habitat, and in some cases, a proposed expansion in the size of areas designated in 2005.

We also reviewed the areas excluded from the 2005 final critical habitat designation based upon section 4(b)(2) of the Act. Our March 22, 2011, revised proposal of critical habitat did not include any proposed exclusions, but we did request public comment as to whether any specific areas being proposed as revised critical habitat should be excluded under section 4(b)(2) of the Act. Based on comments received on the 2011 revised proposed rule and our analysis conducted pursuant to the Act, in this revised final designation we have excluded several areas (see *Application of Section 4(b)(2) of the Act* and Exclusions sections below). Because of these exclusions and other modifications to various units, as described elsewhere in this rule, the areas included in this final revised critical habitat designation differ from those proposed in March 2011. The methodology and process used to calculate acreage was discussed in the proposed revised rule (and herein), and there has been no deviation from that process.

(23) *Comment:* Two commenters believed the Service violated the Administrative Procedure Act and the Act by failing to provide adequate notice of the extent of critical habitat. Specifically, commenters believe the maps provided in the revised proposed rule were inadequate.

Our Response: The critical habitat maps are coarse, compared to detailed land ownership. However, the Geographical Information System (GIS) layers for the unit polygons were posted on the Arcata Fish and Wildlife Office Web site, and were available for downloading during the public comment periods. The availability of the GIS data complies with both the Administrative Procedure Act and the Act. We notified landowners, informing them that critical habitat was being proposed for designation on lands in coastal areas from Washington to southern California. Because of the scale of the revised proposed designation, some individual landowners may have been missed, but we made a good faith effort to reach all those that could be identified at the time of the proposal. We also were available upon request to go over maps as needed and were directly contacted by several landowners that sought clarification of ownership during the open public comment periods.

(24) *Comment:* Two commenters stated that the Service failed to adequately explain why retaining all previously designated critical habitat is essential.

Our Response: By court settlement, the Service agreed to conduct a rulemaking to consider potential revisions to the 2005 critical habitat designation. Our *Methods* and *Criteria Used To Identify Critical Habitat* sections in the 2011 revised proposed rule explain how we selected areas essential to and for the conservation of the species. The methods applied in 2011 were similar to those used in the 2004 proposed rule and 2005 final rule. Each unit in this designation contains a description explaining how it meets the Act's definition and our criteria for designation as critical habitat.

Our revised final designation varies from the 2005 rule. There are exclusions and exemptions in this revised final rule that were not in the previous rule (refer to our sections on Summary of Changes from the Revised Proposed Rule).

(25) *Comment:* Two commenters suggested that the Service violated the Act by proposing units that were not occupied at the time of listing.

Our Response: Critical habitat is defined under section 3 of the Act as (1) the specific areas within the

geographical area occupied by a species, at the time it was listed in accordance with the Act, on which are found those physical or biological features (a) essential to the conservation of the species, and (b) which may require special management considerations or protection; and (2) the specific areas outside the geographical area occupied by a species at the time it was listed, upon a determination that such areas are essential for the conservation of the species. Some units are designated based on this second prong; these units, such as WA 1, were not occupied at the time of listing but have been determined to be essential for the conservation of the species.

In addition, some units included in this designation may not be occupied year-round. However, they are essential for conservation because they constitute important wintering sites where breeding does not occur, or important breeding sites. Unit CA 9 is an example of a unit designated for its importance as wintering site.

Unit OR 12 is designated because, although it is unoccupied, it serves an essential role in conservation by connecting other units and thus facilitating Pacific Coast WSP movement from site to site depending on habitat availability, allowing additional foraging or wintering opportunities. This site is expected to play an important role as sea-level rise inundates other sites. The site is identified in the 2007 Recovery Plan as a recovery site.

(26) *Comment:* One commenter stated that the Service violated the Information (Data) Quality Act because the revised proposed rule is not clear regarding the science used to develop the rule.

Our Response: The revised proposed rule, and this final revision to critical habitat, are in fact clear in describing the science used to develop the rule. In our *Background* and Critical Habitat—*Methods Used to Designate Critical Habitat* sections, we discuss the types of information used to develop the designation, as well as the models, mapping techniques, and other materials used to develop the revised proposed rule. We selected models and data that could be consistently used throughout the Pacific Coast WSP's range, and avoided site-specific models and data that would be more difficult to obtain.

(27) *Comment:* One commenter stated that the public should be able to review input from peer reviewers.

Our Response: Peer review is conducted concurrently with the public comment period. Peer reviewers are provided the same information as the public; however, because of their experience with the species or similar species, they are asked to provide a detailed review. Typically, their response is provided by the closing date of the public comment period; therefore, there is no opportunity for the public to comment on peer-review input. Peer-reviewer input has been summarized in this rule, but the full text is available upon request at the Arcata Fish and Wildlife Office (see **ADDRESSES** section).

(28) *Comment:* Some commenters provided Pacific Coast WSP use information for sites that were not proposed for designation. Specifically, sites in Oregon and the Monterey Bay region of California were referenced. Commenters felt that the Service did not fully consider all sites, stating that the omitted sites provide connectivity and thus value to critical habitat.

Our Response: We proposed sites that have regional and rangewide importance. Many sites in northern California have comparatively little Pacific Coast WSP use relative to sites both to the north and to the south. However, we are designating those sites because of the large gap in breeding and wintering Pacific Coast WSPs from southern Sonoma County, California, to New River in Oregon. The fluctuation in the breeding population and the connectivity value of the sites within a large gap in the Pacific Coast WSP's range justifies their inclusion in designation.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species.

(29) *Comment:* A commenter in Washington expressed concern that beach nourishment at Shoalwater Bay by the USACE would impact designated critical habitat. Additional, detailed information was provided by another commenter during the second comment period for the same unit, related to the USACE's beach nourishment project.

Our Response: These comments raise issues related to section 7 of the Act, which requires that Federal agencies ensure that their actions do not jeopardize species or adversely modify or destroy designated critical habitat. If the USACE engages in beach nourishment projects at Shoalwater Bay, such actions may require consultation with the Service to determine the project's effects on Pacific Coast WSP and on designated critical habitat (refer to Effects of Critical Habitat Designation—*Section 7 Consultation*).

(30) *Comment:* Private landowners from all three States raised concerns that designation of critical habitat on their property would prevent use of their land and adjacent land. Several believe the designation would increase regulation and curtail development and enjoyment. Some municipalities expressed similar concerns.

Our Response: A critical habitat designation may result in limitations to land use only in association with land use or management practices that require a Federal permit, Federal funding, or discretionary action by a Federal agency (*i.e.,* a Federal nexus). If a project requires such Federal involvement, then the action and its effects to the Pacific Coast WSP and its designated critical habitat would be evaluated under section 7 of the Act (refer to Effects of Critical Habitat Designation—*Section 7 Consultation*). Actions that do not have a Federal nexus may continue, provided there is no take of Pacific Coast WSPs. If take of Pacific Coast WSPs is anticipated, an individual may seek an incidental take permit from the Service for the Pacific Coast WSP on the lands where the action is to occur. The designation of critical habitat does not affect a non-Federal action.

(31) *Comment:* Two commenters reported on the importance of certain sites in Sonoma County, California, specifically Salmon Creek Beach and Doran Spit.

Our Response: We agree that the Salmon Creek Beach and Doran Spit sites are important to Pacific Coast WSP conservation. However, their overall importance relative to other sites within Recovery Unit 4 (refer to the Recovery Plan; Service 2007) is not as great. Breeding is variable at both Salmon Creek Beach and Doran Spit, as well as at more northern sites (*e.g.,* CA 8, Manchester Beach). Monitoring of the sites will continue, and the Service will work with beach managers to implement appropriate recovery actions that will further conservation of the Pacific Coast WSP at these sites.

(32) *Comment:* Four commenters questioned why critical habitat was not proposed for Ocean Beach, Pacifica State Beach, and Gazos Creek in San Francisco and San Mateo Counties. Commenters also expressed the importance of Laguna Creek State Beach and Seabright State Beach, noting their collective importance.

Our Response: We agree that these sites are important to Pacific Coast WSP

conservation. However, the potential of these sites as breeding areas is lower than that of the sites we designated for breeding (see the *Criteria Used To Identify Critical Habitat* section below) (Service 2007, pp. B9–B12; Service 2011, p. 16053). Similarly the numbers of wintering birds supported by the suggested sites is lower than that of the sites we designated for wintering alone, and wintering needs are also met by many of the sites designated for breeding. The suggested areas also do not strongly advance the goals of increasing diverse habitat, maintaining connectivity, or utilizing restored areas for plover conservation. However, monitoring of the suggested sites will continue, and we will work with beach managers to implement appropriate recovery actions that will further conservation of the Pacific Coast WSP at these sites.

(33) *Comment:* One commenter ''petitioned'' for exclusions under section 4(b)(2) of the Act for both Oceano Dunes SVRA, and a 4-ac (2-ha) area near Sand City, California.

Our Response: Although there is no 4(b)(2) petition process for exclusions of areas from designation of critical habitat, we have considered the comment in terms of whether Oceano Dunes SVRA and Sand City sites should be excluded from this designation. The commenter cited economic considerations in support of exclusion; these were addressed in the final economic analysis (FEA) for the revised proposed rule (refer to the Exclusions section below). The FEA did not identify any disproportionate costs associated with designation of critical habitat at either Oceano Dunes SVRA or the Sand City sites (refer to our response to Comment 14 above, and to ''Exclusions based on Economic Impacts'' below), and consequently, these sites were not considered for economic exclusions. Moreover, in order for lands to be excluded under section 4(b)(2) of the Act, the benefits of excluding the area must outweigh the benefits of including those lands as critical habitat. In this case, the benefits of excluding the ''petitioned'' lands do not outweigh the benefits of including those lands (for instance section 7 and 10 obligations under the Act; increased public awareness of Pacific Coast WSP habitat, and potential indirect oversite by State and local governments) in this final revised designation.

(34) *Comment:* Three commenters requested exclusions or partial exclusions to Units CA 38, CA 39, and CA 41 because they believe those areas do not contain the PCEs due to disturbance.

Our Response: Refer to our response to Comment 8 above. Our response to Comment 17 also addresses disturbance.

Comments on the Draft Economic Analysis

Comments on Development

(35) *Comment:* Several commenters expressed concern that the designation of critical habitat within the Sand City coastal zone in Unit CA 22 will create regulatory uncertainty with associated costs for future development projects in the area. Additionally, the California Coastal Commission (CCC) may view the designation of critical habitat as ''overriding'' the previously approved Sand City local coastal plan (LCP), which allows for the development of two coastal resorts. If these projects do not move forward, jobs and tax revenue that would have been generated by the developments would be lost.

Our Response: As stated in section 4.2.2 of the FEA, we acknowledge that incremental indirect impacts resulting from future litigation or increased scrutiny from State agencies may include denial of development permits for the Sterling-McDonald and Security National Guaranty (SNG) sites in Sand City, Unit CA 22. Due to uncertainty surrounding the likelihood and extent of such indirect impacts, we are unable to quantify any potential impacts. Specifically, such a calculation requires information about both the probability that current development plans will be affected and the magnitude of impacts, neither of which can be determined at this time, nor directly attributed to the critical habitat designation. The commenter provides estimates of total revenues anticipated to be generated by these projects; however, assuming total loss of these revenues implies that such an impact will occur with 100 percent certainty. It is possible, based on recent litigation concerning the site and limits to the CCC's authority to amend the previously approved local coastal program, development will move forward as planned and not be affected by the designation. Therefore, this analysis does not attempt to quantify these impacts, but notes that such impacts are possible and, if they occur, would be an incremental result of critical habitat designation.

(36) *Comment:* One commenter expressed concern that the SNG development site in Sand City, CA (Unit CA 22), is vulnerable to indirect incremental impacts of the designation. The commenter stated that if critical habitat were designated in this previously excluded area, the development project would be subject to further administrative burden related to review by the CCC. The commenter expressed concern that critical habitat may be used by the CCC or other agencies as a further reason to deny a coastal development permit or other approval, resulting in increased litigation and associated costs.

Our Response: The DEA and FEA acknowledge the potential for increased indirect impacts to SNG due to the designation of critical habitat. The FEA notes that such indirect impacts are possible, and if they occur, may be an incremental result of critical habitat designation. However, as explained in section 4.2.2 of the FEA, we do not quantify these impacts due to considerable uncertainty surrounding the probability that the development permits will be denied or that the development will face legal action due to the designation of critical habitat. To this point, the commenter provides documentation suggesting that denial of a permit by CCC could be illegal in light of recent court decisions. An assumption that development will not proceed at the site as planned is thus highly speculative.

(37) *Comment:* One commenter requested clarification of the meaning of the phrase ''land's option value for development,'' as used in section 4.2.2, paragraph 148, and in Exhibits ES–4 and 4–4, of the DEA.

Our Response: The FEA incorporates clarifying language in section 4.2.2. ''Option value'' refers to the fact that land values incorporate an expectation of residential or commercial development, in terms of likelihood and timing, and the associated returns to the landowner.

(38) *Comment:* In the context of the indirect impacts to SNG development, a commenter stated that it is not helpful or meaningful to characterize economic impacts as indirect because the term may suggest that indirect impacts are of lesser magnitude than direct impacts.

Our Response: As described in section 2.4.2 of the FEA, the designation of critical habitat may, under certain circumstances, affect actions that do not have a Federal nexus and thus are not subject to the provisions of section 7 under the Act. Indirect incremental impacts are those unintended changes in behavior that may occur outside of the Act, through other Federal, State, or local actions, and that may be caused by the designation of critical habitat. The FEA does not intend to diminish the magnitude of such impacts by calling them indirect. The FEA may not quantify indirect impacts in some instances due to the considerable

uncertainty surrounding their likelihood and magnitude.

(39) *Comment:* One commenter requested that the Service utilize the estimate of economic impacts for Unit CA 22 contained in the 2005 economic analysis when making a decision to exclude units from critical habitat designation under section 4(b)(2) of the Act.

Our Response: The 2005 economic analysis was developed under a co-extensive framework, which considered and quantified both baseline costs, as well as incremental impacts of the designation. As described in sections 2.1 and 2.2 (as well as in Exhibit 2–1), the 2011 DEA distinguishes the incremental costs of designation from baseline costs, whereas the 2005 economic analysis evaluated all Pacific Coast WSP (baseline and incremental) conservation costs collectively. That is, the impacts estimated in the 2005 Economic Analysis captured costs of Pacific Coast WSP conservation regardless of whether they resulted specifically from critical habitat designation or from other Federal, State, or local regulations. The 2011 DEA instead characterizes all potential future Pacific Coast WSP conservation as either baseline (expected to occur even without the designation of critical habitat) or incremental (expected to occur only if critical habitat is designated). The FEA qualitatively discusses baseline Pacific Coast WSP conservation and quantifies the incremental impacts.

The identification and estimation of incremental impacts is consistent with direction provided by the Office of Management and Budget (OMB) to Federal agencies for the estimation of the costs and benefits of Federal regulations (see OMB, Circular A–4, 2003). It is also consistent with several recent court decisions, including *Cape Hatteras Access Preservation Alliance* v. *U.S. Department of the Interior,* 344 F. Supp. 2d 108 (D.D.C.); *Center for Biological Diversity* v. *U.S. Bureau of Land Management,* 422 F. Supp. 2d 1115 (N.D. Cal. 2006); *Home Builders Association of Northern California* v. *United States Fish and Wildlife Service,* 616 F.3d 983 (9th Cir. 2010), cert. denied, 179 L. Ed 2d 301, 2011 U.S. Lexis 1392, 79 U.S.L.W. 3475 (2011); and *Arizona Cattle Growers* v. *Salazar,* 606 F. 3d 1160 (9th Cir. 2010), cert. denied, 179 L. Ed. 2d 300, 2011 U.S. Lexis 1362, 79 U.S.L.W. 3475 (2011). These decisions found that estimation of incremental impacts stemming solely from the designation is proper.

(40) *Comment:* One commenter asserted that additional administrative burden and project modifications are necessary under the Act for a USACE beach nourishment project in subunit WA 3B due to the Pacific Coast WSP's recent colonization of subunit WA 3B.

Our Response: The FEA includes the estimated administrative cost of section 7 consultation related to this beach nourishment project in subunit WA 3B. As described in section 4.2.5 of the FEA, due to the designation of critical habitat, this project's previous informal consultation will need to be reinitiated in 2012, to consider the adverse modification standard. This project is short-term and occurs in a critical habitat unit occupied by the Pacific Coast WSP, but could have permanent impacts on critical habitat. The analysis assumes that no project modifications would be necessary to avoid adverse modification of critical habitat in addition to what has already been proposed to reduce impacts to the Pacific Coast WSP. However, until the section 7 analysis is complete, it remains unknown if an adverse modification determination will be the resultant outcome.

(41) *Comment:* Although the revised critical habitat does not overlap any areas currently used for recreation in subunit CA 55B (Coronado Beach), a commenter expressed concern that the designation of critical habitat could impact future recreation activities in the subunit. These activities included lifeguarding activities, beach access, and construction of a bike path and pedestrian trail. The commenter also expressed concern that a popular dog beach north of the critical habitat designation in subunit CA 55B could be affected by critical habitat.

Our Response: If there is a Federal nexus, the future construction of a bike path and pedestrian trail could result in section 7 consultation with the Service if the project may affect Pacific Coast WSPs or designated critical habitat. Costs associated with this consultation have been added to section 4.2.1 of the FEA; however, these costs would be incurred only if activities are subject to a Federal nexus. Because subunit CA 55B is considered occupied by the Pacific Coast WSP and these projects are considered long-term activities, the incremental impacts associated with these projects are limited to the administrative cost of addressing the adverse modification standard during consultation.

The lifeguard facilities and activities are not part of a Federal action, and therefore, would not involve an adverse modification analysis for critical habitat under section 7 of the Act. As the dog beach to the north of subunit CA 55B is not part of this designation as critical habitat, the FEA does not consider impacts to activities occurring at this beach.

Comments on Recreation

(42) *Comment:* A commenter stated that if the open riding and camping area of Oceano Dunes SVRA was to be restored to support the PCEs identified in the revised proposed critical habitat rule, there would be substantial adverse economic impacts. The commenter asserted that restoration of PCEs in this area would require eliminating camping and off-highway vehicle (OHV) riding opportunities in 563 ac (228 ha), or approximately one third of the area currently open to riding.

Our Response: Activities at Oceano Dunes SVRA are not currently subject to a Federal nexus. Because critical habitat only applies to activities implemented by a Federal agency or that require Federal authorization or funding, we do not expect the operations of the park to change due to critical habitat designation. As noted in section 4.2.1 of the FEA and Exhibits ES–4 and 4–4, indirect impacts to Oceano Dunes SVRA are possible, but the analysis does not quantify the impacts due to considerable uncertainty surrounding the probability that the CCC will alter its current permit or Oceano Dunes SVRA will face legal action due to the designation of critical habitat. The FEA notes, however, that such impacts are possible, and if they were to occur, they would be considered incremental results of the designation.

(43) *Comment:* One commenter asserted that the revised proposed critical habitat rule fails to consider the economic impacts of this rule on operations and recreational opportunities in Oceano Dunes SVRA. The commenter expressed concerns that the revised critical habitat designation could result in significant delays to crucial visitor-service efforts or resource management efforts, including the placement of new restrooms, restoration of sensitive vegetation islands, and regular maintenance of perimeter fence to prevent trespass of vehicles into closed areas or adjacent private property. The commenter asserted that the additional time necessary to undertake section 7 consultation could jeopardize projects, jeopardize project funding, and result in significant loss of recreational opportunities in Oceano Dunes SVRA. Loss of recreational opportunities would, in turn, result in significant loss of income for local businesses and the local economy. Two commenters submitted an economic analysis prepared for the California

Department of Parks and Recreation, Off Highway Motor Vehicle Recreation Division, estimating the overall economic contribution of Oceano Dunes SVRA to be $171 million annually.

Our Response: Our analysis notes in section 4.2.1 of the FEA and in Exhibits ES–4 and 4–4 that reducing or eliminating the area available for riding at Oceano Dunes SVRA would result in welfare losses and regional economic impacts. Beach users would incur social welfare losses due to forgone trips or a diminished beach experience (for example, due to crowding). In addition, regional economic impacts arise due to reductions in beach recreation-related expenditures caused by fewer recreation-related trips. The regional economic impacts that could result from reducing or eliminating the riding area would represent some portion of the $171 million annual economic impact of Oceano Dunes SVRA estimated by the commenter.

However, activities on Oceano Dunes SVRA are not currently subject to a Federal nexus. Therefore, the Service does not expect the operations of the park to change due to critical habitat designation, nor does it expect administrative impacts (or delays) associated with undertaking section 7 consultation. As we note in section 4.2.1 of the FEA and in Exhibits ES–4 and 4–4, indirect impacts to Oceano Dunes SVRA are possible, but the analysis does not quantify the impacts due to considerable uncertainty surrounding the probability that the CCC will alter its current permit or that Oceano Dunes SVRA will face legal action due to the designation of critical habitat. In addition, the area within Oceano Dunes SVRA within Unit CA 31 is occupied by both breeding and wintering Pacific Coast WSP, and as a result any project modifications that may take place would be a result of having to avoid take of the species and not because of the designation of critical habitat and would be considered baseline impacts of the designation.

(44) *Comment:* A commenter expressed concern that the designation of critical habitat could impact beach management activities, tourism, and, in turn, tax revenues in the City of Santa Barbara.

Our Response: Section 4.2.2 of the FEA describes expected economic impacts related to dredging and beach nourishment projects in Unit CA 35, Santa Barbara Beaches. This section acknowledges the potential for administrative impacts to semi-annual beach management activities caused by the designation of critical habitat for the Pacific Coast WSP. Beach nourishment projects in this unit are not likely to incur incremental project modifications, as they are short-term and temporary in nature. As Unit CA 35 is occupied by the Pacific Coast WSP, any project modifications proposed in this unit would be due to the presence of the Pacific Coast WSP and are considered baseline impacts of the designation. Therefore, the designation of critical habitat is not expected to impact beach access, tourism, or tax revenues in the City of Santa Barbara.

(45) *Comment:* One commenter expressed concern that the designation of critical habitat on Los Angeles County beaches (CA 43, CA 44, CA 45A–D) could impact future recreational activities and daily maintenance operations, such as beach raking and sanitizing sandy beaches, collecting trash, cleaning restroom facilities, and maintaining volleyball courts.

Our Response: Unless such recreational and maintenance activities are subject to a Federal nexus, as defined under the section titled Effects of Critical Habitat Designation, we do not expect these activities to be affected by designation of critical habitat on Los Angeles County beaches.

Comments on Habitat Management

(46) *Comment:* One commenter asserted that inclusion of proposed units OR 1, OR 2, OR 3, OR 5, and OR 11 generates additional stress on the Oregon Parks and Recreation Department (OPRD) when applying for Federal grants to execute habitat management projects for the plover by creating a Federal nexus where one did not previously exist. The commenter asserted that this Federal nexus needlessly belabors efforts to improve habitat for the plover and forces OPRD and the Service to expend additional staff time addressing items that have already been accounted for in the habitat conservation plan (HCP) process.

Our Response: As stated in the footnote to Exhibit 3–2 of the FEA, and as delineated in Table 3 below, Units OR 1, OR 2, OR 3, OR 4, OR 5, OR 6, OR 12, and OR 13 are considered unoccupied and consultation with the Service would not occur absent critical habitat designation. Unit OR 11 is considered occupied by the Service and therefore, if a Federal nexus exists, consultation may be necessary to address project impacts to the species as well as critical habitat. In the unoccupied units, costs of addressing critical habitat effects during consultation and all administrative costs of consultation are considered incremental impacts of the designation, regardless of activity duration or the permanency of habitat impacts. Following this methodology, the FEA forecasts costs in Units OR 1 and OR 3 associated with future jetty repair as incremental impacts of the designation. For Units OR 2 and OR 5, we do not foresee projects in these areas, and no specific planned or ongoing projects were identified by the commenter. Therefore, the FEA does not quantify additional impacts related to future OPRD habitat management projects.

Note that most areas covered by OPRD's HCP have been excluded from the revised final critical habitat designation. Consequently, Federal grants obtained by the State and other entities to conduct habitat restoration or other actions in the excluded areas will not require a section 7 critical habitat analysis, unless those activities are to occur in areas not specifically excluded (*i.e.,* within designated critical habitat).

(47) *Comment:* One commenter stated that proposed units CA 55E and CA 55G are managed under the San Diego Bay INRMP, a joint INRMP between the U.S. Navy Southwest Division and the San Diego Unified Port District (Port of San Diego), prepared in the year 2000. The commenter requested that these lands be exempted from critical habitat, similar to the exemption of military lands in the proposed rule.

Our Response: As described under the section titled Exemptions, the Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. As a result to a 2004 amendment to the Act, section 4(a)(3)(B)(i) now provides: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.'' The Department of Defense (DOD) lands we identified as essential for the conservation of the Pacific Coast WSP within San Diego Bay have been exempted under section 4(a)(3)(B) of the Act. There are two INRMPs covering Navy land in south San Diego County (2002 Naval Base Coronado INRMP and 2000 San Diego Bay INRMP). All exemptions of Navy lands, including those within San Diego Bay, were based

on the 2002 Naval Base Coronado INRMP (see Exemptions section). The Port of San Diego owns non-DOD lands that are managed using the 2000 San Diego Bay INRMP. Because we have a well-established partnership with the Port of San Diego for Pacific Coast WSP conservation, in this final rule we have excluded, under section 4(b)(2) of the Act, the critical habitat within the plan area that is managed by the Port of San Diego (Subunits CA 55E and CA 55G) (see Exclusions section).

Summary of the 2005 Rule

On September 29, 2005 (70 FR 56970), we designated approximately 12,150 ac (4,922 ha) as critical habitat for the Pacific Coast WSP. We included 32 units within Washington, Oregon, and California. The unit breakdown by State is as follows: Washington, 3 units (2,526 ac (1,023 ha)); Oregon, 5 units (2,147 ac (869 ha)); and California, 24 units (7,477 ac (3,026 ha)). During our comparison of the 2005 final critical habitat designation and this revised final designation, we discovered that the acreage totals for some units or areas were in error. The totals for areas for the 2005 rule identified within this rule are the correct totals.

Summary of Changes From the Revised Proposed Rule

On March 22, 2011 (76 FR 16046), we proposed to designate 28,261 ac (11,436 ha) of critical habitat for the Pacific Coast WSP in 68 units. On January 17, 2012 (77 FR 2243), we reopened the comment period and made changes to our March 22, 2011, revised proposed rule. Specifically, we announced the availability of the draft economic analysis on our March 22, 2011, revised proposed critical habitat rule (76 FR 16046); identified the taxonomic and nomenclature change for the Pacific Coast WSP; proposed to exempt Vandenberg Air Force Base under provisions in section 4(a)(3) of the Act due to their newly approved INRMP; and proposed changes to Unit CA 46: Bolsa Chica State Beach and Bolsa Chica Reserve. The most significant changes between the March 22, 2011, and January 17, 2012, revised proposed rule and this revised final rule are outlined in Table 2 below and include:

(1) In the document announcing the availability of the DEA (77 FR 2243; January 17, 2012), we stated we were considering exempting the Department of Defense (DOD) lands at Vandenberg Air Force Base (AFB) within Units CA 32 and CA 33 from the designation of critical habitat based on the April 14, 2011, approved INRMP, which contains conservation measures that protect the Pacific Coast WSP. We have determined that the actions being implemented through the Vandenberg AFB INRMP provide a benefit to the Pacific Coast WSP, and therefore, we are exempting approximately 1,135 ac (459 ha) of DOD land in Units CA 32 and CA 33 under section 4(a)(3) of the Act. For a complete discussion of exemptions under section 4(a)(3) of the Act, see Exemptions section below.

(2) During the public comment period on the proposed rule, we received information from the Navy that approximately 8 ac (3 ha) of DOD lands were included in the revised proposed critical habitat within Unit CA 22 in Monterey County, California. The Navy submitted an amended INRMP for these lands. We have reviewed the amended INRMP and have determined that it provides conservation benefits for the Pacific Coast WSP and its habitat. We have exempted the 8 ac (3 ha) of DOD lands from the designation under section 4(a)(3) of the Act, see Exemptions section below.

(3) We finalized our exclusion analysis under section 4(b)(2) of the Act. Approximately 3,797 ac (1,537 ha) of habitat are excluded from the revised final critical habitat designation based on this analysis. This represents approximately 16 percent of the habitat that was proposed. See the Exclusions section, below, for more information. Approximately 425 ac (172 ha) of tribal lands are excluded from subunit WA 3B, including all land under the jurisdiction of the Shoalwater Bay Tribe. Another 3,309 ac (1,339 ha) of critical habitat is being excluded under the Oregon Parks and Recreation Department Habitat Conservation Plan, City of San Diego Subarea Plan (under the Multi-Species Conservation Plan) and the Carlsbad Habitat Management Plan (under the Multi-species Habitat Conservation Plan). An additional 63 ac (25 ha) of Port of San Diego managed lands within subunits CA 55E and CA 55G are being excluded based on a management plan for the Pacific Coast WSP and our partnership with the Port. We determined that excluding these lands would not result in extinction of the Pacific Coast WSP, and that the benefits of excluding these lands outweigh the benefits of including them. Consequently, the Secretary is exercising his discretion to exclude approximately 3,797 ac (1,537 ha) of land in Washington, Oregon, and California under section 4(b)(2) of the Act. For a complete discussion of exclusions under section 4(b)(2) of the Act, see Exclusions section below.

(4) Based on comments received by the USACE and the public, we revised Unit CA 46, Bolsa Chica State Beach (subunit CA 46A), and Bolsa Chica Reserve (subunits 46E and 46F). The Unit was revised to include approximately 471 ac (191 ha), a net decrease of approximately 34 ac (14 ha) from the proposal. As described in our January 17, 2012, **Federal Register** notice, the new areas identified better reflect lands essential to the Pacific Coast WSP (77 FR 2243).

(5) We received information from the Willapa National Wildlife Refuge (NWR) during development of this final rule regarding habitat suitability to the Pacific Coast WSP at the refuge, and the extent of Federal jurisdiction. As a result, we modified the unit boundaries for WA 4A, Leadbetter Spit. In the March 2011 proposed rule, WA 4A was identified as having 2,463 ac (997 ha) of habitat meeting criteria for designation as critical habitat (76 FR 16046). Federal jurisdiction goes to ordinary high tide line. The acreage estimate under the proposed rule was incorrect, and the revised unit is approximately 125 ac (50 ha) smaller. In addition, the proposed rule did not account for acreage that was unlabeled in the parcel data, similar to the situation described in point (6) below (see Table 1). Within Subunit WA 4A, approximately 1,713 ac (693 ha) are managed by Washington State and 987 ac (399 ha) are on Willapa National Wildlife Refuge (Federal).

Similarly, Shoalwater Bay Tribe Reservation lands included in Unit WA 3B, Shoalwater/Graveyard Spit, were miscalculated in the revised proposed rule (76 FR 16046). Tribal lands have been recalculated to be 425 ac (172 ha) in this revised final rule, all of which are excluded from designation under 4(b)(2) of the Act (see Exclusions section).

(6) During finalization of our critical habitat designation, we discovered inconsistencies in the calculation of some of the acreages for proposed units. The inconsistencies resulted from calculations based on parcel data (*i.e.* ownership data), which do not contain the intertidal zone and other lands managed by the California State Lands Commission (and the similar agency for Washington). Consequently, those acres were not included in the unit acreage totals in the proposed revised rule. Table 1 lists the affected units.

Maps in the proposed revised rule for the affected units in Table 1 accurately depict the intended unit boundaries, including the unlabeled lands managed by the California State Lands Commission and the State of Washington (76 FR 16046). In addition, our methods discussion in this final revision reflects our decision to use the

water's edge as the westward or ocean-side unit boundary (refer to our *Methods Used to Designate Critical Habitat* section, and our response to Comment 4 in the Summary of Comments and Recommendations section). This revised final designation includes the intertidal zone and other lands managed by state land commission agencies. Therefore, adequate notice has been provided regarding our intent to designate critical habitat for the Pacific Coast WSP to the water's edge.

(7) There were several discrepancies between text and tables in the 2005 final critical habitat rule for the Pacific Coast WSP (70 FR 56970). The information provided in this revised final rule is compared to the tables in the 2005 revised rule (see Table 2 below in this rule for comparison). Rounding error remains an issue, and may result in a difference in acreages between tables in this revised final designation and previous rules. However, these differences in acreages are small, and the data provided within this rule remain representative of our designation. Legal descriptions and GIS data layers are available at *http://www.fws.gov/arcata/es/birds/WSP/plover.html,* or upon request to the Arcata Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** above).

TABLE 1—UNITS WITH DISCREPANCIES FROM PARCEL DATA AND UNIT BOUNDARY. THE DIFFERENCE IN ACREAGE (HECTARES) IS REFLECTED IN LANDS UNDER THE JURISDICTION OF THE CALIFORNIA STATE LANDS COMMISSION

Unit name	Proposed acres *ac (ha)*	Total unit area recalculated *ac (ha)*
WA 4A Leadbetter Spit	2,463 (997)	2,700 (1,093)
CA 2 Gold Bluffs Beach	144 (58)	233 (94)
CA 3A Stone Lagoon	52 (21)	55 (22)
CA 3B Big Lagoon	212 (86)	268 (108)
CA 4A Clam Beach/Little River	194 (79)	337 (136)
CA 5A Humboldt Bay South Spit	419 (170)	572 (231)
CA 5B Eel River North Spit and Beach	259 (105)	464 (188)
CA 6 Eel River Gravel Bars	1,139 (461)	1,349 (546)
CA 7 MacKerricher Beach	1,176 (476)	1,218 (493)
CA 8 Manchester Beach	482 (195)	505 (204)

*Values in table may not sum due to rounding.

TABLE 2—CHANGES BETWEEN THE SEPTEMBER 29, 2005, PACIFIC COAST WSP REVISED CRITICAL HABITAT DESIGNATION; THE MARCH 22, 2011, AND THE JANUARY 17, 2012, REVISED PROPOSED DESIGNATION; AND THIS REVISED FINAL DESIGNATION

[Acreage values are approximate and may not total due to rounding]

Critical habitat unit in this revised final rule	2005 Designation of revised critical habitat in AC/HA		2011 and 2012 Revised proposed revisions to the critical habitat designation in AC/HA		2012 Revised final critical habitat designation in AC/HA	
	AC	HA	AC	HA	AC	HA
Washington:						
WA 1 Copalis Spit	.....	.....	407	165	407	165
WA 2 Damon Point	908	368	673	272	673	272
WA 3A Midway Beach	786	318	697	282	697	282
WA 3B Shoalwater/Graveyard Spit	.....	.....	1121	454	696	282
WA 4A Leadbetter Spit	832	337	2463	997	2700	1093
WA 4B Gunpowder Sands Island	.....	.....	904	366	904	366
Washington Totals	2526	1022	6265	2535	6077	2459
Oregon:						
OR 1 Columbia River Spit	.....	.....	169	68	Excluded under 4(b)(2).	
OR 2 Necanicum River Spit	.....	.....	211	85	11	4
OR 3 Nehalem River Spit	.....	.....	299	121	Excluded under 4(b)(2).	
OR 4 Bayocean Spit	207	84	367	149	201	82
OR 5 Netarts Spit	.....	.....	541	219	Excluded under 4(b)(2).	
OR 6 Sand Lake South	.....	.....	200	81	5	2
OR 7 Sutton/Baker Beaches	260	105	372	151	276	112
OR 8A Siltcoos Breach	8	3	15	6	15	6
OR 8B Siltcoos River Spit	527	213	241	97	116	47
OR 8C Dunes Overlook/Tahkenitch Creek Spit	.....	.....	716	290	383	155
OR 8D North Umpqua River Spit	.....	.....	236	95	59	24
OR 9 Tenmile Creek Spit	235	95	244	99	223	90
OR 10 Coos Bay North Spit	278	113	308	125	273	111

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[Acreage values are approximate and may not total due to rounding]

Critical habitat unit in this revised final rule	2005 Designation of revised critical habitat in AC/HA		2011 and 2012 Revised proposed revisions to the critical habitat designation in AC/HA		2012 Revised final critical habitat designation in AC/HA	
	AC	HA	AC	HA	AC	HA
OR 11 Bandon to New River	632	256	1016	411	541	219
OR 12 Elk River Spit	.....	.....	167	68	Excluded under 4(b)(2).	
OR 13 Euchre Creek Spit	.....	.....	116	47	9	4
Oregon Totals	2147	869	5218	2112	2112	855
California:						
CA 1 Lake Earl	57	24	74	30	74	30
CA 2 Gold Bluffs Beach	.....	.....	144	58	233	94
CA 3A Stone Lagoon	.....	.....	52	21	55	22
CA 3B Big Lagoon	280	113	212	86	268	108
CA 4A Clam Beach/Little River	155	63	194	79	337	136
CA 4B Mad River Beach	377	153	456	185	452	183
CA 5A Humboldt Bay South Spit	375	152	419	170	572	231
CA 5B Eel River North Spit and Beach	283	114	259	105	464	188
CA 5C Eel River South Spit and Beach	402	163	339	137	336	136
CA 6 Eel River Gravel Bars	1193	483	1139	461	1349	546
CA 7 MacKerricher Beach	1048	424	1176	476	1218	493
CA 8 Manchester Beach	341	138	482	195	505	204
CA 9 Dillon Beach	.....	.....	39	16	39	16
CA 10A Point Reyes	462	187	460	186	460	186
CA 10B Limantour	124	50	156	63	156	63
CA 11 Napa-Sonoma	.....	.....	618	250	618	250
CA 12 Hayward	.....	.....	1	0	1	0
CA 13A Eden Landing	.....	.....	237	96	237	96
CA 13B Eden Landing	.....	.....	171	69	171	69
CA 13C Eden Landing	.....	.....	609	246	609	246
CA 14 Ravenswood	.....	.....	89	36	89	36
CA 15 Warm Springs	.....	.....	168	68	168	68
CA 16 Half Moon Bay	37	15	36	15	36	15
CA 17 Waddell Creek Beach	9	4	25	10	25	10
CA 18 Scott Creek Beach	19	8	23	9	23	9
CA 19 Wilder Creek Beach	10	4	15	6	15	6
CA 20 Jetty Road to Aptos	.....	.....	399	161	399	161
CA 21 Elkhorn Slough Mudflats	281	114	281	114	281	114
CA 22 Monterey to Moss Landing	.....	.....	967	391	959	388
	.....	.....	.....	.....	8 ac (3 ha) exempt under 4(a)(3).	
CA 23 Point Sur Beach	61	25	72	29	72	29
CA 24 San Carpoforo Creek	.....	.....	24	10	24	10
CA 25 Arroyo Laguna Creek	.....	.....	28	11	28	11
CA 26 San Simeon State Beach	28	11	24	10	24	10
CA 27 Villa Creek Beach	17	7	20	8	20	8
CA 28 Toro Creek	.....	.....	34	14	34	14
CA 29 Atascadero Beach/Morro Strand State Beach	.....	.....	213	86	213	86
CA 30 Morro Bay Beach	.....	.....	1076	435	1076	435
CA 31 Pismo Beach/Nipomo Dunes	.....	.....	1652	669	1652	669
CA 32 Vandenberg North	.....	.....	711	288	Exempt under 4(a)(3).	
CA 33 Vandenberg South	.....	.....	424	172	Exempt under 4(a)(3).	
CA 34 Devereaux Beach	36	15	52	21	52	21
CA 35 Santa Barbara Beaches	.....	.....	65	26	65	26
CA 36 Santa Rosa Island Beaches	.....	.....	586	237	586	237
CA 37 San Buenaventura Beach	.....	.....	70	28	70	28
CA 38 Mandalay Beach to Santa Clara River	350	142	672	272	672	272
CA 39 Ormond Beach	175	71	320	130	320	130
CA 40, CA 41 Mugu Lagoon	87	35	Exempt under 4(a)(3)		Exempt under 4(a)(3).	

TABLE 2—CHANGES BETWEEN THE SEPTEMBER 29, 2005, PACIFIC COAST WSP REVISED CRITICAL HABITAT DESIGNATION; THE MARCH 22, 2011, AND THE JANUARY 17, 2012, REVISED PROPOSED DESIGNATION; AND THIS REVISED FINAL DESIGNATION—Continued

[Acreage values are approximate and may not total due to rounding]

Critical habitat unit in this revised final rule	2005 Designation of revised critical habitat in AC/HA		2011 and 2012 Revised proposed revisions to the critical habitat designation in AC/HA		2012 Revised final critical habitat designation in AC/HA	
	AC	HA	AC	HA	AC	HA
CA 42 San Nicolas Island	.....	.....	Exempt under 4(a)(3)		Exempt under 4(a)(3).	
CA 43 Zuma Beach	68	28	73	30	73	30
CA 44 Malibu Beach	.....	.....	13	5	13	5
CA 45A Santa Monica Beach	25	10	48	19	48	19
CA 45B Dockweiler North	43	17	34	14	34	14
CA 45C Dockweiler South	24	10	65	26	65	26
CA 45D Hermosa State Beach	10	4	27	11	27	11
CA 46A Bolsa Chica State Beach	4	2	93	38	93	38
CA 46B Bolsa Chica Reserve	.....	.....	2	1	2	1
CA 46C Bolsa Chica Reserve	591	239	222	90	222	90
CA 46D Bolsa Chica Reserve	.....	.....	2	1	2	1
CA 46E Bolsa Chica Reserve	.....	.....	247	100	247	100
CA 46F Bolsa Chica Reserve	.....	.....	2	1	2	1
CA 47 Santa Ana River Mouth	13	5	19	8	19	8
CA 48 Balboa Beach	.....	.....	25	10	25	10
CA 49 San Onofre Beach-Marine Corps Base Camp Pendleton	49	20	Exempt under 4(a)(3)		Exempt under 4(a)(3).	
CA 50A–C Batiquitos Lagoon	65	26	66	27	Excluded under 4(b)(2).	
CA 51A–C San Elijo Lagoon Ecological Reserve	.....	.....	15	6	15	6
CA 52A San Dieguito Lagoon	.....	.....	4	2	4	2
CA 52B San Dieguito Lagoon	.....	.....	3	1	Excluded under 4(b)(2).	
CA 52C San Dieguito Lagoon	.....	.....	4	2	Excluded under 4(b)(2).	
CA 53 Los Penasquitos Lagoon	24	10	32	13	Excluded under 4(b)(2).	
CA 54A Fiesta Island	.....	.....	2	1	Excluded under 4(b)(2).	
CA 54B Mariner's Point	.....	.....	7	3	Excluded under 4(b)(2).	
CA 54C South Mission Beach	.....	.....	38	15	Excluded under 4(b)(2).	
CA 54D San Diego River Channel	.....	.....	51	21	Excluded under 4(b)(2).	
CA 55A orth Island	44	18	Exempt under 4(a)(3)		Exempt under 4(a)(3).	
CA 55B Coronado Beach	.....	.....	74	30	74	30
CA 55C Silver Strand Beach	.....	.....	Exempt under 4(a)(3)		Exempt under 4(a)(3).	
CA 55D Delta Beach	.....	.....	Exempt under 4(a)(3)		Exempt under 4(a)(3).	
CA 55E Sweetwater Marsh National Wildlife Refuge and D Street Fill	128	52	132	54	79	32
CA 55F Silver Strand State Beach	.....	.....	82	33	82	33
CA 55G Chula Vista Wildlife Reserve	.....	.....	10	4	Excluded under 4(b)(2).	
CA 55H Naval Radio Receiving Facility	.....	.....	66	27	Exempt under 4(a)(3).	
CA 55I San Diego National Wildlife Refuge South Bay Unit	.....	.....	5	2	5	2
CA 55J Tijuana Estuary and Border Field State Park	182	74	150	61	150	61
California Totals	7,477	3,026	16,896	6,838	16,337	6,612

TABLE 2—CHANGES BETWEEN THE SEPTEMBER 29, 2005, PACIFIC COAST WSP REVISED CRITICAL HABITAT DESIGNATION; THE MARCH 22, 2011, AND THE JANUARY 17, 2012, REVISED PROPOSED DESIGNATION; AND THIS REVISED FINAL DESIGNATION—Continued

[Acreage values are approximate and may not total due to rounding]

Critical habitat unit in this revised final rule	2005 Designation of revised critical habitat in AC/HA		2011 and 2012 Revised proposed revisions to the critical habitat designation in AC/HA		2012 Revised final critical habitat designation in AC/HA	
	AC	HA	AC	HA	AC	HA
Total *	12,150	4,917	28,379	11,485	24,527	9,926

* Values in table may not sum due to rounding.

In summary, this revised final critical habitat designation includes approximately 24,527 ac (9,926 ha) in 60 units, after excluding portions of Units/subunits WA 3B, OR 1–7, OR 8A–D, OR 9–13, CA 50A–C, CA 52B–C, CA 53, CA 54A–D, CA 55E, CA 55G, and CA 55I (approximately 3,797 ac (1,537 ha)) based on consideration of economic, national security, and other relevant impacts (see Exclusions). The areas identified in this revised final rule constitute revisions of areas excluded and designated as critical habitat for the Pacific Coast WSP on September 29, 2005 (70 FR 56970), and proposed revisions to that rule published on March 22, 2011 (76 FR 16046) and January 17, 2012 (77 FR 2243). This revised final critical habitat designation includes approximately 6,077 ac (2,460 ha) in 4 units within Washington, approximately 2,112 ac (856 ha) in 9 units within Oregon, and 16,337 ac (6,612 ha) in 47 units within California. Table 2 above outlines the differences between the 2005 final critical habitat rule (70 FR 56970; September 29, 2005), the 2011 and 2012 proposed revisions to the critical habitat designation (76 FR 16046, March 22, 2011; 77 FR 2243, January 17, 2012, respectively), and this revised final critical habitat designation for the Pacific Coast WSP. For more information on the differences between the 2005 critical habitat rule and the 2011 revised proposed critical habitat rule and 2012 amendment, please see the Summary of Changes From Previously Designated Critical Habitat section of the revised proposed critical habitat rule published in the **Federal Register** on March 22, 2011 (76 FR 16046), and the Changes to Proposed Revised Critical Habitat section of the document published in the **Federal Register** on January 17, 2012 (77 FR 2243).

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features:

(a) Essential to the conservation of the species and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided under the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot otherwise be relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. In this final rule, we also designate areas within the Pacific Coast WSP's historical range that may not have been occupied at listing. We designate those areas because we have determined that those areas are essential for the conservation of the species. For both the occupied and unoccupied areas (at the time of listing), critical habitat designation identifies, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical and biological features within an area, we focus on the principal biological or physical constituent elements (primary constituent elements such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. Primary constituent elements are the elements of physical or biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. For example, an area currently occupied by the species but that was not occupied at the time of listing may be essential to the conservation of the species and may be included in the critical habitat designation. We designate critical habitat in areas outside the geographical area occupied by a species only when a designation limited to its range would be inadequate to ensure the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to insure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) the prohibitions of section 9 of the Act if actions occurring in these areas may affect the species. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Relationship of Critical Habitat to Recovery Planning

Areas that are important to the conservation of the species, but are outside the critical habitat designation, will continue to be subject to conservation actions we implement under section 7(a)(1) of the Act. Areas that support populations are also subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the agency action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, HCPs, or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

In developing this revised final rule, we considered the conservation relationship between critical habitat and recovery planning. Although recovery plans formulate the recovery strategy for a species, they are not regulatory documents, and there are no specific protections, prohibitions, or requirements afforded a species based solely on a recovery plan. Furthermore, although critical habitat designation can contribute to the overall recovery strategy for a species, it does not, by itself, achieve recovery plan goals.

In Appendix C of the Recovery Plan (Service 2007), the Service recommends management actions that can be taken by land managers to benefit the conservation of the Pacific Coast WSP. Some actions should be implemented with other measures to maximize the recovery potential. Other recovery actions need to be instituted when conditions change; for example, when there is increased predation, or the type of predator changes. Monitoring and intensive management may be required at some sites.

We expect that there will be an increased need for management (*i.e.,* implementation of recovery actions) as ''coastal squeeze'' occurs with a rising shift in sea level. A land manager's response will likely vary by site, depending on the site needs at that time. Additional planning may be required to set priorities to the expected change in habitat condition.

Much information has been collected since the Pacific Coast WSP's listing as threatened in 1993. Those data that define life history parameters need to be regularly assessed to gain a better understanding of Pacific Coast WSP survivorship, response to predation and disturbance, and response to changing habitats. A revised population viability analysis (Service 2007, Appendix D) will assist biologists and land managers to understand population movements, and perhaps prioritize areas suitable for intensive management. Cost-effective management at a few, well-distributed sites may assist with long-term Pacific Coast WSP conservation, and allow for the sharing of resources.

Methods

As required by section 4(b)(2) of the Act, we used the best scientific data available in determining areas that contain the features essential to the conservation of the Pacific Coast WSP. Data sources included research published in peer-reviewed articles and previous Service documents on the species. Additionally, we utilized regional Geographic Information System (GIS) shape files for area calculations and mapping (also refer to Methods section in the 2011 revised proposed rule published at 76 FR 16046).

Physical or Biological Features

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas within the historical range and geographical area occupied by the

species at the time of listing to designate as critical habitat, we consider the physical or biological features essential to the conservation of the species and which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.

We derive the specific physical or biological features essential for the Pacific Coast WSP from studies of this species' habitat, ecology, and life history as described in the Critical Habitat section of the revised proposed rule to designate critical habitat published in the **Federal Register** on March 22, 2011 (76 FR 16046), and in the information presented below. Additional information can be found in the final listing rule published in the **Federal Register** on March 5, 1993 (58 FR 12864), and the Recovery Plan for the Pacific Coast Population of the Western Snowy Plover (*Charadrius alexandrinus nivosus*) finalized on August 13, 2007 (Service 2007). We have determined that the Pacific Coast WSP requires the following physical or biological features.

Habitats That Are Representative of the Historical Geographical and Ecological Distribution of the Species

The historical range of the Pacific Coast WSP extends from Copalis Spit, Washington, south along the Pacific Coast of Oregon and California to Bahia Magdelena, Baja California, Mexico. The Pacific Coast WSP breeds primarily above the high tide line on coastal beaches, sand spits, dune-backed beaches, sparsely vegetated dunes, beaches at creek and river mouths, and salt pans at lagoons and estuaries. Less common nesting habitats include bluff-backed beaches, dredged material disposal sites, salt pond levees, dry salt ponds, and river bars. In winter, Pacific Coast WSPs are found on many of the beaches used for nesting as well as on beaches where they do not nest, including manmade salt ponds and on estuarine sand and mud flats. Despite the variation in the types of habitat where the Pacific Coast WSP is found, these habitats all share the same general characteristics of typically being flat, open areas with sandy or saline substrates, with usually sparse or absent vegetation or driftwood (Stenzel *et al.* 1981, p. 18; Service 2007).

In addition to the varying habitat types identified above, individual habitat characteristics also vary across the Pacific Coast WSP's range. For example, beach habitats in the southern part of its range are generally characterized by large, flat, open spaces, whereas beach habitats within the northern part of the range (north of Tomales Bay, CA) are smaller, more widely distributed, and often associated with stream mouths, bays, or estuaries. These varying habitat types and availability contribute to the Pacific Coast WSP's ability to maintain its use of coastal areas for breeding and wintering across its range and are considered an essential physical or biological feature for the species.

Space for Individual and Population Growth and for Normal Behavior

Pacific Coast WSPs require space for foraging and establishment of nesting territories. These areas vary widely in size depending on habitat type, habitat availability, life-history stage, and activity. As stated in the Background section of the revised proposed designation (76 FR 16046; March 22, 2011), males establish nesting territories that vary from about 0.25 to 2.5 ac (0.1 to 1.0 ha) at interior sites (Page *et al.* 1995, p. 10) and 1.2 ac (0.5 ha) in coastal salt pan habitat, with beach territories perhaps larger (Warriner *et al.* 1986, p. 18). Foraging activities also occur in non-territorial areas up to 5 mi (8 kilometers (km)) from the nesting sites when not incubating. Essential areas must therefore extend beyond nesting territories to include space for foraging during the nesting season and space for overwintering, and to provide for connectivity with other portions of the Pacific Coast WSP's range. Pacific Coast WSPs may overwinter at locations where there is no current breeding, but where breeding may have occurred in the past (*e.g.* Dillon Beach, CA–9). These wintering areas provide important areas for overwinter survival, provide protections for historical nesting areas, and allow for connectivity between sites. These open areas also allow plovers to fully utilize their camouflage and running speed to avoid predators and to catch prey. Based on the information above, we identify areas surrounding known breeding and wintering areas containing space for nesting territories, foraging activities, and connectivity for dispersal and nonbreeding or nesting use to be a physical or biological feature needed by this species.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Pacific Coast WSPs typically forage in open areas by locating prey visually and then running to seize it with their beaks (Page *et al.* 1995, p. 12). They may also probe in the sand for burrowing invertebrates, or charge flying insects that are resting on the ground, snapping at them as they flush. Accordingly they need open areas in which to forage, to facilitate both prey location and capture. Deposits of tide-cast wrack such as kelp or driftwood tend to attract certain invertebrates, and so provide important foraging sites for plovers (Page *et al.* 1995, p. 12). Pacific Coast WSPs forage both above and below high tide, but not while those areas are underwater. Foraging areas will therefore typically be limited by water on their shoreward side, and by dense vegetation or development on their landward sides. Therefore, we have identified open, sandy areas which may contain tide-cast wrack or other vegetative debris to attract prey as a physical or biological feature needed by this species.

Pacific Coast WSPs use sites of freshwater for drinking where available, but some historical nesting sites, particularly in southern California, have no obvious nearby freshwater sources. Adults and chicks in those areas must be assumed to obtain their necessary water from the food they eat. Accordingly we have not included freshwater sites as a physical or biological feature for the species.

Cover or Shelter

Pacific Coast WSPs occupy open beach or similar areas for the majority of their life functions. Such open areas provide little cover or shelter from predators, human disturbance, winds, storms, and the extreme high tides associated with weather events, and these conditions cause many nest losses. Pacific Coast WSPs and their eggs are well camouflaged against light colored, sandy or pebbly backgrounds (Page *et al.* 1995, p. 12), so open areas with such substrates actually constitute shelter for purposes of nesting. Chicks may also crouch near driftwood, dune plants and piles of kelp to hide from predators (Page and Stenzel 1981, p. 7). Plovers readily scrape blown sand out of their nests, but there is little they can do to protect their nests against serious storms or flooding other than to attempt to lay a new clutch if the old one is lost (Page *et al.* 1995, p. 8). No studies have quantified the amount of vegetation

cover that would make an area unsuitable for nesting or foraging, but coastal nesting and foraging locations typically have relatively well-defined boundaries between open sandy substrate favorable to Pacific Coast WSPs and unfavorably dense vegetation inland. Such bounds show up well in aerial and satellite photographs, which we used to map essential habitat features. Therefore, based on the information above, we have identified areas with sandy or pebbly backgrounds or other substrate which provide camouflage for eggs, young, and nesting adults and areas that contain driftwood, dune plants, piles of kelp or other materials which provide cover and shelter to be physical or biological features needed by this species.

Sites for Breeding, Reproduction, and Rearing (or Development) of Offspring

Pacific Coast WSPs nest in depressions in open, relatively flat areas, near to tidal waters but far enough away to avoid being inundated by daily tides. Typical substrate is sandy or pebbly beaches, but plovers may also lay their eggs in existing depressions on harder ground such as salt pan, cobblestones, or dredge tailings. As stated earlier, Pacific Coast WSPs and their eggs are well camouflaged against light-colored, sandy or pebbly backgrounds (Page *et al.* 1995, p. 12), Where available, dune systems with numerous flat areas and easy access to the shore are particularly favored for nesting. Plover nesting areas must provide shelter from predators and human disturbance, as discussed above. Unfledged chicks forage with one or both parents, using the same foraging areas and behaviors as adults.

Undisturbed Areas

Disturbance of nesting or brooding plovers by humans and domestic animals can be a major factor affecting nesting success. Pacific Coast WSPs leave their nests when humans or pets approach too closely. Dogs may also deliberately chase plovers and inadvertently trample nests, while vehicles may directly crush adults, chicks, or nests, separate chicks from brooding adults, and interfere with foraging and mating activities (Warriner *et al.* 1986, p. 25; Service 1993, p. 12871; Ruhlen *et al.* 2003, p. 303). Repeated flushing of incubating plovers exposes the eggs to the weather and depletes energy reserves needed by the adult, which may result in reductions to nesting success. Surveys at Vandenberg Air Force Base, California, from 1994 to 1997, found the rate of nest loss on southern beaches at the Base to be consistently higher than on northern beaches, where recreational use was much lower (Persons and Applegate 1997, p. 8). Ruhlen *et al.* (2003, p. 303) found that increased human activities on Point Reyes beaches resulted in a lower chick survival rate.

Pacific Coast WSP require relatively undisturbed areas. However, disturbance appears to be a relative feature that varies between sites and Pacific Coast WSPs seem to respond differently to disturbance by site. Consequently, one level of disturbance at a particular site may not be detrimental at another site. ''Relatively undisturbed'' is therefore a site-specific consideration. For example, incubating Pacific Coast WSPs at Vandenberg Air Force Base are easily disturbed because there is little human-related activity and noise due to the military mission of the Air Force. At Oceano Dunes SVRA about 30 miles to the south, Pacific Coast WSPs appear to tolerate more noise and activity. With intensive management, the reproductive success for Pacific Coast WSPs at Oceano Dunes SVRA is fairly high, although it varies from year to year.

Recent efforts in various areas along the Pacific coast that have been implemented to isolate nesting plovers from recreational beach users through the use of docents, symbolic fencing, and public outreach have correlated with higher nesting success in those areas (Page, *et al.* 2003, p. 3). Therefore we have identified undisturbed areas that allow the species to conduct their ''normal activities'' to be a physical or biological feature essential for the species.

Primary Constituent Elements for the Pacific Coast Western Snowy Plover

Pursuant to the Act and its implementing regulations under 50 CFR 424.12, we are required to identify the physical or biological features essential to the conservation of the Pacific Coast WSP in areas occupied at the time of listing, focusing on the features' primary constituent elements. We consider primary constituent elements to be the elements of physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species. We are designating critical habitat in areas within the geographical areas that were occupied by the species at the time of listing that continue to be occupied today, that contain the primary constituent elements in the quantity and spatial arrangement to support life-history functions essential for the conservation of the species, and that may require special management considerations or protection. We are also designating areas outside the geographical area occupied by the species at the time of listing, but are essential for the conservation of the species. These sites are within the historical range of the Pacific Coast WSP, and were used by the species prior to listing. See *Criteria Used To Identify Critical Habitat* section below for a discussion of the species' historical and current geographic range.

We believe conservation of the Pacific Coast WSP is dependent upon multiple factors, including the conservation and management of areas to maintain ''normal'' ecological functions, where existing populations survive and reproduce. We are designating areas of critical habitat that provide some or all of the elements of physical or biological features essential for the conservation of this species. Based on the best available information, the primary constituent elements (PCEs) essential to the conservation of the Pacific Coast WSP are the following:

Sandy beaches, dune systems immediately inland of an active beach face, salt flats, mud flats, seasonally exposed gravel bars, artificial salt ponds and adjoining levees, and dredge spoil sites, with:

(1) Areas that are below heavily vegetated areas or developed areas and above the daily high tides;

(2) Shoreline habitat areas for feeding, with no or very sparse vegetation, that are between the annual low tide or low-water flow and annual high tide or high-water flow, subject to inundation but not constantly under water, that support small invertebrates, such as crabs, worms, flies, beetles, spiders, sand hoppers, clams, and ostracods, that are essential food sources;

(3) Surf- or water-deposited organic debris, such as seaweed (including kelp and eelgrass) or driftwood located on open substrates that supports and attracts small invertebrates described in PCE 2 for food, and provides cover or shelter from predators and weather, and assists in avoidance of detection (crypsis) for nests, chicks, and incubating adults; and

(4) Minimal disturbance from the presence of humans, pets, vehicles, or human-attracted predators, which provide relatively undisturbed areas for individual and population growth and for normal behavior.

The critical habitat identified in this revised rule contains the primary constituent elements in the appropriate quantity and spatial arrangement essential to the conservation of the Pacific Coast WSP, and supports multiple life processes for the species.

Portions of some critical habitat units may be currently degraded; however, these areas could be restored with special management, thereby providing suitable habitat to offset habitat loss from anticipated sea-level rise resulting from climate change. Additional areas are proposed as critical habitat to allow a recovering Pacific Coast WSP population to occupy its former range, and allow adjustment to changing conditions (*e.g.* shifting sand dunes), expected sea-level rise, and human encroachment.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features that are essential to the conservation of the species and which may require special management considerations or protection.

All areas included in our revision of critical habitat will require some level of management to address the current and future threats to the physical and biological features essential to the conservation of the Pacific Coast WSP. Special management considerations or protection may be required to minimize habitat destruction, degradation, and fragmentation associated with the following threats, among others: water diversions, stabilized dunes and watercourses associated with urban development, human recreational activities, off-highway vehicle (OHV) use, beach raking, pets, nonnative vegetation, resource extraction, and fishing.

Water diversions reduce the transport of sediments, which contribute to suitable nesting and foraging substrates. Stabilized dunes and watercourses associated with urban development alter the dynamic processes of beach and river systems, thereby reducing the open nature of suitable habitat needed for predator detection. Human recreational activities disturb foraging or nesting activities or may attract and provide cover for approaching predators. The use of OHVs has been documented to crush plover nests and strike plover adults. Beach raking or grooming can remove wrack, reducing food resources and cover, and contributing to beach erosion. Pets (leashed and unleashed) can cause incubating adults to leave the nest and establish trails in the sand that can lead predators to the nest. Nonnative vegetation reduces visibility that plovers need to detect predators, and occupies otherwise suitable habitat. Resource extraction can disturb incubating, brooding, or foraging plovers. Fishing can disturb Pacific Coast WSPs and can attract predators by the presence of fish offal and bait (Lafferty 2001, p. 2222; Dugan 2003, p. 134; Schlacher *et al.* 2007, p. 557; Service 2007, p. 33; Dugan and Hubbard 2010, p. 67).

For discussion of the threats to the Pacific Coast WSP and its habitat, please see the 12-month finding on the petition to delist the Pacific Coast WPS (71 FR 20607, April 21, 2006), the final listing rule (58 FR 12864, March 5, 1993) and the final critical habitat rule (70 FR 56970, September 29, 2005). Please also see the Revised Final Critical Habitat Designation section below for a discussion of the threats in each of the proposed revised critical habitat units.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. We review available information pertaining to the habitat requirements of the species. In accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we consider whether designating additional areas—outside those currently occupied as well as those occupied at the time of listing—are necessary to ensure the conservation of the species. We are designating critical habitat in areas within the geographical area occupied by the species at the time of listing in 1993. We also are designating specific areas outside the geographical area occupied by the species at the time of listing because such areas are essential for the conservation of the species, and are within the Pacific Coast WSP's historical range. We have determined that limiting the designation of critical habitat to those areas that were considered occupied at the time of listing is no longer sufficient to conserve the species because:

(1) There has been considerable loss and degradation of habitat throughout the species' range since the time of listing;

(2) We anticipate a further loss of habitat in the future due to sea-level rise resulting from climate change; and;

(3) The species needs habitat areas that are arranged spatially in a way that will maintain connectivity and allow dispersal within and between units.

All areas designated as critical habitat are within the historical range of the species, which differs from the species' geographic distribution (*i.e.,* occupancy) at the time of listing. We have identified areas to include in this designation by applying Criteria 1 through 6 below. In an effort to update our 2005 final designation of critical habitat for the Pacific Coast WSP, we used the best available information on occupancy and habitat conditions of areas that were analyzed in 2005 to determine whether to add or remove areas from this revision of critical habitat.

The amount and distribution of critical habitat being designated will allow populations of Pacific Coast WSP to:

(1) Maintain their existing distribution;

(2) Increase their distribution into previously occupied areas (needed to offset habitat loss and fragmentation);

(3) Move between areas depending on resource and habitat availability (response to changing nature of coastal beach habitat) and support genetic interchange;

(4) Increase the size of each population to a level where the threats of genetic, demographic, and normal environmental uncertainties are diminished; and

(5) Maintain their ability to withstand local or unit level environmental fluctuations or catastrophes.

We considered the following criteria to select appropriate units for this revised rule:

(1) *Areas throughout the range of the Pacific Coast WSP located to allow the species to move and expand.* The dynamic nature of beach, dune, and similar habitats necessitates that Pacific Coast WSPs move to adjust for changes in habitat availability, food sources, and pressures on survivorship or reproductive success (Colwell *et al.* 2009, p. 5). Designating units in appropriate areas throughout the range of the Pacific Coast WSP allows for seasonal migration, year-to-year movements, and expansion of the Pacific Coast WSP to its historical boundaries. We consider this necessary to conserve the species because it assists in counterbalancing catastrophes, such as extreme climatic events, oil spills, or disease that might depress regional survival or productivity. Having units across the species' range helps maintain a robust, well-distributed population and enhances survival and productivity of the Pacific Coast WSP as a whole, facilitates interchange of genetic material between units, and promotes recolonization of any sites that experience declines or local extirpations due to low productivity or temporary habitat loss. Within this designation we focused on areas within the six recovery units identified in the Recovery Plan (Service 2007, Appendix A).

(2) *Breeding areas.* Areas identified in the Recovery Plan (Service 2007) known to support breeding Pacific Coast WSP

were selected. Selected sites include historical breeding areas and areas currently being used by breeding plovers. These areas are essential to the conservation of the species because they contain the physical and biological features necessary for Pacific Coast WSPs to breed and produce offspring and ensure that population increases are distributed throughout the Pacific Coast WSP's range. By selecting breeding areas across the Pacific Coast WSP's range we can assist in conserving the species' genetic and demographic robustness and important life-history stages for long-term sustainability of the entire listed species. Some breeding areas are occupied year-round and also are used as wintering areas by a portion of the population.

(3) *Wintering areas.* Major wintering sites not already selected under criterion 2 above were added. A ''major'' wintering site is defined as one that supports more wintering birds than average for the geographical region based on current or historical numbers. These areas are necessary to provide sufficient habitat for the survival of Pacific Coast WSPs during the nonbreeding season as these areas allow for dispersal of adults or juveniles to nonbreeding sites and provide roosting and foraging opportunities and shelter during inclement weather.

(4) *Unique habitat.* Additional sites were added that provide unique habitat, or that are situated to facilitate interchange between otherwise widely separated units. This criterion is based on standard conservation biology principles. By protecting a variety of habitats and facilitating interchange between them, we increase the ability of the species to adjust to various limiting factors that affect the population, such as predators, disease, major storms, habitat loss and degradation, and rise in sea level.

(5) *Areas to maintain connectivity of habitat.* Some areas that may be seasonally lacking in certain elements of essential physical or biological features and that contain marginal habitat were included if they were contiguous with areas containing one or more of those elements and if they contribute to the hydrologic and geologic processes essential to the ecological function of the system. These areas are essential to the conservation of the species because they maintain connectivity within populations, allow for species movement throughout the course of a given year, and allow for population expansion.

(6) *Restoration areas.* We have selected some areas within occupied units that, once restored, would be able to support the Pacific Coast WSP. These areas generally are upland habitats adjacent to beach and other areas used by the species containing introduced vegetation, such as European beach grass (*Ammophila arenaria*), that currently limits use of the area by the species. These areas would provide habitat to off-set the anticipated loss and degradation of habitat due to sea-level rise expected from the effects of climate change or due to development. These areas previously contained and would still contain the features essential to the conservation of the species once removal of the beachgrass and restoration of the area has occurred.

Methods Used To Designate Critical Habitat

In order to translate the criteria above to the areas on the ground we used the following methodology to identify the boundaries of critical habitat for the Pacific Coast WSP:

(1) We digitally mapped occurrence data within the range of the Pacific Coast WSP at the time and subsequent to the time of listing in the form of polygons and points using ArcMap 9.3.1 (ESRI 2009). An attempt was made to consider site-specific survey data that was both current and historical. Survey information used in this designation was compiled from several sources during various timeframes as identified in the Recovery Plan (Service 2007, Appendix B).

(2) We utilized National Agriculture Imagery Program (NAIP 2009) aerial imagery with a 3.3-ft (1-m) resolution to determine the lateral extent (width) between the water and upland areas of habitat. The western (seaward) boundary of the coastal units is the water's edge based on NAIP imagery. This boundary varies daily with each changing tide, and will vary seasonally with storm surges, and sand erosion and deposition. Given the dynamic nature of coastal beaches, riparian areas, and salt pond management, we also delineated the lateral extent to encompass the entire area up to the lower edge of permanent upland vegetation or to the edge of a permanent barrier, such as a bluff, levee, sea wall, human development, etc. Using aerial imagery (NAIP 2009), we also delineated the northern and southern extents of the units to include the beach areas associated with the occurrence information identified above.

When determining revised critical habitat boundaries, we made every effort to avoid including developed areas, such as lands covered by buildings, sea walls, pavement, and other structures, because these areas lack physical or biological features for the Pacific Coast WSP. The scale of maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this revised critical habitat are considered excluded in this revised rule. Therefore, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat unless the specific action would affect the physical and biological features in adjacent critical habitat.

We are designating critical habitat units that we have determined were occupied at the time of listing and contain sufficient elements of physical and biological features to support life-history processes essential for the conservation of the species, and lands outside of the geographical area occupied at the time of listing that we have determined are essential for the conservation of the Pacific Coast WSP.

Units in this revised designation have sufficient elements of physical or biological features to support Pacific Coast WSP life-history processes. Some units contain all of the identified elements of physical and biological features and support multiple life-history processes. Some units contain only some elements of the physical and biological features necessary to support the Pacific Coast WSP particular use of that habitat.

(3) In determining the boundaries of the OPRD HCP-covered lands that are being excluded under section 4(b)(2) of the Act from this revised final critical habitat designation, we relied on Oregon State statute for the definition of beach and shoreline boundaries. HCP-covered lands consist of the ''Ocean Shore,'' an area defined by Oregon State statute as the sandy areas of the Oregon coast between the extreme low tide and the actual or statutory vegetation line, whichever is farther landward. HCP-covered lands do not include the Federal lands within the ''Ocean Shore'' boundary. For these Federal lands that are not excluded from this designation, the designated lands extend landward from the mean high tide. OPRD either owns and leases lands on the ''Ocean Shore'' as a State Park or State Natural Area or manages the ''Ocean Shore'' under a statutory recreation easement (Oregon Revised Statute (ORS) 390.635 and 390.620; Oregon Administrative Rule 736–020–0040(3)).

GIS data layers for the statute vegetation line and mean high water line were provided to the Service by the State of Oregon. The statutory

vegetation line (ORS 390.770) was established in 1969. This is a jurisdictional line that determines the regulatory authority of OPRD to regulate development and recreation on the beach. The statutory vegetation line applies to all the land located along the Pacific Ocean between the Columbia River and the Oregon-California boundary between extreme low tide and the lines of vegetation as established and described according to the Oregon Coordinate System (ORS) 93.330.

Adjacent to Federal lands, the ''Ocean Shore'' only extends to the mean high water line (MHWL). MHWL is a tidal datum, which is the computed average of all the high water heights observed over the National Tidal Datum Epoch. For purposes of OPRD jurisdiction where adjacent to Federal lands, ''mean high water'' corresponds generally with the ''line of ordinary high water'' as defined in ORS 274.005(3). For mapping critical habitat in Oregon, MHWL data from south of Florence were collected in the summer of 2008; data from north of Florence were collected in the summer of 2009.

Using the 2009 National Agriculture Imagery Program data (NAIP) for proposed revised western snowy plover critical habitat, we incorporated the MHWL into the critical habitat layer to create separate polygons. These polygons represent HCP-covered lands adjacent to Federal lands and were excluded from critical habitat.

Where the ''Ocean Shore'' overlaps non-Federal lands, we incorporated the statutory vegetation line into the critical habitat layer to determine HCP-covered lands. Based on aerial imagery, if the actual vegetation line was farther landward of the statutory vegetation line, all land seaward of the actual vegetation line was excluded from critical habitat, as defined by Oregon statute. All areas that were not identified for exclusion remain as designated critical habitat.

Revised Final Critical Habitat Designation

We are designating approximately 6,077 ac (2,460 ha) in 4 units within Washington, approximately 2,112 ac (855 ha) in 9 units within Oregon, and 16,337 ac (6,612 ha) in 47 units within California. The area identified as critical habitat Units CA32, Vandenberg Air Force Base North and CA33, Vandenberg Air Force Base South (combined total of approximately 1,134 ac (459 ha)), have been exempted from this revised final designation in their entirety under section 4(a)(3)(B) of the Act (refer to the Exemptions section below). These units had been previously proposed for designation as they did not have clear management protections for Pacific Coast WSP until the April 14, 2011, approval of the base's INRMP. Additional areas have been excluded under section 4(b)(2) of the Act (see Exclusions section below). Table 3 identifies the areas known to be occupied at the time of listing as well as current occupancy status.

TABLE 3—OCCUPANCY OF PACIFIC COAST WSP BY DESIGNATED CRITICAL HABITAT UNITS

Unit	Occupied at time of listing?	Currently occupied?
WA 1 Copalis Spit	No	No.
WA 2 Damon Point	Yes	Yes.
WA 3A Midway Beach	Yes	Yes.
WA 3B Shoalwater/Graveyard Spit	Yes	Yes.
WA 4A Leadbetter Spit	Yes	Yes.
WA 4B Gunpowder Sands Island	Unknown	No.
OR 2 Necanicum River Spit	No	No.
OR 4 Bayocean Spit	Yes	No.
OR 6 Sand Lake South	No	No.
OR 7 Sutton/Baker Beaches	Yes	Yes.
OR 8A Siltcoos Beach	Yes	Yes.
OR 8B Siltcoos River Spit	Yes	Yes.
OR 8C Dunes Overlook/Tahkenitch Creek Spit	Yes	Yes.
OR 8D North Umpqua River Spit	No	No.
OR 9 Tenmile Creek Spit	Yes	Yes.
OR 10 Coos Bay North Spit	Yes	Yes.
OR 11 Bandon to New River	Yes	Yes.
OR 13 Euchre Creek Spit	No	No.
CA 1 Lake Earl	Yes	Yes.
CA 2 Gold Bluffs Beach	Yes	Yes.
CA 3A Stone Lagoon	Yes	Yes.
CA 3B Big Lagoon	Yes	Yes.
CA 4A Clam Beach/Little River	Yes	Yes.
CA 4B Mad River Beach	Yes	Yes.
CA 5A Humboldt Bay South Spit Beach	Yes	Yes.
CA 5B Eel River North Spit and Beach	Yes	Yes.
CA 5C Eel River South Spit and Beach	Yes	Yes.
CA 6 Eel River Gravel Bars	Yes	Yes.
CA 7 MacKerricher Beach	Yes	Yes.
CA 8 Manchester Beach	No	Yes.
CA 9 Dillon Beach	Yes	Yes.
CA 10A Point Reyes	Yes	Yes.
CA 10B Limantour	Yes	Yes.
CA 11 Napa-Sonoma Marshes	Yes	Yes.
CA 12 Hayward	Yes	Yes.
CA 13A Eden Landing	Yes	Yes.
CA 13B Eden Landing	Yes	Yes.
CA 13C Eden Landing	Yes	Yes.
CA 14 Ravenswood	Yes	Yes.

TABLE 3—OCCUPANCY OF PACIFIC COAST WSP BY DESIGNATED CRITICAL HABITAT UNITS—Continued

Unit	Occupied at time of listing?	Currently occupied?
CA 15 Warm Springs	Yes	Yes.
CA 16 Half Moon Bay	Yes	Yes.
CA 17 Waddell Creek Beach	Yes	Yes.
CA 18 Scott Creek Beach	Yes	Yes.
CA 19 Wilder Creek Beach	Yes	Yes.
CA 20 Jetty Road to Aptos	Yes	Yes.
CA 21 Elkhorn Slough Mudflats	Yes	Yes.
CA 22 Monterey to Moss Landing	Yes	Yes.
CA 23 Point Sur Beach	Yes	Yes.
CA 24 San Carpoforo Creek	Yes	Yes.
CA 25 Arroyo Laguna Creek	Yes	Yes.
CA 26 San Simeon State Beach	Yes	Yes.
CA 27 Villa Creek Beach	Yes	Yes.
CA 28 Toro Creek	Yes	Yes.
CA 29 Atascadero Beach/Morro Stand State Beach	Yes	Yes.
CA 30 Morro Bay Beach	Yes	Yes.
CA 31 Pismo Beach/Nipomo Dunes	Yes	Yes.
CA 34 Devereaux Beach	Yes	Yes.
CA 35 Santa Barbara Beaches	Yes	Yes.
CA 36 Santa Rosa Island Beaches	Yes	Yes.
CA 37 San Buenaventura Beach	Yes	Yes.
CA 38 Mandalay Beach to Santa Clara River	Yes	Yes.
CA 39 Ormond Beach	Yes	Yes.
CA 43 Zuma Beach	Yes	Yes.
CA 44 Malibu Beach	Yes	Yes.
CA 45A Santa Monica Beach	Yes	Yes.
CA 45B Dockweiler North	Yes	Yes.
CA 45C Dockweiler South	Yes	Yes.
CA 45D Hermosa State Beach	Yes	Yes.
CA 46A Bolsa Chica State Beach	Yes	Yes.
CA 46B Bolsa Chica Reserve	Yes	Yes.
CA 46C Bolsa Chica Reserve	Yes	Yes.
CA 46D Bolsa Chica Reserve	Yes	Yes.
CA 46E Bolsa Chica Reserve	Yes	Yes.
CA 46F Bolsa Chica Reserve	Yes	Yes.
CA 47 Santa Ana River Mouth	No	No.
CA 48 Balboa Beach	Yes	Yes.
CA 50(A–C) Batiquitos Lagoon	Yes	Yes.
CA 51(A–C) San Elijo Lagoon Ecological Reserve	Yes	Yes.
CA 52(A–C) San Dieguito Lagoon	Yes	Yes.
CA 53 Los Penasquitos Lagoon	Yes	Yes.
CA 54A Fiesta Island	Yes	No.
CA 54B Mariner's Point	Yes	Yes.
CA 54C South Mission Beach	Yes	Yes.
CA 54D San Diego River Channel	Yes	Yes.
CA 55B Coronado Beach	Yes	Yes.
CA 55C Silver Strand Beach	Yes	Yes.
CA 55D Delta Beach	Yes	Yes.
CA 55E Sweetwater Marsh National Wildlife Refuge and D Street Fill	Yes	Yes.
CA 55F Silver Strand State Beach	Yes	Yes.
CA 55H Naval Radio Receiving Facility	Yes	Yes.
CA 55I San Diego National Wildlife Refuge, South Bay Unit	Yes	Yes.
CA 55J Tijuana Estuary and Border Field State Park	Yes	Yes

Table 4 outlines the areas included in this revised final critical habitat designation by land ownership. Units designated as critical habitat are discussed in detail below. The areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the Pacific Coast WSP.

TABLE 4—CRITICAL HABITAT UNITS FOR THE PACIFIC COAST WSP BY LAND OWNERSHIP

Critical habitat units	Proposed acres	Proposed hectares	Land ownership	Designated acres	Designated hectares
WA 1 Copalis Spit	407	165	State	407	165
WA 2 Damon Point	673	272	State	648	262
			Other	25	10
WA 3A Midway Beach	697	282	State	697	282
WA 3B Shoalwater/Graveyard Spit**	1,121	454	State	505	204

TABLE 4—CRITICAL HABITAT UNITS FOR THE PACIFIC COAST WSP BY LAND OWNERSHIP—Continued

Critical habitat units	Proposed acres	Proposed hectares	Land ownership	Designated acres	Designated hectares
			Other	192	78
WA 4A Leadbetter Spit	2,700	1,093	Federal	997	403
			State	1,703	689
WA 4B Gunpowder Sands Island	904	366	Federal	904	366
Washington State Totals			Federal	1,901	769
			State	3,960	1,602
			Other	217	88
OR 2 Necanicum River Spit	211	85	Other	11	4
OR 4 Bayocean Spit	367	149	Federal	199	81
			Other	2	1
OR 6 Sand Lake South	200	81	Other	5	2
OR 7 Sutton/Baker Beaches	372	151	Federal	276	112
OR 8A Siltcoos Breach	15	6	Federal	7	3
			State	8	3
OR 8B Siltcoos River Spit	241	97	Federal	116	47
OR 8C Dunes Overlook/Tahkenitch Creek Spit	716	290	Federal	383	155
OR 8D North Umpqua River Spit	236	96	Federal	59	24
OR 9 Tenmile Creek Spit	244	99	Federal	223	90
OR 10 Coos Bay North Spit	308	125	Federal	273	110
OR 11 Bandon to New River	1,016	411	Federal	459	186
			Other	82	33
OR 13 Euchre Creek Spit	116	47	Other	9	4
Oregon State Totals			Federal	1,995	807
			State	8	3
			Other	109	44
CA 1 Lake Earl	74	30	State	73	30
CA 2 Gold Bluffs Beach*	144	58	State	233	94
CA 3A Stone Lagoon*	52	21	State	55	22
CA 3B Big Lagoon*	212	86	State	268	108
CA 4A Clam Beach/Little River*	194	79	State	222	90
			Other	115	47
CA 4B Mad River Beach	456	185	State	148	60
			Other	304	123
CA 5A Humboldt Bay South Spit*	419	170	Federal	20	8
			State	542	219
			Other	10	4
CA 5B Eel River North Spit and Beach*	259	105	State	457	185
			Other	7	3
CA 5C Eel River South Spit and Beach	339	137	State	172	70
			Other	164	66
CA 6 Eel River Gravel Bars*	1,139	461	State	304	123
			Other	1,045	463
CA 7 MacKerricher Beach*	1,176	476	State	1,144	463
			Other	74	30
CA 8 Manchester Beach*	482	195	Federal	68	28
			State	425	172
			Other	12	5
CA 9 Dillon Beach	39	16	Other	39	16
CA 10A Point Reyes	460	186	Federal	460	186
CA 10B Limantour	156	63	Federal	156	63
CA 11 Napa-Sonoma	618	250	State	618	250
CA 12 Hayward	1	0	Other	1	0
CA 13A Eden Landing	237	96	State	228	92
			Other	8	3
CA 13B Eden Landing	171	69	State	171	69
CA 13C Eden Landing	609	246	State	602	244
			Other	7	3
CA 14 Ravenswood	89	36	Other	89	36
CA 15 Warm Springs	168	68	Federal	168	68
CA 16 Half Moon Bay	36	15	State	36	15
CA 17 Waddell Creek Beach	25	10	State	19	8
			Other	6	2
CA 18 Scott Creek Beach	23	9	State	15	6
			Other	8	3

TABLE 4—CRITICAL HABITAT UNITS FOR THE PACIFIC COAST WSP BY LAND OWNERSHIP—Continued

Critical habitat units	Proposed acres	Proposed hectares	Land ownership	Designated acres	Designated hectares
CA 19 Wilder Creek Beach	15	6	State	14	6
			Other	1	0
CA 20 Jetty Road Aptos	399	161	State	369	149
			Other	30	12
CA 21 Elkhorn Slough Mudflats	281	114	State	281	114
CA 22 Monterey to Moss Landing	967	391	Federal	415	168
			State	285	115
			Other	259	105
CA 23 Point Sur Beach	72	29	State	38	15
			Other	34	14
CA 24 San Carpoforo Creek	24	10	Federal	4	2
			State	18	7
			Other	2	1
CA 25 Arroyo Laguna Creek	28	11	State	18	7
			Other	10	4
CA 26 San Simeon State Beach	24	10	State	24	10
CA 27 Villa Creek Beach	20	8	State	20	8
CA 28 Toro Creek	34	14	State	11	4
			Other	23	9
CA 29 Atascadero Beach/Morro Strand State Beach	213	86	State	64	26
			Other	149	60
CA 30 Morro Bay Beach	1,076	435	State	948	383
			Other	129	52
CA 31 Pismo Beach/Nipomo Dunes	1,652	669	Federal	242	98
			State	552	223
			Other	858	347
CA 34 Devereaux Beach	52	21	State	43	17
			Other	9	4
CA 35 Santa Barbara Beaches	65	26	State	30	12
			Other	35	14
CA 36 Santa Rosa Island Beaches	586	237	Federal	586	237
CA 37 San Buenaventura Beach	70	28	State	70	28
CA 38 Mandalay Beach to Santa Clara River	672	272	State	459	186
			Other	213	86
CA 39 Ormond Beach	320	130	State	159	65
			Other	161	65
CA 43 Zuma Beach	73	30	State	1	0
			Other	72	29
CA 44 Malibu Beach	13	5	State	13	5
CA 45A Santa Monica Beach	48	19	State	29	12
			Other	19	8
CA 45B Dockweiler North	34	14	State	34	14
CA 45C Dockweiler South	65	26	State	54	22
			Other	11	5
CA 45D Hermosa State Beach	27	11	State	8	3
			Other	19	8
CA 46A Bolsa Chica Beach	93	38	State	93	38
CA 46B Bolsa Chica Reserve	2	1	State	2	1
CA 46C Bolsa Chica Reserve	222	90	State	222	90
CA 46D Bolsa Chica Reserve	2	1	State	2	1
CA 46E Bolsa Chica Reserve	247	100	State	247	100
CA 46F Bolsa Chica Reserve	2	1	State	2	1
CA 47 Santa Ana River Mouth	19	8	State	18	7
			Other	1	0
CA 48 Balboa Beach	25	10	Other	25	10
CA 51A–C San Elijo Lagoon Ecological Reserve	15	6	State	11	4
			Other	4	2
CA 52A San Dieguito Lagoon	4	2	Other	4	2
CA 55B Coronado Beach	74	30	State	74	30
CA 55E Sweetwater Marsh National Wildlife Refuge and D Street Fill.	132	54	Federal	79	32
CA 55F Silver Strand State Beach	82	33	Federal	78	31
			State	4	1
CA 55I San Diego National Wildlife Refuge, South Bay Unit	5	2	Federal	5	2
CA 55J Tijuana Estuary and Border Field State Park	150	61	Federal	71	29
			Other	79	32
California State Totals			Federal	2,352	952
			State	9,857	3,989

TABLE 4—CRITICAL HABITAT UNITS FOR THE PACIFIC COAST WSP BY LAND OWNERSHIP—Continued

Critical habitat units	Proposed acres	Proposed hectares	Land ownership	Designated acres	Designated hectares
			Other	4,128	1,671
Totals Designated By Ownership			Federal	6,248	2,529
			State	13,825	5,595
			Other	4,454	1,802
Totals Designated By State			Washington	6,078	2,460
			Oregon	2,112	855
			California	16,337	6,612
Grand Total				24,527	9,926

* Land ownership values differ from the revised proposed rule due to updated ownership data.
** Off-reservation lands (fee-owned) were not excluded and are included within the Other land ownership total.
Values in table may not sum due to rounding.

Brief descriptions of all units and reasons why they meet the definition of critical habitat for the Pacific Coast WSP are described below. The units are grouped by State and listed in order geographically north to south. For more information about the areas excluded from critical habitat designation, please see the Exclusions section of this revised final rule.

Washington

WA 1, Copalis Spit, 407 ac (165 ha)

Copalis Spit is located along the central Washington coast, approximately 20 mi (32 km) northwest of the Community of Hoquiam in Grays Harbor County. Copalis Spit is a 2-mi (3-km) long sand spit bounded by the Copalis River on the northern and landward sides. The Copalis Beach access road off State Route 109 and State Park property line demark the southern boundary. The unit is entirely within Griffiths-Priday Ocean State Park (Washington State Parks and Recreation Commission).

This unit is the northernmost unit in the range of the species and historically supported 6 to 12 nesting pairs of Pacific Coast WSPs, but no nesting has been documented since 1984 (Service 2007, p. 21). This unit was not occupied at the time of listing and is not currently occupied. The unit consists of a long sandy beach with sparsely vegetated dunes that extend to the river, providing nesting and foraging opportunities, as well as protection from the weather. The northward shift of Connor Creek washed out the beach access road at the southern end, effectively closing the area to motorized vehicles. Because of its relatively remote location, the area receives little human use and is therefore relatively undisturbed. Although currently unoccupied, the unit is considered essential for the conservation of the species as it allows for population expansion into the northern extent of the Pacific Coast WSP's historical range from adjacent occupied areas and has high-quality habitat, including a long sandy beach with limited disturbance with sparsely vegetated dunes that extend to the river, providing nesting and foraging opportunities for the species.

WA 2, Damon Point, 673 ac (272 ha)

This unit is located at the southern end of the City of Ocean Shores in Grays Harbor County and is a sandy spit that extends into Grays Harbor. The unit boundary begins at the Damon Point parking area off Marine View Drive. The western boundary generally follows the property line for the Oyhut Wildlife Area.

This unit was occupied at the time of listing, and we consider this unit to be currently occupied. Research in the mid-1980s indicated that up to 20 Pacific Coast WSPs have used Damon Point for nesting. However, use has declined significantly at this site, with only six adult birds documented using the area during the breeding season in 2005. A historic shipwreck (*S.S. Catala*) was exposed during winter storms in 2006, and the vessel was removed from the spit due to oil spill and other hazardous materials concerns over a period of 17 months (State of Washington, Department of Ecology 2007). The opportunity to view the shipwreck and removal operation drew media attention, and hundreds of visitors visited the site on weekends. Visitation of the area has dropped off since the clean-up. Even though no plover nesting has been documented at Damon Point since 2006, we still consider this unit occupied by the species based on previous use of the area, on the fluctuating use of areas in general by the species as a response to habitat and resource availability, and because breeding surveys are not extensive presence-absence surveys and only provide information during the breeding season. We have determined that the unit contains the physical and biological features essential to the conservation of the species which may require special management considerations or protection. The unit includes sandy beaches that are relatively undisturbed by human or tidal activity (nesting habitat), large expanses of sparsely vegetated barren terrain, and mudflats and sheltered bays that provide ample foraging areas.

The majority (648 ac (262 ha)) of the unit is administered by the State of Washington (Department of Fish and Wildlife and Department of Natural Resources). There are over 7 mi (11 km) of sandy beaches and shoreline at Damon Point, and the shape of the spit changes constantly with winter storms and nearshore sand drift. In recent years, some of the lower elevation areas have been overwashed, and coastal erosion may result in separation of the spit from the mainland in the near future. The western edge of the unit lies adjacent to a municipal wastewater treatment facility that is managed by the City of Ocean Shores, with a few undevelopable private parcels in the tidelands near the parking area. Similar to Copalis Spit, the access road has washed out, and the area is currently inaccessible to motorized vehicles.

The primary threats to Pacific Coast WSPs that may require special

management at this time are recreational use, including pedestrians and unleashed pets; habitat loss from European beach grass; and potential reopening of the vehicle access road. Special management in the form of developing and enforcing regulations to address the recreation issues may be needed. Management to remove and control beach grass will prevent further spread of nonnative vegetation, thereby maintaining and expanding the elements of essential physical or biological features identified above.

WA 3A, Midway Beach, 697 ac (282 ha)

Located adjacent to the Community of Grayland, this subunit extends from the northern boundary of Grayland Beach State Park, through South Beach State Park to Cape Shoalwater at the southern end in Pacific County. Midway Beach is an expansive beach and is nearly 0.5 mi (0.8 km) wide at the widest point. This subunit was occupied at the time of listing and is currently occupied. This subunit includes the following physical and biological features essential to the conservation of the species: large areas of sand dune habitat that is relatively undisturbed, areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates, and close proximity to tidally influenced estuarine mud flats that provide cover or shelter from predators, and are important for foraging.

Beach accretion since 1998 has greatly improved habitat conditions, resulting in this beach becoming a primary nesting area in the State. From 1998 to 2005, an average of 18 plovers nested annually at Midway Beach, and from 2003 to 2006, between 23 and 28 Pacific Coast WSPs nested at Midway Beach.

Primary threats at this subunit that may require special management include motorized vehicle use on the beaches and human activity. The recent closure of the Midway Beach Access Road due to safety concerns, *e.g.,* vehicles getting stuck in deep sand, has reduced impacts in the nesting area, but may not be permanent. Therefore, the physical or biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats associated with human-related recreation and other activities. Developing and enforcing regulations to address the recreation issues may be needed. Management to remove and control beach grass will prevent further spread of nonnative vegetation, thereby maintaining and expanding the elements of essential physical and biological features identified above.

WA 3B, Shoalwater/Graveyard Spit, 696 ac (282 ha)

The subunit is located in Pacific County at Shoalwater Bay (also known as Graveyard Spit). This beach is an extension of Midway Beach, and extends south into the entrance of Willapa Bay. The western portion of this subunit starts at a narrow strip of beach adjacent to State Route 105 and extends to the western edge of the Shoalwater Bay Indian reservation. This portion of the subunit is approximately 148 ac (60 ha) in size. The eastern portion of the subunit starts at the eastern edge of the Shoalwater Bay Indian reservation boundary and continues in a southwesterly direction to the Community of Tokeland. This portion of the subunit is approximately 548 ac (222 ha) in size. The landward extent of the unit is the edge of the bay, and the seaward extent of the unit is the Pacific Ocean's water's edge. In our March 2011 revised proposal, we proposed 1,121 ac (454 ha) for this subunit; approximately 425 ac (172 ha) of the proposed subunit that is part of the Shoalwater Bay Tribal lands have been excluded from designation under section 4(b)(2) of the Act (refer to the Exclusions section below).

This subunit was occupied at the time of listing and is currently occupied. The State Recovery Plan for the western snowy plover (WDFW 1995) defines the geographic area from Grayland Beach State Park south to Toke Point as ''South Beach.'' Based on documented sightings and records of western snowy plover use for the south beach geographic area (WDFW 1995, Appendix C), Shoalwater/Graveyard Spit was occupied at the time of listing and is a known or presumed historical nesting area (WDFW 1995, Figure 2, p. 3). Pacific Coast WSPs nested on the Shoalwater Bay Indian reservation in 2006, 2007 and 2008, but no nesting has been documented on the spit since 2008. Although fledging success is relatively high at this location, plover use of the Shoalwater/Graveyard Spit area is sporadic.

The subunit includes the following features essential to the conservation of the species: large areas of sand dune habitat that are relatively undisturbed; areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates; and close proximity to tidally influenced estuarine mud flats. Special management that may be required includes management of human-related activities to reduce disturbance to breeding Pacific Coast WSPs, and maintenance of the physical or biological features within the subunit.

Based on interpretation of aerial imagery, the Cape Shoalwater area has experienced extensive erosion over the past 15 years. A nearly 0.3 mi-wide (0.5 km-wide) by 1.5 mi-long (2.4 km-long) section of the coastline, including roads and residences, has been reclaimed by the ocean, resulting in the accretion of Midway Beach. The accretion of beach improves elements of essential physical or biological features. Because the county ownership layer for this subunit is ambiguous and all private property parcels are under water, the layer could not be used for precise acreage calculations. However, the vast majority of the unit is managed by the State of Washington.

WA 4A, Leadbetter Spit, 2,700 ac (1,093 ha)

The Leadbetter Spit subunit is located in Pacific County at the northern tip of the Long Beach Peninsula, and consists of a 26 mi-long (42 km-long) spit that defines the west side of Willapa Bay and extends down to the mouth of the Columbia River. The subunit is located just north of the community of Ocean Park and includes Leadbetter Point State Park (SP) and the Willapa NWR at the northern end of the spit. The main portion of this subunit is on the ocean side, and includes the coastal beaches from the tip of the peninsula, and the habitat restoration area down to Oysterville Road, approximately 1.8 mi (3 km) south of Leadbetter Point SP. The boundaries for this subunit have changed from that proposed in our March 2011 rule as a result of information provided to us by Willapa NWR staff and an acreage miscalculation in the March 2011 proposed rule (76 FR 16046) (refer to the Summary of Changes from the Revised Proposed section above).

This subunit contains some areas that are currently not suitable habitat (water and vegetated areas) but may become suitable with management actions, sea-level rise, and ongoing natural changes and beach accretion on the spit. Although the refuge manages areas above the high tide line on the northern portion of the spit, the ownership data do not reflect where the State and Federal jurisdictions lie. Thus, all ownership acreages are approximate for this unit. The subunit includes approximately 8 mi (13 km) of coastal beaches and sheltered bays. Approximately 987 ac (399 ha) are on lands that are managed by the Willapa NWR, and the remaining 1,713 ac (693

ha) are managed by the Washington State Park and Recreation Department and Department of Natural Resources.

Leadbetter Spit was occupied at the time of listing, is currently occupied, and is the largest subunit in Washington. Approximately 25 to 30 Pacific Coast WSPs nest and overwinter on the spit annually, with most of the nesting occurring in the snowy plover habitat restoration area within the Willapa NWR. Between 10 and more than 40 breeding adults were recorded between 2005 and 2009 (WDFW 2009, p. 12). A few pairs nest along the ocean beaches and on State Park lands just south of the Willapa NWR. The 2007 Recovery Plan lists a management goal of 30 breeding adults for this subunit (Service 2007, Appendix B).

The subunit includes the following features essential to the conservation of the species: Relatively undisturbed, sandy beaches above and below the high-tide line and sparsely vegetated dunes for nesting; miles of coastal wrack line supporting small invertebrates; and close proximity to tidally influenced estuarine mud flats and sheltered bays for foraging. The combined dynamics of weather and surf cause large quantities of wood and shell material to accumulate on the spit, providing prime nesting habitat, hiding areas from predators, foraging opportunities, and shelter from inclement weather.

European beach grass threatens the habitat quality of the subunit. Special management that may be needed includes restoration and maintenance of degraded habitat to ensure the reinfestation of nonnative vegetation does not occur. Doing so will ensure that elements of essential physical or biological features within this subunit remain intact. Primary threats that may require special management include the State's management of the spring razor clam season, which opens beaches to motorized vehicle and provides access into Pacific Coast WSP nesting areas that normally receive limited human use. The State Parks and Recreation Commission has posted areas where plovers nest, increased enforcement of the wet sand driving regulations, and conducted habitat restoration on State Park lands.

WA 4B, Gunpowder Sands Island, 904 ac (366 ha)

The subunit includes Gunpowder Sands Island just off the northern tip of the Long Beach Peninsula. The island shifts location annually and only a portion of the mapped area may be dry sand at any given time. The island is managed by the State of Washington.

Because the island is only accessible by boat, breeding surveys for Pacific Coast WSP at this location are sporadic. It is unknown if this Gunpowder Sands Island was occupied at the time the Pacific Coast WSP was listed in 1993, but two successful nests and one failed nest were documented on the island in 1995 (WDFW heritage data). Although nesting has not been recently confirmed for this area, we consider this unit essential for the conservation of the species because it provides a safe nesting, resting, and foraging area free of human disturbance and connectivity between two currently occupied areas. We consider that it is important for the species' use, based on the proximity of the site to the occupied nesting area on Leadbetter Spit, and on fluctuating habitat and resource availability.

Gunpowder Sands Island also has physical or biological features essential to the conservation of the species: Relatively undisturbed, sandy beaches above and below the high-tide line; sparsely vegetated dunes for nesting; and coastal wrackline supporting small invertebrates. The island is periodically overwashed during winter storms, resulting in dry sand and beach habitat with little or no vegetation.

Oregon

OR 1, Columbia River Spit

Unit OR 1 has been excluded from critical habitat designation under section 4(b)(2) of the Act (see Exclusions section below).

OR 2, Necanicum River Spit, 11 ac (4 ha)

We proposed 211 (85 ha) for designation in this unit in our revised proposed designation of critical habitat. In this final revision, 200 ac (81 ha) has been excluded from critical habitat designation under section 4(b)(2) of the Act (see Exclusions section below).

This unit is on the western coast of Clatsop County, adjacent to the City of Gearhart, and less than 1 mi (2 km) north of the City of Seaside. It is bounded by the Necanicum River estuary on the south, City of Gearhart to the north and east, and Oregon Parks and Recreation Department's HCP-covered lands to the west. The mouth of the river changes periodically. The northern inland portion of the unit is overgrown with European beach grass; sea-level rise and overwashing of this area during the winter months is anticipated to result in vegetation removal and the creation of additional Pacific Coast WSP breeding habitat. Eleven ac (4 ha) of privately owned land landward of HCP-covered lands are included in this revised designated critical habitat because they are essential to the conservation of the Pacific Coast WSP to address habitat needs arising from anticipated sea-level rise.

Necanicum River Spit was not considered occupied at the time the Pacific Coast WSP was listed in 1993. Two breeding Pacific Coast WSPs were documented in 2002 (Service unpublished data). We consider the unit is essential for the conservation of the species as it is needed for use in response to fluctuating habitat and resource availability. It has the capability of providing future connectivity between occupied areas, dispersal habitat between units, and habitat for resting and foraging. This unit may provide habitat to support breeding plovers and facilitate interchange between otherwise widely separated units within Recovery Unit 1 (identified in the Recovery Plan, Service 2007) in Oregon and Washington.

Necanicum River Spit is a characteristic dune-backed beach with wide sand spits in close proximity to tidally influenced estuarine mud flats. The unit contains sparsely vegetated, low-lying areas of sandy dune; open, sandy areas that are relatively undisturbed by humans; and close proximity to tidally influenced estuarine mud flats, which are considered essential for the conservation of the Pacific Coast WSP.

OR 3, Nehalem River Spit

Unit OR 3 has been excluded from critical habitat designation under section 4(b)(2) of the Act (see Exclusions section below).

OR 4, Bayocean Spit, 201 ac (82 ha)

We proposed 367 ac (149 ha) for designation in this unit in our revised proposed designation of critical habitat. In this final revision, 80 ac (32 ha) were removed from proposed critical habitat at the shoreline due to inundation, and 86 ac (35 ha) of proposed critical habitat has been excluded under section 4(b)(2) of the Act (see Exclusions section below).

This unit is on the western coast of Tillamook County, and about 9 mi (15 km) northwest of the City of Tillamook. It is bounded by Tillamook Bay on the east, the Tillamook Bay South Jetty to the north, the northern boundary of Bayocean Peninsula County Park 2.0 mi (3.2 km) to the south, and HCP-covered lands to the west. The unit is located behind a relatively low foredune. Sea-level rise and overwashing of this area during the winter months is anticipated to result in vegetation removal and

creation of additional Pacific Coast WSP breeding habitat. Two ac (1 ha) of privately owned land and 199 ac (81 ha) of federally owned land landward of the HCP-covered lands are designated due to anticipated sea-level rise.

Bayocean Spit was occupied at the time of listing. Two Pacific Coast WSPs were documented in 1993, and six plovers in 1995, in this unit during the breeding season (ODFW in litt. 1994, Appendix, Table 2; ODFW unpublished data). Prior to 2001, winter use of the area by plovers was documented consistently. Recent records indicate use by wintering plovers in 2007 and 2008 (Service unpublished data). We consider the unit to be needed by the species for future use in response to fluctuating habitat and resource availability. It has the capability of providing future connectivity between occupied areas, dispersal habitat between units, and habitat for resting and foraging. This unit may provide habitat to support breeding plovers and facilitate interchange between otherwise widely separated units within Recovery Unit 1 (identified in the Recovery Plan, Service 2007) in Oregon and Washington.

Bayocean Spit is a characteristic dune-backed beach in close proximity to tidally influenced estuarine mud flats. The unit contains the following features essential to the conservation of the species: Sparsely vegetated, low-lying areas of sandy dune; open, sandy areas that are relatively undisturbed by humans; sandy beach above the mean high water line that supports small invertebrates; and close proximity to tidally influenced estuarine mud flats.

Primary threats to essential physical and biological features that may require special management in this unit are degradation of the sand dune system due to encroachment of European beach grass; disturbance from humans and pets in important foraging and nesting areas; and predators.

OR 5, Netarts Spit

Unit OR 5 has been excluded from critical habitat designation under section 4(b)(2) of the Act (see Exclusions section below).

OR 6, Sand Lake South, 5 ac (2 ha)

We proposed 200 ac (81 ha) for designation in this unit in our revised proposed designation of critical habitat. In this final revision, 195 ac (79 ha) has been excluded from critical habitat designation under section 4(b)(2) of the Act (see Exclusions section below).

This unit is on the southwestern coast of Tillamook County, about 4.5 mi (7 km) north of Pacific City. It is bounded by Sand Lake estuary to the north and east, the northern limit of development in the town of Tierra Del Mar to the south, and HCP-covered lands to the west. The mouth of the lake changes periodically. The unit is a small upland portion of the spit. Sea-level rise and overwashing of this area during the winter months is anticipated to result in vegetation removal and the creation of additional Pacific Coast WSP breeding habitat. Five ac (2 ha) of privately owned land landward of HCP-covered lands are included in this revised designated critical habitat because they are essential to the conservation of the Pacific Coast WSP to address habitat needs arising from anticipated sea-level rise.

Sand Lake South was not considered occupied at the time the Pacific Coast WSP was listed in 1993. However, four snowy plovers were observed during the breeding season at Sand Lake in 1986 (ODFW, in litt. 1994, Appendix, Table 2). Although nesting has not been recently confirmed for this area, Sand Lake South is an historical breeding site within the species' range. The unit has the capability of providing connectivity between occupied areas, dispersal habitat between units, and habitat for resting and foraging. This unit is needed to provide habitat to support breeding plovers and facilitate interchange between otherwise widely separated units within Recovery Unit 1 (identified in the Recovery Plan, Service 2007) in Oregon and Washington.

Sand Lake South is a characteristic dune-backed beach with wide sand spits in close proximity to tidally influenced estuarine mud flats. The unit contains sparsely vegetated, low-lying areas of sandy dune; open, sandy areas that are relatively undisturbed by humans; and close proximity to tidally influenced estuarine mud flats, which are considered essential for the conservation of the Pacific Coast WSP.

OR 7, Sutton/Baker Beaches, 276 ac (112 ha)

We proposed 372 (151 ha) for designation in this unit in our revised proposed designation of critical habitat. In this final revision, 96 ac (39 ha) of proposed critical habitat has been excluded under section 4(b)(2) of the Act (see Exclusions section below).

This unit is on the western coast of Lane County, about 5 mi (8 km) north of the City of Florence. It is located 2.25 mi south of Heceta Head and bounded by Sutton Creek to the south, lands administered by the Siuslaw National Forest to the east, and HCP-covered lands to the west The unit consists of 276 ac (112 ha) of Federal lands, managed by the U.S. Forest Service's (USFS) Siuslaw National Forest.

This unit was occupied at the time of listing and is currently occupied. The most recently documented Pacific Coast WSPs for this unit includes four breeding plovers in 2007 (Lauten *et al.* 2007, p. 5). We have determined that the unit contains the physical and biological features essential to the conservation of the species which may require special management considerations or protection. This unit provides habitat to support breeding plovers and facilitates interchange between otherwise widely separated units under intensive management. It extends behind a relatively low foredune in several places into areas overgrown with beach grass. Sea-level rise and overwashing of these areas during the winter months is anticipated to result in vegetation removal and the creation of additional plover breeding habitat.

The unit is characteristic of a dune-backed beach and wide sand spits with overwash areas and contains an interdune flat created through habitat restoration. It includes the following features essential to the conservation of the species: Sparsely vegetated, low-lying areas of sandy dune; open, sandy areas that are relatively undisturbed by humans; and sandy beach above the mean high water line that supports small invertebrates.

Primary threats to essential physical and biological features that may require special management in this unit are degradation of the sand dune system due to encroachment of European beach grass; disturbance from humans, pets, and horses in important foraging and nesting areas; and predators.

OR 8A, Siltcoos Breach, 15 ac (6 ha)

This subunit is on the southwestern coast of Lane County, about 7 mi (11 km) southwest of the City of Florence. It is an important wintering area that includes a large opening in the foredune 1.2 mi (2 km) north of the Siltcoos River. The southern boundary is located 0.6 mi (1 km) north of the Siltcoos River, with the Oregon Dunes National Recreation Area (NRA) to the east and the Pacific Ocean to the west. The subunit consists of 7 federally owned ac (3 ha) managed by the USFS as the Oregon Dunes NRA in the Siuslaw National Forest and 8 ac (3 ha) on the ''Ocean Shore,'' managed by OPRD.

This subunit was occupied at the time of listing and is currently occupied with recently documented wintering Pacific Coast WSPs in 2005, 2006, 2007, and 2010 (Service unpublished data). As many as 59 Pacific Coast WSP were

documented during the winter of 2005 (C. Burns, pers. comm. 2006), and 26, 36, and 24 Pacific Coast WSP in 2006, 2007 and 2010, respectively (Service unpublished data).

The subunit is characteristic of a dune-backed beach. It includes the following features essential to the conservation of the species: Sparsely vegetated, low-lying areas of sandy dune and sandy beach above the mean high water line that supports small invertebrates.

Primary threats to essential physical and biological features that may require special management in this subunit are degradation of the sand dune system due to encroachment of European beach grass on the available wintering habitat and disturbance from humans, pets, and vehicles in important roosting and foraging areas.

OR 8B, Siltcoos River Spit, 116 ac (47 ha)

We proposed 241 (97 ha) for designation in this unit in our revised proposed designation of critical habitat. In this final revision, 125 ac (51 ha) of proposed critical habitat has been excluded under section 4(b)(2) of the Act (see Exclusions section below).

This subunit is located in Lane and Douglas Counties, about 7 mi (11 km) southwest of the City of Florence. It includes the sand spits to the north and south of the Siltcoos River and is bounded by the Waxmyrtle Trail and campground to the east, and HCP-covered lands to the west. It consists of 116 federally owned ac (47 ha) managed by the USFS as the Oregon Dunes NRA in the Siuslaw National Forest.

Siltcoos River Spit was occupied at the time of listing and is currently occupied. Most recently documented Pacific Coast WSPs for this subunit include 26 breeding adults in 2011 (Lauten *et al.* 2011, p. 25).

The subunit is characteristic of a dune-backed beach and sand spit in close proximity to a tidally influenced river mouth. The subunit contains the following features essential to the conservation of the species: sparsely vegetated, low-lying areas of sandy dune; open, sandy areas that are relatively undisturbed by humans; sandy beach above the mean high water line that supports small invertebrates; and close proximity to tidally influenced freshwater areas.

Primary threats to essential physical and biological features that may require special management in this subunit are degradation of the sand dune system due to encroachment of European beach grass; disturbance from humans and pets in important foraging and nesting areas; vehicle trespass into closed areas; and predators.

OR 8C, Dunes Overlook/Tahkenitch Creek Spit, 383 ac (155 ha)

We proposed 716 (290 ha) for designation in this unit in our revised proposed designation of critical habitat. In this final revision, 333 ac (135 ha) of proposed critical habitat has been excluded under section 4(b)(2) of the Act (see Exclusions section below).

This subunit is in Douglas County, about 9 mi (15 km) southwest of the City of Florence. The southern boundary of the unit is about 5.3 mi (9 km) northwest of the City of Reedsport. It is bounded by the subunit 8B to the north, a street legal vehicle area to the south, Oregon Dunes NRA to the east, and HCP-covered lands to the west. It consists of 383 federally owned ac (155 ha) managed by the USFS as the Oregon Dunes NRA in the Siuslaw National Forest.

Dunes Overlook/Tahkenitch Creek Spit was occupied at the time of listing and is currently occupied. Documented Pacific Coast WSPs for this subunit include 71 breeding plovers in 2011 (Lauten *et al.* 2011, p. 25).

The subunit is characteristic of a dune-backed beach and sand spit in close proximity to a tidally influenced river mouth and contains interdune flats created through habitat restoration. The subunit contains the following features essential to the conservation of the species: Wide sand spits or overwashes and sparsely vegetated, low-lying areas of sandy dune; open, sandy areas that are relatively undisturbed by humans; sandy beach above the mean high water line that supports small invertebrates; and close proximity to tidally influenced freshwater areas.

Primary threats to essential physical and biological features that may require special management in this subunit are degradation of the sand dune system due to encroachment of European beach grass; disturbance from humans in important foraging and nesting areas; and predators.

OR 8D, North Umpqua River Spit, 59 ac (24 ha)

We proposed 236 (95 ha) for designation in this unit in our revised proposed designation of critical habitat. In this final revision, 177 ac (71 ha) of proposed critical habitat has been excluded under section 4(b)(2) of the Act (see Exclusions section below).

This subunit is on the western coast of Douglas County, about 4 mi (5 km) west of the City of Reedsport. It is bounded by the Umpqua River North Jetty to the south, Oregon Dunes NRA land to the north and east, and HCP-covered lands to the west. Subunit 8D consists of 59 ac (24 ha) of Federal land managed by the USFS for the Oregon Dunes NRA in the Siuslaw National Forest.

This subunit was not occupied at the time of listing. Nesting Pacific Coast WSPs were last documented at North Umpqua River Spit in the 1980s (ODFW unpublished data). The subunit is located between currently occupied areas and provides habitat for adult dispersal between units. Although nesting and wintering has not been recently confirmed for this area, we consider the unit is needed by the species for use in response to fluctuating habitat and resource availability.

The subunit is characteristic of a dune-backed beach in close proximity to tidally influenced freshwater areas. The subunit includes sparsely vegetated, low-lying areas of sandy dune; open, sandy areas that are relatively undisturbed by humans; sandy beach above the mean high water line that supports small invertebrates; and close proximity to tidally influenced freshwater areas, which are considered essential for the conservation of the Pacific Coast WSP.

OR 9, Tenmile Creek Spit, 223 ac (90 ha)

We proposed 244 ac (99 ha) for designation in this unit in our revised proposed designation of critical habitat. In this final revision, 21 ac (8 ha) of proposed critical habitat has been excluded under section 4(b)(2) of the Act (see Exclusions section below).

This unit is on the northwestern coast of Coos County, about 11 mi (18 km) southwest of the City of Reedsport. It includes the sand spits and beaches to the north and south of the Tenmile River. This unit is on the northwestern coast of Coos County, about 11 mi (18 km) southwest of the City of Reedsport, with Winchester Bay 6.5 mi (10.5 km) to the north, Coos Bay North Jetty 15.5 mi (25 km) to the south, the City of Lakeside 2.5 mi (4 km) to the east, and HCP-covered lands to the west.

Tenmile Creek Spit was occupied at the time of listing and is currently occupied. Documented Pacific Coast WSPs for this unit include 25 breeding adults in 2011 (Lauten *et al.* 2011, p. 25). Unit OR 9 consists of 223 ac (90 ha) of Federal land managed as the Oregon Dunes NRA by the USFS.

The unit is characteristic of a dune-backed beach and sand spit in close proximity to a tidally influenced river mouth. It includes the following features essential to the conservation of the species: Sparsely vegetated, low-

lying areas of sandy dune; open, sandy areas that are relatively undisturbed by humans; sandy beach above the mean high water line that supports small invertebrates; and close proximity to tidally influenced freshwater areas.

Primary threats to essential physical and biological features that may require special management in this unit degradation of the sand dune system due to encroachment of European beach grass; disturbance from humans in important foraging and nesting areas; vehicle trespass into closed areas; and predators.

OR 10, Coos Bay North Spit, 273 ac (111 ha)

We proposed 308 (125 ha) for designation in this unit in our revised proposed designation of critical habitat. In this final revision, 35 ac (14 ha) of proposed critical habitat has been excluded under section 4(b)(2) of the Act (see Exclusions section below).

This unit is on the western coast of Coos County, about 3 mi (5 km) west of the City of Coos Bay. It is bounded Oregon Dunes NRA 3 mi (4.8 km) to the north, Coos Bay North Jetty to the south, Coos Bay to the east, and HCP-covered lands to the west.

Coos Bay North Spit was occupied at the time of listing and is currently occupied. Documented Pacific Coast WSPs for this unit include 59 breeding plovers in 2011 (Lauten *et al.* 2011, p. 25). The unit consists of 273 ac (111 ha) of Federal land under the jurisdiction of the USACE, but primarily managed by the U.S. Bureau of Land Management (BLM).

The unit is characteristic of a dune-backed beach in close proximity to tidally influenced estuarine mud flats and containing interior interdune flats created through dredge material disposal or through habitat restoration. It includes the following features essential to the conservation of the species: Expansive, sparsely vegetated interdune flats; open, sandy areas that are relatively undisturbed by humans; areas of sandy beach above the mean high water line with occasional surf-cast wrack supporting small invertebrates; and close proximity to tidally influenced estuarine mud flats.

Primary threats to essential physical and biological features that may require special management in this unit are degradation of the sand dune system due to encroachment of European beach grass; disturbance from humans, pets, and horses in important foraging and nesting areas; vehicle trespass into closed areas; and predators.

OR 11, Bandon to New River, 541 ac (219 ha)

We proposed 1,016 ac (411 ha) for designation in this unit in our revised proposed designation of critical habitat. In this final revision, Bandon State Natural Area (227 ac, 92 ha), which is owned and managed by OPRD, and 249 ac (101 ha) of private land have been excluded from critical habitat designation for this unit under section 4(b)(2) of the Act (see Exclusions section below).

The remaining lands of this unit are on the southwestern coast of Coos County, about 3 mi (5 km) south of the City of Bandon. The unit consists of multiple land ownerships bounded by the southern boundary of Bandon State Natural Area to the north, the New River to the east, north of the Floras Creek outlet to the south, and HCP-covered lands to the west. The unit encompasses all of New River Spit and extends behind a relatively low foredune north of Floras Creek. Sea-level rise and overwashing of these areas during the winter months is anticipated to result in vegetation removal and the creation of additional Pacific Coast WSP breeding habitat.

New River was occupied at the time of listing and is currently occupied. Documented Pacific Coast WSPs for this unit include 20 breeding plovers in 2011 (Lauten *et al.* 2011, p. 25; Lauten 2012 pers. comm.). The BLM is the unit's primary land manager. Unit OR 11 consists of 459 ac (186 ha) of Federal land with 82 ac (33 ha) of private land.

The unit is characteristic of a dune-backed beach and barrier spit, and contains interdune flats created through habitat restoration. It includes the following features essential to the conservation of the species: Wide sand spits or overwashes and sparsely vegetated, low-lying areas of sandy dune; open, sandy areas that are relatively undisturbed by humans; areas of sandy beach above the mean high water line with occasional surf-cast wrack supporting small invertebrates; and close proximity to tidally influenced freshwater areas.

Primary threats that may require special management in this unit are degradation of the sand dune system due to encroachment of European beach grass; disturbance from humans and pets in important foraging and nesting areas; vehicle trespass into closed areas; and predators.

OR 12, Elk River Spit

Unit OR 12 has been excluded from critical habitat designation under section 4(b)(2) of the Act (see Exclusions section below).

OR 13, Euchre Creek Spit, 9 ac (4 ha)

We proposed 116 (47 ha) for designation in this unit in our revised proposed designation of critical habitat. In this final revision, 107 ac (43 ha) of proposed critical habitat has been excluded under section 4(b)(2) of the Act (see Exclusions section below).

This unit is on the western coast of Curry County, approximately 10 mi (6 km) north of the City of Gold Beach. It located to the north and south of the Euchre Creek and is bounded by HCP-covered lands to the west. The unit consists of 9 ac (4 ha) of private land. The unit extends into low-elevation areas on the north and south side of Euchre Creek. Sea-level rise and overwashing of these areas during the winter months is anticipated to result in vegetation removal and the creation of additional Pacific Coast WSP breeding habitat.

Although Euchre Creek Spit was not considered occupied at the time the Pacific Coast WSP was listed in 1993, this beach is a historical nesting site. The most recently documented Pacific Coast WSP in the area was one wintering plover in 1989 (ODFW in litt. 1994, Appendix, Table 3). Although nesting and wintering have not been recently confirmed for this area, we consider the unit is needed by the species for use in response to fluctuating habitat and resource availability. We consider the unit to be essential for the conservation of the Pacific Coast WSP as it has the capability of providing connectivity between occupied areas, dispersal habitat between units, and habitat for resting and foraging. This unit may provide habitat to support breeding Pacific Coast WSP and would facilitate interchange between otherwise widely separated units within Recovery Unit 1 (identified in the Recovery Plan, Service 2007) in Oregon and Washington.

Euchre Creek Spit is characteristic of a dune-backed beach and sand spit in close proximity to a tidally influenced river mouth. The unit includes sparsely vegetated, low-lying areas of sandy dune; open, sandy areas that are relatively undisturbed by humans; and close proximity to tidally influenced freshwater areas, which are essential for the conservation of the Pacific Coast WSP.

California

CA 1, Lake Earl, 74 ac (30 ha)

This unit is located directly west of the Lake Earl/Lake Tolowa lagoon system in Del Norte County about 4 mi (7 km) north of Crescent City. The Lake Earl Lagoon spit is approximately 3 mi

(5 km) in length, encompasses approximately 74 ac (30 ha), and lies approximately 2 mi (3 km) north of Point Saint George and the McNamara Airfield.

This unit was occupied at the time of listing and is currently occupied. This unit is a historical breeding site (Yocom and Harris 1975, p. 30), and has harbored a small population of wintering Pacific Coast WSP in recent years (Service unpublished data). This unit is capable of supporting 10 breeding adults with adaptive management (Service 2007, Appendix B). All 74 ac (24 ha) are managed by the State under the jurisdiction of the California Department of Fish and Game (CDFG), and California Department of Parks and Recreation (CDPR).

Essential physical or biological features of the unit for Pacific Coast WSP conservation include sandy beaches above and below the mean high-tide line, wind-blown sand in dune systems immediately inland of the active beach face, and the wash over area at the lagoon mouth.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from: Degradation of the sand dune system due to encroachment of European beach grass; destruction of habitat and loss of wintering and nesting Pacific Coast WSPs from OHV use; and destruction of habitat from annual mechanical breaching (as authorized by the USACE) of the spit between the Lake Earl/Lake Tolowa Lagoon and the Pacific Ocean.

CA 2, Gold Bluffs Beach, 233 ac (94 ha)

This unit is located in Humboldt County about 5 mi (6 km) north of the Town of Orick within Prairie Creek State Park (north of Gold Bluffs Beach campground), and is managed cooperatively with Redwood National Park, collectively known as Redwood National and State Parks (RNSP). This unit was occupied at the time of listing, is currently occupied, and incorporates the primary use area of a pair of Pacific Coast WSPs that nested in Prairie Creek State Park during the summer of 2005, and is commonly used by wintering Pacific Coast WSPs.

Although not considered a main breeding location, unit CA 2 provides a fairly undisturbed location for breeding Pacific Coast WSP that lose nests to predation or other causes at various nest sites, and could offset habitat loss as sea-level rise prevents nesting at sites currently being used by plovers. One chick was fledged from the unit during 2004. Up to five Pacific Coast WSPs were observed within the unit in March 2007. The unit's primary value is as a wintering site (Service 2007, Appendix B). The site is often used as wintering habitat on an irregular basis (Service unpublished data). RNSP are actively managing the area for Pacific Coast WSP.

The northeast portion of the unit is currently vegetated with European beach grass and is, therefore, currently unsuitable for nesting. However, with restoration, that portion of the unit would be considered suitable nesting habitat. We include that portion of the unit to help offset the anticipated effects of sea-level rise over time. RNSP have restored beach habitat by removing nonnative vegetation on other portions of Gold Bluffs Beach. We anticipate similar restoration within the unit to occur sometime in the future.

The unit contains the following features essential to the conservation of the Pacific Coast WSP: Low lying sandy dunes; open, sandy areas that are relatively undisturbed by humans; and sandy beach above and below the high-tide line that supports small invertebrates. Most visitor use in the area is in Fern Canyon, which is to the east of the unit and outside of suitable Pacific Coast WSP habitat. Visitation is light relative to other State and National Parks within the Pacific Coast WSP's range. Limited vehicle use of the beach is allowed for commercial and tribal fishing, and park administrative use.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from human-related use from recreation and OHV use associated with commercial fishing, and European beach grass.

CA 3A, Stone Lagoon, 55 ac (22 ha)

This subunit is approximately 0.9 mi (1.5 km) in length, and is located on the Stone Lagoon spit. Stone Lagoon borders the subunit on the east, and the Pacific Ocean makes up the subunit's western edge. Subunit CA 3A is located in Humboldt County, approximately 3 mi (5 km) south of the Town of Orick.

The subunit was occupied at the time of listing and is currently occupied. Nesting has recently occurred within the subunit. In 2009, a single nest hatched three chicks, all of which fledged (Colwell, *et al.* 2009, p. 9). The Recovery Plan (Service 2007) estimates that up to 16 Pacific Coast WSPs can be supported within Unit CA 3; however, all are attributed to subunit CA 3B. Recent data indicate that the population management potential for subunit CA 3A is underestimated by the Recovery Plan (Service 2007, Appendix B), as it does contribute towards the species' reproductive success in northern California (Colwell *et al.* 2009, p. 9; Service unpublished data).

The subunit contains the following physical or biological features essential to the conservation of the Pacific Coast WSP: Low-lying sandy dunes; open, sandy areas that are relatively undisturbed by humans; and sandy beach above and below the high-tide line that supports small invertebrates. Special management may be needed to control nonnative vegetation and enforce existing regulations to ensure the suitability of the subunit. With time, we anticipate that the entire subunit will be inundated with sea-level rise associated with climate change.

CA 3B, Big Lagoon, 268 ac (108 ha)

This subunit consists of a large sand spit that divides the Pacific Ocean from Big Lagoon. The northern extent of Big Lagoon Spit is located in Humboldt County and is approximately 6 mi (10 km) south of the Town of Orick. This subunit was occupied at the time of listing and is currently occupied. Big Lagoon Spit is historical nesting habitat (Page and Stenzel 1981, p. 9), and currently maintains a winter population of fewer than 10 Pacific Coast WSPs (Service unpublished data). Recent nesting occurred within the subunit during 2005, in which a single nest hatched and fledged three chicks. We estimate the subunit can support 16 breeding adults (Service 2007, Appendix B). The subunit is located on the Big Lagoon Spit, which is approximately 4 mi (7 km) in length. Most of the subunit is managed by the CDPR. Approximately 0.6 ac (0.3 ha) are managed by Humboldt County.

Essential physical or biological features of the subunit that contribute towards the conservation of the Pacific Coast WSP include: Low-lying sandy dunes and open, sandy areas that are relatively undisturbed by humans; and sandy beach above and below the high-tide line that supports small invertebrates.

CDPR has conducted habitat restoration at this unit through the hand-removal of nonnative vegetation. The primary threat to wintering and breeding Pacific Coast WSPs that may require special management is disturbance from humans and pets from walking through winter flocks and potential nesting areas.

Other threats requiring management include control of nonnative vegetation and enforcement of existing human-use

regulations are needed to ensure the suitability of the subunit. With time, we anticipate that the entire subunit will be inundated with sea-level rise associated with climate change.

CA 4A, Clam Beach/Little River, 337 ac (136 ha)

The subunit is located in Humboldt County immediately west and north of the Town of McKinleyville. The Clam Beach/Little River subunit's northern boundary is directly across from the south abutment of the U.S. Highway 101 Bridge that crosses the Little River. The southern subunit boundary is aligned with the north end of the southernmost, paved Clam Beach parking area. The length of the subunit is approximately 2 mi (3 km). Approximately 222 ac (90 ha) are State owned.

This subunit was occupied at the time of listing and is currently occupied. During 2003, the subunit supported a breeding population of approximately 12 Pacific Coast WSPs, and a winter population of up to 55 plovers (Service unpublished data). This subunit is one of four primary nesting locations within northern California. Based on the Recovery Plan (Service 2007, Appendix B), we expect the subunit to be capable of supporting six pairs of breeding Pacific Coast WSPs.

Essential physical or biological features of the subunit that contribute towards the conservation of the Pacific Coast WSP include large areas of sandy dunes, areas of sandy beach above and below the high-tide line, and generally barren to sparsely vegetated terrain. Special management is needed to control nonnative vegetation and enforcement of existing human-use regulations. With time, we anticipate that the lower portions of this subunit will be inundated with sea-level rise associated with climate change.

CA 4B, Mad River Beach, 452 ac (183 ha)

The subunit is located in Humboldt County immediately west of the Town of McKinleyville. This subunit was largely swept clean of European beach grass when the Mad River temporarily shifted north in the 1980s and 1990s. The Mad River Beach subunit is approximately 3 mi (5 km) long, and ranges from the U.S. Highway 101 Vista Point below the Arcata-Eureka Airport in the north, to School Road in the south. Approximately 161 ac (65 ha) are owned and managed by Humboldt County, and 143 ac (58 ha) are privately owned. The remaining 148 ac (60 ha) are managed by the State, and consist of the intertidal zone. Upon recalculation of ownership data, we discovered that the overall subunit area is approximately 4 ac (2 ha) smaller than proposed.

This subunit was occupied at the time of listing and is currently occupied. We expect it to eventually support 12 breeding Pacific Coast WSPs with proper management (Service 2007, Appendix B). The current breeding population is believed to be less than five Pacific Coast WSPs, although plovers from this subunit readily intermix with plovers in CA 4A and elsewhere (Colwell *et al.* 2009, p. 9; Service unpublished data). Occasional winter use by Pacific Coast WSPs has been intermittently documented, with most wintering within the adjacent critical habitat subunit to the north (Service unpublished data).

Essential physical or biological features of the subunit that contribute towards the conservation of the Pacific Coast WSP include large areas of sandy dunes, areas of sandy beach above and below the high-tide line, and generally barren to sparsely vegetated terrain. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the subunit. With time, we anticipate that the lower portions of this subunit will be inundated with sea-level rise associated with climate change.

Potential threats to nests, chicks, and both wintering and breeding adult Pacific Coast WSPs that may require special management are: nonnative vegetation, OHV use, and disturbance caused by equestrians (*i.e.,* people riding horses) and humans with accompanying pets.

CA 5A, Humboldt Bay South Spit Beach, 572 ac (231 ha)

This subunit is located in Humboldt County adjacent to Humboldt Bay, less than 1 mi west of the City of Eureka, with the southern boundary being Table Bluff. Approximately 542 ac (219 ha) of the unit are owned by the CDFG and State Lands Commission, but are managed by BLM; 10 ac (4 ha) are owned and managed by Humboldt County; and 20 ac (8 ha) are owned by the USACE. The subunit is 5 mi (8 km) in total length.

This subunit was occupied at the time of listing and is currently occupied. The Pacific Coast WSP wintering population within the subunit is estimated at fewer than 15 individuals. Three nests, from four breeders, were attempted within the subunit in 2003 (Service unpublished data). This subunit is capable of supporting 30 breeding Pacific Coast WSPs (Service 2007, Appendix B). The BLM has conducted habitat restoration within the subunit, in consultation with us.

The following physical or biological features essential to the conservation of the Pacific Coast WSP can be found within the unit: Large areas of sandy dunes, areas of sandy beach above and below the high-tide line, and generally barren to sparsely vegetated terrain. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from nonnative vegetation, OHV use, and disturbance from equestrians and humans with pets.

CA 5B, Eel River North Spit and Beach, 464 ac (188 ha)

This subunit is located in Humboldt County about 4 mi (7 km) east of the Town of Loleta and stretches from Table Bluff on the north to the mouth of the Eel River in the south. The subunit is estimated to be 3.9 mi (7 km) long, and is managed by the State, except for 7 ac (3 ha) of private land.

This subunit was occupied at the time of listing and is currently occupied with a wintering population of Pacific Coast WSPs estimated at fewer than 20 (Service unpublished data). As many as 11 breeders have been observed during breeding season window surveys, with a breeding population estimated at less than 15 (Colwell *et al.* 2009, p. 9). We expect this subunit to eventually support 20 breeding Pacific Coast WSPs with proper management (Service 2007, Appendix B).

Essential physical or biological features of the subunit include: Large areas of sandy, sparsely vegetated dunes for reproduction and normal behavior, and areas of sandy beach above and below the high-tide line supporting small invertebrates for foraging. Surf-cast organic debris is an important component of the habitat in this subunit, providing shelter from the wind both for nesting Pacific Coast WSPs and for invertebrate prey species. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the subunit. With time, we anticipate that the lower portions of this subunit will be inundated with sea-level rise associated with climate change.

The physical or biological features essential to the conservation of the

species may require special management considerations or protection to address the main threats from nonnative vegetation, predators, OHVs, and disturbance from equestrians and humans with pets.

CA 5C, Eel River South Spit and Beach, 336 ac (136 ha)

This subunit, located in Humboldt County, encompasses the beach segment from the mouth of the Eel River, south to Centerville Road, approximately 4 mi (7 km) west of the City of Ferndale. The subunit is 5 mi (8 km) long; 160 ac (65 ha) are private, with 4 ac (2 ha) managed by Humboldt County. Approximately 172 ac (70 ha) are managed by the State.

This subunit was occupied at the time of listing, is currently occupied, and capable of supporting 20 breeding Pacific Coast WSPs. A single nest was found during the 2004 breeding season (Colwell *et al.* 2004, p. 7). The winter population is estimated at fewer than 80 plovers, many of which breed on the Eel River gravel bars (CA 5) (Service unpublished data).

Essential physical or biological features of the subunit include: Large areas of sandy dunes, areas of sandy beach above and below the high-tide line, and generally barren to sparsely vegetated terrain for foraging. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the subunit. With time, we anticipate that the lower portions of this subunit will be inundated with sea-level rise associated with climate change.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from nonnative vegetation, predators, OHVs, and disturbance from equestrians and humans with pets.

CA 6, Eel River Gravel Bars; 1,349 ac (546 ha)

This unit, located in Humboldt County, is largely inundated during winter months due to high flows in the Eel River. The unit is 6.4 mi (8 km) from the City of Fernbridge, and includes gravel bars between Fernbridge and the confluence of the Van Duzen River. The Eel River is contained by levees in this section, and consists of gravel bars and wooded islands. The unit contains a total of 1,349 ac (546 ha), of which 176 ac (71 ha) are owned and managed by Humboldt County, 304 ac (123 ha) are under the jurisdiction of the California State Lands Commission, and 869 ac (352 ha) are privately-owned.

This unit was occupied at the time of listing, is currently occupied, and capable of supporting 40 breeding Pacific Coast WSPs. Surveys have documented 22 breeding birds in this unit; however, those numbers have dropped off in recent years (Colwell *et al.* 2009, p. 9; Service unpublished data).

Essential physical or biological features of this unit include bare, open gravel bars comprised of both sand and cobble, which support reproduction and foraging. This unit harbors the most important breeding habitat in California north of San Francisco Bay, and has the highest fledging success rate of any area from Mendocino County to the Oregon border.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from predators, OHVs, disturbance from gravel mining, and humans with pets. Gravel mining is managed through a Clean Water Act permit issued by the USACE.

CA 7, MacKerricher Beach, 1,218 ac (493 ha)

This unit is approximately 3.5 mi (5.6 km) long. The unit is just south of the Ten Mile River, and approximately 4 mi (6 km) north of the City of Fort Bragg located in Mendocino County. The State manages approximately 1,144 ac (463 ha), and 74 ac (30 ha) are privately owned. CDPR has been conducting removal of European beach grass to improve habitat for the Pacific Coast WSP and other sensitive dune species within the unit.

This unit was occupied at the time of listing, is currently occupied, and is capable of supporting 20 breeding Pacific Coast WSPs (Service 2007, Appendix B). The current breeding population is estimated at fewer than 10 (Colwell *et al.* 2009, p. 9). The winter population of plovers is fewer than 45 (Service unpublished data).

Essential physical or biological features of the unit include: large areas of sandy dunes, areas of sandy beach above and below the high-tide line, and generally barren to sparsely vegetated terrain. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from nonnative vegetation, predators, and disturbance from equestrians and humans with pets.

CA 8, Manchester Beach, 505 ac (204 ha)

The Manchester Beach unit is approximately 3.5 mi (6 km) long and located in Mendocino County about 1 mi (2 km) west of the Town of Manchester. The State manages 425 ac (172 ha) of the unit, 68 ac (28 ha) are federally managed, and the remaining 12 ac (5 ha) are privately owned. This unit is occupied and provides an important wintering site for Pacific Coast WSPs in the region (Service 2007, Appendix B). In 2003, a pair of Pacific Coast WSPs nested within the unit, and successfully hatched two chicks. However, those chicks did not survive (Colwell *et al.* 2004, p. 7). The current wintering population is estimated at fewer than 20 (Service unpublished data).

Although occupancy at the time of listing has not been confirmed, we consider this unit essential for the conservation of the species based on the fluctuating use of areas by the species as a response to habitat and resource availability. The unit is located adjacent to currently occupied areas and provides dispersal habitat between units. This unit provides habitat to support breeding Pacific Coast WSPs, will facilitate interchange between otherwise widely separated units, and helps provide habitat within a Recovery Unit identified in the Recovery Plan (Service 2007).

The unit contains large areas of sandy dunes, areas of sandy beach above and below the high-tide line, and generally barren to sparsely vegetated terrain, which are essential for the conservation of the Pacific Coast WSP.

CA 9, Dillon Beach, 39 ac (16 ha)

This unit is located at the mouth of Tomales Bay, in Marin County, just south of the Town of Dillon Beach. It stretches for about 0.7 mi (1 km) north from Sand Point. The unit was occupied at the time of listing, is currently occupied, and is an important wintering area for the species. Seventy-five wintering Pacific Coast WSPs were counted at this location during the January 2007 winter window survey (Service 2007, p. 4). The unit does not extend as far north as did the unit proposed for Dillon Beach in 2004 (69 FR 75607, December 17, 2004), because subsequent site visits and discussions with local Pacific Coast WSP surveyors have established that Pacific Coast WSPs only rarely used the area north of

the unit we are designating in this rule. The unit is entirely on private land.

Essential physical or biological features provided by the unit include surf cast debris supporting small invertebrates for foraging, and large stretches of relatively undisturbed, sparsely vegetated, sandy beach, both above and below high-tide line, for foraging and potentially for nesting.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from nonnative vegetation, predators, and disturbance by humans and their pets. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

CA 10A, Point Reyes, 460 ac (186 ha)

This subunit is located in Marin County to the west of the unincorporated Community of Inverness and occupies most of the west-facing beach between Point Reyes and Tomales Point. It is located entirely within the Point Reyes National Seashore, and consists primarily of dune-backed beaches. This unit was occupied at the time of listing, is currently occupied, supports both nesting and wintering Pacific Coast WSPs, and has the potential to support 50 breeding birds with proper management (Service 2007, Appendix B).

The Point Reyes unit includes the following PCEs essential to Pacific Coast WSP conservation: sparsely vegetated sandy beach above and below high-tide for nesting and foraging, wind-blown sand dunes for nesting and predator avoidance, and tide-cast debris attracting small invertebrates for foraging. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the subunit. With time, we anticipate that the lower portions of this subunit will be inundated with sea-level rise associated with climate change.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from nonnative vegetation, disturbance by humans and pets, and predators (particularly corvids).

CA 10B, Limantour, 156 ac (63 ha)

Limantour is a roughly 2.25-mi (4-km) sand spit at the north end of Drake's Bay located in Marin County to the west of the unincorporated Community of Olema. The subunit includes the end of the spit, and narrows to include only the south-facing beach towards the base of the spit. It is completely within the Point Reyes National Seashore. This unit was occupied at the time of listing, is currently occupied, and can support both nesting and wintering Pacific Coast WSPs, although nesting has not been documented since 2000 (Stenzel *in litt.* 2004, p. 3; Service 2009, p. 3). Ninety-eight wintering plovers were counted at the site during the January 2007 window survey (Service 2007, p. 4). The subunit is expected to contribute significantly to plover conservation in the region by providing habitat capable of supporting 10 nesting birds (Service 2007, Appendix B).

PCEs at the subunit include sparsely vegetated beach sand, above and below high-tide for nesting and foraging, and tide-cast debris supporting small invertebrates. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the subunit. With time, we anticipate that the lower portions of this subunit will be inundated with sea-level rise associated with climate change.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from nonnative vegetation, disturbance by humans and pets, and nest predators such as crows and ravens.

CA 11, Napa-Sonoma Marshes, 618 ac (250 ha)

This unit encompasses salt evaporation ponds 7 and 7A, in the Napa-Sonoma Marshes Wildlife Area, owned by the CDFG. It is situated in Napa County, about 2.3 mi (4 km) west of the Napa County Airport, and about 1.5 mi (2.4 km) south of Las Amigas Road. The unit was occupied at the time of listing and is currently occupied. Twelve Pacific Coast WSPs were identified at the location in the summer 2009, during window surveys (Service 2009, p. 2). This is the only location in the northern portion of the San Francisco Bay known to support nesting Pacific Coast WSPs.

Essential physical or biological features provided by the unit include sparsely vegetated areas above daily high-tides, such as salt pans, artificial salt ponds, and adjoining levees, for nesting and foraging.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from nonnative vegetation, flooding, and nest predators such as great egrets (*Casmerodius albus*) and common ravens (*Corvus corax*) (Robinson-Nilsen *et al.* 2009, p. 14). Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

CA 12, Hayward, 1 ac (0 ha)

This unit comprises Island 5 at the Hayward Regional Shoreline Park, located to the west of the City of Hayward in Alameda County. The area is managed by the East Bay Regional Park District (EBRPD) as a nesting area for shorebirds—primarily least terns (*Sterna antillarum browni*), but also Pacific Coast WSPs (Riensche 2007, p. 1). The unit was occupied at the time of listing and is currently occupied. Three Pacific Coast WSPs chicks from one nest successfully fledged from the unit in 2008 (Riensche 2008, p. 2; Robinson *et al.* 2008, pp. 19, 34), but since then seven plover nesting attempts in the area have failed, primarily due to predation (Robinson-Nilsen *et al.* 2009, pp. 16, 32; Robinson-Nilsen 2010, pers. comm.). The most commonly observed avian predators at the site have been California gulls (*Larus californicus*), although the only actual depredation observed was by a killdeer (*Charadrius vociferus*) (Robinson-Nilsen *et al.* 2009, pp. 14, 16). Essential physical or biological features provided by the unit include sparsely vegetated areas above daily high-tides, such as salt pans, artificial salt ponds, and adjoining levees, for nesting and foraging.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from predation, salt pond management, and non-native vegetation. The EBRPD is implementing a predator management program utilizing numerous volunteers as well as staff from the U.S. Department of Agriculture's (USDA) Wildlife Services program (Riensche 2008, p. 2) to reduce predation at this site.

CA 13A, Eden Landing: 237 ac (96 ha)

This subunit encompasses salt ponds E11, E15B, and E16B, just south of highway 92 and the San Mateo Bridge and west of Union City in Alameda County. This unit was occupied at the time of listing, is currently occupied,

and supported a total of 30 Pacific Coast WSP nests in 2009, 15 of which hatched (Robinson-Nilsen *et al.* 2009, p. 32). Approximately 228 ac (92 ha) are State owned. Approximately 8 ac (3 ha) are privately owned. Essential features provided by the subunit include sparsely vegetated areas above daily high tides, such as salt pans, artificial salt ponds, and adjoining levees, for nesting and foraging.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from flooding and avian nest predators such as California gulls (Robinson-Nilsen *et al.* 2009, p. 13).

CA 13B, Eden Landing, 171 ac (69 ha)

This subunit is located west of Union City in Alameda County and encompasses salt pond E14, just south of Eden Creek. This subunit was occupied at the time of listing, is currently occupied, supported nine Pacific Coast WSP nests in 2009, three of which hatched young (Robinson-Nilsen *et al.* 2009, p. 32). The subunit does not include salt ponds E12 and E13 (just north of E14), because those are being converted to high salinity ponds for birds such as eared grebes (*Podiceps nigricollis*) and phalaropes (*Phalaropus* spp.) that forage well on such habitat (Strong 2010a, p. 1). The entire subunit is State owned. Essential features provided by the subunit include sparsely vegetated areas above daily high-tides, such as salt pans, artificial salt ponds and adjoining levees, for nesting and foraging.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from flooding and avian nest predators such as California gulls (Robinson-Nilsen *et al.* 2009, p. 13).

CA 13C, Eden Landing, 609 ac (246 ha)

This subunit encompasses salt ponds E6A and E6B, and is located just north of Old Alameda Creek and west of Union City in Alameda County. This unit was occupied at the time of listing, is currently occupied, and supported a total of two Pacific Coast WSP nests in 2009, both of which hatched young (Robinson-Nilsen *et al.* 2009, p. 32). The subunit does not include a panhandle-shaped area of potential habitat just north of pond E6A because it is being converted to tidal marsh as part of a restoration project started before the South Bay Salt Pond Restoration Project (Strong 2010b, p. 7; Strong 2010c, p. 1). Essential physical or biological features provided by the subunit include sparsely vegetated areas above daily high-tides, such as salt pans, artificial salt ponds, and adjoining levees, for nesting and foraging.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from flooding and avian nest predators such as California gulls (Robinson-Nilsen *et al.* 2009, p. 13).

CA 14, Ravenswood, 89 ac (36 ha)

This unit consists of the southwestern portion of salt pond SF2 located east of the City of East Palo Alto in San Mateo County near the western approach to the Dumbarton Bridge. Pond SF2 is undergoing renovations intended to provide ponded areas, islands, and salt pan for several species of shorebirds, including Pacific Coast WSPs (South Bay Salt Pond Restoration Project 2010, p. 3). The Ravenswood unit is drawn to encompass the salt pan area (Strong 2010b, pp. 3, 4). This unit was occupied at the time of listing and is currently occupied. In 2009, pond SF2 supported 23 Pacific Coast WSPs nests, 17 of which hatched young (Robinson-Nilsen *et al.* 2009, p. 32). The entire unit is privately owned. Essential physical or biological features provided by the unit include sparsely vegetated areas above daily high-tides, such as salt pans, artificial salt ponds and adjoining levees, for nesting and foraging.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from flooding and avian nest predators such as California gulls (Robinson-Nilsen *et al.* 2009, p. 13).

CA 15, Warm Springs, 168 ac (68 ha)

This unit encompasses the northeastern portion of salt evaporation ponds A22 and A23 in the Warm Springs area of the South San Francisco Bay near Foster City in San Mateo County. This unit was occupied at the time of listing and is currently occupied. Fourteen breeding Pacific Coast WSPs were identified at these ponds during the 2009 summer window surveys (Service unpublished data). Additionally, Robinson-Nilsen *et al.* (2009, p. 32) found a total of 21 Pacific Coast WSPs nests at the ponds in 2009, 11 of which successfully hatched young. The southwestern portions of the ponds are excluded in keeping with tidal marsh restoration plans envisioned under the draft Tidal Marsh Recovery Plan (Service 2009, p. 266). The entire unit is federally owned.

Essential physical or biological features provided by the unit include sparsely vegetated areas above daily high-tides, such as salt pans, artificial salt ponds, and adjoining levees, for nesting and foraging.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from flooding and avian nest predators such as California gulls (Robinson-Nilsen *et al.* 2009, p. 13).

CA 16, Half Moon Bay, 36 ac (15 ha)

This unit is located next to the City of Half Moon Bay in San Mateo County and stretches for about 1.25 mi (2 km) along Half Moon Bay State Beach, and is entirely within CDPR land. The essential features of this unit include sandy beach above and below the high-tide line for nesting and foraging, and surf-cast debris to attract small invertebrates. This unit was occupied at the time of listing and is currently occupied. Small numbers of breeding Pacific Coast WSPs have been found at the location in the past five surveys (Service 2009, p. 3). The unit also supports a sizeable winter flock, consisting of 50 Pacific Coast WSPs in 2007 (Service 2007, p. 4). We expect the unit to eventually support 10 breeding Pacific Coast WSPs in the unit under proper management (Service 2007).

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from nonnative vegetation, disturbance by humans and pets, and nest predators. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

CA 17, Waddell Creek Beach, 25 ac (10 ha)

This unit includes the mouth of Waddell Creek and is located about 20 mi (32 km) north of the City of Santa Cruz in Santa Cruz County. It extends about 0.6 mi (1 km) north along the coast from a point about 0.4 mi (0.6 km) south of the creek mouth to a point about 0.2 mi (1 km) north of the creek mouth. Unit CA 17 encompasses approximately 19 ac (8 ha) of State land and 6 ac (2 ha) of private land. This unit was occupied at the time of listing, and the unit has historically (prior to 2004)

been an important breeding and wintering site, supporting up to 11 breeding and up to 50 wintering Pacific Coast WSPs (Service unpublished data). Although Pacific Coast WSPs have not been documented in recent years, we consider this unit presently occupied based on the fluctuating use of areas by the species as a response to habitat and resource availability. The unit is located between currently occupied areas and provides dispersal habitat between units. This unit provides habitat to support breeding plovers, will facilitate interchange between otherwise widely separated units, and helps provide habitat within Recovery Unit 4 (identified in the Recovery Plan, Service 2007) along the central California Coast.

This unit includes the following physical or biological features essential to the conservation of the species: Wind-blown sand dunes, areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates, and generally barren to sparsely vegetated terrain.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from nonnative vegetation and human disturbance. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

CA 18, Scott Creek Beach, 23 ac (9 ha)

This unit includes the mouths of Scott and Molino Creeks and is located about 13 mi (21 km) north of the City of Santa Cruz in Santa Cruz County. It extends about 0.7 mi (1 km) north along the coast from the southern end of the sandy beach, 0.3 mi (0.5 km) south of Molino Creek, to a point about 0.1 mi (0.2 km) north of Scott Creek. Unit CA 18 encompasses approximately 15 ac (6 ha) of State land and 8 ac (3 ha) of local jurisdictional land. This unit was occupied at the time of listing and is currently occupied, and recent surveys have found up to 4 breeding Pacific Coast WSPs, while historical surveys (prior to 2004) have found up to 12 breeding plovers occupying the area (Service unpublished data). Unit CA 18 is an important wintering area, with up to 129 Pacific Coast WSPs recorded in a single season (Service unpublished data).

This unit is essential to the conservation of the species because, with proper management, and in conjunction with the other two relatively small units designated in Santa Cruz County (CA 17 and 19), it can attract additional breeding Pacific Coast WSPs and thereby facilitate interchange between the larger units at Half Moon Bay (CA 16).

The unit includes the following habitat physical or biological features essential to the species: Areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from nonnative vegetation, human disturbance, and predators. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

CA 19, Wilder Creek Beach, 15 ac (6 ha)

This unit is located at the mouth of Wilder Creek and is about 1 mi (1.6 km) west of the city of Santa Cruz, in Santa Cruz County. It extends about 0.25 mi (0.40 km) along the coast encompassing the sandy beach at the mouth of Wilder Creek. The unit is situated on State-owned (14 ac (6 ha)) and private (1 ac (0.4 ha)) land. This unit was occupied at the time of listing and is currently occupied. Although nesting in this area has been uncommon in recent years, it has historically been an important snowy plover nesting area, with up to 16 birds nesting each year (Service 2007, Appendix B) and is also an important Pacific Coast WSP wintering area, with up to 52 birds each winter (Service 2007, Appendix B). Unit CA 19 is capable of supporting 16 breeding Pacific Coast WSPs under proper management (Service 2007, Appendix B).

This unit is essential to the conservation of the species because, with proper management, and in conjunction with the other two relatively small units in Santa Cruz County (CA 17 and 18), it can attract additional breeding Pacific Coast WSPs and thereby facilitate interchange between the larger units at Half Moon Bay (CA 16) and Jetty Road to Aptos (CA 20). The unit includes the following features essential to the species: Areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for nesting and foraging) and generally barren to sparsely vegetated terrain (for foraging and predator avoidance).

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from nonnative vegetation, human disturbance, development, OHV use, pets, and predators. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

CA 20, Jetty Road to Aptos, 399 ac (161 ha)

This unit is located about 5 mi (8 km) west of the City of Watsonville and includes Sunset State Beach located in Santa Cruz County and Zmudowski State Beach and Moss Landing State Beach, both located in Monterey County. The mouth of the Pajaro River is located near the center of the subunit, and is designated as a Natural Preserve within Zmudowski State Beach. Elkhorn Slough is at the south end of the subunit. It extends about 8 mi (13 km) along the coast from Elkhorn Slough to Zils Road. Approximately 369 ac (149 ha) are State owned. The remaining 30 ac (12 ha) are privately owned. This unit was occupied at the time of listing; is currently occupied; is an important breeding area, with as many as 105 breeding Pacific Coast WSPs each year; and is also an important wintering area, with up to 250 plovers each winter (Service unpublished data).

The unit includes the following habitat physical or biological features essential to the species: Areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates, and generally barren to sparsely vegetated terrain.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from nonnative vegetation, human disturbance, development, horses, OHV use, pets, predators, and habitat changes resulting from exotic vegetation. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

CA 21, Elkhorn Slough Mudflats, 281 ac (114 ha)

This unit is located about 3.5 mi (6 km) north of the City of Castroville along the north side of Elkhorn Slough east of Highway 1 located in Monterey County. This unit is 1.5 mi (2 km) long, extending about 1 mi (2 km) along the north shore of Elkhorn Slough east of Highway 1 and about 0.5 mi (1 km) north from Elkhorn Slough to Bennett Slough. The unit is situated entirely on State-owned land. This unit was occupied at the time of listing, is currently occupied, and is an important breeding area, with as many as 41 breeding Pacific Coast WSPs each year, and is also an important wintering area, with up to 137 plovers each winter (Service unpublished data). This unit is capable of supporting 80 breeding Pacific Coast WSPs under proper management (Service 2007, Appendix B).

The unit includes the following habitat physical or biological features essential to the species: Areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates, and mud flat and salt pan habitat with generally barren to sparsely vegetated terrain.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from human disturbance, development, horses, OHV use, pets, predators, and habitat changes resulting from exotic vegetation. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

CA 22, Monterey to Moss Landing, 959 ac (388 ha)

This unit includes the beaches along the southern half of Monterey Bay from the City of Monterey at the south end of the unit to Moss Landing and the mouth of Elkhorn Slough at the north end of the unit in Monterey County. The mouth of the Salinas River is a Natural Preserve under State Parks, and is located near the center of the unit. Both the Salinas River and Marina Dunes Natural Preserves are within the unit. The unit extends about 15 mi (24 km) north along the coast from Monterey to Moss Landing. Unit CA 22 includes approximately 285 ac (115 ha) of State lands, 36 ac (14 ha) of local lands, and 415 ac (168 ha) of Federal land. The remainder is privately owned. This unit was occupied at the time of listing, is currently occupied, and is an important breeding area, with as many as 162 breeding Pacific Coast WSPs each year, and is also an important wintering area, with up to 363 plovers each winter (Service unpublished data).

The unit includes the following physical or biological features essential to the species: Areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from human disturbance, development, horses, OHV use, pets, predators, and habitat changes resulting from exotic vegetation. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

CA 23, Point Sur Beach, 72 ac (29 ha)

This unit is about 17 mi (27 km) south of the City of Monterey and immediately north of Point Sur State Historic Park (SHP) in Monterey County. It extends about 0.7 mi (1 km) north along the coast from Point Sur SHP, and includes the Point Sur Dunes Natural Preserve. This unit encompasses approximately 38 ac (15 ha) of State land and 34 ac (14 ha) of private land. This unit was occupied at the time of listing, is currently occupied, and has supported up to 13 breeding Pacific Coast WSPs each year (Service unpublished data). This unit is capable of supporting 20 breeding Pacific Coast WSPs under proper management (Service 2007, Appendix B). Unit CA 23 is an important wintering area, historically supporting up to 65 plovers each winter (Service unpublished data).

The unit includes the following habitat physical or biological features essential to the species: Wind-blown sand dunes, areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates, and generally barren to sparsely vegetated terrain.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from human disturbance and habitat changes resulting from exotic vegetation. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

CA 24, San Carpoforo Creek, 24 ac (10 ha)

This unit is located approximately 20 mi (32 km) north of the Town of Cambria and 2.5 mi (4 km) south of the San Luis Obispo/Monterey County boundary in San Luis Obispo County. It extends approximately 0.57 mi (1 km) along the coast. This unit contains approximately 4 ac (2 ha) of land owned by the USFS, 18 ac (7 ha) owned by the CDPR, and 2 ac (1 ha) of private land. The unit was occupied at the time of listing, is currently occupied, and has supported as many as nine breeding Pacific Coast WSPs; however, breeding does not occur here every year (Service unpublished data). This unit is capable of supporting 10 breeding Pacific Coast WSPs under proper management (Service 2007, Appendix B). This unit consistently supports 40 to 50 wintering plovers (Service unpublished data). San Carpoforo Creek is approximately 53 mi (84 km) south of the closest unit to the north (CA 23, Point Sur), and approximately 11 mi (18 km) north of the closest unit to the south (CA 25, Arroyo Laguna Creek). Therefore, this unit may facilitate interchange between widely separated habitats.

This unit includes the following physical or biological features essential to the conservation of the species: Areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from human disturbance, pets, and dune-stabilizing vegetation. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

CA 25, Arroyo Laguna Creek, 28 ac (11 ha)

This unit is located 11 mi (8 km) south of San Carpoforo Creek and 10 mi (16 km) north of the Town of Cambria in San Luis Obispo County. It extends

approximately 0.9 mi (2 km) along the coast from a rocky headland 0.2 mi (0.3 km) south of Adobe Creek to 0.2 mi (0.3 km) north of Oak Knoll Creek. This unit encompasses approximately 18 ac (7 ha) of land owned by the CDPR and 10 ac (4 ha) of private land. This unit was occupied at the time of listing and is currently occupied. Arroyo Laguna Creek has historically (prior to 2000) been an important site, supporting as many as 6 breeding and 91 wintering Pacific Coast WSPs; however, neither breeding nor wintering occurs here every year (Service unpublished data). This unit is capable of supporting six breeding Pacific Coast WSPs under proper management (Service 2007, Appendix B). This unit is roughly equidistant between CA 24 (San Carpoforo Creek) and CA 26 (San Simeon State Beach) and may facilitate interchange between widely separated habitats.

This unit includes the following physical or biological features essential to the conservation of the species: Areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates (for nesting and foraging) and generally barren to sparsely vegetated terrain.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from human disturbance, pets, and dune-stabilizing vegetation. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

CA 26, San Simeon State Beach, 24 ac (10 ha)

This unit is located about 2 mi (3 km) north of the Town of Cambria in San Luis Obispo County. It extends about 0.9 mi (2 km) along the coast from a point opposite the intersection of Highway 1 and Moonstone Beach Drive to the northwestern corner of San Simeon State Beach. Unit CA 26 is owned by the CDPR. The unit was occupied at the time of listing and is currently occupied. San Simeon State Beach has supported as many as seven breeding Pacific Coast WSPs; however, breeding does not occur here every year (Service unpublished data). This unit is an important wintering area with up to 143 plovers recorded in a single season over the last 7 years (Service unpublished data).

This unit includes the following physical or biological features essential to the conservation of the species: Areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from human disturbance, pets, and dune-stabilizing vegetation. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

CA 27, Villa Creek Beach, 20 ac (8 ha)

This unit is located about 3.5 mi (6 km) northwest of the Community of Cayucos in San Luis Obispo County. It extends 0.3 mi (0.5 km) northwest along the beach from an unnamed headland 1.4 mi (2 km) north of Point Cayucos to an unnamed headland northwest of Villa Creek. This unit is owned by the CDPR. This unit was occupied at the time of listing, is currently occupied, and is an important breeding and wintering site. This unit has supported as many as 33 breeding Pacific Coast WSPs in a single season (Service unpublished data). Wintering numbers vary widely from year to year, with 10 to 112 plovers recorded over the last 7 seasons (Service unpublished data).

This unit includes the following physical or biological features essential to the species: Areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from nonnative vegetation, human disturbance, pets, horses, and predators. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

CA 28, Toro Creek, 34 ac (14 ha)

This unit is located about 3 mi (5 km) north of the City of Morro Bay in San Luis Obispo County, extending from 0.4 mi (1 km) north of Toro Creek Road to 0.5 mi (1 km) south of Toro Creek Road (total length: 0.9 mi (1 km)). This unit was occupied at the time of listing, is currently occupied, and was historically (prior to 2000) an important breeding area, having supported as many as 16 breeding Pacific Coast WSPs (Service unpublished data). Breeding has not occurred at this unit in the last 5 seasons; however, the unit is capable of supporting 25 breeding plovers under proper management (Service 2007, Appendix B). This unit is an important wintering area with up to 121 Pacific Coast WSPs recorded in a single season (Service unpublished data). The unit encompasses approximately 11 ac (4 ha) of State land and 23 ac (9 ha) of private land.

This unit includes the following physical or biological features essential to the species: Areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from nonnative vegetation, human disturbance, pets, and predators. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

CA 29, Atascadero Beach/Morro Strand State Beach, 213 ac (86 ha)

This unit is located at Morro Strand State Beach just north of the City of Morro Bay in San Luis Obispo County. It extends about 2.25 mi (4 km) north along the beach from the parking area northeast of Morro Rock to an unnamed rocky outcrop opposite the end of Yerba Buena Street at the north end of the City of Morro Bay. This unit encompasses approximately 64 ac (26 ha) of State land, 51 ac (21 ha) of local jurisdictional land, and 98 ac (40 ha) of private land. This unit was occupied at the time of listing, is currently occupied, and is an important breeding area, having supported as many as 24 breeding Pacific Coast WSPs in a single season (Service unpublished data). The unit is capable of supporting 40 breeding Pacific Coast WSPs under proper management (Service 2007, Appendix B). This unit is also an important wintering area, with up to 249 plovers being recorded during a single season over the last 7 years (Service unpublished data).

This unit includes the following physical or biological features essential to the species: areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from nonnative vegetation, human disturbance, pets, and predators. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

CA 30, Morro Bay Beach, 1,076 ac (435 ha)

This unit is located at Montana de Oro State Park south of Morro Rock and adjacent to the City of Morro Bay in San Luis Obispo County. It extends 5.5 mi (9 km) north along the beach from a rocky outcrop about 350 ft (105 m) north of Hazard Canyon to the northern tip of the sand spit. This unit encompasses approximately 948 ac (383 ha) of State land, 69 ac (28 ha) of local jurisdictional land, and 60 ac (24 ha) of private land. This unit was occupied at the time of listing, is currently occupied, and is an important breeding area, supporting as many as 205 breeding Pacific Coast WSPs in a single season (Service unpublished data). Morro Bay Beach is also an important wintering area, supporting up to 104 plovers during a single over the last seven seasons (Service unpublished data).

This unit includes the following physical or biological features essential to the species: Wind-blown sand dunes, areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates, and generally barren to sparsely vegetated terrain.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from human disturbance, horses, pets, predators, and dune-stabilizing vegetation. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

CA 31, Pismo Beach/Nipomo Dunes, 1,652 ac (669 ha)

This unit is located south of the City of Grover Beach and west of the Town of Oceano and extends from San Luis Obispo County into northern Santa Barbara County west of the City of Guadalupe. The unit has approximately 242 ac (98 ha) of Federal land, 552 ac (223 ha) of State land, 377 ac (152 ha) of local jurisdictional land, and 481 ac (195 ha) of private land. This unit extends about 12 mi (19 km) along the beach from a point about 0.4 mi (1 km) north of Mussel Point to a point on the north side of Arroyo Grande Creek at the south end of Strand Way in the Town of Oceano. This unit was occupied at the time of listing, is currently occupied, and is an important breeding area, having supported as many as 162 breeding Pacific Coast WSPs in a single season (Service unpublished data). This unit is capable of supporting 350 breeding Pacific Coast WSPs under proper management (Service 2007, Appendix B). Pismo Beach/Nipomo Dunes is an important wintering area, having supported up to 287 Pacific Coast WSPs during a single season over the last 7 years (Service unpublished data). The unit includes portions of Pismo State Beach and Oceano Dunes SVRA, owned and managed by the CDPR; the Guadalupe-Nipomo Dunes National Wildlife Refuge, owned and managed by the Service; the Guadalupe Oil Field, owned and managed by the Chevron Corporation; and Rancho Guadalupe County Park, owned and managed by the County of Santa Barbara.

This unit includes the following physical or biological features essential to the species: Wind-blown sand dunes, areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates, and generally barren to sparsely vegetated terrain.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from nonnative vegetation, human disturbance, OHVs, horses, pets, and predators. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

CA 32, Vandenberg North, CA 33, Vandenberg South

Pursuant to section 4(a)(3) of the Act, we have exempted units CA 32 (711 ac (288 ha)), and CA33 (424 ac (172ha)), from critical habitat designation (see Exemptions section below).

CA 34, Devereaux Beach, 52 ac (21 ha)

This unit is located on the University of California's Coal Oil Point Natural Reserve, about 7 mi (11 km) west along the coast from the City of Santa Barbara in Santa Barbara County. The unit extends about 1.8 mi (3 km) north along the coast from the western boundary of Isla Vista County Park to a point along the beach opposite the end of Santa Barbara Shores Drive. This unit consists of 43 ac (17 ha) of State land and 9 ac (4 ha) of local jurisdictional land. This unit was occupied at the time of listing, is currently occupied, and is an important breeding area with as many as 39 breeding Pacific Coast WSPs recorded in a single season (Service unpublished data). This unit is also an important wintering area with up to 360 Pacific Coast WSPs recorded during a single season over the last 7 years (Service unpublished data).

This unit includes the following physical or biological features essential to the conservation of the species: Areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from nonnative vegetation, human disturbance, pets, and predators. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated with sea-level rise associated with climate change.

CA 35, Santa Barbara Beaches, 65 ac (26 ha)

This unit is located within the City of Santa Barbara in Santa Barbara County. It extends about 1.8 mi (3 km) along the coast from the Andree Clark Bird Refuge intersection with the Pacific Ocean to the Santa Barbara Harbor. This unit encompasses approximately 30 ac (12 ha) of State land, 35 ac (14 ha) of City of Santa Barbara lands, and 0.3 ac (0.1 ha) of private land. The unit was occupied at the time of listing and is currently occupied. The unit is an

important wintering area with up to 111 Pacific Coast WSPs recorded during a single season over the last 7 years (Service unpublished data).

This unit includes the following physical or biological features essential to the conservation of the species: areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from nonnative vegetation, human disturbance, development, and pets. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated by sea-level rise associated with climate change.

CA 36, Santa Rosa Island Beaches, 586 ac (237 ha)

This unit is located on Santa Rosa Island about 31 mi (50 km) southwest of the City of Santa Barbara in Santa Barbara County. This unit is comprised of 11 different beaches (subunits CA 36A through CA 36K) around the island. This unit encompasses approximately 586 ac (237 ha) of Channel Islands National Park land. This unit was occupied at the time of listing, is currently occupied, and is an important breeding area with as many as 37 breeding Pacific Coast WSPs recorded in a single season (Service unpublished data). This unit is capable of supporting 130 breeding plovers under proper management (Service 2007, Appendix B). This is also an important wintering area with up to 242 plovers recorded during a single season over the last 7 years (Service unpublished data).

This unit includes the following physical or biological features essential to the conservation of the species: Areas of sandy beach above and below the high-tide line with surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from nonnative vegetation, and direct disturbance from expanding marine mammal populations. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated by sea-level rise associated with climate change.

CA 37, San Buenaventura Beach, 70 ac (28 ha)

This unit is located within the City of Ventura in Ventura County. It extends about 2 mi (3 km) north along the coast from rock groin, immediately north of Marina Park to the Ventura Pier. San Buenaventura State Beach is a unit that is owned by the CDPR. This unit was occupied at the time of listing and is currently occupied. It is an important wintering area with up to 72 Pacific Coast WSPs recorded during a single season over the last 7 years (Service unpublished data).

This unit includes the following physical or biological features essential to the conservation of the species: Areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from nonnative vegetation, human disturbance, and pets. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated by sea-level rise associated with climate change.

CA 38, Mandalay Beach to Santa Clara River, 672 ac (272 ha)

This unit is located near the City of Oxnard in Ventura County. It extends about 6 mi (10 km) north along the coast from the north jetty of Channel Islands Harbor to a point about 0.5 mi (1 km) north of the Santa Clara River mouth. This unit encompasses approximately 213 ac (86 ha) of private land and 459 ac (186 ha) of State land within McGrath and Mandalay State Beaches. This unit was occupied at the time of listing and is currently occupied. It is an important breeding area with as many as 70 breeding Pacific Coast WSPs recorded in a single season (Service unpublished data). This unit is also an important wintering area with up to 129 plovers recorded during a single season over the last 7 years (Service unpublished data).

This unit includes the following physical or biological features essential to the conservation of the species: Wind-blown sand dunes, areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates, and generally barren to sparsely vegetated terrain.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from human disturbance, development, pets, and dune-stabilizing vegetation. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated by sea-level rise associated with climate change.

CA 39, Ormond Beach, 320 ac (130 ha)

This unit is located near the cities of Port Hueneme and Oxnard in Ventura County. It extends about 3 mi (5 km) northwest along the coast from Arnold Road and the boundary of Naval Base Ventura County, Point Mugu (NBVC, Point Mugu) to the south jetty of Port Hueneme. This unit encompasses approximately 161 ac (65 ha) of private land and 159 ac (65 ha) of State land. This unit was occupied at the time of listing, is currently occupied, and is an important breeding area with as many as 33 breeding Pacific Coast WSPs recorded in a single season (Service unpublished data). This unit is capable of supporting 50 breeding plovers under proper management (Service 2007, Appendix B). This unit is also an important wintering area with up to 117 plovers recorded during a single season over the last 7 years (Service unpublished data).

This unit includes the following physical or biological features essential to the conservation of the species: Wind-blown sand dunes, areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates, and generally barren to sparsely vegetated terrain.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from nonnative vegetation, human disturbance, and pets. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated by sea-level rise associated with climate change.

CA 40, Mugu Lagoon North; CA 41, Mugu Lagoon South; CA 42, San Nicolas Island

Pursuant to section 4(a)(3) of the Act, we have exempted units CA 40, CA 41, and CA42 from critical habitat designation (see Exemptions section below).

CA 43, Zuma Beach, 73 ac (30 ha)

This unit is located about 8 mi (13 km) west of the City of Malibu in Los Angeles County. It extends about 3 mi (5 km) north along the coast from the north side of Point Dume to the base of Trancas Canyon. This unit encompasses approximately 72 ac (29 ha) of Los Angeles County lands, and 1 ac (0.5 ha) of State land. This unit was occupied at the time of listing and is currently occupied. It is an important wintering area with up to 213 Pacific Coast WSPs recorded during a single season over the last 7 years (Service unpublished data; Ryan *et al.* 2010, p. 19).

This unit includes the following physical or biological features essential to the conservation of the species: Areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from nonnative vegetation, human disturbance, development, horses, and pets. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated by sea-level rise associated with climate change.

CA 44, Malibu Beach, 13 ac (5 ha)

This unit is located within the City of Malibu in Los Angeles County. It extends about 0.5 mi (1 km) north along the coast from approximately 300 ft (94 m) north of the Malibu Pier to Malibu Point. Approximately 9 ac (4 ha) are within Malibu Lagoon State Beach. The ownership of the remaining 4 ac (1 ha) are not known; however, the State likely has jurisdiction over these lands. This unit was occupied at the time of listing and is currently occupied. It is an important wintering area with up to 67 Pacific Coast WSPs recorded during a single season over the last 7 years (Service unpublished data).

This unit includes the following physical or biological features for the conservation of the species: Areas of sandy beach above and below the high-tide line with occasional surf-cast wrack supporting small invertebrates and generally barren to sparsely vegetated terrain.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from nonnative vegetation, human disturbance, and pets. Control of nonnative vegetation and enforcement of existing human-use regulations are needed to ensure the suitability of the unit. With time, we anticipate that the lower portions of this unit will be inundated by sea-level rise associated with climate change.

CA 45A, Santa Monica Beach, 48 ac (19 ha)

This subunit is located between the cities of Santa Monica and Los Angeles in Los Angeles County. It stretches roughly 1 mi (2 km) from Montana Avenue to the mouth of Santa Monica Canyon. This subunit consists of 29 ac (12 ha) of State owned land, and 19 ac (8 ha) are owned by the City of Santa Monica. This subunit was occupied at the time of listing, is currently occupied, and annually supports a significant wintering flock of Pacific Coast WSPs (an average wintering flock of 36 from 2003 to 2010 (Service unpublished data)) in a location with high-quality breeding habitat. This location also facilitates interchange between wintering locations.

This location contains the physical or biological features essential to the conservation of the species, including a wide sandy beach with occasional surf-cast wrack supporting small invertebrates.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from human recreational disturbance, pets, and beach raking.

CA 45B, Dockweiler North, 34 ac (14 ha)

This subunit is located south of Ballona Creek and west of the El Segundo Dunes, and immediately west of the Los Angeles International Airport, in the City of Los Angeles, Los Angeles County. It stretches roughly 0.5 mi (0.8 km) centered at Sandpiper Street. This subunit is owned by the State of California. This subunit was occupied at the time of listing and is currently occupied. In conjunction with Subunits CA 45C and CA 45D, the subunit annually supports a significant wintering flock of Pacific Coast WSPs in a location with high quality breeding habitat (Page *in litt.* 2004) and facilitates interchange between wintering locations.

This location contains the physical or biological features essential to the conservation of the species, including a wide sandy beach with occasional surf-cast wrack supporting small invertebrates.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from human recreational disturbance, pets, and beach raking.

CA 45C, Dockweiler South, 65 ac (26 ha)

This subunit is located immediately west of the Hyperion Wastewater Treatment Plant between the cities of Los Angeles and El Segundo in Los Angeles County. It stretches approximately 1 mi (1.6 km) along Vista del Mar from West Imperial Highway extending past East Grand Avenue. This subunit consists of 54 ac (22 ha) of State land and 11 ac (5 ha) of privately owned land. This subunit was occupied at the time of listing and is currently occupied. In conjunction with Subunits CA 45B and CA 45D, it annually supports a significant wintering flock of Pacific Coast WSPs in a location with high-quality breeding habitat (Page *in litt.* 2004) and facilitates interchange between wintering locations.

This location contains the physical or biological features essential to the conservation of the species, including a wide sandy beach with occasional surf-cast wrack supporting small invertebrates.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from human recreational disturbance, pets, and beach raking.

CA 45D, Hermosa State Beach, 27 ac (11 ha)

This subunit is located immediately west of the City of Hermosa Beach in Los Angeles County. This subunit stretches roughly 0.5 mi (1 km) from Eleventh Street to First Street. This subunit consists of 8 ac (3 ha) State land and 19 ac (8 ha) are privately owned. This subunit was occupied at the time of listing and is currently occupied. The unit supported an average wintering flock of 25 Pacific Coast WSPs from 2003 to 2010 (Service unpublished data). In conjunction with subunits CA 45B and CA 45C, this subunit annually supports a large and significant

wintering flock of Pacific Coast WSP and facilitates interchange between wintering locations.

This location contains the physical or biological features essential to the conservation of the species, including a wide sandy beach with occasional surf-cast wrack supporting small invertebrates.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from human recreational disturbance, pets, and beach raking.

CA 46A, Bolsa Chica State Beach, 93 ac (38 ha)

This subunit is located west of the Pacific Coast Highway, in the City of Huntington Beach, Orange County. It stretches roughly 2.4 mi (3.9 km) from north of the lagoon mouth channel (into Bolsa Chica Ecological Reserve) to just south of the Sunset Beach area near Warner Avenue. This subunit consists of 93 ac (38 ha) owned by the State of California. This subunit was occupied at the time of listing, is currently occupied, and supported an average wintering flock of 27 Pacific Coast WSPs from 2003 through 2010 (Service unpublished data). The subunit annually supports a significant wintering flock of Pacific Coast WSPs in a location with high-quality breeding habitat.

This location contains the physical or biological features essential to the conservation of the species, including a wide sandy beach with occasional surf-cast wrack supporting small invertebrates. The physical or biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from recreational disturbance and beach raking.

CA 46 (Subunits B–F), Bolsa Chica Reserve, 475 ac (192 ha)

These subunits are located east of the Pacific Coast Highway, in Orange County. They consist of 475 ac (192 ha), all of which are owned by the State of California. Bolsa Chica Reserve contains significant nesting areas (which we are labeling as individual subunits B, C, D, E, and F). This location supported 47 breeding adult Pacific Coast WSP in 2009 (Knapp and Peterson 2009, p. 8). These subunits were occupied at the time of listing, are currently occupied, and annually support one of the largest breeding populations of Pacific Coast WSP in the region. The Recovery Plan for the Pacific Coast WSP states that this location contributes to the conservation goal for the region by providing a management potential of 70 breeding birds (Service 2007, Appendix B). This location also supported an average wintering flock of 14 Pacific Coast WSP from 2003 through 2010 (Service unpublished data). This reserve is an active oil field that underwent significant reconstruction and restoration between 2004 and 2006, including the addition of three new nest sites and a new ocean inlet that allows the water level to rise and fall resembling the irregular semi-diurnal tidal range of southern California's ocean waters (Knapp and Peterson 2009, p. 1).

This location contains the physical or biological features essential to the conservation of the species, including tidally influenced estuarine mud flats supporting small invertebrates, and seasonally dry ponds that provide nesting and foraging habitat for Pacific Coast WSP. The physical or biological features essential to the conservation of the species in these subunits may require special management considerations or protection to address threats from vegetation encroachment in nesting and foraging areas and predation of chicks and eggs.

CA 47, Santa Ana River Mouth, 19 ac (8 ha)

This unit is located north of the Santa Ana River mouth, immediately west of the City of Huntington Beach in Orange County. This unit consists of 19 ac (8 ha), of which 18 ac (7 ha) are owned by the State of California, and 1 ac (0.4 ha) is privately owned. This unit was not occupied at the time of listing. However, we consider this unit essential for the conservation of the species based on the fluctuating use of areas by the species as a response to habitat and resource availability. The unit is located adjacent to currently occupied areas and provides dispersal habitat between units. This unit provides habitat to support breeding plovers, and will facilitate interchange between otherwise widely separated units, and helps provide habitat within the Recovery Unit identified in the Recovery Plan (Service 2007).

This location contains habitat such as a wide sandy beach with surf-cast wrack supporting small invertebrates, and tidally influenced estuarine mud flats that provide nesting and foraging habitat for Pacific Coast WSPs. Primary threats in this unit are those associated with recreational disturbance and beach raking.

CA 48, Balboa Beach, 25 ac (10 ha)

This unit is located on the Balboa Peninsula, immediately west of the City of Newport Beach in Orange County. This unit stretches roughly 0.3 mi (0.5 km) from A Street south to G Street, including a total of 25 ac (10 ha), all of which are owned by the City of Newport Beach. This unit was occupied at the time of listing, is currently occupied, and supported two breeding adult Pacific Coast WSPs in 2009 (P. Knapp, pers. comm. 2010) and three breeding adult Pacific Coast WSPs in 2010 (T. Ryan, *in litt.* 2010). It also supported an average wintering flock of 35 Pacific Coast WSPs from 2003 through 2010 (Service unpublished data).

This location contains the physical or biological features essential to the conservation of the species, including a wide sandy beach with occasional surf-cast wrack supporting small invertebrates.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from human recreational disturbance, predation of chicks and eggs, and beach raking.

CA 49, San Onofre Beach-Marine Corps Base Camp Pendleton

Unit CA 49 has been exempted from critical habitat designation under section 4(a)(3) of the Act (see Exemptions section below).

CA 50 (Subunits A–C), Batiquitos Lagoon

Unit CA 50 (66 ac (27 ha)) has been excluded from critical habitat designation under section 4(b)(2) of the Act (see Exclusions section below).

CA 51 (Subunits A–C), San Elijo Lagoon Ecological Reserve, 15 ac (6 ha)

These subunits are located between the cities of Solana Beach and Encinitas in San Diego County. These subunits were occupied at the time of listing and are currently occupied. They consist of 15 ac (6 ha), of which 11 ac (4 ha) are owned by the State of California, and 4 ac (2 ha) are privately owned. San Elijo Lagoon includes three nest sites (which we are labeling as individual Subunits CA 51A, CA 51B, and CA 51C). The San Elijo Lagoon Restoration Working Group is planning to restore habitat at the San Elijo Lagoon Ecological Reserve, which may include nest sites for nesting sea birds and shorebirds, including Pacific Coast WSP and California least tern. Restoration and enhancement of coastal dune habitat at this site is ongoing, and the Service is currently participating in

a cooperative agreement with the San Elijo Lagoon Conservancy to create suitable nesting areas for Pacific Coast WSPs, California least terns, and other shorebirds in the southwest corner of the West Basin of the lagoon. The Recovery Plan for the Pacific Coast WSP states that this location contributes significantly to the conservation goal for the region by providing a management potential of 20 breeding birds (Service 2007, Appendix B). This unit may facilitate interchange between wintering locations (see *Criteria Used to Identify Critical Habitat* section above).

These subunits contain the physical or biological features essential to the conservation of the species, including sandy beaches and tidally influenced estuarine mud flats with tide-cast organic debris supporting small invertebrates. Restoration of degraded habitat within these subunits will improve the habitat.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from human recreational disturbance, vegetation encroachment in the intertidal zone, and predation of chicks and eggs.

CA 52A, San Dieguito Lagoon, 4 ac (2 ha)

Subunit CA 52A is located at the west end of San Dieguito River Park within the city of Del Mar in San Diego County. This subunit was occupied at the time of listing, is currently occupied, and consists of 4 ac (1 ha), all of which are privately owned.

This subunit is a nest site that was created for nesting seabirds and shorebirds including Pacific Coast WSP and California least tern. This subunit also facilitates interchange between wintering locations. The Recovery Plan for the Pacific Coast WSP states that San Dieguito Lagoon contributes significantly to the conservation goal for the region by providing a management potential of 20 breeding birds (Service 2007, Appendix B). Additionally, restoration of this site occurred in 2009, improving areas used by breeding and wintering shorebirds. Use of one nesting site by a pair of plovers was reported in 2010 (Foster, pers. comm. 2010b). Additional improvements to the nest sites are expected in the future.

This subunit contains the physical or biological features essential to the conservation of the species, including wide sandy beaches and tidally influenced estuarine mud flats with tide-cast organic debris supporting small invertebrates.

The physical or biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from human recreational disturbance, vegetation encroachment in the intertidal zone, and predation of chicks and eggs.

CA 52 (Subunits B–C), San Dieguito Lagoon

Subunits CA 52B (3 ac (1 ha)) and CA 52C (4 ac (2 ha)) have been excluded from critical habitat designation under section 4(b)(2) of the Act (see Exclusions section below).

CA 53, Los Penasquitos Lagoon

Unit CA 53 (32 ac (13 ha)) has been excluded from critical habitat designation under section 4(b)(2) of the Act (see Exclusions section below).

CA 54A, Fiesta Island

Subunit CA 54A (2 ac (1 ha)) has been excluded from critical habitat designation under section 4(b)(2) of the Act (see Exclusions section below).

CA 54B, Mariner's Point

Subunit CA 54B (7 ac (3 ha)) has been excluded from critical habitat designation under section 4(b)(2) of the Act (see Exclusions section below).

CA 54C, South Mission Beach

Subunit CA 54C (38 ac (15 ha)) has been excluded from critical habitat designation under section 4(b)(2) of the Act (see Exclusions section below).

CA 54D, San Diego River Channel

Subunit CA 54D (51 ac (21 ha)) has been excluded from critical habitat designation under section 4(b)(2) of the Act (see Exclusions section below).

CA 55A, Naval Air Station North Island

Subunit CA 55A has been exempted from critical habitat designation under section 4(a)(3) of the Act (see Exemptions section below).

CA 55B, Coronado Beach, 74 ac (30 ha)

This subunit is located immediately west of the City of Coronado in San Diego County. This subunit stretches roughly 0.6 mi (0.96 km) from the boundary with Naval Air Station North Island (NASNI) to the south end of the natural sand dunes at Coronado City Beach. This subunit includes a total of 74 ac (30 ha) owned by the State of California. This subunit was occupied at the time of listing, is currently occupied, and is adjacent to the sizable Pacific Coast WSP population at NASNI, which contained an average wintering flock of 69 Pacific Coast WSPs from 2003 to 2010 (Service unpublished data). Additionally, biologists recorded 17 breeding adults at NASNI during 2009 surveys (Service unpublished data). The Recovery Plan for the Pacific Coast WSP states that this location (in conjunction with adjacent military lands) contributes significantly to the conservation goal for the region by providing a management potential of 20 breeding birds (Service 2007, Appendix B). This unit also facilitates interchange between wintering locations.

This subunit contains the physical or biological features essential to the conservation of the species, including a wide sandy beach with occasional surf-cast wrack supporting small invertebrates, as well as wind-blown sand in dune systems immediately inland of the active beach face.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from human recreational disturbance and beach raking.

CA 55C, Silver Strand Beach and CA 55D, Delta Beach

Subunits CA 55C and CA 55D have been exempted from critical habitat designation under section 4(a)(3) of the Act (see Exemptions below).

CA 55E, Sweetwater Marsh National Wildlife Refuge and D Street Fill, 79 ac (32 ha)

Lands owned and managed by the Port of San Diego under the San Diego Bay Natural Resources Plan within subunit CA 55E (53 ac (21 ha)) have been excluded from critical habitat designation under section 4(b)(2) of the Act (see Exclusions section below). Federal lands (79 ac (32 ha)) within the subunit that are owned and managed by the Service (Sweetwater Marsh National Wildlife Refuge) are not excluded from critical habitat.

This subunit is located on the east side of San Diego Bay in the City of Chula Vista in San Diego County. This subunit consists of approximately 79 ac (32 ha) of which all are owned by the Service. This subunit was occupied at the time of listing, is currently occupied, and supported nesting Pacific Coast WSPs in 2000 (R. Patton, pers. comm. 2010), and two adult Pacific Coast WSPs in 2009 (Service unpublished data). The Recovery Plan for the Pacific Coast WSP states that this location contributes significantly to the conservation goal for the region by providing a management potential of 25 breeding birds (Service 2007, Appendix

B). Additionally, this subunit annually supports a large and significant wintering flock of Pacific Coast WSPs and facilitates interchange between wintering locations.

This subunit contains the physical or biological features essential to the conservation of the species, including sandy beaches above and below mean high-tide line and tidally influenced estuarine mud flats that provide nesting and foraging habitat for Pacific Coast WSPs.

The physical or biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from vegetation encroachment in the intertidal zone, and predation of chicks and eggs.

CA 55F, Silver Strand State Beach, 82 ac (33 ha)

This subunit is located immediately north of the City of Imperial Beach, in the City of Coronado in San Diego County. This subunit consists of 82 ac (33 ha), of which approximately 78 ac (31 ha) are owned by the State of California, and the ownership of 4 ac (1 ha) are unknown, but may also be under the State's jurisdiction. This subunit was occupied at the time of listing and is currently occupied. The subunit stretches roughly 1.5 mi (2.4 km) west of Silver Strand Boulevard, and is centered roughly at Coronado Cays Park. This subunit, in conjunction with adjacent lands at Naval Amphibious Base Coronado, supported at least 10 breeding adults in 2009 (Service unpublished data) and 8 breeding adults in 2010 (Ryan, *in litt.* 2010). The Recovery Plan for the Pacific Coast WSP states that this location contributes significantly to the conservation goal for the region by providing a management potential of 65 breeding birds (Service 2007, Appendix B). This subunit contained an average wintering flock of 13 Pacific Coast WSPs from 2003 to 2010 (Service unpublished data). This subunit also facilitates interchange between wintering locations.

This subunit contains the physical or biological features essential to the conservation of the species, including a wide sandy beach with occasional surf-cast wrack supporting small invertebrates, as well as wind-blown sand in dune systems immediately inland of the active beach face.

The physical or biological features essential to the conservation of the species may require special management considerations or protection to address the main threats from human recreational disturbance and predation of chicks and eggs.

CA 55G, Chula Vista Wildlife Reserve

Subunit CA 55G (10 ac (4 ha)) has been excluded from critical habitat designation under section 4(b)(2) of the Act (see Exclusions section below).

CA 55H, Naval Radio Receiving Facility

Subunit CA 55H has been exempted from critical habitat designation under section 4(a)(3) of the Act (see Exemptions section below).

CA 55I, San Diego National Wildlife Refuge, South Bay Unit, 5 ac (2 ha)

This subunit is located at the southernmost end of San Diego Bay in a location that is operated by Western Salt Works as salt evaporation ponds. This subunit is immediately north of the City of Imperial Beach, in the City of San Diego in San Diego County. This subunit consists of 5 ac (2 ha), all of which are owned by the Service. This subunit was occupied at the time of listing, is currently occupied, and supported at least three breeding adults in 2009 (Collins, *in litt.* 2010), and seven breeding adults in 2010 (Ryan, *in litt.* 2010). The Recovery Plan for the Pacific Coast WSP states that this location contributes significantly to the conservation goal for the region by providing a management potential of 30 breeding birds (Service 2007, Appendix B).

The subunit contains the physical or biological features essential to the conservation of the species, including sparsely vegetated areas on artificial salt flats and adjoining dikes, as well as tidally influenced estuarine mud flats with tide-cast organic debris supporting small invertebrates for foraging.

The physical or biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from egg and chick predation.

CA 55J, Tijuana Estuary and Border Field State Park, 150 ac (61 ha)

This subunit is located in the City of Imperial Beach in San Diego County. This subunit stretches roughly 2 mi (3.2 km) from the end of Seacoast Drive to the United States/Mexico border, extending across both the Tijuana Slough National Wildlife Refuge and Border Field State Park. This subunit consists of 150 ac (61 ha), of which 71 ac (29 ha) are owned by the Service and 79 ac (32 ha) are owned by the State of California. This subunit was occupied at the time of listing, is currently occupied, and supported at least 10 adult breeding Pacific Coast WSPs in 2009 (B. Collins, *in litt.* 2010), and 19 breeding adults in 2010 (Ryan, *in litt.* 2010). This location also supported an average wintering flock of 54 Pacific Coast WSPs from 2003 to 2010 (Service unpublished data). The Recovery Plan for the Pacific Coast WSP states that this location contributes significantly to the conservation goal for the region by providing a management potential of 40 breeding birds (Service 2007, Appendix B).

This subunit contains the physical or biological features essential to the conservation of the species, including a wide sandy beach with occasional surfcast wrack supporting small invertebrates, as well as tidally influenced estuarine mud flats with tide-cast organic debris supporting small invertebrates for foraging.

The physical or biological features essential to the conservation of the species in this subunit may require special management considerations or protection to address threats from human recreational disturbance and predation of chicks and eggs.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Decisions by the 5th and 9th Circuit Courts of Appeal have invalidated our regulatory definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F.3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.,* 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve

its intended conservation role for the species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) of the Act through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected, and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical and biological features to an extent that appreciably reduces the conservation value of critical habitat for the Pacific Coast WSP. As discussed above, the role of critical habitat is to support life-history needs of the species and to provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result consultation for the Pacific Coast WSP. These activities include, but are not limited to:

(1) Actions and management efforts affecting Pacific Coast WSP on Federal lands, such as refuges, national seashores, parks, and wildlife reserves. Such activities may include clearing and raking of tidal debris (seaweed, driftwood) from beaches, causing a loss in cover and forage; high levels of visitor use, which can disturb and disrupt normal behavior; restoration efforts, which can temporarily affect Pacific Coast WSP's use of an area; and utility corridors that require maintenance, which can lead to disturbance of Pacific Coast WSPs;

(2) Dredging and dredge spoil placement that permanently removes the physical or biological features to the extent that Pacific Coast WSPs are affected for the foreseeable future;

(3) Construction and maintenance of roads, walkways, marinas, access points, bridges, culverts, and other structures that interfere with Pacific Coast WSP nesting, breeding, or foraging or that result in increases in predation;

(4) Storm water and wastewater discharge from communities, which could impact invertebrate abundance, on which Pacific Coast WSPs rely for food; and

(5) Flood control actions that change the physical or biological features to the extent that the habitat no longer contributes to the conservation of the species.

Note that the scale of these activities is a crucial factor in determining whether, in any instance, they would directly or indirectly alter critical habitat to the extent that the value of the critical habitat would be appreciably diminished in providing for the physical or biological features essential to the conservation of the Pacific Coast WSP.

We consider all of the revised final critical habitat units and subunits to contain features essential to or for the conservation of the Pacific Coast WSP. To ensure that their actions do not jeopardize the continued existence of the Pacific Coast WSP, Federal agencies already consult with us on activities in areas currently occupied by the Pacific Coast WSP, or in unoccupied areas if the species may be affected by their actions.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

(1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;

(2) A statement of goals and priorities;

(3) A detailed description of management actions to be implemented to provide for these ecological needs; and

(4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.''

We consult with the military on the development and implementation of INRMPs for installations with federally listed species. We analyzed INRMPs developed by military installations located within the range of the critical habitat designation for the Pacific Coast WSP to determine if units covered by these INRMPs are exempt under section 4(a)(3) of the Act. The following areas are Department of Defense lands with completed, Service-approved INRMPs within the revised critical habitat designation.

Approved Integrated Natural Resources Management Plans

Naval Support Activity Monterey, CA 22, 8 ac (3 ha)

The Department of the Navy, Naval Support Activity (NSA) Monterey provides primary support to the Naval Postgraduate School, Fleet Numerical Meteorology and Oceanography Center, Navy Research Lab and more than 15 additional tenant commands. Naval Support Activity Monterey supports over 160 buildings which are located on more than 626 ac (253 ha) of DOD lands. The Naval Postgraduate School is the largest producer of advanced graduate degrees for DOD and graduates thousands every year from all services and from over 50 countries. The Fleet Numerical Meteorology and Oceanography Center provides the highest quality, most relevant, and timely worldwide Meteorology and Oceanography support to U.S. and coalition forces from their Operations Center in Monterey, California. The Navy Research Lab conducts scientific and weather modeling as well as atmospheric and aerosol studies.

The NSA Monterey INRMP is a planning document that guides the management and conservation of natural resources under the installation's control. The INRMP was prepared to ensure that natural resources are managed in support of the NSA Monterey's military command mission and that all activities are consistent with Federal stewardship requirements. The NSA Monterey INRMP was completed in 2001. An addendum to the 2001 INRMP, addressing conservation of the Pacific Coast WSP, was submitted to the Service in March 2012 and was approved and signed by the Service in May 2012. The INRMP is NSA Monterey's adaptive plan for managing natural resources to support and be consistent with the military mission, while protecting and enhancing the biological integrity of lands under its use. Naval Support Activity Monterey is committed to an ecosystem management approach for its natural resources program by integrating all components of natural resource management into a comprehensive and coordinated effort. An integrated approach to ecosystem management will help protect the biological diversity found at NSA Monterey.

The INRMP identifies the goal of contributing to the recovery of the Pacific Coast WSP through development of cooperative, ecosystem management-based strategies. The INRMP identifies the following management and protective measures to achieve this goal:

(1) Protect and maintain natural coastal processes that perpetuate high-quality breeding habitat including measures such as:

(2) Ensure beach areas are clean of litter and contaminants;

(3) Improve signage mandating dogs be leashed at all times;

(4) Develop and maintain a feral animal predator management program;

(5) Minimize activities which can affect invertebrate populations that shorebirds forage on,such as routine removal of tidal wrack;

(6) Discourage human foot traffic from suitable nesting areas with fencing and educational signage;

(7) Eliminate incompatible military operations on beach during nesting season;

(8) Actively communicate management strategies to local community;

(9) Enhance remnant dune areas as potential nest sites;

(10) Identify opportunities to use suitable dredge or other materials for expansion of beachareas to create improved nesting substrate;

(11) Maintain native plant coverage on dunes and control invasive weeds on dunes and beach;

(12) Conduct monitoring in support of management objective;

(13) Meet with stakeholders annually to oversee implementation and prioritize projects;

(14) Monitor Pacific Coast WSP population at least annually; and

(15) Regularly monitor dune and beach area and identify conflicts for immediate actions and long-term projects.

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that the identified lands are subject to the 2001 INRMP and the 2012 Addendum to the INRMP for NSA Monterey and that the conservation efforts identified in the INRMP have and will provide a benefit to the Pacific Coast WSP and features essential to its conservation, and will benefit Pacific Coast WSPs occurring in habitats within or adjacent to NSA Monterey. Therefore, lands within this installation (approximately 8 ac (3 ha) of of Unit CA 22) are exempt from critical habitat designation under section 4(a)(3) of the Act. We are not including approximately 8 ac (3 ha) of habitat for the Pacific Coast WSP in this revised final critical habitat designation because of this exemption.

Vandenberg Air Force Base, CA 32 and CA 33, 1,135 ac (460 ha)

VAFB is headquarters for the 30th Space Wing, the Air Force's Space Command unit that operates VAFB and the Western Test Range/Pacific Missile Range. VAFB operates as an aerospace center supporting west coast launch activities for the Air Force, Department of Defense, National Aeronautics and Space Administration, and commercial contractors. The three primary operational missions of VAFB are to launch, place, and track satellites in near-polar orbit; to test and evaluate the intercontinental ballistic missile systems; and to support aircraft operations in the western range. VAFB lies on the south-central California coast, approximately 275 mi (442 km) south of San Francisco, 140 mi (225 km) northwest of Los Angeles, and 55 mi (88 km) northwest of Santa Barbara. The

99,100-ac (40,104-ha) base extends along approximately 42 mi (67 km) of Santa Barbara County coast, and varies in width from 5 to 15 mi (8 to 24 km).

The VAFB INRMP was prepared to provide strategic direction to ecosystem and natural resources management on VAFB. The long-term goal of the INRMP is to integrate all management activities in a manner that sustains, promotes, and restores the health and integrity of VAFB ecosystems using an adaptive management approach. The INRMP was designed to: (1) Summarize existing management plans and natural resources literature pertaining to VAFB; (2) identify and analyze management goals in existing plans; (3) integrate the management goals and objectives of individual plans; (4) support base compliance with applicable regulatory requirements; (5) support the integration of natural resource stewardship with the Air Force mission; and (6) provide direction for monitoring strategies.

VAFB completed an INRMP in 2011, which benefits western snowy plover by: (1) Implementing restrictions on recreational beach access during the nesting season, which are evaluated each year for their effectiveness in protecting snowy plovers; (2) prohibiting recreational off-road vehicle activity on western snowy plover beaches at any time except when essential to support the VAFB mission or in an emergency; (3) training VAFB personnel to operate ATVs to avoid impacts to western snowy plovers and their habitat; (4) using horse and foot patrols when possible on base beaches; (5) enforcing leash laws throughout VAFB year-round; (6) prohibiting all pets on western snowy plover nesting beaches between March 1 and September 30 each year; (7) implementing a predator management plan that includes ecologically sound approaches to reducing predation of western snowy plover nests and chicks; (8) cleaning base beaches between October 1 and February 28 each year under the ''Adopt-a-Beach Program'' and implementing program-specific monitoring of western snowy plovers, to determine impacts from launches and other Air Force activities; (9) restricting aircraft overflight to a minimum of 500-foot altitude above western snowy plover nesting beaches; and (10) establishing flight patterns to minimize aircraft presence over these beaches (VAFB 2011, Tab D, p. 18–20). Furthermore, VAFB's environmental staff reviews projects and enforces existing regulations and orders that, through their implementation, avoid and minimize impacts to natural resources, including the western snowy plover and its habitat.

Habitat features essential to the conservation of the western snowy plover exist on VAFB, and activities occurring on VAFB are currently being conducted in a manner that minimizes impacts to western snowy plover habitat. This military installation has a Secretarial-approved INRMP that provides a benefit to the western snowy plover, and VAFB has committed to work closely with the Service and the CDFG to continually refine their existing INRMP as part of the Sikes Act's INRMP review process. Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that conservation efforts identified in the 2011 INRMP for VAFB provide a benefit to the western snowy plover and its habitat. This includes habitat located on Vandenberg North (CA 32) and South (CA 33) beaches. Therefore, lands subject to the INRMP for VAFB, which includes the lands leased from the Department of Defense by other parties, are exempt from critical habitat designation under section 4(a)(3)(B) of the Act, and we are not including approximately 1,135 ac (460 ha) of habitat in this revised critical habitat designation because of this exemption.

Naval Base Ventura County Point Mugu, CA 40 and CA 41, 208 ac (84 ha)

The Department of the Navy, Naval Base Ventura County, manages two facilities in Ventura County, California: Point Mugu and San Nicolas Island. Naval Base Ventura County, Point Mugu (NBVC, Point Mugu) was established in 1949 as the Naval Air Weapons Station to support a new U.S. Naval Air Missile Test Center, which provided material and service support, including military personnel administration, air traffic control, and flight line functions. The NBVC, Point Mugu occupies approximately 4,490 ac (1,817 ha) of land on the coast of southern California, Ventura County. Currently, the installation is used for target drone launches, aircraft operations, and beach missile launch operations, and is responsible for maintenance of the roads and perimeter fence, utilities maintenance, pest management, recreation, and natural resource management.

The NBVC, Point Mugu INRMP is a planning document that guides the management and conservation of natural resources under the installation's control. The INRMP was prepared to ensure that natural resources are managed in support of the Naval Base Ventura County's military command mission and that all activities are consistent with Federal stewardship requirements. The NBVC, Point Mugu INRMP was completed in 2002, and renewed and approved by the Service in 2008. The INRMP is Naval Base Ventura County's adaptive plan for managing natural resources to support and be consistent with the military mission, while protecting and enhancing the biological integrity of lands under its use (U.S. Navy 2002, p. ES–3). Naval Base Ventura County is committed to an ecosystem management approach for its natural resources program by integrating all components of natural resource management into a comprehensive and coordinated effort. An integrated approach to ecosystem management will help protect the biological diversity found at NBVC, Point Mugu.

The INRMP identifies the following management and protective measure goals for the Pacific Coast WSP:

(1) Monitor and manage breeding habitat of Pacific Coast WSPs;

(2) Monitor and manage wintering and migration areas to maximize Pacific Coast WSP population survival;

(3) Develop mechanisms for long-term management and protection of Pacific Coast WSPs and their breeding and wintering habitat;

(4) Undertake scientific investigations that facilitate recovery efforts;

(5) Undertake public information and education programs for Pacific Coast WSPs;

(6) Continue measures in place for Pacific Coast WSP protection, including beach closures;

(7) Protect and maintain natural coastal processes that perpetuate high-quality breeding habitat;

(8) Keep Pacific Coast WSP management areas closed to all pets, leashed or not, with the exception of NBVC security dogs on official duty (*e.g.,* apprehending a suspect);

(9) Monitor habitat to maintain the nesting substrates necessary for Pacific Coast WSP breeding success;

(10) Identify factors that limit the quality of wintering and breeding habitat;

(11) Clean and restore the eastern arm of Mugu Lagoon to sandy beach;

(12) Improve methods of monitoring Pacific Coast WSPs, such as color banding; and

(13) Develop and implement public information and education programs on Pacific Coast WSPs and recovery efforts at the proposed Mugu Lagoon Visitor Education Center.

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that the identified lands are

subject to the 2008 INRMP for NBVC, Point Mugu and that the conservation efforts identified in the INRMP have and will provide a benefit to the Pacific Coast WSP and features essential to its conservation, and will benefit Pacific Coast WSPs occurring in habitats within or adjacent to NBVC, Point Mugu. Therefore, lands within this installation (Units CA 40 and CA 41) are exempt from critical habitat designation under section 4(a)(3) of the Act. We are not including approximately 208 ac (84 ha) of habitat in this revised final critical habitat designation because of this exemption.

Department of the Navy, Naval Base Ventura County, San Nicolas Island (CA 42), 321 ac (130 ha)

San Nicolas Island is under the jurisdiction of Department of the Navy, Naval Base Ventura County. The 14,230-ac (5,759-ha) San Nicolas Island is located approximately 65 mi (105 km) south of NBVC, Point Mugu. Naval facilities on San Nicolas Island include a 10,000-ft (3,048-m) concrete and asphalt runway, radar tracking instrumentation, electro-optical devices, telemetry, communications equipment, and missile and target launch areas, as well as personnel support. Currently, the island is used as the management launch platform for short- and medium-range missile testing, and an observation facility for missile testing. Primarily, San Nicolas Island's mission is to support the primary research, design, development, testing, and evaluation of air weapons and associated aircraft systems into anti-surface and anti-air warfare aircraft.

The San Nicolas Island INRMP (U.S. Navy 2005, pp. 1–129) is a planning document that guides the management and conservation of natural resources under the Navy Base Ventura County's control. The INRMP was prepared to ensure that natural resources are managed in support of the Naval Base Ventura County's military command mission and that all activities are consistent with Federal stewardship requirements. The San Nicolas Island INRMP was completed and approved by the Service in 2003, and renewed in 2005. The San Nicolas Island INRMP is Naval Base Ventura County's adaptive plan for managing natural resources to support and be consistent with the military mission, while protecting and enhancing the biological integrity of lands under its use (U.S. Navy 2005, p. 5). Naval Base Ventura County is committed to an ecosystem management approach for its natural resources program by integrating all components of natural resource management into a comprehensive and coordinated effort. An integrated approach to ecosystem management will help protect the biological diversity found at San Nicolas Island.

The San Nicolas Island INRMP identifies the following management and protective measure goals for the Pacific Coast WSP:

(1) Monitor Pacific Coast WSPs' nests during missile launches, barge landings, and other activities that may disturb nesting behaviors;

(2) Close Pacific Coast WSP nesting areas to recreational activity during the breeding season (March through September);

(3) Monitor the effects of Navy activities on Pacific Coast WSPs by conducting island-wide Pacific Coast WSP censuses twice annually, once during the breeding season and once during the winter season;

(4) Educate island personnel regarding protected species regulations and responsibilities;

(5) Maintain signs around breeding sites to alert personnel of closures;

(6) Conduct site-specific Pacific Coast WSP surveys in potential or known breeding habitat prior to disturbance activities;

(7) Remove unnecessary structures in Pacific Coast WSP nesting areas and attach avian excluders to essential structures, if feasible;

(8) Conduct amphibious training exercises on beaches not harboring nesting Pacific Coast WSPs;

(9) Continue to implement a feral cat control/removal program;

(10) Develop and maintain a computer database for storing information on locations of nesting sites, incidental sightings and size and results of surveys for resource management purposes;

(11) Continue to participate with recovery planning and other efforts to help establish stable Pacific Coast WSP populations; and

(12) Support research to explore the effects of increasing pinniped (seal, sea lion) populations on nesting success of Pacific Coast WSPs.

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that the identified lands are subject to the 2005 INRMP for San Nicolas Island and that the conservation efforts identified in the INRMP have and will provide a benefit to the Pacific Coast WSP and features essential to its conservation, and will benefit Pacific Coast WSPs occurring in habitats within or adjacent to NBVC, San Nicolas Island. Therefore, lands within this installation (Unit CA 42) are exempt from critical habitat designation under section 4(a)(3)(B) of the Act. We are not including approximately 321 ac (130 ha) of habitat in this revised final critical habitat designation because of this exemption.

Marine Corps Base (MCB) Camp Pendleton (CA 49), 441 ac (179 ha)

Marine Corps Base (MCB) Camp Pendleton is the Marine Corps' premier amphibious training installation and it is the only west coast amphibious assault training center. The installation has been conducting air, sea, and ground assault training since World War II. MCB Camp Pendleton occupies over 125,000 ac (50,586 ha) of coastal southern California in the northwest corner of San Diego County. Aside from nearly 10,000 ac (4,047 ha) that is developed, most of the installation is largely undeveloped land that is used for training. MCB Camp Pendleton is situated between two major metropolitan areas: The City of Los Angeles that is 82 mi (132 km) to the north, and the City of San Diego that is 38 mi (61 km) to the south. MCB Camp Pendleton is located north of the City of Oceanside, southeast of the City of San Clemente, and adjacent to the western side of the unincorporated community of Fallbrook, San Diego County, California. Aside from a portion of the installation's border that is shared with the Cleveland National Forest's San Mateo Wilderness Area and Fallbrook Naval Weapons Station, surrounding land use includes urban development, rural residential development, and farming and ranching. The largest single leaseholder on the installation is CDPR, which possesses a 50-year real estate lease granted on September 1, 1971, for 2,000 ac (809 ha) that encompasses San Onofre State Beach.

The MCB Camp Pendleton INRMP is a planning document that guides the management and conservation of natural resources under the installation's control. The INRMP was prepared to assist installation staff and users in their efforts to conserve and rehabilitate natural resources consistent with the use of MCB Camp Pendleton to train Marines and set the agenda for managing natural resources on MCB Camp Pendleton. Marine Corps Base Camp Pendleton completed its INRMP in 2001, followed by a revised and updated version in 2007, to address conservation and management recommendations within the scope of the installation's military mission, including conservation measures for Pacific Coast WSP (MCB Camp Pendleton 2007, Appendix F, Section F.23, pp. F85–F89). The Service provided concurrence in 2001 and 2007

for the respective INRMPs. Additionally, CDPR is required to conduct its natural resources management consistent with the philosophies and supportive of the objectives in the revised 2007 INRMP (MCB Camp Pendleton 2007, Chapter 2, p. 31).

The Pacific Coast WSP and its habitat are provided protection and management by the Estuarine and Beach Conservation Plan (MCB Camp Pendleton 2007, Appendix B, pp. B–1—B–20), which was addressed through the section 7 consultation process with a biological opinion issued by the Service on October 30, 1995 (Service 1995, Biological Opinion 1–6–95–F02), and is now implemented under the 2007 INRMP. Base-wide protection measures for avoidance and minimization of impacts to Pacific Coast WSP and its habitat, especially during the breeding season, are provided in both the conservation plan and Base Order P3500.1M. The base-wide protection measures for Pacific Coast WSP include, but are not limited to:

(1) Minimize reduction or loss of upland buffers surrounding coastal wetlands;

(2) Restore the dune system in the vicinity of the Santa Margarita Estuary following the guidance developed by The Nature Conservancy;

(3) Maintain integrity of listed species' habitat; and

(4) Promote growth of current population of Pacific Coast WSPs (MCB Camp Pendleton 2007, Appendix B, pp. B5–B7).

Annual management and protection measures for Pacific Coast WSPs identified in Appendix F of the INRMP include, but are not limited to:

(1) Installation of sign postings describing the sensitive nature of the breeding area/season;

(2) Installation of permanent/temporary fencing that directs military training away from sensitive nesting and foraging areas;

(3) Beach habitat enhancement (nonnative vegetation control and sand mobilization);

(4) Ant control (ants can cause incubating adults to abandon a nest, and can contribute towards chick mortality); and

(5) Focused predator control (MCB Camp Pendleton 2007, Appendix F, p. F89).

Current environmental training regulations and restrictions are provided to all military personnel to maintain compliance with the terms of the INRMP. Training regulations guide activities to protect endangered and threatened species on the installation, including Pacific Coast WSP and its habitat. Specific conservation measures, outlined in the Instructions for Military Training Activities section of the Estuarine and Beach Conservation Plan, are applied to Pacific Coast WSP and its habitat (MCB Camp Pendleton 2007, p. B–13). These include:

(1) Military activities are kept to a minimum within the Santa Margarita Management Zone (*i.e.,* the area on the base where the majority of nesting sites occur) and any nesting site outside the traditionally fenced nesting areas during the breeding/nesting season (1 March–31 August) for the Pacific Coast WSP. A buffer distance of 984 ft (300 m) away from fenced or posted nesting areas must be adhered to for all activities involving smoke, pyrotechnics, loud noises, blowing sand, and large groupings of personnel (14 or more). Aircraft are not authorized to land within 984 ft (300 m) of fenced nesting areas on Blue Beach or White Beach and are required to maintain an altitude of 300 ft (91 m) Above Ground Level (AGL) or more above nesting areas.

(2) Recreational activities within the Santa Margarita Management Zone and posted nest locations during the breeding season are to be kept to a minimum, and camping at Cocklebur Canyon Beach is prohibited.

(3) Foot traffic within the Santa Margarita Management Zone is prohibited within 150 ft (46 m) of posted nesting areas during the breeding season.

(4) A 300-ft (91-m) buffer from posted nesting areas is required for surf fishermen, and no live baitfish or amphibians are allowed for fishing activities.

Additionally, MCB Camp Pendleton Environmental Security staff review projects and enforce existing regulations and orders that, through their implementation under National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) requirements, avoid and minimize impacts to natural resources, including the Pacific Coast WSP and its habitat. MCB Camp Pendleton also provides training to personnel on environmental awareness for sensitive resources on the base, including the Pacific Coast WSP and its habitat. As a result of these regulations and restrictions, activities occurring on MCB Camp Pendleton are currently conducted in a manner that minimizes impacts to Pacific Coast WSPs and their habitat.

MCB Camp Pendleton's INRMP also benefits Pacific Coast WSP through ongoing monitoring and research efforts. To assess the effectiveness of MCB Camp Pendleton's Estuarine and Beach Conservation Plan, biennial monitoring is conducted to determine number of pairs, hatching success, and reproductive success (MCB Camp Pendleton 2007, Appendix B, p. B12). Annual monitoring of nests is conducted to track Pacific Coast WSP population trends (MCB Camp Pendleton 2007, Appendix F, p. F89). Data are provided to all necessary personnel through MCB Camp Pendleton's GIS database on sensitive resources and MCB Camp Pendleton's published resource atlas. Moreover, CDPR is required to conduct its natural resources management consistent with the philosophies and supportive of the objectives of the INRMP (MCB Camp Pendleton 2007, p. 2–30).

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that the identified lands are subject to the MCB Camp Pendleton INRMP and that conservation efforts identified in the 2007 INRMP do and will continue to provide a benefit to Pacific Coast WSP and features essential to its conservation, and will benefit Pacific Coast WSPs occurring in habitats within or adjacent to MCB Camp Pendleton. This includes habitat located in the following areas: San Onofre Beach, Aliso/French Creek Mouth, and Santa Margarita River Estuary (names of areas follow those used in the draft recovery plan (Service 2001, Appendix B, p. B–16)). Therefore, lands within this installation are exempt from critical habitat designation under section 4(a)(3) of the Act. We are not including approximately 441 ac (179 ha) of habitat in this revised final critical habitat designation because of this exemption.

Naval Base Coronado, Naval Air Station (CA 55A, CA 55C, CA 55D, and CA 55H), 734 ac (297 ha)

Naval Base Coronado includes eight military facilities in San Diego County, California. Three of these facilities (Naval Air Station North Island (CA 55A); Naval Amphibious Base Coronado (CA 55C, and CA 55D); and Naval Radio Receiving Facility (CA 55H)) include beach habitat that supports Pacific Coast WSPs. For planning and description purposes regarding these beaches and the military training that occurs here, the U.S. Navy describes these areas as:

(1) Naval Air Station North Island (NAS North Island),

(2) Naval Amphibious Base Coronado or Silver Strand Training Complex—North (SSTC–North), and

(3) Naval Radio Receiving Facility or Silver Strand Training Complex—South (SSTC–South).

NAS North Island is located north of the City of Coronado and encompasses 2,803 ac (1134 ha), of which approximately 95 ac (39 ha) is southern foredune/beach habitat. SSTC–North is located south of the City of Coronado and encompasses roughly 1,000 ac (405 ha), of which approximately 257 ac (104 ha) are beach-front habitat leased from CDPR for amphibious military training activities. SSTC–North, including the San Diego Bay-front beach referred to as Delta Beach, supports approximately 278 ac (113 ha) of southern foredune/beach habitat. SSTC–South is located north of the City of Imperial Beach, and encompasses 450 ac (182 ha), of which approximately 78 ac (32 ha) is southern foredune/beach habitat.

The U.S. Navy completed an INRMP in 2002 to provide a viable framework for the management of natural resources on lands controlled by for Naval Base Coronado. This INRMP was approved by the Service. The U.S. Navy continues to implement the completed 2002 INRMP as a revision is being drafted. The INRMP identifies conservation and management recommendations within the scope of the installation's military mission, including conservation measures for Pacific Coast WSP and its habitat (Naval Base Coronado 2002, Section 3, pp. 81–83). The management strategy outlines actions that would contribute to the recovery of Pacific Coast WSP through development of cooperative, ecosystem management-based strategies (Naval Base Coronado 2002, Section 4, pp. 56–58).

The INRMP revision will reflect the management changes driven by the U.S. Navy's need for additional beach training. The U.S. Navy will continue to implement the 2002 INRMP, subject to modified management strategies identified in the 2010 Silver Strand Training Area Biological Opinion (BO), until completion of a revised INRMP. The revised INRMP will include the management strategy identified in the 2010 Silver Strand Training BO. The 2002 INRMP identifies conservation and management recommendations within the scope of the installation's military mission, including conservation measures for Pacific Coast WSP and its habitat (Naval Base Coronado 2002, Section 3, pp. 81–83). The management strategy outlines actions that would contribute to the recovery of Pacific Coast WSP through development of cooperative, ecosystem management-based strategies (Naval Base Coronado 2002, Section 4, pp. 56–58). Management actions that will benefit the Pacific Coast WSP to be implemented by the Navy on the U.S. Navy's Silver Strand Training Complex Operations, Naval Base, Coronado, in accordance with the 2002 INRMP as modified by the 2010 SSTC BO (08B0503–09F0517) include:

(1) Minimize the potential for take of nests and chicks at SSTC–N and SSTC–S Beaches during the breeding season;

(2) Monitor training activities to ascertain the impact on Pacific Coast WSP distribution and report any observed incidental take to the Service annually;

(3) Modify the beach to create hummocks to deter plovers from nesting in intensively used beach lanes;

(4) Schedule efforts to avoid beach lanes with higher nest numbers;

(5) Study the effects of military working dogs on plovers to develop additional conservation measures, if necessary;

(6) Require that dogs be on leashes;

(7) Annual nest site preparation;

(8) Mark and avoid up to 22 nests at SSTC–S, SSTC–N Beaches, plus any additional nests that exceed 22 that are initiated in beach lanes Orange 1 and Orange 2;

(9) Protect nesting and foraging areas at NAS North Island, SSTC–North, SSTC–South, and Delta Beach from predation by supporting consistent and effective predator management;

(10) Enhance and disallow mowing of remnant dune areas as potential nest sites in areas that can be protected from human disturbance and predators during nesting season;

(11) Conduct monitoring throughout Naval Base Coronado and establish a consistent approach to monitoring nesting attempts and hatching success to determine the success of predator management activities, and limit predator-prey interactions by fencing unless it conflicts with U.S. Navy training;

(12) Identify opportunities to use dredge material that has high sand content for expansion and rehabilitation of beach areas at NAS North Island and Delta Beach to create improved nesting substrate;

(13) Minimize activities that can affect invertebrate populations necessary for Pacific Coast WSP foraging by prohibiting beach raking on Naval Base Coronado beaches, with the exception of the area immediately in front of the Navy Lodge at NAS North Island and Camp Surf at SSTC–South;

(14) If any relocation of nest/eggs is necessary as a protective measure, each nest/egg will be relocated the shortest distance possible into suitable habitat by Service-approved monitors to increase the chance of nest success;

(15) Identify conflicts for immediate action and response;

(16) Public outreach to military residents of adjacent housing;

(17) Post signs to eliminate human trespassers during nesting season and possibly for nest avoidance as well; and

(18) Work with the Service and others to develop a regional approach to managing and conserving the habitat needed to sustain Pacific Coast WSP.

The 2010 SSTC BO (08B0503–09F0517, p. 128) also specifies that if new information reveals that the increased training is affecting Pacific Coast WSP in a manner inconsistent with the conclusion of the Biological Opinion, then reinitiation of consultation may be warranted. If monitoring indicates that the western snowy plover numbers within the area of increased military training decline below the 5-year average, as determined by maximum active nest numbers—average of 18 plover pairs at SSTC (range of 11 to 22); 10 plover pairs at NASNI (range of 7 to 14); and 8 plover pairs at SSSB (range of 5 to 9)—reinitiation of consultation may be warranted. If snowy plover use of SSTC beaches declines, Service and U.S. Navy biologists will evaluate alternative explanations for any observed decline (such as, continuation of low productivity associated with predation) and the need for additional conservation measures. This cooperative relationship allows the Service to work closely with the U.S. Navy for the continued implementation of beneficial measures to Pacific Coast WSP, while minimizing impacts associated with the increased training activities that are required for military readiness.

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that the identified lands are subject to the Naval Base Coronado INRMP and that the conservation efforts identified in the existing Service-approved INRMP will provide a benefit to Pacific Coast WSP features essential to its conservation and will benefit Pacific Coast WSPs occurring in habitats within and adjacent to NAS North Island, SSTC–North, and SSTC–South. We also anticipate that the draft revised INRMP will provide a similar if not greater benefits to Pacific Coast WSPs, but will reopen this designation as necessary to evaluate the conservation efforts in Naval Base Coronado's final revised INRMP. Therefore, lands within this installation (Units CA 55A, CA 55C, CA 55D, and CA 55H) are exempt under section 4(a)(3) of the Act. We are not including approximately 734 ac (297 ha) of habitat in this revised final critical habitat designation because of this exemption.

Table 5 below provides approximate land areas (ac, ha) that meet the definition of critical habitat but are exempt from designation under section 4(a)(3)(B) of the Act.

TABLE 5—EXEMPTIONS FROM DESIGNATION BY CRITICAL HABITAT UNIT

Unit	Specific area	Basis for exemption	Areas meeting the definition of critical habitat in ac (ha)	Areas exempted in ac (ha)
CA 22	Naval Support Area Monterey	4(a)(3)(B)	8 ac (3 ha)	8 ac (3 ha).
CA 32	Vandenberg Air Force Base North	4(a)(3)(B)	711 ac (288 ha)	711 ac (288 ha).
CA 33	Vandenberg Air Force Base South	4(a)(3)(B)	423 ac (171 ha)	423 ac (171 ha).
CA 40	Naval Base Ventura County Point Mugu, Mugu Lagoon North.	4(a)(3)(B)	136 ac (55 ha)	136 ac (55 ha).
CA 41	Naval Base Ventura County Point Mugu, Mugu Lagoon South.	4(a)(3)(B)	72 ac (29 ha)	72 ac (29 ha).
CA 42	Naval Base Ventura County, San Nicolas Island	4(a)(3)(B)	321 ac (130 ha)	321 ac (130 ha).
CA 49	Marine Corps Base (MCB) Camp Pendleton	4(a)(3)(B)	441 ac (179 ha)	441 ac (179 ha).
CA 55A	Naval Base Coronado, Naval Air Station North Island.	4(a)(3)(B)	142 ac (57 ha)	142 ac (57 ha).
CA 55C	Naval Base Coronado Silver Strand Beach	4(a)(3)(B)	436 ac (176 ha)	436 ac (176 ha).
CA 55D	Naval Base Coronado Delta Beach	4(a)(3)(B)	90 ac (36 ha)	90 ac (36 ha).
CA 55H	Naval Base Coronado Naval Radio Receiving Facility.	4(a)(3)(B)	66 ac (27 ha)	66 ac (27 ha).
Total				2,846 ac (1,151 ha).

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the decision not to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise his discretion to exclude the area only if such exclusion would not result in the extinction of the species.

When identifying the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus, the educational benefits of mapping essential habitat for recovery of the listed species, and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan that provides equal to or more conservation that a critical habitat designation would provide.

In the case of the Pacific Coast WSP, the benefits of critical habitat include public awareness of the Pacific Coast WSP's presence and the importance of habitat protection, and in cases where a Federal nexus exists, increased habitat protection for the Pacific Coast WSP due to the protection from adverse modification or destruction of critical habitat.

When we evaluate the existence of a conservation or management plan when considering the benefits of exclusion, we consider a variety of factors, including but not limited to, whether the plan is finalized; how it provides for the conservation of the essential physical or biological features; whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan will be implemented into the future; whether the conservation strategies in the plan are likely to be effective; and whether the plan contains a monitoring program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information.

After evaluating the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to evaluate whether the benefits of exclusion outweigh those of inclusion. If our analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, we then determine whether exclusion would result in extinction. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation.

Based on the information provided by entities seeking exclusion, as well as any additional public comments received and information in our files, we evaluated whether certain lands in the revised proposed critical habitat were appropriate for exclusion from this revised final designation pursuant to section 4(b)(2) of the Act. We considered the areas discussed below for exclusion under section 4(b)(2) of the Act, and present our detailed analysis below. For those areas in which the Secretary has exercised his discretion to exclude, we conclude that:

(1) Their value for conservation will be preserved in the near future by existing protective actions, or

(2) The benefits of excluding the particular area outweigh the benefits of their inclusion, based on the ''other relevant factor'' provisions of section 4(b)(2) of the Act.

We are excluding a total of approximately 3,797 ac (1,537 ha) of land from critical habitat for the Pacific Coast WSP. Table 6 below provides approximate areas (ac, ha) of lands in each State by unit that meet the definition of critical habitat but are being excluded under section 4(b)(2) of the Act from the final critical habitat rule. Maps showing excluded areas are available upon request by contacting the Arcata Fish and Wildlife Office (see the **ADDRESSES** section).

TABLE 6—AREAS EXCLUDED FROM CRITICAL HABITAT DESIGNATION BY CRITICAL HABITAT UNIT

Unit/subunit	Area excluded under section 4(b)(2) of the act
HABITAT CONSERVATION PLANS	
Oregon Parks and Recreation Department HCP	
UNIT	ac (ha).
OR 1 Columbia River Spit	169 (68).
OR 2 Necanicum River Spit	200 (81).
OR 3 Nehalem River Spit	299 (121).
OR 4 Bayocean Spit	166 (67).
OR 5 Netarts Spit	541 (219).
OR 6 Sand Lake South	195 (79).
OR 7 Sutton/Baker Beaches	96 (39).
OR 8B Siltcoos River Spit	125 (51).
OR 8C Dunes Overlook/Tahkenitch Creek Spit	333 (135).
OR 8D North Umpqua River Spit	177 (71).
OR 9 Tenmile Creek Spit	21 (8).
OR 10 Coos Bay North Spit	35 (14).
OR 11 Bandon to New River	475 (192).
OR 12 Elk River Spit	167 (68).
OR 13 Euchre Creek Spit	107 (43).
Subtotal for OPRD HCP Lands	3,106 (1,257).
Southern California Multi-Species HCPs and Other Management Plans	
UNIT	ac (ha).
CA 50A Batiquitos Lagoon	24 (10).
CA 50B Batiquitos Lagoon	23 (9).
CA 50C Batiquitos Lagoon	19 (8).
CA 52B San Dieguito Lagoon	3 (1).
CA 52C San Dieguito Lagoon	4 (2).
CA 53 Los Penasquitos Lagoon	32 (13).
CA 54A Fiesta Island	2 (1).
CA 54B Mariner's Point	7 (3).
CA 54C South Mission Beach	38 (15).
CA 54D San Diego River Channel	51 (21).
CA 55E Sweetwater Marsh National Wildlife Refuge and D Street Fill	53 (21).
CA G55 Chula Vista Wildlife Reserve	10 (4).
Subtotal for all Southern CA Plans	266 (108).
Subtotal for all HCP Lands in OR and CA	3,372 (1,365).
Tribal Lands	
Shoalwater Bay Tribe	
UNIT	ac (ha).
Shoalwater Bay tribal lands within WA3B Shoalwater/Graveyard Spit	425 (172).
Subtotal for Tribal Lands	425 ac (172 ha).
Total Area Excluded Under 4(b)(2)	3,797 (1,537).

* Values in this table may not sum due to rounding.

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we prepared a draft economic analysis of the proposed critical habitat designation and related factors (Industrial Economics Incorporated (IEc) 2011, pp. 1–130). The draft analysis, dated September 15, 2011, was made available for public review and comment from January 17, 2012, through February 16, 2012 (77 FR 2243). Following the close of the comment

period, a final analysis (dated March 23, 2012) of the potential economic effects of the designation was developed taking into consideration the public comments and any new information (IEc 2012, pp. 1–131).

The intent of the final economic analysis (FEA) is to quantify the economic impacts of all potential conservation efforts for the Pacific Coast WSP; some of these costs will likely be incurred regardless of whether we designate critical habitat (baseline). The economic impact of the final critical habitat designation is analyzed by comparing scenarios both ''with critical habitat'' and ''without critical habitat.'' The ''without critical habitat'' scenario represents the baseline for the analysis, considering protections already in place for the species (*e.g.,* under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated. The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we consider in the final designation of critical habitat. The analysis looks retrospectively at baseline impacts incurred since the species was listed, and forecasts both baseline and incremental impacts likely to occur with the designation of critical habitat.

The FEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The FEA measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Decision makers use this information to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, the FEA looks retrospectively at costs that have been incurred since 1993 (year of the species' listing) (58 FR 12864; March 5, 1993), and considers those costs that may occur in the 20 years following the designation of critical habitat, which was determined to be the appropriate period for analysis because limited planning information was available for most activities to forecast activity levels for projects beyond a 20-year timeframe. The FEA quantifies economic impacts of the Pacific Coast WSP conservation efforts associated with the following categories of activity: (1) Recreation; (2) commercial and residential development; (3) gravel mining; (4) military activities; and (5) habitat and species management.

Nearly 86 percent of the critical habitat is not expected to experience any incremental impacts. In some of these units, the critical habitat area is subject to existing HCPs or land management plans that incorporate plover conservation. For other units, no future land use threats (*e.g.,* development or transportation projects) are forecast to occur (IEc 2012, p. 4–1).

In the DEA, the major cost was associated with military operations at Vandenberg Air Force Base, which was proposed for designation as Units CA 32 and 33 in our March 2011 proposed revised designation. Vandenberg Air Force Base subsequently completed a Secretarial-approved INRMP and has been exempted from this final revised designation under section 4(a)(3) of the Act (see Exemptions section).

The FEA estimates total potential incremental economic impacts in areas proposed as revised critical habitat over the next 20 years (2012 to 2032) to be $266,000, annualized at $25,100 using a 7 percent discount rate. These totals include the potential incremental impacts associated with inclusion of Vandenberg Air Force Base and, as a result of its exemption from this final designation, the total potential incremental impacts may be less. These costs represent additional administrative effort as part of future consultations under section 7 of the Act. We do not expect that the designation will result in additional conservation efforts for the plover due to the nature of the known projects. Exhibit 4–2 provides the estimated incremental impacts by activity (IEc 2012, p. 4–6). Development activities have the highest incremental impact at $50,000, followed by habitat and species management at $16,700, and mining at $10,500.

Development

The FEA estimates the largest impacts of the proposed revised critical habitat rule would result from real estate development. The FEA has identified two commercial resort developments that may be affected by the designation of critical habitat for the Pacific Coast WSP. The total incremental impacts within Unit CA 22 are estimated to be $17,100 ($1,610 annualized) at a 7 percent discount rate and include the administrative cost of addressing adverse modification during consultation as well as any additional conservation efforts necessary to avoid adverse modification (IEc 2012, pp. 4–4, 4–12—4–14). These costs are assuming that a Federal nexus would be identified for the proposed project; currently, however, there is no federal nexus and thus consultation under section 7 is not required. Indirect costs (*i.e.,* lost potential income to local business and construction jobs) may also be associated with this unit and the project proponents have estimated these impacts to be approximately $30 million annually to the local economy if the projects are not allowed to proceed due to litigation or other permit proceedings not connected with this critical habitat designation (IEc 2012, p. 4–14). These estimates could not be verified by our economic analysis. Both development sites are located at the southerly end of Unit CA 22 in Sand City, California. The first development site, commonly known as the ''Sterling/McDonald'' site, is jointly owned by a private developer and the Sand City Redevelopment Agency. The project proponents are presently in the process of developing an Environmental Impact Report (EIR) under CEQA. Project proponents expect the EIR to be completed in 6 months. The second site on the Sand City coastline is the Security National Guaranty (SNG) development site (formerly known as the Lonestar site). Similar to the Sterling McDonald site, the SNG site is planned for a mixed-use visitor-serving resort. The hotel-condo resort will include up to 341 units. Pursuant to CEQA, the resort has undergone a full EIR along with an addendum update and peer review.

These development projects do not have a Federal nexus and thus consultation with the Service under section 7 of the Act is not required. Due to the lack of a Federal nexus, no direct impacts of critical habitat designation are expected; however, indirect impacts (*i.e.* lost potential income to local business and construction jobs) are possible in the event that other permitting processes or litigation unrelated to this designation affect project approvals (IEc 2012, pp. 4–12–4–13). SNG has prepared a detailed habitat protection plan (HPP) that evaluates and mitigates potential impacts to any presence of sensitive biological resources, including the Pacific Coast WSP. Conservation

measures contained within the HPP related to the plover include: Fencing and signage around construction; Pacific Coast WSP surveys prior to, during, and after construction; erection of exclosures and signage if any nesting Pacific Coast WSPs are discovered; predator management; permanent conservation easement for Pacific Coast WSP habitat on the property; and quarterly and annual reporting to the Service (IEc 2012, p. 4–13).

One additional development project was identified in subunit CA 55B by the City of Coronado. The City of Coronado has developed a conceptual plan for a Class 1 bike path and pedestrian trail for the Central Beach area in subunit CA 55B. If this plan moves forward, consultation with the Service would occur if there is a Federal nexus. The total incremental impacts within this unit are estimated to be $4,670 ($441 annualized) at a 7 percent discount rate and include the administrative cost of addressing adverse modification during consultation as well as any additional conservation efforts necessary to avoid adverse modification (IEc 2012, pp. 4–5, 4–14).

Recreation

The majority of incremental costs associated with recreation are at the Oceano Dunes State Vehicular Recreation Area (SVRA). Oceano Dunes SVRA is one of several Off-Highway Vehicle (OHV) areas administered by the CDPR and encompasses roughly 3,590 ac (1,453 ha) in San Luis Obispo County; approximately 1,500 ac (607 ha) are designated for camping and OHV use. Portions of Oceano Dunes SVRA are located within Unit CA 31. While there is no federal nexus for activities at Oceano Dunes SVRA, CDPR is working with the Service to develop a habitat conservation plan in connection with obtaining an incidental take permit. An intra-Service consultation under section 7 would be required for issuance of the permit. Consequently, the direct incremental impacts identified are a result of section 7 administrative costs and are estimated to be approximately $9,580 ($904 annualized, at a 7 percent discount rate); however, additional indirect costs may also be associated with this unit (IEc 2012, pp. 4–4, 4–10—4–12).

Mining

Gravel mining has occurred within Unit CA 6 and within the Eel River basin for decades and has been regulated under a variety of programs, including under section 404 of the Clean Water Act and the Rivers and Harbors Act, which are administered by the USACE. Currently, six gravel extractors operate in Unit CA 6 under a countywide permit issued by the USACE. A biological opinion has been issued for the gravel mining operations, and the USACE is required to re-initiate consultation to renew the Letter of Permission during the life of the permit. The USACE must consult with the Service again in 2014, 2019, 2024, and 2029. The direct incremental impacts identified are a result of section 7 administrative costs and are estimated to be approximately $10,500 ($995 annualized, at a 7 percent discount rate) (IEc 2012, pp. 4–3, 4–18—4–19).

Habitat and Species Management

We have consulted on many habitat and species management projects throughout the range of the Pacific Coast WSP. The FEA has identified four habitat and species management activities that would require consultation under section 7 of the Act. The projects include: (1) A habitat restoration project in subunit WA 3B; (2) the draft Fort Ord Dunes HCP; (3) the Santa Barbara County Parks Department draft HCP for Rancho Guadalupe Dunes County Park in Unit CA 31; and (4) the draft HCP for Oceano Dunes SVRA for the CDPR. Individual costs for each unit are summarized in Exhibit 4–1 (IEc 2012, pp. 4–3—4–6). The total estimated costs associated with these projects are $16,700 ($1,580 annualized, at a 7 percent discount rate) (IEc 2012, pp. 4–21—4–23).

Because the FEA did not identify any disproportionate, or unreasonable costs that are likely to result from the designation of revised final critical habitat, the Secretary did not consider exercising his discretion to exclude any areas from this designation of critical habitat for the Pacific Coast WSP based on economic impacts. A copy of the FEA with supporting documents may be obtained by contacting the Arcata Fish and Wildlife Office (see **ADDRESSES**) or by downloading from the Internet at *http://www.regulations.gov.*

Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the Department of Defense (DOD) where a national security impact might exist. In preparing this proposal, we have exempted from the designation of critical habitat those DOD lands with completed INRMPs determined to provide a benefit to the Pacific Coast WSP. We have also determined that the remaining lands within the proposed designation of critical habitat for the species are not owned or managed by the Department of Defense, and, therefore, we anticipate no impact on national security.

In comments received from the Navy on our 2011 revised proposed rule, we were notified that approximately 8 ac (3 ha) associated with a Navy school (Naval Support Area Monterey) along the Monterey Bay coast was identified within the revised proposed critical habitat for the Pacific Coast WSP. These DOD lands have been exempted from the revised final designation under section 4(a)(3) of the Act (see Exemptions).

The Navy also identified that approximately 0.08 ac (0.03 ha) at Naval Base Ventura County, Port Hueneme, was included in the revised proposed rule. These lands were inadvertently included as part of Unit CA 39 in the revised proposed designation due to a mapping error. The identified 0.08 ac (0.03 ha) of Navy lands within Unit CA 39, Ormond Beach, have been removed in this revised final designation because they are unsuitable habitat and not essential to the conservation of the species.

No other DOD lands have been identified within the revised final designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this revised final designation based on impacts on national security.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts to national security. We consider a number of factors including whether the landowners have developed any HCPs or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any tribal issues, and consider the government-to government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

Land and Resource Management Plans, Conservation Plans, or Agreements Based on Conservation Partnerships

We consider a current land management or conservation plan (HCPs, as well as other types) to provide adequate management or protection for Pacific Coast WSP and its habitat if it meets the following criteria:

(1) The plan is complete and provides the same or better level of protection from adverse modification or

destruction than that provided through a consultation under section 7 of the Act;

(2) There is a reasonable expectation that the conservation management strategies and actions will be implemented for the foreseeable future and effective, based on past practices, written guidance, or regulations; and

(3) The plan provides adaptive management and conservation strategies and measures consistent with currently accepted principles of conservation biology.

Habitat Conservation Plans (HCPs)

Section 10(a)(1)(B) of the Act authorizes us to issue to non-Federal entities a permit for the incidental take of endangered and threatened species. This permit allows a non-Federal landowner to proceed with an activity that is legal in all other respects, but that results in the incidental taking of a listed species (*i.e.,* take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity). The Act specifies that an application for an incidental take permit must be accompanied by a habitat conservation plan, and specifies the content of such a plan. The purpose of HCPs is to describe and ensure that the effects of the permitted action on covered species are adequately minimized and mitigated, and that the action does not appreciably reduce the survival and recovery of the species. In our assessment of HCPs associated with this final rulemaking, the analysis required for these types of exclusions involves careful consideration of the benefits of designation versus the benefits of exclusion. The benefits of designation typically arise from additional section 7 protections, as well as enhanced public awareness once specific areas are identified as critical habitat. The benefits of exclusion generally relate to relieving regulatory burdens on existing conservation partners, maintaining good working relationships with them, and encouraging the development of new partnerships.

Some HCP permittees have expressed the view that critical habitat designation on lands covered by an HCP devalues the conservation efforts of the plan's proponents, and could undermine the partnerships fostered through the development and implementation of the plans. They believe critical habitat designation on HCP lands would discourage development of additional HCPs and other conservation plans in the future. Where an existing HCP provides for protection for a species and its essential habitat within the plan area, or where the existence of a Federal nexus for future activities is uncertain, the benefits of preserving existing partnerships by excluding the covered lands from critical habitat are most significant. Excluding lands owned by or under the jurisdiction of the permittees of an HCP, under these circumstances, promotes positive working relationships and eliminates impacts to existing and future partnerships while encouraging development of additional HCPs for other species.

Large-scale HCPs take many years to develop and foster an ecosystem-based approach to habitat conservation planning, by addressing conservation issues through a coordinated approach. If local jurisdictions were to require landowners to obtain incidental take permits (ITP) individually prior to the issuance of a building permit under section 10 of the Act, this would result in uncoordinated, patchy conservation that would be less likely to achieve listed species recovery. We actively work to foster partnerships with local jurisdictions and encourage development of regional HCPs that afford proactive, landscape-level conservation for multiple species, including voluntary protections for covered species.

The proposed rule to revise designated habitat for the Pacific Coast WSP (76 FR 16046; March 22, 2011) did not specifically identify any HCP, management plan, or conservation partnership that the Service was proposing at that time for exclusion under section 4(b)(2) of the Act. The Service did indicate that it was seeking input from the public as to whether the Secretary should exclude HCP areas or other such areas under management that benefits the Pacific Coast WSP from the final revised designation, and mentioned that there were areas in the revised proposed designation that were included in management plans or other large-scale HCPs, such as the Oregon Parks and Recreation Department (OPRD) Habitat Conservation Plan. The Service also sought input on exclusions of Tribal Lands from the final revised designation. In developing the revised final critical habitat and weighing the benefits of exclusion versus inclusion, we have analyzed these areas that are managed under a HCP, similar management plan, or conservation partnership and have determined that several units or portions of units that were included in the revised proposed designation are managed consistent with the intent of the exclusion language. We discuss each of these areas below.

Oregon Parks and Recreation Department Habitat Conservation Plan

The OPRD HCP was permitted under section 10(a)(1)(B) of the Act in 2011, and covers about 230 mi (370 km) of sandy shore within the range of the Pacific Coast WSP in Oregon. The associated incidental take permit (ITP) authorizes incidental take of the Pacific Coast WSP caused by public use and recreation management activities, natural resources management activities, and beach management activities along the coast of Oregon for a period of 25 years (Service 2011).

The HCP-covered lands consist of the ''Ocean Shore,'' an area defined by Oregon State statute as the sandy areas of the Oregon coast between the extreme low tide and the actual of statutory vegetation line, whichever is farther landward. HCP-covered lands do not include the Federal lands within the ''Ocean Shore'' boundary. In the areas adjacent to Federal lands, the covered lands extend from the extreme low tide to the mean high tide. Covered lands are either owned and leased by OPRD as a State Park or Natural Area or managed under a statutory recreation easement within the Ocean Shore (Oregon Revised Statute 390.635 and 390.620; Oregon Administrative Rule 736–020–0040(3)). Federal lands are not covered by the HCP and were, therefore, not considered for exclusion.

Conservation measures to be implemented on the covered lands will be focused on 16 management areas that were identified to have the greatest potential to provide Pacific Coast WSP habitat when considered in the context of recreational use of the Ocean Shore, historical Pacific Coast WSP use, and the biological requirements of the species.

The OPRD either owns or leases five of these management areas, which are identified as ''Snowy Plover Management Areas'' (SPMAs): (1) Columbia River South Jetty; (2) Necanicum Spit; (3) Nehalem Spit; (4) Bandon; and (5) Netarts Spit. The remaining 11 potential management areas are identified as ''Recreation Management Areas'' (RMAs) and are adjacent to upland areas owned by other landowners but are located within the area defined as Ocean Shore. Together, the 16 management areas span approximately 48 mi (77 km) of the 230 mi (370 km) of sandy Ocean Shore in Oregon.

The conservation measures (Table 7) include: (1) Implementation of Pacific Coast WSP management activities on OPRD-owned or -leased SPMAs; (2) implementation of recreational use

restrictions at SPMAs and RMAs owned by other landowners; and (3) implementation of beach management activities on the Ocean Shore.

TABLE 7—SUMMARY OF PACIFIC COAST WSP CONSERVATION OBJECTIVES WITHIN THE OREGON PARKS AND RECREATION DEPARTMENT HCP

Area specific management objectives	Conservation benefit to Pacific Coast WSP
Restrict activities near nesting habitat during the breeding season (March 15 through September 15)	Protect nesting and foraging areas.
Restore and maintain plover nesting habitat	Protect, restore, or enhance breeding and foraging areas.
Restore, maintain, and manage currently unoccupied sites for plover nesting	Protect, restore, or enhance breeding and foraging areas.
Manage predators within plover nesting areas	Protect individuals, eggs, and young.
Monitor breeding and nonbreeding population	Ensure effectiveness of plover conservation measures in HCP.
Conduct public outreach and education about plovers and their habitat	Protect nesting and foraging areas.
Provide law enforcement of HCP rules and regulations	Protect nesting and foraging areas.
If wintering plovers are impacted by covered activities or climate change is impacting plovers within the covered lands, modify the HCP to respond to changed circumstances.	Protect wintering, nesting, and foraging plovers.
Ensure site-specific management actions are prioritized and completed through individual site management plans.	Protect, restore, or enhance breeding, wintering, and foraging areas.

Under the OPRD HCP, site management plans are required by the HCP for each area managed for Pacific Coast WSPs. Site management plans include management prescriptions specific to individual management areas and describe how the conservation measures required by the HCP (*i.e.,* recreation management, habitat restoration and maintenance, predator management, monitoring, enforcement, and public outreach and education) will be completed at each managed area. Site management plans also outline the extent of seasonal recreational use restrictions for each area and are approved by the Service, and are reviewed every 5 years to ensure the provisions are providing conservation benefits and meeting the intent of the HCP.

The Bandon State Natural Area (SNA) is managed as the Bandon SPMA. OPRD has completed a draft site management plan, which has been submitted to the Service for review and approval. This site management plan further describes how the conservation measures, required in the HCP, will be completed at Bandon SPMA. Active management of the Bandon SPMA, per this site management plan, will begin in 2013. In the interim, OPRD continues to manage plovers at the site by restricting recreational access, providing public education, law enforcement, and habitat restoration and management. The site management plan will specify the long-term implementation of the OPRD HCP provisions at Bandon SPMA.

In addition to the occupied Bandon SPMA, as many as four areas currently unoccupied by the Pacific Coast WSP have been identified as SPMAs and targeted for management of potential nesting populations of the Pacific Coast WSP over the term of the 25-year ITP. Three SPMAs will initially be managed by OPRD for nesting populations of Pacific Coast WSP: (1) Columbia River South Jetty; (2) Necanicum Spit; and (3) Nehalem Spit.

By 2013, OPRD will prepare site management plans that describe how restoration and management measures required by the HCP are implemented at these three unoccupied SPMAs. Active management will begin the nesting season after site plans have been approved by the Service, starting in 2014. One additional SPMA, Netarts Spit, could also be managed if (1) the Columbia River South Jetty, Necanicum Spit, or the Nehalem Spit SPMA becomes occupied; and (2) one of the RMAs is not already under active, Service-approved management for the Pacific Coast WSP. Under these circumstances, OPRD will commit to managing Netarts Spit for nesting populations of the Pacific Coast WSP to ensure that a minimum of three unoccupied SPMAs are being actively managed at any given time over the term of the 25-year ITP.

As discussed above, RMAs extend from the extreme low tide line to the mean high tide line on Federal lands, and from the mean low tide line to the statutory or actual vegetation line, whichever is most landward, on all other lands. Under the HCP, the OPRD will implement recreational use restrictions at up to 11 RMAs, which include; Bayocean Spit, South Sand Lake Spit, Sutton/Baker Beach, Siltcoos Estuary/Dunes Overlook/Tahkenitch Estuary, Tahkenitch South, Umpqua River North Jetty, Tenmile, Coos Bay North Spit, New River, Elk River, and Euchre Creek.

If a RMA or the area immediately inland of a RMA becomes occupied by the Pacific Coast WSP, but a site management plan does not exist, the OPRD will automatically implement recreational use restrictions on HCP-covered lands between March 15 and September 15 of each year. These restrictions will remain in place until an agreement is reached between the Service and the landowner on conservation, any recommended conservation actions or a site management plan is developed by OPRD. The OPRD will also be notified of any changes that may modify the application of recreational use restrictions to a more focused area, based on the conservation needs of the plovers at the site, as outlined in the HCP. The provisions to implement restrictions on the covered lands allow OPRD to protect plovers within covered lands regardless of the management on the adjacent areas. In addition, a memorandum of understanding has been completed and signed by all involved State and Federal agencies, ensuring consistent management of plovers across jurisdictional boundaries according to the provisions of the HCP.

In the event that a Service-approved site management plan has been developed, the OPRD will implement recreational use restrictions in cooperation with the landowner as directed by the site management plan. If an RMA and the areas immediately inland of the RMA are unoccupied by the Pacific Coast WSP, the OPRD will only implement recreational use restrictions at the request of the landowner and after consultation with

the Service and collaboration with the OPRD. The OPRD will also work with county and private landowners adjacent to RMAs to provide supervision, enforcement, and signage on their lands, because such restrictions (ropes, signs, enforcement) cannot be implemented by a private landowner on the Ocean Shore without OPRD approval.

If a Pacific Coast WSP should nest on HCP-covered lands outside an occupied or unoccupied SPMA or RMA, the OPRD will install fencing around the individual nest in coordination with the landowner, and will consider installing a nest enclosure after consultation with the Service. Specifically, the OPRD will install a 164-foot (50-m radius) roped buffer around the nest that allows access along the wet sand, and will determine, through coordination with the Service, if use of an exclosure to protect the nest from predation is appropriate. The OPRD will also work with the Service and the landowner to install signage, as appropriate, to indicate the presence of nesting Pacific Coast WSPs.

The terms of the OPRD HCP and associated ITP only addressed impacts to Pacific Coast WSPs during the breeding season. The HCP concluded that the impacts of covered activities did not rise to the level of take for wintering Pacific Coast WSPs. Therefore, OPRD did not request coverage by the ITP for activities that occur outside the breeding season, nor did the OPRD HCP include provisions for wintering habitat management or protection. However, the provisions for habitat management of nesting areas within the covered lands should provide conservation value for wintering habitat within the conservation area by providing protections during the nonbreeding season to foraging, roosting, and winter use areas. In addition, OPRD included a provision that would require amendment of the HCP, if covered activities were determined to adversely impact wintering Pacific Coast WSPs, based on annual monitoring.

The OPRD HCP has provisions for adaptive management to address uncertainties in achieving conservation objectives for Pacific Coast WSP habitat, including uncertainties that may be associated with climate change. The adaptive management strategy helps to ensure management will continue to be consistent with agreed-upon Pacific Coast WSP conservation objectives. Climate change and associated sea-level rise were considered ''changed circumstances'' that may require additional conservation measures of OPRD. In the event that sea-level rise results in loss of Pacific Coast WSP nesting habitat over the term of the HCP, OPRD and the Service will determine appropriate conservation measures necessary to respond to the changed circumstance.

Benefits of Inclusion—Oregon Parks and Recreation Department HCP

The primary effect of designating any particular area as critical habitat is the requirement for Federal agencies to consult with us under section 7 of the Act to ensure actions they carry out, authorize, or fund do not destroy or adversely modify designated critical habitat. This would provide an additional benefit beyond that provided under the jeopardy standard which obligates Federal agencies to consult under section 7 of the Act with us on actions that may affect a federally listed species to ensure such actions do not jeopardize the species' continued existence. If a federally listed species does not occupy an area where a proposed action may occur, Federal agencies are not obligated to consult with us to ensure actions do not jeopardize the species' existence. However, the designation of critical habitat in such unoccupied areas provides an additional layer of regulatory review that would require Federal agencies to consult with us to ensure that critical habitat is not adversely modified. Therefore, there may be an additional regulatory benefit to designating critical habitat in unoccupied areas that we have determined to be essential.

In evaluating project effects on critical habitat, the Service must be satisfied that the PCEs and, therefore, the essential features of the critical habitat likely will not be altered or destroyed by proposed activities to the extent that the conservation of the affected species would be appreciably reduced. If critical habitat were designated in areas of unoccupied habitat or currently occupied areas subsequently become unoccupied, different outcomes or requirements are also likely because effects to unoccupied areas of critical habitat are not likely to trigger the need for a jeopardy analysis.

Critical habitat designation can also result in ancillary conservation benefits to the Pacific Coast WSP by triggering additional review and conservation through other Federal laws. The Federal laws most likely to afford protection to designated Pacific Coast WSP habitat are the Clean Water Act (CWA), Coastal Zone Management Act (CZMA; 16 U.S.C. 1451 *et seq.*), and the Rivers and Harbors Act (RHA; 33 U.S.C. 401 *et seq.*). Projects requiring a review under the CWA, CZMA, and RHA that are located within critical habitat or are likely to affect critical habitat would create a Federal nexus and trigger section 7 consultation under the Act. Examples of potential projects that may trigger consultation as a result of CWA, CZMA, and RHA include beach restoration (such as, beach replenishment or removal of nonnative plants) and channel dredging.

Another important benefit of including lands in a critical habitat designation is that the designation can serve to educate landowners and the public regarding the potential conservation value of an area, and may help focus conservation efforts on areas of high conservation value for certain species. Any information about the Pacific Coast WSP and its habitat that reaches a wide audience, including parties engaged in conservation activities, is valuable.

Benefits of Exclusion—Oregon Parks and Recreation Department HCP

The benefits of excluding from designated critical habitat the approximately 3,106 ac (1,257 ha) of lands owned and managed by the Oregon Parks and Recreation Department are significant and include the measures summarized in Table 7 above.

We have created close partnerships with the OPRD and several other stakeholders through the development of the OPRD HCP, which incorporates protections and management objectives for the Pacific Coast WSP and the habitat upon which it depends for breeding, sheltering, and foraging activities. The conservation strategy identified in the OPRD HCP, along with our close coordination with OPRD, addresses the identified threats to Pacific Coast WSP and the geographical areas that contain the physical or biological features essential to the conservation of the species in the areas identified in Table 6. The management objectives identified within this conservation strategy seek to achieve conservation goals for Pacific Coast WSPs and their habitat, and thus can be of greater conservation benefit than the designation of critical habitat, which does not require specific actions. Thus, the OPRD HCP provides a greater benefit to the Pacific Coast WSP than would designating critical habitat. Therefore, the relative benefits of designation of critical habitat on these lands are diminished and limited.

Conservation measures that provide a benefit to Pacific Coast WSP and its habitat have been implemented in the areas owned and managed by the OPRD. These measures will continue to be

implemented as the OPRD and the Service finalize site-specific management plans on covered lands. Such measures include protection of nesting and foraging areas, predator management at nest sites, and trash clean-up at occupied sites.

Excluding the approximately 3,106 ac (1,257 ha) owned and managed by the OPRD from the critical habitat designation will sustain and enhance the working relationship between the Service and the OPRD. The willingness of the OPRD to work with the Service on innovative ways to manage federally listed species will continue to reinforce those conservation efforts and our partnership, which contribute significantly toward achieving recovery of Pacific Coast WSP. We consider this voluntary partnership in conservation vital to our understanding of the status of species on non-Federal lands and necessary for us to implement recovery actions such as habitat protection and restoration, and beneficial management actions for species.

The Benefits of Exclusion Outweigh the Benefits of Inclusion—Oregon Parks and Recreation Department HCP

We reviewed and evaluated the exclusion of approximately 3,106 ac (1,257 ha) of land owned and managed by the OPRD from our designation of critical habitat. The benefits of including these lands in the designation are small because the regulatory, educational, and ancillary benefits that would result from critical habitat designation are almost entirely redundant with the regulatory, educational, and ancillary benefits already afforded through the OPRD HCP and under State and Federal law.

The OPRD HCP provides for significant conservation and management of the geographical areas that contain the physical or biological features essential to the conservation of the Pacific Coast WSP and help achieve recovery of this species through the objectives as described in Table 7. Exclusion of these lands from critical habitat will help preserve the partnerships we have developed with the OPRD, other stakeholders, and project proponents through the development and ongoing implementation of the OPRD HCP. These partnerships are focused on conservation of multiple species, including Pacific Coast WSP, and secure conservation benefits for the species that will lead to recovery, as described above, beyond those that could be required under a critical habitat designation. Furthermore, these partnerships aid in fostering future partnerships for the benefit of listed species.

We also conclude that the educational benefits of designating critical habitat on lands owned and managed by the OPRD would be negligible because there have been numerous opportunities for public education and outreach related to Pacific Coast WSP over the 10-year development of the HCP. In addition, the HCP includes public education and related tasks to conserve plovers on the entire Oregon coast. Western snowy plovers are State-listed throughout Oregon, and as a result, they receive a high degree of conservation oversight and management within the State. The OPRD HCP has gone through the State's public review and input process, and again through the Federal public review and input process under NEPA. These processes have provided extensive opportunities to educate the public and landowners about the location of plovers and plover habitat, and efforts to conserve the physical or biological features essential to the conservation of Pacific Coast WSP.

Pacific Coast WSP currently occupies areas that are owned and managed by the OPRD and covered by its HCP (refer to Table 3). Because one of the primary threats to the Pacific Coast WSP is habitat loss and degradation, the consultation process under section 7 of the Act for projects with a Federal nexus will, in evaluating effects to the plovers, evaluate the effects of the action on the conservation or functionality of the habitat for the Pacific Coast WSP regardless of whether critical habitat is designated for these lands; a similar analysis would be performed to conduct the adverse modification analysis (IEc 2011, p. D–3). Consultation will continue to occur in areas outside the covered lands that remain critical habitat, but not on the excluded areas. However, the HCP has provisions for protecting and restoring plover habitat on occupied and unoccupied lands that far exceed the conservation afforded by section 7 consultation. These measures will not only prevent the degradation of essential features of plover habitat, but they will improve and maintain these features over time.

We have determined that the management actions provided through implementation of the OPRD HCP, in conjunction with our partnership with the OPRD, provide a greater benefit to Pacific Coast WSP than would critical habitat designation. Furthermore, we have determined that the additional regulatory benefits of designating critical habitat in the occupied areas afforded through the section 7(a)(2) consultation process, are minimal because of limited Federal nexus and conservation measures which specifically benefit Pacific Coast WSP and its habitat are in place to address unoccupied areas. We also conclude that the educational and ancillary benefits of designating the geographical areas containing the physical or biological features essential to the conservation of the Pacific WSP would be minimal, because the HCP process has already provided considerable public education and ancillary benefits. Therefore, in consideration of the factors discussed above in the *Benefits of Exclusion* section, including the relevant impact to current and future partnerships, we have determined that the significant benefits of exclusion of lands covered by the OPRD HCP outweigh the benefits of critical habitat designation.

Exclusion Will Not Result in Extinction of the Species—Oregon Parks and Recreation Department HCP

We have determined that the exclusion of 3,106 ac (1,257 ha) from the designation of critical habitat for the Pacific Coast WSP of lands owned and managed by the OPRD, as identified in the OPRD HCP will not result in extinction of the species because current conservation efforts under the plan adequately protect the geographical areas containing the physical or biological features essential to the conservation of the species. For projects affecting plovers in occupied areas, the jeopardy standard of section 7 of the Act, coupled with protection provided by OPRD HCP, would provide assurances that this species will not go extinct as a result of excluding these lands from the critical habitat designation. Based on the above discussion, the Secretary is exercising his discretion under section 4(b)(2) of the Act to exclude from this final critical habitat designation portions of the units or subunits that are within the OPRD HCP boundary (refer to Table 6), totaling 3,106 ac (1,257 ha) of land.

Multiple Species Conservation Program (MSCP)—City of San Diego Subarea Plan

The MSCP is a comprehensive habitat conservation planning program that encompasses 582,243 ac (235,626 ha) within 12 jurisdictions of southwestern San Diego County, California (County of San Diego 1998). The MSCP identifies the conservation needs of 85 federally listed and sensitive species, including the Pacific Coast WSP, and serves as the basis for development of subarea plans by each jurisdiction in support of section 10(a)(1)(B) permits. The MSCP

identifies where mitigation activities should be focused, such that upon full implementation of the subarea plans approximately 171,920 ac (69,574 ha) of the MSCP plan area will be preserved and managed for covered species (County of San Diego 1998, pp. 2–1, 4–2—4–4).

Conservation of the Pacific Coast WSP is addressed in the MSCP and in the City of San Diego Subarea Plan. The section 10(a)(1)(B) permit for the City of San Diego Subarea Plan was issued on July 18, 1997 (Service 1997). The City of San Diego Subarea Plan identifies areas where mitigation activities should be focused to assemble preserve areas in the Multi-Habitat Planning Area (MHPA); additional preserve areas within the MSCP (*i.e.,* outside the City of San Diego Subarea Plan jurisdiction) include Pre-Approved Mitigation Areas (PAMA).

When completed at the end of the 50-year permit term, the public sector (Federal, State, and local government, and the general public) will have contributed 108,750 ac (44,010 ha) (63 percent) to the preserve areas, of which 81,750 ac (33,083 ha) (48 percent) was existing public land when the MSCP was established, and 27,000 ac (10,927 ha) (16 percent) will have been acquired. At completion, the private sector will have contributed 63,170 ac (25,564 ha) (37 percent) to the preserve areas as part of the development process, either through avoidance of impacts or as compensatory mitigation for impacts to biological resources outside the preserve. Currently, and in the future, Federal and State governments, local jurisdictions and special districts, and managers of privately owned land will manage and monitor their land in the preserve within the MHPA for species and habitat protection (County of San Diego 1998, pp. 2–1, 4–2—4–4).

The MSCP requires the City of San Diego to develop framework and site-specific management plans, subject to the review and approval of the Service and CDFG, to guide the management of all preserve land under City control. Currently, the framework plan for the City of San Diego is in place. The City of San Diego has not yet completed site-specific management plans for some lands containing Pacific Coast WSP, including some lands we are excluding from critical habitat designation (CA 52B–C and CA 53). However, the City of San Diego has completed the Mission Bay Natural Resources Management Plan, which addresses Pacific Coast WSP within Mission Bay (CA 54A–D).

Under section 4(b)(2) of the Act, the Secretary is exercising his discretion to exclude from critical habitat, all proposed subunits within the City of San Diego Subarea Plan boundaries, including a portion of proposed subunits within San Dieguito Lagoon (CA 52B–C), all of the proposed unit at Los Penasquitos Lagoon (CA 53), and all proposed subunits within Mission Bay (CA 54A–D). This area encompasses approximately 137 ac (55 ha) of land. We did not exclude one subunit within the San Dieguito Lagoon (CA 52A) as this area is not within the boundaries of the City of San Diego Subarea Plan. All areas containing the physical or biological features essential to the conservation of the species that occur on non-Federal lands covered by the City of San Diego Subarea Plan under the MSCP are excluded from the final critical habitat designation.

Benefits of Inclusion—City of San Diego Subarea Plan under the MSCP

The primary effect of designating any particular area as critical habitat is the requirement for Federal agencies to consult with us under section 7 of the Act to ensure actions they carry out, authorize, or fund do not destroy or adversely modify designated critical habitat. Absent critical habitat designation in occupied areas, Federal agencies remain obligated under section 7 of the Act to consult with us on actions that may affect a federally listed species to ensure such actions do not jeopardize the species' continued existence. If a federally listed species does not occupy an area where a proposed action may occur, Federal agencies are not obligated to consult with us to ensure actions do not jeopardize the species' existence. However, the designation of critical habitat in such unoccupied areas provides an additional layer of regulatory review that would require Federal agencies to consult with us to ensure that critical habitat is not adversely modified. Therefore, there may be an additional regulatory benefit to designating critical habitat in unoccupied areas that we have determined to be essential, such as Fiesta Island (CA 54A).

In evaluating project effects on critical habitat, the Service must be satisfied that the PCEs and, therefore, the essential features of the critical habitat likely will not be altered or destroyed by proposed activities to the extent that the conservation of the affected species would be appreciably reduced. If critical habitat were designated in areas of unoccupied habitat or currently occupied areas subsequently become unoccupied, different outcomes or requirements are also likely because effects to unoccupied areas of critical habitat are not likely to trigger the need for a jeopardy analysis.

Critical habitat designation can also result in ancillary conservation benefits to the Pacific Coast WSP by triggering additional review and conservation through other Federal laws. The Federal laws most likely to afford protection to designated Pacific Coast WSP habitat are the Clean Water Act (CWA), Coastal Zone Management Act (CZMA), and the Rivers and Harbors Act (RHA). Projects requiring a review under the CWA, CZMA, and RHA that are located within critical habitat or are likely to affect critical habitat would create a Federal nexus and trigger section 7 consultation under the Act. Examples of potential projects that may trigger consultation as a result of CWA, CZMA, and RHA include beach restoration (such as, beach replenishment or removal of nonnative plants) and channel dredging. Thus, review of Federal actions affecting designated critical habitat units would consider the importance of this habitat to the species and the protections required for the species and its habitat.

Another important benefit of including lands in a critical habitat designation is that the designation can serve to educate landowners and the public regarding the potential conservation value of an area, and may help focus conservation efforts on areas of high conservation value for certain species. Any information about the Pacific Coast WSP and its habitat that reaches a wide audience, including parties engaged in conservation activities, is valuable.

Benefits of Exclusion—City of San Diego Subarea Plan Under the MSCP

The benefits of excluding from designated critical habitat the approximately 137 ac (55 ha) of land within the boundaries of the City of San Diego Subarea Plan are significant and include: (1) That the conservation management objectives for Pacific Coast WSP and its habitat identified in the City of San Diego Subarea Plan, described in Table 8 below, would continue to be implemented into the future; (2) continued and strengthened effective working relationships with all MSCP jurisdictions and stakeholders to promote the conservation of the Pacific Coast WSP and its habitat; (3) continued meaningful collaboration and cooperation in working toward recovering this species, including conservation benefits that might not otherwise occur; (4) encouragement of other jurisdictions with completed subarea plans under the MSCP to amend their plans to cover and benefit the

Pacific Coast WSP and its habitat; (5) encouragement of other coastal jurisdictions within the range of Pacific Coast WSP to complete HCPs or subarea plans under the MSCP that cover or are adjacent to Pacific Coast WSP habitat (including the cities of Coronado and Imperial Beach); and (6) encouragement of additional HCP and other conservation plan development in the future on other private lands that include the Pacific Coast WSP and other federally listed species.

TABLE 8—SUMMARY OF PACIFIC COAST WSP CONSERVATION OBJECTIVES WITHIN THE CITY OF SAN DIEGO SUBAREA PLAN UNDER THE MSCP

Area specific management objectives	Conservation benefit to Pacific Coast WSP
Protect nesting sites from human disturbance during the reproductive season	Protect breeding areas.
Implement specific measures to protect against detrimental edge effects	Protect, restore, or enhance breeding and foraging areas.
Ensure that incidental take (during the breeding season) associated with maintenance or removal of levees or dikes is not authorized except as specifically approved by wildlife agencies.	Protect individuals and nests.
Ensure the conservation of: 99 percent of saltpan habitat; 90–95 percent of remaining beach habitat outside of intensively used beaches; and 93 percent of potential habitat.	Protect nesting, wintering, and foraging areas.

We have created close partnerships with the City of San Diego and several other stakeholders through the development of the City of San Diego Subarea Plan, which incorporate protections and management objectives (described in Table 8 above) for the Pacific Coast WSP and the habitat upon which it depends for breeding, sheltering, and foraging activities. The conservation strategy identified in the subarea plan, along with our close coordination with the city and other stakeholders, addresses the identified threats to Pacific Coast WSP and the geographical areas that contain the physical or biological features essential to its conservation. The conservation gains to the Pacific Coast WSP identified within the City of San Diego Subarea Plan are more beneficial than designation of critical habitat because inclusion in critical habitat does not require beneficial management actions. Thus, the City of San Diego Subarea Plan provides a greater benefit to the Pacific Coast WSP than would designation of critical habitat. Our partnership with the City of San Diego helps ensure implementation of the protections and management actions identified within the City of San Diego Subarea Plan. Therefore, the relative benefits of designation of critical habitat on these lands are diminished and limited.

Excluding lands within the MSCP from the critical habitat designation will sustain and enhance the working relationship between the Service and the City of San Diego. The willingness of the City to work with the Service on innovative ways to manage federally listed species will continue to reinforce those conservation efforts and our partnership, which contribute significantly toward achieving recovery of Pacific Coast WSP.

By excluding the approximately 137 ac (55 ha) of land within the boundaries of the City of San Diego Subarea Plan from critical habitat designation, we are encouraging new partnerships with other landowners and jurisdictions to protect the Pacific Coast WSP and other listed species. Our ongoing partnerships with the City of San Diego, the larger regional MSCP participants, and the landscape-level multiple species conservation planning efforts they promote, are essential to achieve long-term conservation of the Pacific Coast WSP. We consider this voluntary partnership in conservation vital to our understanding of the status of species on non-Federal lands and necessary for us to implement recovery actions such as habitat protection and restoration, and beneficial management actions for species.

The Benefits of Exclusion Outweigh the Benefits of Inclusion—City of San Diego Subarea Plan Under the MSCP

We have reviewed and evaluated the exclusion of approximately 137 ac (55 ha) of land within the boundaries of the City of San Diego Subarea Plan. The benefits of including these lands in the designation are small because the regulatory, educational, and ancillary benefits that would result from critical habitat designation are almost entirely redundant with the regulatory, educational, and ancillary benefits already afforded through the City of San Diego Subarea Plan and under State and Federal laws. The City of San Diego Subarea Plan provides for significant conservation and management of the geographical areas that contain the physical or biological features essential to the conservation of the Pacific Coast WSP and help achieve recovery of this species through the objectives as described in Table 8.

Exclusion of these lands from critical habitat will help preserve the partnerships we have developed with local jurisdictions and project proponents through the development and ongoing implementation of the MSCP and the City of San Diego Subarea Plan. These partnerships are focused on conservation of multiple species, including Pacific Coast WSP, and secure conservation benefits for the species that will lead to recovery, as described above, beyond those that could be required under a critical habitat designation. Furthermore, these partnerships aid in fostering future partnerships for the benefit of listed species, the majority of which do not occur on Federal lands and thus are less likely to result in a section 7 consultation.

We also conclude that the educational benefits of designating critical habitat within the City of San Diego Subarea Plan boundaries would be negligible because there have been several opportunities for public education and outreach related to Pacific Coast WSP. The framework for the regional MSCP was developed over a 7-year period; the City of San Diego Subarea plan has been in place since 1997. Implementation of the subarea plan is formally reviewed yearly through publicly available annual reports and a public meeting, providing extensive opportunity to educate the public and landowners about the location of, and efforts to conserve, the physical or biological features essential to the conservation of Pacific Coast WSP.

Within the City of San Diego Subarea Plan boundaries, Pacific Coast WSP currently occupies all but one subunit (CA 54A). Any project with a Federal nexus will require consultation under section 7 of the Act in those subunits occupied by Pacific Coast WSPs.

Furthermore, because one of the primary threats to the Pacific Coast WSP is habitat loss and degradation, the consultation process required under section 7 of the Act for a project with a Federal nexus will, in evaluating effects to the plovers, most likely evaluate the effects of the action on the conservation or functionality of occupied habitat for the Pacific Coast WSP and thus the jeopardy analysis would be similar to that performed to conduct the adverse modification analysis (IEc 2011, p. D–3). Therefore, there would be minimal additional benefit of designating critical habitat within the boundaries of the City of San Diego Subarea Plan. The management objectives identified within this conservation strategy seek to achieve conservation goals for Pacific Coast WSPs and their habitat, and thus can be of greater conservation benefit than the designation of critical habitat, which does not require specific actions, particularly in the unoccupied subunit CA 54A. The City of San Diego Subarea Plan would ensure the conservation of 99 percent of saltpan habitat; 90–95 percent of remaining beach habitat outside of intensively used beaches; and 93 percent of potential habitat. We have determined that the additional regulatory benefits of designating critical habitat in the occupied areas afforded through the section 7(a)(2) consultation process are minimal because of limited Federal nexus, and because of conservation measures in place which specifically benefit Pacific Coast WSP and its habitat. These conservation measures also provide for conservation of Pacific Coast WSP habitat in unoccupied areas. The City of San Diego Subarea Plan will also manage saltpan habitat within the MSCP used by Pacific Coast WSP for breeding and the City will implement measures to protect nesting sites from human disturbance during the reproductive season, control predators, and protect against detrimental edge effects (Service 1997, p. 110–111).

We have determined that the additional regulatory benefits of designating occupied areas as Pacific Coast WSP critical habitat, such as protection afforded through the section 7(a)(2) consultation process, are minimal. Furthermore, the conservation objectives identified by the City of San Diego Subarea Plan, in conjunction with our partnership with the City of San Diego will provide a greater benefit to the species than critical habitat designation, especially in areas that are not currently occupied because the specific measures identified above in the plan that benefit the plover and its habitat will be implemented regardless of the species presence. We also conclude that the educational and ancillary benefits of designating critical habitat for Pacific WSP within the City of San Diego Subareas Plan boundaries would be negligible because of the partnership established between the Service and the City of San Diego, the management objectives identified in the City of San Diego Subarea Plan, the educational outreach that has occurred as part of the subarea planning process, and the independent regulatory protection already provided under the subarea plan. Therefore, in consideration of the relevant impact to current and future partnerships, as summarized in the *Benefits of Exclusion* section above, we determined the significant benefits of exclusion outweigh the benefits of critical habitat designation.

Exclusion Will Not Result in Extinction of the Species—City of San Diego Subarea Plan Under the MSCP

We determine that the exclusion of 137 ac (55 ha) of land from the designation of critical habitat for the Pacific Coast WSP within the boundaries of the City of San Diego Subarea Plan will not result in extinction of the species because current conservation efforts under the subarea plan adequately protect the geographical areas containing the physical or biological features essential to the conservation of the species. In our 1997 Biological Opinion, the Service determined that implementation of the City of San Diego Subarea Plan is not likely to result in jeopardy to Pacific Coast WSP (Service 1997, p. 111). Therefore, based on the benefits described above, we have determined that this exclusion would not result in the extinction of the Pacific Coast WSP. Based on the above discussion, the Secretary is exercising his discretion under section 4(b)(2) of the Act to exclude from this final critical habitat designation a portion of proposed subunits within San Dieguito Lagoon (CA 52B–C), all of the proposed unit at Los Penasquitos Lagoon (CA 53), and all proposed subunits within Mission Bay (CA 54A–D) addressed by the City of San Diego Subarea Plan under the MSCP, totaling 137 ac (55 ha) of land.

Multiple Habitat Conservation Program (MHCP)—Carlsbad Habitat Management Plan (Carlsbad HMP)

The MHCP is a comprehensive habitat conservation planning program that encompasses 111,908 ac (45,279 ha) within seven jurisdictions in northwestern San Diego County, California, including the cities of Carlsbad, Encinitas, Escondido, Oceanside, San Marcos, Solana Beach, and Vista. The MHCP was designed to create, manage, and monitor an ecosystem preserve. The MHCP is a subregional plan that identifies the conservation needs of 77 federally listed and sensitive species, including Pacific Coast WSP, and serves as the basis for development of subarea plans by each jurisdiction in support of section 10(a)(1)(B) permits. The subregional MHCP identifies where mitigation activities should be focused, such that upon full implementation of the subarea plans over 20,000 ac (8,094 ha) of the MHCP plan area will be preserved and managed for covered species (AMEC Earth and Environmental, Inc. (AMEC) and Conservation Biology Institute (CBI) 2003, p. E–16). The MHCP is also a subregional plan under the State of California's Natural Communities Conservation Plan (NCCP) program and was developed in cooperation with CDFG. The MHCP preserve system is intended to protect viable occurrences of native plant and animal species and their habitats in perpetuity, while accommodating continued economic development and quality of life for residents of northern San Diego County.

Conservation of Pacific Coast WSP is addressed in the subregional plan and in the Carlsbad HMP. The section 10(a)(1)(B) permit for the City of Carlsbad HMP was issued on November 9, 2004 (Service 2004a). The Carlsbad HMP identifies areas where mitigation activities should be focused to assemble preserve areas within the Focused Planning Areas (FPAs). The FPAs are comprised of ''hard line'' preserves, indicating that lands will be conserved and managed for biological resources, and ''soft line'' planning areas, within which preserve areas will ultimately be delineated and managed based on further data and planning (AMEC and CBI 2003, p. ES–6). Those areas of the MHCP preserve that are already conserved, as well as those designated for inclusion in the preserve under the plan, are referred to as the ''preserve area'' in this revised final critical habitat designation. Conservation within the FPAs will be achieved by the implementing measures documented in each city's subarea plan, including land use regulation, minimization of impacts, mitigation, and acquisition of parcels from willing sellers (AMEC and CBI 2003, p. ES–6).

The Carlsbad HMP was approved by the Service on October 15, 2004. Approximately 24,570 ac (9,943 ha) of land are within the Carlsbad HMP

planning area, with about 8,800 ac (3,561 ha) remaining as natural habitat for species covered under the plan. Of this remaining habitat, the Carlsbad HMP proposes to establish a preserve system covering approximately 6,786 ac (2,746 ha). The MHCP requires the City of Carlsbad to develop area-specific management directives to address species and habitat needs for the preserve areas, including lands that support Pacific Coast WSP, and its habitat, and requires the City of Carlsbad to describe specific policies that will be implemented for the MHCP, subject to the review and approval of the Service and CDFG, to guide the City's preserve system. The City of Carlsbad has not yet completed area-specific management directives for some lands that support Pacific Coast WSP and its habitat. However, the MSCP, which has been approved and permitted by the Service and CDFG. provides an overarching conservation benefit for the Pacific Coast WSP, and the Carlsbad HMP includes numerous conservation measures to benefit the Pacific Coast WSP and its habitat and will be implemented regardless of any area specific plan (see Table 9). Furthermore, the City has demonstrated their commitment to implementation of the HMP since its approval in 2004, and we are confident their commitment will continue into the future as they establish the preserve system and the directives that will govern management of the preserve lands. Therefore, the lands identified as critical habitat subunit CA 50A–C which are addressed within the Carlsbad HMP are being excluded from this revised critical habitat designation. Currently, and in the future, Federal and State governments, local jurisdictions and special districts, and managers of privately owned land will manage and monitor their land in the preserve within the FPA for species and habitat protection (AMEC and CBI 2003, p. E–24).

Under section 4(b)(2) of the Act, the Secretary is exercising his discretion to exclude from critical habitat, all proposed subunits within Batiquitos Lagoon (CA 50A–C) that are addressed by the Carlsbad HMP under the Multiple Habitat Conservation Program (MHCP). This area encompasses approximately 66 ac (27 ha) of land. All geographical areas containing the physical or biological features essential to the conservation of the species that occur on non-Federal lands covered by the Carlsbad HMP under the MHCP are excluded from the final critical habitat designation.

Benefits of Inclusion—Carlsbad HMP Under the MHCP

The primary effect of designating any particular area as critical habitat is the requirement for Federal agencies to consult with us under section 7 of the Act to ensure actions they carry out, authorize or fund do not destroy or adversely modify designated critical habitat. Absent critical habitat designation in occupied areas, Federal agencies remain obligated under section 7 of the Act to consult with us on actions that may affect a federally listed species to ensure such actions do not jeopardize the species' continued existence. If a federally listed species does not occupy an area where a proposed action may occur, Federal agencies are not obligated to consult with us to ensure actions do not jeopardize the species' existence. However, the designation of critical habitat in such unoccupied areas provides an additional layer of regulatory review that would require Federal agencies to consult with us to ensure that critical habitat is not adversely modified. Therefore, there may be an additional regulatory benefit to designating critical habitat in unoccupied areas that we have determined to be essential.

In evaluating project effects on critical habitat, the Service must be satisfied that the PCEs and, therefore, the essential features of the critical habitat likely will not be altered or destroyed by proposed activities to the extent that the conservation of the affected species would be appreciably reduced. If critical habitat were designated in areas of unoccupied habitat or currently occupied areas subsequently become unoccupied, different outcomes or requirements are also likely because effects to unoccupied areas of critical habitat are not likely to trigger the need for a jeopardy analysis.

Critical habitat designation can also result in ancillary conservation benefits to the Pacific Coast WSP by triggering additional review and conservation through other Federal laws. The Federal laws most likely to afford protection to designated Pacific Coast WSP habitat are the Clean Water Act (CWA), Coastal Zone Management Act (CZMA), and the Rivers and Harbors Act (RHA). Projects requiring a review under the CWA, CZMA, and RHA that are located within critical habitat or are likely to affect critical habitat would create a Federal nexus and trigger section 7 consultation under the Act. Examples of potential projects that may trigger consultation as a result of CWA, CZMA, and RHA include beach restoration (such as replenishment or removal of nonnative plants) and channel dredging. Thus, review of Federal actions affecting designated critical habitat units would consider the importance of this habitat to the species and the protections required for the species and its habitat.

Another important benefit of including lands in a critical habitat designation is that the designation can serve to educate landowners and the public regarding the potential conservation value of an area, and may help focus conservation efforts on areas of high conservation value for certain species. Any information about the Pacific Coast WSP and its habitat that reaches a wide audience, including parties engaged in conservation activities, is valuable.

Benefits of Exclusion—Carlsbad HMP Under the MHCP

The benefits of excluding from designated critical habitat the approximately 66 ac (27 ha) of land within the boundaries of the Carlsbad HMP are significant and include: (1) An assurance that the conservation management objectives for Pacific Coast WSP and its habitat contained in the Carlsbad HMP, as described in Table 9 below, will be implemented into the future; (2) continued and strengthened effective working relationships with all MHCP jurisdictions and stakeholders to promote the conservation of the Pacific Coast WSP and its habitat; (3) continued meaningful collaboration and cooperation in working toward recovering this species, including conservation benefits that might not otherwise occur; (4) encouragement of other jurisdictions with completed subarea plans under the MHCP to amend their plans to cover and benefit the Pacific Coast WSP and its habitat; (5) encouragement of other coastal jurisdictions within the range of Pacific Coast WSP to complete HCPs or subarea plans under the MHCP that cover or are adjacent to Pacific Coast WSP habitat (including the cities of Encinitas, Oceanside, and Solana Beach); and (6) encouragement of additional HCP and other conservation plan development in the future on other private lands that include the Pacific Coast WSP and other federally listed species.

TABLE 9—SUMMARY OF PACIFIC COAST WSP CONSERVATION OBJECTIVES WITHIN THE CARLSBAD HMP

Area specific management objectives	Conservation benefit to Pacific Coast WSP
Conserve saltmarsh and estuarine habitats at Buena Vista, Agua Hedionda, and Batiquitos Lagoons consistent with the City of Carlsbad's wetland policy.	Protect nesting, wintering, and foraging areas.
Assure no net loss of saltmarsh and estuarine habitats within the City of Carlsbad	Protect, restore, or enhance foraging areas.
Conserve all major populations within the City of Carlsbad, *i.e.,* at Agua Hedionda and Batiquitos Lagoons.	Protect individuals.
Assure no direct impacts to nesting areas	Protect nests.
Manage preserve areas to minimize edge effects; control nonnative plants; maintain hydrology and water quality; protect habitats from physical disturbances; and control predators.	Protect, restore, or enhance breeding, wintering, and foraging areas.
Restore and enhance habitat in preserved areas, where possible	Protect, restore, or enhance breeding, wintering, and foraging areas.
Restrict activities near nesting habitat during the breeding season (April 1 through August 31)	Protect individuals and nests.
Implement access control measures for areas where populations are present during the nonbreeding season, if warranted.	Protect individuals.

We have created close partnerships with the City of Carlsbad and several other stakeholders through the development of the Carlsbad HMP, which incorporates protections and management objectives (described in Table 9 above) for the Pacific Coast WSP and the habitat upon which it depends for breeding, sheltering, and foraging activities. The conservation strategy identified in the Carlsbad HMP, along with our close coordination with each city and other stakeholders, addresses the identified threats to Pacific Coast WSP and the geographical areas that contain the physical or biological features essential to its conservation. The conservation gains to the Pacific Coast WSP identified within the Carlsbad HMP are more beneficial than designation of critical habitat because critical habitat designation does not require beneficial management actions. Thus, the Carlsbad HMP provides a greater benefit to the Pacific Coast WSP than would designating critical habitat. Our partnership with the City of Carlsbad helps ensure implementation of the protections and management actions identified within the Carlsbad HMP. Therefore, the relative benefits of designation of these lands are diminished and limited.

By excluding the approximately 66 ac (27 ha) of land within the boundaries of the Carlsbad HMP from critical habitat designation, we are encouraging new partnerships with other landowners and jurisdictions to protect the Pacific Coast WSP and other listed species. Our ongoing partnerships with the City of Carlsbad, the larger regional MHCP participants, and the landscape-level multiple species conservation planning efforts they promote, are essential to achieve long-term conservation of the Pacific Coast WSP. We consider this voluntary partnership in conservation vital to our understanding of the status of species on non-Federal lands and necessary for us to implement recovery actions, such as habitat protection and restoration, and beneficial management actions for species.

The Benefits of Exclusion Outweigh the Benefits of Inclusion—Carlsbad HMP Under the MHCP

The benefits of including these lands in the designation are small because the regulatory, educational, and ancillary benefits that would result from critical habitat designation are almost entirely redundant with the regulatory, educational, and ancillary benefits already afforded through the Carlsbad HMP and under State and Federal law. The Carlsbad HMP provides for significant conservation and management of the geographical areas that contain the physical or biological features essential to the conservation of the Pacific Coast WSP and help achieve recovery of this species through the objectives as described in Table 9.

Exclusion of these lands from critical habitat will help preserve the partnerships we have developed with local jurisdictions and project proponents through the development and ongoing implementation of the MHCP and Carlsbad HMP. These partnerships are focused on conservation of multiple species, including Pacific Coast WSP, and secure conservation benefits for the species that will lead to recovery, as described above, beyond those that could be required under a critical habitat designation. Furthermore, these partnerships aid in fostering future partnerships for the benefit of listed species, the majority of which do not occur on federal lands and thus are less likely to result in a section 7 consultation.

We also conclude that the educational benefits of designating critical habitat within the boundaries of the Carlsbad HMP would be negligible because there have been several opportunities for public education and outreach related to Pacific Coast WSP. The framework for the regional MHCP was developed over a 12-year period; the Carlsbad HMP has been in place since 2004. Implementation of the subarea plan is formally reviewed yearly through publicly available annual reports and a public meeting, providing extensive opportunity to educate the public and landowners about the location of, and efforts to conserve, the physical or biological features essential to the conservation of Pacific Coast WSP.

Within the Carlsbad HMP boundaries, any project with a Federal nexus will require consultation under section 7 of the Act because Pacific Coast WSP currently occupies all proposed subunits within the plan boundaries. Furthermore, because one of the primary threats to the Pacific Coast WSP is habitat loss and degradation, the consultation process required under section 7 of the Act for a project with a Federal nexus will, when analyzing effects to plovers, most likely evaluate the effects of the action on the conservation or functionality of occupied habitat for the Pacific Coast WSP and thus the jeopardy analysis would be similar to that performed to conduct the adverse modification analysis (IEc 2011, p. D–3). Therefore, there would be minimal additional benefit of designating critical habitat within the boundaries of the Carlsbad HMP.

We have determined that the additional regulatory benefits of designating critical habitat for Pacific Coast WSP within the boundaries of the Carlsbad HMP, such as protection afforded through the section 7(a)(2) consultation process, are minimal. We also conclude that the educational and

ancillary benefits of designating critical habitat for Pacific WSP within the boundaries of the Carlsbad HMP would be negligible because of the partnership established between the Service and the City of Carlsbad, the management objectives identified in the Carlsbad HMP, and the independent regulatory protection already provided under the Carlsbad HMP. Therefore, in consideration of the relevant impact to current and future partnerships, as summarized in the *Benefits of Exclusion* section above, we determine that the significant benefits of exclusion outweigh the benefits of critical habitat designation.

Exclusion Will Not Result in Extinction of the Species—Carlsbad HMP Under the MHCP

We determine that the exclusion of 66 ac (27 ha) of land from the designation of critical habitat for the Pacific Coast WSP within the boundaries of the Carlsbad HMP will not result in extinction of the species because current conservation efforts under the Carlsbad HMP adequately protect the geographical areas containing the physical or biological features essential to the conservation of the species. In our 2004 Biological Opinion, the Service determined that the MHCP subregional and the City's subarea plans are not likely to jeopardize the continued existence or recovery of the Pacific Coast WSP (Service 2004, pp. 148–149). No direct impacts are expected from the MHCP subregional plan or the City's subarea plan due to 100 percent conservation of the coastal lagoons and because the MHCP will not allow any take of individuals or nests of Pacific Coast WSP. Therefore, we have determined that this exclusion will not result in the extinction of the Pacific Coast WSP. Based on the above discussion, the Secretary is exercising his discretion under section 4(b)(2) of the Act to exclude from this final critical habitat designation all proposed subunits within Batiquitos Lagoon (CA 50A–C) that are addressed by the Carlsbad HMP under the MHCP, totaling 66 ac (27 ha) of land.

Other Management Plans

San Diego Bay Natural Resources Plan

In a collaborative strategy, the Port of San Diego and the U.S. Department of the Navy, Southwest Division prepared an INRMP for the San Diego Bay in September of 2000 (San Diego Bay INRMP) (U.S. Navy and San Diego Unified Port District 2000, p. xxi). The lands within the boundaries of the San Diego Bay INRMP that were proposed as revised critical habitat include Sweetwater Marsh National Wildlife Refuge and D Street Fill (CA 55E) and Chula Vista Wildlife Reserve (CA 55G). These lands are owned and managed by the Port of San Diego. As described above under the section titled Exemptions, all lands in the San Diego Bay that are owned or managed by the U.S. Department of the Navy are exempted from critical habitat as a result of benefits provided to Pacific Coast WSP based on a separate and distinct INRMP (Naval Base Coronado INRMP).

Because subunits CA 55E and CA 55G are not owned or controlled by the Department of Defense, but rather are owned and managed by the Port of San Diego, it is inappropriate to exempt the Port of San Diego lands from the critical habitat designation under section 4(a)(3)(B)(i) of the Act. However, after reviewing comments from the Port of San Diego concerning these subunits during both comment periods, conducting an analysis of the benefits of inclusion compared with the benefits of exclusion, and determining that exclusion will not result in the extinction of the species, we are excluding these Port of San Diego lands (CA 55E and CA 55G) under section 4(b)(2) of the Act. We, hereafter, refer to the Port of San Diego management plan for the Port lands incorporated into the San Diego Bay INRMP as the San Diego Bay Natural Resources Plan.

The intent of the San Diego Bay Natural Resources Plan is to provide for stewardship of natural resources while supporting the ability of the Port of San Diego to achieve their mission within San Diego Bay. The plan is part of a larger strategy to assist the users of the San Diego Bay to make better, more cost-effective decisions about the development, conservation, restoration, and management of San Diego Bay. This strategy takes an ecosystem approach to management, whereby San Diego Bay is viewed as an ecosystem as opposed to a collection of individual species, sites, or projects, and management is addressed across ownership and jurisdictional boundaries. In conjunction with the San Diego Bay INRMP, the San Diego Bay Natural Resources Plan was developed through the cooperative effort of 13 governmental and nongovernmental organizations representing the primary working group known as the Technical Oversight Committee (TOC). The Service, a member of the TOC, participated in the development of the plan and is a signatory to the overarching San Diego Bay INRMP, which includes the Port of San Diego's lands.

The footprint of the San Diego Bay Natural Resources Plan encompasses both uplands adjacent to the bay and all tidelands bayward of the historical mean high tide. Historical tideland areas owned or controlled by the Port of San Diego include 5,483 ac (2,219 ha) of nearly 15,000 ac (6,070 ha) of land and water within San Diego Bay, which collectively supports over 1,100 documented marine and terrestrial species (U.S. Navy and Port of San Diego 2011, p. 1–12), including Pacific Coast WSP.

In conjunction with the San Diego Bay INRMP, the San Diego Bay Natural Resources Plan is currently being revised (U.S. Navy, Southwest Division and Port of San Diego 2011). The Service is providing input during the development of this revision. The revised version includes many of the same objectives and strategies as the current version, although it expands coverage on water quality, sediment quality, sustainable development, and other topics. The revision also outlines additional benefits for Pacific Coast WSP. In February of 2012, a draft was released for public comment, and the Port of San Diego had a public meeting to allow members of the public to provide input. Both the San Diego Bay INRMP and the San Diego Bay Natural Resources Plan continue to be implemented while being updated and revised.

Under section 4(b)(2) of the Act, the Secretary is exercising his discretion to exclude from critical habitat a portion of proposed subunits within San Diego Bay, which includes the non-Federal lands portion of the Sweetwater Marsh National Wildlife Refuge and D Street Fill subunit (CA 55E) and the Chula Vista Wildlife Reserve subunit (CA 55G) addressed by the San Diego Bay Natural Resources Plan. This area encompasses approximately 63 ac (25 ha) of non-Federal land. A 79-ac (32-ha) portion of subunit CA 55E (Sweetwater Marsh National Wildlife Refuge and D Street Fill) is Federal land that is a part of the greater San Diego Bay National Wildlife Refuge Complex and is not excluded from critical habitat designation.

Benefits of Inclusion—San Diego Bay Natural Resources Plan

The primary effect of designating any particular area as critical habitat is the requirement for Federal agencies to consult with us under section 7 of the Act to ensure actions they carry out, authorize, or fund do not destroy or adversely modify designated critical habitat. Absent critical habitat

designation in occupied areas, Federal agencies remain obligated under section 7 of the Act to consult with us on actions that may affect a federally listed species to ensure such actions do not jeopardize the species' continued existence. If a federally listed species does not occupy an area where a proposed action may occur, Federal agencies are not obligated to consult with us to ensure actions do not jeopardize the species' existence. However, the designation of critical habitat in such unoccupied areas provides an additional layer of regulatory review that would require Federal agencies to consult with us to ensure that critical habitat is not adversely modified. Therefore, there may be an additional regulatory benefit to designating critical habitat in unoccupied areas that we have determined to be essential, such as Chula Vista Wildlife Reserve (CA 55G).

As stated above, the principal benefit of any designated critical habitat is that Federal activities will require section 7 consultations to ensure that adequate protection is provided to avoid adverse modification or destruction of critical habitat. This would provide an additional benefit beyond that provided under the jeopardy standard. In evaluating project effects on critical habitat, the Service must be satisfied that the PCEs and, therefore, the essential features of the critical habitat likely will not be altered or destroyed by proposed activities to the extent that the conservation of the affected species would be appreciably reduced. If critical habitat were designated in areas of unoccupied habitat or currently occupied areas subsequently become unoccupied, different outcomes or requirements are also likely because effects to unoccupied areas of critical habitat are not likely to trigger the need for a jeopardy analysis.

Critical habitat designation can also result in ancillary conservation benefits to the Pacific Coast WSP by triggering additional review and conservation through other Federal laws. The Federal laws most likely to afford protection to designated Pacific Coast WSP habitat are the Clean Water Act (CWA), Coastal Zone Management Act (CZMA), and the Rivers and Harbors Act (RHA). Projects requiring a review under the CWA, CZMA, and RHA that are located within critical habitat or are likely to affect critical habitat would create a Federal nexus and trigger section 7 consultation under the Act. Examples of potential projects that may trigger consultation as a result of CWA, CZMA, and RHA include beach restoration (such as, beach replenishment or removal of nonnative plants) and channel dredging. Thus, review of Federal actions affecting designated critical habitat units would consider the importance of this habitat to the species and the protections required for the species and its habitat.

Another important benefit of including lands in a critical habitat designation is that the designation can serve to educate landowners and the public regarding the potential conservation value of an area, and may help focus conservation efforts on areas of high conservation value for certain species. Any information about the Pacific Coast WSP and its habitat that reaches a wide audience, including parties engaged in conservation activities, is valuable.

Benefits of Exclusion—San Diego Bay Natural Resources Plan

The benefits of excluding from designated critical habitat the approximately 63 ac (25 ha) of lands owned and managed by the Port of San Diego within the San Diego Bay Natural Resources Plan are significant and include: (1) An expectation that the management objectives contained within the San Diego Bay Natural Resources Plan, as described in Table 10 below, will be implemented into the future; (2) continued and strengthened effective working relationships with the Port of San Diego and other jurisdictions and stakeholders in the San Diego Bay to promote the conservation of the Pacific Coast WSP and its habitat; (3) continued meaningful collaboration and cooperation in working toward recovering this species, including conservation benefits that might not otherwise occur; (4) encouragement of other coastal jurisdictions within the range of Pacific Coast WSP to complete management plans that provide a benefit to Pacific Coast WSP or its habitat; and (5) encouragement of future management plan development on private lands that include the Pacific Coast WSP and other federally listed species.

TABLE 10—SUMMARY OF PACIFIC COAST WSP CONSERVATION OBJECTIVES WITHIN THE SAN DIEGO BAY NATURAL RESOURCES PLAN.

Area specific management objectives	Conservation Benefit to Pacific Coast WSP
Support consistent and effective predator management at nest sites	Protect nesting and foraging areas.
Protect unvegetated areas or remnant dune sites above the high tide line which are potential nesting sites.	Protect nesting and foraging areas.
Reduce human use during nesting season, particularly in the upper dunes; enforce dog leashing; and post signs.	Protect nesting and foraging areas.
Clean up trash, which attracts predators.	Protect nesting and foraging areas.
Prohibit beach raking which can affect invertebrate populations upon which the plover depends	Protect foraging areas.
Enhance remnant dune areas as potential nest sites in areas that can be protected from human disturbance and predators during nesting season.	Restore habitat for nesting adults.
Remove ice plant (*e.g., Carpobrotus* sp.) and other nonnatives from remnant dunes	Restore habitat for nesting adults.
Support broader beaches with gentler slopes to support plover nesting	Restore habitat for nesting adults.
Conduct research and monitoring in support of the management objective (*i.e.,* study the plover's preference for higher mudflat, so that function may be protected or enhanced).	Restore habitat for nesting adults.

We have created close partnerships with the Port of San Diego and several other stakeholders through the development of the San Diego Bay Natural Resources Plan, which incorporates protections and management objectives (described above in Table 10) for the Pacific Coast WSP and the habitat upon which it depends for breeding, sheltering, and foraging activities. The conservation strategy identified in the San Diego Bay Natural Resources Plan, along with our close coordination with Port of San Diego, addresses the identified threats to Pacific Coast WSP and the geographical areas that contain the physical or biological features essential to its conservation on subunits CA 55E and CA 55G. The management objectives identified within this conservation

strategy are more beneficial than designation of critical habitat on lands owned and managed by the Port of San Diego because critical habitat designation does not require beneficial management actions. Thus, the Port of San Diego Natural Resources Plan provides a greater benefit to the Pacific Coast WSP than would designating critical habitat. Therefore, the relative benefits of designation of critical habitat on these lands are diminished and limited.

Conservation measures that provide a benefit to Pacific Coast WSP and its habitat have been implemented in both subunits (CA 55E and CA 55G) owned and managed by the Port of San Diego since 2000. These measures will continue to be implemented as the Port of San Diego finalizes the revised plan (expected in late 2012). Such measures include protection of nesting and foraging areas, predator management at nest sites, prohibition of beach raking, and trash clean-up at occupied sites (described in Table 10 above) (U.S. Navy and San Diego Unified Port District 2000, p. 4–109; Maher, pers. comm. 2012).

Excluding the approximately 63 ac (25 ha) owned and managed by the Port of San Diego from the critical habitat designation will sustain and enhance the working relationship between the Service and the Port of San Diego. The willingness of the Port of San Diego to work with the Service on innovative ways to manage federally listed species will continue to reinforce those conservation efforts and our partnership, which contribute significantly toward achieving recovery of Pacific Coast WSP. We consider this voluntary partnership in conservation vital to our understanding of the status of species on non-Federal lands and necessary for us to implement recovery actions such as habitat protection and restoration, and beneficial management actions for species.

The Benefits of Exclusion Outweigh the Benefits of Inclusion—San Diego Bay Natural Resources Plan

The benefits of including these lands in the designation are small because the regulatory, educational, and ancillary benefits that would result from critical habitat designation are almost entirely redundant with the regulatory, educational, and ancillary benefits already afforded through the San Diego Bay Natural Resources Plan and under State and Federal law.

The San Diego Bay Natural Resources Plan provides for significant conservation and management of the geographical areas that contain the physical or biological features essential to the conservation of the Pacific Coast WSP and help achieve recovery of this species through the objectives as described in Table 10. Exclusion of these lands from critical habitat will help preserve the partnerships we have developed with the Port of San Diego and project proponents through the development and ongoing implementation of the San Diego Bay Natural Resources Plan. These partnerships are focused on conservation of multiple species, including Pacific Coast WSP, and secure conservation benefits for the species that will lead to recovery, as described above, beyond those that could be required under a critical habitat designation. Furthermore, these partnerships aid in fostering future partnerships for the benefit of listed species, the majority of which do not occur on federal lands and thus are less likely to result in a section 7 consultation.

We also conclude that the educational benefits of designating critical habitat on lands owned and managed by the Port of San Diego would be negligible because there have been several opportunities for public education and outreach related to Pacific Coast WSP. As part of the larger San Diego Bay INRMP, the San Diego Bay Natural Resources Plan has been in place since 2000. Additionally, as part of the larger San Diego Bay INRMP, implementation of the revised San Diego Bay Natural Resources Plan will be formally reviewed yearly through publicly available annual reports and a public meeting, again providing extensive opportunity to educate the public and landowners about the location of, and efforts to conserve, the physical or biological features essential to the conservation of Pacific Coast WSP. Members of the TOC, and specifically the Port of San Diego, are aware of the value of these lands to the conservation of Pacific Coast WSP, and conservation measures are already in place to protect Pacific Coast WSP habitat.

Pacific Coast WSP currently occupies one subunit (CA 55E) that is owned and managed by the Port of San Diego with the Port of San Diego Natural Resources Plan. Because one of the primary threats to the Pacific Coast WSP is habitat loss and degradation, the consultation process under section 7 of the Act for a project with a Federal nexus will, in analyzing effects to the plovers, most likely evaluate the effects of the action on the conservation or functionality of the habitat for the Pacific Coast WSP; a similar analysis would be performed to conduct the adverse modification analysis (IEc 2011, p. D–3).

We have determined that the management actions provided through implementation of the San Diego Bay Natural Resources Plan, in conjunction with our partnership with the Port of San Diego, provide a greater benefit to Pacific Coast WSP than would critical habitat designation in the unoccupied subunit (CA 55G). As outlined in Table 10, the San Diego Bay Natural Resources Plan outlines numerous measures which benefit the Pacific Coast WSP including measures in currently unoccupied areas such as in subunit CA 55G. These measures include restoration of marginal habitat or areas currently not being used by the plover. Furthermore, we determine that the additional regulatory benefits of designating critical habitat in the occupied subunit (CA 55E), such as protection afforded through the section 7(a)(2) consultation process, are minimal. We also conclude that the educational and ancillary benefits of designating the geographical areas containing the physical or biological features essential to the conservation of the Pacific WSP provided by the San Diego Bay Natural Resources Plan would be negligible because of the partnership established between the Service and the Port of San Diego and the management objectives identified in the San Diego Bay Natural Resources Plan. Therefore, in consideration of the relevant impact to current and future partnerships, as summarized in the *Benefits of Exclusion* section above, we determined the significant benefits of exclusion outweigh the minor benefits of critical habitat designation.

Exclusion Will Not Result in Extinction of the Species—San Diego Bay Natural Resources Plan

We determined that the exclusion of 63 ac (25 ha) from the designation of critical habitat for the Pacific Coast WSP of lands owned and managed by the Port of San Diego, as identified in the San Diego Bay Natural Resources Plan will not result in extinction of the species because current conservation efforts under the plan adequately protect the geographical areas containing the physical or biological features essential to the conservation of the species. For projects affecting plovers in occupied areas, the jeopardy standard of section 7 of the Act, coupled with protection provided by the San Diego Bay Natural Resources Plan, provide assurances that this species will not go extinct as a result of excluding these lands from the critical habitat designation. Based on the above

discussion, the Secretary is exercising his discretion under section 4(b)(2) of the Act to exclude from this final critical habitat designation a portion of proposed subunits within San Diego Bay (Sweetwater Marsh NWR and D Street Fill (CA 55E) and Chula Vista Wildlife Reserve (CA 55G)) that are addressed by the San Diego Bay Natural Resources Plan, totaling 63 ac (25 ha) of land. We also anticipate that the expected revisions to the existing San Diego Bay Natural Resources Plan will provide an even greater conservation benefit to the Pacific Coast WSP and its habitat due to our close working relationship with the Port of San Diego.

Tribal Lands—Exclusions Under Section 4(b)(2) of the Act

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951); Executive Order 13175; and the relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2), we coordinate with federally-recognized Tribes on a government-to-government basis. Further, Secretarial Order 3206, ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act'' (1997) states that (1) critical habitat shall not be designated in areas that may impact tribal trust resources, may impact tribally-owned fee lands, or are used to exercise tribal rights unless it is determined essential to conserve a listed species; and (2) in designating critical habitat, the Service shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.

Habitat on tribal lands was determined to be essential to the conservation of Pacific Coast WSP due to its location within the matrix of habitat available for Pacific Coast WSP. Because Pacific Coast WSPs move between coastal sites based on site condition and season, connectivity among and within habitats is essential for long-term persistence and recovery of the Pacific Coast WSP. Beach and intertidal habitat on or adjacent to tribal lands were determined to be important to maintain nesting, foraging, and roosting habitat, and to maintain connectivity between breeding and wintering habitats. The longstanding and distinctive relationship between 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. Accordingly, we are obligated to consult with Tribes based on their unique relationship with the Federal government. In addition, we evaluate Tribes' past and ongoing efforts for species conservation and the benefits of including or excluding tribal lands in the designation under section 4(b)(2) of the Act.

We contacted all tribes potentially affected by the revised proposed designation and met with the Shoalwater Bay Tribe to discuss their ongoing and future management strategies for Pacific Coast WSP. We subsequently received a letter from the Shoalwater Bay Tribe describing ongoing tribal management, conservation efforts, and tribal coordination with the USACE. In their letter to us, the Shoalwater Bay Tribe stated that they do not participate in nontribal habitat designation processes (*i.e.,* process to designate critical habitat under the Act). The Tribe requested a section 4(b)(2) exclusion under the Act.

We determined approximately 425 ac (172 ha) of lands owned by, or under the jurisdiction of, the Tribe contained biological features essential to the conservation of the Pacific Coast WSP, and therefore meet the definition of critical habitat under the Act. These tribal lands are located in subunit WA 3B. In making our final decision with regard to the designation of critical habitat for the Pacific Coast WSP on these tribal lands, we considered several factors, including Secretarial Order 3206, Executive Order 13175, the President's memorandum on ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951; April 29, 1994), conservation measures in place on these lands that may benefit the Pacific Coast WSP, economic impacts to tribes, our relationship with tribes, and impacts to current and future partnerships with the Shoalwater Bay Indian Tribe and other tribes we coordinate with on endangered and threatened species issues. Under section 4(b)(2) of the Act, the Secretary is exercising his discretion to exclude approximately 425 ac (172 ha) of tribal land from this revised final critical habitat designation. As described in our analysis below, this conclusion was reached after considering the relevant impacts of specifying these areas as critical habitat.

Shoalwater Bay Indian Tribe

The Shoalwater Bay Indian Tribe (Tribe) is a Federally-recognized tribe with a relatively small (approximately one square mile) reservation in Pacific County, Washington. Lands within the Shoalwater Bay Indian Reservation boundary include upland forested terrestrial habitats, a small residential and commercial area, and coastal marine habitats. Critical habitat for the Pacific Coast WSP was proposed in the portion of the reservation with coastal beaches as part of unit WA 3B. Through our ongoing coordination with the Tribe, we have established a partnership that has benefitted natural resource management on tribal lands. For our 4(b)(2) balancing analysis, we considered our partnership with the Tribe and, therefore, analyzed the benefits of including and excluding those lands under the sovereign control of the Tribe that met the definition of critical habitat.

Existing tribal regulations, including the 2001 Tribal Environmental Codes that protect the saltmarsh and sand spit as natural areas, will ensure any land use actions, including those funded, authorized, or carried out by Federal agencies, are not likely to result in the destruction or adverse modification of all lands considered for exclusion. The Tribe coordinates with the Service on all actions that have the potential to affect habitat for listed species on the reservation, including the Pacific Coast WSP. In 2003, the Service completed a Planning Aid Letter, and in 2006, we wrote a Fish and Wildlife Coordination Act Report for the USACE (Shoalwater Bay Indian Tribe is the project sponsor) on the proposed Shoalwater Coastal Erosion Project, which entails beach nourishment along the sand spit used by the Pacific Coast WSP. We completed a section 7 consultation for this project in 2007. The Service coordinated with the Tribe and USACE on the project design. We are actively working with these partners in implementation of the project to avoid or minimize impacts to current Pacific Coast WSP nesting habitat. Since surveys were conducted and nesting was confirmed in 2006, the Tribe has played an active role in surveying for and protecting habitat for the Pacific Coast WSP. In an email, dated June 9, 2011, to the Service, the USACE indicated that they were in the process of developing a Snowy Plover Management Plan as part of the beach nourishment and coastal erosion project. In an August 31, 2011, letter to

the Service, the Tribe confirmed that they will continue to use their existing regulatory structure to ''provide habitat protection for the Pacific Coast WSP'' and ''keep trespassers off those areas considered most important to the species,'' and references the USACE's intent to ''develop a Pacific Coast WSP habitat protection plan as part of the erosion control project.'' The Tribe and Service are coordinating with the USACE on drafting the habitat protection plan and implementation of the project, which is scheduled to start in late summer 2012 (pending surveys for the Pacific Coast WSP). We are also coordinating with the Tribe and the USACE on the planting/vegetation management plan. We are currently working on a memorandum of understanding with the Tribe regarding plover protection. Any potential impacts to the Pacific Coast WSP from future proposed activities on the tribal lands will be addressed through a section 7 consultation using the jeopardy standard, and such activities would also be subject to the take prohibitions in section 9 of the Act.

Benefits of Inclusion—Shoalwater Bay Tribe

The main benefit of any designated critical habitat is that Federal activities will require section 7 consultations to ensure that adequate protection is provided to avoid adverse modification or destruction of critical habitat. This would provide an additional benefit beyond that provided under the jeopardy standard. In evaluating project effects on critical habitat, the Service must be satisfied that the PCEs and, therefore, the essential features of the critical habitat likely will not be altered or destroyed by proposed activities to the extent that the conservation of the affected species would be appreciably reduced. If critical habitat were designated in areas of unoccupied habitat or currently occupied areas subsequently become unoccupied, different outcomes or requirements are also likely because effects to unoccupied areas of critical habitat are not likely to trigger the need for a jeopardy analysis.

In *Sierra Club* v. *Fish and Wildlife Service,* 245 F.3d 434 (5th Cir. 2001), the Fifth Circuit Court of Appeals stated that the identification of habitat essential to the conservation of the species can provide informational benefits to the public, State and local governments, scientific organizations, and Federal agencies. The court also noted that critical habitat designation may focus and heighten public awareness of the plight of listed species and their habitats. Designation of critical habitat may contribute to conservation efforts by other parties by delineating areas of high conservation value for the Pacific Coast WSP.

The primary benefit of including an area in a critical habitat designation is the requirement for Federal agencies to ensure actions they fund, authorize, or carry out are not likely to result in the destruction or adverse modification of any designated critical habitat, the regulatory standard of section 7(a)(2) of the Act under which consultation is completed. Federal agencies must also consult with us on actions that may affect a listed species and refrain from undertaking actions that are likely to jeopardize the continued existence of such species. The analysis of effects of a proposed project on critical habitat is separate and different from that of the effects of a proposed project on the species itself. The jeopardy analysis evaluates the action's impact to survival and recovery of the species, while the destruction or adverse modification analysis evaluates the action's effects to the designated habitat's contribution to conservation. Therefore, the difference in outcomes of these two analyses represents the regulatory benefit of critical habitat. This will, in many instances, lead to different results and different regulatory requirements. Thus, critical habitat designations may provide greater benefits to the recovery of a species than listing alone would do. However, for some species, and in some locations, the outcome of these analyses will be similar, because effects to habitat will often also result in effects to the species.

Public education is often cited as another possible benefit of including lands in critical habitat as it may help focus conservation efforts on areas of high value for certain species. Partnership efforts with the Shoalwater Bay Indian Tribe to conserve the Pacific Coast WSP and other coastal species of concern have resulted in heightened awareness about the species.

The designation of critical habitat for the Pacific Coast WSP may strengthen or reinforce some Federal laws, such as NEPA or Clean Water Act. These laws analyze the potential for projects to significantly affect the environment. Critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental law.

Benefits of Exclusion—Shoalwater Bay Tribe

Under Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, we recognize that we must carry out our responsibilities under the Act in a manner that harmonizes the Federal trust responsibility to tribes and tribal sovereignty while striving to ensure that tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation. In accordance with the Presidential memorandums of April 29, 1994, and November 9, 2009, to the maximum extent possible, tribes are the appropriate governmental entities to manage their lands and tribal trust resources, and we are responsible for strengthening government-to-government relationships with tribes. Federal regulation through critical habitat designation may affect the tribal working relationships we now have and which we are strengthening throughout the United States. Maintaining positive working relationships with tribes is key to implementing natural resource programs of mutual interest, including habitat conservation planning efforts. In light of the above-mentioned orders and for a variety of other reasons described in their comment letters and communications, critical habitat designation is typically viewed by tribes as an unwarranted and unwanted intrusion into tribal self-governance.

In the case of the Pacific Coast WSP proposed critical habitat, the Shoalwater Bay Indian Tribe submitted a letter and email (August 31, 2011) requesting to be excluded from the critical habitat designation. In their letter, they stated that the Tribe ''continues to demonstrate its desire to protect threatened and/or endangered species through its management and stewardship capabilities'' without ''externally defined designated critical habitat designations.'' The Tribe stated that they wish to make ''their own determinations regarding the Reservation and tribal trust resources'' and ''are pleased that the Tribe has been able to provide for the Pacific Coast WSP and steps are being taken to continue that effort in the most effective way possible'' (letter prepared by Gary Burns, Environmental Program Director and signed by the Tribal Council Chairperson). These communications clearly indicate that designation of tribal lands as critical habitat for Pacific Coast WSP would impact future conservation partnership opportunities with the Tribe. Therefore, a critical habitat designation could potentially damage our relationship with the Shoalwater Bay Indian Tribe. The commitment by the Tribe to restore habitat for this

native plant and efforts to control invasive species such as smooth cordgrass (*Spartina alterniflora*) supports their commitment to protect habitat for the Pacific Coast WSP and strengthens the ongoing partnership with the Service. In their comments to the Service on the proposed rule, the Tribe indicated they would use their existing regulations to protect the Pacific Coast WSP and its habitat.

Significant benefits would be realized by forgoing designation of critical habitat on lands managed by the Shoalwater Bay Indian Tribe. These benefits include:

(1) Continuing and strengthening of our effective relationship with the Tribe to promote conservation of Pacific Coast WSP and its habitat; and

(2) Allowing continued meaningful collaboration and cooperation in working toward recovering this species, including conservation actions that might not otherwise occur.

The Shoalwater Bay Indian Tribe coordinates regularly with the Washington State Department of Fish and Wildlife on annual surveys for the Pacific Coast WSP and is partnering with the Service (Willapa National Wildlife Refuge and Ecological Services) to control nonnative/invasive species and restore habitat for the Pacific Coast WSP and other coastal species on the outer beach. Service coordination includes attending meetings with tribal representatives to discuss ongoing projects, management plans, and other issues as that arise.

Because the Tribe is the entity that enforces protective regulations on tribal land, and we have a working relationship with them, exclusion of these lands will yield a significant partnership benefit. We will continue to work cooperatively with the Tribe on efforts to conserve the Pacific Coast WSP. Therefore, excluding these lands from critical habitat provides the significant benefit of maintaining and strengthening our existing conservation partnerships and the potential of fostering new tribal partnerships.

Benefits of Exclusion Outweigh Benefits of Inclusion—Shoalwater Bay Tribe

Based on the above considerations and consistent with the direction provided in section 4(b)(2) of the Act, the Service has determined that the benefits of excluding the above tribal lands outweigh the benefits of including them as critical habitat. This conclusion is based on the following factors. The tribal lands considered for exclusion are currently occupied by Pacific Coast WSPs and will be subject to the consultation requirements of the Act in the future. Although a jeopardy and adverse modification analysis must satisfy two different standards, because any modifications to proposed actions resulting from a section 7 consultation to minimize or avoid impacts to the Pacific Coast WSP will be habitat-based, it is likely that measures implemented to minimize impacts to the critical habitat will also minimize impacts to the Pacific Coast WSP. Therefore, in the case of the Pacific Coast WSP, the benefits of critical habitat designation are very similar to the benefits of listing, and in some respects would be indistinguishable from the benefits of listing. Few additional benefits are provided by including these tribal lands in this critical habitat designation beyond what will be achieved through the implementation of the existing tribal management or conservation plans. In addition, we expect that the benefit of informing the public of the importance of this area to Pacific Coast WSP conservation would be low. Inclusion of tribal lands will not significantly improve habitat protections for Pacific Coast WSP beyond what is already provided for in the Tribe's own protective policies and practices, discussed above.

Given the cooperative relationship between the Shoalwater Bay Indian Tribe and the Service, and all of the conservation benefits taken together, the additional regulatory and educational benefits of including the tribal lands as critical habitat are relatively small. The designation of critical habitat can serve to educate the public regarding the potential conservation value of an area, but this goal is already being accomplished through the identification of these areas in the tribal management planning, development of tribal Fish and Wildlife Codes, and through their outreach efforts.

Because of the ongoing relationship between the Service and the Shoalwater Bay Indian Tribe through a variety of forums, we find the benefits of these coordination efforts to be greater than the benefits of applying the Act's section 7 consultations for critical habitat to Federal activities on tribal lands. Based upon our consultations with the Tribes, designation of tribal lands as critical habitat would adversely impact our working relationship and the benefits resulting from this relationship.

In contrast, although the benefits of encouraging tribal participation in resource management planning may be indirect, enthusiastic tribal participation and an atmosphere of cooperation are crucial to the long-term effectiveness of implementing successful endangered species conservation programs. Also, we have concluded that the Tribe's voluntary conservation efforts will provide tangible conservation benefits that will reduce the likelihood of extinction and increase the likelihood for Pacific Coast WSP recovery. Therefore, we assign great weight to these benefits of exclusion. To the extent that there are regulatory benefits of including tribal lands in critical habitat, there would be associated costs that could be avoided by excluding the area from designation. As we expect the regulatory benefits to be low, we likewise give weight to avoidance of those associated costs, as well as the additional transaction costs related to section 7 compliance.

We reviewed and evaluated the benefits of inclusion and the benefits of exclusion of Shoalwater Bay Indian tribal lands as critical habitat for the Pacific Coast WSP. Past, present, and future coordination with the Shoalwater Bay Indian Tribe has provided and will continue to provide Pacific Coast WSP habitat conservation needs on tribal lands, such that there would be no additional benefit from designation of critical habitat. Further, because any potential impacts to the Pacific Coast WSP from future projects will be addressed through a section 7 consultation with us under the jeopardy standard, critical habitat designation on the Shoalwater Bay Indian Reservation would largely be redundant with the combined benefits of listing and existing tribal regulations and management. Therefore, the benefits of designating critical habitat on tribal lands are not significant.

On the other hand, the benefits of excluding the Shoalwater Bay Indian Reservation from critical habitat are significant. Exclusion of these lands from critical habitat will help preserve and strengthen the conservation partnership we have developed with the Tribe and will foster future partnerships and development of management plans; inclusion, however, would negatively impact our relationships with the Tribe and other tribes. We are committed to working with the Shoalwater Bay Indian Tribe to further the conservation of the Pacific Coast WSP and other endangered and threatened species on the reservation. The Tribe will continue to use their existing regulatory structure to protect Pacific Coast WSP and its habitat. The Tribe continues to provide for indirect conservation of Pacific Coast WSP habitat by implementing conservation measures for other coastal species that use some of the same habitat. Therefore, in consideration of the relevant impact to our partnership and our government-to-government

relationship with the Shoalwater Indian Bay Tribe, and the ongoing conservation management practices of the Tribe and our current and future conservation partnerships with them, we determined the significant benefits of exclusion outweigh the benefits of inclusion in the critical habitat designation.

In summary, we find that excluding the Shoalwater Bay Indian tribal lands from this revised final critical habitat will preserve our partnership and may foster future habitat management and species conservation plans with the Tribe and with other tribes now and in the future. These partnership benefits are significant and outweigh the additional regulatory benefits of including these lands in final critical habitat for the Pacific Coast WSP. As a result, the regulatory benefits of critical habitat designation on tribal land would largely be redundant with the combined benefits of listing and existing tribal regulations.

Exclusion Will Not Result in Extinction of the Species—Shoalwater Bay Tribe

We determined that the exclusion of 425 ac (172 ha) of tribal lands from the designation of Pacific Coast WSP critical habitat will not result in extinction of the species. The jeopardy standard of section 7 of the Act and routine implementation of conservation measures through the section 7 process due to Pacific Coast WSP occupancy and protection provided by under Title 23 of the Tribal Environmental Ordinances provide assurances that this species will not go extinct as a result of excluding these lands from the critical habitat designation. Therefore, based on the above discussion the Secretary is exercising his discretion to exclude approximately 425 ac (172 ha) of tribal lands managed by the Shoalwater Bay Indian Tribe from this final critical habitat designation.

Required Determinations

Regulatory Planning and Review—Executive Orders 12866 and 13563

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. The OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C. 801 *et seq.*), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. In this final rule, we are certifying that the revised critical habitat designation for the Pacific Coast WSP will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; as well as small businesses. Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this rule, as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

To determine if the rule could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (*e.g.,* development industry, recreation, mining). We apply the ''substantial number'' test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define ''substantial number'' or ''significant economic impact.'' Consequently, to assess whether a ''substantial number'' of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities authorized, funded, or carried out by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they authorize, fund, or carry out that may affect the Pacific Coast WSP. Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities (see *Application of the ''Adverse Modification Standard''* section).

In our final economic analysis of the critical habitat designation, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the listing of the Pacific Coast WSP and the designation of critical habitat. The analysis is based on the estimated impacts associated with the rulemaking as described in Chapters 1 through 5 and Appendix A of the analysis and evaluates the potential for economic

impacts related to: (1) Recreation; (2) commercial and residential development; (3) gravel mining; (4) military activities; and (5) habitat and species management (IEc 2012).

In the FEA of the revised proposed critical habitat, we evaluate the potential economic effects on small business entities resulting from implementation of conservation actions related to the proposed revisions to critical habitat for the Pacific Coast WSP. The FEA is based on the estimated incremental impacts associated with the proposed rulemaking as described in Chapter 4. The FEA evaluates the potential for direct economic impacts related to activity categories identified above as well as for indirect impacts related to CEQA, uncertainty, and delay. The FEA concludes that the incremental impacts resulting from this rulemaking that may be borne by small businesses will be associated only with recreation. Incremental impacts are either not expected for the other types of activities considered or, if expected, will not be borne by small entities.

As discussed in Appendix A of the FEA, Exhibit A–1 describes the non-Federal entities that may be affected by critical habitat designation and assesses whether they are considered small entities under the RFA. The State of California (CDPR), Santa Barbara County, Monterey County, Santa Cruz County, and City of Coronado will participate in the future consultations with the Service. Of these entities, only the City of Coronado meets the RFA's definition of a small governmental jurisdiction. Third-party administrative costs for the City of Coronado are expected to be $818 in 2012, assuming a 7 percent discount rate. This impact represents less than 0.01 percent of the City's annual revenues of $40.3 million. In addition, the FEA has identified the potential for critical habitat to possibly indirectly influence future litigation or State review of environmental permits within Oceano Dunes SVRA (Unit CA 31) and the two development projects in Sand City (Unit CA 22). Critical habitat may indirectly serve as a lever for future litigation aimed at reducing or eliminating OHV-recreation on the beach. Such action would indirectly affect recreators and businesses in the local community.

In summary, we considered whether this designation will result in a significant economic effect on a substantial number of small entities. Based on the above reasoning and currently available information, we concluded that this rule would not result in a significant economic impact on a substantial number of small entities. Therefore, we are certifying that the designation of critical habitat for Pacific Coast WSP will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute ''a significant adverse effect'' when compared to not taking the regulatory action under consideration.

The economic analysis finds that none of these criteria are relevant to this analysis. Thus, based on information in the economic analysis, energy-related impacts associated with Pacific Coast WSP conservation activities within critical habitat are not expected. As such, the designation of critical habitat is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

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

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments because it will not 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. The FEA concludes incremental impacts may occur due to project modifications that may need to be made for real estate development; however, these are not expected to significantly affect small governments. The City of Coronado has been identified as the only small government affected by the designation, and the total estimated cost associated with the designation is $818 in 2012, assuming a 7 percent discount rate. This impact represents less than 0.01 percent of the City's annual revenues of $40.3 million. Consequently, we do not believe that this revised final critical habitat

designation will significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (''Government Actions and Interference with Constitutionally Protected Private Property Rights''), we have analyzed the potential takings implications of designating revised critical habitat for the Pacific Coast WSP in a takings implications assessment. As discussed above, the designation of critical habitat affects only Federal actions. Although private parties that receive Federal funding, assistance, or require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. The FEA has identified that all the incremental costs are entirely administrative in nature. No incremental project modifications are anticipated to result from section 7 consultations with the majority of consultation costs being incurred by the Service and other Federal action agencies. Of the approximately 76 anticipated consultations over the 20-year period of analysis, only nine will involve third parties. The takings implications assessment concludes that this revised designation of critical habitat for the Pacific Coast WSP does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this rule does not have significant Federalism effects. A federalism impact summary statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this revised final critical habitat designation with appropriate State resource agencies in California, Oregon, and Washington. We did receive comments from State Park managers in both Oregon and California. The ORPD requested that lands under their approved HCP be excluded from designation. The CDPR commented that portions of Oceano Dunes SVRA should be excluded from designation; however, that park unit does not have an approved HCP or other management plan. The designation may have some benefit to these governments in that the areas that contain the physical or biological features essential to the conservation of the species are more clearly defined, and the elements of the features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the applicable standards as set forth in sections 3(a) and 3(b)(2) of the Order. We are designating revised critical habitat in accordance with the provisions of the Act. This revised final rule uses standard property descriptions in the preamble's critical habitat unit descriptions and identifies the elements of physical or biological features essential to the conservation of the Pacific Coast WSP within the designated areas to assist the public in understanding the habitat needs of the species.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (NEPA) (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the Circuit Court of Appeals of the United States for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld by the Court of Appeals of the United States for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), *cert. denied,* 516 U.S. 1042 (1996)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), E.O. 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

In the proposed revisions to critical habitat published in the **Federal Register** on March 22, 2011 (76 FR 16046), we proposed to designate 1,121 ac in subunit WA 3B Shoalwater/Graveyard Spit, of which we claimed approximately 336 ac (136 ha) to be within the Shoalwater Bay Tribal lands. After further review and additional information provided by the Shoalwater Bay Tribe, we have identified approximately 425 ac (172 ha) belonging to the Tribe and meeting the definition of critical habitat. We worked directly with the Tribe to determine economic and other burdens expected to result from critical habitat designation on tribal lands, and as a result of information exchanged, the Secretary is exercising his discretion to exclude all Shoalwater Bay Tribal lands meeting the definition of critical habitat for the Pacific Coast WSP from this final

revised designation under section 4(b)(2) of the Act (see Exclusions Under Section 4(b)(2) of the Act—Tribal Lands section above).

References Cited

A complete list of all references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Field Supervisor, Arcata Fish and Wildlife Office (see **ADDRESSES**).

Authors

The primary authors of this rule are staff of the Arcata Fish and Wildlife Office and Pacific Southwest Regional Office.

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 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 revising the entry for ''Plover, western snowy'' under BIRDS to read 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							
*	*	*	*	*	*		*
Plover, western snowy (Pacific Coast population DPS).	*Charadrius nivosus nivosus.*	Pacific Coast population DPS—U.S.A. (CA, OR, WA), Mexico.	Pacific Coast population DPS—U.S.A. (CA, OR, WA), Mexico (within 50 miles of Pacific coast).	T	493	17.95(b)	NA
*	*	*	*	*	*		*

■ 3. Amend § 17.95(b) by revising the entry for ''Western Snowy Plover (*Charadrius alexandrinus nivosus*)—Pacific Coast Population'' to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(b) *Birds.*

* * * * *

Western Snowy Plover (*Charadrius nivosus nivosus*)—Pacific Coast Population

(1) Critical habitat units are depicted for: Washington—Grays Harbor and Pacific Counties; Oregon—Clatsop, Tillamook, Lane, Douglas, Coos, and Curry Counties; and California—Del Norte, Humboldt, Mendocino, Marin, Napa, Alameda, San Mateo, Santa Cruz, Monterey, San Luis Obispo, Santa Barbara, Ventura, Los Angeles, Orange, and San Diego Counties, on the maps below.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of the Pacific Coast population of the western snowy plover are sandy beaches, dune systems immediately inland of an active beach face, salt flats, mud flats, seasonally exposed gravel bars, artificial salt ponds and adjoining levees, and dredge spoil sites, with:

(i) Areas that are below heavily vegetated areas or developed areas and above the daily high tides;

(ii) Shoreline habitat areas for feeding, with no or very sparse vegetation, that are between the annual low tide or low-water flow and annual high tide or high-water flow, subject to inundation but not constantly under water, that support small invertebrates, such as crabs, worms, flies, beetles, spiders, sand hoppers, clams, and ostracods, that are essential food sources;

(iii) Surf- or water-deposited organic debris, such as seaweed (including kelp and eelgrass) or driftwood located on open substrates that supports and attracts small invertebrates described in paragraph (ii) of this entry for food, and provides cover or shelter from predators and weather, and assists in avoidance of detection (crypsis) for nests, chicks, and incubating adults; and

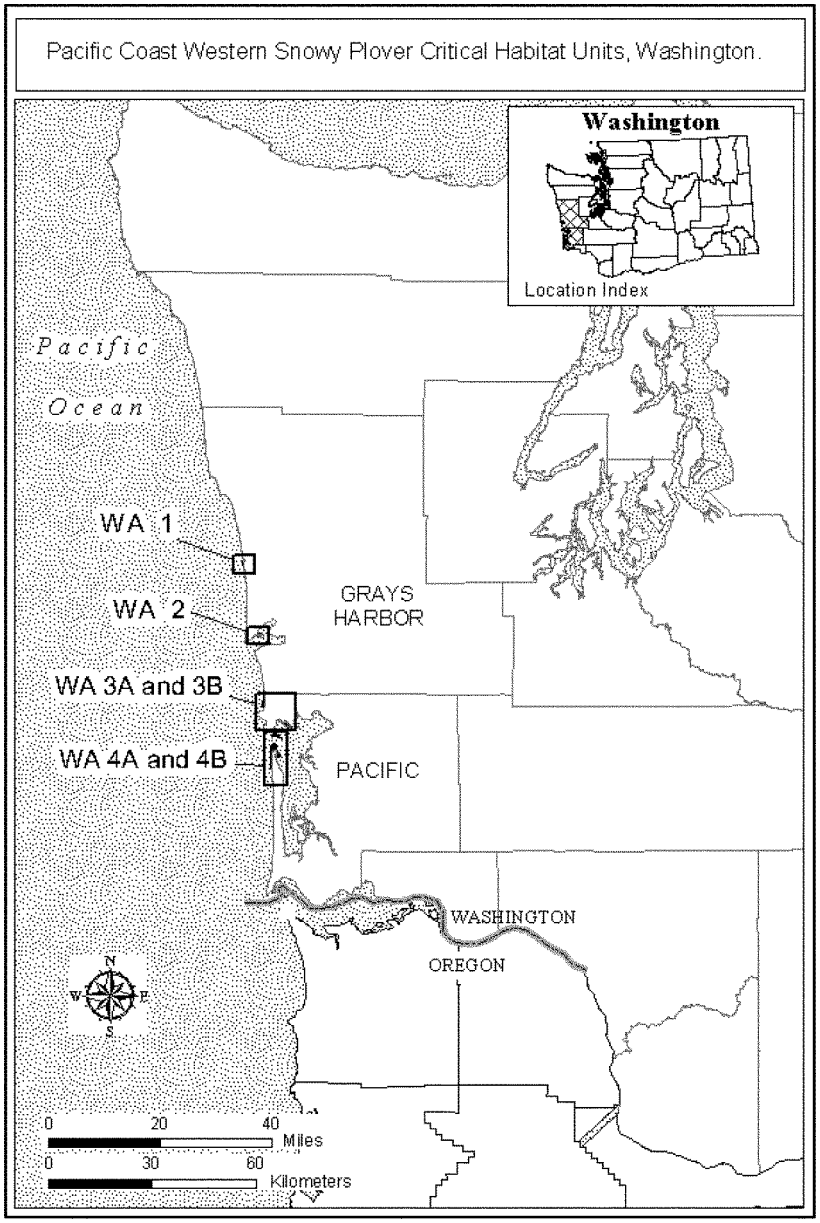
(iv) Minimal disturbance from the presence of humans, pets, vehicles, or human-attracted predators which provide relatively undisturbed areas for individual and population growth and for normal behavior.

(3) Critical habitat does not include manmade structures (such as buildings, roads, paved areas, boat ramps, and other developed areas) and the land on which such structures are directly located and existing within the legal boundaries on the effective date of this rule.

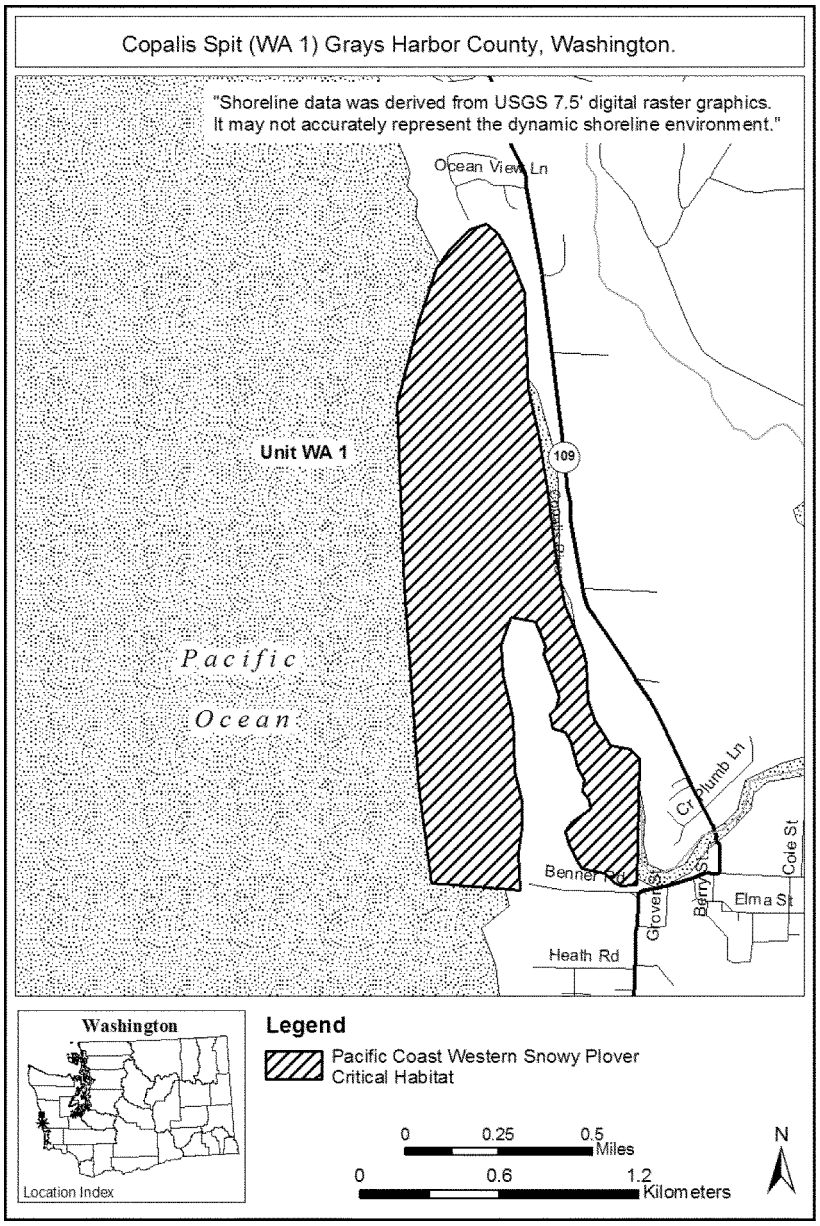
(4) *Critical habitat map units.* Data layers defining map units were created on a base of USGS digital ortho-photo quarter-quadrangles, and critical habitat units were then mapped using Universal Transverse Mercator (UTM) Zone 10N and 11N coordinates.

(5) The coordinates for these maps are available on the Internet at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2010–0070, at *http://www.fws.gov/arcata/,* or at the Arcata Fish and Wildlife Office, 1655 Heindon Road, Arcata, CA 95521.

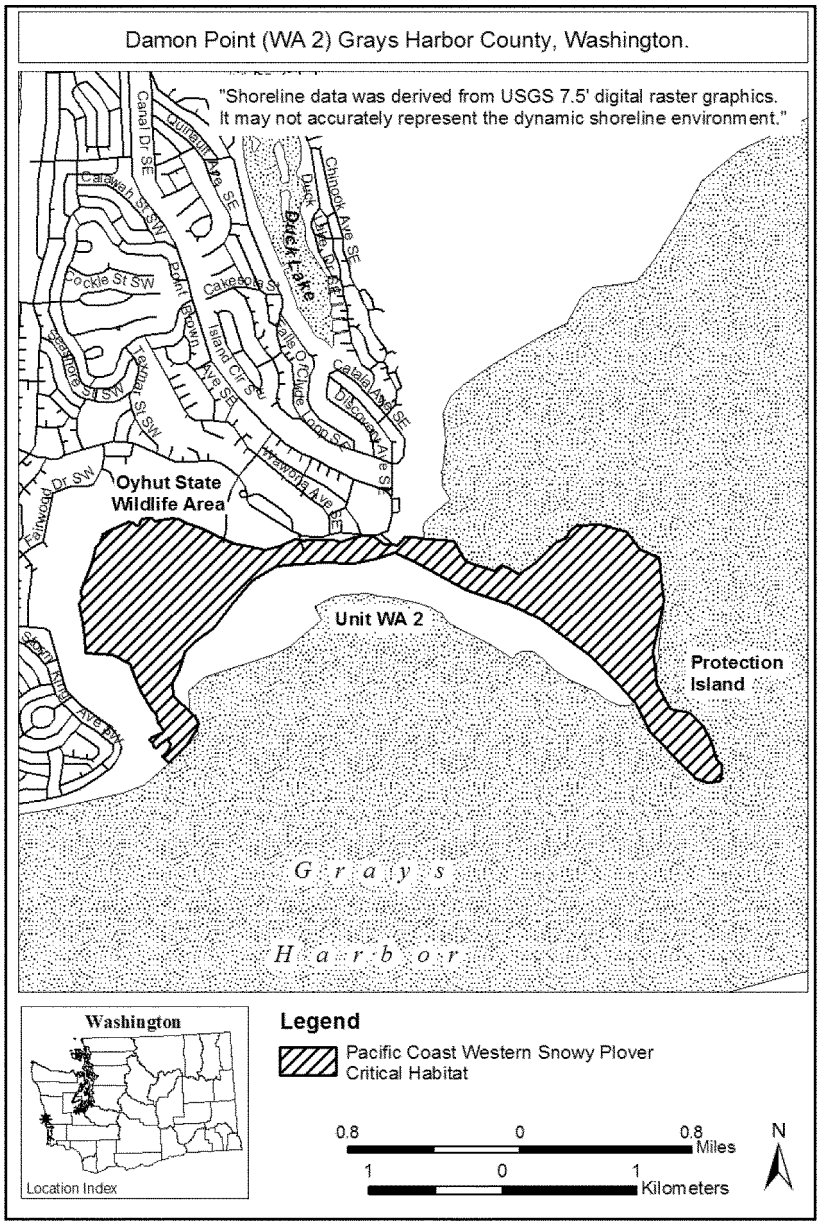
(6) Index map of critical habitat units for the Pacific Coast western snowy plover (*Charadrius nivosus nivosus*) in Washington follows:



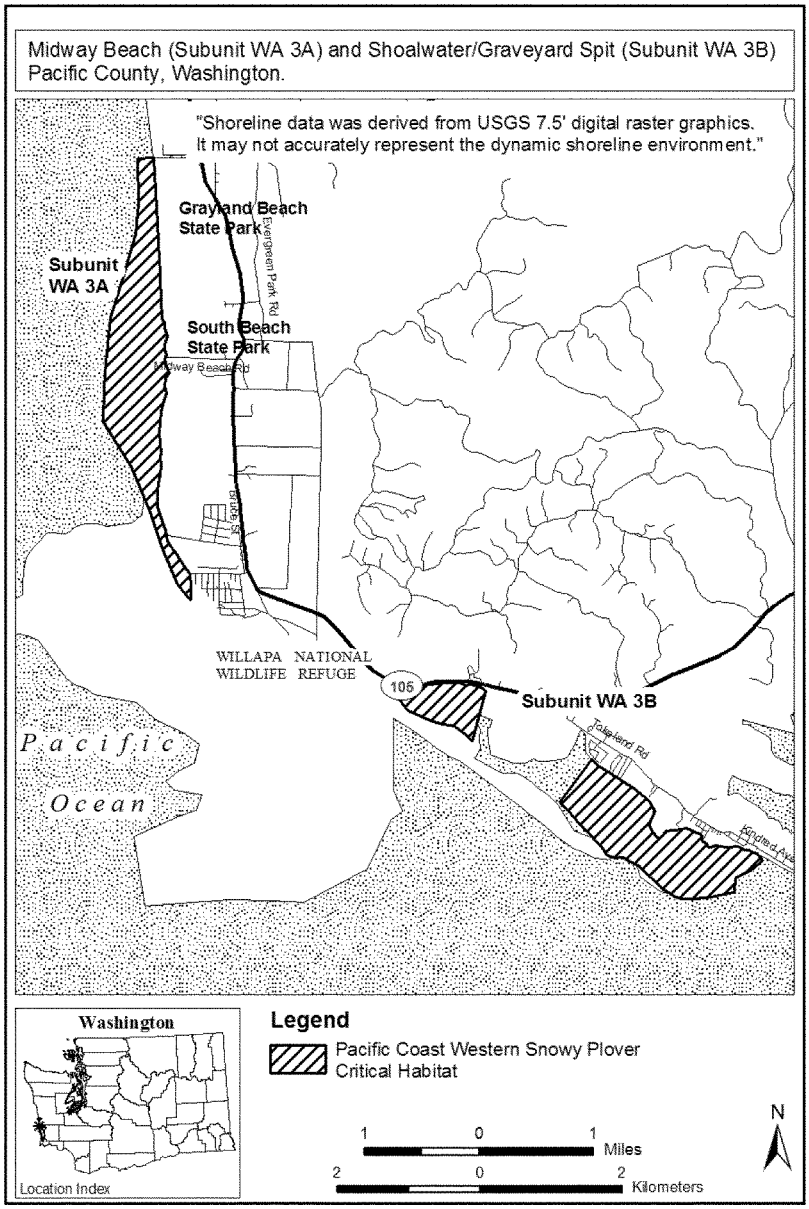
(7) Unit WA 1: Copalis Spit, Grays Harbor County, Washington. Map follows:



(8) Unit WA 2: Damon Point, Grays Harbor County, Washington. Map follows:

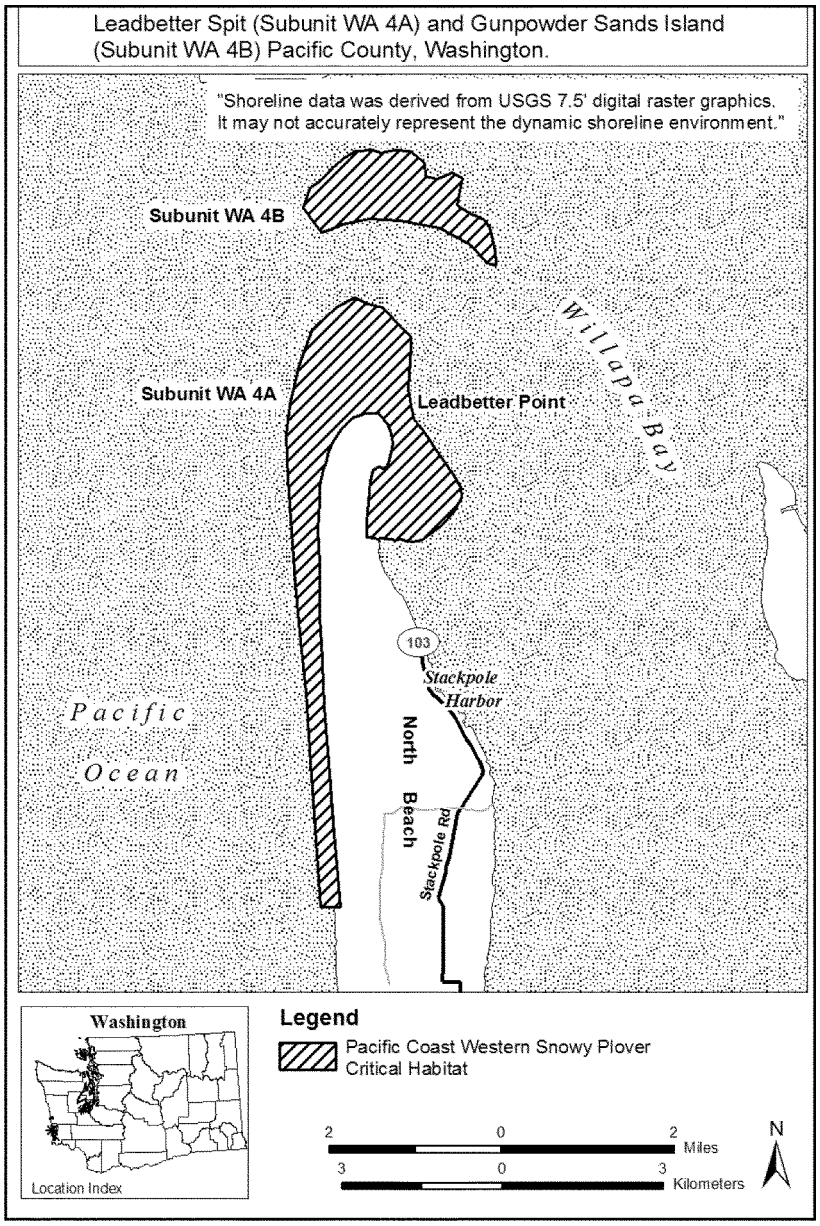


(9) Subunit WA 3A: Midway Beach, Pacific County, Washington. Map of Subunits WA 3A and WA 3B follows.



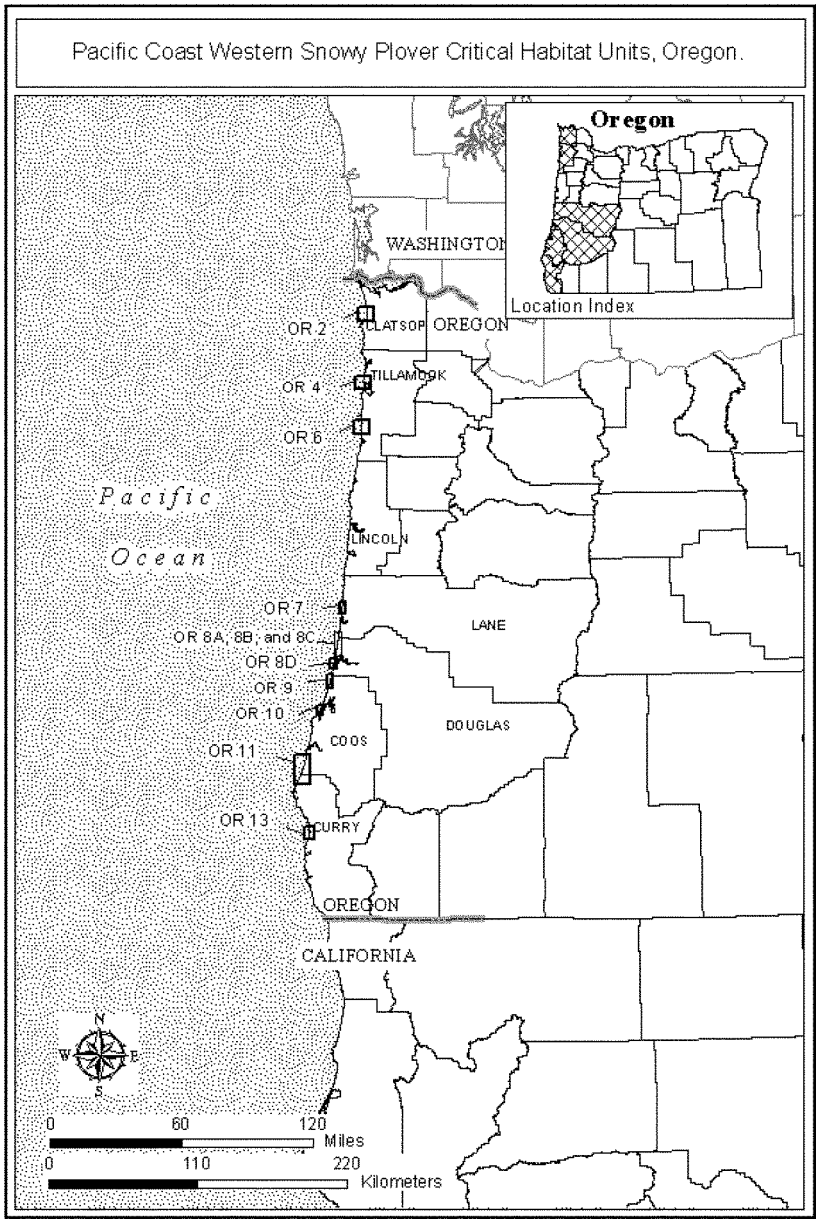
(10) Subunit WA 3B: Shoalwater/Graveyard Spit, Pacific County, Washington. Map of Subunits WA 3A and WA 3B is provided at paragraph (8) of this entry.

(11) Subunit WA 4A: Leadbetter Spit, Pacific County, Washington. Map of Subunits WA 4A and WA 4B follows.

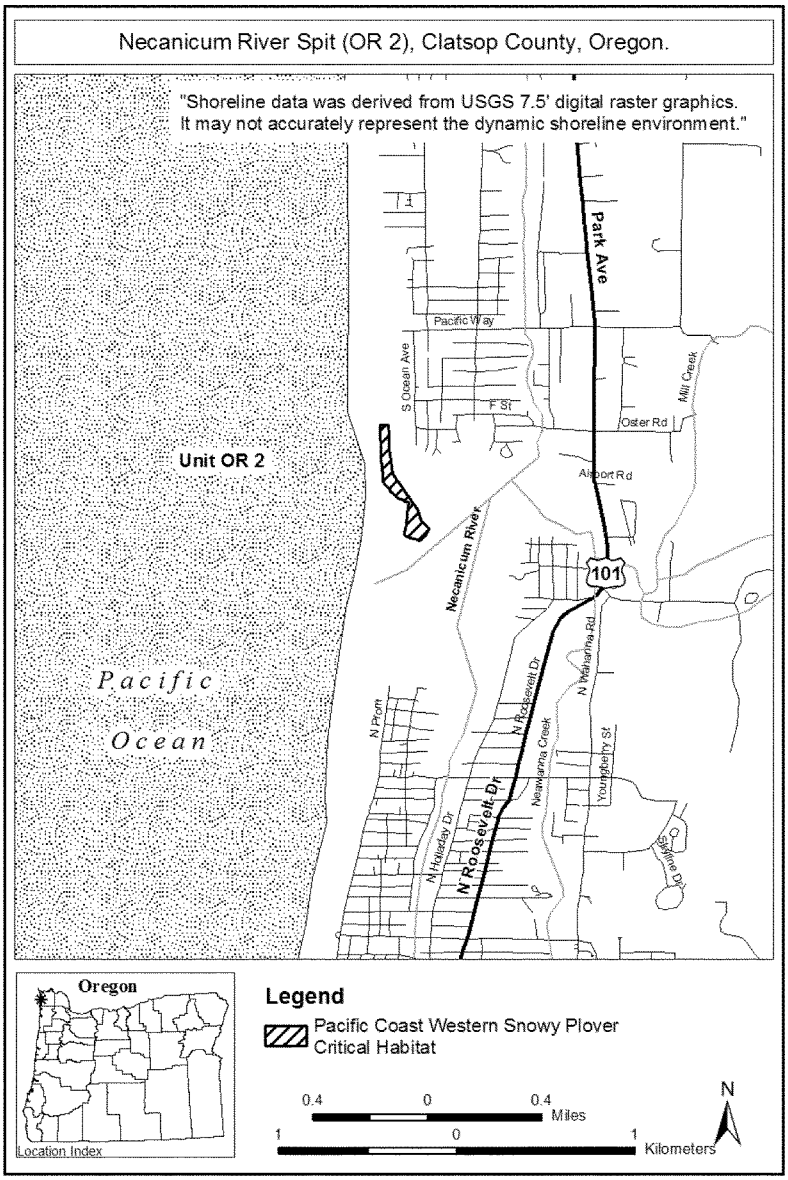


(12) Subunit WA 4B: Gunpowder Sands Island, Pacific County, Washington. Map of Subunits WA 4A and WA 4B is provided at paragraph (11) of this entry.

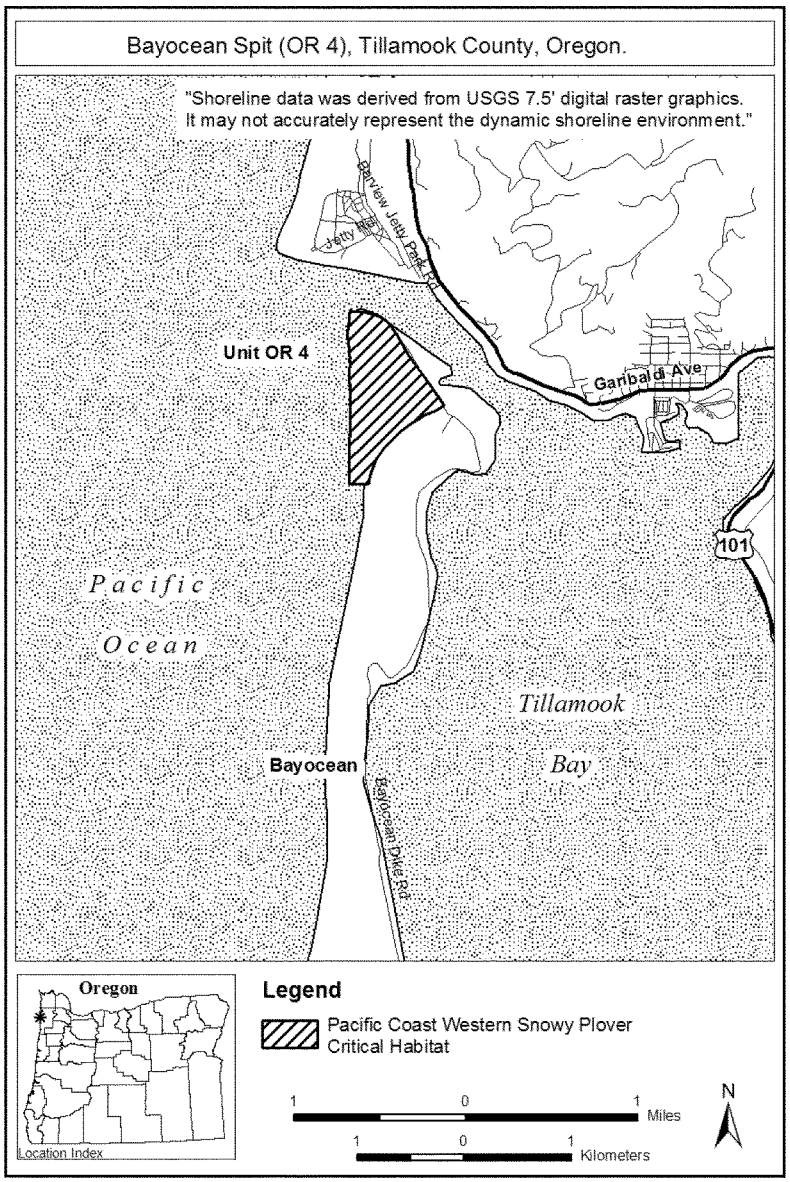
(13) Index map of critical habitat units for the Pacific Coast western snowy plover (*Charadrius nivosus nivosus*) in Oregon follows:



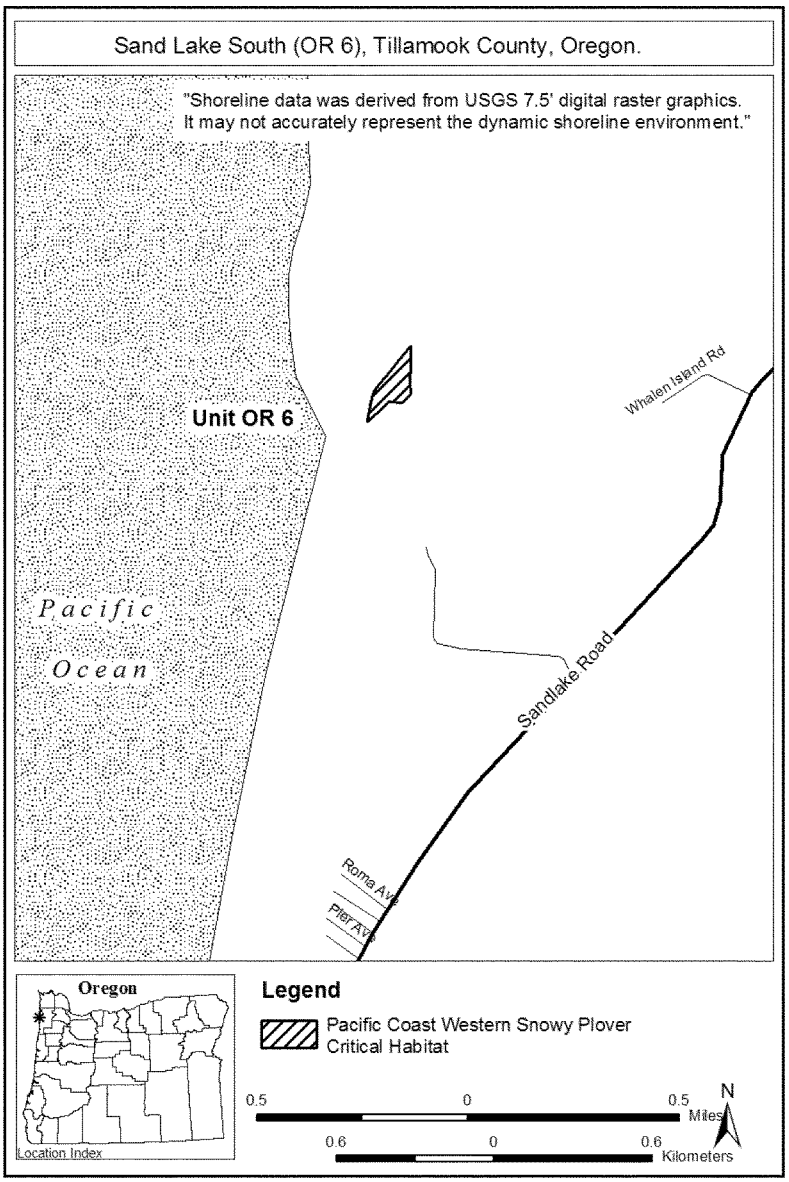
(14) Unit OR 2: Necanicum River Spit, Clatsop County, Oregon. Map follows:



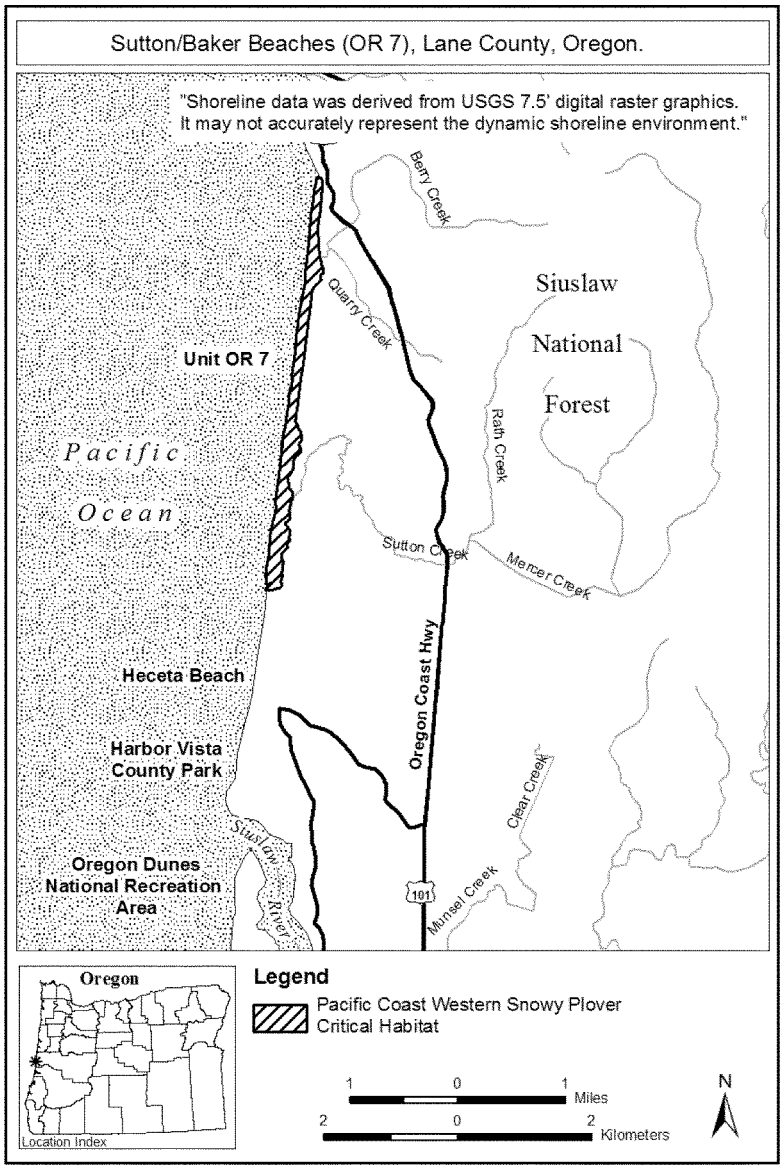
(15) Unit OR 4: Bayocean Spit, Tillamook County, Oregon. Map follows:



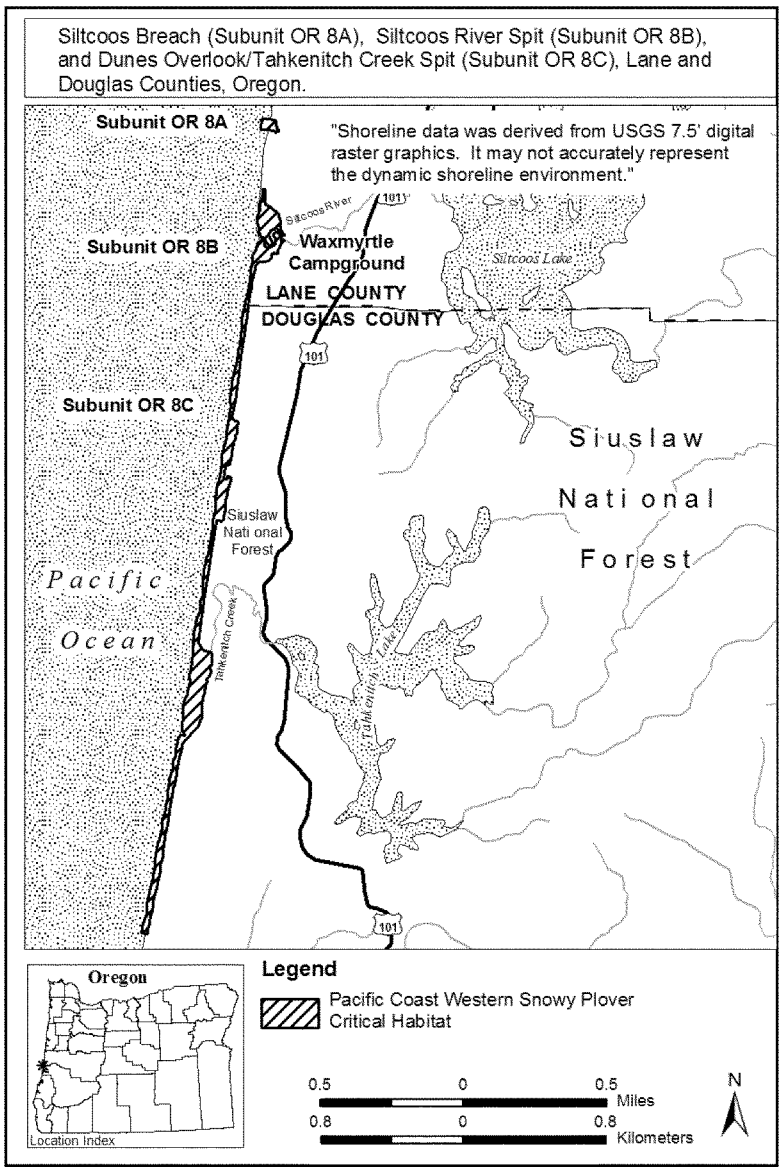
(16) Unit OR 6: Sand Lake South, Tillamook County, Oregon. Map follows:



(17) Unit OR 7: Sutton/Baker Beaches, Lane County, Oregon. Map follows:



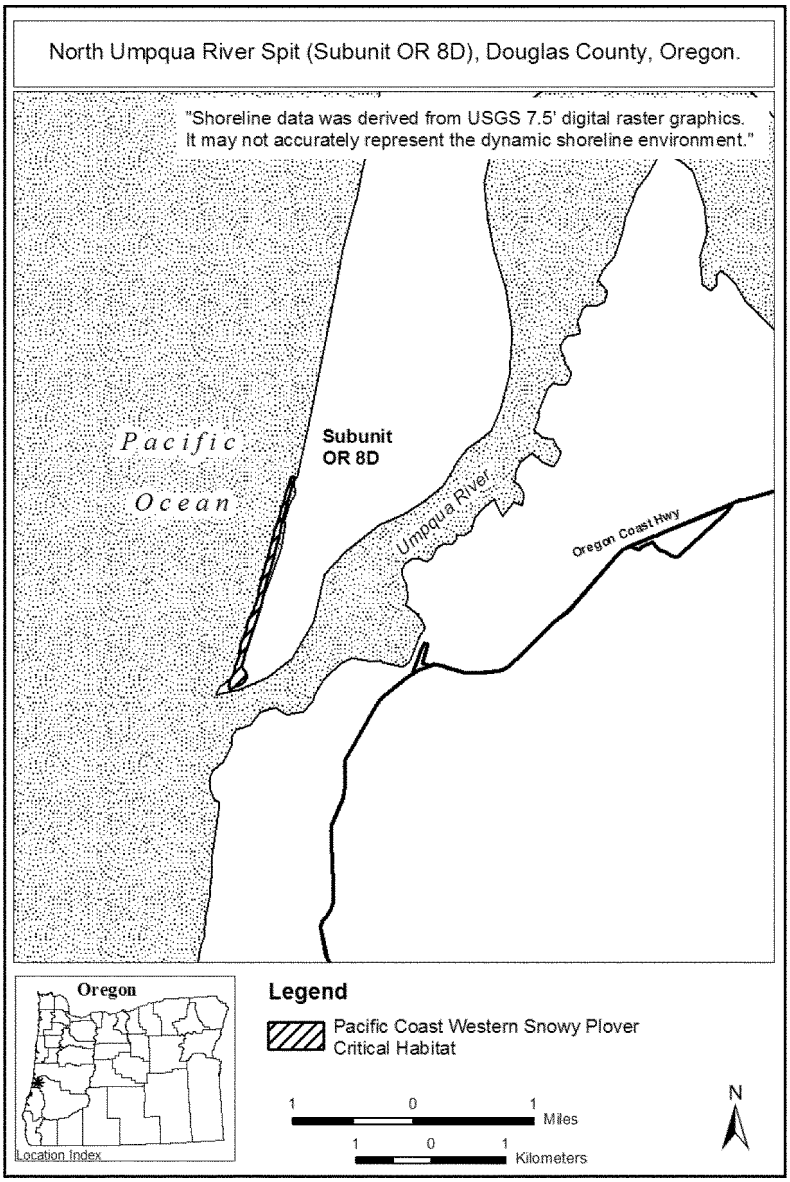
(18) Subunit OR 8A: Siltcoos Breach, Lane County, Oregon. Map of Subunits OR 8A, OR 8B, and OR 8C follows:



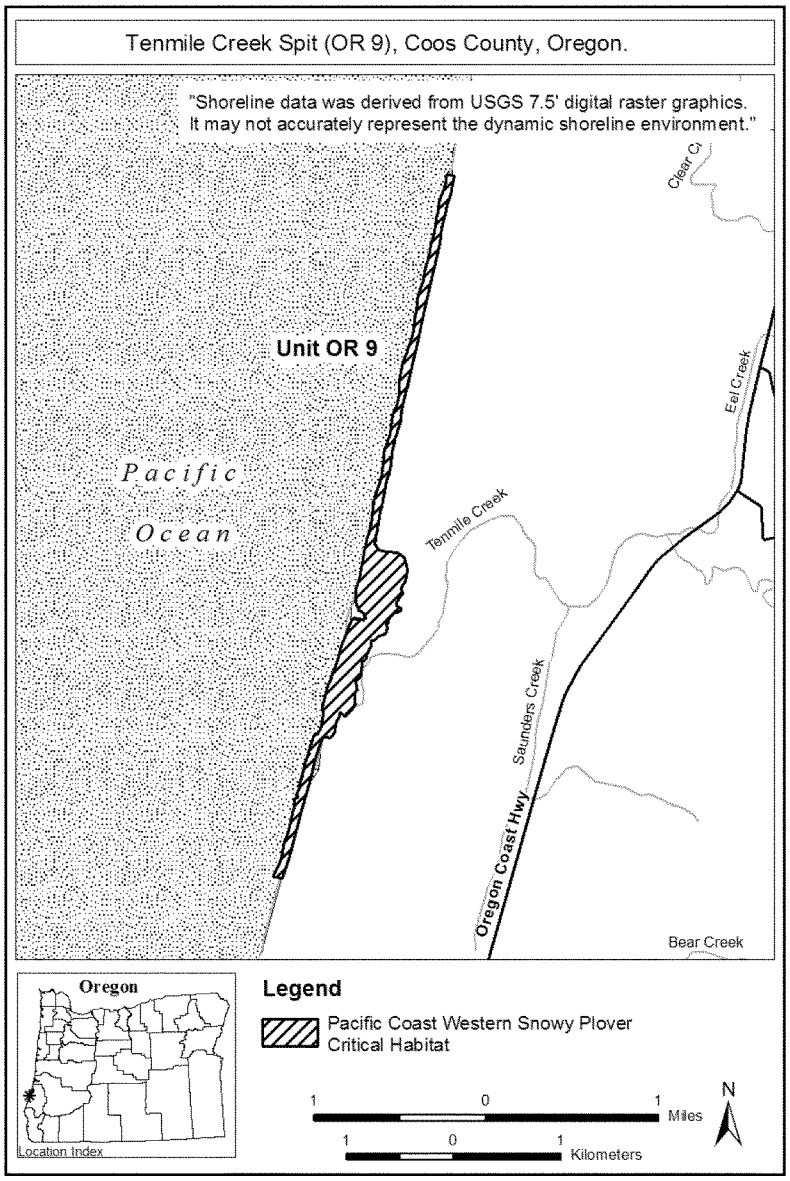
(19) Subunit OR 8B: Siltcoos River Spit, Douglas and Lane Counties, Oregon. Map of Subunits OR 8A, OR 8B, and OR 8C is provided at paragraph (18) of this entry.

(20) Subunit OR 8C: Dunes Overlook Tahkenitch Creek Spit, Douglas County, Oregon. Map of Subunits OR 8A, OR 8B, and OR 8C is provided at paragraph (18) of this entry.

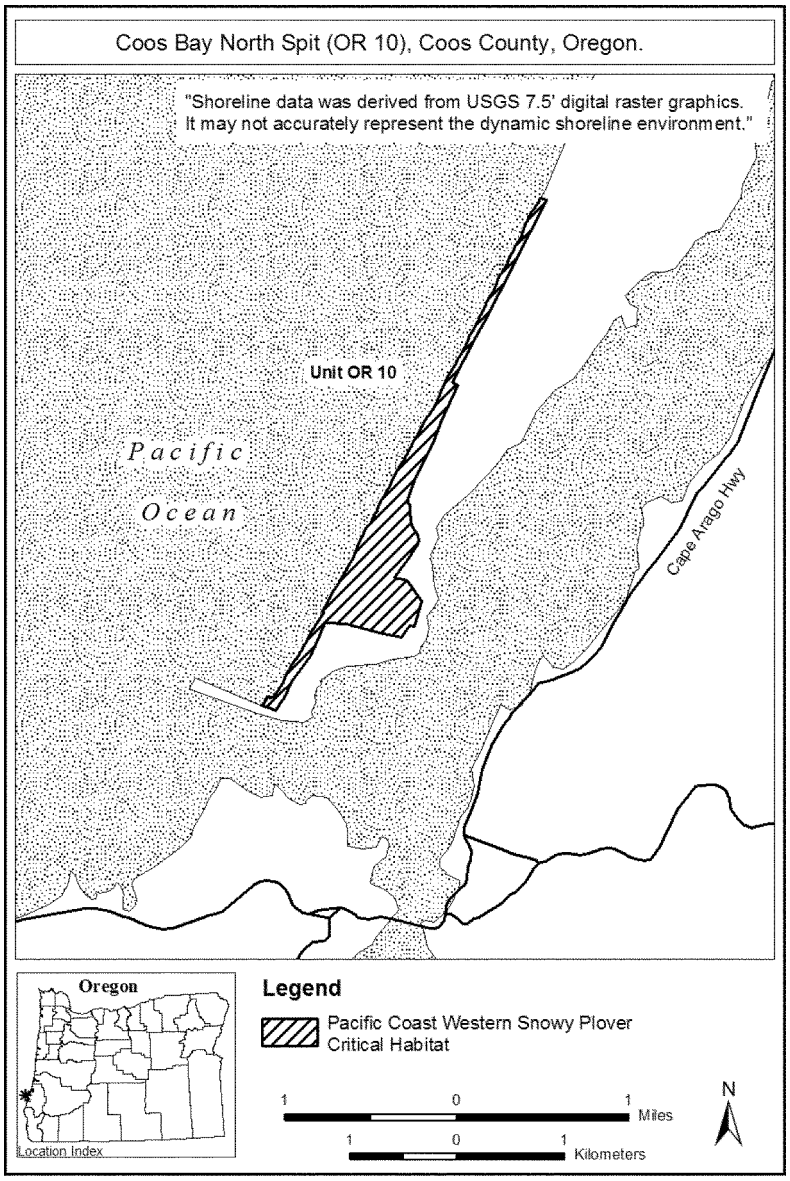
(21) Subunit OR 8D: North Umpqua River Spit, Douglas County, Oregon.
Map follows:



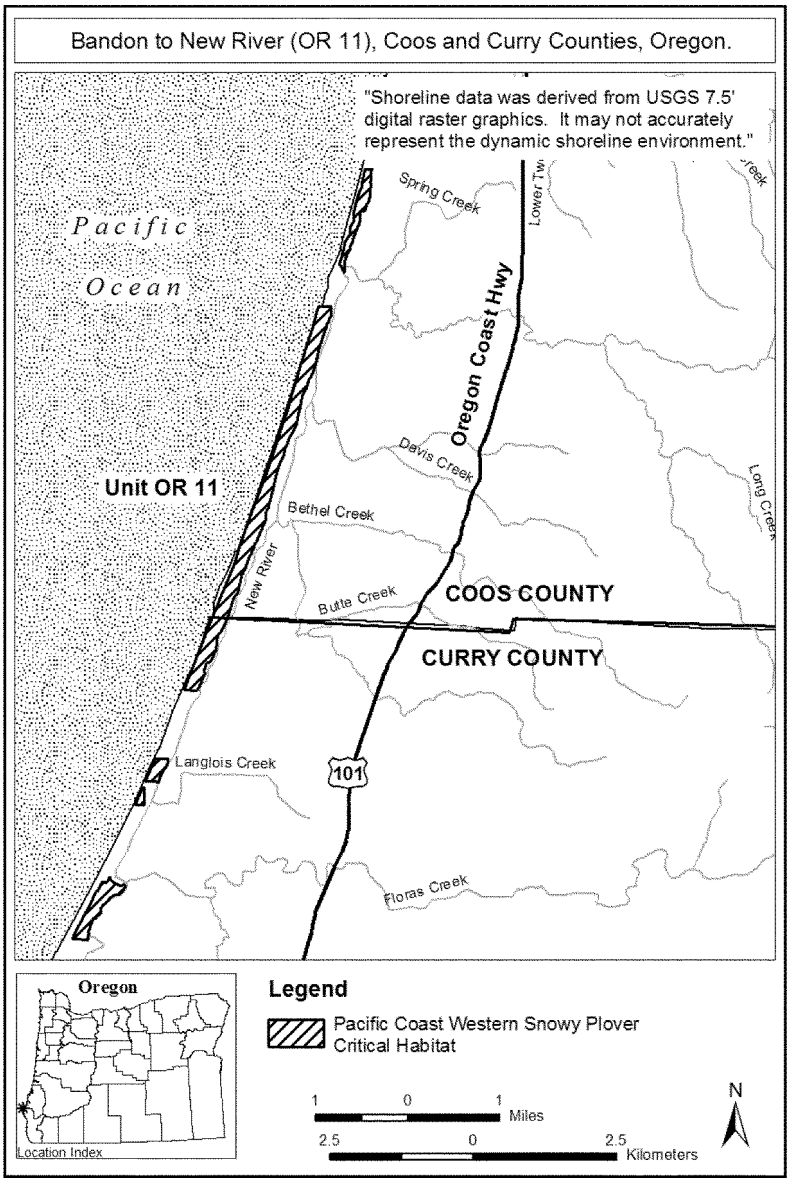
(22) Unit OR 9: Tenmile Creek Spit, Coos County, Oregon. Map follows:



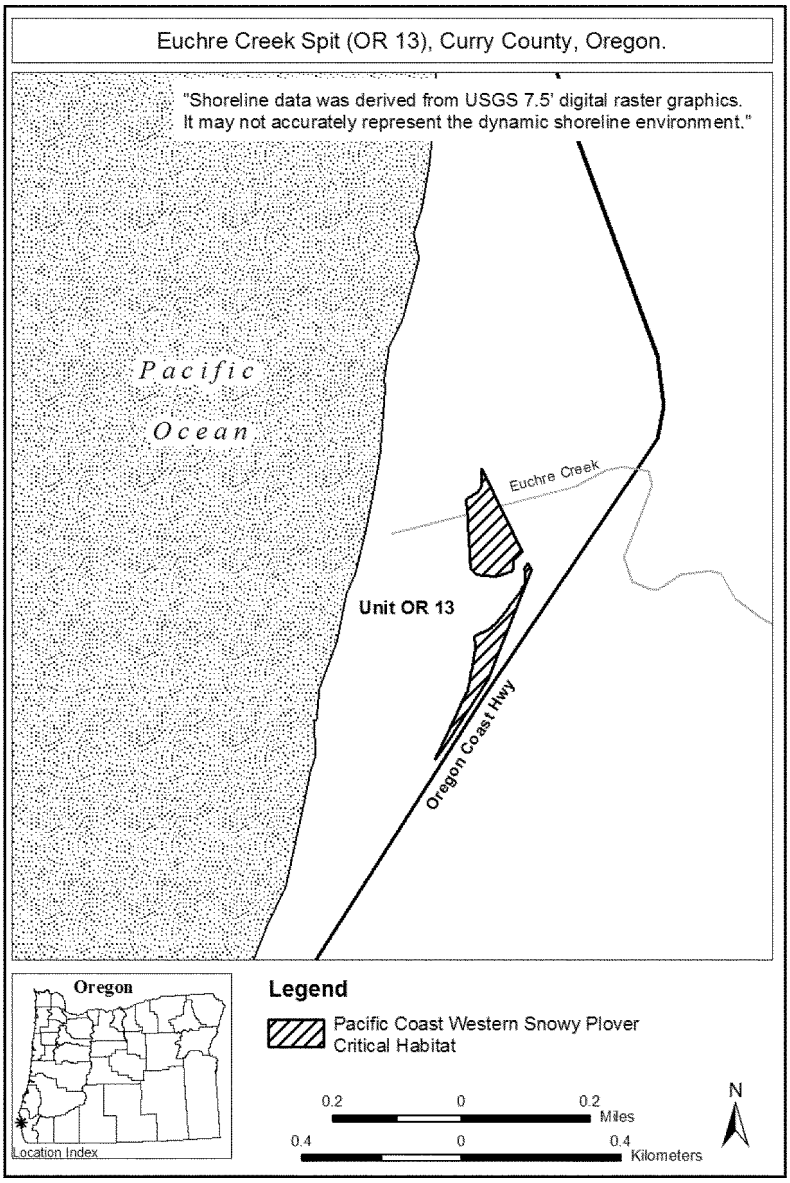
(23) Unit OR 10: Coos Bay North Spit, Coos County, Oregon. Map follows:



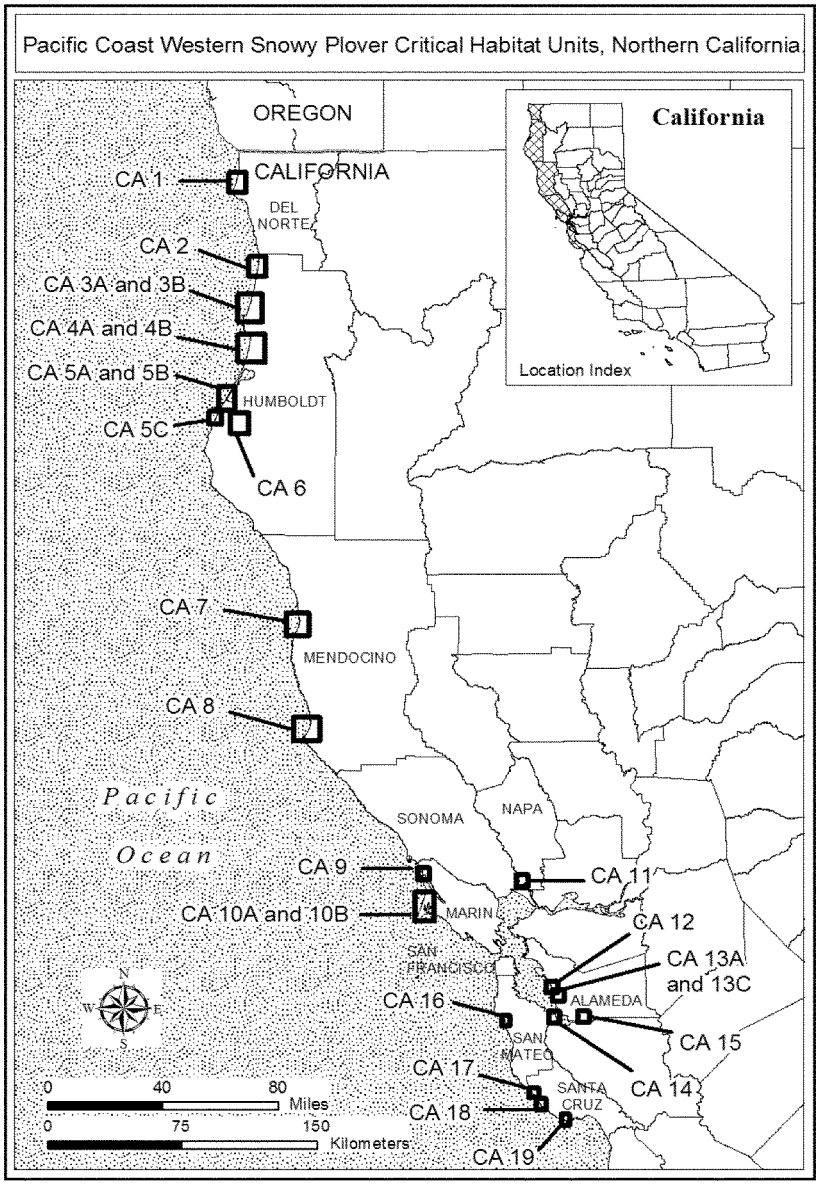
(24) Unit OR 11: Bandon to New River, Coos and Curry Counties, Oregon. Map follows:



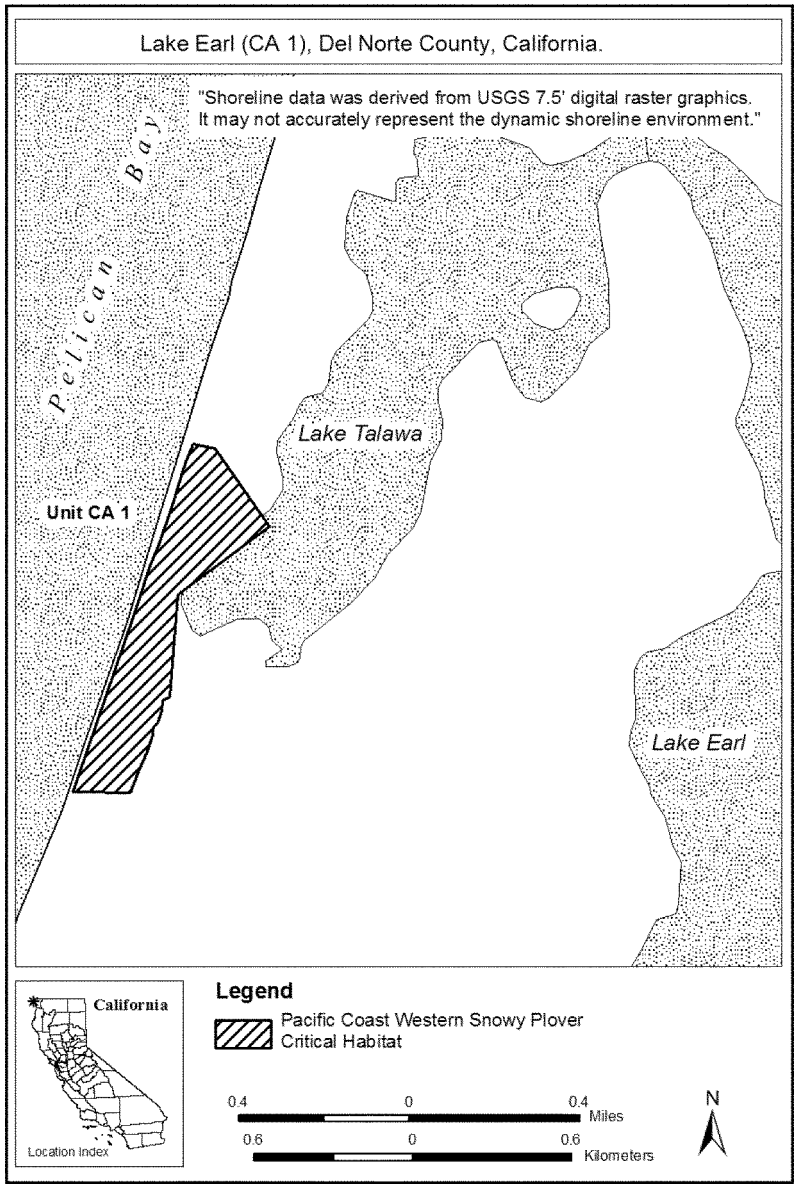
(25) Unit OR 13: Euchre Creek Spit, Curry County, Oregon. Map follows:



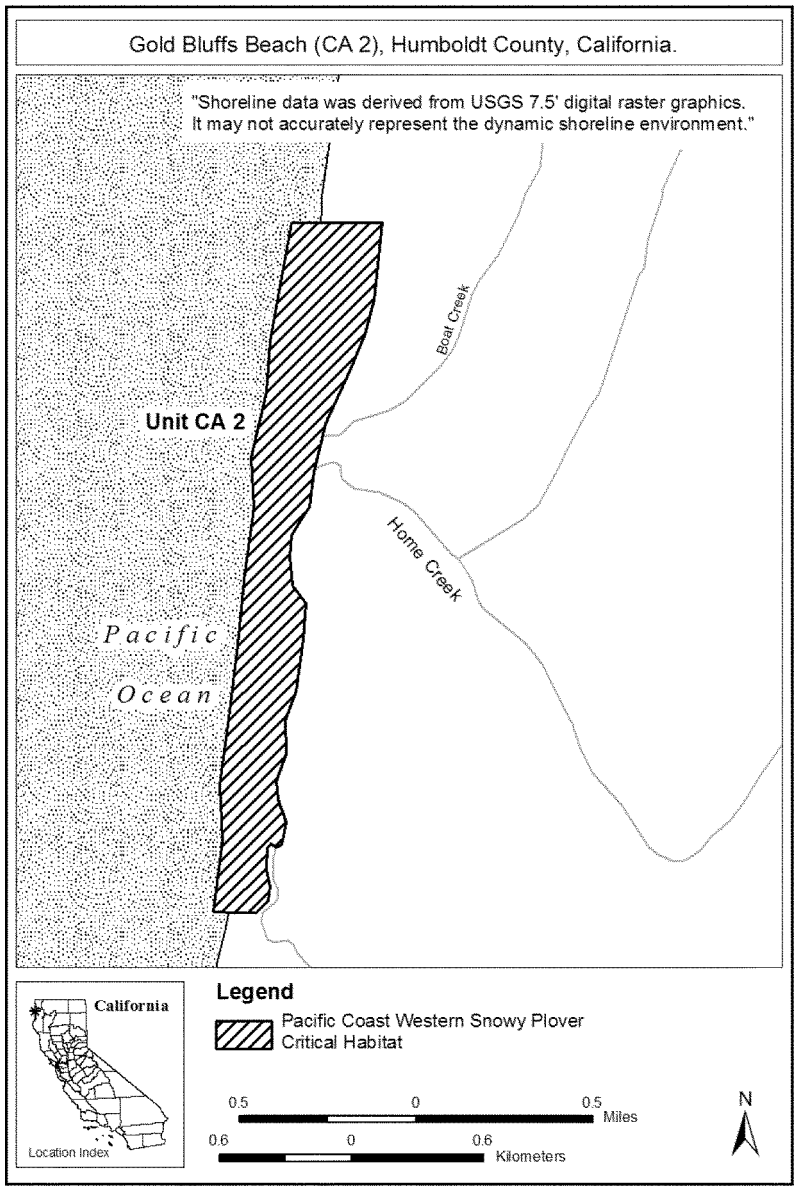
(26) Index map of critical habitat units for the Pacific Coast western snowy plover (*Charadrius nivosus nivosus*) in Northern California follows:



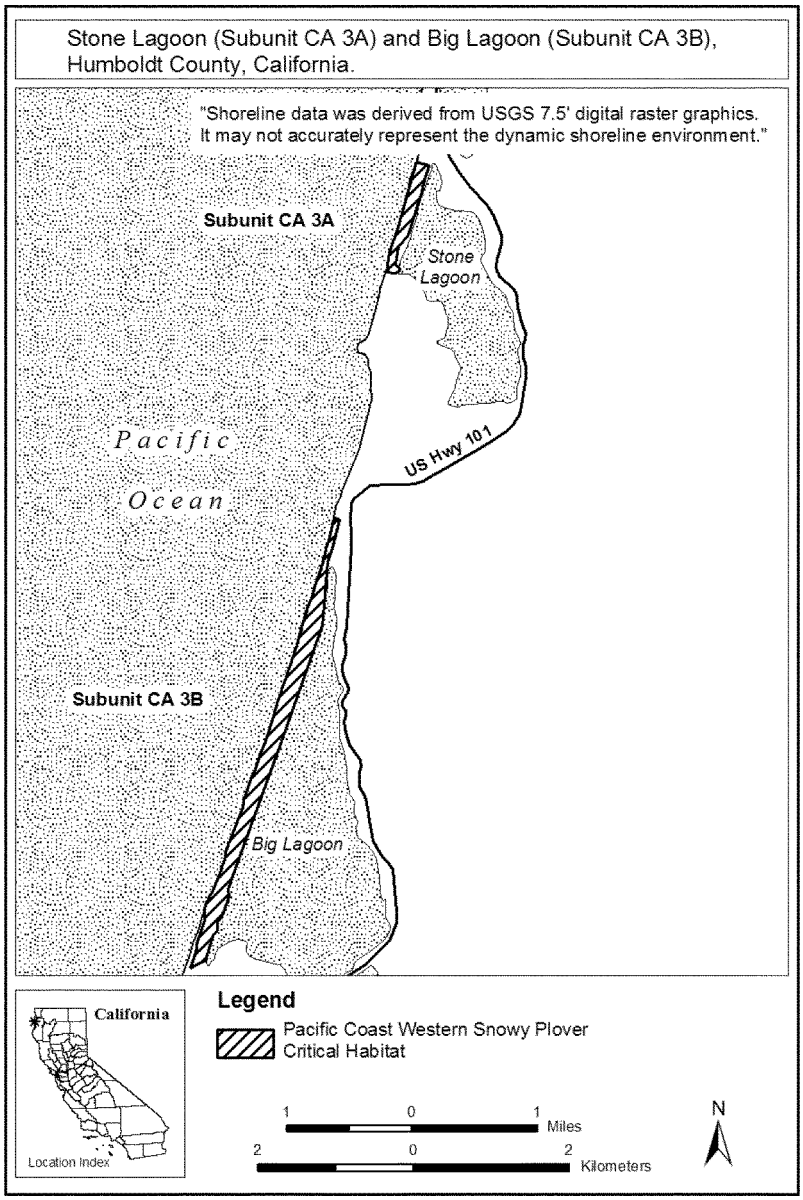
(27) Unit CA 1: Lake Earl, Del Norte County, California. Map follows:



(28) Unit CA 2: Gold Bluffs Beach, Humboldt County, California. Map follows:

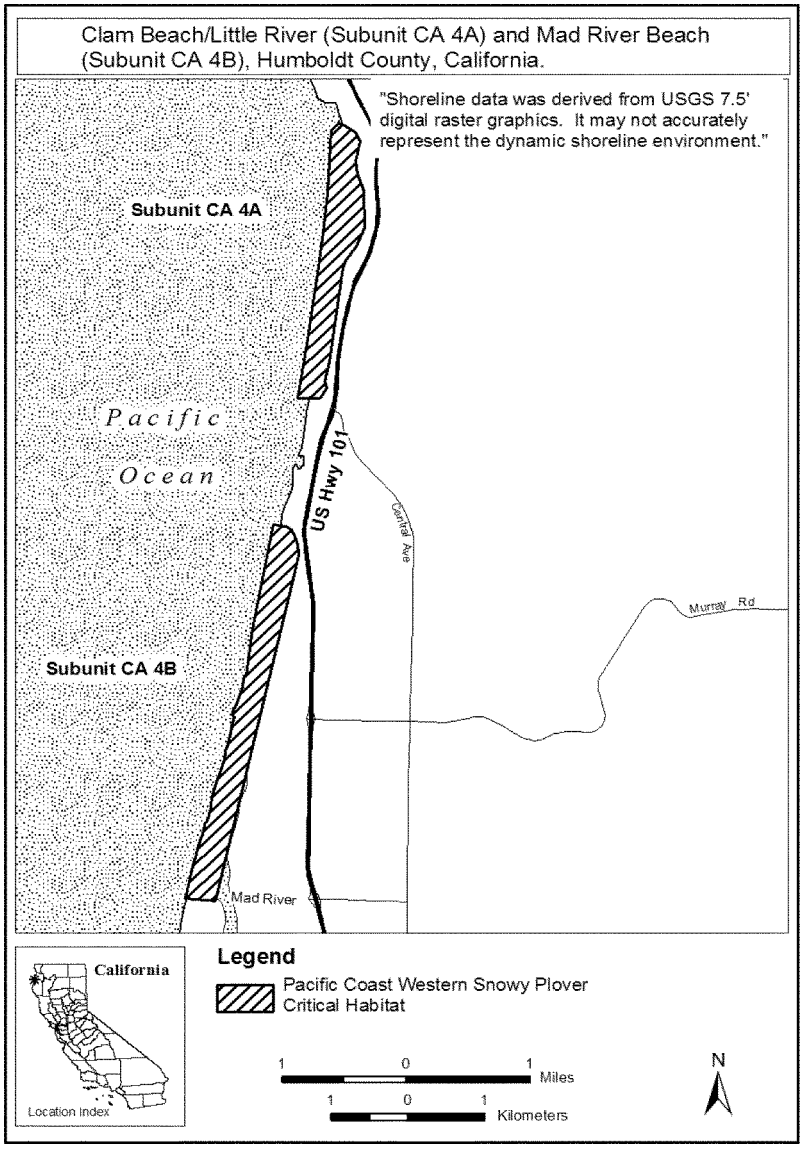


(29) Subunit CA 3A: Stone Lagoon, Humboldt County, California. Map of Subunits CA 3A and CA 3B follows:



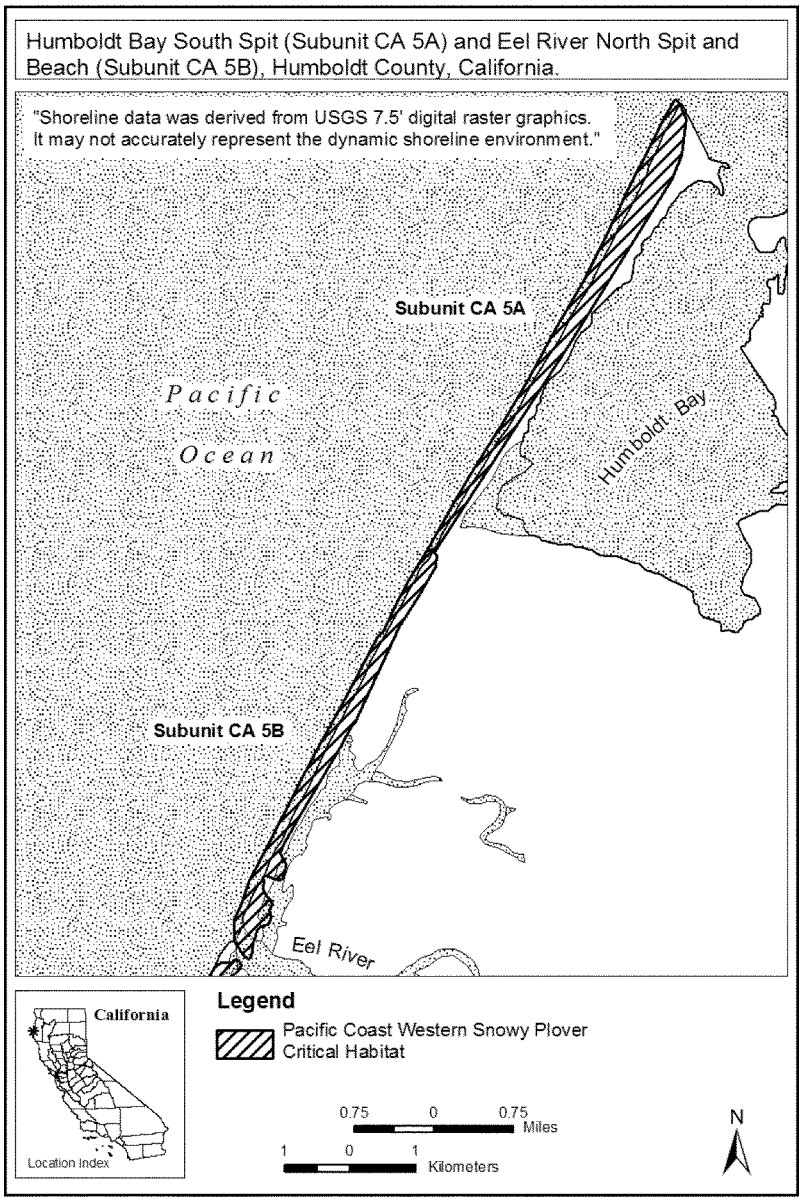
(30) Subunit CA 3B: Big Lagoon, Humboldt County, California. Map of Subunits CA 3A and CA 3B is provided at paragraph 29 of this entry.

(31) Subunit CA 4A: Clam Beach/Little River, Humboldt County, California. Map of Subunits CA 4A and CA 4B follows:



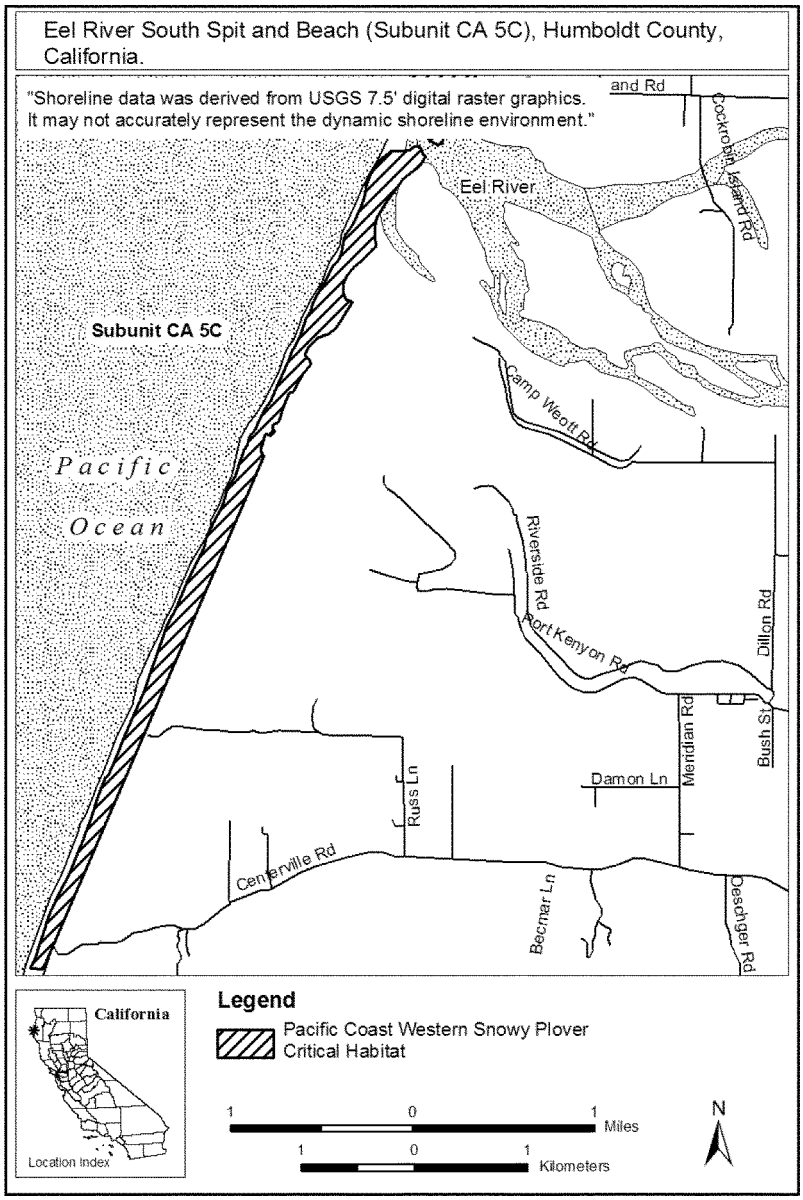
(32) Subunit CA 4B: Mad River Beach, Humboldt County, California. Map of Subunits CA 4A and CA 4B is provided at paragraph 31 of this entry.

(33) Subunit CA 5A: Humboldt Bay South Spit, Humboldt County, California. Map of Subunit CA 5A and CA 5B follows:

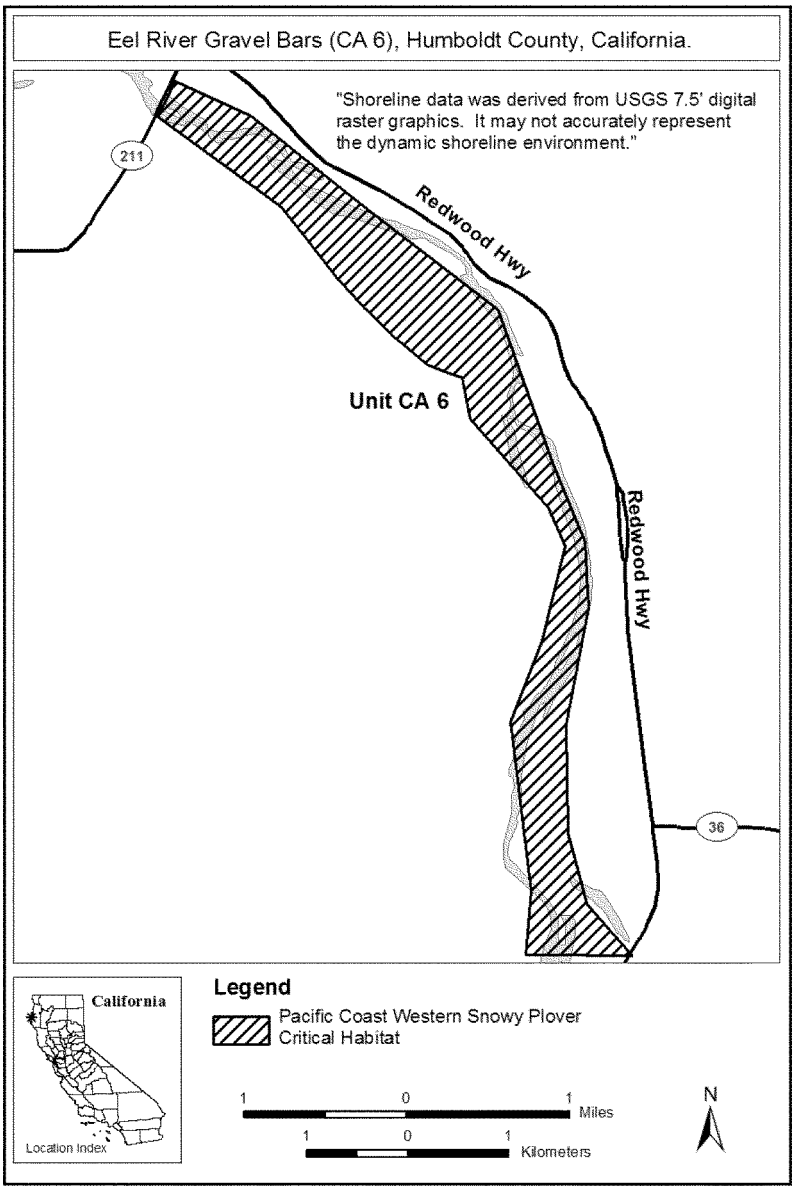


(34) Subunit CA 5B: Eel River North Spit and Beach, Humboldt County, California. Map of Subunits CA 5A and CA 5B is provided at paragraph 33 of this entry.

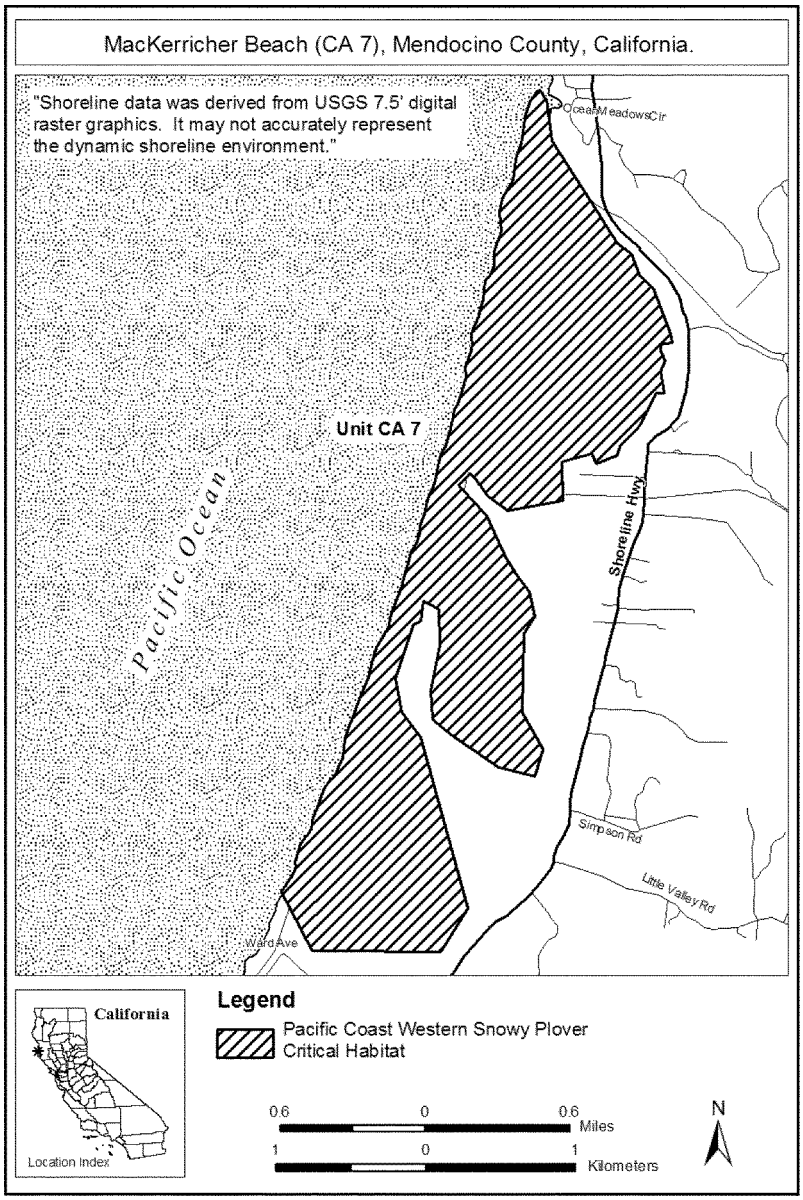
(35) Subunit CA 5C: Eel River South Spit and Beach, Humboldt County, California. Map follows:



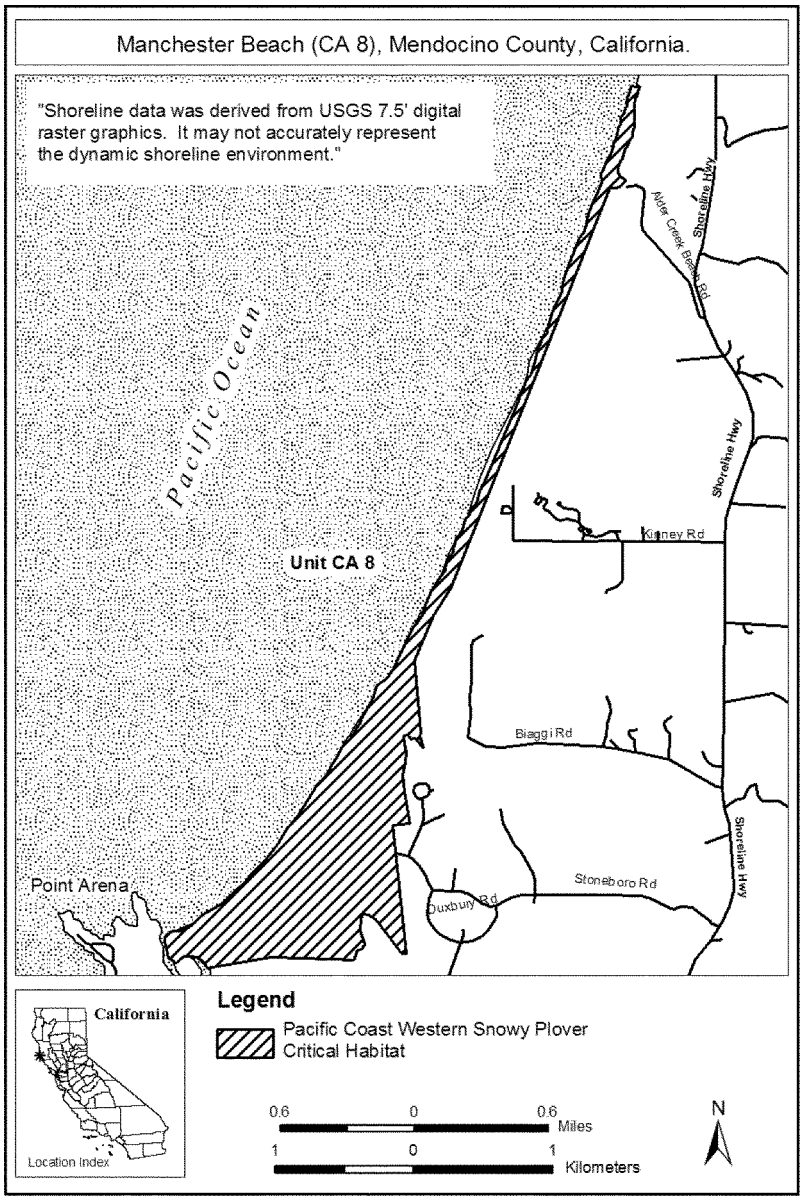
(36) Unit CA 6: Eel River Gravel Bars, Humboldt County, California. Map follows:



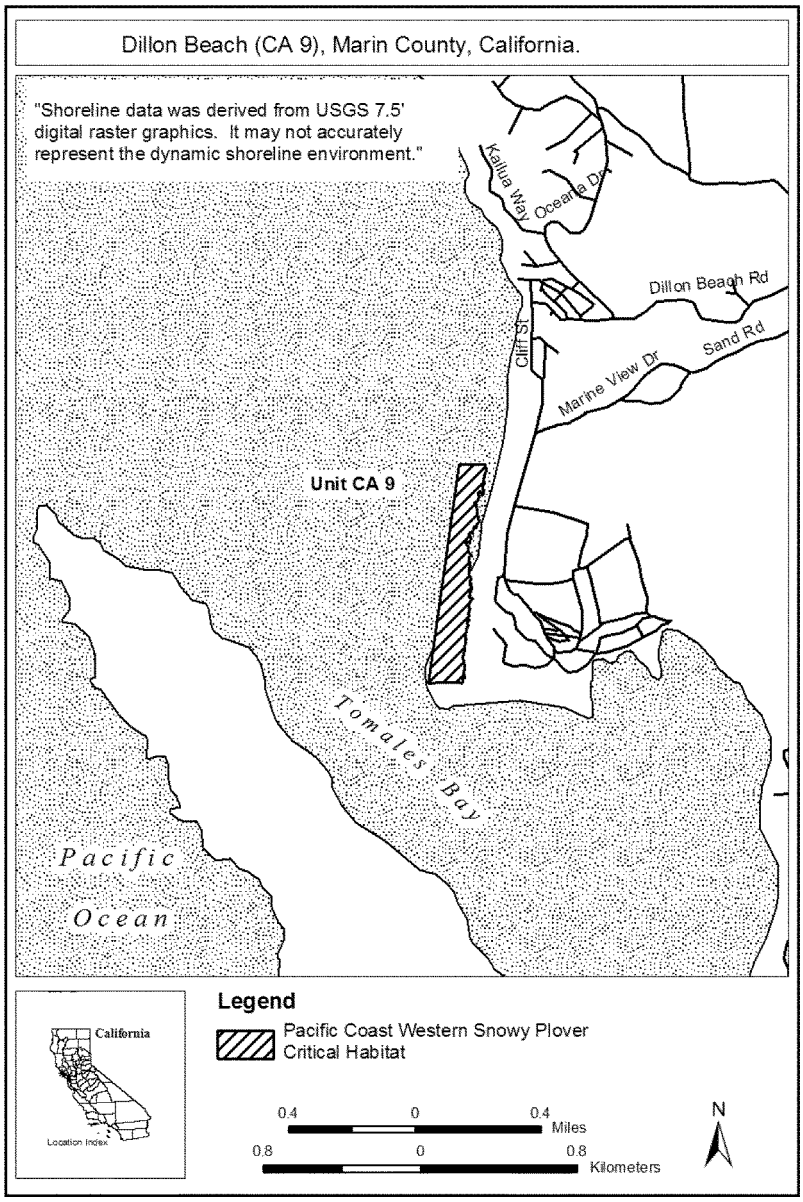
(37) Unit CA 7: MacKerricher Beach, Mendocino County, California. Map follows:



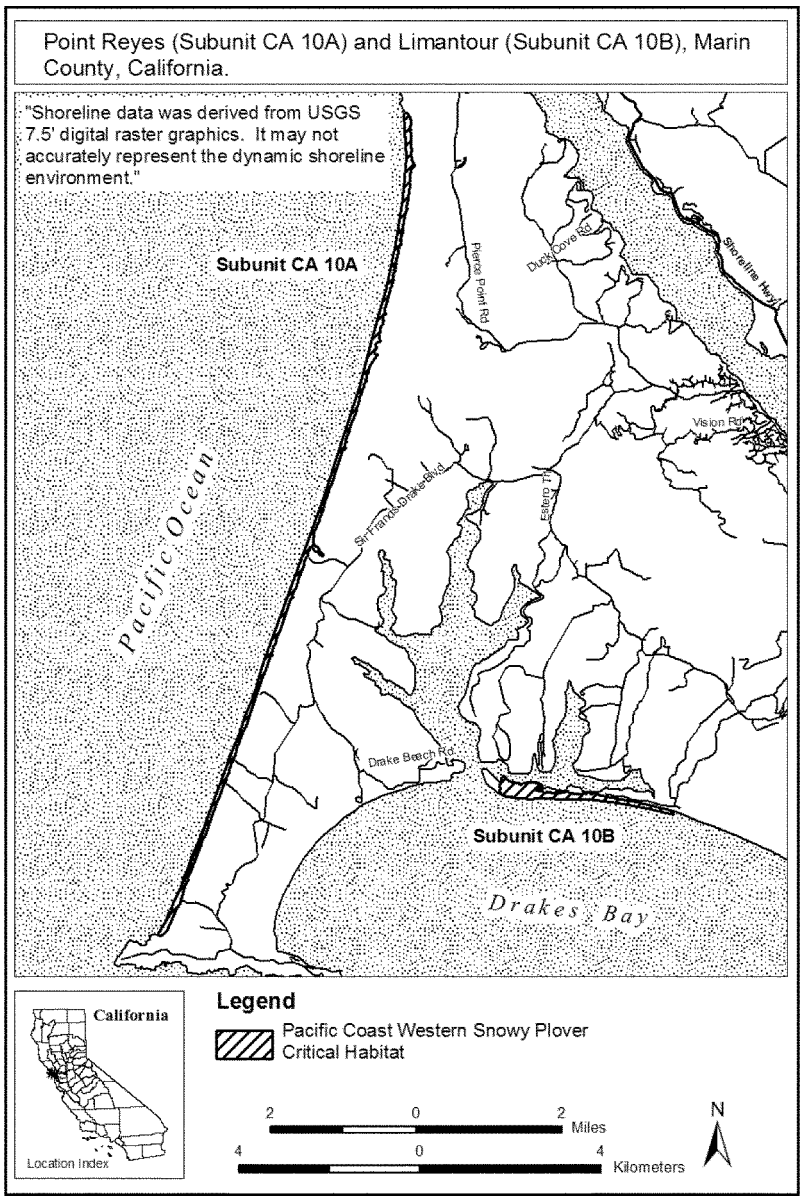
(38) Unit CA 8: Manchester Beach, Mendocino County, California. Map follows:



(39) Unit CA 9: Dillon Beach, Marin County, California. Map follows:

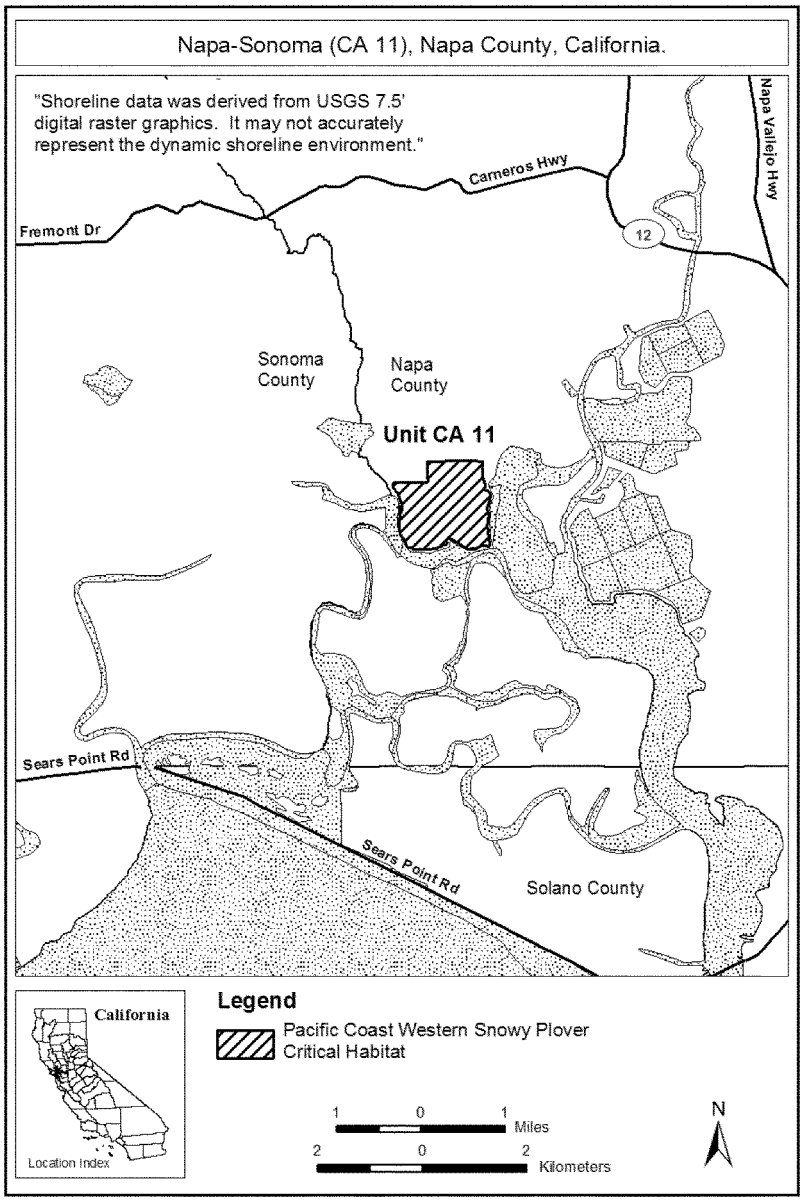


(40) Subunit CA 10A: Point Reyes, Marin County, California. Map of Subunits CA 10A and CA 10B follows:

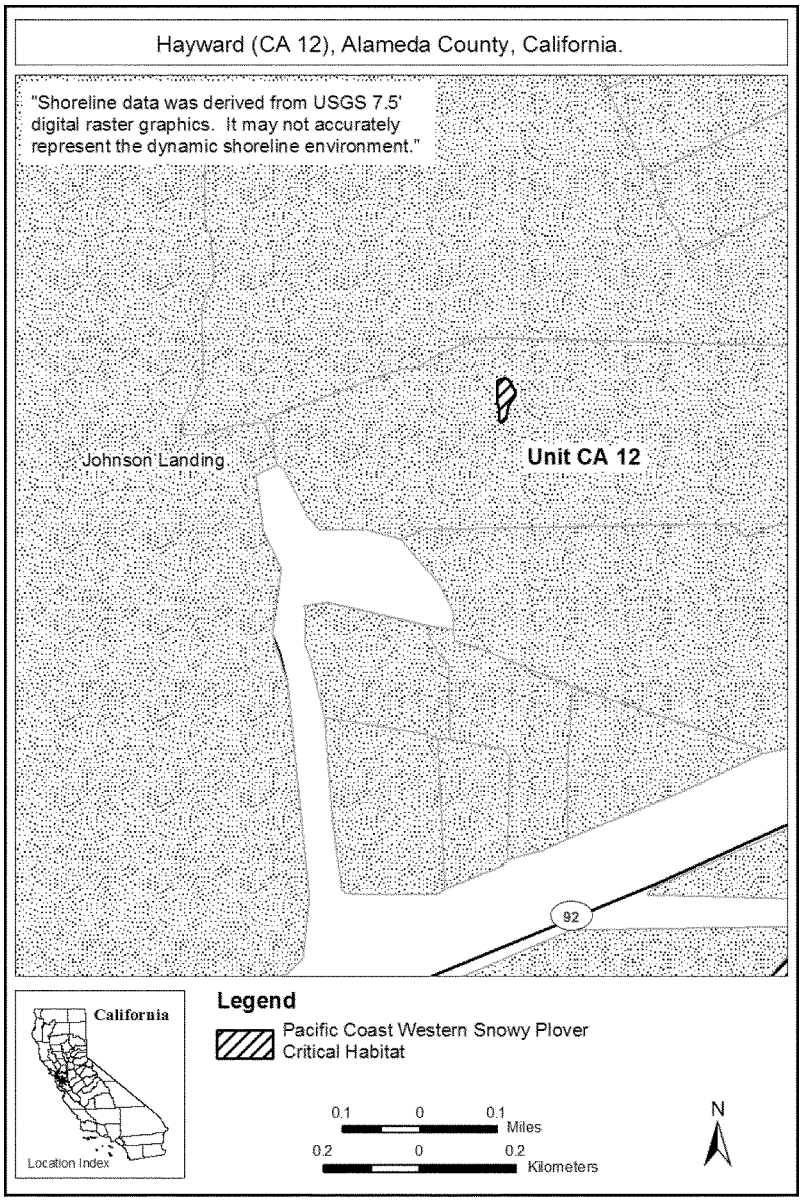


(41) Subunit CA 10B: Limantour, Marin County, California. Map of Subunits CA 10A and CA 10B is provided at paragraph 40 of this entry.

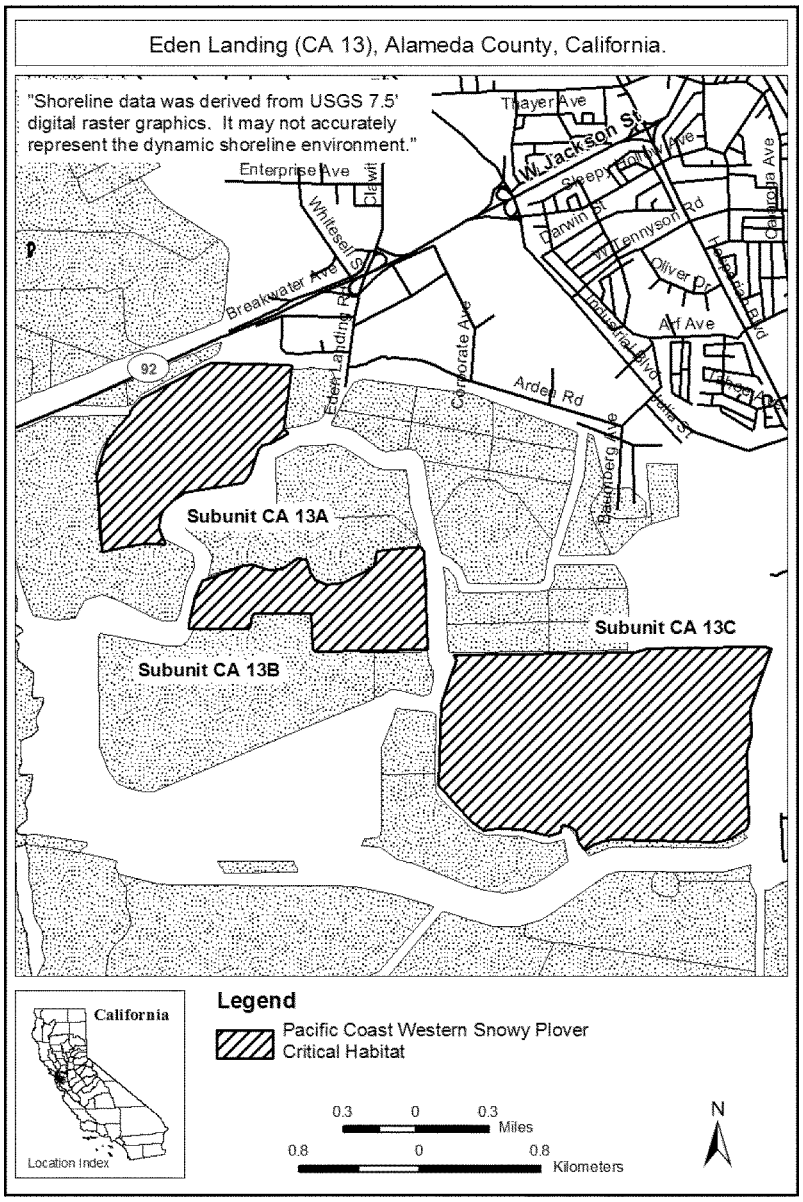
(42) Unit CA 11: Napa-Sonoma, Napa County, California. Map follows:



(43) Unit CA 12: Hayward, Alameda County, California. Map follows:



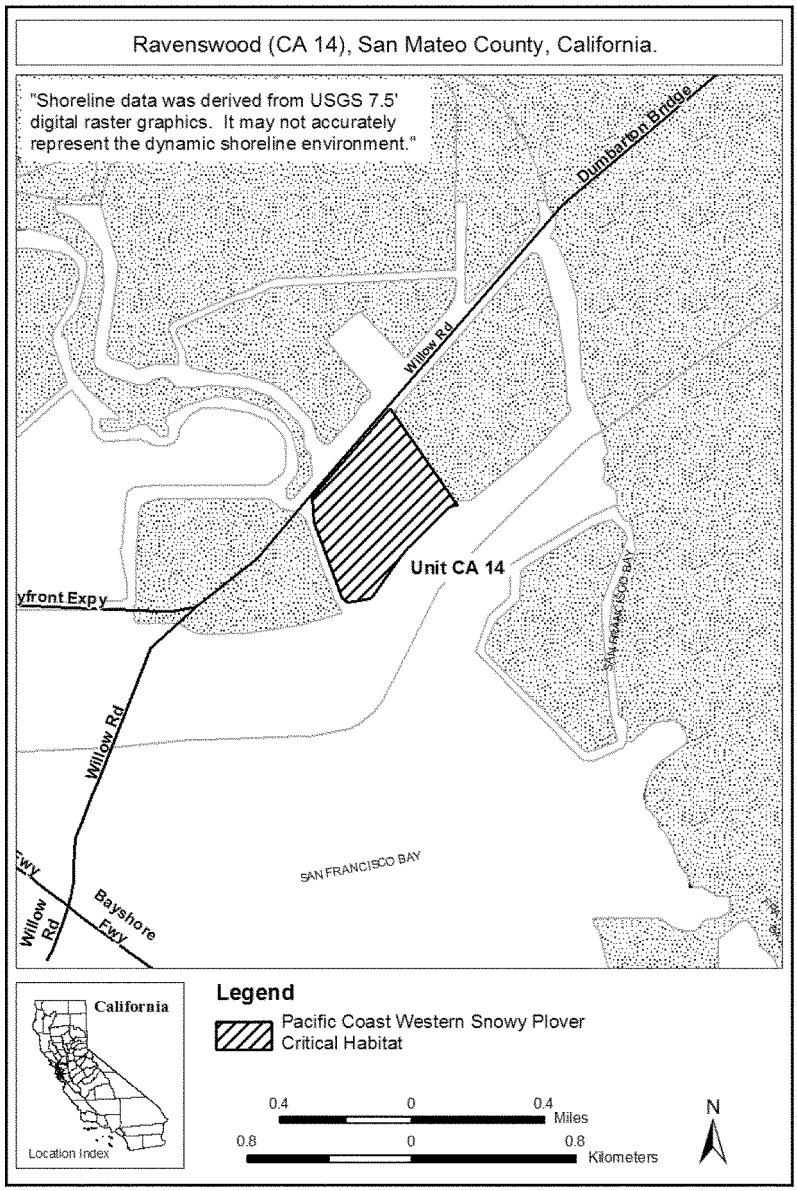
(44) Subunit CA 13A: Eden Landing, Alameda County, California. Map of Subunits CA 13A, CA 13B, and CA 13C follows:



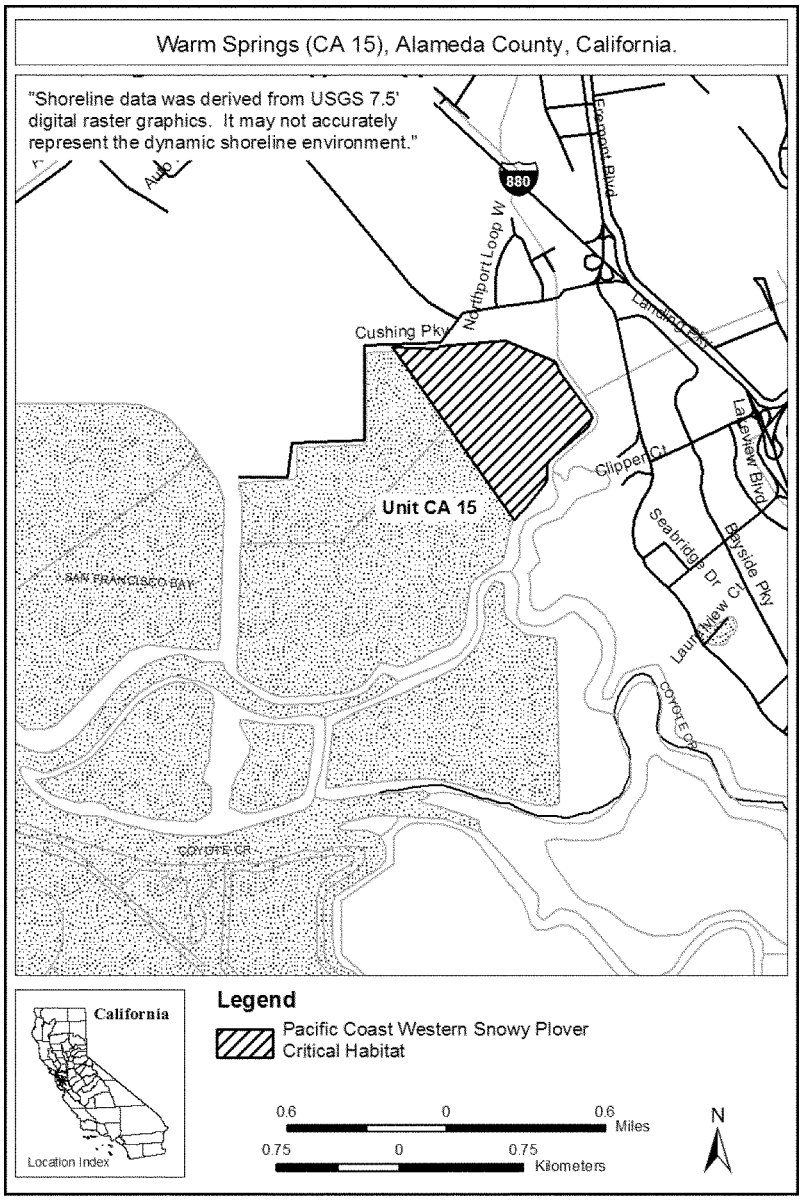
(45) Subunit CA 13B: Eden Landing, Alameda County, California. Map of Subunits CA 13A, CA 13B, and CA 13C is provided at paragraph 44 of this entry.

(46) Subunit CA 13C: Eden Landing, Alameda County, California. Map of Subunits CA 13A, CA 13B, and CA 13C is provided at paragraph 44 of this entry.

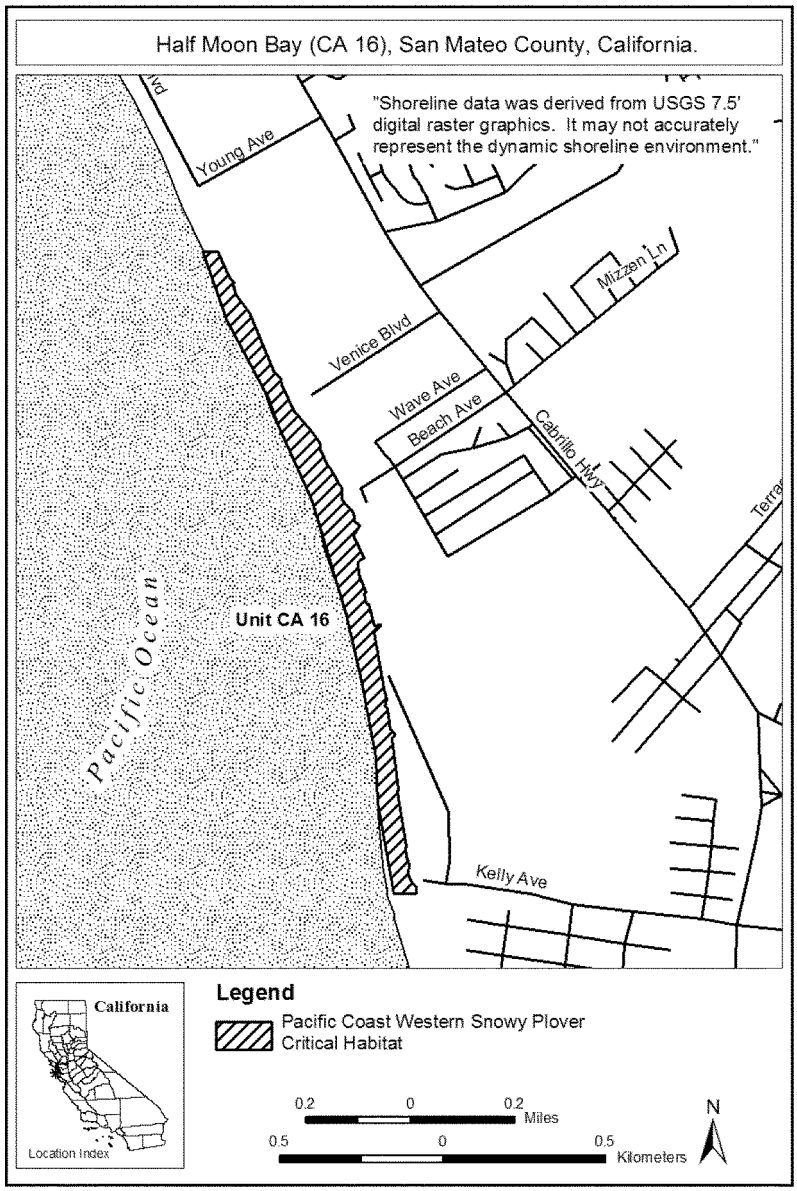
(47) Unit CA 14: Ravenswood, San Mateo County, California. Map follows:



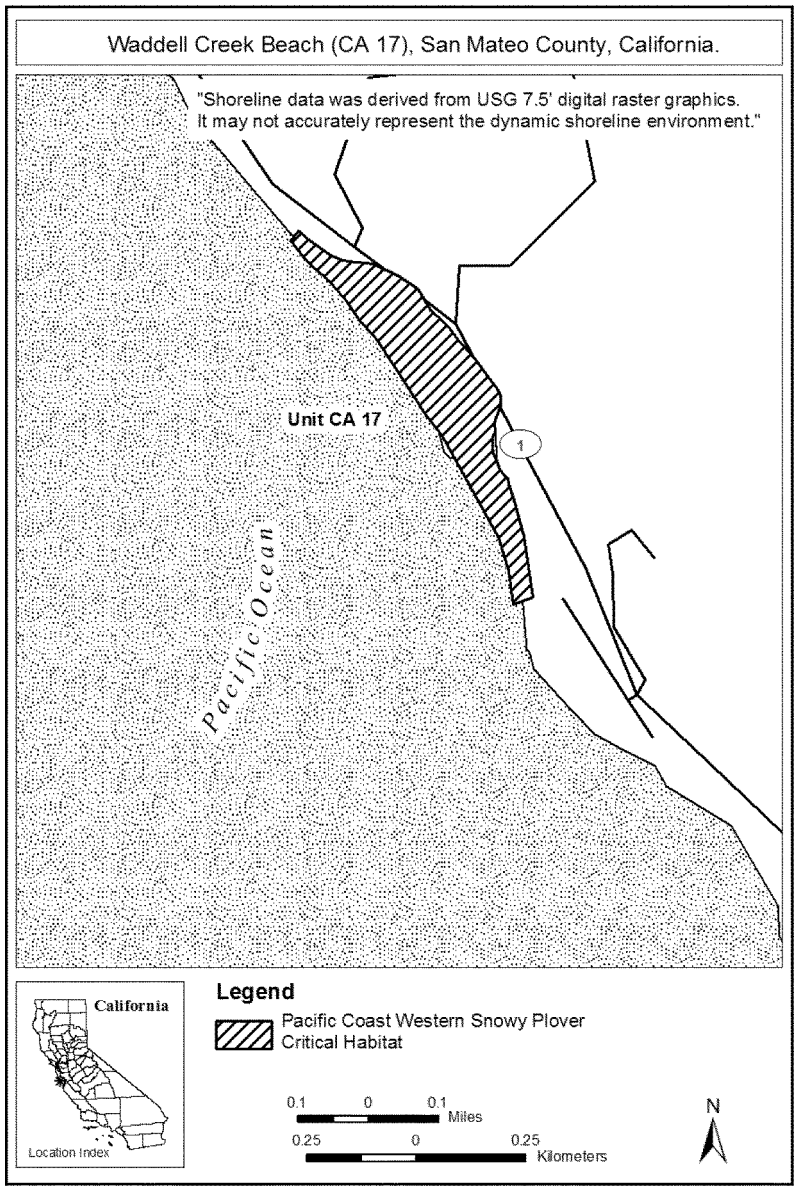
(48) Unit CA 15: Warm Springs, Alameda County, California. Map follows:



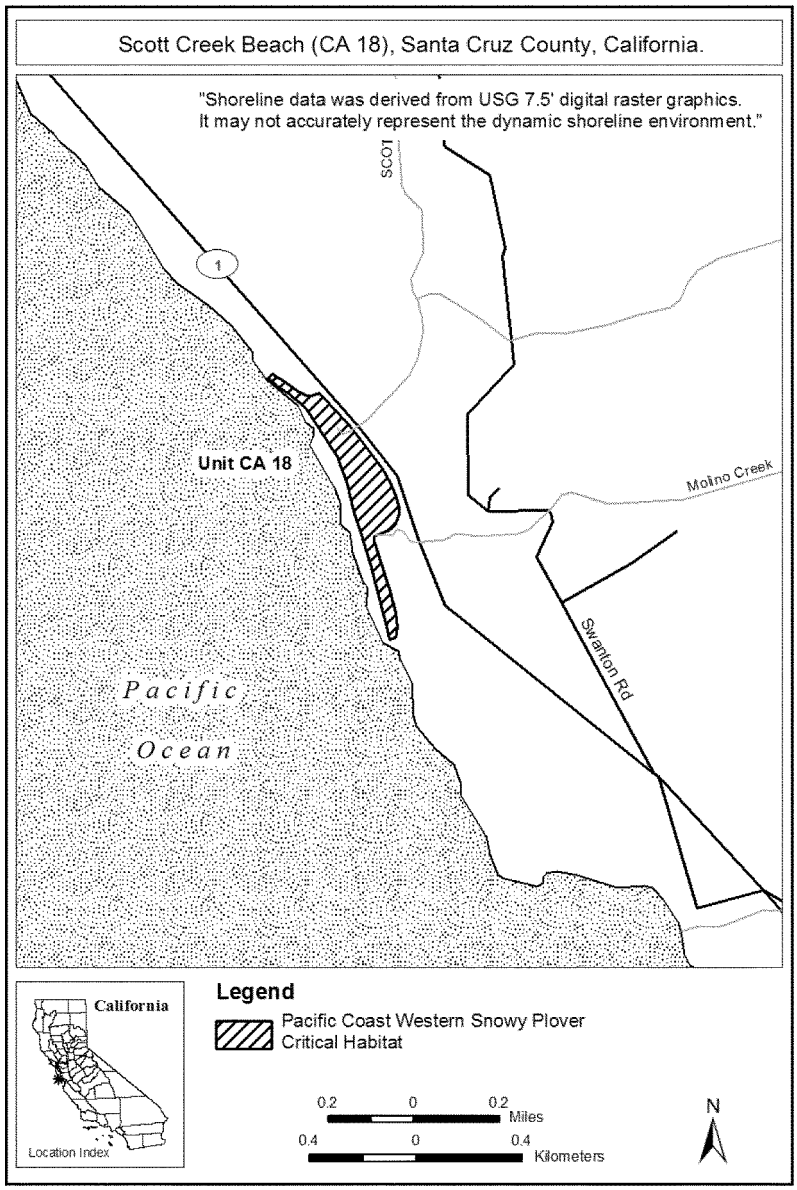
(49) Unit CA 16: Half Moon Bay, San Mateo County, California. Map follows:



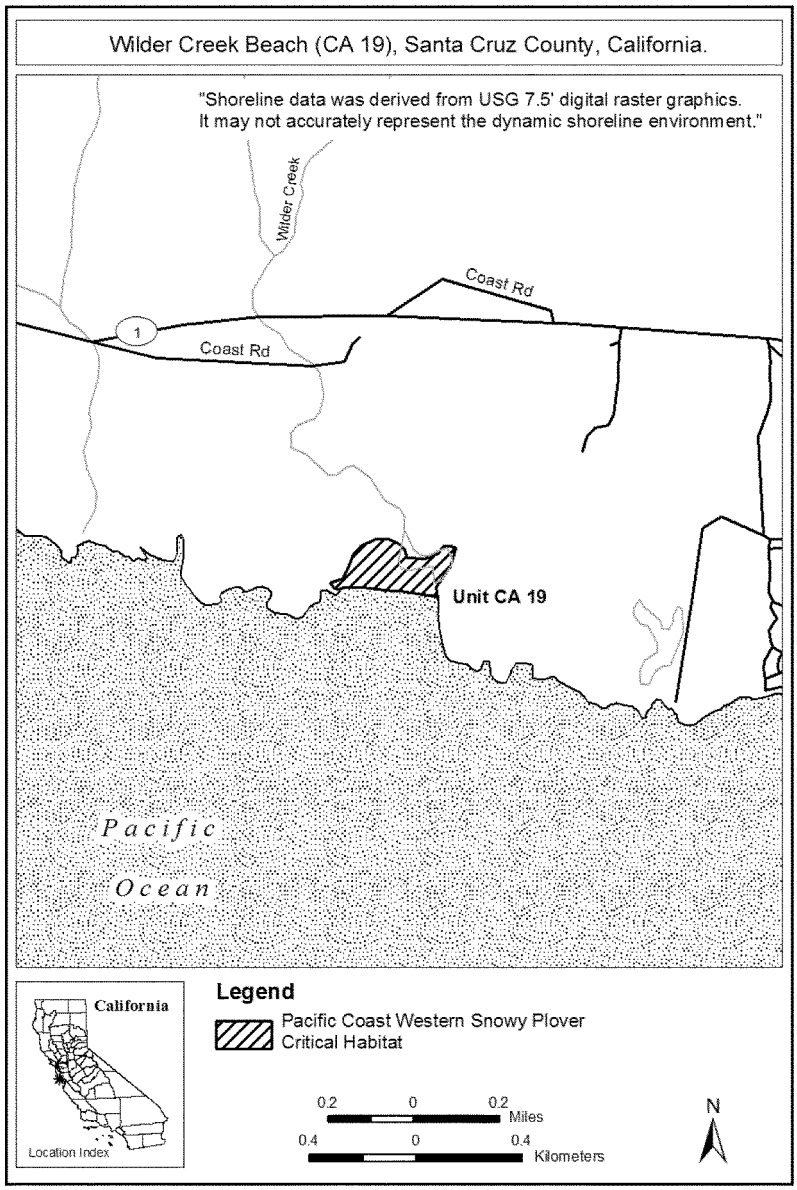
(50) Unit CA 17: Waddell Creek Beach, Santa Cruz County, California. Map follows:



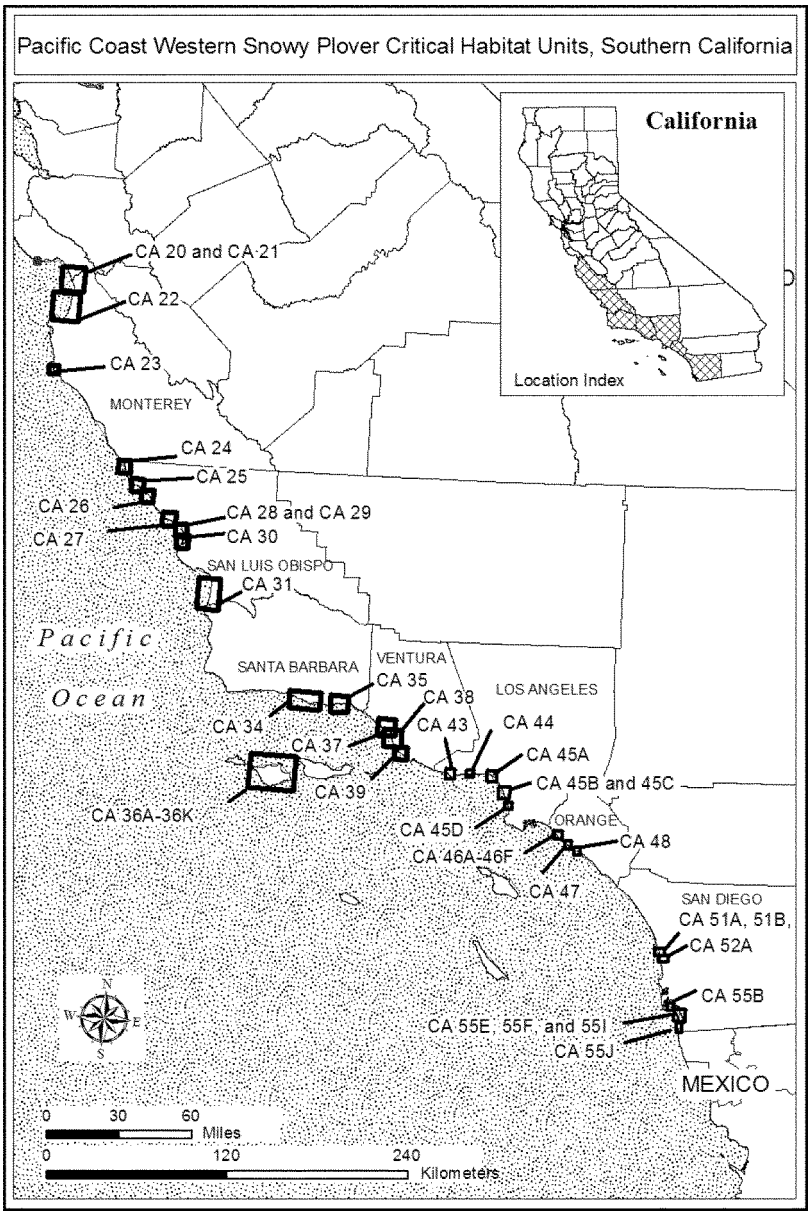
(51) Unit CA 18: Scott Creek Beach, Santa Cruz County, California. Map follows:



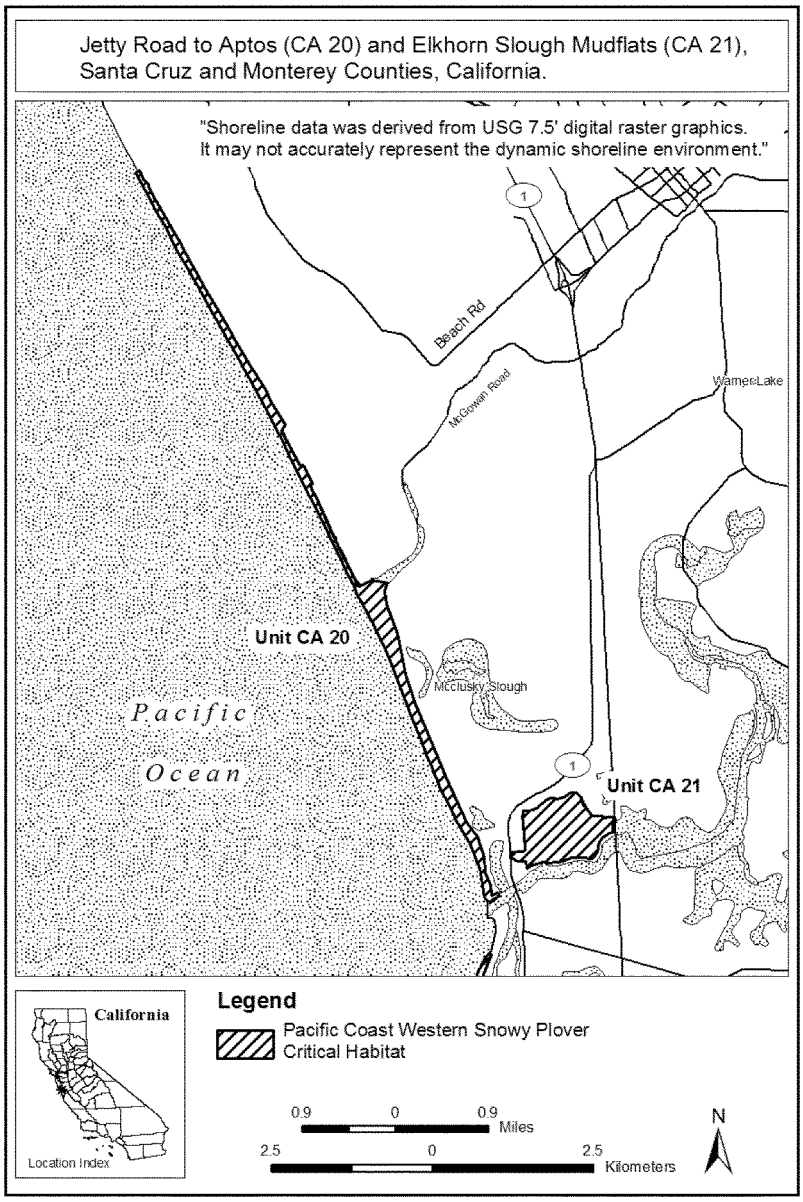
(52) Unit CA 19: Wilder Creek Beach, Santa Cruz County, California. Map follows:



(53) Index map of critical habitat units for the Pacific Coast western snowy plover (*Charadrius nivosus nivosus*) in Southern California follows:

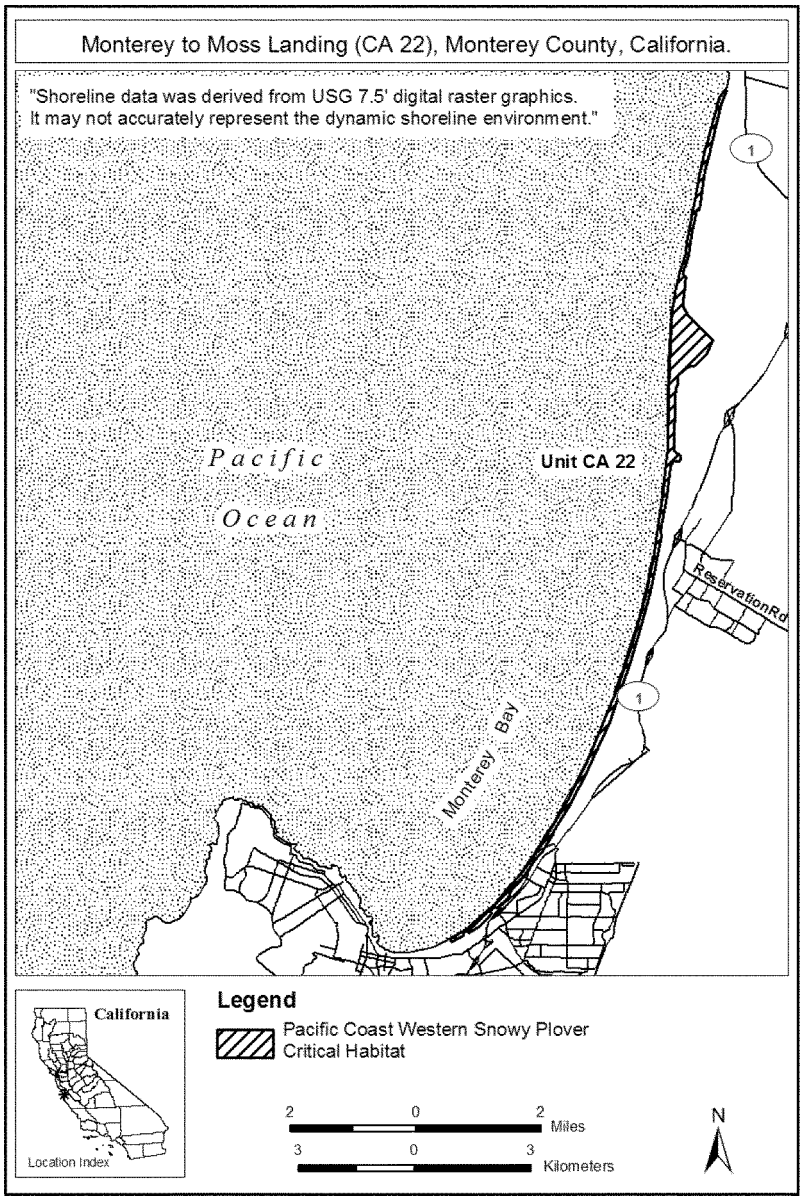


(54) Unit CA 20: Jetty Road to Aptos, Santa Cruz and Monterey Counties, California. Map of Units CA 20 and CA 21 follows:

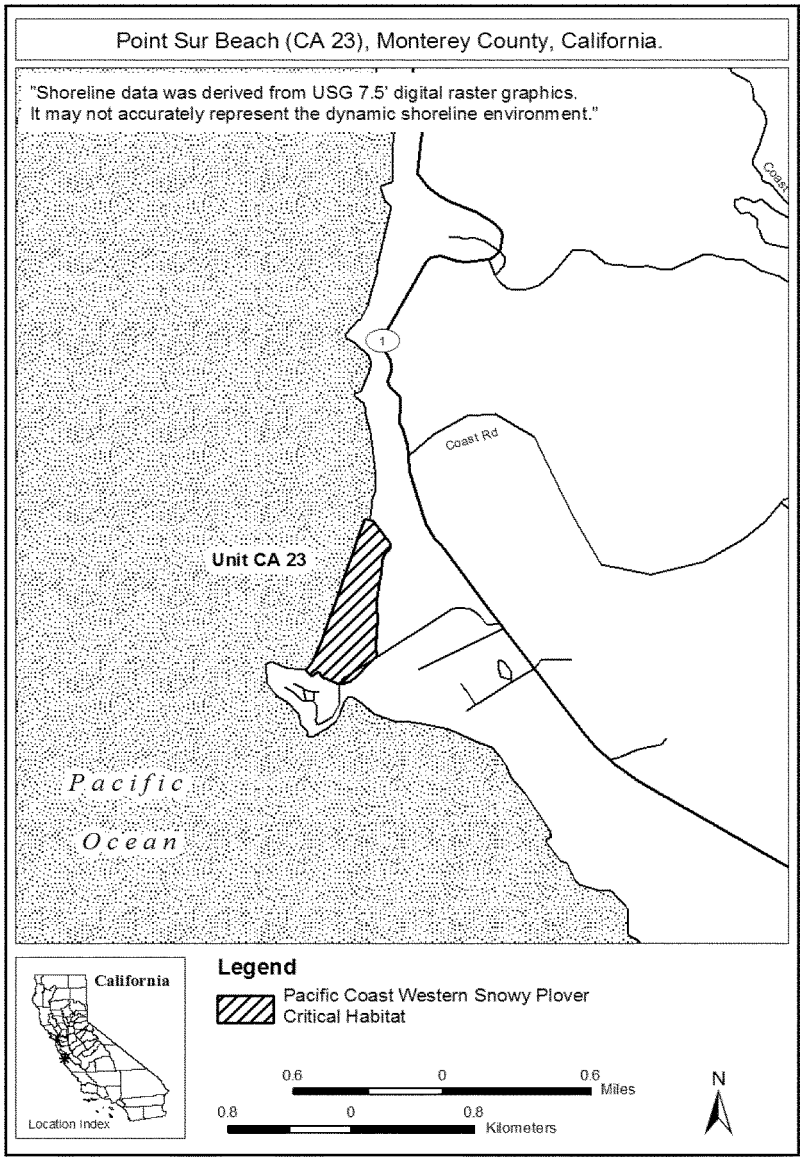


(55) Unit CA 21: Elkhorn Slough Mudflats, Monterey County, California. Map of Units CA 20 and CA 21 is provided at paragraph 54.

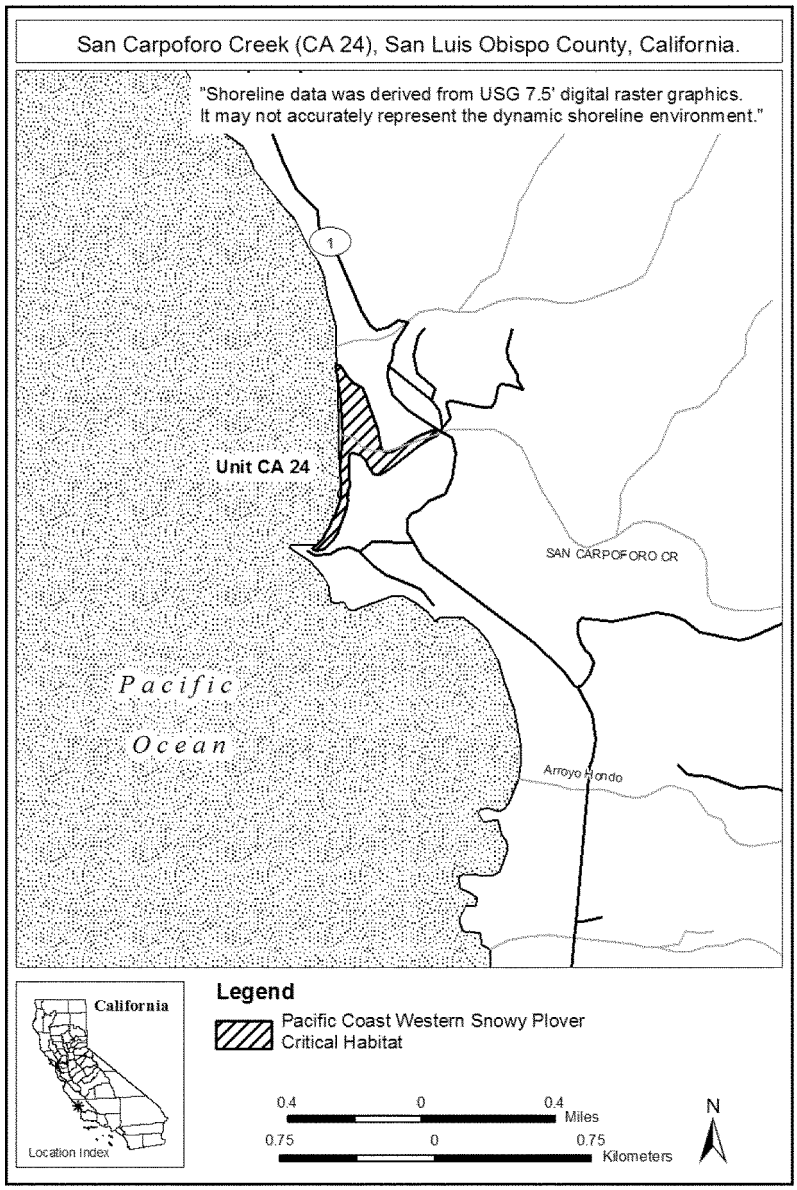
(56) Unit CA 22: Monterey to Moss Landing, Monterey County, California. Map follows:



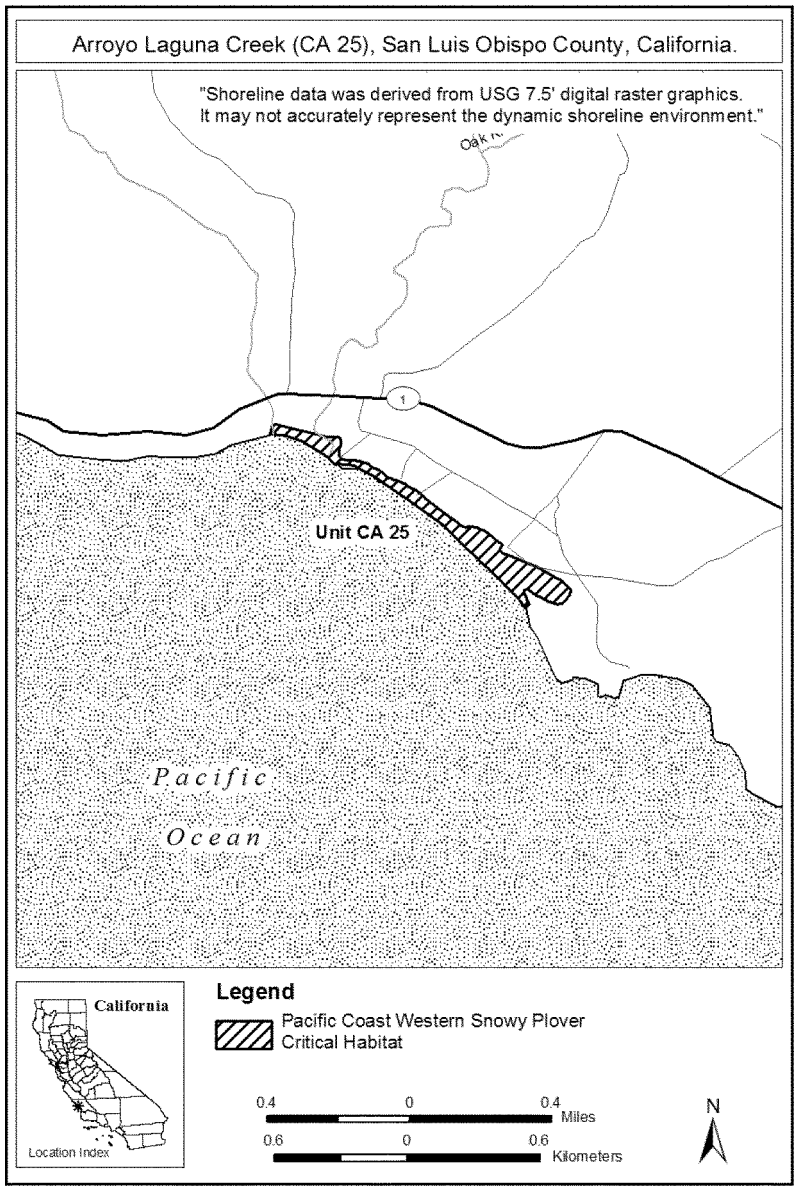
(57) Unit CA 23: Point Sur Beach, Monterey County, California. Map follows:



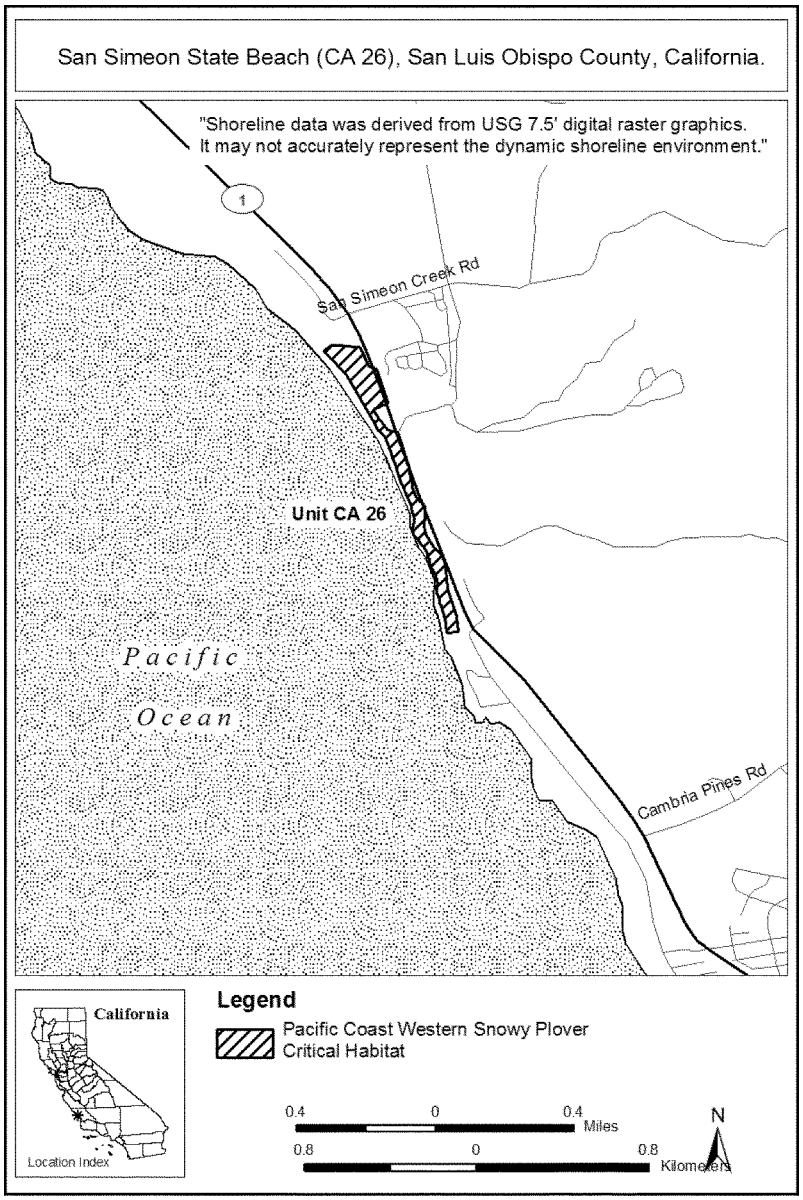
(58) Unit CA 24: San Carpoforo Creek, San Luis Obispo County, California.
Map follows:



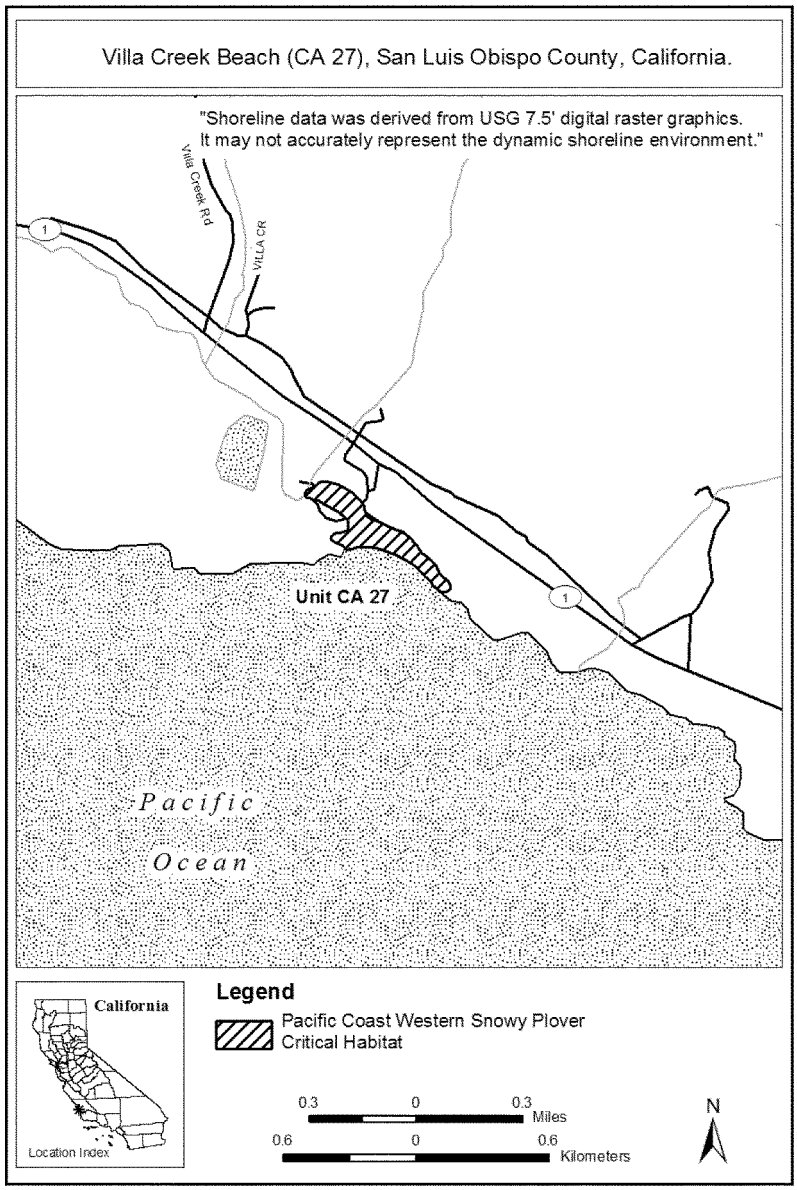
(59) Unit CA 25: Arroyo Laguna Creek, San Luis Obispo County, California. Map follows:



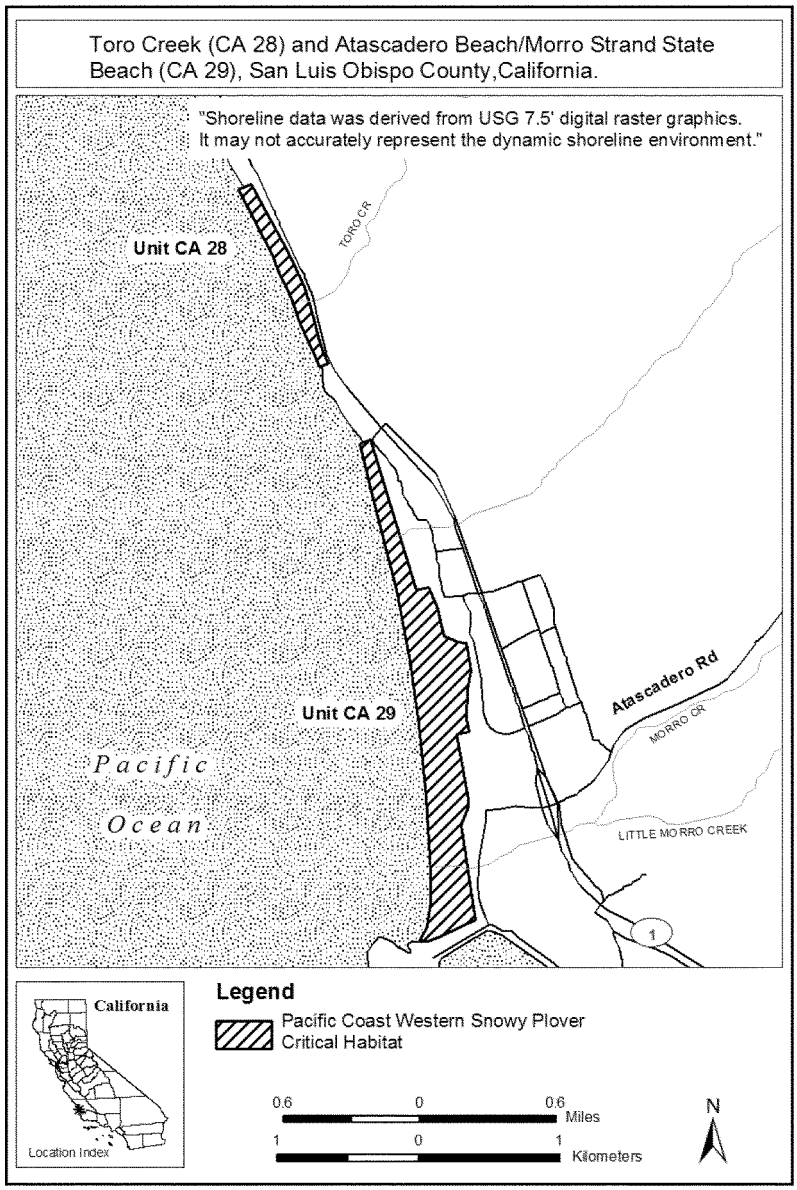
(60) Unit CA 26: San Simeon State Beach, San Luis Obispo County, California. Map follows:



(61) Unit CA 27: Villa Creek Beach, San Luis Obispo County, California. Map follows:

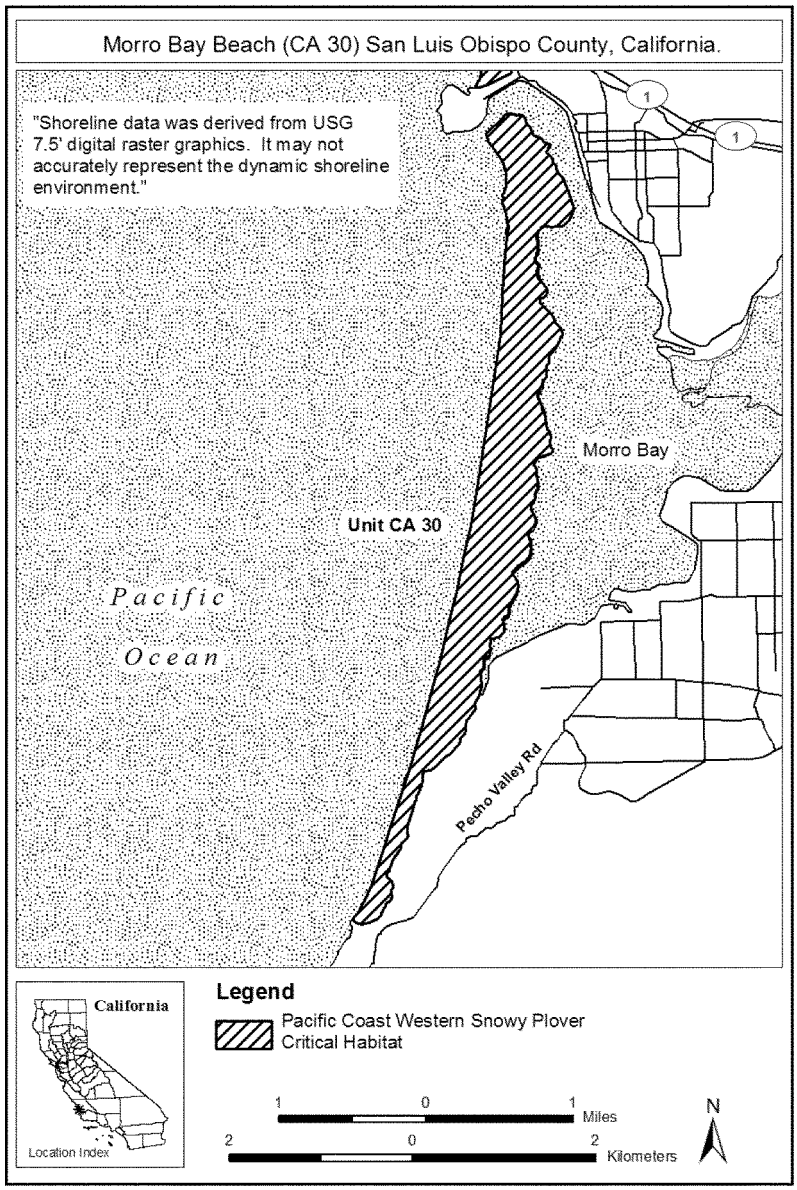


(62) Unit CA 28: Toro Creek, San Luis Obispo County, California. Map of Units CA 28 and CA 29 follows:

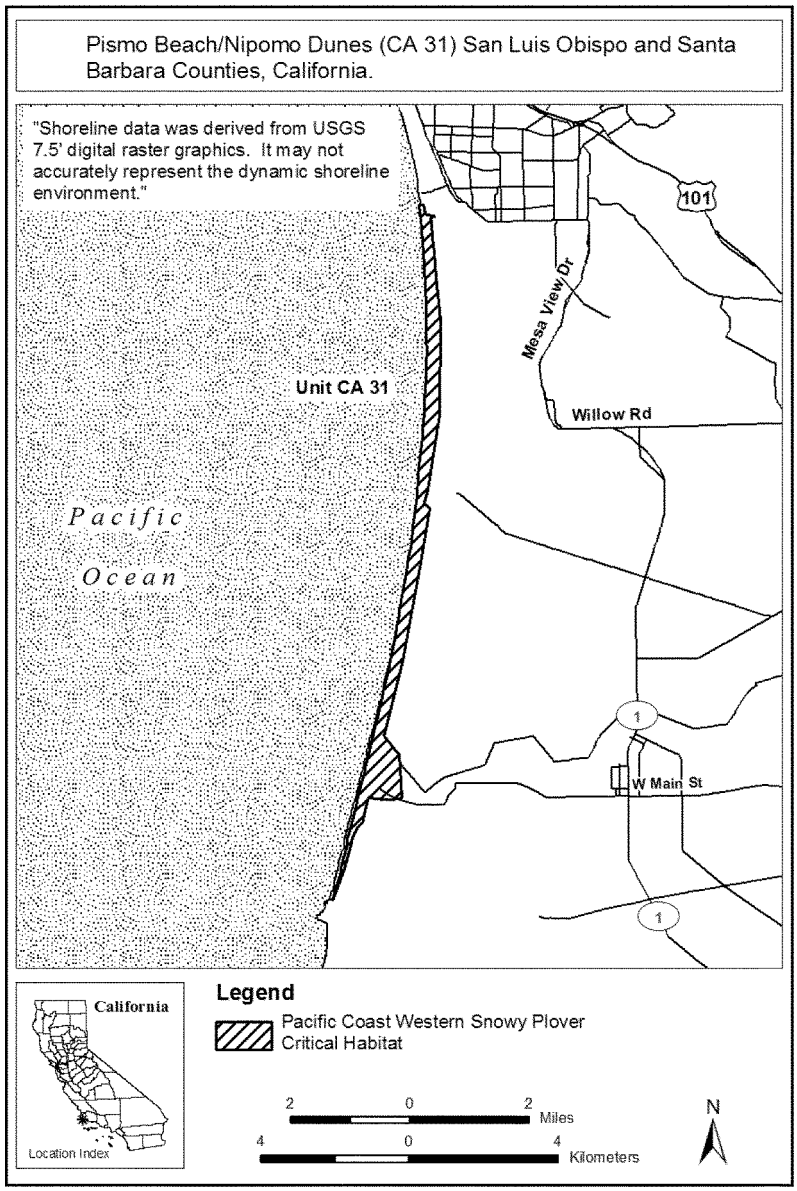


(63) Unit CA 29: Atascadero Beach/Morro Strand State Beach: San Luis Obispo County, California. Map of Units CA 28 and CA 29 is provided at paragraph 62 of this entry.

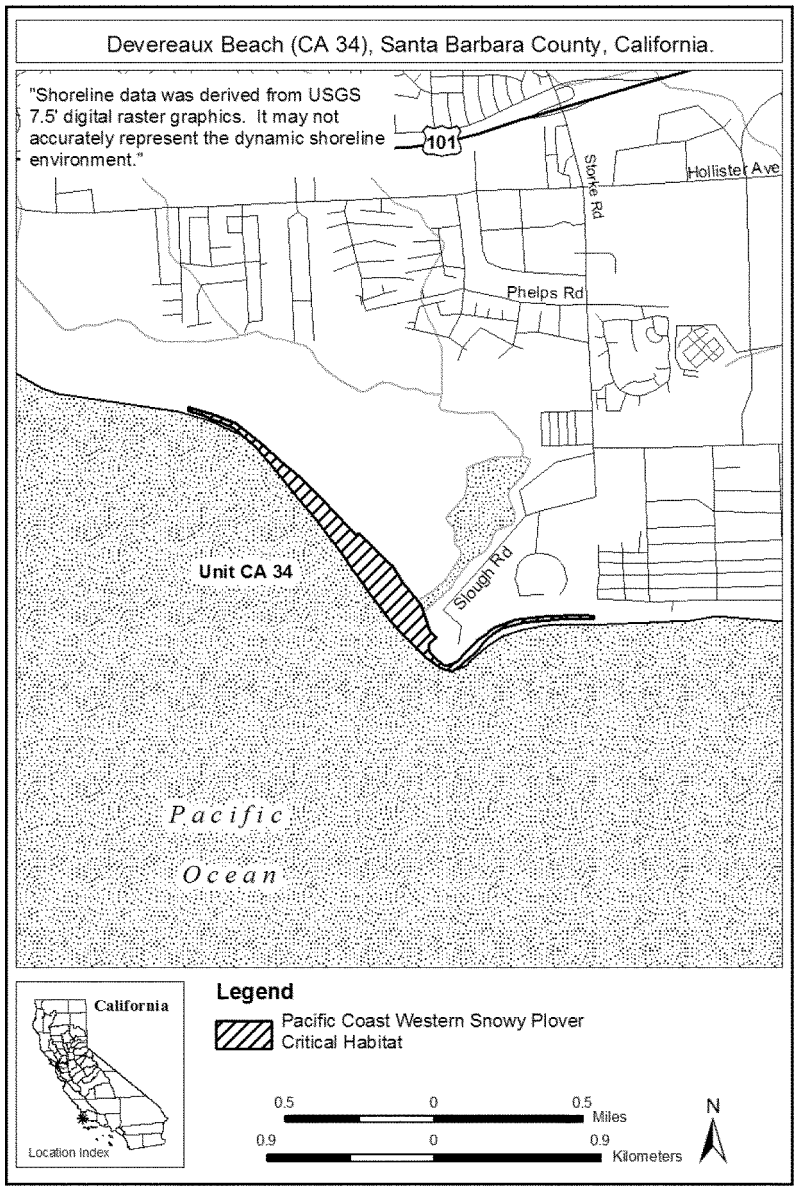
(64) Unit CA 30: Morro Bay Beach, San Luis Obispo County, California. Map follows:



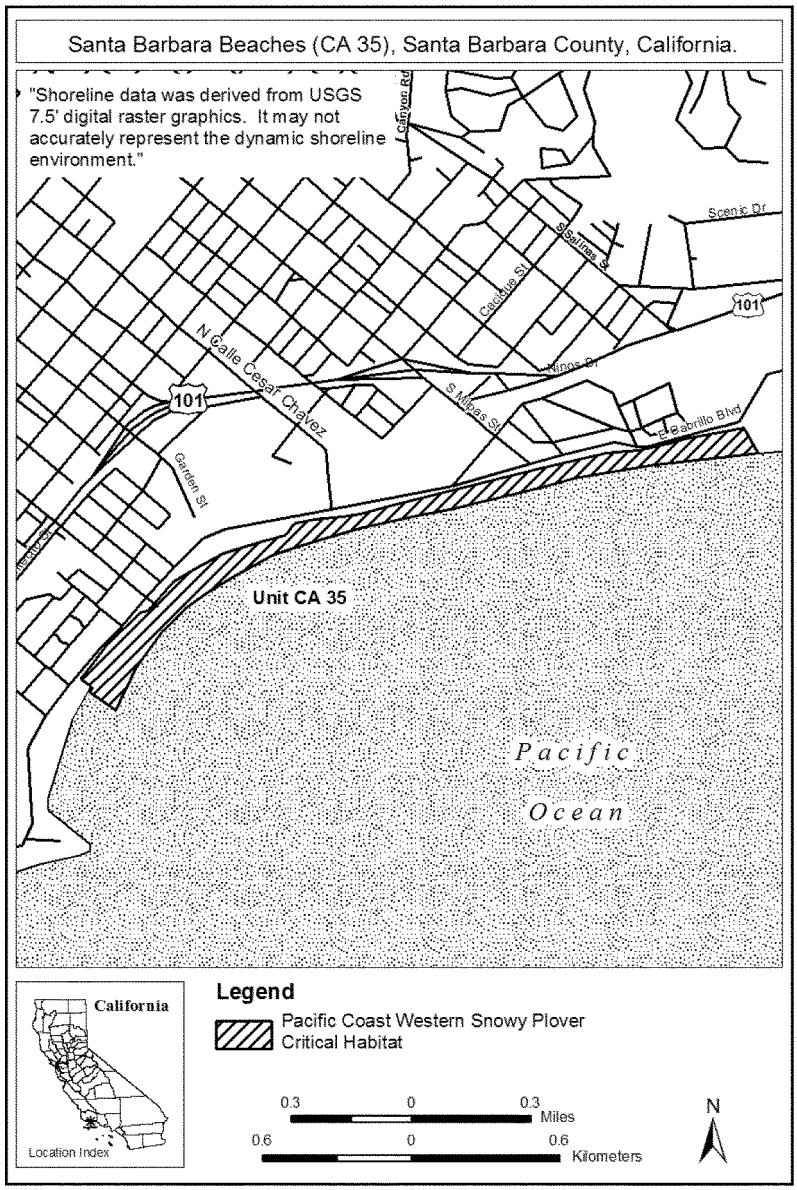
(65) Unit CA 31: Pismo Beach/Nipomo Dunes, San Luis Obispo and Santa Barbara Counties, California. Map follows:



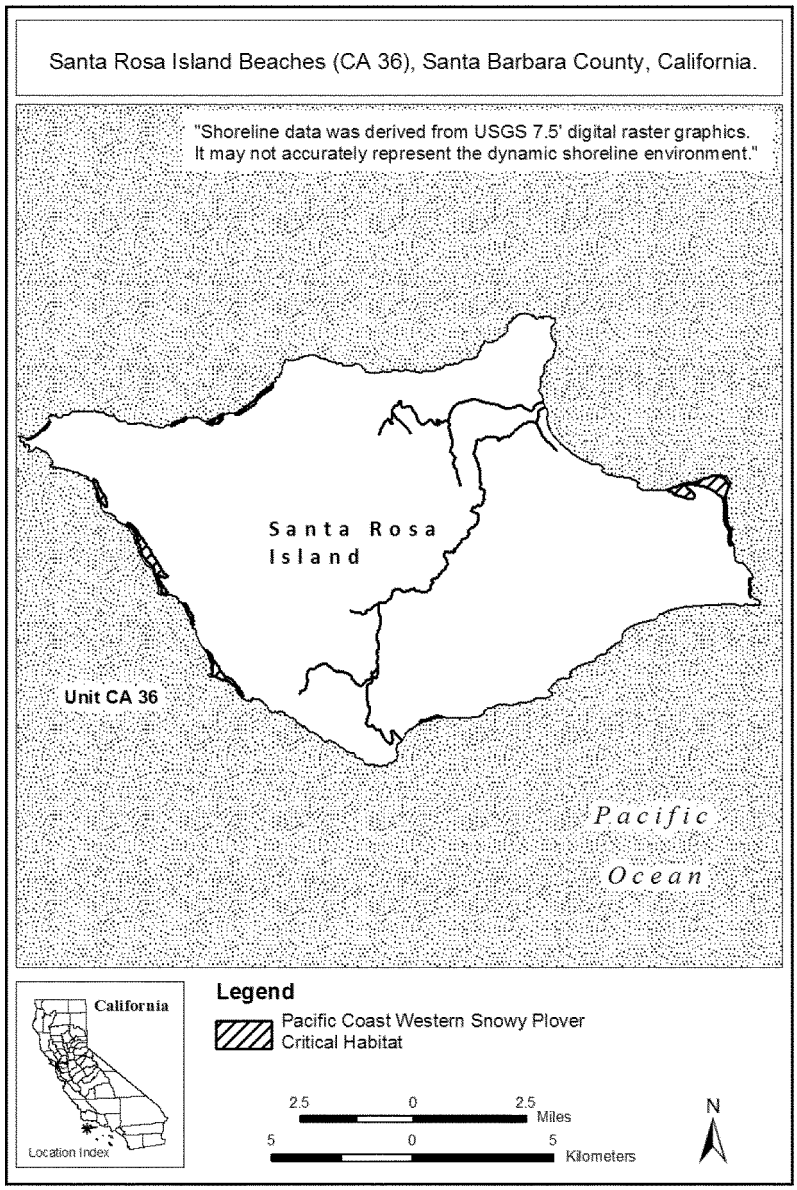
(66) Unit CA 34: Devereaux Beach, Santa Barbara County, California. Map follows:



(67) Unit CA 35: Santa Barbara Beaches, Santa Barbara County, California. Map follows:



(68) Subunit CA 36A: Santa Rosa Island Beaches, Santa Barbara County, California. Map of Unit CA 36: Santa Rosa Island Beaches, including Subunits CA 36A through CA 36K follows:



(69) Subunit CA 36B: Santa Rosa Island Beaches, Santa Barbara County, California. Map of Unit CA 36: Santa Rosa Island Beaches, including Subunits CA 36A through CA 36K is provided at paragraph 68 of this entry.

(70) Unit CA 36C: Santa Rosa Island Beaches, Santa Barbara County, California. Map of Unit CA 36: Santa Rosa Island Beaches, including Subunits CA 36A through CA 36K is provided at paragraph 68 of this entry.

(71) Unit CA 36D: Santa Rosa Island Beaches, Santa Barbara County, California. Map of Unit CA 36: Santa Rosa Island Beaches, including Subunits CA 36A through CA 36K is provided at paragraph 68 of this entry.

(72) Unit CA 36E: Santa Rosa Island Beaches, Santa Barbara County, California. Map of Unit CA 36: Santa Rosa Island Beaches, including Subunits CA 36A through CA 36K is provided at paragraph 68 of this entry.

(73) Unit CA 36F: Santa Rosa Island Beaches, Santa Barbara County, California. Map of Unit CA 36: Santa Rosa Island Beaches, including Subunits CA 36A through CA 36K is provided at paragraph 68 of this entry.

(74) Unit CA 36G: Santa Rosa Island Beaches, Santa Barbara County, California. Map of Unit CA 36: Santa Rosa Island Beaches, including Subunits CA 36A through CA 36K is provided at paragraph 68 of this entry.

(75) Unit CA 36H: Santa Rosa Island Beaches, Santa Barbara County, California. Map of Unit CA 36: Santa Rosa Island Beaches, including Subunits CA 36A through CA 36K is provided at paragraph 68 of this entry.

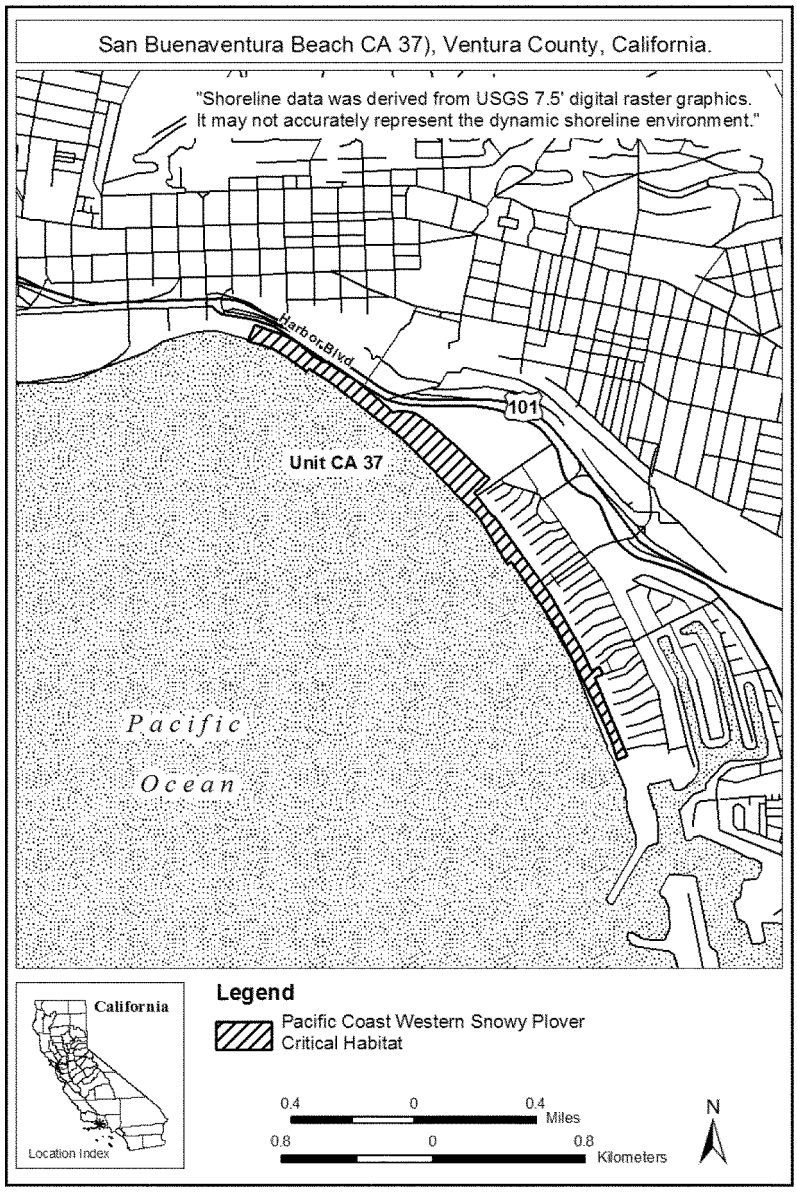
(76) Unit CA 36I: Santa Rosa Island Beaches, Santa Barbara County, California. Map of Unit CA 36: Santa Rosa Island Beaches, including Subunits CA 36A through CA 36K is provided at paragraph 68 of this entry.

(77) Unit CA 36J: Santa Rosa Island Beaches, Santa Barbara County,

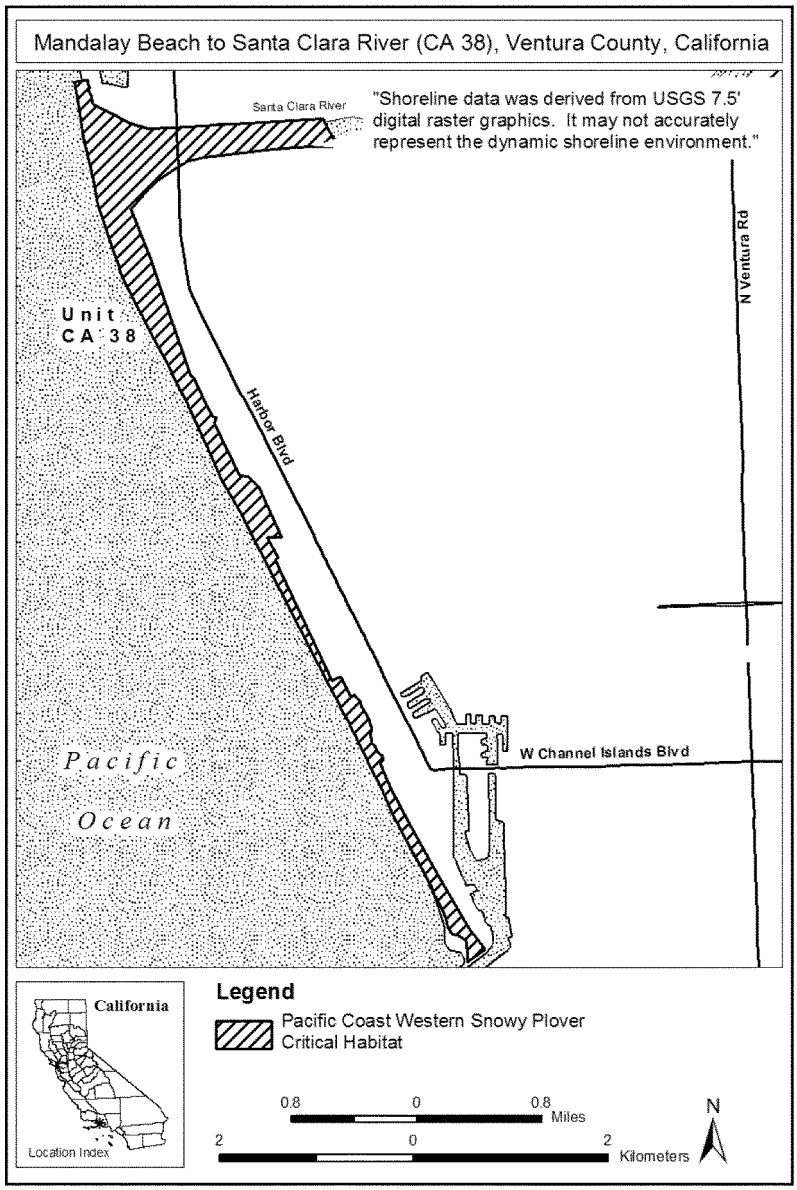
California. Map of Unit CA 36: Santa Rosa Island Beaches, including Subunits CA 36A through CA 36K is provided at paragraph 68 of this entry.

(78) Unit CA 36K: Santa Rosa Island Beaches, Santa Barbara County, California. Map of Unit CA 36: Santa Rosa Island Beaches, including Subunits CA 36A through CA 36K is provided at paragraph 68 of this entry.

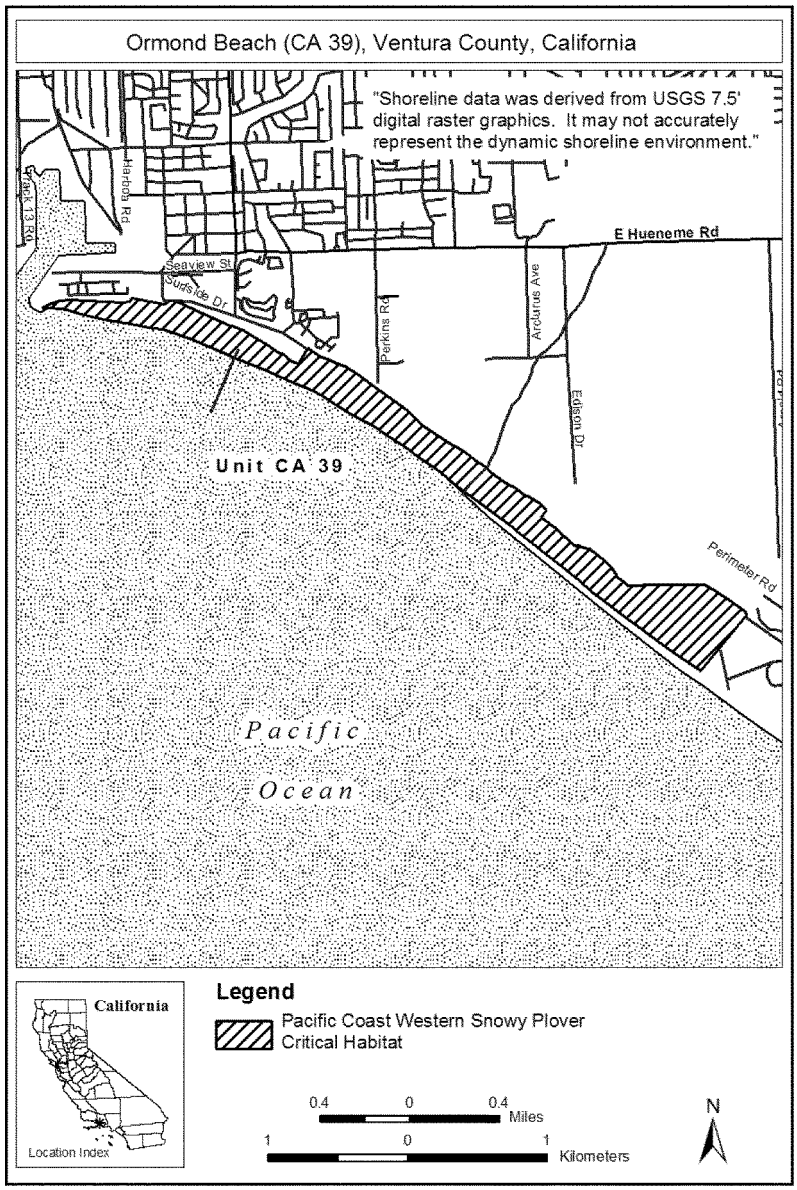
(79) Unit CA 37: San Buenaventura Beach, Ventura County, California. Map follows:



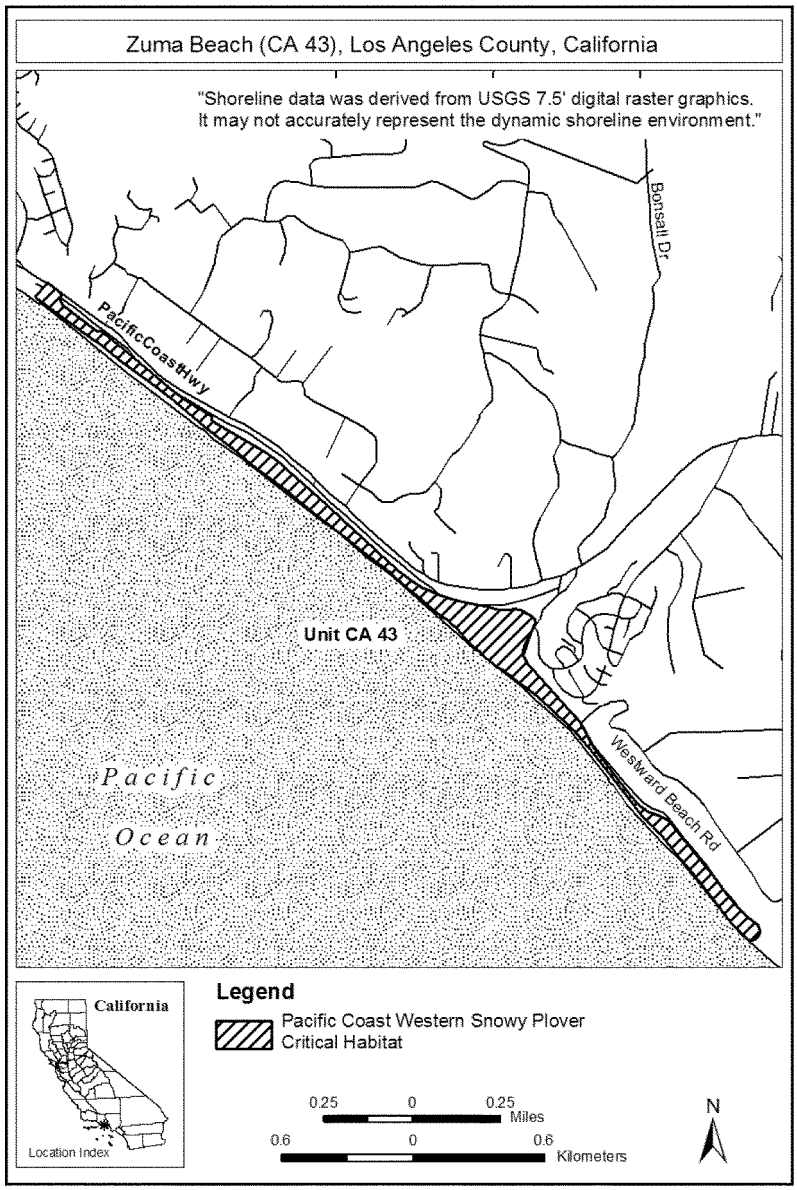
(80) Unit CA 38: Mandalay Beach to Santa Clara River, Ventura County, California. Map follows:



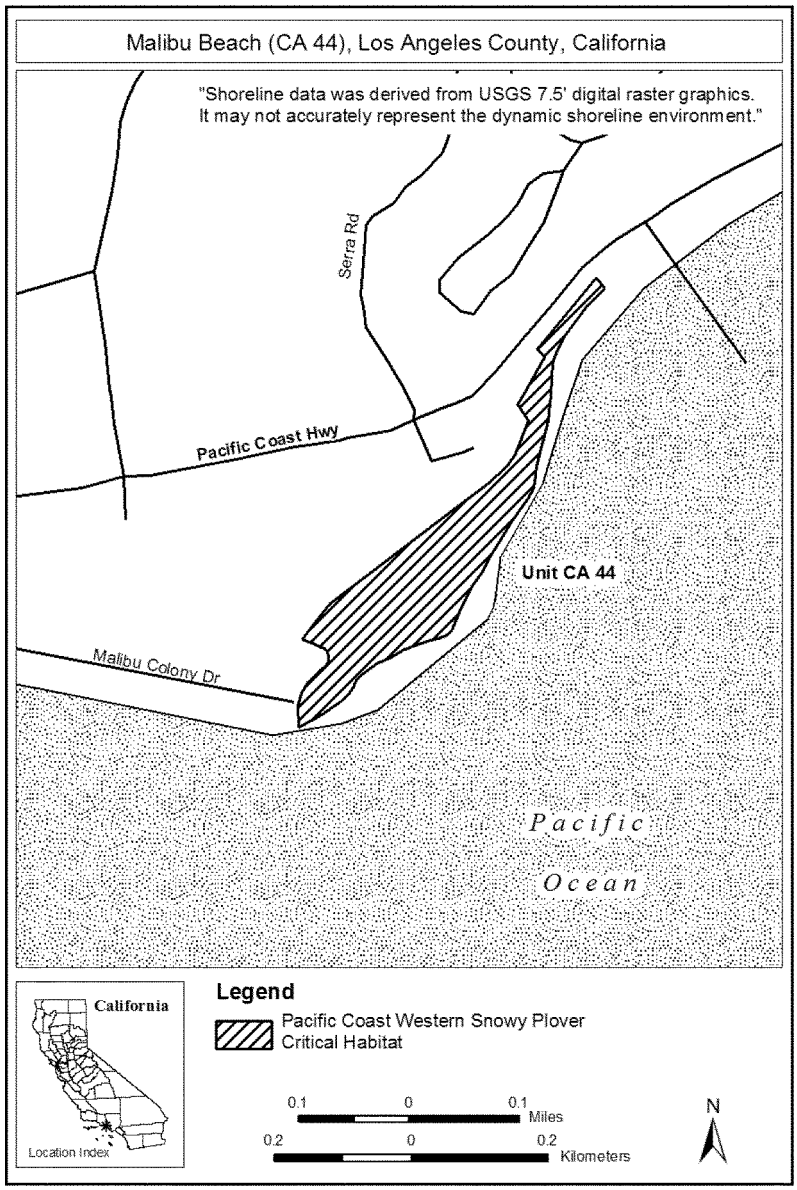
(81) Unit CA 39: Ormond Beach, Ventura County, California. Map follows:



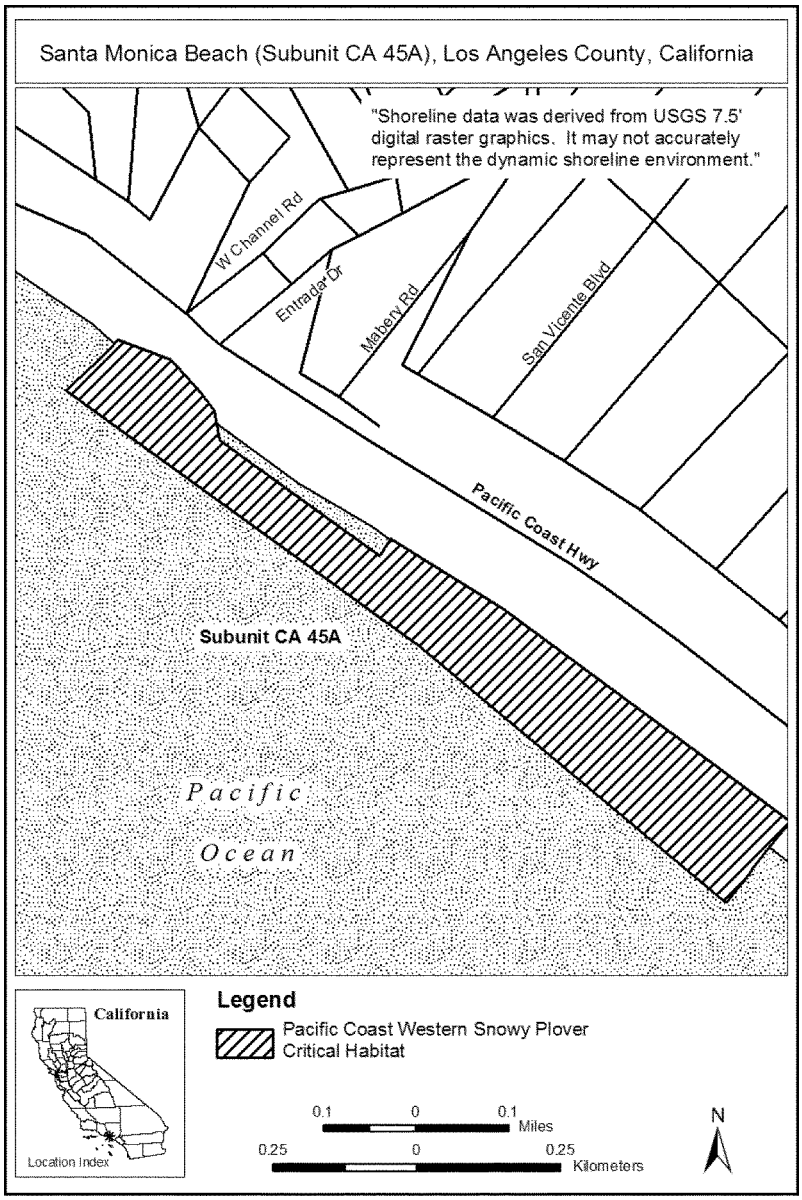
(82) Unit CA 43: Zuma Beach, Los Angeles County, California. Map follows:



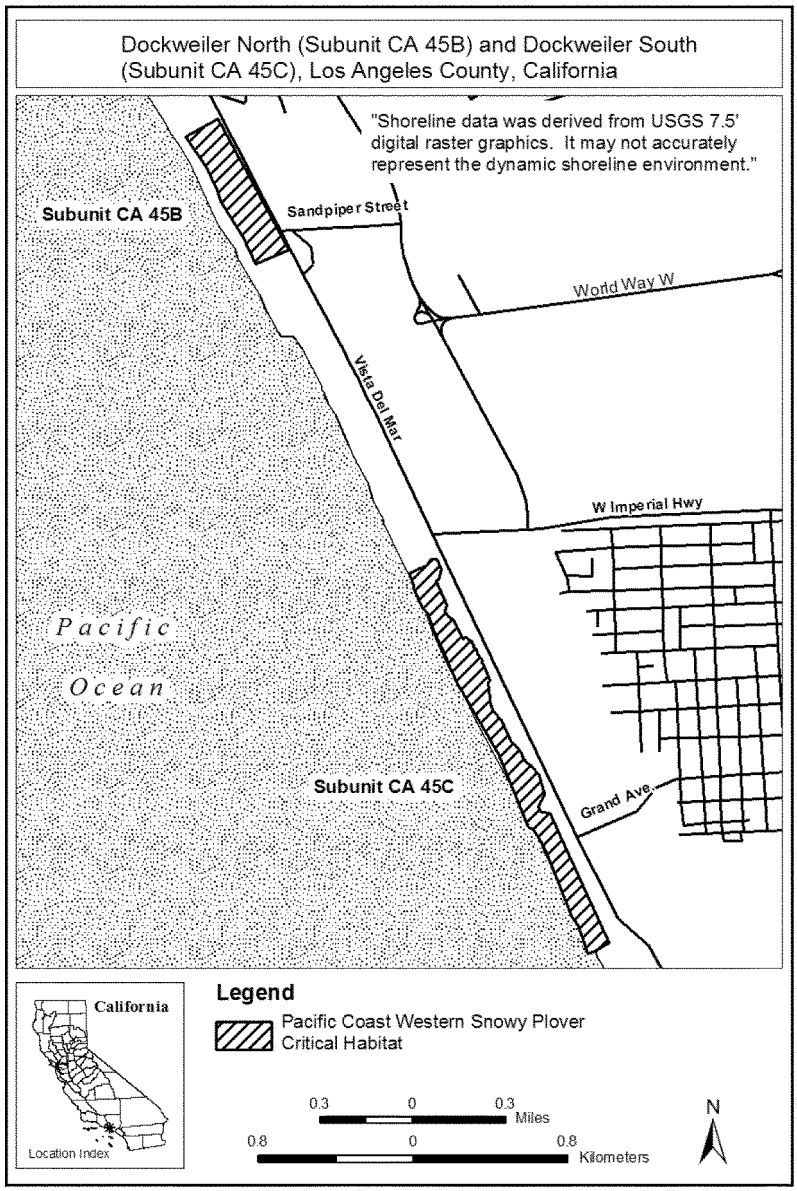
(83) Unit CA 44: Malibu Beach, Los Angeles County, California. Map follows:



(84) Subunit CA 45A: Santa Monica Beach, Los Angeles County, California. Map follows:

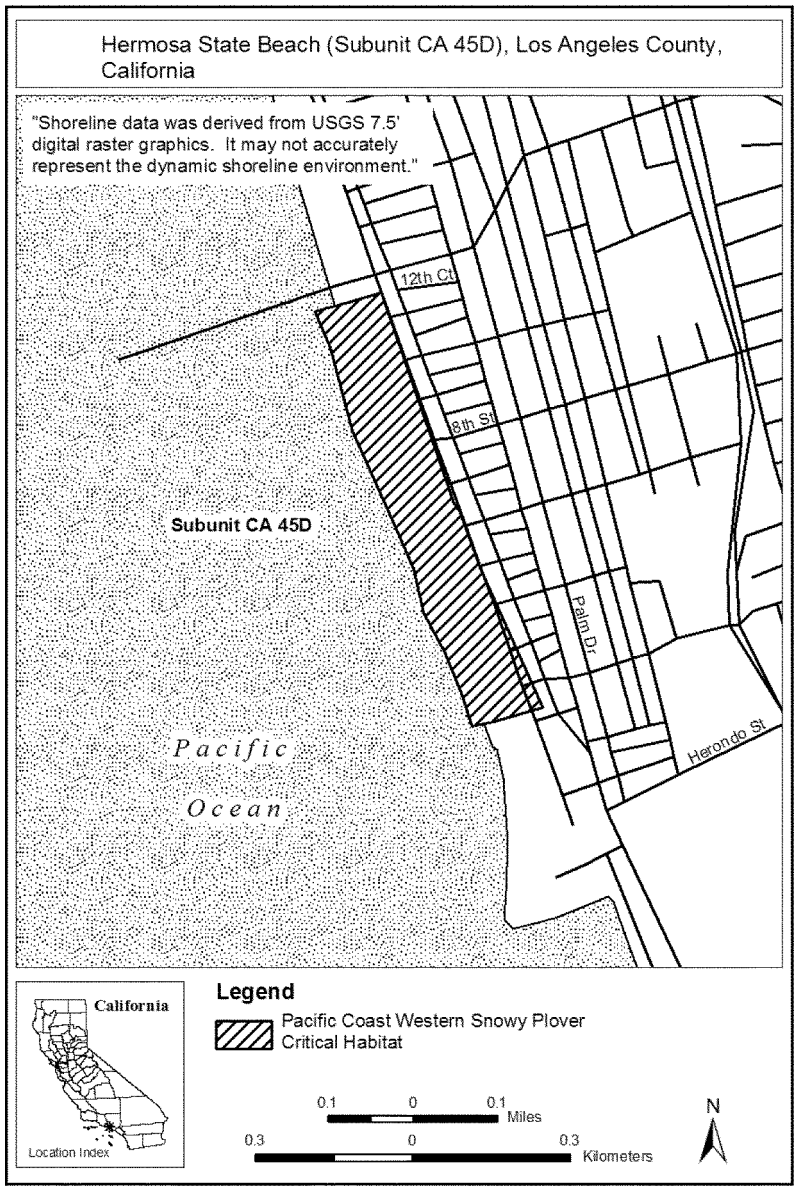


(85) Subunit CA 45B: Dockweiler North, Los Angeles County, California. Map of Subunits CA 45B and CA 45C follows:

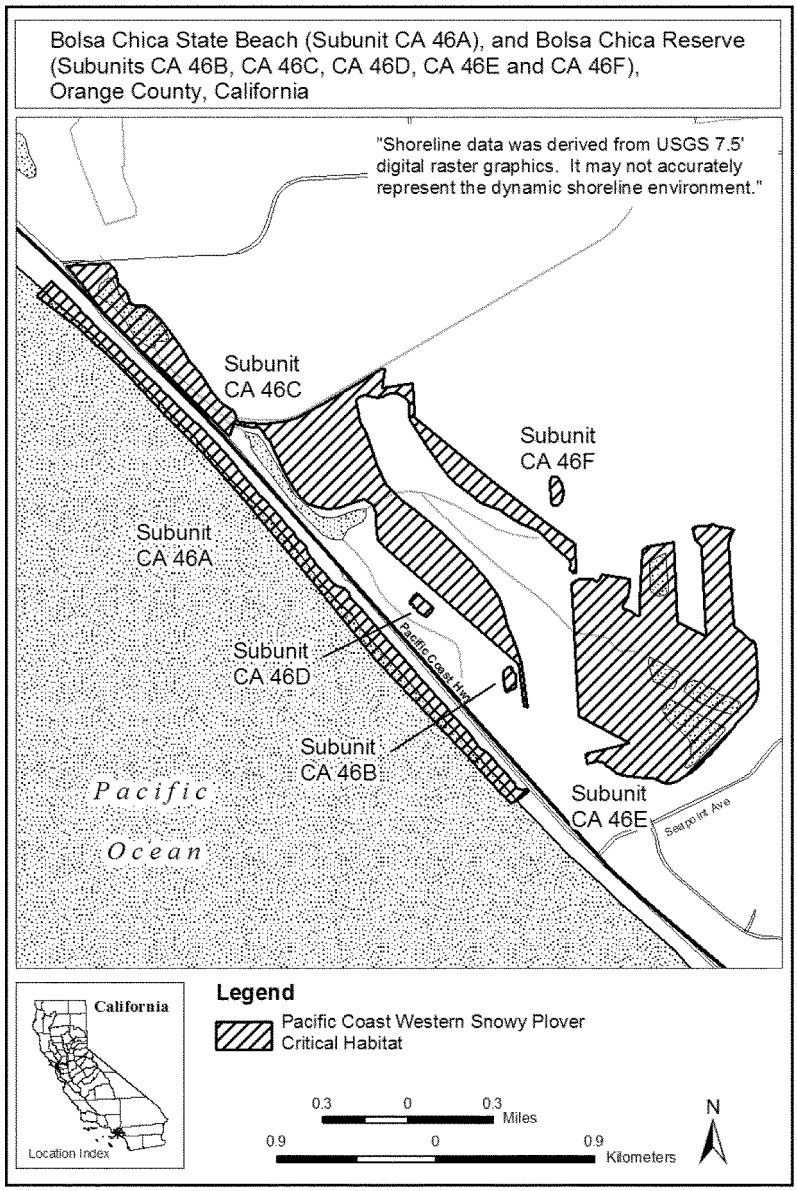


(86) Subunit CA 45C: Dockweiler South, Los Angeles County, California. Map of Subunits CA 45B and CA 45C is provided at paragraph 85 of this entry.

(87) Subunit CA 45D: Hermosa State Beach, Los Angeles County, California. Map follows:



(88) Subunit CA 46A: Bolsa Chica State Beach, Orange County, California. Map of Subunits CA 46A through CA 46F follows:



(89) Subunit CA 46B: Bolsa Chica Reserve, Orange County, California. Map of Subunits CA 46A through CA 46F is provided at paragraph 88 of this entry.

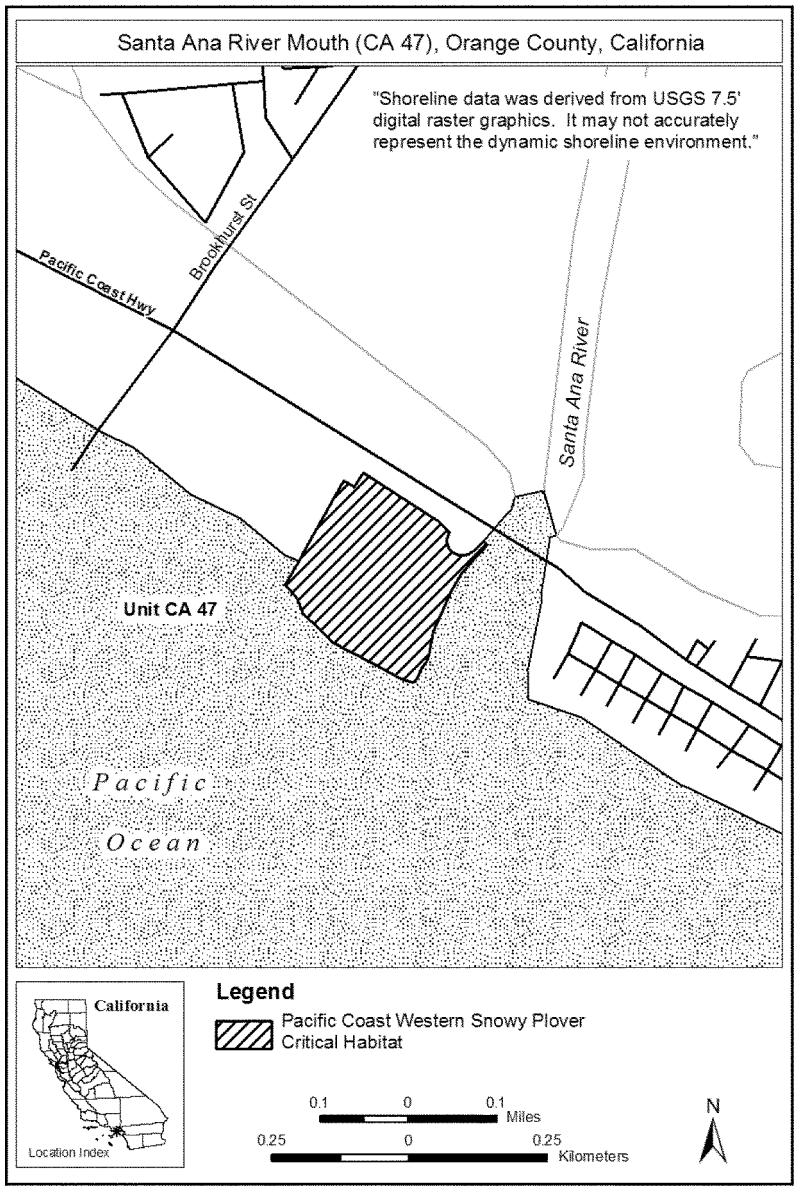
(90) Subunit CA 46C: Bolsa Chica Reserve, Orange County, California. Map of Subunits CA 46A through CA 46F is provided at paragraph 88 of this entry.

(91) Subunit CA 46D: Bolsa Chica Reserve, Orange County, California. Map of Subunits CA 46A through CA 46F is provided at paragraph 88 of this entry.

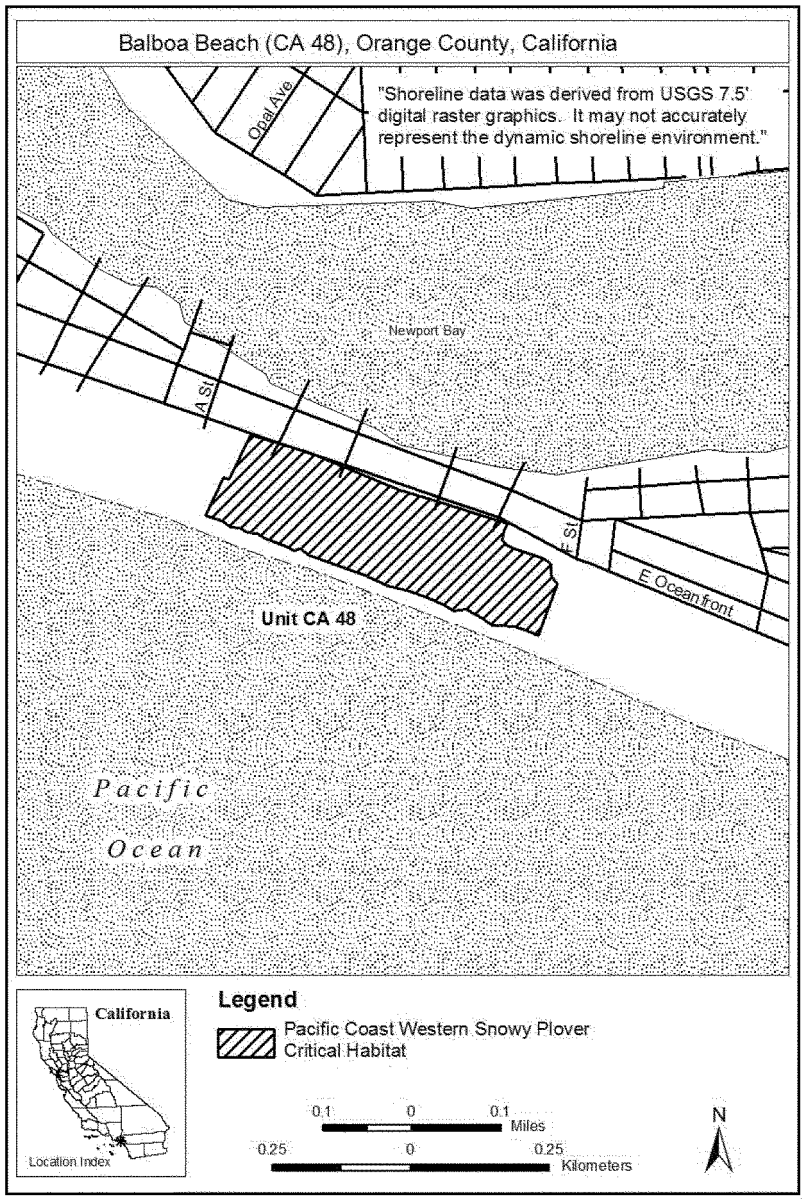
(92) Subunit CA 46E: Bolsa Chica Reserve, Orange County, California. Map of Subunits CA 46A through CA 46F is provided at paragraph 88 of this entry.

(93) Subunit CA 46F: Bolsa Chica Reserve, Orange County, California. Map of Subunits CA 46A through CA 46F is provided at paragraph 88 of this entry.

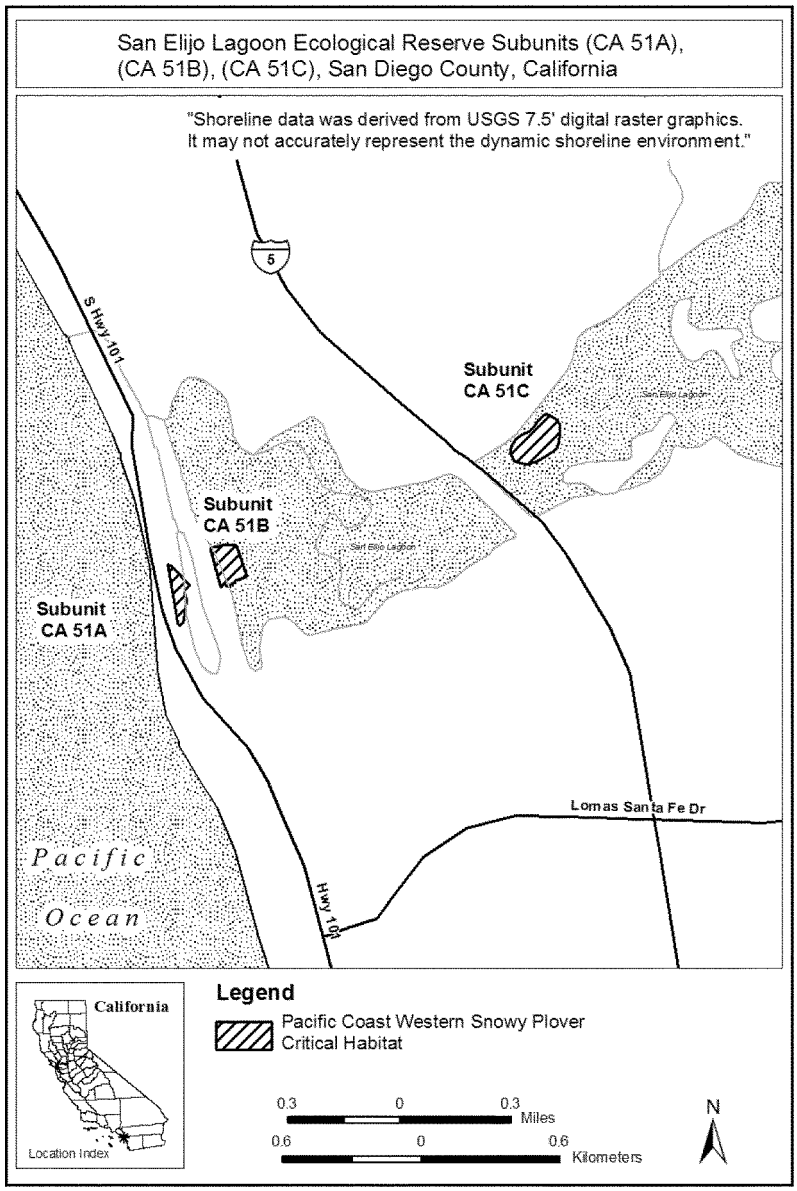
(94) Unit CA 47: Santa Ana River Mouth, Orange County, California. Map follows:



(95) Unit CA 48: Balboa Beach, Orange County, California. Map follows:



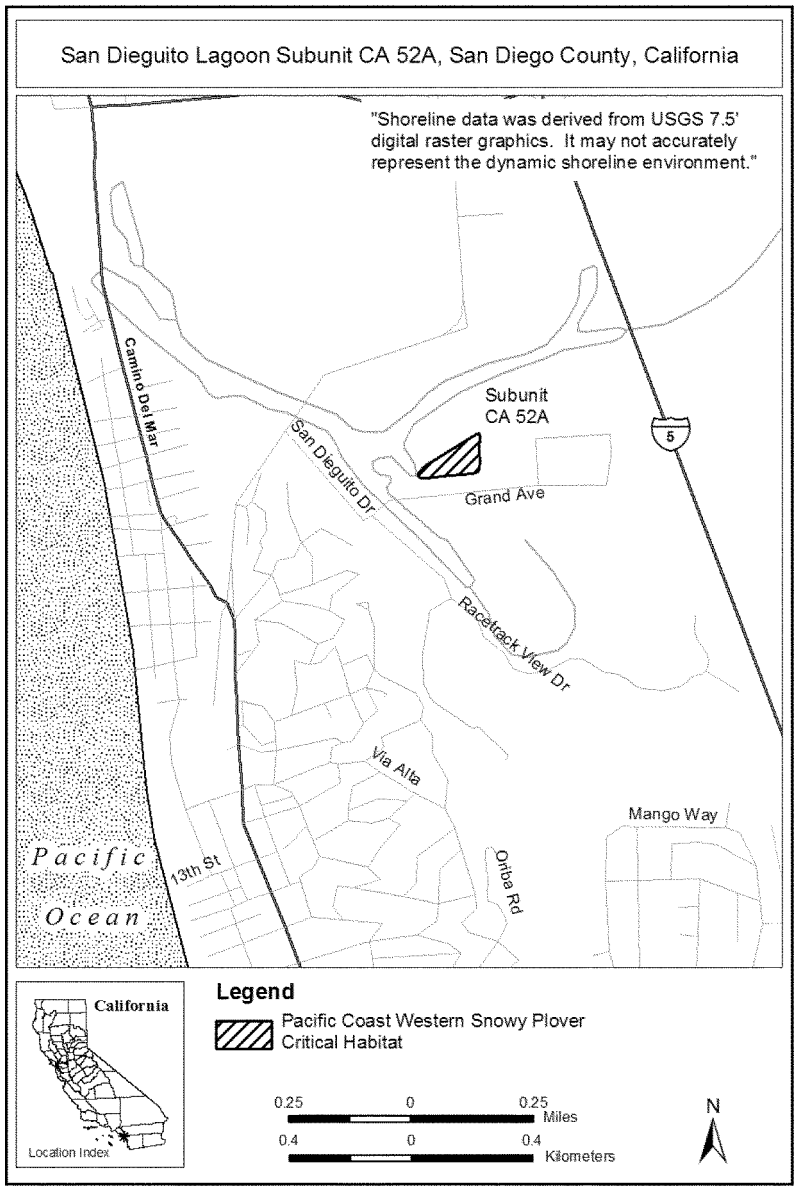
(96) Subunit CA 51A: San Elijo Lagoon Ecological Reserve, San Diego County, California. Map of Subunits CA 51A, CA 51B, and CA 51C follows:



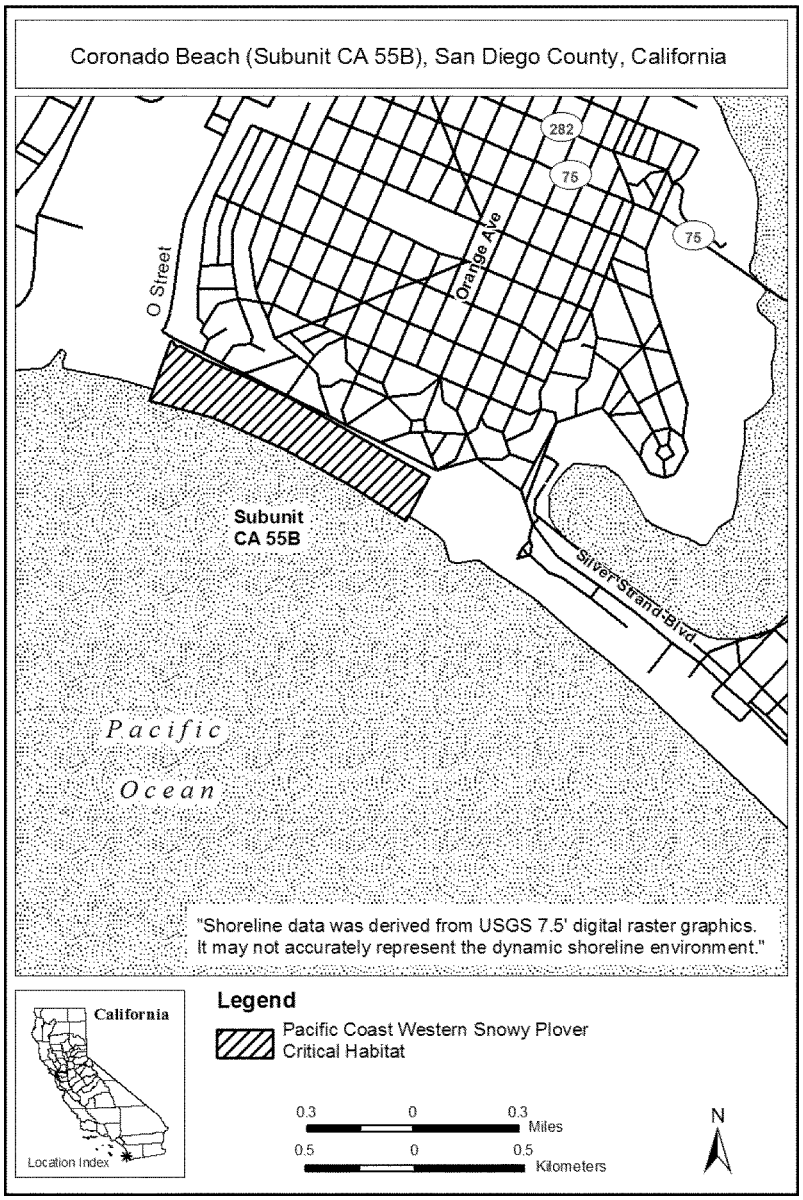
(97) Subunit CA 51B: San Elijo Ecological Reserve, San Diego County, California. Map of Subunits CA 51A, CA 51B, and CA 51C is provided at paragraph 96 of this entry.

(98) Subunit CA 51C: San Elijo Ecological Reserve, San Diego County, California. Map of Subunits CA 51A, CA 51B, and CA 51C is provided at paragraph 96 of this entry.

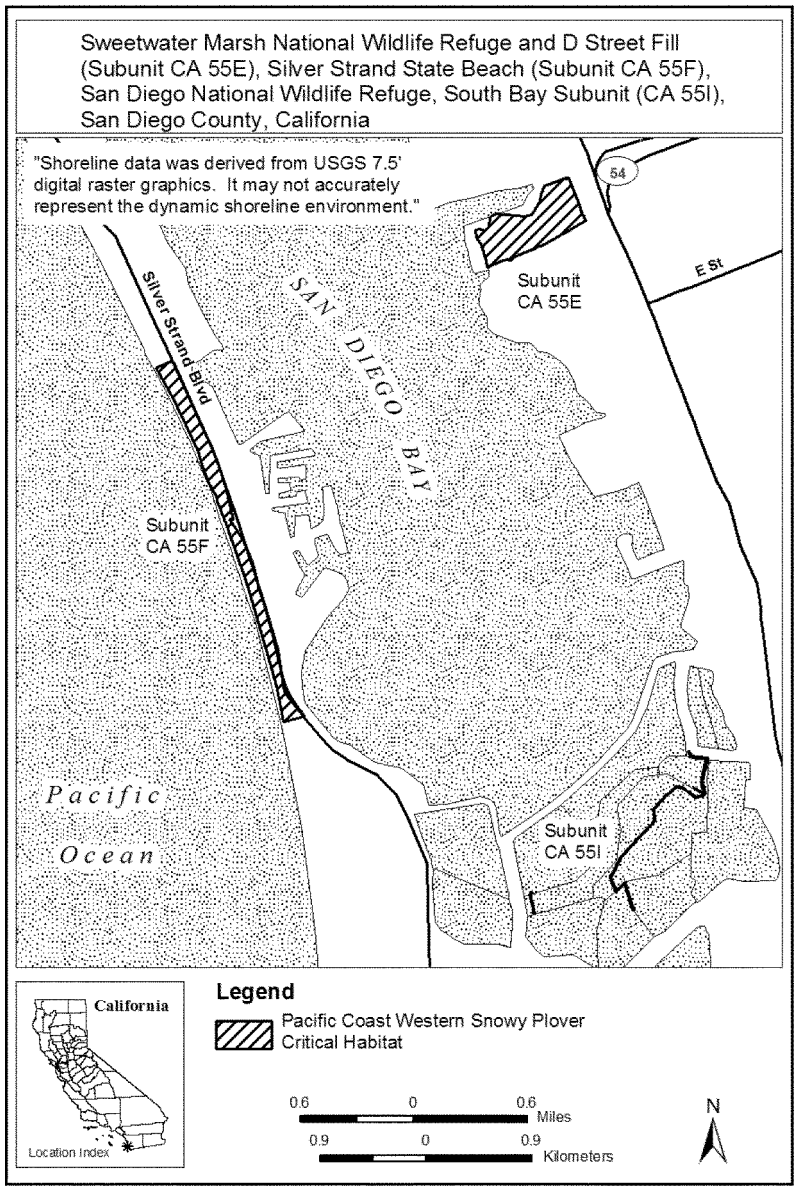
(99) Subunit CA 52A: San Dieguito Lagoon, San Diego County, California. Map follows:



(100) Subunit CA 55B: Coronado Beach, San Diego County, California. Map follows:



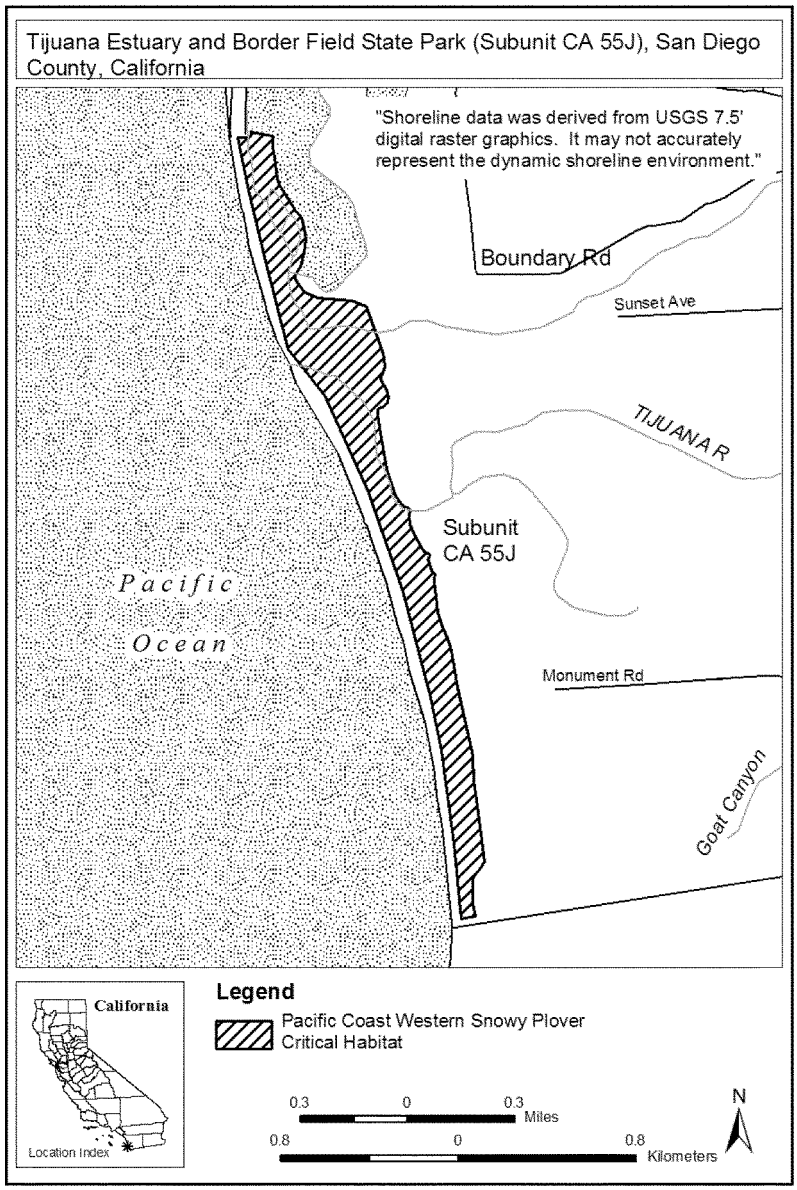
(101) Subunit CA 55E: Sweetwater Marsh National Wildlife Refuge, San Diego County, California. Map of Subunits CA 55E, CA 55F, and CA 55I follows:



(102) Subunit CA 55F: Silver Strand State Beach, San Diego County, California. Map of Subunits CA 55E, CA 55F, and CA 55I is provided at paragraph 101 of this entry.

(103) Subunit CA 55I: San Diego National Wildlife Refuge—South Bay Unit, San Diego County, California. Map of Subunits CA 55E, CA 55F, and CA 55I is provided at paragraph 101 of this entry.

(104) Subunit CA 55J: Tijuana Estuary and Border Field State Park, San Diego County, California. Map follows:



* * * * *

Dated: May 30, 2012.

Rachel Jacobson,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2012–13886 Filed 6–18–12; 8:45 am]

BILLING CODE 4310–55–P

FEDERAL REGISTER

Vol. 77 Tuesday,

No. 118 June 19, 2012

Part IV

Department of the Interior

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Withdrawal of the Proposed Rule To List Dunes Sagebrush Lizard; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2010–0041; 4500030113]

RIN 1018–AV97

Endangered and Threatened Wildlife and Plants; Withdrawal of the Proposed Rule To List Dunes Sagebrush Lizard

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; withdrawal.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), withdraw the proposed rule to list the dunes sagebrush lizard (*Sceloporus arenicolus*) as endangered under the Endangered Species Act of 1973, as amended (Act). This withdrawal is based on our conclusion that the threats to the species as identified in the proposed rule no longer are as significant as believed at the time of the proposed rule. We base this conclusion on our analysis of current and future threats and conservation efforts. We find the best scientific and commercial data available indicate that the threats to the species and its habitat have been reduced to the point that the species does not meet the statutory definition of an endangered or threatened species. Therefore, we are withdrawing our proposal to list the species as endangered.

ADDRESSES: The withdrawal of our proposed rule, comments, and supplementary documents are available on the Internet at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2010–0041. Comments and materials received, as well as supporting documentation used in the preparation of this rule, are also available for public inspection, by appointment, during normal business hours at: U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna Road NE., Albuquerque, NM 87113, (505) 346–2525, facsimile (505) 346–2542.

FOR FURTHER INFORMATION CONTACT: Wally Murphy, Field Supervisor, New Mexico Ecological Services Field Office (see **ADDRESSES** section). If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

Previous Federal Action

On December 30, 1982, we published our notice of review classifying the sand dune lizard (dunes sagebrush lizard) as a Category 2 species (47 FR 58454). Category 2 status included those taxa for which information in the Service's possession indicated that a proposed rule was possibly appropriate, but for which sufficient data on biological vulnerability and threats were not available to support a proposed rule.

Please note that we will be referring to this species throughout this finding using the currently accepted common name of dunes sagebrush lizard (Crother *et al.* 2008, p. 39).

On September 18, 1985, we published our notice of review reclassifying the dunes sagebrush lizard as a Category 3C species (50 FR 37958). Category 3C status included taxa that were considered more abundant or widespread than previously thought or not subject to identifiable threats. Species in this category were not included in our subsequent notices of review, unless their status had changed. Therefore, in our notice of review on November 21, 1991 (56 FR 58804), the dunes sagebrush lizard was not listed as a candidate species.

On November 15, 1994, our animal candidate notice of review once again included the dune sagebrush lizard as a Category 2 species (59 FR 58982), indicating that its conservation status had changed. On February 28, 1996, we published a Candidate Notice of Review (CNOR) that announced changes to the way we identify candidates for listing under the Act (61 FR 7596). In that document, we provided notice of our intent to discontinue maintaining a list of Category 2 species, and we dropped all former Category 2 species from the list. This was done in order to reduce confusion about the conservation status of those species, and to clarify that we no longer regarded them as candidate species. As a result, the dunes sagebrush lizard did not appear as a candidate in our 1996 (61 FR 7596; February 28, 1996), 1997 (62 FR 49398; September 19, 1997), or 1999 (64 FR 57534; October 25, 1999) notices of review.

In our 2001 CNOR, the dunes sagebrush lizard was placed on our candidate list with listing priority number (LPN) of 2 (66 FR 54807; October 30, 2001). Service policy (48 FR 43098, September 21, 1983) requires the assignment of an LPN to all candidate species that are warranted for listing. This listing priority system was developed to ensure that the Service has a rational system for allocating limited resources in a way that ensures that the species in greatest need of protection are the first to receive such protection. A lower LPN reflects a need for greater protection than a higher LPN. The LPN is based on the magnitude and immediacy of threats and the species' taxonomic uniqueness with a value range from 1 to 12. A listing priority number of 2 for the dunes sagebrush lizard means that the magnitude and the immediacy of the threats to the species are high. Since 2001, the species has remained on our candidate list with an LPN of 2.

On June 6, 2002, the Service received a petition from the Center for Biological Diversity to list the dunes sagebrush lizard. On June 21, 2004, the United States District Court for the District of Oregon (*Center for Biological Diversity* v. *Norton,* Civ. No. 03–1111–AA) found that our resubmitted petition findings for the southern Idaho ground squirrel, dunes sagebrush lizard, and Tahoe yellow cress, which we published as part of the CNOR on May 4, 2004 (69 FR 24876), were not sufficient. The court indicated that we did not specify what listing actions for higher priority species precluded publishing a proposed rule for these three species, and that we did not adequately explain the reasons why actions for the identified species were deemed higher in priority, or why such actions resulted in the preclusion of listing actions for the southern Idaho ground squirrel, sand dune lizard, or Tahoe yellow cress. The court ordered that we publish updated findings for these species within 180 days of the order.

On December 27, 2004, the Service published its 12-month finding, which determined that listing was warranted, but precluded by higher priorities (69 FR 77167). In that finding, the species remained on the candidate list, with an LPN of 2. On December 14, 2010, we proposed the dunes sagebrush lizard for listing as endangered under the Endangered Species Act of 1973, as amended (Act) (75 FR 77801). Publication of the proposed rule opened a 60-day comment period that closed on February 14, 2011. On December 5, 2011 (76 FR 75858), the Service extended our determination on whether or not to list until June 14, 2012, due to significant scientific disagreement.

Species Information

The dunes sagebrush lizard is a small, light-brown phrynosomatid lizard (family Phrynosomatidae, genus *Sceloporus*), with a maximum snout-to-vent length of 70 millimeters (mm) (2.8 inches (in)) for females and 65 mm (2.6 in) for males (Degenhardt *et al.* 1996, p.

160). The dunes sagebrush lizard's nearest relative is the sagebrush lizard (*Sceloporus graciosus*), with the closest population occurring in northwestern New Mexico. The dunes sagebrush lizard and sagebrush lizard were isolated from each other at least 15,000 years ago during the late Pleistocene era, when suitable habitat for each species became separated by large areas of warm, dry unsuitable land (Jones and Lovich 2009, p. 200). Sabath (1960, p. 22) first described the occurrence of light-colored sagebrush lizards in southeastern New Mexico and western Texas. Kirkland L. Jones collected the type specimen for *Sceloporus graciosus arenicolus* on April 27, 1968, in eastern Chaves County, New Mexico (Degenhardt *et al.* 1996, p. 159). Degenhardt and Jones (1972, p. 213) described the dunes sagebrush lizard (*Sceloporus graciosus arenicolus*) as a subspecies of the sagebrush lizard. The dunes sagebrush lizard was elevated to a species in 1992 (Smith *et al.* 1992, pp. 42–43). Scientific publications, field guides, and professional scientific organizations all consider the dunes sagebrush lizard to be a valid species, and we concur. Much of the previous literature concerning *Sceloporus arenicolus* refers to it by the common name of sand dune lizard (e.g., Degenhardt *et al.* 1996, p. 159); however, the currently accepted common name is dunes sagebrush lizard (Crother *et al.* 2008, p. 39).

Habitat and Ecology

The dunes sagebrush lizard is only found in *Quercus havardii* (shinnery oak) dune habitat, located in southeastern New Mexico and West Texas. The shinnery oak community is not spreading, and its boundaries have not changed since early surveys, suggesting that new habitat is not being created (Peterson 1992, p. 2). The dune habitat in southeastern New Mexico and western Texas, where the dunes sagebrush lizard is found, lies within a small portion of the overall shinnery oak community. During the late Pleistocene era, wind erosion of the Blackwater Draw formation along with shinnery oak encroachment formed this unique dune system. The prevailing winds blow from the southwest to the northeast, creating sand accumulation along the western edge of the Llano Estacado (a large mesa or tableland) (Muhs and Holliday 2001, p. 82). This process creates parabolic dunes (crescent-shaped dunes that are concave upwind and form in areas where there is some vegetation and a good supply of sand). In this case, the dune habitat is dependent upon the existence of shinnery oak in areas with appropriate permeable, sandy soils. The landscape created by the shinnery oak dune community is a spatially dynamic system that is altered by natural processes like wind and rain. Over time, these natural processes erode and flatten sand dunes, and new dunes form in the flats (Muhs and Holliday 2001, p. 75). Shinnery oak dune complexes can transition into shinnery oak flats, along with a mosaic of habitat types within or near the range of dunes sagebrush lizard. Landforms separating habitat may include mesquite hummocks, grasslands, and tabosa flats that are lacking shinnery oak and are dominated by *Hilaria mutica* (tabosa grass) and scattered *Prosopis glandulosa* (honey mesquite).

Shinnery oak plays a very important role in stabilizing the dunes (Muhs and Holliday 2001, p. 75). Each shinnery oak tree occurs primarily under ground, with only one-tenth of the plant standing 0.6 to 0.8 meters (m) (2 to 3 feet (ft)) above ground level. Shinnery oak trees are clonal, meaning that each plant in a clone is descended asexually from a single ancestor. One clone can cover up to 81 hectares (ha) (205 acres (ac)) and can live more than 13,000 years, although individual stems on the surface may not be that old (Peterson and Boyd 1998, p. 5). These drought-tolerant trees, with large root and stem masses and an extensive underground system of horizontal stems that extends 4.6 to 6.1 m (15 to 20 ft) below the surface, support the dynamic dune system (Peterson and Boyd 1998, p. 5). The shinnery oak dune systems of western Texas and eastern New Mexico are being stabilized to different degrees by the shinnery oak cover. In some areas where land practices and drought have caused vegetation removal and shifting sands the dunes are not as stable (Muhs and Holliday 1995, p. 198).

The connection between dunes sagebrush lizards and the shinnery oak dune system is very specific; the range of the species is closely linked to the distribution of shinnery oak dunes (Fitzgerald *et al.* 1997, p. 4), and dunes sagebrush lizards are rarely found at sites lacking shinnery oak dune habitat (Fitzgerald *et al.* 1997, p. 2), though they have occasionally been found in the shinnery oak flats adjacent to dunes. The presence of dunes sagebrush lizards is also directly linked to the quality and quantity of available shinnery oak dune habitat (Fitzgerald *et al.* 1997, p. 8; Smolensky and Fitzgerald 2011, p. 324). Shinnery oak provides structure to the dune system, provides critical shelter for the dunes sagebrush lizard's thermoregulation (regulation of body temperature), and habitat for the dunes sagebrush lizard's insect prey base, which includes ants (Order Hymenoptera, Family Formicidae); small beetles (Order Coleoptera), including lady bird beetles (Family Coccinellidae) and their larvae; crickets (Order Orthoptera); grasshoppers (Order Orthoptera); and spiders (Order Araneae) (Degenhardt *et al.* 1996, p. 160).

Within the shinnery oak dune system, dunes sagebrush lizards are found in deep, wind-hollowed depressions called blowouts. These large, steep blowouts provide habitat for thermoregulation, foraging, and predator avoidance, where dunes sagebrush lizards escape under leaf litter or loose sand during the hot part of the day and at night (Painter *et al.* 2007, p. 3). Sand grain size within these blowouts may be a limiting factor in the distribution and occurrence of the dunes sagebrush lizard within the shinnery oak dunes. Preliminary laboratory and field experiments designed to determine sand grain preference demonstrated that dunes sagebrush lizards select sites with a predominance of medium-sized sand grains and do not use finer sands (Fitzgerald *et al.* 1997, p. 6). Finer sand grain sizes are thought to limit the dunes sagebrush lizard's ability to effectively breathe when they bury themselves to avoid predators or to thermoregulate. Dunes sagebrush lizards may instead prefer sand that is suitable for burying but not too fine to prevent respiration (Fitzgerald *et al.* 1997, p. 23). Sand grain size is also important in the establishment of dune blowouts and can influence the dune structure (Fitzgerald *et al.* 1997, p. 6).

Besides the shinnery oak dunes, dunes sagebrush lizards may sometimes be found in shinnery oak flats that are adjacent to occupied dunes. These shinnery oak flats are used by females looking for nesting sites and for dispersal of recent hatchlings (Hill and Fitzgerald 2007, p. 5). Females often utilize more than one dune during the nesting season and have home range sizes of about 436 square meters (m^2) (4,693 square feet (ft^2)). The largest recorded home range is 2,799.7 m^2 (9,185.4 ft^2), which includes the movement of a tracked female from her primary home range to her nesting site (Hill and Fitzgerald 2007, p. 5). Dunes sagebrush lizards are active between March and October, and are dormant underground during the colder winter months. Mating has been observed in April and May (Sena 1985, p. 17). Females build nest chambers and lay eggs in the moist soil below the surface. Nests have been observed on west-

facing, open sand slopes with little to no vegetation, approximately 18 centimeters (cm) (7.1 in) below the sand surface (Hill and Fitzgerald 2007, p. 5). Females produce one to two clutches per year, with three to five eggs per clutch. Hatchlings appear between July and September (Hill and Fitzgerald 2007, p. 2; Sena 1985, p. 6).

New Mexico

The distribution of the dunes sagebrush lizard in New Mexico was not formally described until 1997, using the results of 169 standardized surveys conducted at 157 sites. Of the 157 sites surveyed, 72 sites were determined to be occupied by dunes sagebrush lizards (Fitzgerald 1997, p. 13). As a result of these surveys, a polygon was drawn around all occupied habitat in New Mexico. The dunes sagebrush lizard is limited to a narrow, isolated band of shinnery oak dunes between elevations of 780 and 1,400 m (2,600 and 4,600 ft) in southeastern New Mexico. Additional sites have since been located in shinnery oak dunes within or just outside of the described distribution, although no populations have been found outside of the shinnery oak dune habitat. In 2010, the range was refined to incorporate new dunes sagebrush lizard occurrences, along with soil and vegetation data. The newly described range is delineated by the outer edges of the habitat; however, not all areas within the polygon are considered habitat. For instance, areas covered by mesquite hummocks are not considered dunes sagebrush lizard habitat, though they are located within the polygon.

Since the dunes sagebrush lizard was not described until 1973, it was not considered a full species until 1992, and its range was not described until 1997, there is limited site-specific data available for this species. We do have historical records of occurrence, and limited surveys by the New Mexico Department of Game and Fish (NMDGF), the Bureau of Land Management (BLM), and various universities. The first concerted effort to survey for the dunes sagebrush lizard in New Mexico took place in 1997 when the species' distribution was first defined (Fitzgerald *et al.* 1997, p. 23). After 1997, there were no consistent surveys, and all of the sites surveyed in 1997 were not revisited until 2008 to 2011. During the 2008 to 2010 surveys, dunes sagebrush lizards were found at 63 of the sites that were defined in 1997, and were not detected at 9 sites (Painter 2010, p. 1). The BLM has also surveyed BLM land for dunes sagebrush lizards throughout the species range in New Mexico. Surveys were conducted at 45 sites within the Roswell Field Office, with 6 of the sites having dunes sagebrush lizards (BLM 2011, p. 5). Twenty dunes sagebrush lizards were also captured during surveys, but it is unclear if these captures occurred within the pitfall arrays, or at separate sites. The Carlsbad Field Office had 91 pitfall arrays, with 24 of those arrays having dunes sagebrush lizards (BLM 2011, p. 7).

Surveys for the dunes sagebrush lizard have not been consistently done. Dunes sagebrush lizard populations naturally fluctuate and can be affected by extreme weather events such as drought; therefore, single site visits may not accurately determine if a site is not occupied. Based on the limited survey results we have in our files, we cannot determine long-term trends of occupancy for this species. The Service, NMDGF, BLM, and Texas Parks and Wildlife Department, along with various universities, are working to develop consistent survey and monitoring techniques. Future surveys should incorporate detection probabilities and utilize standard survey techniques for the species, in order to more accurately compare results over time.

The known geographic range of the dunes sagebrush lizard in New Mexico extends from the San Juan Mesa in northeastern Chaves County, Roosevelt County, through eastern Eddy and southern Lea Counties (Fitzgerald *et al.* 1997, p. 23). The Mescalero Escarpment is the west side of the Llano Estacado south from San Juan Mesa, and is informally referred to as the Caprock. In New Mexico there are three genetically and geographically distinct populations of dunes sagebrush lizards: the northern population (near Kenna, New Mexico), the central population (at the Caprock Wildlife Area, north of U.S. Highway 380), and the southern population (near Loco Hills and Hobbs, New Mexico). These populations are separated from each other by geologic and ecologic landscape barriers, such as the caliche caprock of the Llano Estacado plateau, mesquite hummock landscapes, highways, roads, and oil and gas pads, that form areas of unsuitable vegetation, and lack dune structure (Chan *et al.* 2008, p. 13). These barriers have isolated the populations, and they have genetically diverged over time. The northernmost population is evolutionarily considered to be the youngest population (Chan *et al.* 2008, p. 13). The southern population is considered to be the oldest population of dunes sagebrush lizard and is genetically isolated from the central population due to the presence of the uninhabitable caliche caprock of the Llano Estacado plateau. Due to the presence of the caprock, where dunes sagebrush lizards do not occur, suitable shinnery oak dune habitat is limited to a narrow 8-kilometer (km) (4.9-mile (mi)) patch between the southern and central populations. Data from Chan *et al.* (2008, p. 10) suggest that conservation of large areas that contain a network of dune complexes is needed to maintain historical levels of connectivity, and the unique genetic qualities of the three dunes sagebrush lizard populations in New Mexico.

Texas

In Texas, the species was historically found in Andrews, Crane, Gaines, Ward, and Winkler Counties (Fitzgerald *et al.* 2011, p. 2). During 2006 and 2007, surveys were conducted to determine the distribution of the dunes sagebrush lizard in the State. Surveys were conducted at 27 sites (19 of these sites were historical localities) that contained potential dunes sagebrush lizard habitat in Andrews, Crane, Cochran, Edwards, Ward, and Winkler Counties. Dunes sagebrush lizards were found at only 3 of the 27 sites surveyed (Laurencio *et al.* 2007, p. 7). Two of the sites were in large patches of shinnery oak dunes that stretch through Ward, Winkler, and Andrews Counties. Shinnery oak dune habitat exists in north and western Crane County, but dunes sagebrush lizards were not found. One dunes sagebrush lizard was found at a site in Gaines County located within the easternmost contiguous habitat that stretches from the southernmost population in New Mexico (Laurencio *et al.* 2007, p. 11).

In 2011, a comprehensive effort was undertaken to determine the dunes sagebrush lizard's habitat and range in Texas. The shinnery oak dune habitat was delineated and 50 surveys were conducted to define the dunes sagebrush lizard's range in Texas. The mapped range in Texas includes only shinnery oak dune habitat, which represents both occupied and suitable habitat for the dunes sagebrush lizard (Fitzgerald *et al.* 2011, p. 10).

Of the 50 sites surveyed, 28 sites were occupied by dunes sagebrush lizards. Dunes sagebrush lizards were found at all 19 sites surveyed in Andrews County, and it is estimated that there are approximately 12,650 ha (31,260 ac) of suitable habitat in this county (Fitzgerald *et al.* 2011, p. 13). Even though there is a historical dunes sagebrush lizard location in Crane County, no lizards were detected in 2011 (Fitzgerald *et al.* 2011, p. 10). In Gaines County, the dunes sagebrush lizard is only known from one site that

is approximately 114 ha (281 ac) in the southwestern corner of the county. Dunes sagebrush lizards were documented at this site in 2007, so surveys were not conducted in 2011 (Fitzgerald *et al.* 2011, p. 9). In Ward County, it is estimated that there are 6,960 ha (17,198 ac) of dunes sagebrush lizard habitat. Five surveys were conducted in Ward County, outside of Monahans Sandshills State Park, with dunes sagebrush lizards detected at only one site (Fitzgerald *et al.* 2011, p. 12). Historically, dunes sagebrush lizards were only known to occur in the far northeastern corner of this county, in and near Monahans Sandhills State Park. Surveys in 2007 (Laurencio *et al.* 2007, p. 11) found no dunes sagebrush lizard in the 1,554-ha (3,840-ac) park. In 2010, the park was again surveyed, and dunes sagebrush lizards were present (Fitzgerald 2010, p. 1). It is evident that the dunes sagebrush lizard is still at the park, but the negative survey data from 2007 suggests they may be present in small numbers, and that further monitoring should be done at the park and other long-term monitoring sites. Finally, it is estimated that there are 39,789 ha (98,320 ac) of habitat in Winkler County. Out of the ten sites surveyed, eight had dunes sagebrush lizards (Fitzgerald *et al.* 2011, p. 12). Dunes sagebrush lizard populations in Texas are all on private land, including the population at Monahans Sandhills State Park, which is privately owned and leased to the State of Texas.

Summary of Comments and Recommendations

In the proposed rule published on December 14, 2010 (75 FR 77801), we requested that all interested parties submit written comments on the proposal by February 14, 2011. We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties and invited them to comment on the proposal. Newspaper notices inviting general public comment were published in the Carlsbad Daily Argus, The Portales News Tribune, Hobbs News Sun, Midland Reporter, and Lubbock Online. We received requests for public hearings in both Texas and New Mexico. We held a public hearing in Midland, Texas, on April 27, 2011, and a second public hearing in Roswell, New Mexico, on April 28, 2011. The comment period was reopened to accept comments received during the public hearings, and was closed on May 9, 2011 (76 FR 19304; April 7, 2011). On December 5, 2011 (76 FR 75858), the Service issued a 6-month extension on the final determination to list the lizard and opened the comment period again until January 19, 2012. The comment period was then reopened on February 24, 2012 (77 FR 11061), in order for the Service to consider the Texas Conservation Plan. The final comment period closed on March 12, 2012.

During the comment period for the proposed rule, we received over 800 comment letters directly addressing the proposed listing of the dunes sagebrush lizard with endangered status. During the April 27 and April 28, 2011, public hearings, 147 individuals or organizations made comments on the proposed rule. The majority of the comments, written and stated at the public hearing, opposed the proposal based on potential economic impacts. Other comments addressed the science provided in the proposal, specifically the lack of information regarding the species in Texas. We received approximately 30 comments that supported the proposal. All substantive information provided during the comment periods has either been incorporated directly into this final determination or addressed below.

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinion from seven knowledgeable individuals with scientific expertise that included familiarity with dunes sagebrush lizard and its habitat, biological needs, and threats. We received responses from five of the peer reviewers.

We reviewed all comments received from the peer reviewers for substantive issues and new information regarding the listing of the dunes sagebrush lizard. Peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Reviewer Comments

(1) Comment: Organisms with small geographic ranges are more susceptible to extinction than organisms with larger geographic ranges. Also, organisms with specific ecological requirements are more susceptible to extinction than organisms with more general ecological requirements. Thus, even without consideration of anthropogenic effects, the dunes sagebrush lizard warrants special consideration to ensure its persistence as a species. Unfortunately, human activity throughout the geographic range of the lizard has critically exacerbated those two components of its ecology to the point that extinction is a very real threat.

Our Response: We assessed the status of the lizard, along with the past, present, and future threats to the species. We did consider the risk of extinction in our five-factor analysis and determined that historical levels of development in dunes sagebrush lizard habitat will not continue into the future. Though human activities have caused the loss of habitat within the species' range, we have determined that this species has adequate habitat available to persist into the future, given that conservation efforts direct future development outside of shinnery oak dune habitat. While having a small geographic range and specialized habitat may make a species more susceptible to threats, we have determined the dunes sagebrush lizard does not meet the definition of an endangered or threatened species because the previous threats have been alleviated.

(2) Comment: One commenter thought the proposed rule underestimated the potential harm from solar energy development.

Our Response: We acknowledge that solar energy development may be a potential threat in the future; however, we are not aware of any permitted or planned projects within the dunes sagebrush lizard's habitat.

(3) Comment: Given that the effects of disease on the lizard are unknown, it would be more accurate for the Service to state that it cannot make a conclusion about the effects of disease, due to the lack of knowledge.

Our Response: Because of known disease and parasites within the genus *Sceloporus,* it is reasonable to assume that the dunes sagebrush lizard is also affected by disease and parasites. It is correct that we cannot make a conclusion regarding the impacts of disease or parasites, and that the effects are unknown. Based on this peer review suggestion, the *Factor C* section has been updated to reflect our understanding of disease and parasites on the dunes sagebrush lizard.

(4) Comment: The section on competition could include other competitors in addition to side-blotched lizards.

Our Response: Research has not been conducted to determine the impacts of competition with other species on the dunes sagebrush lizard. The presence of other species near and around dunes sagebrush lizard habitat, within fragmented and unfragmented areas, has anecdotally been considered competition. It is possible that other species come into areas that are no longer inhabited by dunes sagebrush lizards, or it may be that increased competition causes a reduction in dunes sagebrush lizards in an area. Competition is mentioned in Sias and

Snell's 1998 research as a potential stressor for the dunes sagebrush lizard, although no formal studies have been done. Based on this, and other peer review comments, we have updated our analysis to clarify our current understanding of competition with other lizard species. Please see *Factor E,* below, for further discussion.

(5) Comment: Another common cause of anthropogenic (human-influenced) extinctions relates to the presence of exotic or alien species. The proposed rule does not mention predation by or competition with alien species.

Our Response: We have updated our analysis to include alien species, specifically feral hogs, which have now been found within the dunes sagebrush lizard's habitat. We recognize there is potential for other alien species, though we do not have substantial information regarding these species to consider them threats to the dunes sagebrush lizard. Please see *Factor C,* below, for further discussion.

(6) Comment: The proposed rule presents a scientifically supported conclusion that the dunes sagebrush lizard is in danger of extinction, that a number of anthropogenic actions exacerbate the situation, and that existing regulatory mechanisms and actions have failed to reverse a pattern of declining populations. Listing this species as endangered is a necessary step that can improve the chances that this species will persist.

Our Response: At the time of the proposed rule, the New Mexico Conservation Agreements had little participation, and the Texas Conservation Plan had not yet been developed. After the proposal published, there was a significant increase in the number of oil and gas companies and ranchers who enrolled in the New Mexico Conservation Agreements, and the Texas Conservation Plan was signed. We have also received clarification from BLM regarding the implementation of their Special Status Species Resource Management Plan Amendment (RMPA). The conservation agreements, along with the RMPA, provide conservation measures that direct development outside of dune habitat. As a result, we have determined that the dunes sagebrush lizard no longer meets the definition of a threatened or endangered species.

(7) Comment: When talking about the range of the lizard, the Service excluded Crane County, Texas.

Our Response: We have updated the information in our final determination to include the 2011 surveys that were conducted in Texas, and now include Crane County, Texas, in the range of the species (see *Species Information,* above).

(8) Comment: One peer reviewer thought the sand grain work was poorly done, and should not form the basis for any conservation measures for the lizard.

Our Response: More information should be collected regarding sand grain size, as it is relevant to the dunes sagebrush lizard's habitat preferences; however, the work that was completed provides basic information regarding the presence of dunes sagebrush lizards. In this document, the discussion of sand grain size is limited to stating that it may be a limiting factor for this species.

(9) Comment: One peer reviewer, along with several comments from BLM, the Natural Resources Conservation Service (NRCS), the States, and the public, expressed concern with the survey methodologies and how we used the information in the proposed rule. They noted that the survey does not allow for the evaluation of trends, but only defines the status quo or decline.

Our Response: We recognize that the survey information for this species is limited and not conclusive in regard to estimating abundance or population numbers. The Service is not relying on population numbers; rather we have used the best available information about habitat loss now and into the future. In 2011, we received a report detailing comprehensive surveys that were completed in Texas. This report provided valuable information that delineated the shinnery oak dune habitat, and determined occupancy of this habitat in Texas. We also received a report documenting BLM's survey efforts in 2011, which has now been incorporated into the discussion of *Species Information,* above. Based on public, agency, and peer review comments, we have updated the information in *Species Information* regarding surveys.

(10) Comment: In the Texas section it is stated that one dunes sagebrush lizard was found in Gaines County. The peer reviewer found a large population, and states that Texas surveys have found more populations than described in the proposed rule.

Our Response: Please see comment 9. We have updated the information in *Species Information,* above, in our final determination with this information and results from the 2011 survey effort in Texas. All information for surveys in Gaines County is included in the *Species Information* section.

(11) Comment: One peer reviewer thought we placed too much emphasis on the prey base of the lizard. To the reviewer's knowledge, the prey base is not a factor in the decline of any *Sceloporus* species, and until a proper diet study is conducted, we must assume that dunes sagebrush lizards are like their close relatives in diet and will eat most any insect that is small enough that they come across.

Our Response: Shinnery oak provides the structure in which the dunes sagebrush lizard and its insect prey base feed, breed, and find shelter. In Summary of Factors Affecting the Species, below, we discuss prey base in relation to the loss of habitat because the prey base can also be threatened by the removal of shinnery oak. We believe it is relevant to discuss the prey base in the context of available vegetative cover for both the dunes sagebrush lizard and its prey.

(12) Comment: A commenter suggested that, instead of the Coachella Valley fringe-toed lizard (*Uma inornata*) comparison, an example of a *Sceloporus* species would be more appropriate. The commenter suggested using research on Florida scrub lizard (*Sceloporus woodi*), which specializes on a sand ecosystem in Florida, would be more appropriate.

Our Response: The Service has reviewed literature on the Florida scrub lizard and has incorporated a study on this species into our discussion of *The Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range,* below.

(13) Comment: Leavitt's report on fragmentation should be included in the threats analysis.

Our Response: This new report (Leavitt *et al.* 2011) provides additional information regarding the long-term, landscape-level effects of oil and gas development on dunes sagebrush lizards, and confirms the results provided in the Sias and Snell (1998) report. We have now summarized this report in the discussion on Oil and Gas Development, below.

(14) Comment: Climate change could have a significant impact on the dunes sagebrush lizard. The predictions made by B. Sinervo on side-blotched lizards are dire, and dunes sagebrush lizards have an even lower tolerance for heat than side-blotched lizards.

Our Response: We agree that climate change may have an impact on dunes sagebrush lizard habitat. The New Mexico Conservation Agreements, Texas Conservation Plan, and RMPA all direct development outside of habitat, which will leave large patches of intact habitat. Large, intact patches of habitat are less susceptible to climate change and drought than smaller, more fragmented patches. However, we recognized in the proposal that the dunes sagebrush lizard

may be vulnerable to changes in climate. We also note that this does not imply that the species cannot survive natural events such as drought since the dunes sagebrush lizard evolved in an environment subject to periodic atypical weather events. Please see the discussion on Climate Change and Drought, below, for additional discussion.

(15) Comment: One peer reviewer, along with multiple public commenters, believed that the conclusion that pollution is a threat to the dunes sagebrush lizard is not well supported.

Our Response: We agree that there is no research on the direct effects of pollution on the dunes sagebrush lizard, and that the research available is based on other lizard species. We also note that the scope of this impact is highly localized, and will be minimized by the New Mexico Conservation Agreements and Texas Conservation Plan. Please see the section on Exposure to Pollutants, below, for further discussion.

Comments From States

Section 4(i) of the Act states, ''the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.'' Comments received from the State regarding the proposal to list the dunes sagebrush lizard as endangered are addressed below.

(16) Comment: County and State governments in New Mexico and Texas, along with hundreds of public commenters, submitted comments regarding the social, cultural, private-property, and economic impacts of listing the dunes sagebrush lizard. Some commenters were additionally concerned because oil and gas leases on State lands in both New Mexico and Texas provide funding for public schools.

Our Response: We acknowledge the concerns expressed by commenters, and the possible impacts that might result from listing the dunes sagebrush lizard. The Act requires that we determine whether any species is an endangered or threatened species based solely on the threats to the species as determined by a review of the best available scientific information. The Act lists five factors for evaluation: (A) The present or threatened destruction, modification, or curtailment of the 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. Considerations of a social, cultural, political, or economic nature are not part of the evaluation for listing decisions. Since comments of that nature are outside the scope of this decision we have not specifically addressed them in this rule.

(17) Comment: County and State governments in New Mexico and Texas submitted comments supporting the use of conservation agreements to conserve the dunes sagebrush lizard instead of listing it under the Act.

Our Response: The Service recognizes the importance of strong partnerships to conservation of species. However, if a species meets the definition of a threatened or endangered species under the Act, we have no discretion not to list it in deference to other ongoing conservation actions. On the other hand, if ongoing and future conservation efforts reduce or remove threats to the species to the point that the species no longer meets the definition of endangered or threatened under the Act, then listing is no longer required. We have determined that the dunes sagebrush lizard does not meet the definition of a threatened or endangered species (see *Ongoing and Future Conservation Efforts* and Summary of Factors Affecting the Species, below), due in part to the New Mexico Conservation Agreements and Texas Conservation Plan.

(18) Comment: County and State governments in New Mexico and Texas, along with public commenters, submitted comments questioning the validity of the science behind the proposal.

Our Response: In our proposed rule and final determination, we used the best available scientific information to support our analyses. Additionally, we delayed our final determination by an additional 6 months, as allowed by the Act when there is substantial disagreement regarding the sufficiency or accuracy of available data, in order to solicit information to clarify these issues. We acknowledge that the science regarding the species may be incomplete in some areas, but we must rely upon the best available scientific information to make a decision nonetheless.

(19) Comment: County and State governments in New Mexico and Texas, along with public commenters, stated that documents used in the proposed rule did not meet Information Quality Act requirements.

Our Response: We used the best available scientific information and met the standards of the Information Quality Act. The Service has established guidelines to implement the Information Quality Act. These guidelines establish Service policy and procedures for reviewing, substantiating, and correcting the quality of information it disseminates to the public. Persons affected by that information may seek and obtain, where appropriate, correction of information that they believe may be in error or otherwise not in compliance with Section 515 of the Treasury and General Government Appropriations Act of 2001 (Pub. L. 106–554, HR 5658). Section 515 is also known as the Information Quality Act (IQA). Our guidelines are posted at *http://www.fws.gov/informationquality/topics/IQAguidelines-final82307.pdf.*

(20) Comment: County and State governments in New Mexico and Texas stated concerns that the Service did not coordinate with State and local governments, and did not comply with the National Environmental Policy Act (NEPA). Several commenters noted that, in order to be in compliance with various case law, policies, or regulations, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources. Affected counties within New Mexico and Texas requested agency coordination.

Our Response: We have determined that NEPA documents need not be prepared in connection with making a decision whether to list a species as endangered or threatened under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). The Service has coordinated with the State conservation agencies to collect any information regarding the dunes sagebrush lizard. The State of New Mexico provided many of the reports used in the proposed rule. Texas Parks and Wildlife Department provided lizard survey information from 2007 that was included in the proposed rule. State and local governments have been provided with adequate opportunity to comment on the proposed rule. Multiple comment periods allowed for adequate opportunity for public comment. In addition, question and answer sessions and public hearings (with notices in the **Federal Register** and local newspapers) were held on April 27 and 28, 2011, providing another opportunity for comment submission. In addition to the comment period, we visited with commenters on several occasions to ensure that their concerns were heard and considered. In 2011, the Service met with representatives of Chaves and

Eddy Counties, and various state and local governments in Texas.

Federal Agency Comments

(21) Comment: The BLM and NRCS submitted many comments with factual corrections, or new information regarding those agencies' actions with respect to the dunes sagebrush lizard.

Our Response: We have incorporated these comments into our final determination, as appropriate. We have also included our current understanding of BLM's implementation of its Special Status Species RMPA, and of the NRCS's Technical Note 5,3 which guides herbicide treatments within dunes sagebrush lizard habitat.

(22) Comment: The BLM does not chemically treat shinnery oak. The proposed rule states that Triclopyr and Clopyralid are used to treat mesquite, but can kill shinnery oak, depending on concentrations. The BLM applies herbicides according to labels. Use of these chemicals can cause seasonal browning of shinnery oak, but the plants so affected leaf out the following spring and produce acorns.

Our Response: We are aware of one incident where the use of these chemicals damaged shinnery oak (although not permanently) within dunes sagebrush habitat. The RMPA states that the BLM will not treat shinnery oak dunes with herbicides. Three historic dunes sagebrush lizard sites were treated with Triclopyr and Clopyralid during the summer of 2010 as part of a mesquite treatment. The timing of this treatment coincided with the dunes sagebrush lizard's breeding season, and browned the oak for the duration of the summer. In 2011, researchers revisited the sites; however, due to drought conditions, none of the shinnery oak had leafed out. It is thought that the oak was not permanently affected by the treatment, and the BLM is monitoring the sites. The Service has since worked with the BLM to ensure that no dunes sagebrush lizard sites will be treated, and there are now protocols in place to ensure dunes sagebrush lizard habitat is buffered from adjacent mesquite treatments.

(23) Comment: BLM, NRCS, and public commenters stated that the habitat description and rate of habitat loss are not accurate, complete, or correctly defined.

Our Response: Based upon public comments and information provided by the BLM, NRCS, and Texas A&M University, we have updated our analysis to include our current understanding of the habitat in both New Mexico and Texas. We have specifically corrected an error in the proposed rule that stated ''In 1982, it was estimated that there was one million acres (404,686 ha) of shinnery oak dunes in New Mexico (McDaniel *et al.* 1982, p. 12). Currently, the amount of shinnery oak dune habitat is estimated to be 600,000 acres (248,811 ha), a 40 percent loss since 1982.'' This should have stated ''In 1982, it was estimated that there was one million acres (404,686 ha) of shinnery oak in New Mexico (McDaniel *et al.* 1982, p. 12). Currently, the amount of shinnery oak is estimated to be 600,000 acres (248,811 ha), a 40 percent loss since 1982.'' The reference was describing all shinnery oak and was not specific to shinnery oak dune habitat. Please see *Species Information,* above, and Summary of Factors Affecting the Species, below.

(24) Comment: BLM commented that off-highway vehicle (OHV) use drops significantly during the months of June through September, due to hot weather conditions.

Our Response: We had not considered this in our proposal, but have incorporated this discussion in the ''Off-Highway Vehicle (OHV) Use'' section regarding the lizard's potential exposure to OHV activities.

(25) Comment: BLM biologists reported no conflicts with the occupied dunes sagebrush lizard habitat at the Square Lakes OHV Area, and Mescalero Sands appears not to be habitat for the dunes sagebrush lizard. BLM remains committed to ensure that there are no conflicts with dunes sagebrush lizards, and there should be no BLM-related OHV impacts.

Our Response: We disagree that there are no impacts to dunes sagebrush lizards in the occupied OHV areas; however, these impacts (e.g., habitat degradation, collision mortality) are localized and do not threaten entire populations or the species as a whole (see Off-Highway Vehicle (OHV) Use, below). Mescalero Sands OHV Area was historically occupied, and should be resurveyed to determine if dunes sagebrush lizards are still present, though BLM's 2011 surveys did not find dunes sagebrush lizards at the site.

(26) Comment: Although 111,519 ha (275,570 ac) have been leased for oil and gas development within delineated dunes sagebrush lizard habitat, it is not guaranteed that this area will be developed.

Our Response: We agree. We understand that not all leased areas will actually be developed for oil or gas. Additionally, many leased areas are now enrolled under the New Mexico Conservation Agreements or Texas Conservation Plan, and will only be developed with the conservation measures in these agreements. Please see *Ongoing and Future Conservation Efforts* section, below.

(27) Comment: The Service does not consider the amount of habitat that is covered by conservation agreements. These agreements provide protection, reclamation, and restoration. The conservation agreements should go through an analysis under the Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE) (68 FR 15100).

Our Response: When the proposed rule was published in December 2010, there were only four companies enrolled in the New Mexico Conservation Agreements, covering 20,303 ha (50,170 acres) of dunes sagebrush lizard habitat. As of May 2012, enrollment has risen to 29 companies, covering 110,893 ha (274,024 acres) of dunes sagebrush lizard habitat. Ranchers have enrolled 151,083 ha (373,335 acres) of rangeland. When combined with the New Mexico State Land Office enrollment and the application of the management restrictions on public lands under the RMPA, 95 percent of dunes sagebrush lizard habitat in New Mexico is included in areas protected by conservation efforts. On February 17, 2012, the Texas Conservation Plan was signed, and as of May 2012, 71 percent (56,105 ha (138,640 ac)) of the habitat in Texas has been enrolled in this plan. The Service has now completed a PECE analysis of the New Mexico Conservation Agreements and the Texas Conservation Plan, and information from that analysis has been incorporated into our final determination. Our PECE analysis is available at *http://www.regulations.gov.* We are withdrawing our proposal to list the species (see Summary of Factors Affecting the Species, below), due in part to these efforts.

(28) Comment: Not all parts of the dunes sagebrush lizard's range have incurred the same amount of development.

Our Response: The Service agrees that not all areas that contain dunes sagebrush lizard habitat have equal development, and currently there are areas where development is much greater than other areas. Based on public comments, information received from the BLM, and our habitat fragmentation analysis, we have updated our analysis of habitat fragmentation in both New Mexico and Texas. Please see Summary of Factors Affecting the Species, below.

(29) Comment: BLM data shows that 91.4 percent of the dunes sagebrush lizard's habitat has less than or equal to 9 percent caliche cover.

Our Response: The data provided by BLM did not include Texas. The Service digitized all of the caliche roads in both New Mexico and Texas, and found that in New Mexico, 45 percent of the habitat is currently fragmented, and 48 percent of the habitat in Texas is currently fragmented with caliche roads and pads. Please see the discussion on Oil and Gas Development, below, for more discussion.

(30) Comment: BLM's RMPA is not merely guidance, and provides protection and surface reclamation, places development out of dunes, prohibits chemical treatments in occupied or suitable habitat, provides dispersal corridors, reduces new drilling locations, decreases the size of well pads, places more than one well per pad, reclaims inactive pads and roads, reduces the number and length of roads, reduces the number of powerlines and pipelines, requires habitat surveys prior to development, limits seismic activity near dunes, places utility and rights-of-ways in common corridors, and implements best management practices for development and reclamation. The rule mischaracterizes the extent to which operators may obtain exceptions, waivers, and modifications.

Our Response: Based on comments and clarifications from BLM, we revised our analysis to reflect our current understanding of BLM's implementation of their RMPA. Please see *The Inadequacy of Existing Regulatory Mechanisms,* below, for a complete discussion of BLM's RMPA.

Public Comments

(31) Comment: Not all of the papers were peer reviewed, scientifically valid, or are specific to the dunes sagebrush lizard. One commenter specified that the use of the Sena (1985) study is not appropriate because the dissertation was never finalized.

Our Response: The report by Sena (1985) contains valuable life-history information about the dunes sagebrush lizard, which is used in various publications. In determining and evaluating threats to the dunes sagebrush lizard, we used the best scientific and commercial data available. This included articles published in peer-reviewed journals, data collected by various agencies, universities, and the Service. It is correct that some of our citations are not specific to these species or the geographic area. Nevertheless, the citations offer evidence that certain threats result in basic biological responses for similar species, and we would expect the same threat to have a similar response with the dunes sagebrush lizard.

(32) Comment: Caliche roads and pads disintegrate over time and should not be considered a threat.

Our Response: While it is true that caliche roads and pads may disintegrate over time, the calcium carbonate released from the caliche into the soil will impede plant growth, and the roads and pads will continue to affect the geologic processes that are necessary for dune formation.

(33) Comment: Disturbance creates more bare ground and edge habitat that would be beneficial to the dunes sagebrush lizard.

Our Response: The dunes sagebrush lizard lives in bare sand dune blowouts within shinnery oak dunes. The disturbed areas (roads and pads) are primarily caliche, which is a hard surface where the dunes sagebrush lizard would be unable to bury. Also, the caliche does not provide vegetative cover for the dunes sagebrush lizard to seek shelter, food, or nesting habitat.

(34) Comment: The habitats in Texas and New Mexico are different.

Our Response: Though there may be differences in the habitats in Texas and New Mexico, the dunes sagebrush lizard is found in the same habitat features: Sand dune shinnery oak blowouts. The shinnery oak sand dunes may be more or less stable in the different areas based on the amount of shinnery oak vegetation present, which can vary with land use practices and drought (Muhs and Holliday 2001, p. 75).

(35) Comment: The treatment of shinnery oak with tebuthiuron was discontinued 18 years ago. There is no evidence that dunes sagebrush lizard habitat has been treated since 1993. The Service provided an inaccurate estimate of the amount of habitat treated with tebuthiuron.

Our Response: The Service has documented that, as recently as 2009, shinnery oak dunes within the dunes sagebrush lizard's range in Roosevelt County, New Mexico, were treated with tebuthiuron (Service 2009, p. 1). After the publication of the proposed rule NRCS finalized a technical note that provided treatment buffers around shinnery oak dunes in New Mexico. However, this measure does not apply to Texas. The New Mexico Conservation Agreements and Texas Conservation Plan limit tebuthiuron treatments to areas outside of shinnery oak dune habitat for the dunes sagebrush lizard. Based upon public comments and information received from NRCS, we have updated our analysis to include our current understanding of tebuthiuron treatments in both New Mexico and Texas. Please see ''Shinnery Oak Removal'' for more discussion.

(36) Comment: One commenter questioned whether dunes sagebrush lizards return to tebuthiuron treatment areas, or if they are present in treatment areas. The commenter also asked whether shinnery oak returns to treated areas.

Our Response: The long-term monitoring site on the Caprock Wildlife Area includes a grid that is located on the edge of an old tebuthiuron treatment. The shinnery oak dunes and dunes sagebrush lizards are present at this site. In areas where the dune structure is still present and shinnery oak was not completely eradicated, dunes sagebrush lizards are still present at historically treated sites. According to recent data, these sites do not provide the necessary structure to have a self-sustaining dunes sagebrush lizard population, and are only sustained by nearby populations in good habitat (Ryburg and Fitzgerald 2011). It is estimated that shinnery oak will return in approximately 20 years (McDaniel 1980). Please see Shinnery Oak Removal, below, for more discussion.

(37) Comment: There is no evidence that the habitat is being threatened. The dunes sagebrush lizard is only found in a narrow habitat range that is not going away.

Our Response: The dunes sagebrush lizard's habitat has been fragmented and destroyed with the placement of caliche pads and roads, which do not provide the necessary elements for the dunes sagebrush lizard to feed, breed, and take shelter. Based on the enrollment in the New Mexico Conservation Agreements and the Texas Conservation Plan, the Service has determined that there are measures in place to direct future development outside of shinnery oak dunes, and also remove some existing infrastructure in both Texas and New Mexico. Please see the discussion in *Ongoing and Future Conservation Efforts,* below.

(38) Comment: Texas was not given an opportunity to participate in the candidate conservation agreement with assurances (CCAA) prior to the proposed rule.

Our Response: The candidate conservation agreement (CCA) and CCAA in New Mexico were developed with the BLM and the Center of Excellence in Hazardous Materials Management (CEHMM; the applicants), and signed in December 2008. At that time, the majority of known habitat was thought to occur in New Mexico, although the species was known from a few sites in Texas. The New Mexico Conservation Agreements were also

developed in response to threats to the lesser prairie chicken. It was not until 2011, that the Texas Comptroller's Office and the oil and gas industry in Texas began developing the Texas Conservation Plan, which was signed on February 17, 2012.

(39) Comment: Several comments stated that the shinnery oak dune system was not formed during the Pleistocene, not formed by geologic processes, and that the government planted shinnery oak in the 1970s.

Our Response: The commenters did not provide any scientific evidence to support these claims, nor does the Service have any scientific evidence to support these claims.

(40) Comment: Many comments pertained to the dunes sagebrush lizard survey information we discussed in the proposed rule, including allegations of incorrect use of the data gathered from the surveys, inconsistent methodology, and incomplete or absent survey information for much of Texas.

Our Response: The Service agrees that the history of surveys for this species is limited. The more recent surveys conducted to define the species' range were thorough and have incorporated new locations as they are found. In 2010, the habitat range was modified to include new locations, including data from BLM. This final determination also includes survey information from 2011 for both New Mexico and Texas. All of this information has been incorporated into this final determination.

(41) Comment: A hotter, drier climate would cause less dune stability and be better for the dunes sagebrush lizard.

Our Response: The effects of a hotter, drier climate on shinnery oak dune habitat are discussed in the Climate Change and Drought section, below. In summary, we agree that a hotter, drier climate can cause less dune stability in both the Monahan's Sands and Mescalero dune fields. However, this may not be beneficial to the dunes sagebrush lizard, because hotter temperatures could cause dunes sagebrush lizards to spend more time regulating their body temperature, and not searching for food and mates. A hotter, drier climate may also affect the shinnery oak, and increase habitat loss.

(42) Comment: After 70 years, there are still dunes sagebrush lizards in the oilfield. The commenter questioned whether any studies have examined the density of dunes sagebrush lizards to the age of oilfields. It seems logical that when the oil field comes in, the dunes sagebrush lizards leave, but remaining dunes sagebrush lizards become tolerant as activities decrease. The commenter questioned, given that dunes sagebrush lizards are still found at 8 ha (20 ac) spacing, whether they are threatened by oilfield development.

Our Response: Caliche pads and roads do not provide the basic requirements for the dunes sagebrush lizard to feed, breed, and shelter. They fragment the shinnery oak dune habitat, and increase predation and direct mortality. There are decreased numbers of dunes sagebrush lizards in developed areas, where habitat fragmentation decreases the species abundance. Dunes sagebrush lizards can be present in very low numbers, but this does not mean that they are thriving. Though research regarding the effects of oil and gas development on the dunes sagebrush lizard was not designed to specifically address this question, we summarize the available findings in *The Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range,* below.

(43) Comment: A commenter inquired whether lizards are doing better in areas where the BLM has control.

Our Response: As part of the RMPA, BLM is responsible for establishing intervals and standards for evaluating and monitoring the measures within the plan, and determining whether the mitigation measures are satisfactory. Because the RMPA places oil and gas development up to 200 m (656 ft) out of dunes, it is anticipated that dunes sagebrush lizard habitat will be conserved.

(44) Comment: The BLM has closed drilling on 109,265 ha (270,000 acres) of habitat.

Our Response: Data provided by the BLM stated that 62,021 ha (153,257 acres) within the dunes sagebrush lizard's range in New Mexico will be closed to future leasing, and 53,657 ha (132,590 acres) are unleased and will remain unleased. This information has been updated in the *Ongoing and Future Conservation Efforts* discussion, below.

(45) Comment: The dunes sagebrush lizard is not geographically isolated, and individuals travel and breed between various populations.

Our Response: The genetic information shows that dunes sagebrush lizard populations are isolated, and there is little movement, if any, between the major populations (Chan 2008). Please see *Species Information,* above.

(46) Comment: The vast majority of pipelines are laid above ground.

Our Response: We were unable to find a data source to verify this comment.

(47) Comment: Pipelines create dispersal corridors.

Our Response: Though dunes sagebrush lizards can be found in shinnery oak dune habitat along pipelines, no research has determined if these pipelines are actually used as corridors between habitat patches. After pipelines are in place and vegetation returns, dunes sagebrush lizards are found along pipelines. It is reasonable to conclude that dunes sagebrush lizards could use a pipeline corridor between two shinnery oak dune complexes, but we do not have any documented examples of this occurring. There is potential for pipelines to lead to areas that are unsuitable habitat as well.

(48) Comment: Trenches are rarely left open for over a half mile in sandy soil because they tend to cave in.

Our Response: Open trenches, even a half mile long, can trap reptiles (including dunes sagebrush lizards) and other vertebrates. This threat can be minimized if trenches are closed quickly, or escape ramps are placed in trenches to allow animals to climb out. These and other measures are included in the BLM trench stipulation and the New Mexico Conservation Agreements (see *The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range,* below, for additional discussion.)

(49) Comment: Generations of dunes sagebrush lizards learn to adapt and thrive in altered environments.

Our Response: Although dunes sagebrush lizards persist in areas where shinnery oak dunes are adjacent to moderate oil and gas development, there have been no documented dunes sagebrush lizards outside of shinnery oak dune habitat. It is unreasonable to believe that they have adapted to conditions that do not provide areas to feed, breed, and seek shelter. The species requires shinnery oak dunes for shelter, food, and areas to lay eggs.

(50) *Comment: Sceloporus arenicolus* is not a valid species.

Our Response: The Service uses the best available information to determine if a species is valid. There is no disagreement within the scientific community as to the validity of the dunes sagebrush lizard as a species. It is considered a valid species by the Society for the Study of Amphibians and Reptiles, and the Center for North American Herpetology. It was first described as a subspecies of the sagebrush lizard (*Sceloporus graciosus*), but was determined to be a full species in 1992 (Smith *et al.* 1992, pp. 42–43). Please see *Species Information,* above, for a complete discussion of the species taxonomy.

(51) Comment: The Service received a study conducted in 2011 that did not find hydrogen sulfide or tebuthiuron in the soil at the study site, and determined that preliminary analysis

does not show threats to the dunes sagebrush lizard.

Our Response: This was a preliminary study that was not conclusive about the effects of hydrogen sulfide on the dunes sagebrush lizard. We do not expect hydrogen sulfide to be a stressor on the dunes sagebrush lizard throughout the species' range, and would only expect for the species to be exposed in areas where regular hydrogen sulfide releases occur (see Exposure to Pollutants section, below). Also, we do not have information regarding the effects of tebuthiuron on individuals. The information we do have indicates that the stressor, instead, is the impact of removing shinnery oak dune habitat. Unless tebuthiuron has recently been applied in an area, it is not expected to be found in the soil.

(52) Comment: A commenter inquired as to why critical habitat was not determinable, and thus not included in the proposed rule.

Our Response: In 2010, when we published our proposed rule, we had limited information regarding dunes sagebrush lizard habitat throughout the range, especially in Texas. Section 4(a)(3) of the Act requires the designation of critical habitat concurrently with the species' listing ''to the maximum extent prudent and determinable.'' Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

When critical habitat is not determinable, the Act provides for an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

In our proposed rule, we stated that we were unable to determine which areas meet the definition of critical habitat, because the location and distribution of physical and biological features that may be considered essential to the conservation of the species were not sufficiently understood at that time. Therefore, although we determined that the designation of critical habitat was prudent for the dunes sagebrush lizard, we found that critical habitat for the dunes sagebrush lizard was not determinable at that time.

(53) Comment: There were multiple scientific reviews of the proposed rule provided by various universities, oil companies, and petroleum associations. All of these reviews raised issues with both published and unpublished information used in our determination, and problems with our interpretation of the information.

Our Response: We acknowledge that the science regarding the dunes sagebrush lizard may not be complete, but we must base our decisions on the best scientific information available. Many of the comments reflected disagreement with the use of unpublished reports. Most of the scientific reviews did not present new data regarding the status of the dunes sagebrush lizard. Some of the comments reflect disagreements with published literature. In our proposed rule and final determination, we used the best available scientific information to support our decision. Any new information that was provided, such as the 2011 surveys completed in Texas and New Mexico, were incorporated into the information in *Species Information,* above.

(54) Comment: A commenter questioned whether studying the lizard contributes to its decline.

Our Response: There is no evidence that the limited research that has been conducted on the dunes sagebrush lizard throughout its range has led to population declines. Lizard populations are stable in the Caprock Wildlife Area where long-term lizard monitoring has occurred (Fitzgerald *et al.* 2011).

(55) Comment: A commenter questioned how blowing sand naturally changes the dune structure, since this habitat is not sustainable over time.

Our Response: The shinnery oak dune system relies on the natural geologic processes of wind and vegetation changes to form new dunes and shift the entire dune system. Unnatural changes to the geologic structure will alter the dune system. Shinnery oak acts to stabilize the dune structure to various degrees, and maintains the dunes sagebrush lizard's unique habitat. Please see *Species Information,* above, for further details.

(56) Comment: Soils in Texas have high sulfates with or without oil and gas activities.

Our Response: We were unable to verify this information for the shinnery oak dune habitat in Texas.

(57) Comment: Roads and well pads are actively being reclaimed throughout the species' range.

Our Response: We have included information on ongoing reclamation of caliche pads and roads in the discussions of *Ongoing and Future Conservation Efforts* and *The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range,* below.

(58) Comment: Oil and gas development in southeast New Mexico and west Texas, which has taken place for many decades and has caused habitat fragmentation, soil compaction, and destruction of the shinnery oak, have contributed to the dunes sagebrush lizard's decline.

Our Response: We agree that oil and gas activities occur within the range of the dunes sagebrush lizard, and portions of the species' range have high levels of oil and gas development. This development has led to the historic loss of vegetation, and has caused soil compaction and habitat fragmentation. However, more than 50 percent of the dunes sagebrush lizard's range is not currently fragmented with oil and gas, and the lizard has adequate habitat to persist into the future.

(59) Comment: A 2011 study out of Texas Tech University did not find that pollution is a threat to the dunes sagebrush lizard.

Our Response: The Texas Tech University study was limited in scope, and specifically stated that it was preliminary information, and that further research needs to be completed.

(60) Comment: The Service should not rely on the New Mexico Conservation Agreements, Texas Conservation Plan, and RMPA to provide adequate protections for the dunes sagebrush lizard and its habitat. The species should be listed as endangered throughout its range.

Our Response: Based on our PECE analyses of the New Mexico Conservation Agreements and Texas Conservation Plan, and our thorough review of the RMPA, we have concluded that those conservation efforts address threats throughout the range of the dunes sagebrush lizard, and are adequate to reduce the threats to the species such that it no longer meets the definition of endangered or threatened. See *Ongoing and Future Conservation Efforts,* below, for additional discussion.

(61) Comment: Recent studies have shown that the dunes sagebrush lizard's range is actually larger than previously thought. There is no evidence that the range of the dunes sagebrush lizard is shrinking.

Our Response: The NMDGF, BLM, and Texas A&M University have been conducting surveys to estimate the range of the dunes sagebrush lizard. The known range of the dunes sagebrush lizard has been refined in New Mexico, and has now been delineated in Texas (Fitzgerald *et al.* 2011, p. 10). We do not have long-term monitoring data to evaluate whether the dunes sagebrush lizard's population is increasing, stable, or declining. Still, on a gross scale, our

observations indicate that the range of the dunes sagebrush lizard is limited to the areas of shinnery oak dunes. The BLM, CEHMM, Texas A&M University, and the Service will continue to monitor the dunes sagebrush lizard's population and range as part of the New Mexico Conservation Agreements and Texas Conservation Plan.

(62) Comment: There is no compelling information that the dunes sagebrush lizard's population has been reduced.

Our Response: We have no evidence that the dunes sagebrush lizard's population is declining, as we do not have survey information that is robust enough to provide population information throughout the species' range. However, we have information that indicates the range of the lizard has declined in the past, primarily due to effects of oil and gas development and shinnery oak removal. As discussed throughout this document, we do not expect that the range of the lizard will continue to decline, primarily due to the conservation measures provided by the New Mexico Conservation Agreements, Texas Conservation Plan, and RMPA.

(63) Comment: The proposal did not discuss the role ranching plays in maintaining large tracts of dunes sagebrush lizard habitat.

Our Response: Large tracts of dunes sagebrush lizard habitat are beneficial to the persistence of the species into the future. These unfragmented shinnery oak dunes provide core habitat that is necessary for connectivity within and between populations. Sixty-nine percent (151,083 ha (373,335 ac)) of the dunes sagebrush lizard's delineated habitat in New Mexico is enrolled in New Mexico Conservation Agreements for ranching in New Mexico. Please see *Ongoing and Future Conservation Efforts and Grazing,* below, for more discussion.

(64) Comment: The proposal did not discuss what impacts listing may have on other species of concern with overlapping ranges.

Our Response: The proposed rule specifically addressed the threats to the dunes sagebrush lizard. Protection of dunes sagebrush habitat also protects habitat for other species like the lesser prairie-chicken and many other species that utilize the shinnery oak sand dune ecosystem.

(65) Comment: A commenter inquired about the results of efforts of the dunes sagebrush lizard working group.

Our Response: The dunes sagebrush lizard working group has recently produced a white paper that prioritizes research and directs management with the collaboration of scientists and agency biologists. This white paper will be used to direct management for the New Mexico Conservation Agreements and Texas Conservation Plan into the future.

(66) Comment: The proposal was only based on litigation pressure, or was politically motivated.

Our Response: The dunes sagebrush lizard became a candidate in 2001 when the Service determined that listing was warranted, but precluded by higher priority listing actions. While we ultimately agreed to publish a proposed rule pursuant to a settlement agreement, the rulemaking had previously been funded and substantial progress had already been made on the draft at the time of the agreement. The proposal was not litigation driven nor politically motivated, and was based on the threats to the species at the time of publication.

(67) Comment: Several commenters provided opinions as to the value of the conservation agreements. For example, one commenter noted that a decision to list will create a disincentive for affected property rights owners to cooperate with the Service. Other commenters opined that the New Mexico Conservation Agreements, Texas Conservation Plan, and RMPA are not regulatory and lack sufficient certainty or effectiveness to obviate the continued need for listing. Further, the Texas Conservation Plan is not reasonably certain to be implemented or effective and it does not form a basis for declining to list the dunes sagebrush lizard as endangered.

Our Response: We have completed PECE analyses for the New Mexico Conservation Agreements and Texas Conservation Plan, and have determined that there is sufficient certainty of implementation and effectiveness of the conservation efforts established by those agreements. Habitat loss is the primary threat to the species, and the New Mexico Conservation Agreements, Texas Conservation Plans, and the RMPA are all designed to reduce the threat of habitat loss. Directing development outside of dunes sagebrush lizard habitat is the foundational requirement that will protect the dunes sagebrush lizard and its habitat from future impacts; and the New Mexico Conservation Agreements, Texas Conservation Plan, and RMPA all have these foundational requirements. In addition, both Agreements include detailed plans for monitoring and reporting in the future. The Service has incorporated our PECE analyses for the agreements and a thorough description of BLM's implementation of the RMPA into the *Ongoing and Future Conservation Efforts* and *The Inadequacy of Existing Regulatory Mechanisms* discussions, below.

(68) Comment: Several commenters interpreted the Sias and Snell study to say that dunes sagebrush lizards will increase in oil and gas fields as compared to unfragmented habitat.

Our Response: The Sias and Snell (1998) report shows a significant decline in dunes sagebrush lizards in areas fragmented with oil and gas development, compared to unfragmented habitat. More recent research from Texas A&M University has verified this finding at a landscape scale (Leavitt *et al.* 2011). Though we do not know the exact mechanism driving declines in dunes sagebrush lizards adjacent to oil and gas development, we do have reliable evidence that dunes sagebrush lizards decline in these areas.

(69) Comment: A commenter suggested the lizard may be declining due to natural predation.

Our Response: There are natural predators of the dunes sagebrush lizard, such as coachwhip snakes, shrikes (birds), collared lizards, and roadrunners (birds). Some of these predators are more abundant in areas with caliche pads and roads. Dunes sagebrush lizards are more vulnerable to predation in areas with greater edge habitat and less vegetative cover to avoid predation. See *Disease or Predation,* below, for more information.

(70) Comment: Mesquite encroachment is a threat to the dunes sagebrush lizard.

Our Response: We agree. Based on comments provided by the public, BLM, and researchers in southeastern New Mexico, we have determined that there are areas where mesquite is encroaching into shinnery oak dunes, and threatens dunes sagebrush lizard habitat. The New Mexico Conservation Agreement, Texas Conservation Plan, and RMPA all address mesquite encroachment as a threat to the dunes sagebrush lizard. Please see *The Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range,* below, for more information. We have completed an analysis of the New Mexico Conservation Agreements and the Texas Conservation Plan under PECE, and have concluded that the conservation efforts established by them are sufficiently certain to be implemented and effective that they reduce the threats to the species so that it does not meet the definition of endangered or threatened (see PECE analysis at *http://www.regulations.gov*).

(71) Comment: Extinction is natural.

Our Response: The Service recognizes that extinction can be natural. Extinction pressure can also be exacerbated by human-caused threats. We completed a five-factor analysis to

determine if there are threats, natural or manmade, to the dunes sagebrush lizard, such that it is in danger of extinction now or likely to become so in the foreseeable future. See Summary of Factors Affecting the Species section, below.

(72) Comment: All species are habitat specialists. This is why you do not find fish in the sand dunes.

Our Response: From an ecological perspective, the term habitat specialist refers to a species that can tolerate a relatively narrow range of environmental conditions. This contrasts with a habitat generalists which describes a species that can tolerate a relatively wide range of environmental conditions. The dunes sagebrush lizard is considered a habitat specialist in that it is only found within the shinnery oak sand dune habitat in southeastern New Mexico and western Texas. The shinnery oak sand dunes provide the necessary vegetative cover and structure for the dunes sagebrush lizard to lay eggs, seek shelter, and find prey.

(73) Comment: In 2011, Smolensky and Fitzgerald's research found that dunes sagebrush lizard habitat can have up to 9 percent caliche cover (14.4 wells per section), and still have no negative impacts to dunes sagebrush lizards. Commenters stated that this paper provides evidence that oil and gas does not cause declines in dunes sagebrush lizards.

Our Response: This research contained the above statement; however, the research was not designed to experimentally test how oil and gas may or may not be linked to declines in lizard populations. The Service met with the researchers who provided the following clarifications regarding their research and how it should be interpreted:

- The study is preliminary, with 11 sites that varied in habitat quantity and quality. Thus it was not possible to control for the influence of habitat when analyzing the effect of caliche roads and pads. The study was correlative, not experimental, and the history of the individual sites was not accounted for.
- The study showed habitat quantity and quality were correlated. The study showed encounters per unit effort for dunes sagebrush lizard was also correlated with habitat quantity.
- Total area of caliche does not account for proximity of wells to habitat areas nor the spatial configuration of roads and well pads. It did not directly address the issues of habitat fragmentation.
- The sites were chosen based on confirmed presence of dunes sagebrush lizard at the time of the visual encounter transects. Thus this study had no ability to detect if dunes sagebrush lizards had disappeared from areas where extensive habitat modification had occurred from oil and gas development.
- This study demonstrates a link between habitat quantity and quality. As such, the paper provides good evidence for support of conserving large areas of shinnery dunes.
- This paper and Smolensky and Fitzgerald (2010) provide baseline estimates of numbers of dunes sagebrush lizards. This is important because the information can be used to assess temporal trends in dunes sagebrush lizard numbers.
- The study did not find a direct effect of oil and gas development, nor did it conclude there is no such effect. The authors explained in detail that habitat area, habitat quality, and effects of surface area of caliche were intermingled. As in the first point, above, the effect of habitat quality was not separated from the effects of scale and from effects of habitat conversion to caliche.
- The study did not test if and how construction of caliche roads and well pads may impact the condition of habitat over time. When roads are built, the habitat for the dunes sagebrush lizard could possibly deteriorate because roads fragment the habitat and may, for example, facilitate encroachment of mesquite or influence maintenance of the shinnery dune topography.

(74) Comment: The regulatory options available to the BLM when permitting oil and gas development are either insufficient or are not utilized by the agency. The conflicted nature of that agency's mission, coupled with the extreme pressure exerted on its leaders by the oil and gas industry, results in a scenario where environmental concerns often take a backseat to development. Because of this regulatory inadequacy, the dunes sagebrush lizard has not been sufficiently protected by the BLM.

Our Response: We disagree. BLM voluntarily developed the RMPA and subsequent CCA in order to better manage the dunes sagebrush lizard and lesser prairie chicken habitats. BLM has provided substantial information regarding the implementation of the RMPA in all aspects of project planning. Please see the *Factor D* and *Ongoing and Future Conservation Efforts* sections for a complete discussion.

(75) Comment: There was a map of the sagebrush lizard's range on the Service Web site that covered a much larger area than was depicted in the proposal.

Our Response: An erroneous map for *Sceloporus graciousus arenicolus* was previously found in our Environmental Conservation Online System (*https://ecos.fws.gov*) which depicted a range that included much of Texas and New Mexico. The dunes sagebrush lizard is a full species, *Sceloporus arenicolus,* which is only found in southeastern New Mexico and southwest Texas. The erroneous account and map for *Sceloporus graciosus arenicolus* have since been removed. Please see the *Species Information* section, above, for a full description of the dunes sagebrush lizard and its range.

Summary of Changes From the Proposed Rule

Based upon our review of the public comments, comments from other Federal and State agencies, peer review comments, issues addressed at the public hearing, and any new relevant information that may have become available since the publication of the proposal, we reevaluated our proposed rule and made changes as appropriate. Other than minor clarifications and incorporation of additional information on the species' biology, this determination differs from the proposal by:

(1) Based on our analyses, the Service has determined that the dunes sagebrush lizard should not be listed as endangered. This document withdraws the proposed rule as published in 2010 (75 FR 77801; December 14, 2010).

(2) The Service has added the *Ongoing and Future Conservation Efforts* section prior to the Summary of Factors Affecting the Species section, below. The conservation agreements are no longer discussed in *Factor D. Inadequacy of Existing Regulatory Mechanisms,* but are included in this section.

(3) The Service completed an analysis of the amount of habitat fragmented by caliche roads, that is now included in the Summary of Factors Affecting the Species section.

Ongoing and Future Conservation Efforts

Below we review the current plans that provide conservation benefit to the dunes sagebrush lizard. We describe the significant conservation efforts that are already occurring and expected to occur in the future. We have also completed an analysis of the ongoing and future conservation efforts pursuant to our Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE) (68 FR 15100) on the New Mexico Conservation Agreements and Texas Conservation Plan.

New Mexico

After the dunes sagebrush lizard became a candidate species in 2001, a variety of conservation initiatives were put in place to conserve the dunes sagebrush lizard's habitat, while continuing oil and gas and ranching activities in the area. The document that served as the foundation for the conservation of dunes sagebrush lizard was the Collaborative Conservation Strategies for the Lesser Prairie-Chicken and the Sand Dune Lizard (dunes sagebrush lizard) in New Mexico (2005). This strategy provided the conservation framework necessary for the development of the combined Candidate Conservation Agreement (CCA) and Candidate Conservation Agreement with Assurances (CCAA) for the Lesser Prairie-Chicken and Sand Dune Lizard (dunes sagebrush lizard) (hereafter called New Mexico Conservation Agreements), and BLM's RMPA. These collaborative conservation efforts are now being implemented to benefit the dunes sagebrush lizard, as well as the lesser prairie-chicken (*Tympanuchus pallidicinctus*).

The first document to describe the conservation efforts developed in the conservation strategy was BLM's RMPA (see Factor D for additional discussion).

After the implementation of the RMPA, CEHMM, BLM, and the Service worked in cooperation and consultation with land owners and industry to develop the New Mexico Conservation Agreements, in order to bring about voluntary implementation of conservation measures for the lesser prairie-chicken and dunes sagebrush lizard. If either species were listed as threatened or endangered under the Act, the listing triggers both a regulatory and a conservation responsibility for Federal, State, and private landowners. These responsibilities stem from section 9 of the Act that would prohibit ''take'' (i.e., harass, harm, pursue, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct) of listed species. In addition to the section 9 prohibitions, Federal agencies must ensure that their actions will not jeopardize the continued existence of the listed species.

First, CEHMM, BLM, and the Service worked together for several years to develop the CCA, to bring about conservation on BLM land, and later they worked together to develop the CCAA to bring about conservation on non-Federal lands. The CCA was developed with the vision that the conservation measures would be implemented while the species were still candidates, and would be effective at conserving both species so as to preclude the need to list. This is accomplished by way of industry, landowner, and agency collaboration combining their respective resources to provide comprehensive conservation results that are demonstrable and beneficial to both species.

If either species were listed as threatened or endangered under the Act, the listing would trigger both a regulatory and a conservation responsibility for Federal, State, and private landowners. These responsibilities stem from section 9 of the Act that would prohibit ''take'' (i.e., harass, harm, pursue, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct) of listed species. In addition to the section 9 prohibitions, Federal agencies must ensure that their actions will not jeopardize the continued existence of the listed species. Under the CCA, participants have joined by voluntarily signing a certificate of participation (CP), and their actions have been analyzed in the Service's conference opinion on the CCA, which would be converted to a biological opinion and provide incidental take coverage should either species be listed. As such, participants in the CCA receive a high degree of certainty that additional restriction would not be placed on their otherwise legal activities.

The companion CCAA provides incentives for voluntary conservation of species-at-risk on private and State lands. Under the CCAA, a property owner voluntarily commits to implement specific conservation measures on non-Federal lands for the species by signing a certificate of inclusion (CI). Under the CCAA, if either species is listed, then private landowners receive assurances that additional restrictions would not be placed on their otherwise legal activities. Without regulatory assurances, landowners may be unwilling to initiate conservation measures for these species. In both cases, signing up under the CCA or CCAA is voluntary. Through enactment of a voluntary program, enrollees can elect to continue participation at their discretion. This translates into enrollees' prerogative to opt out if they so desire. Leaving participation, however, eliminates the programmatic safeguards that CCA and CCAA provide.

Interested CCA participants enroll their Federal mineral or surface leases through a CP, and CCAA participants enroll non-Federal mineral or surface parcels through a CI. At enrollment, the participants understand that all conservation measures are binding and each is implemented at the time when the specific conservation measures are applicable. Each surface-disturbing activity that occurs after enrollment results in a habitat conservation fee, as described in an action-specific fee schedule located in the CI or CP.

CEHMM has established a two-step review process to ensure implementation of the conservation measures. Step one consists of BLM permitting activities on public lands only according to the conservation measures listed in an enrolled company's CP. Similarly, a participant works with CEHMM to plan non-Federal activities according to conservation measures in their CI. The New Mexico Oil Conservation Division reviews all Federal and non-Federal applications for permits to drill, and posts the approved permits on their Web site. In step two, CEHMM queries the Web site weekly to determine where new well locations were permitted, and then reviews the locations on enrolled lands, either mapped or in the field, to ensure compliance with the applicable conservation measures. CEHMM then calculates the habitat conservation fee and charges the company the appropriate fees within 10 working days. For noncompliant locations, CEHMM contacts the company and negotiates changes to the project so that the conservation measures are implemented properly. Finally, BLM and participants submit data summarizing surface-disturbing activities to CEHMM for inclusion in monthly and annual reports to the Service. This process monitors all participants and ensures that development does not occur in dunes sagebrush habitat in enrolled areas.

A conservation team, including biologists from the Service, BLM, CEHMM, NMDGF, and the New Mexico State Land Office, was established to prioritize projects to be funded for dunes sagebrush lizard habitat restoration, reclamation of historical pads and roads, environmental contaminant removal, and other research leading to conservation of the dunes sagebrush lizard.

As of May 2012, there were 151,083 ha (373,335 ac) enrolled in the New Mexico Conservation Agreements under ranching agreements and 112,060 ha (276,906 ac) enrolled under mineral agreements. On March 1, 2012, the New Mexico State Land Office enrolled all State Trust lands in lesser prairie-chicken and dunes sagebrush lizard habitat in a unique CI under the CCAA. As of May 2012 in New Mexico, 83 percent of the dunes sagebrush lizard's habitat was enrolled in the New Mexico

Conservation Agreements. Properties may be enrolled by both the landowner for ranching activities, and by the oil or gas company for extraction activities. Including the areas that BLM has removed from leasing altogether, the area covered by the RMPA, and the area enrolled in the New Mexico Conservation Agreements, 211,708 ha (523,129 ac) have conservation measures applied to them. This is 95 percent of the total dunes sagebrush lizard habitat in New Mexico. The Service has completed a PECE analysis on the New Mexico Conservation Agreements, and it is available for review at *http://www.regulations.gov.*

Texas

A conservation plan has been developed for dunes sagebrush lizard habitat in Texas. The Texas Conservation Plan was developed and approved after the publication of the proposed rule to list the dunes sagebrush lizard. It was developed in conjunction with the Texas Comptroller's Office (the permittee) and many stakeholders, including Federal, State, and private partners representing interests in the natural resource, oil and gas, ranching, and agricultural industries.

The Texas Conservation Plan is structured differently than the New Mexico Conservation Agreements in its implementation of conservation measures (e.g., avoidance, minimization, and mitigation). The Texas Conservation Plan focuses on the avoidance of activities within lizard habitat that would further degrade habitat, reclamation of lizard habitat to reduce fragmentation, and, due to the presence of mesquite in Texas habitat, removal of mesquite that is encroaching into shinnery oak dunes. If avoidance of lizard habitat cannot be accomplished, the participants may adopt conservation measures that minimize habitat impacts, and as a last resort, mitigate for the loss of lizard habitat.

Each CI will be developed upon enrollment and will be unique to each site enrolled. Therefore, the overall conservation standards incorporated in each CI must work to accomplish the conservation goals of the Texas Conservation Plan while providing maximum benefit to the dunes sagebrush lizard. Though the specific conservation measures described in each CI may vary on a case-by-case basis, the Texas Conservation Plan as a whole limits the amount of habitat loss within dunes sagebrush lizard habitat to one percent in the first 3 years. As detailed in the permit and the Texas Conservation Plan, the permittee must first demonstrate avoidance and show that all appropriate minimization measures have been utilized before any habitat degradation is allowable. Then, if habitat loss is unavoidable, the permittee must secure mitigation commensurate with the impact prior to authorizing any habitat loss, and, further, that habitat loss cannot exceed one percent of the total dunes sagebrush lizard habitat in Texas over the first 3 years of implementation of the Texas Conservation Plan (2012 to 2015). After the first 3 years, the Service and the permittee will evaluate the Texas Conservation Plan's accomplishments, and analyze any habitat loss authorized by the CIs, to determine if future habitat loss (up to 10 percent) may be authorized. Total dunes sagebrush lizard habitat loss will not exceed 10 percent during the 30-year life of the Texas Conservation Plan.

The primary conservation measure limits impacts to high-quality habitat on enrolled areas. Participants work with the permittee (or third party contractor, because the Texas Comptroller's Office anticipates contracting this function out to a third party) to develop individual CIs through a process identified in Appendix F of the Texas Conservation Plan. This process involves a habitat impact assessment, discussion of conservation options under the Texas Conservation Plan, determination of mitigation needs, and development of a property-specific management plan. This is agreed upon through the signing of the CI. A participant is then responsible for proper implementation, annual and monthly reporting, and compliance monitoring (via third party contractors making post-construction site visits on behalf of the permittee). The permittee will provide regular reports to the Service and meet with the Service to determine if habitat goals are being met. The other provisions of the Texas Conservation Plan are based on the Conservation Recovery Award System and mitigation for loss of habitat (which is also monitored by a third party contractor). Though there may be some habitat impacts, habitat restoration done through the award system will offset this and have the positive effect of decreasing habitat fragmentation and providing for the long-term conservation of the species. It is required that 90 percent of the delineated habitat in Texas be avoided, and only up to 10 percent of the habitat may eventually be taken (under the stipulations described above), only if that same amount of habitat has already been created elsewhere by restoring previously developed habitat, or protecting habitat from mesquite encroachment.

As of May 2012, the Texas Conservation Plan included 91,959 ha (227,235 ac). Of that area, 56,105 ha (138,640 ac) (71 percent) are within mapped lizard habitat. Of this amount, 28,363 ha (70,087 ac) (56 percent) represent lizard habitat that is classified as occupied lizard habitat. The remaining 35,853 ha (88,595 ac) represent areas adjacent to mapped lizard habitat that may buffer or connect patches of lizard habitat. We anticipate these numbers to increase as additional CIs are signed and more detailed information on enrolled lands is provided. The Service has completed a PECE analysis on the Texas Conservation Plan, and it is available for review at *http://www.regulations.gov.*

PECE

The purpose of PECE is to ensure consistent and adequate evaluation of recently formalized conservation efforts when making listing decisions. The policy provides guidance on how to evaluate conservation efforts that have not yet been implemented or have not yet demonstrated effectiveness. The evaluation focuses on the certainty that the conservation efforts will be implemented and effectiveness of the conservation efforts. The policy presents nine criteria for evaluating the certainty of implementation and six criteria for evaluating the certainty of effectiveness for conservation efforts. These criteria are not considered comprehensive evaluation criteria. The certainty of implementation and the effectiveness of a formalized conservation effort may also depend on species-specific, habitat-specific, location-specific, and effort-specific factors. We consider all appropriate factors in evaluating formalized conservation efforts. The specific circumstances will also determine the amount of information necessary to satisfy these criteria.

To consider that a formalized conservation effort contributes to forming a basis for not listing a species, or listing a species as threatened rather than endangered, we must find that the conservation effort is sufficiently certain to be (1) Implemented, and (2) effective, so as to have contributed to the elimination or adequate reduction of one or more threats to the species identified through the section 4(a)(1) analysis. The elimination or adequate reduction of section 4(a)(1) threats may lead to a determination that the species does not meet the definition of threatened or endangered, or is threatened rather than endangered.

An agreement or plan may contain numerous conservation efforts, not all of which are sufficiently certain to be implemented and effective. Those conservation efforts that are not sufficiently certain to be implemented and effective cannot contribute to a determination that listing is unnecessary, or a determination to list as threatened rather than endangered. Regardless of the adoption of a conservation agreement or plan, however, if the best available scientific and commercial data indicate that the species meets the definition of ''endangered species'' or ''threatened species'' on the day of the listing decision, then we must proceed with appropriate rulemaking activity under section 4 of the Act. Further, it is important to note that a conservation plan is not required to have absolute certainty of implementation and effectiveness in order to contribute to a listing determination. Rather, we need to be certain that the conservation efforts will be implemented and effective such that the threats to the species are reduced or eliminated.

New Mexico Conservation Agreements—Using the criteria in PECE, we evaluated the certainty of implementation and effectiveness of the New Mexico Conservation Agreements. We have determined that the conservation efforts have a high certainty of being implemented. Our reasons for concluding that our level of certainty is high are that the level of enrollment is high (over 83 percent of lizard habitat is enrolled), the mechanism and authorities for collecting funds are in place, the process for allocating funds to support reclamation work and research in lizard habitat is in place, the monitoring and documentation of compliance with the conservation measures are in place, and monthly and annual reports are complete, and all parties have the legal authorities to carry out their responsibilities under the New Mexico Conservation Agreements. We have determined that the conservation efforts are effective at eliminating or reducing threats to the species because they direct new development and herbicide treatments outside of suitable and occupied habitat, restore habitat, and reduce fragmentation. We are confident that the efforts will continue to be implemented because we have a documented track record of compliance on all of the enrolled lands to date. In over 3 years of implementation, neither CEHMM nor the BLM have reported incidence of non-compliance with the conservation measures. Measures, such as reclamation, are placed on an implementation schedule and will be effective upon completion. Participants have sufficient incentive to remain enrolled and continue conservation of habitat for the lizard. The agreements have sufficient monthly and annual monitoring and reporting requirements to ensure that all of the conservation measures are implemented as planned, and are effective at removing threats to the lizard and its habitat. The collaboration between the Service, CEHMM, and BLM requires regular team meetings and involvement of all parties in order to implement the agreements fully. We find that the conservation efforts in the New Mexico Conservation Agreements and its implementing CIs and CPs have a high level of certainty of implementation (for those measures not already implemented) and effectiveness and can be considered as part of the basis for our final listing determination for the lizard.

Texas Conservation Plan—After review and analysis of the Texas Conservation Plan pertaining to the dunes sagebrush lizard in Texas, we have determined that the conservation effort will be effective at eliminating or reducing threats to the species, because it first avoids habitat and if necessary, limits development within suitable and occupied habitat as a priority, and it also improves and strives to restore habitat and reduces fragmentation. We are confident that the conservation effort will be implemented on enrolled acres, and the loss of habitat will be limited to 1 percent in the first 3 years of the plan, and not more than 10 percent over the 30-year life of the permit. Mitigation measures, such as habitat improvement and mesquite removal, are priorities in the plan. The agreements have sufficient monthly and annual monitoring and reporting requirements to ensure that all of the conservation measures are implemented as planned, and are effective at removing threats to the lizard and its habitat. The collaboration between the Service and other stakeholders requires regular meetings and involvement of all parties in order to implement the agreements fully. For this reason, we have determined that the Texas Conservation Plan will be implemented and effective at reducing the threats to the lizard in Texas, given that the majority (71 percent) of mapped lizard habitat in Texas has been enrolled.

As of May 2012, there are 56,105 ha (138,640 ac) of dunes sagebrush lizard habitat enrolled in the Texas Conservation Plan. Enrollees have collectively remitted approximately $773,000 in participation fees into the Habitat Protection Fund administered by the Texas Conservation Plan, all funds which cannot be used by the Texas Legislature for any other purpose.

Some of the same companies who are enrolled in the New Mexico Conservation Agreements have also either enrolled or committed to enroll acres in Texas. Two major operators, Conoco-Phillips and Bopco, are enrolled in both plans. As evidenced by the enrollment acreages and funds collected thus far, numerous other companies have submitted enrollment forms to enroll in the Texas Conservation Plan. However, due to confidentiality protections provided by the Texas Conservation Plan, those company names have not been disclosed to date. The high level of participation and compliance with the New Mexico Conservation Agreements and additional voluntary conservation efforts prescribed by the Texas Conservation Plan supports our determination that similar enrollment, implementation, and success is likely to be achieved in Texas.

The Service issued the permit to the permittee on February 17, 2012. Since then, in a short time, the permittee has enrolled significant acreages, collected funds from current enrollees, and has created and set into motion a non-profit organization to administer specific functions of the Texas Conservation Plan, including but not limited to, outreach to attract more participation. As of May 2012, the third party administrator is negotiating agreements with interested parties. It is reasonable to conclude that the enrollments will continue and dunes sagebrush lizard habitat placed under conservation through the Texas Conservation Plan will increase over time. We conclude that the Texas Conservation Plan has a high level of certainty of implementation and effectiveness, and can therefore be considered as part of the basis for our final determination for the dunes sagebrush lizard.

Our full analysis of the New Mexico Conservation Agreements and Texas Conservation Plan pursuant to PECE can be found at *http://www.regulations.gov.*

Summary of Factors Affecting the Species

Section 4 of the Act and its implementing regulations (50 CFR 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 if the Service determines that it is in danger of extinction or likely to become so due to

one or more of the five factors described in section 4(a)(1) of the Act: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination. Each of these factors is discussed below.

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

The dunes sagebrush lizard is a habitat specialist and is found only in shinnery oak dune habitat (Sias and Snell 1998, p. 1). Shinnery oak is considered to be a highly threatened community (Dhillion *et al.* 1994, p. 52), and the shinnery oak dune habitat is a subset of that larger community. Changes in either land management practices or climate that impact this vegetative community reduce the potential for the habitat to be available, and may destabilize the dunes within the shinnery oak dune habitat (Muhs and Holliday 2001, p. 86).

The greatest threat to the dunes sagebrush lizard is the loss of its specialized habitat, due to a variety of factors, including activities associated with oil and gas development, and herbicide treatment for range improvements. Other threats that are also expected to contribute to habitat loss, modification, or fragmentation in the future include localized OHV use, wind and solar energy development, climate change, and drought.

In addition to habitat loss, development causes habitat fragmentation that breaks up large areas of suitable habitat into smaller patches. When large habitat patches are divided into smaller patches, there is increased edge habitat and decreased interior habitat. Individuals that live near the habitat's edge have limited resources because the exterior areas do not provide adequate shade, cover, or prey. The loss of vegetation and cover along habitat edges decreases survivorship, growth, and reproduction, and also increases predation. Individuals within smaller habitat patches, with greater proportions of edge habitat, have an increased chance of mortality, because they have less of a barrier between the core patch and the habitat disturbance (Dramsted *et al.* 1996; p. 23; Jaeger *et al.* 2005, p. 329; Ingelfinger and Anderson 2004, p. 385; Delgado-Garcia *et al.* 2007, p. 2949; Ballesteros-Barrera *et al.* 2007, p. 736; Sias and Snell 1996, p. 28; Endriss *et al.* 2007, p. 320).

For most lizard species, connectivity and movement between patches could also play an important role in determining the occupancy and sustainability of each patch (Barrows and Allen 2007, p. 66). The probability of a species going extinct in local habitat patches increases with fragmentation, as the patches become more isolated from each other (Dramstad *et al.* 1996, pp. 20–24).

We do not know how large habitat patches need to be in order to maintain viable populations of dunes sagebrush lizards. However, literature published on other species has shown that populations within smaller habitat patches have a greater risk of extinction than those in large habitat patches, because small patches support fewer individuals and have a higher proportion of less suitable edge habitat than more suitable interior habitat (Dramsted *et al.* 1996, pp. 20–24). For the similar sand-dwelling Coachella Valley fringe-toed lizard (*Uma inornata*), a decrease in habitat patch size resulted in an increased probability of local extinction. For isolated habitat patches to sustain fringe-toed lizard populations, patch size needed to be at least 100 ha (250 ac) (Chen *et al.* 2006, p. 28). Research on the Florida scrub lizard (*Sceloporus woodi*) found that patch size significantly influenced recruitment and survivorship, with the number of hatchlings per female doubling in the largest habitat patches (Hokit and Branch 2003, p. 61).

Based on these studies, we expect that the largest habitat patches for the dunes sagebrush lizard would support higher populations and decrease the chance of local population loss and extinction. The habitat for the dunes sagebrush lizard is currently patchy and fragmented throughout its range, and populations are not always connected by suitable habitat, due to natural geologic processes and human development (Chan *et al.* 2008, p. 10). The movement of this dynamic system could be interrupted by habitat fragmentation that would prevent the geologic processes from continually forming dunes, and potentially cause the current dune structures to collapse. Also, there is little evidence to suggest that dunes sagebrush lizards often traverse unsuitable habitat to find suitable habitat patches (Fitzgerald *et al.* 1997, p. 26).

Genetic diversity of dunes sagebrush lizard populations has historically been linked to the connectivity of the entire system (Chan *et al.* 2008, p. 10). Therefore, the fragmentation and loss of habitat can lower migration rates and genetic connectivity among remaining populations of dunes sagebrush lizards, potentially reducing genetic variability and increasing extinction risk. If dunes sagebrush lizards are unable to move between habitat patches because of natural patchiness and fragmentation, genetic connectivity will be reduced or lost, and individual populations will become vulnerable to stochastic events (Chan *et al.* 2008, p. 10).

The following activities have resulted in the loss and fragmentation of dunes sagebrush lizard habitat. Along with each activity, there is a description of the existing conservation actions that are intended to conserve the dunes sagebrush lizard and its habitat.

Oil and Gas Development

The dunes sagebrush lizard is found within the Permian Basin, which is one of the most productive oil and gas producing areas in the western United States. Over 50 percent of oil production in Texas occurs in Districts 8 and 8A (Texas oil and gas districts); these districts overlap the known geographic range of the dunes sagebrush lizard (Tarver and Dasgupta 1997, p. 3670). Within New Mexico, 70 percent of land within the range of the dunes sagebrush lizard has been leased by private entities, BLM, or the New Mexico State Land Office for oil and gas exploration and development (Service 2012, p. 1). Oil and gas activities have been linked to the reduction in dunes sagebrush lizard numbers around oil and gas wells (Sias and Snell 1998, p. 10; Leavitt *et al* 2011, p. 3).

There are various research projects regarding the effects of oil and gas development on the dunes sagebrush lizard. The first research project to investigate the potential effects of oil and gas activities on the dunes sagebrush lizard was completed in 1998 (Sias and Snell 1998). The goal of this study was to determine if there was a localized influence around wells placed within or adjacent to shinnery oak dune habitat, on the dunes sagebrush lizard. Visual surveys were conducted along transects at various distances from well sites, within dunes sagebrush lizard habitat. Surveys were only completed in areas where dunes sagebrush lizards were present, based on presence/absence surveys performed prior to this effort (Sias and Snell 1998, p. 3).

This study found a negative relationship between well density and the number of dunes sagebrush lizards present at sites (Sias and Snell 1998, p. 9). A regression analysis was completed that predicted a 25 percent decline of

dunes sagebrush lizard populations in areas where well densities were 13.64 wells per section. In addition, the study noted that dunes sagebrush lizard populations in areas with well densities of 29.82 wells per section were predicted to decline by 50 percent (Sias and Snell 1998, p. 10). The study also found that there were 39 percent fewer dunes sagebrush lizards in areas that were 80 m (260 ft) away from well pads, as compared to well pads that are greater than 190 m (620 ft) from dunes sagebrush lizard sites (Sias and Snell 1998, p. 2). This study suggests that moderate levels of oil and gas activities are not an imminent threat to the species, but high levels of continued development could result in population reductions (Sias and Snell 1998, p. 23).

In 2011, a preliminary study was published that showed habitat quantity and quality for the dunes sagebrush lizard were positively correlated. This research was done on 11 sites that varied in habitat quantity and quality, and were all occupied with dunes sagebrush lizards. This study was not designed to detect if dunes sagebrush lizards had disappeared from areas where extensive habitat modification had occurred from oil and gas development. The study showed encounters per unit effort for dunes sagebrush lizards were correlated with habitat quantity. In other words, more dunes sagebrush lizards were found in large areas of abundant habitat, regardless of whether the overall landscape was fragmented. This study did not find a direct effect of oil and gas development, nor did it conclude there is no such effect. As such, the paper provides good evidence for support of conserving large areas of shinnery dunes (Smolensky and Fitzgerald 2011, pp. 315–324).

In 2009, a study was initiated to determine how management practices affected patterns of landscape fragmentation and populations of dunes sagebrush lizards. Because the 1998 study determined that there were fewer dunes sagebrush lizards around well pads, this study was designed to determine if the same trends exist at a larger population scale (Leavitt *et al.* 2011, p. 3). The study established long-term monitoring sites in areas that are fragmented with oil and gas development, and areas that are not fragmented. Each site has pitfall grids to capture and mark dunes sagebrush lizards in each habitat type. Mark and recapture data from these grids will be used to estimate population size.

The data were collected from 27 trapping grids over 3 years, for a total of 48,600 trap days, and data collection will continue through 2012. The total number of all lizards captured in fragmented and unfragmented sites was not significantly different, but dunes sagebrush lizards were captured at much lower frequencies on fragmented grids compared to unfragmented grids (Leavitt *et al.* 2011, pp. 5–7). Four of the fragmented grids have yet to have a dunes sagebrush lizard captured on them. These grids are located at historical dunes sagebrush localities, in a highly developed oilfield between U.S. Highway 82 and NM State Highway 529, between Maljamar, New Mexico and Loco Hills, New Mexico (Leavitt *et al.* 2011, p. 7).

The three studies described above did not look closely into the causes (specific activities) of the reduced lizard populations in the vicinity of areas of oil and gas development that pose specific threats to the dunes sagebrush lizard. However, it is likely that the reduction or absence of dunes sagebrush lizards from sites adjacent to oil and gas wells has probably resulted from the cumulative effects of all of the activities associated with the development. The activities and infrastructure for oil and gas development included seismic exploration, roads, pads where well pumps and drilling rigs are placed, battery tanks, power lines, pipelines, and injection wells. Each of these specific activities is discussed below.

Caliche Pads and Roads—In the sandy soils of the dunes, it is necessary to increase the stability of the sandy surface to create roads for large equipment and trucks. Caliche (soil with high amounts of calcium carbonate) was common throughout the range of the dunes sagebrush lizard and often used to stabilize the sand. Bulldozers have been used to remove vegetation, and caliche was placed over the sand to create a road or well pad. The removal of shinnery oak dune habitat has resulted in a grid of roads and pads, pipelines, and power lines that are found at varying degrees throughout the range of the dunes sagebrush lizard.

Within the range of the dunes sagebrush lizard, there are 10,995 well sites. Each oil pad averages 0.8 to 1.2 ha (2 to 3 ac), and each gas pad averages 1.2 to 1.6 ha (3 to 4 ac) (Service 2012, p. 1). The Service has digitized all of the roads within the dunes sagebrush lizard habitat to estimate the percent of habitat that falls within 200 m (656 ft) of a road, which is the measure we used for habitat to be considered fragmented (as defined in Sias and Snell 1998). Forty-six percent of the total 301,468 ha (744,994 ac) of habitat in New Mexico and Texas are currently fragmented by roads. Forty-eight percent of the 81,509 ha (201,413 ac) of habitat in Texas (Fitzgerald *et al.* 2011, p. 10), and 45 percent of the 219,979 ha (543,581 ac) of habitat in New Mexico have been fragmented (Service 2012, p. 1).

The portions of the dunes sagebrush lizard's range where oil and gas activities were most prevalent are in the southern part of their range in New Mexico and West Texas, where the density of roads and well pads may have contributed to further separation of the southern population from the central population of dunes sagebrush lizards (Chan *et al.* 2008, p. 9). In New Mexico, this development covers an area of shinnery oak dunes measuring 8 km (5 mi) by 26 km (16 mi), between U.S. Highway 82 and U.S. Highway 62 in Lea and Eddy Counties. In this area there are 142 sections (36,780 ha (90,880 ac)) where the well pad density is greater than 13 wells per section. In the BLM's RMPA planning area, which incorporates all of the dunes sagebrush lizard's habitat on BLM land in New Mexico, approximately 100 new wells per year are to be drilled over the next 20 years (BLM 2007, p. 4.37). However, management prescriptions in the published RMPA direct that these activities will be outside of occupied dunes sagebrush lizard habitat.

The network of roads and pads throughout the shinnery oak dune habitat altered the habitat, making it difficult for shinnery oak to emerge and persist; the trees cannot grow through compacted areas, with increased calcium carbonate, or through permanently paved areas. Well pad and road construction removed shinnery oak on the surface, and further degraded the habitat by causing soil compaction. After well pads have been abandoned, shinnery oak did not reestablish unless the caliche was removed and rhizomes (horizontal underground stems) could regrow (Boyd and Bidwell 2002, p. 332). When the shinnery oak dune habitat was destroyed or fragmented by roads and pads, the resources provided by the shinnery oak were subsequently reduced, and dunes sagebrush lizard populations were subdivided into smaller and more vulnerable patches.

Hatchling and adult dunes sagebrush lizards have been found in shinnery oak flats between large dunes, suggesting that the area between the sand dunes is important for dispersal. Surveys by the BLM recorded dunes sagebrush lizards in the shinnery oak flats (Bird 2007, p. 2). In the past, oil and gas development has been directed into the shinnery oak flats and out of the dune complexes to lessen the impact to the dunes sagebrush lizard. In studies of other

lizard species where habitat is highly fragmented, lizards are limited to small habitat patches. These studies have also found increased mortality, due to collisions with vehicles, and due to inaccessibility to habitat, mates, and prey, leading to a reduction in population size and population persistence (Delgado-Garcia *et al.* 2007, p. 2949).

Based on various studies for similar lizard species, it would be expected that there have been negative impacts to dunes sagebrush lizards and their habitat as a result of roads and pads associated with oil and gas development. These impacts include soil compaction; decreased stability of microclimates; loss of habitat; decreased habitat quality; division of the ecosystem with artificial gaps; abrupt habitat edges; conversion of habitat interior to habitat edge; inhibited access to resources for foraging, breeding, nesting, predator avoidance, and thermoregulation; behavior modification; and direct mortality due to collisions (Jaeger *et al.* 2005, p. 329; Ingelfinger and Anderson 2004, p. 385; Delgado-Garcia *et al.* 2007, p. 2949; Ballesteros-Barrera *et al.* 2007, p. 736; Sias and Snell 1996, p. 28; Endriss *et al.* 2007, p. 320).

The New Mexico Conservation Agreements, RMPA, and Texas Conservation Plan all limit future development of roads and pads within the delineated habitat for the dunes sagebrush lizard. These plans also provide for removal of existing roads and pads once they become inactive in order to increase connectivity between shinnery oak dune complexes. The Service believes that the roads and pads associated with oil and gas development remove habitat and cause habitat fragmentation where they occur. However, more than 50 percent of the dunes sagebrush lizard's habitat is not fragmented (Service 2012, p. 1), and provides adequate core habitat for the dunes sagebrush lizard to feed, breed and shelter.

Pipelines—There are a variety of different pipelines throughout the oilfields. First, there are gathering lines, which range in size from 5 to 20 cm (2 to 8 in) in diameter, and are often laid on the surface. These small lines gather the oil from many wells, and connect to larger trunk lines measuring 20 to 61 cm (8 to 24 in) in diameter, which tend to be buried lines. Every oil or gas well has an associated pipeline, and a separate right-of-way for each pipeline. Buried pipelines were built by digging linear trenches that are 1 to 2 m (3 to 6 ft) deep, depending on the pipe being laid. The construction of pipelines removed vegetation, including shinnery oak. Pipelines are located throughout the range of the dunes sagebrush lizard. We believe pipelines pose a mortality risk to the dunes sagebrush lizard in areas where oil and gas infrastructure has been most dense, and may continue to be a mortality risk if oil and gas activities expand in the central and northern parts of the range of the species. The most significant stressor to the dunes sagebrush lizard associated with pipelines is the actual construction process, which removes vegetation, including shinnery oak, and also destabilizes the overall dune structure when placed in the dunes. Large equipment can crush nests and individuals hiding beneath the sand.

Another stressor has been the large open trenches that can form linear pitfall traps. There have been numerous recorded instances of reptiles and amphibians being trapped in pipeline, waterline, and telecommunication line trenches (Hawken 1951, p. 81; Anderson *et al.* 1952, p. 276). For example, in 2001, a 4.8–km (3.0–mi) long telecommunication line trench (similar in structure to pipeline trenches) on Albuquerque, New Mexico's West Mesa was monitored for trapped animals. During 23 days of monitoring, 298 reptiles and amphibians, including several lizard species, were removed from the trench (Painter 2008, p. 1). There were no escape ramps along the trench, so it was impossible for animals to escape.

During a distribution survey for dunes sagebrush lizards in July 2008, the NMDGF found an open pipeline ditch that went through State, private, and BLM land, that was determined to be out of compliance with the company's BLM permit, and occurred on land that was not enrolled in the CCA. The open ditch was approximately 1.2 m (4 ft) wide and 1.2 m (4 ft) deep, bisecting a dune complex known to be occupied with dunes sagebrush lizards. The large, open ditch had formed a pitfall trap where animals could not escape if they fell in. Though no dunes sagebrush lizards were detected in the ditch at the time of the survey, other reptiles were found in the ditch, and surveyors were concerned that dunes sagebrush lizards could easily be trapped in the ditch (Currylow *et al.* 2008, p. 1).

Once the pipelines are established, properly functioning pipelines are less of a stressor to the dunes sagebrush lizard. Some existing buried pipelines located within shinnery oak dunes provide sunken dune-like areas where dunes sagebrush lizards are found. Twenty-four percent of dunes sagebrush lizards found during BLM surveys were found along pipelines adjacent to shinnery oak dunes (Bird 2006, p. 2). Although it is not known how dunes sagebrush lizards utilize existing pipelines (Sias and Snell 1998, p. 5; Bird 2005, p. 1; Bird 2006, p. 1; Bird 2007, p. 1), the shinnery oak does reestablish in these areas, and they do provide the necessary habitat for dunes sagebrush lizards to forage and find shelter.

Since dunes sagebrush lizards can be found along pipelines, routine maintenance and potential leaks are localized stressors to the dunes sagebrush lizard. Leaks expose dunes sagebrush lizards to toxins, and routine maintenance increases the likelihood of being crushed by OHV travel along pipelines (Sias and Snell 1998, p. 3). On May 16, 2010, a pipeline burst in dunes sagebrush lizard habitat, spraying oil into the air and across the landscape (Leavitt 2010, p. 1). These spills introduce toxins and contaminants into the soil and cover surrounding vegetation. However, the stressors associated with pipelines are localized, and are more prevalent in areas where oil and gas development has been high.

Because pipelines are localized and the effects are temporary, it is not anticipated that they will have a significant impact on populations or the species as a whole. The New Mexico Conservation Agreements and Texas Conservation Plan route pipelines out of dunes sagebrush lizard habitat, and encourage the use of established corridors for pipelines to minimize disturbance each time a pipeline is established. The same conditions apply on public lands through the BLM RMPA. The New Mexico Conservation Agreements have a trench stipulation that requires that any open trench have escape ramps or biological monitors to remove any vertebrate from the trench. This conservation measure discourages open trenches near dunes sagebrush lizard habitat. The BLM and New Mexico Oil Conservation Division work with companies to prevent and quickly clean up emergency spills. The Service concludes that while pipelines may pose localized threats where they occur, the potential impact of pipelines is very small in relation to the total lizard habitat. The dunes sagebrush lizard has adequate unfragmented habitat available throughout its range such that pipelines do not pose a significant threat. Further, the conservation measures provided in the New Mexico Conservation Agreements and Texas Conservation Plan, and the conditions stipulated in the BLM RMPA will minimize any potential impacts from pipelines.

Powerlines—Like pipelines, powerlines have been located throughout the range of the dunes sagebrush lizard, and are more prevalent in areas of high oil and gas development. We believe the presence of powerlines may have increased predation to the dunes sagebrush lizard in areas where oil and gas infrastructure has been most dense, and may continue to be a stressor as oil and gas activities expand in the central and northern parts of the range of the species. Aside from the initial disturbance associated with installation and maintenance of a pole-mounted above-ground powerline, the most significant stressor to the dunes sagebrush lizard associated with powerlines is the increase of predator perches within the shinnery oak dune habitat. Increased predator perches may lead to increased predation by avian predators. Individuals that exist adjacent to powerlines likely have a greater risk of predation, and populations near powerlines may decline due to greater predation rates.

However, more than 50 percent of the dunes sagebrush lizard's habitat is not fragmented, and provides adequate core habitat for the dunes sagebrush lizard to feed, breed, and shelter without the threat of increased predation (Service 2012, p. 1). The Service concludes that while powerlines may increase predation where they occur, the potential impact of powerlines is very small in relation to the total lizard habitat. The dunes sagebrush lizard has adequate core habitat available throughout its range such that pipelines do not pose a significant threat. Further, the New Mexico Conservation Agreements and Texas Conservation Plan direct that new powerline construction be allowed only outside of shinnery oak dune habitat.

Seismic Exploration—Seismic exploration utilizes artificially induced shock waves to search for subsurface deposits of crude oil, natural gas, and minerals, and to facilitate the location of prospective drilling sites. Shock waves are typically produced by vibratory mechanisms mounted on specialized trucks known as thumper trucks that weigh approximately 60 tons. Seismic waves then reflect and refract off subsurface rock formations and travel back to acoustic receivers called geophones. The time it takes for seismic energy to return aids in the estimation of the structure and stratigraphy of subsurface formations (Pendleton *et al.* 2008, p. 1). Seismic exploration is conducted prior to the development of oil and gas fields, in order to determine the below surface availability of oil or gas and refine the placement of well pads.

Seismic exploration for oil and gas has been a periodic, localized activity that may have caused limited disturbance to the dunes sagebrush lizard and its habitat. Stressors due to seismic exploration occurred because heavy thumper trucks may have caused the destabilization of dunes by driving through dune complexes (Painter 2004, p. 4). Seismic exploration may also have posed a direct threat to the dunes sagebrush lizard. Dunes sagebrush lizards are dormant and immobile during colder winter months (October through March). If seismic exploration occurred during the winter months when dunes sagebrush lizards were dormant beneath the soil surface and unable to move, dunes sagebrush lizards may have been crushed. If the exploration occurred during the nesting season, eggs that were buried below the surface may also have been destroyed (Painter 2004, p. 4). Seismic exploration poses a localized threat for a short period of time while the trucks are crossing a given area. Because of mineral interest ownership and targeted pay zones, once an area has been surveyed, it will likely not be surveyed again.

Because seismic exploration is a localized activity that only occurs once or twice in a given area, it is not anticipated to have a significant impact on populations or the species as a whole. Seismic exploration is a precursor to future oil and gas development in an area, but it also directs development to the areas where drilling will be most productive, and may limit the amount of surface disturbance. The RMPA, New Mexico Conservation Agreements, and Texas Conservation Plan restrict or limit seismic exploration within dunes sagebrush lizard habitat. The Service concludes that seismic activities may pose localized risk of mortality where they occur, but would not be expected to cause habitat loss or population declines, since these activities occur in only a very small part of the range. There is adequate habitat available that is not affected by seismic development, and seismic activities will not pose significant threats to the species, especially since these activities will now be managed under the RMPA, New Mexico Conservation Agreements, and Texas Conservation Plan, which provide minimization of exposure.

Summary of Oil and Gas Activities—A 2007 report from the BLM (BLM 2007, pp. 3–16) states that reductions of dunes sagebrush lizard population sizes in New Mexico are associated with surface disturbance and removal of shinnery oak due to activities, such as oil and gas development, and the creation of roads associated with new rights-of-way. In areas with previously high levels of oil and gas development, populations have declined or have been extirpated (Leavitt *et al.* 2011, p. 7). If oil and gas development were projected to continue at the rate they occurred in the past, the likelihood of extinction for the dunes sagebrush lizard would be high. With the implementation of the New Mexico Conservation Agreements and the Texas Conservation Plan, it is not anticipated that oil and gas development will occur at the historical rates in the dunes sagebrush lizard's shinnery oak dune habitat. The New Mexico Conservation Agreements require that all development remain outside of the shinnery oak dunes and corridors between dune complexes. The Texas Conservation Plan's foundational conservation measure is to limit development to areas outside of dunes sagebrush lizard habitat, allow development only when avoidance is not feasible, and impose severe limitations on, and require implementation of offsetting conservation efforts for, such development. The New Mexico Conservation Agreements and Texas Conservation Plan have habitat restoration components that not only limit future development, but also reclaim areas that are currently fragmented with oil and gas development. Reclamation removes inactive caliche roads and pads, and associated infrastructure (power lines, pipelines, tank batteries etc.). The Service concludes that if all future oil and gas development is placed outside of the dunes sagebrush lizard's shinnery oak dune habitat, the species will have sufficient habitat to be viable into the future. As described in the section on PECE, above, the Service has concluded that there is sufficient certainty that the New Mexico Conservation Agreements and Texas Conservation Plan will continue to be implemented and will be effective to reduce the threat of habitat loss to the lizard.

Wind and Solar Energy Development

Eastern New Mexico and western Texas are highly suitable areas for wind and solar energy development. The infrastructure for wind and solar energy would cause similar habitat fragmentation as that produced by oil and gas development. Potential direct effects to the dunes sagebrush lizard from wind energy development include physical disturbance during construction and maintenance of a

project, habitat loss, and habitat fragmentation associated with the infrastructure of the project. A wind farm infrastructure typically consists of: (1) The physical disturbance around a tower; the area of a turbine workspace during construction (temporary) is usually a 45- to 60-m (150- to 200-ft) radius around the turbine and permanently a 15–m (50-ft) radius; (2) Gravel access roads linking wind turbine strings to each other and to existing roads; (3) Area for a concrete batch plant, if required; and (4) Buildings housing electrical switchgear, supervisory control and data acquisition central equipment, and maintenance facilities. Additionally, vehicle traffic to turbines over the life of the facility, expected to average 20 years, could pose a threat similar to the infrastructure of oil and gas development to the dunes sagebrush lizard. Alteration of habitat related to wind energy development could influence habitat suitability for this species; however, we are unaware of any studies at wind energy development sites that have examined these effects.

There is no specific information available to determine if wind or solar energy development is a threat to the dunes sagebrush lizard at this time, though there is concern regarding potential effects if wind and solar development were to occur in the species' habitat. More information is necessary to determine if any effects will result from specific alternative energy projects that will be located within dunes sagebrush lizard habitat. However, the BLM's RMPA states that applications to permit either solar or wind energy on public land within the RMPA planning area will not be approved unless the applicant can demonstrate, using peer-reviewed science, that there will be no negative impacts to dunes sagebrush lizards. Also, the New Mexico Conservation Agreements limit alternative energy to areas outside of dunes sagebrush lizard habitat. And while the Texas Conservation Plan does not specifically include a conservation measure managing wind development, it does limit all development activities in the dunes sagebrush lizard's habitat to no more than one percent of that habitat in the first 3 years.

Off-Highway Vehicle (OHV) Use

An OHV is any motorized vehicle capable of, or designated for, travel on or immediately over land, water, or other natural terrain. This includes motorcycles and off-highway motor bikes, all-terrain vehicles, dune buggies, snowmobiles, most four-wheel-drive automobiles, and any other civilian vehicle specifically designed for off-road travel (Ouren *et al.* 2007, p. 4). Extensive use of OHVs can cause soil compaction, reduce plant cover, and degrade habitat (Ouren *et al.* 2007, p. 4), causing the loss of basic needs including habitat for foraging, breeding, nesting, predator avoidance, and thermoregulation for lizard species (Jaeger *et al.* 2005, p. 329; Ingelfinger and Anderson 2004, p. 385; Delgado-Garcia *et al.* 2007, p. 2949; Ballesteros-Barrera *et al.* 2007, p. 736). Research in other dune systems has found that, in areas where plant cover is reduced, there are greater rates of erosion that led to dune destabilization. Routes used by OHVs formed mazes through large areas of dunes, fragmenting the habitat and reducing habitat connectivity at a landscape level (Ouren *et al.* 2007, p. 5). Studies on other lizard species have found that OHV travel also causes increased mortality due to lizard collisions with the vehicles themselves (Delgado-Garcia *et al.* 2007, p. 2949).

The presence of OHV pathways within dunes sagebrush lizard's habitat led researchers to believe that high levels of OHV activities were the cause for population losses in Texas (Laurencio *et al.* 2007, p. 10), but that is likely not the primary cause of extirpations in New Mexico (Painter 2004, p. 5). Nevertheless, OHV use has been a factor affecting the species within localized areas within the dunes sagebrush lizard's range. For example, on BLM land in New Mexico, established and planned OHV areas, such as the Square Lake Dune Complex and the Mescalero Sands North Dune OHV Area, are adjacent to, or within, habitat historically occupied by the dunes sagebrush lizard. These OHV areas were established in order to concentrate OHV within designated areas. The OHV use planned for the Square Lake Dune Complex is limited to existing roads, trails, and unvegetated dunes (BLM 2007, p. 4.45). This area is currently being used by OHVs, and BLM plans to formally designate this area for OHV use.

The Mescalero Sands North Dune OHV Area is considered an open area of more than 243 ha (600 ac), where vehicles are not restricted to designated trails (BLM 2007, p. 4.45), although this OHV area was historically occupied by dunes sagebrush lizards (Fitzgerald *et al.* 1997, Appendix 1). Authorized OHV activities have degraded shinnery oak dunes, potentially crushed dunes sagebrush lizards, and introduced weed species within the otherwise open dune blowouts. At the Mescalero Sands OHV area, dunes have multiple OHV trails, exposed shinnery oak roots, and erosion. In 2011, BLM surveyed this area and did not find dunes sagebrush lizards (BLM 2011, p. 6).

In the comments provided, BLM states that OHV activity drops off during the months of June through September, so lizards may not be exposed to this activity during the nesting season at intense rates. Off-highway vehicle use is not considered to be a significant threat to the species as a whole. We conclude that OHV use has been a localized threat with potential impacts to individual dunes sagebrush lizards and nests. Because OHV use has been a localized threat, it may have had a significant impact on populations, but not the species as a whole. The New Mexico Conservation Agreements and Texas Conservation Plan now restrict or limit OHV use within dunes sagebrush lizard habitat. Further, the BLM RMPA restricts off-road activities to just existing roads and trails and to the designated OHV areas.

Shinnery Oak Removal

Historically, shinnery oak was commonly removed for the purpose of clearing for agriculture and increasing forage for grazing. Shinnery oak is toxic to cattle when it first produces leaves in the spring, and it also competes with more palatable grasses and forbs for water and nutrients (Peterson and Boyd 1998, p. 8). Shinnery oak is also managed for the control of boll weevil (*Anthonomus grandis*), which destroys cotton crops. Boll weevils overwinter in areas where large amounts of leaf litter accumulate. Fire is used to remove leaf litter, and then tebuthiuron, an herbicide, is used to remove shinnery oak (Plains Cotton Growers 1998, pp. 2–3). Over 40,000 ha (100,000 ac) of shinnery oak in New Mexico and 400,000 ha (1,000,000 ac) of shinnery oak in Texas have been lost due to the tebuthiuron treatments and other herbicides (Peterson and Boyd 1998, p. 2).

A 5-year study was conducted to determine the effects of tebuthiuron application on the dunes sagebrush lizard. This study documented that dunes sagebrush lizards were absent at 50 percent of the previously occupied sites where treatments had occurred (Painter *et al.* 1999, p. 2). Shinnery oak removal results in dramatic reductions and extirpations of dunes sagebrush lizards (Snell *et al.* 1997, p. 8). For example, the extirpation of dunes sagebrush lizards was repeatedly confirmed by Snell *et al.* (1997, p. 1) from areas that were treated with herbicides to remove shinnery oak. Dunes sagebrush lizard numbers

dropped 70 to 94 percent in areas that were chemically treated, compared to adjacent untreated plots. Some plots experienced 100 percent population loss in areas treated with tebuthiuron. Painter *et al.* (1999, p. 38) estimated that about 24 percent of the total dunes sagebrush lizard habitat in New Mexico had been eliminated by 1999 due to herbicide treatment. In 2011, BLM surveyed some of the areas that were sprayed between 1969 and 1992, and found between one and four individual dunes sagebrush lizards at seven of the eight sites surveyed (BLM 2011, p. 6). Shinnery oak was not completely eradicated from these sites, and treated areas all had shinnery oak dune habitat present.

Habitat loss and dunes sagebrush lizard declines are not linked to the actual application of tebuthiuron, but rather to the long-term effects associated with the removal of shinnery oak habitat (Snell *et al.* 1997, p. 3). Herbicide treatment removes or reduces natural shinnery oak vegetation and creates smaller habitat patches rather than naturally occurring large expanses of shinnery oak. Habitat in which shinnery oak is removed with Tebuthiuron fails to meet the basic needs of the dunes sagebrush lizard, including foraging, breeding, nesting, predator avoidance, and thermoregulation. Habitat fragmentation has caused and will continue to cause inaccessibility to habitat, mates, and prey that could reduce the population size; threaten population persistence; and potentially cause local extirpations of dunes sagebrush lizards.

On BLM lands, the RMPA states that tebuthiuron may only be applied in shinnery oak habitat if there is a 500-m (1,600-ft) buffer around dunes, and that no chemical treatments should occur in suitable or occupied dunes sagebrush lizard habitat (BLM 2007, p. 4.22). The New Mexico Conservation Agreements and Texas Conservation Plan restrict or limit tebuthiuron application to areas outside of dunes sagebrush lizard habitat (out of the dunes and corridors between dunes). In 2011, the NRCS finalized Technical Note 53 that limits the application of tebuthiuron to areas outside of shinnery oak dunes in New Mexico.

We believe that the removal of shinnery oak with tebuthiuron was historically a significant threat to the dunes sagebrush lizard throughout its range. NRCS Technical Note 53, the New Mexico Conservation Agreements, and Texas Conservation Plan all restrict or limit the application of tebuthiuron within dunes sagebrush lizard habitat. Because of these agreements, the Service concludes that tebuthiuron treatment of shinnery oak dune habitat will not continue within the range of the dunes sagebrush lizard, or if so, it will be at a rate much less than that of historical application. Accordingly, we conclude that the threat associated with removal of shinnery oak with tebuthiuron has been reduced significantly, compared to our previous projections in our proposed rule.

Grazing

As discussed above, removal of shinnery oak to improve rangelands removes habitat for the dunes sagebrush lizard; however, there may also be direct impacts of grazing on dunes sagebrush lizards. While there has been no specific research regarding the impacts of grazing on the dunes sagebrush lizard and its habitat, dunes sagebrush lizards have been found in areas that are moderately grazed (Painter *et al.* 1999, p. 32). In shinnery oak dune habitat, high densities of livestock can lead to overutilization, and result in reduced ground cover, increased annual grasses and forbs, decreased perennial grasses, and increased erosion (Painter *et al.* 1999, p. 32). These conditions can be adverse for the dunes sagebrush lizard. Research has shown that high levels of grazing removes grasses and forbs, causes soil compaction, increases bare ground, and reduces water infiltration. These conditions could alter dune structure and decrease vegetation availability for foraging, mating, and predator avoidance (Smith *et al.* 1996, p. 1307; Castellano and Valone 2006, p. 87). While it is clear from this discussion that shinnery oak removal to improve rangeland conditions is a threat to the species, the direct impact of grazing on dunes sagebrush lizards is unknown at this time. The New Mexico Conservation Agreements include conservation measures that are focused on increasing lesser prairie-chicken habitat, and decreasing the impacts that may occur from grazing. Though we have no information that grazing has a direct impact on the dunes sagebrush lizard, the conservation measures in place for the lesser prairie-chicken will reduce any potential habitat threat that grazing may have. Sixty-nine percent, or 151,083 ha (373,335 ac), of dunes sagebrush lizard habitat in New Mexico is enrolled in either the CCA or CCAA for ranching in New Mexico. Large ranches in New Mexico and Texas provide areas of intact habitat with little or no fragmentation that benefit the dunes sagebrush lizard by creating habitat corridors and core habitat. These areas are necessary for the persistence of the species into the future.

Climate Change and Drought

Our analyses under the Act include consideration of ongoing and projected changes in climate. The terms ''climate'' and ''climate change'' are defined by the Intergovernmental Panel on Climate Change (IPCC). The term ''climate'' refers to the mean and variability of different types of weather conditions over time, with 30 years being a typical period for such measurements, although shorter or longer periods also may be used (IPCC 2007a, p. 78). The term ''climate change'' thus refers to a change in the mean or variability of one or more measures of climate (e.g., temperature or precipitation) that persists for an extended period, typically decades or longer, whether the change is due to natural variability, human activity, or both (IPCC 2007a, p. 78).

Scientific measurements spanning several decades demonstrate that changes in climate are occurring, and that the rate of change has been faster since the 1950s. Examples include warming of the global climate system, and substantial increases in precipitation in some regions of the world and decreases in other regions (IPCC 2007a, p. 30; Solomon *et al.* 2007, pp. 35–54, 82–85). Results of scientific analyses presented by the IPCC show that most of the observed increase in global average temperature since the mid-20th century cannot be explained by natural variability in climate, and is ''very likely'' (defined by the IPCC as 90 percent or higher probability) due to the observed increase in greenhouse gas concentrations in the atmosphere as a result of human activities, particularly carbon dioxide emissions from use of fossil fuels (IPCC 2007a, pp. 5–6 and figures SPM.3 and SPM.4; Solomon *et al.* 2007, pp. 21–35). Further confirmation of the role of greenhouse gases comes from analyses by Huber and Knutti (2011, p. 4), who concluded it is extremely likely that approximately 75 percent of global warming since 1950 has been caused by human activities.

Scientists use a variety of climate models, which include consideration of natural processes and variability, as well as various scenarios of potential levels and timing of greenhouse gas emissions, to evaluate the causes of changes already observed and to project future changes in temperature and other climate conditions (e.g., Meehl *et al.* 2007, entire; Ganguly *et al.* 2009, pp. 11555, 15558; Prinn *et al.* 2011, pp. 527, 529). All combinations of models and emissions scenarios yield very similar projections of increases in the most common measure of climate change, average global surface temperature

(commonly known as global warming), until about 2030. Although projections of the magnitude and rate of warming differ after about 2030, the overall trajectory of all the projections is one of increased global warming through the end of this century, even for the projections based on scenarios that assume that greenhouse gas emissions will stabilize or decline. Thus, there is strong scientific support for projections that warming will continue through the 21st century, and that the magnitude and rate of change will be influenced substantially by the extent of greenhouse gas emissions (IPCC 2007a, pp. 44–45; Meehl *et al.* 2007, pp. 760–764 and 797–811; Ganguly *et al.* 2009, pp. 15555–15558; Prinn *et al.* 2011, pp. 527, 529).

Various changes in climate may have direct or indirect effects on species and their habitats. These effects may be positive, neutral, or negative, and they may change over time, depending on the species and other relevant considerations, such as interactions of climate with other variables (e.g., habitat fragmentation) (IPCC 2007, pp. 8–14, 18–19). Identifying likely effects often involves aspects of climate change vulnerability analysis. Vulnerability refers to the degree to which a species (or system) is susceptible to, and unable to cope with, adverse effects of climate change, including climate variability and extremes. Vulnerability is a function of the type, magnitude, and rate of climate change and variation to which a species is exposed, its sensitivity, and its adaptive capacity (IPCC 2007a, p. 89; see also Glick *et al.* 2011, pp. 19–22). There is no single method for conducting such analyses that applies to all situations (Glick *et al.* 2011, p. 3). We use our expert judgment and appropriate analytical approaches to weigh relevant information, including uncertainty, in our consideration of various aspects of climate change.

Globally, it has been predicted that climate change will cause a decline in lizard populations, with an estimated 40 percent of lizard populations becoming extinct by 2080 (Huey *et al.* 2010, p. 832). In a recent study in Mexico, 12 percent of 200 lizard populations went extinct due to the magnitude of warming in the spring (Huey *et al.* 2010, p. 832). For the lizard species studied, warming caused the lizards to avoid activities such as foraging or reproducing. In order to avoid becoming overheated, the lizards remained in cooler refuges. This research has shown evidence of actual extinctions of local populations linked to changes in climate in *Sceloporus* lizards (the genus of the dunes sagebrush lizard) (Sinervo *et al.* 2010, p. 894). There is no information regarding the susceptibility of dunes sagebrush lizard populations, in particular, to changes in climate. However, below we briefly discuss potential impacts on dunes sagebrush lizard habitat.

The predicted changes in climate in the desert Southwest include higher temperatures and less rainfall, and changes in storm frequency and severity (Seager *et al.* 2007, p. 1183; Saunders *et al.* 2008, p. 5). Higher temperatures and lower rainfall, as predicted by various models for the southeastern part of New Mexico, could manifest as further changes in the plant community (Seager *et al.* 2007, p. 1183). These increased temperatures could convert shinnery oak vegetation communities to communities with species such as yucca (*Yucca elata*), mesquite, and cacti (Family Cactacea). However, the climate models for the Southwest are not specific to the shinnery oak dune habitat, and potential impacts to the habitat are speculative.

Last year (2011) was one of the driest years on record, and shinnery oak did not leaf out for many months (BLM 2011, p. 10). However, shinnery oak is drought tolerant, and has survived previous periods of intense drought, including the long-term drought during the 1950s. Long-term drought may affect leaf production during dry years, reduce the fitness of individual patches of oak; however, based on its ability to persist through previous intense drought, shinnery oak may be more resilient to the effects of climate change. Because the response of shinnery oak to changes in climate is speculative, the extent or magnitude of impacts to shinnery oak as a result of future climate change is not known at this time.

If climate change results in additional habitat fragmentation, current areas of continuous core habitat will be more important to the species. It is anticipated that large contiguous stands of shinnery oak will be necessary for the system to be resilient to climate change. Larger habitat patches provide larger interior habitat with greater shade and cover, which will help the lizard better cope with any increasing temperatures. Further, good core habitat provides better resources of vegetation and prey, and has less edge habitat, which reduces risk of predation. Having larger patches intact stabilizes the size of a population, decreasing the probability of local extinctions, and will better allow populations to withstand the stress of climate change.

Though there are no immediate plans in place to remediate the potential climate change impacts on the dunes sagebrush lizard, there are efforts to decrease fragmentation and potentially increase available habitat. The RMPA, New Mexico Conservation Agreements, and Texas Conservation Plan will limit and reduce habitat fragmentation within dunes sagebrush lizard habitat, and leave core habitat intact. The New Mexico Conservation Agreements address the dunes sagebrush lizard's potential response to climate change, while meeting multiple objectives, as described in the Service's September 2010 *Rising to the Urgent Challenge: Strategic Plan for Responding to Accelerating Climate Change.* Several objectives of this plan focus on reducing nonclimate change stressors to reduce the overall cumulative impacts of all stressors, and thereby reduce the number of factors limiting the continued survival of the species. The New Mexico Conservation Agreements direct companies to develop outside of suitable dune complexes and corridors linking those complexes. Another conservation measure calls for reclamation and restoration of degraded habitat. The BLM has 10,117 ha (25,000 ac) of mostly contiguous dunes sagebrush lizard habitat in their designated Area of Critical Environmental Concern set aside for the dunes sagebrush lizard and the lesser prairie-chicken. Also, BLM has 57,870 ha (132,590 ac) of habitat unleased for minerals, which also is not available for future leasing. Actions from the New Mexico Conservation Agreements and BLM public lands management result in a network of larger contiguous blocks of suitable habitat to facilitate movements in response to climate change and also create large refugia for the dunes sagebrush lizard and its habitat.

Because the delineated habitat for the dunes sagebrush lizard is oriented in a north to south band of shinnery oak dunes, it is not expected that all of the range will be equally impacted by climate change. If habitat impacts are realized in portions of the range of the lizard, climate change considerations can be included when deciding which areas are priorities for reclamation and habitat restoration, to offset negative effects of a changing climate. The agreements can also facilitate and fund mesquite removal within shinnery oak dunes as a potential result of climate change.

As is the case with all stressors that we assess, even if we conclude that a species may be affected in a negative way by one or more climate-related impacts, it does not necessarily follow that the species meets the definition of an ''endangered species'' or a ''threatened species'' under the Act. We

do not have climate models specific for the shinnery oak dunes habitat of the lizard, but when considering more general climate models for the Southwest, it is likely that the lizard will face a warmer, drier climate in the future than it has in the past. However, the adaptive management provided for in the New Mexico Conservation Agreements and Texas Conservation Plan directs that knowledge regarding climate-associated changes in environmental conditions will be used to help devise appropriate conservation measures to meet changing needs in the habitat, including additional habitat reclamation and restoration to provide larger refugia for the lizard.

Mesquite Encroachment

Though honey mesquite (*Prosopis glandulosa*) is a native plant in the southwestern United States, it has recently expanded from drainages and upland slopes, and is now common in grasslands (Golubov *et al.* 1999, p. 955). Honey mesquite is known to be an aggressive invader, and encroachment into shinnery oak dune habitat has recently been noted. Honey mesquite's invasion into shinnery oak dunes may degrade habitat for the dunes sagebrush lizards due to a variety of factors. Mesquite can spread quickly, and will fill in open blowouts that are a necessary component to dunes sagebrush lizard habitat. Mesquite grows taller than shinnery oak, and can serve as predator perches for shrikes and raptors.

Much of the habitat in Texas has mesquite encroachment into the shinnery oak dunes, as do some areas in New Mexico. The amount of shinnery oak dune habitat with mesquite encroachment has not yet been quantified, so the scope of the threat is unknown. The reduction of mesquite encroachment into shinnery oak dune habitat is a priority for the New Mexico Conservation Agreements and Texas Conservation Plan. Though mesquite encroachment may not be totally controlled, areas where it is a problem can be identified and prioritized for habitat restoration efforts.

Even though the scope of mesquite encroachment as a threat is not completely known, the RMPA, New Mexico Conservation Agreements, and Texas Conservation Plan all have conservation or mitigation measures in place to control it as necessary. The Service believes that the funding available through BLM, the New Mexico Conservation Agreements' Conservation Fund, and the Texas Conservation Plan's Mitigation Fund, ensures that the treatment of mesquite encroachment is likely to occur throughout the range of the dunes sagebrush lizard. Because this problem has been identified as a priority for restoration efforts, the Service concludes that this threat is being addressed and alleviated, and can be minimized through conservation efforts. Without the efforts of the New Mexico Conservation Agreements, Texas Conservation Plan, and BLM's Restore New Mexico, mesquite encroachment would likely be considered a significant threat to the dunes sagebrush lizard. However, with the conservation efforts now in place, the Service concludes that mesquite encroachment does not pose a significant threat to the dunes sagebrush lizard, either now or in the future.

Summary of Factor A

Habitat specialists with limited geographic ranges, such as the dunes sagebrush lizard, are more vulnerable to habitat alterations than wide-ranging habitat generalists (Ballesteros-Barrera *et al.* 2007, p. 733). Habitat fragmentation and the overall reduction of shinnery oak dune habitat has affected survivorship, growth, and reproductive ability by increasing edge habitat and decreasing available cover. This led to smaller populations and decreased connectivity between populations (Chan *et al.* 2008, p. 9). The size of the habitat patches and suitable dune complexes will influence the probability of individual habitat patches being eliminated in this dynamic system. It is important to maintain connectivity between shinnery oak dune patches in each of the geographic areas across the dunes sagebrush lizard's known range (Chan *et al.* 2008, p. 9).

Historical removal of shinnery oak within occupied habitat posed a serious threat by generating or increasing a variety of stressors for the dunes sagebrush lizard, a species that depends on a very specialized dynamic system to survive. Shinnery oak stabilizes dunes in the short term, but overall the dunes are dynamic and slowly shifting across the landscape. Without shinnery oak, sands are not held in place, and the entire dune community is susceptible to wind erosion (Muhs and Holliday 1995, p. 198), which can threaten the long-term persistence of the species.

Due to the implementation of the New Mexico Conservation Agreements, the Texas Conservation Plan, and the RMPA, the Service does not anticipate future development to mirror the historical development that has already occurred. BLM's RMPA, the New Mexico Conservation Agreements, and the Texas Conservation Plan have identified the threats to this species, and provide conservation measures to alleviate or lessen those threats, to restore degraded habitat, and to reduce fragmentation or restore connectivity. The RMPA was developed to address sensitive species conservation concerns and to establish the minimum requirements that will be applied to all future Federal activities covered by the RMPA for both the dunes sagebrush lizard and the lesser prairie chicken (*Tympanuchus pallidicinctus*). Within New Mexico, 52 percent of the range of the dunes sagebrush lizard habitat (and 68 percent of the mineral ownership) are federally owned and are under BLM lease stipulations and the RMPA.

The RMPA, New Mexico Conservation Agreements, and Texas Conservation Plan all restrict or limit development within the dunes sagebrush lizard's habitat. These restrictions and limitations apply to development activities related to oil and gas exploration, wind and solar power development, OHV use, grazing, and mesquite control. The majority of the delineated dunes sagebrush lizard habitat in New Mexico and Texas is covered by the RMPA, enrolled in the New Mexico Conservation Agreements, or enrolled in the Texas Conservation Plan. Also, 53,400 ha (132,590 ac) of dunes sagebrush lizard habitat is unleased, and has been permanently removed from future leasing in New Mexico. In New Mexico, 95 percent (211,703 ha (523,130 ac)) of dunes sagebrush lizard habitat is subject to conservation measures. In Texas, 71 percent (56,105 ha (138,640 ac)) is enrolled in the Texas Conservation Plan. Because of these agreements, the RMPA, and the habitat that has been removed from leasing, the Service concludes that oil and gas development will not continue within dunes sagebrush lizard habitat at historical rates. These agreements also provide funding to remove pads and roads and reduce habitat fragmentation. As part of the New Mexico Conservation Agreements' and BLM's efforts, hundreds of well pads, roads, and associated oil and gas infrastructure have been reclaimed within the lizard's range in New Mexico.

The discontinuation of habitat loss and fragmentation, and the restoration of already fragmented habitat, will have the benefit of decreasing edge habitat and increasing interior habitat. Individuals that live within core habitat will have increased resources, because the interior habitat provides adequate shade, cover, and prey. The increased vegetation and cover will lead to increased survivorship, growth, and reproduction, and also to decreased predation by species that are near roads

and on power lines. Individuals within larger habitat patches, which have smaller proportions of edge habitat, have a decreased chance of going extinct, because they have a greater barrier between the core patch and the habitat disturbance. Leaving an occupied patch intact stabilizes the size of a population, decreasing the probability of local extinctions and increasing the stability of the population (Dramsted *et al.* 1996, p. 23; Jaeger *et al.* 2005, p. 329; Ingelfinger and Anderson 2004, p. 385; Delgado-Garcia *et al.* 2007, p. 2949; Ballesteros-Barrera *et al.* 2007, p. 736; Sias and Snell 1996, p. 28; Endriss *et al.* 2007, p. 320).

The Service concludes that if future development and activities involving oil and gas exploration, wind and solar power development, OHV use, and grazing are placed outside of the dunes sagebrush lizard's habitat, and if tebuthiuron treatments are limited to areas outside of habitat, the species currently has adequate habitat to persist into the future. Currently, greater than 50 percent of the dunes sagebrush lizard's habitat is unfragmented and provides large areas of core shinnery oak dunes. These large core areas, along with the adaptive management provisions of the conservation agreements, will provide refugia to help maintain adequate habitat for the lizard with changing climatic conditions. If the RMPA and these agreements were not in place throughout the range of the species, the Service anticipates that the threats of oil and gas development and shinnery oak removal would continue at the levels of that in the past. However, with the conservation agreements, the current habitat conditions will be maintained or improved, such that we no longer find this factor to be a threat, either now or in the future.

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

The dunes sagebrush lizard is not a commercially valuable species, but could be increasingly sought by collectors due to its rarity. However, scientific collecting is not known to represent a significant threat to populations. Furthermore, the State of New Mexico requires scientific collecting and research permits for the dunes sagebrush lizard (NMDGF 1978, p. 7; TX House Bill 12, 2007). Therefore, we do not consider overutilization to be a significant threat, either currently or in the future.

C. Disease or Predation

Disease and Parasites

There are no studies on the impacts of disease or parasitism on dunes sagebrush lizards, but studies have been conducted on close relatives within the genus *Sceloporus. Sceloporus* lizards infected with malaria have reduced volumes of red blood cells, reduced hemoglobin (the protein that carries oxygen in the blood), impaired physical stamina, reduced fat stores, reduced number of offspring, and smaller testes (Klukowski and Nelson 2001, p. 289). The incidence of malaria in *Sceloporus* lizards is dependent on the lizard's age, size, genetic background, and gender (Klukowski and Nelson 2001, p. 289). Other lizards in the genus *Sceloporus* have parasitic helminthes (a type of parasitic worm) in their gut. These helminthes have not been found in high numbers in dunes sagebrush lizards (Goldberg *et al.* 1995, p. 190). In general, other stressors in the environment, such as habitat degradation and pollution, may weaken species' immune systems and make them more susceptible to disease and parasites (Whitfield *et al.* 2000, p. 657). Research specific to the dunes sagebrush lizard has not been conducted to determine if they have been infected with malaria or if they have parasitic helminthes. At this point, we have no information that disease or parasites are threats to the dunes sagebrush lizard.

Predation

During Hill and Fitzgerald's (2007) nesting ecology study, 25 percent of radio-tracked female dunes sagebrush lizards were eaten by coachwhips (*Masticophis flagellum*). Coachwhips are large, swift, diurnal snakes that feed primarily on lizard species. Another predator, the loggerhead shrike (*Lanius ludovicianus*), is found throughout the range of the dunes sagebrush lizard. Loggerhead shrikes are birds that occur in many habitats, from remote deserts to suburban areas. These small predators perch on trees, shrubs, poles, fences, and utility wires, and swoop down to capture and impale prey (Rappole 2000, p. 163). Increased perches and increased edge effects could lead to increased levels of predation that would affect the dunes sagebrush lizard. A study of flat-tailed horned lizards found that shrike counts are higher along edge habitats than in interior habitat patches (Barrow *et al.* 2006, p. 492). Areas with greater development are, therefore, more likely to have higher incidence of shrike predation than areas that are not fragmented.

Power line grids are located throughout oil and gas developments. The New Mexico State Land Office does not have a database of the power lines within the shinnery oak habitat and range of the dunes sagebrush lizard. However, many well pad operations and power plants are connected with a grid of transmission lines that are most dense in areas of high development. The ongoing threat associated with power lines and fences is that they provide perching habitat for predaceous birds throughout the shinnery oak dunes. The conservation measures in the New Mexico Conservation Agreements and Texas Conservation Plan will minimize habitat disturbance, including powerlines in dunes sagebrush lizard habitat. They provide that new powerlines and fences will not be allowed on enrolled lands in dunes sagebrush lizard habitat. This will limit and reduce habitat fragmentation and reduce perch sites for shrikes. Moreover, over 50 percent of the dunes sagebrush lizard's habitat remains unfragmented (Service 2012). We acknowledge that dunes sagebrush lizards may be taken by shrikes at an increased rate in developed areas, but conclude that the remaining unfragmented interior habitat will have decreased predation pressure, and thus predation does not pose a significant threat to the species as a whole now or in the future.

Feral hogs are now found in 17 counties in New Mexico, including all of the counties with dunes sagebrush lizards. Recently, feral hogs have been found in the shinnery oak dune habitat (Carswell 2011, p. 1). Feral hogs are voracious predators that have been found to eat great numbers of small vertebrates. However, we have no information on the effect of feral hogs on dunes sagebrush lizard populations. Through the New Mexico Conservation Agreements, CEHMM and BLM are working with the U.S. Department of Agriculture to find and eradicate feral hogs within dunes sagebrush lizard habitat in New Mexico before the threat is fully realized.

Summary of Factor C

There are likely impacts to individuals from predation. It is expected that predation rates would be highest in developed areas that provide more perch sites for shrikes. The new conservation measures restricting and limiting development to areas outside of shinnery oak dunes habitat will lessen the predation pressure in core habitats. We also believe that there is adequate unfragmented core habitat within the species range, and we would not expect increased predation pressure in these

areas. Therefore, we conclude that disease or predation do not pose significant threats to the dunes sagebrush lizard now or in the future.

D. The Inadequacy of Existing Regulatory Mechanisms

Under New Mexico's Wildlife Conservation Act, on January 24, 1995, NMDGF listed the dunes sagebrush lizard as a group 2 Endangered Species (Painter *et al.* 1999, p. 1). This listing affords the lizard protection from take, but not from habitat destruction (NMDGF 1978, p. 9). The dunes sagebrush lizard is not listed as endangered or threatened in the State of Texas under either the Texas Parks and Wildlife Code or the Texas Administrative Code (Texas Parks and Wildlife Department 1973, p. 1). We are not aware of any local laws or ordinances that protect the dunes sagebrush lizard and its habitat in New Mexico or Texas.

Current regulations under State and local laws are not designed, nor have provisions, to protect the dunes sagebrush lizard from habitat loss. However, there are conservation measures that are enforced by the BLM, under their RMP, that remove or alleviate threats on BLM land in dunes sagebrush lizard habitat. The RMPA established BLM's internal guidance for managing these species in southeastern New Mexico. Along with other measures, the RMPA allows BLM to place oil and gas development up to 200 m (650 ft) outside of dunes sagebrush lizard habitat, and prioritizes the reclamation of nonfunctioning oilfield development in areas that will most benefit the dunes sagebrush lizard. The RMPA also prohibits herbicide treatment in dunes sagebrush lizard habitat. In accordance with the RMPA, BLM identified 53,657 ha (132,590 ac) that are currently unleased dunes sagebrush lizard habitat that will be closed to future leasing. Since 2008, the RMPA has been used to guide development within the planning area, which includes all BLM land within the range of the dunes sagebrush lizard in New Mexico. The RMPA provides baseline conservation measures, and removes habitat from leasing to prevent the continued loss of dunes sagebrush lizard habitat on Federal lands in New Mexico. BLM has also removed over 172 ha (425 ac) of caliche pads and roads, along with associated oil and gas infrastructure. At the time of our proposed rule, we did not have a full understanding of how BLM implements the RMPA. BLM has now provided detailed information regarding the processes involved in implementing the RMPA. For instance, no exceptions have been made to the conservation measure that keeps development outside of dunes sagebrush lizard habitat, unlike our assumptions in the proposal. The RMPA provides the foundational requirements for any activities located within the delineated habitat for the dunes sagebrush lizard on BLM lands, and all staff are aware of these requirements.

In the proposal, the Service understood statements within the RMPA such as ''may move development out of dunes sagebrush lizard habitat up to 200 meters'' to mean that this was optional and potentially unenforceable. We have since received detailed comments from BLM regarding the implementation of the RMPA that have changed our understanding of the RMPA. Based on BLM's comments, the Service now understands that the statement ''may move development up to 200 meters outside of dunes sagebrush lizard habitat'' authorizes BLM to move development outside of dunes without further analysis. If BLM has to move development greater than 200 meters, further analysis and documentation must first occur. The BLM has not issued exceptions to this conservation measure, and exceptions to the conservation measures are very difficult to obtain.

BLM staff from all divisions meet weekly to discuss new applications to drill, or other activities that may affect special status species including the dunes sagebrush lizard. When a well location is proposed near dunes sagebrush lizard habitat, resource specialists accompany the permitting agent to the proposed location to ensure that the well is placed outside of shinnery oak dune habitat.

BLM does not treat the RMPA as discretionary guidance, but instead implements it with all activities in dunes sagebrush lizard and lesser prairie-chicken habitat. The regulations pertaining to resource management practices are at 40 CFR 1500, which discusses the overview of Federal land management, while regulations at 40 CFR 1600 discuss the specifics about implementation of the National Environmental Policy Act and Federal Land Policy and Management Act. The RMPA provides a standard to consistently guide the protection of the dunes sagebrush lizard, and reduce or eliminate the threats to the species and its habitat on BLM lands in New Mexico. Fifty-four percent of the dunes sagebrush lizard's entire range is covered by BLM's RMPA, and 24 percent (53,657 ha (132,590 ac)) of the habitat in New Mexico is currently unleased and has been removed from future leasing by the RMPA.

In summary, we conclude that inadequacy of existing regulatory mechanisms does not pose a threat to the dunes sagebrush lizard.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Exposure to Pollutants

Though few studies have been conducted to determine the full effects of pollutants on reptiles, there is conclusive evidence of some adverse impacts to lizard species (Whitfield *et al.* 2000, p. 657). Sias and Snell (1998) studied the effects of oil and gas wells on dunes sagebrush lizard abundance from 1995 to 1997. The results of their research showed a strong negative relationship between dunes sagebrush lizard population density and proximity to well pads. Specifically, they found a 39 percent decrease in the abundance of dunes sagebrush lizards within 0 to 80 m (0 to 260 ft) of wells. Sias and Snell (1996, p. 30) believe that oil and gas extraction resulted in a reduction in abundance of dunes sagebrush lizards as a result of: (1) Direct habitat loss due to construction of roads and well pads (as discussed above in Factor A); (2) poisoning of dunes sagebrush lizards from oil spills, hydrogen sulfide gas emissions, and exposure to chemicals and other toxins in the vicinity of oil and gas wells; (3) mortality caused by increased traffic; and (4) giving a competitor of the dunes sagebrush lizard a competitive advantage (see ''Competition'' section below).

During petroleum extraction, hydrogen sulfide is removed from the petroleum and released into the air, where it remains for up to one day. Hydrogen sulfide is heavier than air and tends to sink to the ground, where it remains until it is neutralized (Kraft 2010, p. 1). Hydrogen sulfide is a highly toxic gas that is the dominant reduced (unoxygenated) sulfur gas in oilfields (Tarver and Dasgupta 1997, p. 3669). Measurements of hydrogen sulfide have been taken at a site near Loco Hills, New Mexico (40 km (25 mi) east of Artesia), near historical dunes sagebrush lizard sites. Air concentrations of hydrogen sulfide as high as 33 parts per million (ppm) were recorded for a period of 32 minutes in the Loco Hills area of New Mexico (Lusk and Kraft 2010, p. 19). Lusk and Kraft (2010) recommend the adoption of interim air quality standards for the protection of wildlife at 1 ppm, the requirement of routine monitoring of hydrogen sulfide to identify sources in areas where ambient concentrations exceed 1 ppm, and the reduction of

emissions to meet these wildlife conservation goals.

Most of the sulfur that is emitted by oil and gas infrastructure ends up in the soil (Tarver and Dasgupta 1997, p. 3674). Surface soil tests in active oilfields in Texas found sulfate (an oxygenated form of sulfur) levels in the soil to range between 20 to 200 ppm near active facilities, as opposed to 1 ppm in similar soils not adjacent to oil facilities (Tarver and Dasgupta 1997, p. 3674). Dunes sagebrush lizards dig just below the soil surface during hot parts of the day and at night and would, therefore, be in direct contact with the sulfates in the soil. Sulfates increase the anaerobic activities in the soil, make the soil more acidic, and could cause protein and gene damage to organisms, depending on the duration of exposure (Escher and Hermens 2002, p. 4203). Acidic soil is directly linked to small hatchling size and slower running speed, which can influence survival and success rates of juvenile lizards (Marco *et al.* 2005, p. 109).

The long-term impacts of oilfield pollutants to dunes sagebrush lizard populations, fecundity, and survivorship are unknown. Oilfields contain a variety of organic toxic pollutants including petroleum hydrocarbons, polycyclic aromatic hydrocarbons (PAHs), phenanthrene, fluoranthene, and benzo[a]anthracene. Two studies on the impacts of oil and gas pollution to another sand-dwelling lizard, the Nidua fringe-fingered lizard (*Acanthodactylus scutellatus*), a sand-dwelling species from the Middle East, were conducted in the oilfields in Kuwait. Tissue samples taken from both the fringe-fingered lizard and its insect prey base (ants) found the PAH concentrations in the fringe-fingered lizard and ant tissue increased with the exposure to the toxins. The levels of PAHs in the fringe-fingered lizard and ant tissues were high enough to affect the function of vital organs. Fringe-fingered lizards are not able to remove the toxins from their system quickly, due to their slow metabolic rate and simple enzyme system (Al-Hashem *et al.* 2007, p. 555). Additionally, the exposure to oilfield chemicals affected the behavior and foraging time for the fringe-fingered lizard by altering time of emergence and basking behavior (Al-Hashem *et al.* 2008, p. 589).

If dunes sagebrush lizards are exposed to this type of pollution, we may expect physiological dysfunction, impaired foraging abilities, increased mortality, and population declines. For this reason, we believe the exposure to pollutants from oil and gas production may be a factor affecting the survival of individuals and populations located around oil and gas development. It is also likely that exposure to pollutants in areas of development cannot be separated from the cumulative effects of development as a whole. It is anticipated that the conservation measures, restricting and limiting development to areas outside of shinnery oak dunes habitat, are expected to limit the dunes sagebrush lizard's exposure to pollutants.

Companies enrolled in the New Mexico Conservation Agreements and Texas Conservation Plan have agreed to routine maintenance schedules to reduce the risk of spills. In New Mexico, companies enrolled in the New Mexico Conservation Agreements have agreed to an adaptive management approach to reducing the risk of hydrogen sulfide exposure. The conservation measure will determine areas of high hydrogen sulfide risk, and will also determine the distance at which hydrogen sulfide is a threat to the dunes sagebrush lizard. Then measures, such as alarms or shut-off valves, will be put in place in the high-risk areas to reduce the risk of exposure. Since over half of the dunes sagebrush lizard's range is not fragmented, we conclude that there is adequate core habitat available within the species' range to provide areas without increased exposure to pollutants.

Competition

The side-blotched lizard and the prairie lizard (*Sceloporus consobrinus*) are generalist lizard species found throughout the range of the dunes sagebrush lizard. Researchers studying the dunes sagebrush lizard have reported that the side-blotched lizard is a competitor for resources with the dunes sagebrush lizard (Sena 1985, p. 13) and has been observed directly competing for insect prey (Sias and Snell 1996, p. 6). In areas where there are large dune blowouts in shinnery oak dune complexes, the dominant lizard species is the dunes sagebrush lizard. As the habitat becomes marginal with smaller dune blowouts adjacent to shinnery oak flats or unsuitable habitat, there are greater numbers of side-blotched lizards and fewer dunes sagebrush lizards. In areas that have more habitat disturbance and greater edge effects, there are also more side-blotched lizards than dunes sagebrush lizards (Painter 2007, p. 2). The side-blotched lizard is the most abundant lizard found in the same habitat as the dunes sagebrush lizard. The side-blotched lizard uses more open, sandy substrate than the dunes sagebrush lizard, which uses the vegetative cover provided by shinnery oak. The side-blotched lizard also spends more time in the open sun and more time foraging (Sartotrius *et al.* 2002, pp. 1972–1975). As a generalist, the side-blotched lizard is not affected by habitat disturbance and alteration in the way that dunes sagebrush lizard, a habitat specialist, is affected (Sias and Snell 1996, p. 18; Painter *et al.* 2007, p. 3). The side-blotched lizard may either out-compete the dunes sagebrush lizard in these altered habitats, or is simply filling a niche when the sites no longer support dunes sagebrush lizards. The prairie lizard is often found in adjacent shinnery oak and mesquite flats, and may thrive in areas where shinnery oak dunes no longer occur.

Summary of Factor E

The Service concludes that there is sufficient certainty that the commitment to place development outside of the dunes sagebrush lizard's shinnery oak dune habitat will be implemented and will be effective. Therefore, the risk of competition, and exposure to pollutants, will only be localized stressors, and will not pose significant threats to the species as a whole. Leaving large areas of unfragmented habitat intact will decrease the risk of exposure to both pollutants and competitors.

Cumulative Impacts

Some of the potential threats discussed in this finding could work in concert with one another to cumulatively affect the dunes sagebrush lizard to the point that they may, in combination, become significant threats to the species, either now or in the future. However, we conclude that the suite of conservation efforts in the RMPA, New Mexico Conservation Agreements, and Texas Conservation Plan address and alleviate all of the threats to the dunes sagebrush lizard adequately for the species to continue to be viable into the future.

Determination

As required by the Act, we considered the five factors in assessing whether the dunes sagebrush lizard meets the definition of a threatened or endangered species. We examined the best scientific and commercial information available regarding the past, present, and future threats faced by the dunes sagebrush lizard. Based on our review of the best available scientific and commercial information, we find that the current and future threats are not of sufficient imminence, intensity, or magnitude to indicate that the dunes sagebrush lizard is in danger of extinction (endangered), or likely to become endangered within

the foreseeable future (threatened), throughout all or a significant portion of its range. Therefore, the dunes sagebrush lizard does not meet the definition of a threatened or endangered species and we are withdrawing the proposed rule to list the dunes sagebrush lizard as endangered. Our rationale for this finding is outlined below.

The dunes sagebrush lizard is not in danger of extinction now because it currently occurs in an area of sufficient size and distribution that it is expected to be resilient to random natural impacts. Further, its distribution encompasses the known genetic diversity of the species such that current populations are representative of the known diversity of the species. As such, the species has not currently declined to the point that it is subject to impacts from stochastic events that would result in a change in the status of the species as a whole. In other words, if the species continues to occur in its current distribution, we expect it will have sufficient resiliency, redundancy, and representation to be viable now and in the foreseeable future.

In our proposed rule, we identified several threats that significantly impacted the status of the species. This was an appropriate conclusion based on the best scientific and commercial information available at that time. However, since that time, significant ongoing and future conservation efforts, in combination with new information on the status and distribution of the species, have reduced the magnitude of potential impacts now and in the future such that the species no longer meets the definition of an endangered or threatened species.

In our proposed rule, we identified loss of habitat due to oil and gas development and the treatment of shinnery oak dune habitat with tebuthiuron as the most significant threats to the continued existence of the dunes sagebrush lizard. Our conclusion was based on information about past and current impacts to lizard habitat due to these stressors, information about potential future development within lizard habitat, and the lack of areas protected from these impacts.

Since the time of our proposed listing, there have been many efforts to develop conservation measures for the dunes sagebrush lizard in Texas, and substantial interest in the existing conservation plans in New Mexico. Several conservation plans, including the New Mexico Conservation Agreements, Texas Conservation Plan, and BLM's RMPA, put in place conservation efforts that have been implemented by the States, BLM, private landowners, and oil and gas companies, and have a high level of certainty of continuing to be implemented in the future and of being effective. These efforts have reduced or eliminated threats to the dunes sagebrush lizard. When considered together, the area that has been has been removed from oil and gas leasing, is enrolled in the New Mexico Conservation Agreements, or is covered by BLM's RMPA amounts to 95 percent (211,703 ha (523,129 ac)) of the dunes sagebrush lizard's habitat in New Mexico. Further, 71 percent (56,105 ha (138,640 ac)) of the mapped dunes sagebrush lizard habitat in Texas has been enrolled in the Texas Conservation Plan.

In New Mexico, conservation measures within the New Mexico Conservation Agreements limit development to areas outside of the dunes sagebrush lizard's shinnery oak dune habitat. In addition, the New Mexico Conservation Agreements and BLM's Restore New Mexico Program have conservation measures or mitigation measures that remove caliche roads and pads, along with other nonfunctioning oil and gas infrastructure. This measure creates additional habitat and reduces fragmentation throughout the dunes sagebrush lizard range, enhancing dunes sagebrush lizard habitat conservation through avoidance.

The Texas Conservation Plan also focuses on the avoidance of activities within lizard habitat that would further degrade habitat, reclamation of lizard habitat to reduce fragmentation, and, due to the presence of mesquite, removal of mesquite that is encroaching into shinnery oak dunes. If avoidance of lizard habitat cannot be accomplished, the participants may adopt conservation measures that minimize habitat impacts, and as a last resort, mitigate for the loss of lizard habitat. The Texas Conservation Plan limits habitat loss to 1 percent of delineated dunes sagebrush lizard habitat within the first 3 years, with a total of 10 percent of the entire delineated habitat allowed to be taken over the 30-year life of the plan. Even though the Texas Conservation Plan allows for the loss of some dunes sagebrush lizard habitat, no ground-disturbing activity can take place in delineated dunes sagebrush lizard habitat until reclamation work has successfully created dunes sagebrush lizard habitat elsewhere within the range of the species.

The second most significant threat described in the proposed rule was the rangewide application of tebuthiuron to reduce or kill shinnery oak in dunes sagebrush lizard habitat. In 2011, the NRCS finalized Technical Note 53, which states that no tebuthiuron treatments may occur in shinnery oak dunes within the range of the dunes sagebrush lizard in New Mexico. Also, the RMPA, New Mexico Conservation Agreements, and Texas Conservation Plan all prohibit the application of tebuthiuron on shinnery oak dunes.

Conservation measures that limit development and activity within habitat are also in place to minimize impacts of other less significant potential threats such as OHV, wind and solar development, predation by nonnative species, and increased predation due to development.

We have a high degree of certainty that New Mexico Conservation Agreements will continue to be implemented and that the Texas Conservation Plan will be implemented. As summarized in the *Ongoing and Future Conservation Efforts* section, above, we have determined that the New Mexico Conservation Agreements have a high certainty of being implemented. Our reasons for concluding that our level of certainty is high are that the level of enrollment is high (over 83 percent of lizard habitat is enrolled), the mechanism and authorities for collecting funds are in place, the process for allocating funds to support reclamation work and research in lizard habitat is in place, the monitoring and documentation of compliance with the conservation measures are in place, and monthly and annual reports are complete, and all parties have the legal authorities to carry out their responsibilities under the New Mexico Conservation Agreements.

Further, we have determined that the Texas Conservation Plan has high certainty of implementation. The Service issued the permit to the permittee on February 17, 2012. Since then, in a short time, the permittee has enrolled significant acreages, collected funds from current enrollees, and has created and set into motion a non-profit organization to administer specific functions of the Texas Conservation Plan, including but not limited to, outreach to attract more participation. As of May 2012, 71 percent (56,105 ha (138,640 ac)) of dunes sagebrush lizard habitat in Texas is enrolled in the Texas Conservation Plan. Enrollees have collectively remitted approximately $773,000 in participation fees into the Habitat Protection Fund administered by the Texas Conservation Plan. These funds cannot be used by the Texas Legislature for any other purpose. Additionally, some of the same

companies who are enrolled in the New Mexico Conservation Agreements have also either enrolled or committed to enroll acres in Texas. Two major operators, Conoco-Phillips and Bopco, are enrolled in both plans. As evidenced by the enrollment acreages and funds collected thus far, numerous other companies have submitted enrollment forms to enroll in the Texas Conservation Plan. However, due to confidentiality protections provided by the Texas Conservation Plan, those company names have not been disclosed to date. The high level of participation and compliance with the New Mexico Conservation Agreements and additional voluntary conservation efforts prescribed by the Texas Conservation Plan supports our determination that similar enrollment, implementation, and success is likely to be achieved in Texas.

We also have high certainty that the New Mexico Conservation Agreements and Texas Conservation Plan will be effective at reducing and eliminating threats to the dunes sagebrush lizard to the point that the species no longer meets the definition of threatened or endangered. Our certainty arises from the fact that the primary effect of both plans is to move further impacts outside of occupied dune complexes. Further, the agreements have sufficient monthly and annual monitoring and reporting requirements to ensure that all of the conservation measures are implemented as planned, and are effective at removing threats to the lizard and its habitat. The collaboration between the Service and other stakeholders requires regular meetings and involvement of all parties in order to implement the agreements fully.

In summary, we conclude that the conservation efforts have sufficient certainty of implementation and effectiveness that they can be relied upon in this final listing determination. Further, we conclude that the conservation efforts have reduced or eliminated current and future threats to the dunes sagebrush lizard to the point that the species no longer is in danger of extinction now or in the foreseeable future. Therefore, we conclude that listing the dunes sagebrush lizard as an endangered or threatened species is not warranted, and are withdrawing our proposed rule to list the dunes sagebrush lizard as endangered.

We will continue to monitor the status of the species through monitoring requirements in the New Mexico Conservation Agreements and Texas Conservation Plan, and our evaluation of any other information we receive. These monitoring requirements will not only inform us of the amount of dunes sagebrush lizard habitat conserved and reclaimed, but will also help inform us of the status of the dunes sagebrush lizard. Additional information will continue to be accepted on all aspects of the species. We encourage interested parties, outside of those parties already signatories to the New Mexico Conservation Agreements and Texas Conservation Plan, to become involved in the conservation of the species.

If at any time data indicate that the protective status under the Act should be reinstated, including, but not limited to, information that enrollment in the voluntary agreements has declined substantially, or if we become aware of noncompliance issues with the conservation measures, or if there are new or increasing threats, we can initiate listing procedures, including, if appropriate, emergency listing pursuant to section 4(b)(7) of the Act.

References Cited

A complete list of all references cited in this document is available on the Internet at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2010–0041 or upon request from the Field Supervisor, New Mexico Ecological Services Field Office (see **ADDRESSES** section).

Authors

The primary authors of this document are the staff members of the New Mexico Ecological Services Field Office (see **ADDRESSES**).

Authority: The authority for this action is the Endangered Species Act of 1979, as amended (16 U.S.C. 1531 *et seq.*).

Dated: June 12, 2012.

Daniel M. Ashe,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2012–14818 Filed 6–18–12; 8:45 am]

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